INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI I. C. SUDHIR, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1212/Del/2014
(Assessment Year: 2009-10)

M/s. New Delhi Television Ltd, 207, Okhla Industrial Estate, Phase-III, New Delhi PAN:AAACN0865D	Vs.	ACIT, Circle-13(1), C.R. Building, New Delhi
(Appellant)		**(Respondent)**

ITA No. 2658/Del/2014
(Assessment Year: 2009-10)

DCIT, Circle-13(1), C.R. Building, New Delhi	Vs.	M/s. New Delhi Television Ltd, 207, Okhla Industrial Estate, Phase-III, New Delhi PAN:AAACN0865D

C.O. No. 233/Del/2014
(In ITA No. 2658/Del/2014)
(Assessment Year: 2009-10)

M/s. New Delhi Television Ltd, 207, Okhla Industrial Estate, Phase-III, New Delhi PAN:AAACN0865D	Vs.	ACIT, Circle-13(1), C.R. Building, New Delhi
(Appellant)		**(Respondent)**

Assessee by :	Shri C.S. Agarwal, Sr. Adv
Revenue by:	Sh. Girish Dave, Standing Counsel
Date of Hearing	From 03/7/2017 to 06/07/2017
Date of pronouncement	14/07/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

ITA No. 1212/Del/2014
(Assessment Year: 2009-10)

1. Appeal No 1212/Del/2014 is filed by the assessee against the order of Assistant Commissioner of Income Tax, Circle-13(1), New Delhi (hereinafter referred to as the

ld AO) passed u/s 144 read with section 144C(13) of the Income Tax Act, 1961 in pursuance of the direction issued by the ld Dispute Resolution Panel [hereinafter referred to as the Ld DRP] u/s 144C(5) of the Act dated 31.12.2013 against the draft assessment order of the ld Assessing Officer wherein, transfer pricing adjustments proposed in terms of order of Additional Director of Income Tax, Transfer Pricing Officer-II(1), New Delhi (hereinafter referred to as 'Transfer Pricing Officer', 'TPO') passed u/s 92CA(3) of the Income Tax Act on 30.01.2013 and other corporate additions proposed were also incorporated therein.

2. The assessee is a company engaged in the business of television news broadcasting through its three different channels. It is also producing customized software, programmes for broadcasters. It filed its return of income on 30.09.2009 declaring loss of Rs. 64,83,91,422/-. Subsequently, the return was picked up for the scrutiny and notice u/s 143(2) was issued on 19.08.2010. During the course of assessment proceedings reference u/s 92CA of the Act was also made by the ld. AO to the ld Transfer Pricing Officer to determine the arm's length price of international transactions entered into by the assessee with its Associate Enterprises (in short 'AE') . The ld Transfer Pricing Officer passed order u/s 92CA(3) of the act on 30.01.2013 proposing adjustment on account of business support segment of assessee of Rs. 1,53,73,846/- against the price received of Rs. 7,46,87,177/- whose ALP was determined at Rs. 9,00,61,023/-. The ld Transfer Pricing Officer further made an adjustment on account of corporate guarantee of Rs. 10,87,56,000/- wherein, assessee has issued corporate guarantee in favour of its subsidiary for issue of coupon bonds of US$100 million, the ld TPO computed guarantee commission at 2.70% amounting to Rs. 10,87,56,000/- considering it as international transaction. The ld Assessing Officer incorporating the above adjustment on account of transfer pricing adjustments passed a draft of proposed assessment order u/s 144C of the Income Tax Act on 30.03.2013 making disallowance of following sums:-

Sl No.	Particulars	Amount
1	Disallowance of software expenses	Rs. 82,45,612/-
2.	Disallowance of commission u/s 40a(ia)	Rs. 41,54,41,111/-

3.	Disallowance u/s 14A	Rs. 78,40,990
4.	Disallowance on transmission and uplinking charges u/s 40(a)(i)	Rs. 7,81,23,855/-
5.	Unexplained money u/s 69A	Rs. 642,54,22,000/-

3. Thus, the total income was determined at Rs. 64,10,811,990/- against the returned loss of Rs. 64,83,91,422/- in draft of proposed assessment order.

4. The assessee filed its objection before the ld Dispute Resolution Panel who issued direction u/s 144C(15) on 31.12.2013 which were further modified on 31.12.2013 by miscellaneous order. The ld DRP directed the ld Assessing Officer to delete following disallowances:

Sl No.	Particulars	Amount
1	Disallowance of software expenses	Rs. 82,45,612/-
2.	Disallowance of commission u/s 40a(ia)	Rs. 41,54,41,111/-
3.	Disallowance on transmission and uplinking charges u/s 40(a)(i)	Rs. 7,81,23,855/-

5. The ld DRP also directed the AO to restrict transfer pricing adjustment of Rs. 12,41,29,846/- to Rs. 5,09,65,629/-.

6. The ld Dispute Resolution Panel during the course of hearing directed the ld Assessing Officer further enquiries and consequent to those enquiries an addition of Rs. 254,75,00,000/- was made on account of unexplained unsecured loan u/s 68 on account of failure on part of the assessee to discharge its onus of proving the genuineness of the transaction of raising unsecured loan through its subsidiaries NDTV Networks PLC . All other adjustments/ variations proposed by the ld AO were directed to be retained in final assessment order.

7. Consequently, the ld Assessing Officer passed order u/s 144 read with section 144C(13) of the Income Tax Act on 21.02.2014 determining the total income of the assessee at Rs. 838,33,37,197/- against the returned loss of the assessee of Rs. 64,83,91,422/- making following additions and disallowances:-

Sl No.	Particulars	Amount
1	Disallowance u/s 14A	Rs.78,40,990/-

2	Transfer pricing adjustments u/s 92CA(3)	Rs. 5,09,65,629/-
3	Unexplained money u/s 69A	Rs. 642,54,22,000/-
4	Unexplained unsecured loans u/s 68	Rs. 254,75,00,000/-

8. Therefore, assessee aggrieved with the order passed by the Assessing Officer u/s 144 of the Income Tax Act has preferred appeal before us in ITA No. 1212/Del/2014.

9. The Revenue aggrieved with the direction of the ld Dispute Resolution Panel has preferred appeal before us u/s 253(2A) of the Income Tax Act challenging the deletion of disallowance of following expenditure by the ld Dispute Resolution Panel in ITA No. 2658/Del/2014:-

Sl No.	Particulars	Amount
1	Disallowance of commission expenditure u/s 40a(ia) of the Act for non deduction of tax at source	Rs. 41,54,41,111/-
2.	Disallowance of transmission and uplinking charges paid to Intelsat Corporation USA on account of non deduction of tax at source	Rs. 7,81,23,855/-
3.	Disallowance of software expenses	Rs. 82,45,612/-

10. The Revenue has raised the following grounds of appeal in ITA No. 2658/Del/2014:-

"*1. That on the facts and circumstances of the case and in law, Hon'ble DRP has erred, in not approving the disallowance amounting to Rs. 41,54,41,111/- proposed u/s 40(a)(ia) of the Act on account of non-deduction of IDS on commission paid to Advertisement Agency, by relying on the decision of Hon'ble Delhi High Court in the case of Living Media India Ltd. in ITA No. 1264 of 2007 dated 06.05.2008, whereas the SLP (Civil) No. 1257 of 2009 filed by the Revenue against the above decision is pending before the Hon'ble Supreme Court on this issue.*

2. That on the facts and circumstances of the case and in law, Hon'ble DRP has erred, in not approving the disallowance amounting to Rs. 7,81,23,8557- proposed u/s 40(a)(i) of the Act on account of non-deduction of TDS on transmission and uplinking charges paid to Intelsat Corporation, USA, by relying on the decision of Hon'ble Delhi High Court in the case of Intelsat

Corporation in ITA No. 977 of 2011 dated 19.08.2011, whereas the SLP (Civil) No. 4319 of 2012 filed by the Revenue against the above decision is pending before the Hon'ble Supreme Court on this issue.

3. *That on the facts and circumstances of the case and in law, Hon'ble DRP has erred in not approving the disallowance amounting to Rs. 82,45,6121- proposed on account of software expenses by relying on the decision of the Ld. CIT(A) for the AYs 2006-07 and 2007-08 without going into merit of the issue. Reliance in this regard is hereby placed on the judgment of the Hon'ble Supreme Court in the case of Tata Consultancy Services Vs State of Andhra Pradesh (2004) 271 ITR 401 (SC)."*

11. The assessee has filed cross objection vide appeal No. 233/Del/2014 wherein, initially it has raised five cross objection as under:-

"1. That on the facts and circumstances of the case, the cross appeal bearing ITA No. 2658/DEL/2018 filed by the Ld. Assessing Officer ["AO"] is barred by limitation, therefore could not be entertained and liable to be dismissed.

2. That on the facts and circumstances of the case and in law, the Ld. Assessing Officer ["AO"] erred in agitating in Ground No. i of the captioned appeal that the HonTDle Dispute Resolution Panel - II ["DRP"] erred in not approving disallowance under section 40(a)(ia) of the Act amounting to Rs. 41,54,41,111 being an alleged commission.

2.1 That the Ld. AO erred in stating that the decision of Hon'ble Delhi High Court in the case of Living Media India Ltd. in ITA 1264 No. 1264 of 2007 is pending before Hon'ble Supreme Court in SLP (Civil) 1257 of 2009 whereas in fact the Hon'ble Supreme Court had dismissed the said SLP vide its order dated 11/12/2009.

2.2 Without prejudice to above cross objections and in the alternate, the Ld. AO erred in not appreciating that alleged constructive payments could not be disallowed under section 4o(a)(ia) of the Act in view of the

decision of the Special Bench of Tribunal in the case of Merilyn Shipping and Transport v. ACIT(136ITD23)(SB).

3, That on the facts and circumstances of the case and in law, the Ld. AO erred in agitating in Ground No. 2 of the captioned appeal that the Hon'ble DRP had erred in not approving disallowance under section 40(a)(i) of the Act amounting to Rs. 7,81,23,855 on account of non-deduction of tax on transmission and uplinking charges paid to Intelsat Corporation, USA.

3.1 That on the facts and circumstances of the case and in law, the Ld. AO failed to appreciate that the as per the relevant legal position prevalent in the year under consideration there was no obligation on assessee to deduct tax on such payments, and the amended definition of Royalty under section of g(i)(vi) of the Act with retrospective effect from 1.4.76 in Finance Act 2012 could not be applied in the present case.

3.2 That the Ld. AO erred in not appreciating that the amended definition of Royalty under section of 9(i)(vi) of the Act with retrospective effect from 1.4.76 in Finance Act 2012 had no effect in view of the provisions of Double taxation Avoidance Agreement between India and USA ("DTAA").

3.3 Without prejudice to above cross objections and in the alternate, the Ld. AO erred in not appreciating that alleged transmission and uplinking charges paid to Intelsat Corporation, USA could not be disallowed under section 4o(a)(i) of the Act in view of the decision of the Special Bench of Tribunal in the case of Marilyn Shipping and Transport v. ACIT (136 ITD 23) (SB).

4. That on the facts and circumstances of the case and in law, the Ld. AO erred in agitating in Ground No. 3 of the captioned appeal that the Hon'ble DRP had erred in not approving disallowance amounting to Rs. 82,45,612 being software expenditure held as capital expenditure in the draft assessment order by following the earlier order of Ld. CIT(A) on identical facts.

5. *That in view of the decision of the Hon'ble Special Bench in the case of Biocon Ltd vs DCIT (LTU), Bangalore on the allowability of ESOP expenditure (wherein the Respondent Assessee being an Intervenor for the AY 2006-07 & 2007-08), that the Ld. AO ought to have been directed to compute the ESOP expenditure to be allowed in the year under consideration in accordance with aforesaid decision and to exclude the reversal of ESOP expenditure offered to tax amounting of Rs. 83,31,150/- in the computation of income in the year under consideration."*

12. Subsequently vide letter dated 11.05.2016 the assessee modified its cross objection as under:-

"Cross objection No. 5:-

That in views of the decision of the Hon'ble Tribunal dated December 20,2013 in appellant's own case on the allowability of ESOP expenditure for AY 2006-07, the ld AO ought to have allowed the ESOP expenditure of Rs. 33835748/- in the year under consideration in accordance with the aforesaid decision as against Rs. 125271933/- claim in AY 2006-07, Rs. 212841993/- claimed in AY 2007-08 and Rs. 178656690/- claimed in AY 2008-09 and further ought to have excluded the reversal of ESOP expenditure offered to tax amounting to Rs. 8331150/- in the computation of income in the year under consideration."

13. The assessee further made a prayer for raising the additional cross objections for the reason that revenue in its cross objection has raised an objection that the appeal of the assessee is not maintainable on the ground that the assessment has been framed by the Assessing Officer u/s 144 of the Income Tax Act. Therefore, assessee in order to avoid any technical issues in its appeal has raised following additional grounds in its cross objection:-

"1. The assessee thus without prejudice to its contention that, appeal filed by the assesee bearing ITA No. 1212/Del/2014 is maintainable, respectfully prays that, it be permitted to raise such ground as additional grounds of cross – objection.

Additional/ Modified objections:-

Cross objection No. 6:-

That the Learned Assistant Commissioner of Income Tax (Ld. AO), Circle 13(1), New Delhi has erred both on facts and, in law in determining income of the Appellant at Rs. 8,38,33,37,197 /- as against the returned loss of Rs. 64,83,91,422 in an order of assessment dated February 21, 2014 framed u/s 144 read with section 144C (13) of the Income-tax Act, 1961 (Act) and the assessment framed is apparently without jurisdiction as well as barred by limitation.

Cross objection No. 7:-

That the various findings recorded by the Ld. AO/Ld. DRP in the impugned orders are highly perverse and have been recorded with preconceived notions and without considering the submissions/evidences/material produced on record and hence, such findings are vitiated and deserve to be rejected and the additions so made in the impugned assessment order deserve to be deleted.

Cross objection No. 8:-

That the Ld. AO/Ld. DRP has grossly erred in law and on facts of the instant case in making an addition of Rs. 642,54,22,000/- (as sum equivalent to $150 Million) by invoking section 69A of the Act purely on surmises, conjectures and suspicion, failing to appreciate that under section 69A of the Act, the burden lay upon him to establish that, Appellant had made an investment of which it is an owner and has not been recorded by it in its books of accounts.

1.1 That the Ld. AO/Ld.DRP has grossly erred in law and on facts of the instant case in making an addition of the aforesaid sum of Rs. 642,54,22,000/- by invoking section 69A of the Act even without appreciating that the aforesaid sum was not an unexplained sum of money as the said sum was a capital contribution made by M/s Universal Studios International BV against the subscription of share

capital and had also duly been recorded in the books of accounts of the investee company i.e. NDTV Networks International Holdings BV(NNIH).

1.2 *That the findings of the Ld. AO that the Appellant had not complied with the provisions of section 212 of Companies Act, as the prescribed documents were not attached with the audited accounts is highly arbitrary and not in accordance with the provisions of the Act and has been recorded by brushing aside the order of the Ministry of Corporate Affairs, which has exempted the assessee to attach the details of the subsidiary companies with its balance sheet.*

1.3 *That the Ld. AO/Ld. DRP erred in applying the provisions of section 69A of the Act by failing to appreciate that the transaction in question does not pertain to the Appellant and the Appellant is not a party to the said transaction.*

Cross objection No. 9:-

That the Ld. AO/Ld. DRP has grossly erred in law and on facts of the instant case in making an addition of Rs. 2,54,75,00,000/- (as sum equivalent to $50 Million) by invoking provisions of section 68 of the Act purely on extraneous or irrelevant consideration and in failing to appreciate that there was no credits in the books of Appellant and as such section 68 of the Act had no application.

9.1 *That the Ld. AO/Ld DRP grossly erred in not appreciating that the borrower of the loan namely NDTV Networks Plc, UK (NNPLC) is a separate assessee which is liable to be taxed separately for its income and no addition is warranted of the aforesaid loan transaction in the total income of the Appellant under section 68 of the Act.*

Cross objection No. 10:-

Without prejudice to Cross objection No. 9 above, that the Ld. DRP exceeded its jurisdiction while directing the Ld. AO to enhance the variations as a result of further enquiry in respect of the loan transaction between the NDTV

Networks Plc. UK and NDTV Networks BV, as such a direction is outside the purview of powers of the Ld. DRP in view of section 144C(8) of the Act.

10.1 That the Ld. DRP failed to appreciate that being an appellate authority in view of the amendment in Finance Act 2012, the Ld. DRP ought not to have issued any directions for taxing any new source of income which is not emanating from the impugned draft assessment order.

Cross objection No. 11:-

That the Ld. DRP has grossly erred in law and on facts of the case in directing the Ld. AO to record his reasons before invoking Rule 8D of the Income Tax Rules (Rules), 1962, without appreciating that the provisions of section 14A of the Act are not applicable to the facts of the instant case.

11.1 That the Ld. AO erred in making an addition of Rs. 78,40,990 by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules by rejecting the claim of the Appellant that it has not incurred any expenditure in respect of the investments from which the earnings are exempt under the Act.

Cross objection No. 12:-

That on facts of the case and in law, the Ld. TPO/AO has erred in not discharging their statutory onus to establish that any of the conditions specified in clause (a) to (d) of Section 92C (3) of the Act have been satisfied before disregarding the arm's length price determined by the Appellant and proceeding to determine the arm's length price themselves.

Cross objection No. 13:-

That Ld. AO erred in enhancing the ALP by Rs. 74,63,229/- in respect of the international transaction pertaining to provision of business support services ('BSS') to its associated enterprises (AE) by arbitrarily rejecting the

comparables adopted by the Appellant and by selecting the comparables which were not comparables on the basis of FAR (functions performed, assets employed and risks assumed).

13.1 That the Ld. TPO erred in inadvertently considering the amount of price received for the impugned international transaction (BSS) as Rs 7,46,87,177 instead of Rs 7,52,77,881 while computing the adjustment thereby, resulting in incorrect computation of the adjustment.

Cross objection No. 14:-

That the Ld. AO/Ld. TPO has grossly erred in making an addition of Rs. 4,35,02,400/- in respect of the alleged international transaction of provision of Corporate Guarantee on the ground that the Appellant should have been compensated for providing such alleged guarantee.

14.1 That the Ld. AO/Ld. TPO failed to appreciate that the Appellant did not provide any corporate guarantee during the year but merely gave an undertaking to provide guarantee for and on behalf of its AE and had not actually provided any guarantee.

14.2 That the Ld. AO/Ld. TPO erred in computing the arm's length guarantee commission rate erroneously based on flawed methodology and adjustments (without prejudice to the Appellant's contention that it had not provided any guarantee).

Cross objection No. 15:-

That on the facts of the case and in law, the Ld. AO has erred in levying interest under 234B/D of the Act while completely disregarding the provisions of the Act and the judicial precedence in this regard.

Cross objection No. 16:-

That on the facts of the case and in law, the Ld. AO has erred in withdrawing interest under section 244A of the Act while completely disregarding the provisions of the Act.

Cross objection No. 17:-

That on the facts of the case and in law, the Ld. AO has grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The above grounds of appeal are mutually exclusive and without prejudice to each other"

14. Now we first come to the appeal of the assesse in ITA No. 1212/Del/2014 and test it whether it is maintainable or not.

15. On the issue of maintainability of appeal, the ld AR commenced the arguments that appeal of the assessee is maintainable. The ld authorized representative of the assessee vehemently submitted that cross objection filed by the Revenue in CO No. 303/Del/2014 in appeal of the assessee in ITA No. 1212/Del/2014, the Revenue has raised the issue that when the order of the ld Assessing Officer is passed u/s 144 of the Income Tax Act, therefore, on conjoint reading of section 253(1)(d) restricts the right of the assessee of appeal before the tribunal. He further stated that according to the Revenue if the assessment order is passed u/s 143(3) of the Income Tax Act pursuant to the direction issued by the DRP then only the assessee has right to file an appeal before the Tribunal. He vehemently opposed the above objection of the revenue. He further stated that above stated Cross objection (CO) of the assessee has been dismissed by the coordinate bench vide order dated 23.03.2017 refusing to condone the delay as it was delayed by 169 days. He further submitted a copy of the letter dated 31.03.2013 issued by Deputy Commissioner of Income Tax, Circle 13(1), New Delhi by the then assessing officer to the assessee forwarding draft assessment order wherein, it has been stated that draft assessment order is passed u/s 143(3) of the Income Tax Act read with Section 144C of the Income Tax Act for AY 2009-10 in the case of the assessee. Therefore, he submitted that draft assessment order is passed u/s 143(3) by the ld Assessing Officer and not u/s 144

as claimed by the Revenue therefore final assessment order canot be passed u/s 144 of the act. He further referred to the draft assessment order passed by ld Assessing Officer which is placed at page no. 355 of the appeal set wherein, in heading at Sl No. 11 it is mentioned that impugned draft order dated 31.03.2013 is passed u/s 143(3) read with section 144C of the Act. He further referred to the heading of the order which also says that draft assessment order is passed u/s 143(3) read with section 144C of the Act. He referred to the final assessment order placed at page No. 63 of the appeal set to say that ld Assessing Officer has without any reason mentioned section 144 in the heading of the order. He therefore submitted that for all intent and purposes the assessment order passed by the ld Assessing Officer is u/s 143(3) of the act and not u/s 144 of the act as claimed by the revenue.

16. With respect to the claim of the Revenue that order has been passed by the ld Assessing Officer u/s 144 of the Income Tax Act he referred to page No. 400 of the appeal set and referred page No. 46 of 51 of the draft assessment order. His contention was that as the material information according to the ld Assessing Officer pertaining to the subsidiaries companies of the assessee was not furnished pursuant to summons issued in December 2010 and notice issued in February 2013, the ld Assessing Officer has held that accounts of the assessee are not maintained and prepared in accordance with the accounting standards issued by the Central Govt. and are therefore, incomplete and incorrect. Therefore, the Assessing Officer invoked provision of section 145(3) of the Act read with section 209, 210, 211 and 212 of the Companies Act, 1956. He further referred to page No. 47 of 51 of the draft assessment order where the ld Assessing Officer invoked the provisions of section 145(3) of the act. He further referred to page No. 48 of 51 to show that as according to the Assessing Officer there was a breach of condition prescribed u/s 145(3) of the Act and Assessing Officer was not satisfied about the correctness and completeness of the account and as according to him the accounting standard notified have not been followed by the assessee, ld Assessing Officer applied provisions of section 145(3) and assumed jurisdiction u/s 144 of the Act. He vehemently submitted that the ld Assessing Officer does not have any right to invoke the provisions of section 145(3) at the first instance and further merely because provisions of section 145(3)

are violated the ld Assessing Officer does not have right to invoke the provisions of section 144 of the Act. He therefore first referred to provision of section 145(3) of the Act to submit that the accounts of the assessee are correct and complete. He further referred to the annual accounts of the company to show that assessee has been granted an exemption by the Ministry of Corporate Affairs for not including the annual account of the subsidiaries of the company. He referred to page No.1746 to 1883 of the paper book Vol No. V which is the Directors Report of the company dated 30/4/2009 to show that assessee was exempted as it has been granted approval u/s 212(8) of the Companies Act, 1956 for the financial year ended on 31.03.2009 waving the publication of publishing of individual balance sheet etc of the subsidiaries and other documents otherwise required to be attached with the account of the company. He therefore, submitted that assessee has obtained permission required by the law for not enclosing the relevant details of subsidiary company and therefore, Assessing Officer cannot say that assessee has not submitted the accounts of the subsidiaries and therefore the accounts of the assessee are not incomplete. In the end, he submitted a note stating that accounts of the assessee are complete and proper. Contents of his note are as under:-

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1. *The captioned appeals and cross objection pertaining to AY 2009-10 are fixed for hearing on 03.07.2017 having been adjourned from 01.05.2017.*

2. *That on 20.03.2017, the Hon'ble Tribunal was pleased to hear the cross objection filed by the revenue i.e. CO No. 373/Del/2014 in ITA No. 1212/Del/2014. The said cross objection of the revenue have been disposed off by an order dated 23.02.2017. In the cross objection filed by the revenue, it had been contended that the appeal filed by the assessee is not maintainable, since assessment had been framed u/s 144 of the Act and in the absence of any provision providing for an appeal before the Hon'ble Tribunal, the appeal filed by the assessee is not maintainable. However, the Hon'ble Tribunal has disposed off the*

said cross objection when it had held that the cross objection filed is not maintainable.

3. *It is further submitted that the 'subject matter' of appeal in assessee's appeal (ITA No. 1212/Del/2014) is as per grounds of appeal and for the sake of brevity are not being extracted here. The assessee had also filed cross objection No. 233/Del/2014 in an appeal filed by the revenue i.e. ITA No. 2658/Del/2014. The said cross objection was filed on 08.09.2014. The assessee also filed additional grounds of cross objection (apart from the grounds of cross objection in CO No. 233/2014) in the cross objection filed by the asessee. The said 'additional grounds' in CO No. 233/2014 were filed on 03.02.2016 and also filed modified ground No. 5 of cross objection on 24.05.2016.*

4. *It is submitted that the perusal of the ground of appeal filed by the assessee or filed by the revenue as also the grounds of cross objection filed by the assessee does not pertain to any ground about the maintainability of the appeal and on the ground that an assessment had been made u/s 144 of the Act which is disputed by the assessee. Infact, such a ground of cross objection was subject matter in the CO No. 313/Del/2014 filed by the revenue and has been disposed off. Infact, 'subject matter' of the appeal before the Hon'ble Tribunal are contained in the grounds of appeal raised by the assessee and in the cross objection filed by the assessee including additional grounds and modified ground No. 5 of cross objection on 24.05.2016, as well as in the grounds of appeal filed by the revenue.*

5. *Sir(s), one of the contention which the revenue is raising, is not the subject matter of appeals or of the cross objection, is about the maintainability of the appeal filed by the assessee i.e. ITA No. 1212/Del/2014 and is on the ground that since the assessment has been framed u/s 144 of the Income Tax Act, and no appeal has been provided u/s 253(1)(d) of the Act (since the assessment has been*

framed u/s 144 of the Act and not u/s 143(3) of the Act), the said appeal is not maintainable.

6. However, in rebuttal it is submitted that the revenue is not invoking Rule 27 of the ITAT Rules nor any application has been filed by the revenue in that regard. Further in the submissions made apart from justifying the contention that

a. Assessment has been made u/s 144 of the Act;
b. No appeal would lie before the Hon'ble Tribunal;

It has not been stated that in the absence of such a ground being subject matter of appeal, how an adjudication can be sought from the Hon'ble Tribunal. The submission of the assessee is that the Hon'ble Tribunal has to decide an appeal and record its finding only on the subject matter of appeal. It is undeniable fact that the Hon'ble Tribunal has entertained the appeal when it has granted the stay u/s 254(2A) of the Act and revenue has not filed any writ challenging the order on the ground that the appeal is not maintainable before the Hon'ble Tribunal. In brief the submission is that:

a. That no appeal would lie before the Hon'ble Tribunal is a non issue;
b. It is a fait accompli i.e. appeal filed by the appeal is not maintainable;
c. The assessment has not been framed u/s 144 o the Act as has been contended by the revenue instead an assessment framed u/s 143(3) of the Act.

Without prejudice to the aforesaid, and to support that the contention of the revenue that assessment was framed u/s 144 of the Act is misconceived, it is submitted as under:

(a) *The draft order of assessment dated 31.03.2013 was admittedly made u/s 143(3) read with section 144C of the IT Act as is specifically stated by the learned AO in the order and thus it is an admitted fact that the draft order of assessment was not made u/s 144 of the Act. In fact, there is no concept of framing the draft order of assessment u/s 144 of the Act.*

(b) *There is no finding or direction given by the learned DRP that the final order of assessment be made u/s 144 of the Act. In respect thereof it is submitted that the learned AO without jurisdiction, post receipt of the directions of the learned DRP changed the title of the assessment order labeling it to be passed u/s 144 r.w.s. 144C of the Act though there was no such direction issued by the learned DRP.*

(c) *Further, no direction had been given by the learned CIT in the appeal filed by the revenue, (who has directed the appeal to be filed before the Hon'ble Tribunal against the directions of the learned DRP by the revenue) to raise such ground, and thus it is submitted, it being not a subject matter of appeal, cannot be held to be the subject matter of appeal before the Hon'ble Bench and hence cannot be agitated or any finding can be given by the Hon'ble Tribunal.*

(d) *The contention thus is that the submission of the revenue that no appeal is maintainable since assessment has been made u/s 144 of the Act, is not the subject matter of appeal since in none of the grounds of appeal raised by the assessee or revenue such a ground of appeal emerge.*

7. *It may be stated here that revenue in the written submission has however contended that the appeal is not maintainable overlooking that such a ground is not the subject matter of appeal. That the revenue has placed reliance on Rule 27 of the Income Tax Appellate Tribunal Rules in support of its contention that such a contention is*

permissible to be raised. The assessee vehemently opposes such a contention on the ground that it is impermissible to invoke Rule 27 Income Tax Appellate Tribunal Rules, 1963. In support the assessee seeks to rely upon the judgment of the Hon'ble High Court of Delhi in the case of Divine Infracon Pvt. Ltd. (ITA No. 771/2015) decided by the Hon'ble High Court on 13.08.2015, wherein an identical contention was raised before the High Court by the revenue and it was held by the High Court that the Tribunal had erred to have permitted Rule 27 to be invoked as it was not the subject matter of appeal. The discussion would be found in paragraphs 5 to 13 of the said judgment wherein it was held that the Hon'ble Tribunal could only deal with the subject matter of appeal and it would not be open to a respondent to travel outside the scope of the subject matter of the appeal under the guise of invoking Rule 27. Aforesaid submissions have been raised which are without prejudice to its submission that the revenue's contention that assessment has been framed u/s 144 is completely misconceived both factually and legally.

8. *It is submitted that neither the draft order of assessment reflect that the draft order was framed u/s 144 of the Act nor it is submitted with respect that there is a direction by the learned DRP to frame assessment u/s 144 of the Income Tax Act. It is added here that had, the draft assessment been made u/s 144 of the Act then it is obvious, as provided u/s 246A of the Act, the only remedy available was to file an appeal before the learned CIT(A) and not to have filed objection before the learned DRP u/s 144C(5) of the Act. In fact it appears the learned AO on the strength of the observation made by him in the draft order dated 31.03.2013 (see pages 48 – 49) is contending that the draft of the order of assessment was made u/s 144 of the Act. The finding recorded are as below:*

"In view of the same as stated hereinabove, the undersigned holds and declares that the provisions of section 145(3) of the IT Act, 1961 is applicable to the case of the assessee for the assessment year 2009-10 in respect of previous year 2008-09 and undersigned thereby and therefore assumes jurisdiction under section 144 of the IT Act, 1961 to determine the true and correct income of the assessee company."

9. *It is submitted that such a contention is completely misconceived. The mere fact the learned AO had in the draft of the order declared that he is invoking section 145(3) does not postulate that assessment was made u/s 144 of the Act.*

10. *It is submitted that the assessment u/s 144 of the Act could be made only in the circumstances as provided u/s 144 of the Act. The provision of section 144 of the Act are extracted here below:*

Best judgment assessment.

144. (1) If any person—

(a) fails to make the return required under sub-section (1) of section 139 and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or

(b) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or

(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,

the Assessing Officer, after taking into account all relevant material which the Assessing Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment :

Provided that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment :

Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub-section (1) of section 142 has been issued prior to the making of an assessment under this section.

(2) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.

11. *In the instant case it is submitted that the assessee had neither failed to make return nor it had failed to comply with all the terms of the notice issued u/s 142(1) of the Act or having made the return, failed to comply with all the terms of section 143(2) of the Act. There are no other circumstances which permit the learned AO to frame assessment u/s 144 of the Act. In the instant case, none of the aforesaid circumstances exists or can be shown to have existed. Thus it is submitted the mere fact that the learned AO intended to compute income u/s 145(3) does not made an order of assessment to be an order u/s 144 of the Act. Section 145(3) reads as under:*

> *"Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1),[or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee], the Assessing Officer may make an assessment in the manner provided in section 144."*

12. *It is further submitted that when the direction of the learned DRP dated 31.12.2013, is perused it would be seen that nowhere the learned DRP states that the draft assessment order is an order to be read to be an order of assessment made u/s 144 of the Act.*

13. *The appellant further submits that by merely invoking the provision of section 145(3) of the Act, an order cannot be said to be made u/s 144 of the Act. All what section 145(3) of the Act provides is that, the AO may make an assessment in the manner provided u/s 144 and not that assessment is made u/s 144, since the conditions making assessment*

u/s 144 are entirely different. There is a distinction between the manner of making assessment and completing assessment as provided u/s 144 of the Act, they are not identical in terms.

14. *It is submitted that in the instant case assessment has not been framed u/s 144 of the Income Tax Act. Nor can be stated that merely because the learned AO in the draft order of assessment has stated that he is computing the income in the manner provided u/s 145(3) of the Act assessment has been completed u/s 144 of the Act. There is a substantial difference in framing an assessment u/s 144 of the Act and of computing income by invoking the provisions of section 145(3) of the Act. In support the appellant seeks to rely upon the judgment of the Nagpur High Court in the case of CIT vs. BadridasRamrai Shop reported in 7 ITR 613, wherein their Lordships while considering the provisions of section 13 (which is parimateria with section 145) had held that "the only difference between the proviso to section 13 and the provisions of section 23(4) (corresponding to section 144) is that the latter authorizes the Income Tax Officer to make the assessment "to the best of his judgment" while the former tells the Income-tax Officer that he has to make his computation "upon such basis and in such manner as the Income-tax Officer may determine". The proviso to section 13 gives the Income-tax Officer as wide, if not wider, powers than he is given under section 23(4)."*

At page 621 their Lordships have held as under:

> *"In our opinion Section 22(3) is designed to enable a person who has made a return which he subsequently discovers contains an omission or a wrong statement to correct that wrong statement at any time before the assessment is made. It does not apply to the case of a person who has made a false return knowing it to be a false return and whose false return is discovered by the Income-tax Officer ; were it otherwise, one would be left*

with an infinite progression of returns scrutinised, found false, returns altered, found false and so on. Where the assessee has made a false return and has been given notice to satisfy the Income-tax Officer as to the correctness of the return and produce his books which are scrutinised and found false or incomplete or unreliable, then the proviso to Section 13 comes into play. In this case the Income-tax Officer has been given a return which is not reliable. That return has been supported by books which are also not reliable. The position is in substance the same as arises when no return has been made at all, but in law there is a curious difference between the two positions. If no return has been made at all or if a return has been made and the notice given has not been complied with, then Section 23(4) applies and the Income-tax Officer has to make the assessment to the best of his judgment. The Privy Council in the case mentioned above has decided that where Section 23(4) applies so long as the Income-tax Officer does not act dishonestly, vindictively or capiciously but exercises his judgment, he may make such assessment as he thinks fit even to the extent of guessing what the assessment should be. But where there has been a return and the notice has been complied with and it is found that the books which are put forward to support the return are unreliable, then one goes to Section 13. Section 13 is not an assessment but a computation section. Its provisions instruct the Income-tax authorities as to the method to be adopted in computing the profits and gains of business in question. Primarily the method is that adopted by the assessee."

14.1 *In view of the aforesaid it is most respectfully submitted that the assertion of the counsel for the revenue in the instant proceedings that the assessment was framed u/s 144 and as such no appeal lies is completely misconceived. It is reiterated that assessment has not been framed as a conditions for framing assessment u/s 144 were not existent. Even otherwise even the draft order shows that draft of the order of assessment was framed u/s 143(3) and not u/s 144 of the Income Tax Act. Further it is submitted that the learned DRP had not issued any direction to frame assessment u/s 144 of the Act.*

14.2 *In CIT vs. Standard Triumph Motor Co. Ltd., 119 ITR 573 (Mad.) (affirmed by Supreme Court in 201 ITR 391), and CIT vs. Kerala Financial Corporation Ltd., 155 ITR 246 (Ker.), CIT vs. MariappaGounder (P), 147 ITR 676 (Mad.) affirmed by the Supreme Court in 232 ITR 2, it has been held that section 145(3) of the Act is a machinery section which does not qualify as charging section of the Income Tax Act. It is thus submitted that contention of the revenue is entirely misconceived. Since section 145(3) is not a charging section but is a machinery provision, whereas section 144 is a charging provision*

14.3 *In brief it is submitted that merely because the AO in his draft order of assessment had stated that the provisions of section 145(3) of the Act is applicable and therefore he assumes jurisdiction us/ 144 of the Act to determine the true and correct income of the assessee company does not be read to a concluded assessment was made u/s 144 of the Ac. Had the same been an assessment made u/s 144 then it is obvious there could have been no reference us/ 144C, could have been made to the DRP; whereas the AO while forwarding the draft order has required the assessee either accept the order or to file objection before the DRP. In such a situation now to turn around to*

show that assessment was made u/s 144 of the Act is misleading contention.

15. *Lastly it is submitted that Gujarat High Court has held in CIT vs. Purshottamdas T. Patel reported in 209 ITR 52, that the assessment is one integrated process is completed only when total income is determine and determination of tax is also made. In the instant case draft order of assessment was framed on 31.03.2013; whereas notice of demand was issued only on 21.02.2014; whereas the assessment has to be framed by 31.12.2013. Thus the assessment made is apparently barred by limitation and is nonest in the eyes of law. In fact it is submitted had this been the contention of the revenue then obviously the assessment had been framed before 31.12.2013 and would have been barred by limitation on that date.*

16. *The appellant submits that the subject matter of the cross objection which is now being raised by the revenue by invoking rule 27 of the ITAT Rules, despite the fact that such a cross objection has been dismissed may be on the ground that the delay in filing of the cross objection have not been condoned, yet there is merger of such a ground raised in the cross objection. In any case, it is submitted that rule 27 of the ITAT Rules is inapplicable in the instant case as such a Rule can be invoked by the respondent only when no appeal has been preferred by the respondent. For the sake of convenience Rule 27 is extracted hereinbelow:*

> *Respondent may support order on grounds decided against him.*
>
> *27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him.*

It would be seen that aforesaid rule come to aid of a respondent who has not preferred an appeal before the Tribunal and if any ground has been decided against the respondent by the CIT(A), then in the appeal

of the appellant, he may support the order of CIT(A) on any of the grounds decided against him. However such a rule has no application where respondent has preferred an appeal. It is submitted that since the respondent has preferred an appeal, as such, aforesaid rule cannot be invoked.

17. *In para 5 of the written submissions of the revenue filed on 20.03.2017, it has been contended by the revenue that the appellant has admitted the fact that the assessment was completed under section 144 of the Act (since the same has been stated in the relevant particulars of the Form 36B filed by the appellant) is completely misconceived and erroneous. It is submitted that such an averment is not only misconceived but is wholly fallacious. It is submitted that since the appellant was required to state in Form 36B in column the section quoted in the final assessment order passed by the Assessing Officer ("AO") in pursuance to the directions of the Hon'ble DRP, the assessee had no option but to state the section stated in the order. It is thus submitted that there is no admission as has been alleged. However, it is denied that the appellant had accepted the assessment being framed u/s 144 rws 144C(13) of the Act and the same is evident from Ground number 1 specifically taken by the appellant in appeal no. 1212/Del/2014 that the assessment so completed is without jurisdiction and barred by limitation.*

18. *Section 253(1)(d) of the Act, though states that the appeal can be filed with the Hon'ble ITAT against the order passed by the AO under section 143(3) in pursuance to the direction of DRP. Apparently, in the present case, the draft assessment order was passed u/s 143(3) rws 144C of the Act and the same is an admitted fact by the AO in para 2.1 and para 3 of the final assessment order dated 21.02.2014. However, the AO without jurisdiction, post receipt of the directions of DRP changed the title of the assessment order to 144 rws 144C though*

there was no such direction issued by the DRP. This itself shows that the action of the AO is completely arbitrary and without jurisdiction. In support of the above, reliance is placed on the judgement of Hon'ble Gujarat High Court in the case of WocoMotherson Advanced Rubber Technologies Limited80 taxmann.com 63. It is submitted that in the said judgment, the Hon'ble Gujarat High Court has held that the learned AO is duty bound to give effect to the directions of the learned DRP. In the instant case, the learned AO acted without jurisdiction when he went to change the filed of the order which is evidently an afterthought. It is submitted that para 2.1 and in para 3, the AOhas held that the draft order of assessment was made u/s 143(3) of the Act read with section 144C(1) of the Act and not that it was made u/s 144 of the Act.

19. *Without prejudice to the above, It is an admitted position that if an AO intends to complete the assessment u/s 144 of the Act, he ought to issue the final assessment order including the income determined and tax computed and there is no need to propose an income and seek the directions of the DRP. The provisions of section 144C of the Act have no application whatsoever which is clearly spelt out by the provisions of section 246A of the Act. Thus, appeal against the order u/s 144 would lie before the CIT(A).*

20. *Assuming that the assessment was completed u/s 144 of the act, then in that case the AO ought to have completed the assessment i.e. determined total income and raised demand notice by 31.03.2013 itself rather than proposing to make adjustment to the returned income as emphasized in the procedure laid down u/s 144C of the Act. To support the the same, the appellant places reliance on the judgement of Hon'ble Gujarat High Court in the case of Purushottamdas T. Patel 209 ITR 52.*

21. *In para 7 of the said submission made by the revenue, the AO has admitted that under the provisions of section 246A of the Act, appeal against both the classes of assessment i.e. u/s 143(3) and 144 of the Act can be filed before the CIT(A). However, he failed to appreciate that for filing an appeal, the AO ought to have determined the total assessed income and demand and issued notice u/s 156 of the Act. Otherwise, whatsoever appeal cannot be filed with the CIT(A). It is undisputed that no demand notice was issued along with the draft assessment order dated 31.03.2013 and which was issued on 21.02.2014. Thus, the assessment in the present case is barred by limitation as held in the case of Purushottam T Patel (Supra).*

22. *Since in the present case, draft assessment order was issued u/s 143(3) rws 144C of the Act, the AO himself directed the appellant to files its objections before the DRP meaning thereby that the assessment was completed u/s 143(3) and not 144 of the Act.*

23. *From para 8 onwards of the said submission, the AO has contested that the right to appeal is not an inherent right unless it is provided for in the statute. The above proposition has no relevance on the facts stated above since if an assessee does not have a right to appeal it could only be trite of law in the peculiar facts of the present case wherein an assessment which is draft assessment u/s 143(3) and subsequently changed to u/s 144 in a complete biased, arbitrary and illegalmanner which renders the entire proceedings void-ab –initio and illegal.*

24. *It is also submitted that in the present case, provisions of section 145(3) were invoked which provides that the AO has liberty to complete the assessment u/s 143(3) of the Act in the manner provided u/s 144 of the Act. In other words, the assessment so made will still continue to be u/s 143(3) of the Act only. It does not mean that the*

assessment is completed u/s 144 of the Act. In support of the same, reliance is placed on the judgment of Hon'ble Kerala High Court in the case of Ponkunnam Traders (102 ITR 366)."

17. He therefore, submitted that merely invoking provisions of section 145(3) does not allow the Assessing Officer to pass an order u/s 144 of the Income Tax Act, 1961. He further referred to provisions of section 144 of the Act to state that in clause (a) to (c) of Section 144(1) covers four situations and failure of any of the conditions is not established by the Revenue and therefore, the provisions of section 144 cannot be invoked. He further, submitted that provisions of section 145(3) or its failure does not give any right to the ld Assessing Officer to pass an order u/s 144 of the Income Tax Act, 1961. He therefore pressed upon that order actually passed by the ld Assessing Officer is order u/s 143(3) of the Act.

18. He further raised the arguments that assessment order is barred by limitation he referred that as no notice of demand was issued along with the draft assessment order it is not an order passed under the Income Tax Act, 1961 and therefore, the order is barred by limitation.

19. Against this the ld DR submitted that though the cross objection of the Revenue has been dismissed by the coordinate bench on technical grounds but still the Revenue has right to submit that the appeal of the assessee is not maintainable. He relied upon the decision of the Hon'ble Supreme Court in Post Graduate Institute of Medical Education and Research Vs. A.P. Vasan and others in (2003) 5 Supreme Court Cases 321. He referred to para No. 26 of the order to state that despite the fact that revenue has not filed a counter appeal they could nevertheless challenge the appeal of the assessee. On dismissal of cross objection of the Revenue he submitted that there are several errors in the order dated 23.03.2017 of the coordinate bench. He specifically referred to submission dated 01.05.2017 of the AO. He has submitted that even if the CO of the Revenue has been dismissed still Revenue can challenge the maintainability of the appeal of the assessee.

20. To show that impugned order in fact has been passed u/s 144 of the Act, he refereed that in Form No. 36B filed by the assessee in Column No. 2 it has been stated by the assessee itself that order is passed u/s 144 read with Section

144C(13) of the Act. He further referred to ground No. 1 of the appeal of the Revenue to show that assessee is specifically objecting the assessment order dated 21.02.2014 which is passed u/s 144 read with section 144C(13) of the Income Tax Act, 1961. He therefore, submitted that now the assessee cannot say that the order has not been passed u/s 144 of the Act. He therefore, vehemently contested that order has been passed by the Assessing Officer u/s 144 of the Act which has been mentioned in the draft order passed by the AO on 31.03.2013 and final order was in fact passed u/s 144 of the Act. He further referred to the various objections by the assessee before the ld Dispute Resolution Panel and stated that in none of the objections assessee has challenged the action of the ld Assessing Officer of assuming jurisdiction u/s 144 of the Act. He therefore contended that assessee cannot take now the plea that order is passed by AO u/s 143(3) of the Act. He stated that what is not contested before the lower authorities cannot be taken as ground of appeal by the assessee. Only recourse available to the assessee was by filing an additional ground of appeal which has not been done. He took us to all the objections of the assessee before the ld DRP. His contention was that the order passed by the ld AO is without jurisdiction or barred by limitation of time was not at all contested by assessee before ld DRP despite quite a lengthy remand proceedings before the ld DRP. He therefore, contested that now there is no reason to agitate this issue before the Tribunal. He further referred to page No. 983 of the paper book which is the ' statement of facts' submitted by the assessee before the ld DRP. He referred to page No. 977, 978, 979, 980, 981 of the paper book to show that assessee has given a false statement before the lower authorities that assessee has been granted the permission to not to include the necessary details as required by the provisions of section 212 of the Companies Act. He submitted that in the Directors Report for FY 2008-09 which was signed by the Chairman and Managing Director of the company on 30.04.2009 it is stated that company has been granted approval u/s 212(8) of the Act to not to include the balance sheets, profit and loss account of the subsidiaries. He submitted a paper book consisting of 35 pages to demonstrate the above issue. He drew our attention to the relevant extract of sections 209 to section 212 of the Companies Act which deals with the books of account as well as the disclosure required to be made by the assessee. He further

referred to the relevant extract of the annual accounts of the company which is also available at page No. 983 of paper Book Vol-III of the Assessee. He further referred to the date of signing of such report by the Chairman of the company, Dr. Pranoy Roy on 30.04.2009. Then he took us to the approval granted by the Ministry of Corporate Affairs to the assessee u/s 212(8) of the Companies Act at page No. 34 and 35 of his paper book. He has drawn our attention that Ministry of Corporate Affairs has granted approval to the company only on 03.07.2009 whereas, the Director's Report of the company dated 30.04.2009 states that Ministry of Corporate Affairs has granted approval to the company u/s 212(8) of the Companies Act. He vehemently referred to both the dates and pointed out that there is a false statement by the company in its Director's Report dated 30.04.2009 claiming that it already has such an approval when it was not even applied for. He further stated that despite there being such an approval even on 03.07.2009 does not exempt company from disclosing the information to various regulatory and Govt. authorities. He therefore, submitted that claim of the company falls flat as on 30.04.2009 it did not have any exemption and further the exemption was not with respect to disclosure to Govt. authorities. He vehemently stated that annual accounts of the company create serious doubts as it is apparently backdated. He further referred to page No. 989 of the paper book where there is reference to schedule 29 of the financial statement of the company for the year ended on 31.03.2009 which contains notes on accounts with respect to shareholders agreement dated 23.05.2008. He stated that the impugned disclosure did show that 26% effective indirect stake has been given in another subsidiary company of the assessee. However, the real issue is about the amount of investment that has been made in the NDTV Networks International Holding BV was not disclosed. He referred to the page No. 992 of the paper book of the assessee to show that many of the details were submitted by the assessee only as additional evidence before the ld DRP. He therefore, submitted that the accounts of the assessee were not complete and correct and hence are unreliable.

21. He further relied upon the decision of special bench in case of M/s. All cargo Global Logistics Ltd vs. DCIT dated 21.05.2012 to support his contention that only option available with the assessee is to raise the issue of the order being without jurisdiction and barred by limitation is by way of raising an additional ground of

appeal, if at all the appeal of the assessee is maintainable, which is not the case before the bench. He further submitted that assessee has not disclosed vital information by not complying with provisions of section 212 of The Companies Act, 1956 and therefore, ld DRP has upheld the piercing of the corporate veil in case of the assessee. He further submitted that therefore the AO rejected the books of account of the assessee applying provision of section 145(3) of the act and has assumed jurisdiction u/s 144 of the Act which is correct and in accordance with law on the facts and circumstances of the case. He therefore submitted that now it is unchallenged by the assessee that order is in fact passed u/s 144 of the Act.

22. He further submitted that assessee has also not complied the condition of notice u/s 142(1) as mentioned at page No. 47 and 48 of the draft assessment order. He submitted that the AO issued notice u/s 142(1) on 22.02.2011 asking the assessee to furnish the copies of the balance sheet etc which assessee submitted without the balance sheet, profit and loss account, audit report and Director's report of the subsidiaries. Therefore, there was no submission of any of such documents with respect to subsidiary furnished by the assessee. He further submitted that by notice u/s 142(1) dated 15.02.2013 ld AO also asked the similar detail wherein the assessee submitted the information of subsidiaries except in case of NDTV Network PLC though mentioned in the covering letter. Even by letter dated 11.03.2013 the balance sheet and profit and loss account of NDTV Network PLC along with Profit and Loss account was submitted but the notes on account of that subsidiary was never submitted before the ld AO during the assessment proceedings. He further stated that copy of share subscription agreement dated 23.05.2008 and identity, creditworthiness and genuineness of the investor as well as the copy of the balance sheet etc of the investee company were never submitted before the AO. He submitted that as many as eight different types of documents were submitted by the assessee as additional evidence before the ld DRP. He submitted that information regarding investors in 100 million US$ step up coupon convertible bonds was also not submitted despite the fact that most of the investors are from tax heaven jurisdiction. Regarding the claim of the assessee that order is time barred, he submitted that order is within time and assessee could not show that how the order is barred by limitation by placing definite time lines.

23. He further submitted that the order titled as draft Assessment order is passed invoking provision of section 144 of the Act because the assessee has failed to comply with the notice issued u/s 142(1) of the Income Tax Act, 1961 and further by virtue of second proviso to section 144(1) where the notice under sub-section 142(1) has been issued prior to the making of an assessment u/s 144 of the Act, It is not necessary to give any opportunity of hearing to the assessee by issuing a show-cause notice to the assessee that why the assessment should not be made u/s 144 of the Act. He further referred to the provisions of section 145(3) of the Act that where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee then the AO may make an assessment in the manner provided u/s 144 of the Act. He therefore submitted that when AO has rightly invoked the provisions of section 145(3) and also stated that as assessee has not satisfied him about the correctness and completeness of the account the provisions of section 144 has rightly been invoked.

24. He further submitted that provisions of section 144C does not refer to any on the specific section whether section 143(3) or section 144 of the Act, therefore, according to the facts and circumstances of the each case the AO may pass order under any of the above two sections. He therefore, vehemently contested that claim of the assessee that Assessment order has been framed u/s 143(3) is devoid of any merit.

25. Based on the above argument he further referred to the provision of section 253(1)(d) of the Act which provides that an order passed by the AO u/s 143(3), 147, 153A and 153C in pursuance of the directions of the Dispute Resolution Panel can be subject to appeal before the Tribunal. He therefore submitted that there is no mention of orders passed u/s 144 of the Act being appealable before the Tribunal even though they are passed in pursuance of direction of the Dispute resolution panel. He therefore submitted that present appeal of the assessee lacks jurisdiction before the tribunal. In the end he submitted a detailed note on this issue as under:-

> *"The respondent has jurisdiction over the appellant, in respect of which case bearing ITA No.1212/Del/2014, ITA No.2658/Del/2014 & Co.No.233/Del/2014 for AY 2009-10 are pending for disposal.*

2. Facts of the case are stated briefly to have an appreciation of factual and legal issue involved in the order of the Assessing Officer (the AO) in case of M/s NDTV for AY 2009-10 u/s 144 r.w.s. 144 C(13) of the Act dated 21.02.2014. The assessee company filed its return of income for AY 2009-10 on 30.09.2009 declaring loss of (-) Rs.64, 83, 91,422/-.

The return was processed u/s 143(1) of the Act. Later on, the case was selected for scrutiny assessment by issue and service of notice u/s 143(2) on 19.08.2010 followed by issue of several notices u/s 142(1) of the Act. The AO after receipt of the directions of the DRP finalized assessment u/s 144 r.w.s 144C (13) of the Act on 28.02.2014 in conformity with the directions of the DRP by determining total taxable income of Rs. 838.33 crore.

3. The assessee filed an appeal against the said the assessment order of the AO u/s 144 r.w.s. 144C (13) of the Act before Hon'ble ITAT u/s 253(1)(d) of Act, even when no appeal against the order passed by the AO under section 144 of the Act in pursuance to the direction of the DRP is provided u/s 253(1)(d) of the Act.

4. For sake of clarity, relevant provisions of clause (d) of sub-section (1) of section 253 of the Act is reproduced as under:

"an order passed by an Assessing Officer under sub-section (3), of section 143 or section 147 [or section 153A or section 153C] in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order"

5. The fact of completion of assessment under section 144 of the Act is admitted by the appellant which fact is evidenced by relevant particulars in Form No 36B read with Rule 14 of the I.T.Rules, 1962 & verified by & on behalf of the appellant on March 3, 2014. It is pertinent to point out that even in the appeal bearing ITA No. 1212/Del/2014 filed by the assessee before the Hon'ble ITAT on 04.03.2014, the

assessee has not taken any ground against the assumption of jurisdiction by the AO u/s 144which was also confirmed by the DRP.

6. A question would thus arise as to whether an appealto the Appellate Tribunal is provided against an order of the AO passed u/s 144 read with section 144C(13) u/s 253 of the Act?

Clause (d) of sub-section (1) of section 253 of the Act deals with the appellate jurisdiction of the ITAT against orders passed by the AO in pursuance of the directions of the Dispute Resolution Panel, which reads as under:

"[(d)an order passed by an Assessing Officer under sub-section(3), of section 143 or section 147 [or section 153A or section 153C] in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order;]"

It is evident from the provision of section 253 (1) (d) that no appeal is provided against the order made by the AO u/s 144 of the Act in pursuance to the directions of the DRP.

7. As against this, when one looks at the provisions of section 246A of the Act providing appeals before Commissioner (Appeals), it provides appeals against both classes of assessments, that under section 143(3) as well under section 144 when aggrieved against such orders.

8. It is pertinent to mention here that there is no inherent right of appeal given to an assessee and no right of appeal can be created by way of implication. This view gets support from judgement of Punjab and Haryana High Court in case of CIT v. RamlalMansukhRai (1970) 77 ITR 964 (P&H)[1]. If the right of appeal is not given by the statute, no appeal will lie,as upheld in following cases:

- Harihar v. CIT 9 ITR 246[2]
- Bhagat v. CIT 4 ITC 33[3]

A right of appeal is the creature of the statute and an assessee has right of appeal only if there is a statutory provision for it, as held in following cases :

- *CIT v. Ashok Engineering 194 ITR 645 (SC)*[4]
- *CIT v. Mahaveer Prasad & Sons (1980) 125 ITR (165 Del)*[5]
- *Caltex Oil v. CIT 202 ITR 375 (Bom)*[6]

9. Right of appeal is not a vested right. This proposition of law is so deeply embedded in the common law system that there is no exception to the general rule. Thus whereas the appeal is a creation of statute, the manner in which such appellate proceedings are determined is also provided for under the law.

a) *In KondibaDagaduKadam v. SavitribaiSopanGujar&Ors., AIR 1999 SC 2213*[7]*, Hon'ble Apex Court held as under:-*

> *"It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before an appeal can be maintained and no Court has the power to add to or enlarge those grounds. The appeal cannot be decided on merit on merely equitable grounds."*

b) *Further, there can be no quarrel that the right of appeal/revision cannot be absolute and the legislature can impose conditions for maintaining the same. In Vijay Prakash D. Mehta &Jawahar D. Mehta v. Collector of Customs (Preventive), Bombay, AIR 1988 SC 2010*[8]*, Hon'ble Apex Court held as under:-*

> *"Right to appeal is neither an absolute right noran ingredient of natural justice, the principles of which must be followed in all*

judicial or quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant .....The purpose of the Section is to act in terrorem to make the people comply with the provisions of law."

c) *A similar view has been reiterated by Hon'ble Apex Court in Anant Mills Co. Ltd. v. State of Gujarat, AIR 1975 SC 1234[9]; and Shyam Kishore &Ors. v. Municipal Corporation of Delhi &Anr., AIR 1992 SC 2279[10]. A Constitution Bench of this court in Nandlal&Anr. v. State of Haryana, AIR 1980 SC 2097[11], held that the "right of appeal is a creature of statute and there is no reason why the legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory".*

d) *In Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad &Ors., (1999) 4 SCC 468[12], Hon'ble Apex Court held that the right of appeal though statutory, can be conditional/qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided for under the statute and when a law authorises filing of an appeal, it can impose conditions as well.*

Thus, it is evident from the above that the right to appeal is a creation of Statute and it cannot be created by acquiescence of the parties or by the order of the Court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a Court or Authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance of the conditions mentioned in the provision that creates it. Therefore, the Court has

no power to enlarge the scope of those grounds mentioned in the statutory provisions.

10. The rule of strict interpretation was very recently explained by Hon'ble Supreme Court in the case of CIT v. Calcutta Knitwears [2014] 362 ITR 673 (SC)[13] as the foremost principle in interpretation of fiscal statutes, so that where the statute is clear and unambiguous, the literal interpretation has necessarily to follow as decided in the context of third-party jurisdiction in a search under section 158BD after review of both English and Indian precedents, in Swedish Match AB v. SEBI [2004] 122 Comp Cas 83 (SC); CIT v. Ajax Commissioner of Stamp Duties (NSW) v. Simpson [1917] 24 CLR 209 and Grundy v. Pinniger [1852] 1 L J Ch. 405. Hardship or inconvenience cannot also justify a different interpretation in view of the judicial restraint against the plain meaning of language employed by the Legislature.

In PrakashNathKhanna v. CIT [2004] 9 SCC 686[14], Hon'ble Apex court explained that the language employed in a statute is the determinative factor of the legislative intent. The Legislature is presumed to have made no mistake. The presumption is that it intended to say what it has been said. Assuming there is a defect or an omission in the words used by the Legislature, the court cannot correct or make up the deficiency. Where the legislative intent is clear from the language, the court should give effect to it (Delhi Financial Corporation v. Rajiv Anand [2004] 11 SCC 625[15]

11. The power of ITAT to admit an appeal u/s 253 has invited judicial scrutiny by various benches of the ITAT in following cases:

11.1 Hon'ble ITAT-cochin bench examining the scope of provision of section 253 in case of The Sub Registrar V DIT I.T.A. No. 212/coch/2013 & S.A.42/coch/2013 order dated 24.7.2013[16] has held as under :

"5. Now coming to the direction given by the Director of Income-tax (intelligence) in clause 7 of the demand notice, no doubt, the Director of

Income-tax (Intelligence) mentioned in the demand notice that an appeal can be filed before this Tribunal under Part B of Chapter XX of the Income-tax Act. It is well settled principles of law that consent of a litigant party will not confer any jurisdiction on a judicial or quasi judicial authority unless and until it is otherwise conferred by the legislature. Therefore, the consent / direction of the Director of Income-tax (Intelligence) will not confer any jurisdiction on this Tribunal unless it is provided for in the Income-tax Act by the Parliament. Hence, this Tribunal could not entertain the appeal filed by the Sub Registrar, Meppayur-Kozhikode.

6. Coming to the contention of the ld.DR that appeal is provided u/s 246A(q) of the Act, no doubt, an order imposing penalty under Chapter XXI is appealable before the CIT(A) under section 246A(q) of the Act. Admittedly, section 271FA falls in Chapter XXI of the Income-tax Act. Therefore, one may claim that an appeal is provided u/s 246A(q) of the Act. We are conscious that the CIT(A) is equivalent in rank that of the Director of Income-tax (Intelligence), therefore, the appeal before CIT(A) may not be an effective and efficious remedy available to the Sub Registrar, Meppayur-Kozhikode against whom penalty was levied. However, this Tribunal being a quasi judicial authority established under the Income-tax Act, cannot travel beyond the provisions of section 253 of the Act. Therefore, merely because the remedy available u/s 246A(q) of the Act may not be effective and efficious that alone will not give any jurisdiction to this Tribunal to entertain this appeal.

7. Further, we are of the considered opinion that when the provisions of section 271FA was introduced in the statute ITA No. 212/Coch/2013 S.A. No.42/Coch/2013 book by the Finance Act, 2004 with effect from 01-04-2005 the consequential amendment to section 253 was omitted to be carried out. This omission may be unintended. One may argue that an appeal is provided against the order of penalty u/s 271 in 253(1)(a) and 253(1)(c) of the Act, therefore, all branches of section 271 i.e. from 271A to 271G are included in section. This argument may not be correct because section 271 is an

independent section and it has its own sub sections. Sections 271A to 271G are not sub sections under section 271 and they are independent sections by themselves. This is obvious from section 253(1)(a) and 253(1)(c) itself. The legislature has mentioned sections 271 and 271A separately in section 253(1)(a) and 253 (1)(c) of the Act. Therefore, the legislature treated sections 271 and 271A as separate and independent sections. In other words, sections 271A to 271G are independent and separate sections and it is not part / branch of sections 271 of the Act. Therefore, argument, if any, that section 271FA is part of section 271 is not correct. This Tribunal is of the considered opinion that section 271FA is separate and independent of section 271 and therefore, the reference of section 271 in section 253(1)(a) or 253(1)(c) may not be included section 271FA. As already observed, the omission to include section 271FA in section 253 may be unintended. Therefore, it is open to the department to bring to the notice of the concerned authority about the omission to provide appeal before the Tribunal for making consequential amendment to section 253 of the Act in case the department found that the omission is unintended.

8. In view of the above discussion, the appeal of the Sub Registrar, Meppayur-Kozhikode is dismissed as not maintainable before this Tribunal. However, it is made clear that it is open to the Sub Registrar, Meppayur-Kozhikode to challenge the order passed by the Director of Income-tax (Intelligence) levying penalty u/s 271FA of the Act before the appropriate forum in a manner known to law."

11.2. Hon'ble ITAT-Cochin in its later decision in case of SRO, Meppayar-Kozhihode v DIT (Intelligence) (2013) 37 Taxmann.com 36[17] examining scope of section 253 has held as under:

"4. We have considered rival submissions on either side and also perused the material available on record. The question arises for consideration is whether this Tribunal could entertain an appeal by the Sub Registrar, Meppayur-

Kozhikode against the order of penalty u/s 271FA of the Act. We have carefully gone through the provisions of section 253 of the Act. Section 253 provides for an appeal before this Tribunal against the orders mentioned therein. For the purpose of clarity, the provisions of section 253 are reproduced hereunder:

"253 Appeals to the Appellate Tribunal (1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order —

(a) an order passed by a Deputy Commissioner (Appeals) before the 1st day of October, 1998 or, as the case may be, a Commissioner (Appeals) under section 154, section 250 section 271, section 271A or section 272A; or

(b) an order passed by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st Day of January, 1997; or

(ba) an order passed by an Assessing Officer under sub-section (1) of section 115VZC; or

(c) an order passed by a Commissioner under section 12AA or under clause (vi) of sub-section (5) of section 80G or under section 263 or under section 271 or under section 272A or an order passed by him under section 154 amending his order under section 263 or an order passed by a Chief Commissioner or a Director General or a Director under section 272A; or

(d) an order passed by an Assessing Officer under sub-section (3), of section 143 or section 147 in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order."

Nowhere in section 253 mentions the order passed by Director of Income-tax (Intelligence) or any other officer of the Income-tax Department levying penalty u/s 271FA is appealable before this Tribunal. This Tribunal being a quasi judicial authority established under the provisions of the Income-tax Act cannot travel beyond the provisions of the Act. Therefore, unless and until an appeal is specifically provided in section 253 of the Act against the order levying penalty u/s 271FA, this Tribunal is of the considered opinion that the present appeal is not maintainable before this Tribunal.

5. Now coming to the direction given by the Director of Income-tax (Intelligence) in clause 7 of the demand notice, no doubt, the Director of Income-tax (Intelligence) mentioned in the demand notice that an appeal can be filed before this Tribunal under Part B of Chapter XX of the Income-tax Act. It is well settled principles of law that consent of a litigant party will not confer any jurisdiction on a judicial or quasi judicial authority unless and until it is otherwise conferred by the legislature. Therefore, the consent/direction of the Director of Income-tax (Intelligence) will not confer any jurisdiction on this Tribunal unless it is provided for in the Income-tax Act by the Parliament. Hence, this Tribunal could not entertain the appeal filed by the Sub Registrar, Meppayur-Kozhikode.

6. Coming to the contention of the ld. DR that appeal is provided u/s 246A(q) of the Act, no doubt, an order imposing penalty under Chapter XXI is appealable before the CIT(A) under section 246A(q) of the Act. Admittedly, section 271FA falls in Chapter XXI of the Income-tax Act. Therefore, one may claim that an appeal is provided u/s 246A(q) of the Act. We are conscious that the CIT(A) is equivalent in rank that of the Director of Income-tax (Intelligence), therefore, the appeal before CIT(A) may not be an effective and efficacious remedy available to the Sub Registrar, Meppayur-Kozhikode against whom penalty was levied. However, this Tribunal being a quasi judicial authority established under the Income-tax Act, cannot travel beyond the provisions of section 253 of the Act. Therefore, merely because the

remedy available u/s 246A(q) of the Act may not be effective and efficacious that alone will not give any jurisdiction to this Tribunal to entertain this appeal.

7. Further, we are of the considered opinion that when the provisions of section 271FA was introduced in the statute book by the Finance Act, 2004 with effect from 01-04-2005 the consequential amendment to section 253 was omitted to be carried out. This omission may be unintended. One may argue that an appeal is provided against the order of penalty u/s 271 in 253(1)(a) and 253(1)(c) of the Act, therefore, all branches of section 271 i.e. from 271A to 271G are included in section. This argument may not be correct because section 271 is an independent section and it has its own sub sections. Sections 271A to 271G are not sub sections under section 271 and they are independent sections by themselves. This is obvious from section 253(1)(a) and 253(1)(c) itself. The legislature has mentioned sections 271 and 271A separately in section 253(1)(a) and 253 (1)(c) of the Act. Therefore, the legislature treated sections 271 and 271A as separate and independent sections. In other words, sections 271A to 271G are independent and separate sections and it is not part/branch of sections 271 of the Act. Therefore, argument, if any, that section 271FA is part of section 271 is not correct. This Tribunal is of the considered opinion that section 271FA is separate and independent of section 271 and therefore, the reference of section 271 in section 253(1)(a) or 253(1)(c) may not be included section 271FA. As already observed, the omission to include section 271FA in section 253 may be unintended. Therefore, it is open to the department to bring to the notice of the concerned authority about the omission to provide appeal before the Tribunal for making consequential amendment to section 253 of the Act in case the department found that the omission is unintended."

11.3. Hon'ble ITAT-Hyderabad bench examining provisions of section 253 in case of ACIT v D.E.Shaw India Software (P) Ltd. (2015) 64 Taxmann.com95[18] has held as under :

"4. We have carefully considered the rival contentions and perused the record. For the sake of immediate reference, we extract the provisions of section 253(6) and the proviso thereto which clearly highlights that the legislature intended to exempt the Revenue from payment of institution fees only with regard to the appeals referred to in sub-section (2). For both the parties in respect of memorandum of cross-objections, no appeal fees is payable.

"Section 253(6) :

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, in the case of an appeal made on or after the 1st day of June, 1992, irrespective of the date of initiation of the assessment proceedings relating thereto, be accompanied by a fee of,—

(a) Where the total income of the assessee as computed by the Assessing Officer in the case to which the appeal relates is one hundred thousand rupees or less, five hundred rupees;

(b) Where total income of the assessee computed as aforesaid in the case to which the appeal relates is more than one hundred thousand rupees, but not more than two hundred thousand rupees, one thousand five hundred rupees.

(c) Where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than two hundred thousand rupees, one per cent of the assessed income, subject to a maximum of ten thousand rupees.

(d) Where the subject matter of an appeal relates to any matter, other than those specified in clauses (a), (b) and (c), five hundred rupees;

Provided that no such fee shall be payable in the case of an appeal referred to in sub-section (2) or a memorandum of cross-objections referred to in sub-section (4)". (Emphasis supplied).

Sub-section (2A) is conspicuously absent in the proviso to section 253(6) in which event, the Revenue has to pay the institution fees in order to file a valid appeal.

4.1 In the instant case, memorandum of appeal is filed pursuant to directions given by the DRP. A statutory right to file an appeal is provided under sub-section (2A) of section 253 which reads as under :

> *"[(2A)] The Commissioner may, if he objects to any direction issued by the Dispute Resolution Panel under sub-section (5) of section 144C in respect of any objection filed on or after the 1st day of July, 2012, by the assessee under sub- section (2) of section 144C in pursuance of which the Assessing Officer has passed an order completing the assessment or reassessment, direct the Assessing Officer to appeal to the Appellate Tribunal against the order.]"*

4.2 This sub-section (2A) was introduced by the Finance Act, 2012 w.e.f. 01.07.2012. While inserting sub- section (2A) in Section 253, the legislature has taken care to insert sub-section (3A) also, which specifies that the appeal shall be filed within 60 days of the date on which the order sought to be appealed against is passed by the AO pursuant to the directions to the DRP under sub-section (5) of section 144C. Not only that, sub-section (4) also was amended by inserting sub-section (2A) in sub-section (4) for filing of cross-objections. This indicates that the legislature has consciously not amended sub-section (6). Therefore, the contention of the Ld. CIT/DR that it could be an omission or mistake in not amending the sub-section (6) for the appeals preferred to in sub-section (2A) cannot be accepted. Since the legislature intentionally has not exempted appeals in sub-section (2A), it can be

concluded that the Assessing Officer's appeal to the Appellate Tribunal shall be accompanied by a fee as prescribed under clauses (a) to (d) of the provisions. As AO has not taken any steps to pay the fees, in spite of being intimated to him in the acknowledgment itself, we have no option than to reject the memorandum of appeals preferred, as not maintainable.

4.3 Ld. D.R. also pointed out that ITAT can accept a Memorandum of Appeal by using its discretion. Rule 9 of the Appellate Tribunal Rules, 1963 provides in discretion to the ITAT. Rule 9(3) is as under :

> *"The Tribunal may in its discretion, accept a Memorandum of Appeal which is not accompanied by all or any of the documents referred to in sub-rule (1)."*

4.4 As can be seen from the above, if the memorandum of appeal is deficient in its enclosures, as prescribed, then only the Tribunal can exercise its discretion to accept the memorandum of appeal. In the present appeals, the enclosures are not defective but the fee payable as per the statutory provisions of section 253(6) was not paid. Since the Memo of Appeal is not accompanied by the fee, as prescribed, we are of the opinion that there is no discretion to the ITAT to accept Memorandum of Appeal filed, in violation of the statutory provisions. ITAT being a quasi-judicial body under the I.T. Act, it has to follow the statutory provisions as prescribed. Under analogous circumstances, while dealing with an appeal filed by an assessee against the order passed under section 271FA, the ITAT, Cochin Bench in the case of Sub-Registrar Office, Meppayur - Kozhikode v. DIT (Intelligence) [2013] 37 taxmann.com 36/[2014] 64 SOT 10 (URO) observed that the Tribunal cannot travel beyond the provisions of the Act and cannot admit an appeal even if the opponent party gives consent permitting the appellant to file an appeal. In otherwords, the consent of a litigant party would not confer jurisdiction on a quasi judicial authority unless and until it is otherwise conferred under the statute."

11.4. The Chennai bench of ITAT examining scope of section 253 in case of Intimate Fashion (India) (P) Ltd. (2013) 31 Taxmann.com 306[19] has held as under :

"7. The contention of the assessee before us is that as no direction was given by the DRP and consequently provisions of section 144C(13) are not applicable in the instant case and therefore, as per the provisions of section 144C(3), the assessment order should have been passed on or before 31.3.2012 and in view of this, the impugned order dated 15.6.2012 is barred by limitation.

8. We find that the orders against which appeal can be preferred before the Tribunal are provided in section 253 of the Act. Section 253(1)(d) reads as under:

> *"an order passed by an Assessing Officer under sub-section (3), of section 143 or section 147[or section 153A or section 153C] in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order."*

9. A bare perusal of the provision shows that the order passed u/s 143(3) by the Assessing Officer when such order is passed in pursuance of the directions of the DRP only shall be appealable before the Tribunal and in case of an order passed u/s 143(3) by the Assessing Officer which is not in pursuance to the directions of the DRP, appeal shall not lie against such order directly before the Tribunal.

10. In the instant case, the contention of the A.R of the assessee is that the impugned order passed u/s 143(3) by the Assessing Officer is not an order which is passed in pursuance of the directions of the DRP. However, if the above contention of the assessee is taken as correct then it implies that the

assessee is not entitled to file directly appeal before the Tribunal in pursuance to such an order of the Assessing Officer passed u/s 143(3) of the Act. We find that the DRP has categorically stated that it has no jurisdiction to pass any direction in pursuance to the belated objections filed by the assessee against the draft order of the Assessing Officer and in fact, the Panel gave no direction in respect of objections of the assessee. It is also observed that the DRP has also not given any direction to pass the order as per the draft assessment order. In the above circumstances, in our considered view, the instant appeal is not covered by the provisions of section 253(1)(d) of the Act and the instant appeal is not maintainable. We, therefore, decline to admit the instant appeal and dismiss the same in limine."

11.5. The Amritsar bench of ITAT in case of Sub-Registrar, Nakoar v DIT (2012) Taxmann.com 225[20] examining identical issue of power of ITAT u/s 253 of the Act has held as under :

"6.1 From the above, it is clear that no power to entertain the appeals against the order passed under s. 271FA, has been provided to the Tribunal. Therefore, the appeals cannot be entertained by the Tribunal. On the other hand, the powers have been given to the CIT(A) under s. 246A(l)(q), which reads as under :

"246A(1)(q) : An assessee aggrieved by any of the following orders (whether made before or after the appointed day) may appeal to the CIT(A) against : (q)an order imposing a penalty under Chapter XXI."

6.2 In view of the clear provisions of s. 246A(l)(q) of the Act, an appeal against the order passed under Chapter XXI can be preferred before the CIT(A). The provisions of s. 271FA falls under the Chapter XXI of the Act. Thus, in view of the clear and unambiguous provisions of the Act, these appeals cannot be admitted by us, particularly, when, we have no jurisdiction under the law to entertain such appeals. Consequently, we dismiss all the appeals, for want of jurisdiction."

11.6. Hon'ble ITAT-Delhi bench has also examined power of ITAT u/s 253 of the Act in case of SIS live v ACIT(2016) 65 Taxmann.com10[21] as under:

"11. Now let us take stock of the legal position about the filing of appeal by the Revenue against the assessment order passed pursuant to the direction given by the DRP. In this regard, it is pertinent to note that the institution of the DRP came into being by means of insertion of section 144C by the Finance (No. 2) Act, 2009 w.e.f. 1.4.2009. As per this section, an assessee who is dissatisfied with a draft order can approach the DRP for necessary relief. Such a relief can be allowed by giving direction under sub-section (5) of this section. Sub-section (13) of section 144C provides that the AO is obliged to pass a final assessment order in conformity with the direction given by the DRP. This shows that the direction tendered by the DRP is binding on the AO notwithstanding the AO's reservations on it. The Finance Act, 2012 inserted sub-section (2A) to section 253 w.e.f. 1.7.2012 providing that : 'The Principal Commissioner or Commissioner may, if he objects to any direction issued by the Dispute Resolution Panel under sub-section (5) of section 144C in respect of any objection filed on or after the 1st day of July, 2012, by the assessee under sub-section (2) of section 144C in pursuance of which the Assessing Officer has passed an order completing the assessment or reassessment, direct the Assessing Officer to appeal to the Appellate Tribunal against the order.' This divulges that the AO was without any remedy to challenge the unacceptable adverse direction given by the DRP, given effect to in his own order, in respect of any objections filed before this cut-off date of 1.7.2012. Now with this amendment, the Revenue has been given a liberty to file appeal before the tribunal if the CIT objects to any direction issued by the Dispute Resolution Panel, +that has been incorporated in the final assessment order. The point to be underscored is that such a power of filing appeal is restricted only to the cases where 'objection is to the direction of the DRP' and not to the voluntary action of the AO/TPO himself. In other words, if the AO/TPO has decided a point, which has been reversed by the DRP, then an appeal

can be filed by the Department against the assessment order on such point(s). The right to file an appeal does not extend to a point decided either way by the AO/TPO himself, which remains intact even after the direction given by the DRP.

12. Similar is the position about filing a Cross objection by the Department, which is covered under sub-section (4) of section 253. As per this provision amended by the Finance Act, 2012,: 'The Assessing Officer ...., on receipt of notice that an appeal against the order of .... the Assessing Officer in pursuance of the directions of the Dispute Resolution Panel has been preferred under sub-section (1) ..., may, notwithstanding that he may not have appealed against such order or any part thereof, within thirty days of the receipt of the notice, file a memorandum of cross-objections... against any part of the order of the Assessing Officer (in pursuance of the directions of the Dispute Resolution Panel).....'. It is manifest that the liberty to file cross objection has been given to the AO u/s 253(4) of the Act only against that part of the order of the Assessing Officer which is in pursuance of the directions of the Dispute Resolution Panel. This provision does not encompass a case of the AO filing cross objection against that part of the assessment order which has not been disturbed by the DRP."

11.7. A careful analysis of above referred to legal jurisprudence on the issue has revealed that Hon'ble ITAT examining scope of its power u/s 253 has laid down following principles:

(a) If an appeal is not covered by provisions of section 253 of the Act, the appeal is not maintainable.

(b) The Tribunal being a quasi judicial authority established under the Income Tax Act cannot travel beyond the provisions of section 253 of the Act.

(c) *It is well settled principle of law that consent of a litigant party will not confer any jurisdiction on a judicial or quasi judicial authority unless and until it is otherwise conferred by the legislature.*

(d) *The Tribunal cannot travel beyond the provisions of the Act and cannot admit an appeal even if the opponent party gives consent permitting the appellant to file an appeal.*

(e) *Power of filing appeal against any direction issued by the Dispute Resolution Panel to the ITAT is restricted to cases covered under provisions of section 253(1)(d) and section 253 (2A) of the Act.*

12. Respectfully following the above referred to legal position that assessee has right of appeal only if there is a statutory provision for it,it is respectfully submitted that in this case, no appeal lies against the order of the Assessing Officer passed u/s 144 read with section 144C (13) of the Act as would be evident from a careful reading of clause (d) of sub-section (1) of section 253 of the Act. Accordingly, it is prayed that appeal of the assessee should not be entertained for adjudication and should be rejected on the ground that no appeal is provided against the order passed by the Assessing Officer in this case.

13. To sum up: Following propositions are placed for kind consideration with set of case laws on which reliance is placed in support thereof:

S.No	*Proposition*	*Serial No of case law compilation*
1.	*Maintainability of appeal-*	*1, 19, 20 & 21.*
2.	*Right of appeal has to be given by express words in a Statute-*	*2, 3, 8, 9, 11, 12.16, 17, 18.*

Prayer:

14. In view of above, it is humbly stated that appeal of the assessee company against order of the AO u/s 144 r.w.s 144C (13) of the Act is liable to be dismissed in limine&may kindly be so dismissed as being beyond jurisdiction."

26. The ld DR further submitted a note on appeal u/s 253(1)(d) of the Act as under:-

1. *The appellant has jurisdiction over the respondent, in respect of which case bearing ITA No.1212/Del/2014, ITA No.2658/Del/2014 & Co.No.233/Del/2014 for AY 2009-10 are pending for disposal.*

2. *Facts of the case are stated briefly to have an appreciation of factual and legal issue involved in the order of the Assessing Officer (the AO) in case of M/s NDTV for AY 2009-10 u/s 144 r.w.s. 144 C(13) of the Act dated 21.02.2014. The assessee company filed its return of income for AY 2009-10 on 30.09.2009 declaring loss of (-) Rs.64,83,91,422/-. The return was processed u/s 143(1) of the Act. Later on, the case was selected for scrutiny assessment by issue and service of notice u/s 143(2) on 19.08.2010 followed by issue of several notices u/s 142(1) of the Act. During course of scrutiny assessment proceedings, the*

assessee furnished partial information and did not comply with terms and conditions of notices u/s 142(1) of the Act on certain issues. The assessee was also found contravening provisions of section 145(2) of the Act. After considering replies and arguments as filed on behalf of the assessee, a show cause notice was issued to the assessee to show cause as why assessment should not be completed u/s 144 of the Act. After giving opportunity of being heard and considering objection/replies of the assessee, the AO assumed jurisdiction u/s 144 of the Act as evidenced from last paragraph on page 48 of the draft assessment order. A draft assessment was issued on 31.03.2013 u/s 144/144C(1) of the Act proposing taxable income of Rs. 641.08 crore as against declared loss of Rs. 64.83 crore . (It is to clarify here that due to typographic mistake on first page of the order, section 143(3)/144C(1) of the Act was wrongly mentioned as against correct section 144/144C(1) of the Act.) The assessee filed objection u/s 144C before Hon'ble Dispute Resolution Panel (the DRP) against the proposal of the AO to finalize assessment at Rs. 641.08 crore as against declared loss of Rs. 64.83 crore u/s 144 of the Act. The DRP heard the assessee and examined additional evidences field by the assessee and caused further enquiries to be made u/s 144C(7) by directing the AO to send remand reports. The DRP, taking into account proposal of additions to income in draft assessment order, submissions by the assessee, remand reports of the AO and non-submission of the information by the assessee on certain points, issued directions u/s 144C(5) of the Act to the AO on 31.12.2013. It is pertinent to mention here the assessee did not challenge assumption of the jurisdiction by the AO u/s 144 of the Act, however, it did take a ground against rejection of books of A/c, which was not pressed before the DRP and was rejected after scrutiny by the DRP and the DRP confirmed assumption of jurisdiction u/s 144 of the Act. The DRP gave categorical findings on the issue under the title "Non-disclosure of vital information" in paras 5.3 to 5.5 of its directions, which are reproduced verbatim as

under:-

"Non-disclosure of vital information

5.3. According to AO, as per Section 212 of the Companies Act, 1956 as well as the Indian Accounting Standards 7, 12, 18, 19, 27, 28, 33 and 107, the transactions of the subsidiaries were to be consolidated and disclosed in the audited accounts of the assessee since it is the parent company of all the Netherland and UK based companies On being asked, the assessee produced a conditional order dated 03.07.2009 of the Ministry of Corporate Affairs which exempted from attaching the details of subsidiaries with its balance sheet and other accounts in terms of provision of sub-section 8 of Section 212 of the Companies Act, 1956. The AO has pointed out that even this order of the Ministry of Corporate Affairs was not fully complied with The assessee is a listed company. The disclosure of accounts prescribed by Security and Exchange Board of India (SEBI) was not adhered to in spite of the fact that the assessee has committed so to do under listing agreement with Stock Exchange. The order of the Ministry of Corporate Affairs was issued on 03.07.2009 whereas the audited accounts of the assessee was finalised much before that. In any case, this order exempting the assessee was not retrospectively operative. Therefore, the lapses or omissions of not making full and true disclosure in the audited accounts of the assessee were not condoned by the exemption order of Ministry of Corporate Affairs.

5.4. The AO had asked for details about these transactions through her letters during the course of the assessment proceedings. The AO has mentioned that the requisite information was not produced before ADIT Investigation, Unit-II(2), New Delhi nor produced before her during the course of assessment proceedings. Therefore, the AO has come to the following conclusion (which is narrated on Page 46 of the

draft assessment order):

"As the material information which was required under the law to be attached with the balance sheet of the assessee company was neither attached nor being provided pursuant to summons issued by the Department in December 2010 nor in response to notice issued in February 2013, a reasonable belief was formed that the accounts of the assessee are not maintained and prepared in accordance with the Accounting Standards issued by the Central Government and were therefore incomplete and incorrect based upon which the true and correct income of the assessee liable to tax cannot be determined."

5.5. A show cause notice was issued by the AO to the assessee u/s 145(3) of the IT Act r/w relevant sections of the Companies Act by stating 'why the books of accounts should not be rejected' in accordance with Section 144 of the IT Act and why the assessment should not be concluded under that section. Further, the AO also contended that the assessee has also failed to comply with the requirements of Income Tax Act as well. On Page 46 to 48 of the draft assessment order, the AO has given reasons for rejection of the books of accounts of the assessee and why best judgment assessment u/s 144 of the IT Act is warranted in this case. The AO issued show cause notice to the assessee before resorting to Section 144 of the IT Act."

(Emphasis supplied)

Further, in para 5.13 of its directions, the DRP categorically held as under:-

"5.13 Therefore, DRP is of the considered view that the corporate veil needs to be pierced in this case as has rightly been done by the AO. The action of the AO to that extent is upheld."

Corporate veil cannot be pierced without rejecting the account books of the assessee and without travelling beyond such account books after such rejection. Thus, by upholding the piercing of corporate veil after itself causing enquiries to be made u/s 144C (7), the DRP has upheld the rejection of account books of the assessee and has upheld completion of assessment u/s 144 by the AO. The AO after receipt of the directions of the DRP finalized assessment order u/s 144 r.w.s 144C (13) of the Act on 28.02.2014 in conformity with the directions of the DRP by determining total taxable income of Rs. 838.33 crore.

3. *The assessee filed an appeal against the said the assessment order of the AO u/s 144 r.w.s. 144C (13) of the Act before Hon'ble ITAT u/s 253(l)(d) of Act, even when no appeal against the order passed by the AO under section 144 of the Act in pursuance to the direction of the DRP is provided u/s 253(l)(d) of the Act. For shake of clarity relevant provisions of clause (d) of sub-section (1) of section 253 of the Act is reproduced as under:*

"an order passed by an Assessing Officer under sub-section (3), of section 143 or section 147 [or section 153A or section 153C] in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order"

4. *In this case the AO assumed jurisdiction u/s 144 of the Act by taking into account non-compliance of terms and conditions of the notice u/s 142(1) of the as well as by rejecting books of A/c of the assessee u/s 145(3) of the Act. It is pertinent to point out that even in the appeal bearing ITA No. 1212/Del/2014 filed by the assessee before the Hon'ble ITAT on 04.03.2014, the assessee has not taken any ground against the assumption of jurisdiction by the AO u/s 144 as also confirmed by the DRP. Thus, the assessee admits that assumption of*

jurisdiction u/s 144 by the AO was correct on facts and in law.

Non-compliance to terms and conditions of notice u/s 142(1) of the Act

5. *It is evident from the finding of facts as recorded in the assessment order that the assessee had not complied with terms and conditions of notice u/s 142(1) as mentioned at page 47/48 of the draft assessment order. Details of non-compliance of notice u/s 142(1) are noted in Annexure 'A' to this submission. In view of above, provisions of clause (c) of subsection 1 of section 144 are also applicable and proviso to section 144(1) cannot be invoked in this case.*

Reasons for rejection of books of A/c under section 145(3) of the Act

6. *It is evident from findings recorded by the AO in the assessment order that the assessee had not followed Indian Auditing Standards as notified by Central Government under the Companies Act, 1956 as well as Accounting Standards as notified u/s 145(2) of the Act while filing audited A/c of the assessee company. In this regard, a reference may be made to page 46 to 50 of the draft assessment order. The instances of non-compliance by the assessee have been summarized as under:*

(a) *The assessee did not attach audited P&L A/c, balance sheet and annual reports of its subsidiary companies along with audited account of the assessee company as well as along with return of income for the year under consideration.*

(b) *The assessee did not make disclosure in terms of paragraph 4 of Accounting Standard notified u/s 145(2) of the Act. [Kindly refer No. 9949(F.No.l32/7195-TPL) dated 25.01.1996]*

(c) *Annual accounts did not follow following Indian Accounting Standards as notified by the Central Government:*

Ind. AS1: Presentation of Financial statement Ind. AS7: Statement of cash flow Ind. AS12: Income Tax Ind. AS18: Ind. AS19: Employee benefits
Ind. AS24: Related Party disclosure
Ind. AS27: Separate Financial Statements
Ind. AS28: Investment in associates and Joint Venture
Ind. AS33: Earning per share
Ind. AS107:

7. *In view of above facts, that the assessee did not follow Accounting Standards as notified u/s 145(2), a show cause notice was issued u/s 145(3) to the assessee to show cause as to why books of accounts of the assessee should not be rejected and assessment of the company should not completed u/s 144 of the Act.? In response to the notice, the assessee argued that it was exempted u/s 212(8) of Indian Companies Act, 1956 to attach the details of annual audited accounts of the subsidiary companies. The claim of the assessee cannot be accepted for following reasons:*

- *It is evident from the paragraph 4 of accounting standard as notified u/s 145(2) of the Act that the assessee was required to make complete disclosure of all the material items including information about all the material facts including transactions governed by substance over form. For the sake of clarity the relevant part of notified accounting standard are reproduced as under:*

"4. Accounting policies adopted by an assessee should be such so as to represent a true and fair view of the state of affairs of the business, profession or vocation in the financial statements prepared and presented on the basis of such accounting policies. For this purpose, the major considerations governing the selection and application of accounting policies are following,

namely:-

(i) Prudence - Provisions should be made for all known liabilities and losses even though the amount cannot be determined with certainty and represents only a best estimate in the light of available information;

(ii) Substance over form-The accounting treatment and presentation in financial statements of transactions and events should be governed by their substance and not merely by the legal form;

(iii) Materiality - Financial statements should disclose all material items, the knowledge of which might influence the decisions of the user of the financial statements."

(Extracted from Accounting standards notified u/s 145(2) [No.9949 [F.N0.132/7/95-TPL], DATED 25-1-1996])

- *It is pertinent to mention here that exemption u/s 212(8) of the Companies Act cannot supersede the requirement under the Income Tax Act, 1961 which is not subordinate to Indian Companies Act, 1956.*
- *It is evident from the paragraph (v) of terms and conditions of the order u/s 212(8) dated 03.07.2009 in F.No.47/496/2009-CL-III issued by Ministry of Corporate Affairs that the assessee was directed to regularly file data of holding as well as subsidiary companies to various regulatory and Government authorities as may be required by them.*

It is evident from above referred to facts that the assessee deliberately avoided disclosing material information about the subsidiary companies in contravention to provisions of section 145(2) and 145(3) of the Act and terms and conditions of order u/s 212(8) under Companies Act 1956. No reasonable

explanation for withholding information about the subsidiary companies of the NDTV has forth come from the assessee during proceeding before DRP.

8. *Even though these subsidiary companies were paper companies located in UK, Mauritius, Netherland, Sweden, etc. having no office, employee and known business activities, financial transactions worth several hundreds of crores were routed through these subsidiary companies for benefit of NDTV Ltd. and its management. However, the assessee had seriously restricted the probe by the AO into the issue of substance over form by withholding information about the subsidiary companies.*

9. *It is pertinent to mention here that accounting standard notified under section 145(2) provide that the accounting treatment and presentation in financial statement of transactions and events should be governed by their substance and not merely by legal form. However, the assessee neither followed the disclosure norms nor had disclosed audited A/c, balance sheet, profit & loss A/c and annual report of subsidiary paper companies in the return of Income of the NDTV Ltd.*

10. *Sub-sections (3A), (3B) and (3C) in section 211 of Companies Act 1956 (w.e.f Oct. 31, 1998) stipulate the profit and loss account and the balance sheet have to comply with accounting standards. For this purpose, the expressions "Accounting standards" shall mean to be the standards of accounting recommended by the Institute of Chartered Accountants as may be prescribed by the Central Government in consultation with National Advisory Committee on Accounting Standards constituted under section 210A of Companies Act 1956. Thus, the Accounting Standards are prescribed by the Central Government and Accounting standards are now mandatory qua the companies and non-compliance with these standards would lead to violation of section 211 of the Companies Act in as much as the annual accounts may then not be regarded as presenting a "True and*

fair view". It is evident from the order of the AO that the assessee had not followed several Auditing Standards as prescribed by the Central Government as contemplated by section 2(33) of the Companies Act 1956.

11. *Examining importance of Accounting Standards as notified by Central Government under Companies Act 1956, Hon'ble Supreme Court in case of J.K. Industries Ltd. and another Vs Union of India and others (2008) 297 ITR 176 (SC) has held as under:*

"Under section 211(3A) Accounting Standards framed by the National Advisory Committee on Accounting Standards constituted under section 210A are now made mandatory. Every company has to comply with the said standards. Similarly, under section 227(3)(d), every auditor has to certify whether the profit and loss account and Similarly, balance sheet comply with accounting standard referred to in section 211(3C). Similarly, under section 211(1) the company accounts have to reflect a "true ad fair" view of the state of affairs. Therefore, the object behind insistence on compliance with the A.S. and "True and fair" accrual is the presentation of accounts in a manner which would reflect the true income/profit. One has, therefore, to look at the entire scheme of the Companies Act. In our view, the provisions of the Companies Act together with the rule framed by the Central Government constitute a complete scheme. Without the rules, the Companies Act cannot be implemented. The impugned rules framed under section 642 are a legitimate aid to construction of the Companies Act as contemporanea exposition. Many of the provisions of the Companies Act, like computation of book profit, net profit etc. cannot be put into operation without the rules."

The Importance of Accounting standard for implementation of provisions of Income Tax has also been accepted by Hon'ble Apex Court and High Courts in following cases:

Challapalli Sugars Ltd. Vs CIT (1975) 98 ITR 167 (SC)
CITVsIndo-Nippon Chemical Co. Ltd. (2003) 261 ITR 275 (SC)
CIT Vs Woodward Governor India (P) Ltd. (2007) 294 ITR 451 (Delhi)
Prakash Leasing Ltd. Vs DCIT (2012)23 Taxmann.com.3
CITVsVirtual soft System Ltd. (2012) 205 Taxmann.257.

12. *Provisions of section 145(3) provide that be AO may proceed under section 145(3) under any of the following circumstances:*

(a) *Where he is not satisfied about the erectness or completeness of the accounts; or*
(b) *Where method of accounting cash or mercantile has not been regularly followed by the assessee; or*
(c) *Accounting standards as notified by Central Government has not been regularly followed by the assessee*

In this case, it is evident from discussion in proceedings paragraphs that the assessee had not followed Accounting Standards as notified by Central Government. Accordingly, the AO had correctly rejected books of account u/s 145(3) of the Act.

Whether the AO was justified in framing assessment u/s 144 read with section 144C(13) of the Act 1961

13. *In a case where the provisions of section 145(3) are attracted, the AO is entitled to make an assessment in the manner as provided in section 144. Provisions of section 144 stipulate that the AO after taking into account all the relevant material which AO has gathered shall, after giving the assessee an "opportunity of being heard" make the assessment of the total income or loss to the best judgement and determine the sum payable by the assessee on the basis of such*

assessment. The Proviso to section 144(1) further explaining term used "opportunity of being heard" stipulates that such opportunity shall be given by the AO by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to best judgement. It was further provided that provisions of Proviso to section 144(1) shall not apply where a notice under sub-section (1) of section 142 has been issued prior to the making of an assessment under this section.

14. *In this case, the AO, after rejecting books of A/c u/s 145(3) and taking note of non-compliance to terms and conditions of the notice u/s 142(1), assumed jurisdiction u/s 144 of the Act. However, due to typographical mistake on first page of draft order, section 143(3) read with section 144C was written instead of correct section 144 read with section 144C(1). However this rectifiable mistake was corrected as evident from directions of DRP u/s 144C(5) of the Act. (in this regard, paragraph 2.2.1 of the assessment order may be referred to).*

15. *It is evident from above discussion that the assessee had neither complied with the terms and conditions of the notice u/s 142(1) nor had followed accounting standards as notified by Central Government, accordingly, the AO assumed jurisdiction u/s 144 of the Act and finalized assessment proceeding u/s 144 read with section 144C of the Act. This leads to an irresistible conclusion that the AO has assumed jurisdiction u/s 144 on two counts - one, rejection of books of A/c 145(3) and second, non- compliance of terms and condition of notice u/s 142(1) of the Act.*

16. *For aforestated reasons, an argument that the assessment order should have been passed u/s 143(3) instead of section 144 of the Act is not found tenable. It is pertinent to mention here that assumption of jurisdiction under section 144 of the Act in cases of non-compliance of*

notices u/s 142(1) is clearly stipulated by clause (c) of subsection 1 of section 144 of the Act and assumption of jurisdiction u/s 144 due to rejection of books of A/c u/s 145 (3) is provided under section 145(3) of the Act by including wordings "...the Assessing Officer may make an assessment in manner provided in section 144".

17. *Several Courts including Hon'ble Apex Court have approved assessment u/s 144 in cases where books of A/cs were rejected u/s 145(3) of the Act which may be summarized as under:*

- *Kachwala Gems vs. JCIT, Jaipur 288 ITR 10 (SC)*
- *Bastiram Narayan Das vs. CIT (1994) 210 ITR 438 (Bom)*
- *Gunda Subahiya vs. CIT (1939) 7 ITR 21 (Mad-FB)*
- *Amitabh Construction P. Ltd. vs. Addl. CIT (2011) 335 ITR 523 (Jhar)*

For the reasons mentioned in above paragraph 4 to 17, it is concluded that the AO was legally justified in passing assessment order u/s 144 read with section 144C(13) of the Act.

18. *Issue 1: Whether order of the AO u/s 144 r.w.s. 144C(13) is barred by limitation*

- *In this case, the assessee filed return of income on 30.09.2009 and later on a reference was made to Transfer Pricing Office u/s 92CA(1) of the Act, accordingly, as per second Proviso to section 153(1) the time limit to complete assessment was 31.03.2013. Since, in this case, the AO had proposed variation in the return income of the assessee included variation in the return of income as a consequence of the order of the TPO u/s 92CA(3) the provisions of section 144C were applicable, accordingly, the AO frame a draft assessment order on 30.03.2013 within time limit as stipulated in second Proviso to section*

153(1) and further time limit to pass the order as stipulated u/s 144C was followed by the AO. In view of these facts, it is incorrect to argue that last date of passing final assessment order in this case was 31.03.2013 as against this in this case last date to pass order in compliance to the direction of the DRP was 28.02.2014 u/s 144C read with second Proviso to section 153(1) of the Act.

19. *Issue 2: Whether provisions of section 144C is not applicable to draft order u/s 144 of the Act*

- *The argument of the assessee that provisions of section 144C are not applicable to the draft order u/s 144 is legally incorrect statement. Clause(b) of sub-section (15) of section 144C stipulates that provisions of section 144C are applicable to:*

  - *All the cases of foreign company*
  - *All the cases where variation in the income arise due to transfer pricing additions*

  It is evident from provisions of section 144C of the Act that a proposed order of assessment where variation in return of income of above referred to classes of assessee known as eligible assessee are proposed are covered u/s 144C. The proposed order of assessment may be u/s 143(3), 147 or section 144 of the Act. The provisions of section 144C do not exclude proposed order of assessment u/s 144 of the Act as incorrectly argued by the AR of the assessee.

20. *Issue 3: Whether the draft assessment order and final order were u/s 144 of the Act*

- *Facts of the case are stated briefly to have an appreciation of factual and legal issue involved in the order of the Assessing*

Officer (the AO) in case of M/s NDTV for AY 2009-10 u/s 144 r.w.s. 144 C(13) of the Act dated 21.02.2014. The assessee company filed its return of income for AY 2009- 10 on 30.09.2009declaring loss of (-)Rs.64,83,91,422/-. The return was processed u/s 143(1) of the Act. Later on, the case was selected for scrutiny assessment by issue and service of notice u/s 143(2) on 19.08.2010 followed by issue of several notices u/s 142(1) of the Act. During course of scrutiny assessment proceedings, the assessee furnished partial information and did not comply with terms and conditions of notices u/s 142(1) of the Act on certain issues. The assessee was also found contravening provisions of section 145(2) of the Act. After considering replies and arguments as filed on behalf of the assessee, a show cause notice was issued to the assessee to show cause as why assessment should not be completed u/s 144 of the Act. After giving opportunity of being heard and considering objection/replies of the assessee, the AO assumed jurisdiction u/s 144 of the Act as evidenced from last paragraph on page 48 of the draft assessment order. A draft assessment was issued on 31.03.2013 u/s 144/144C(1) of the Act proposing taxable income of Rs. 641.08 crore as against declared loss of Rs. 64.83 crore . (It is to clarify here that due to typographic mistake on first page of the order, section 143(3)/144C(1) of the Act was wrongly mentioned as against correct section 144/144C(1) of the Act.) The assessee filed objection u/s 144C before Hon'ble Dispute Resolution Panel (the DRP) against the proposal of the AO to finalize assessment at Rs. 641.08 crore as against declared loss of Rs. 64.83 crore u/s 144 of the Act. The DRP heard the assessee and examined additional evidences field by the assessee and caused further enquiries to be made u/s 144C(7) by directing the AO to send remand reports. The DRP, taking into account proposal of additions to income in draft

assessment order, submissions by the assessee, remand reports of the AO and non-submission of the information by the assessee on certain points, issued directions u/s 144C(5) of the Act to the AO on 31.12.2013. It is pertinent to mention here the assessee did not challenge assumption of the jurisdiction by the AO u/s 144 of the Act, however, it did take a ground against rejection of books of A/c, which was not pressed before the DRP and was rejected after scrutiny by the DRP and the DRP confirmed assumption of jurisdiction u/s 144 of the Act. The DRP gave categorical findings on the issue under the title "Non-disclosure of vital information" in paras 5.3 to 5.5 of its directions, which are reproduced verbatim as under:-

"Non-disclosure of vital information

5.3. According to AO, as per Section 212 of the Companies Act, 1956 as well as the Indian Accounting Standards 7,12,18,19, 27, 28, 33 and 107, the transactions of the subsidiaries were to be consolidated and disclosed in the audited accounts of the assessee since it is the parent company of all the Netherland and UK based companies. On being asked, the assessee produced a conditional order dated 03.07.2009 of the Ministry of Corporate Affairs which exempted from attaching the details of subsidiaries with its balance sheet and other accounts in terms of provision of sub-section 8 of Section 212 of the Companies Act, 1956. The AO has pointed out that even this order of the Ministry of Corporate Affairs was not fully complied with. The assessee is a listed company. The disclosure of accounts prescribed by Security and Exchange Board of India (SEBI) was not adhered to in spite of the fact that the assessee has committed so to do under listing agreement with Stock Exchange. The order of the Ministry of Corporate Affairs was issued on 03.07.2009 whereas the audited accounts of the assessee was finalised much before that. In

any case, this order exempting the assessee was not retrospectively operative. Therefore, the lapses or omissions of not making full and true disclosure in the audited accounts of the assessee were not condoned by the exemption order of Ministry of Corporate Affairs.

5.4. The AO had asked for details about these transactions through her letters during the course of the assessment proceedings. The AO has mentioned that the requisite information was not produced before ADIT Investigation, Unit-II(2), New Delhi nor produced before her during the course of assessment proceedings. Therefore, the AO has come to the following conclusion (which is narrated on Page 46 of the draft assessment order):

> *"As the material information which was required under the law to be attached with the balance sheet of the assessee company was neither attached nor being provided pursuant to summons issued by the Department in December 2010 nor in response to notice issued in February 2013, a reasonable belief was formed that the accounts of the assessee are not maintained and prepared in accordance with the Accounting Standards issued by the Central Government and were therefore incomplete and incorrect based upon which the true and correct income of the assessee liable to tax cannot be determined."*

5.5. A show cause notice was issued by the AO to the assessee u/s 145(3) of the IT Act r/w relevant sections of the Companies Act by stating 'why the books of accounts should not be rejected' in accordance with Section 144 of the IT Act and why the assessment should not be concluded under that section. Further, the AO also contended that the assessee has also failed to comply with the requirements of Income Tax Act as well. On Page 46 to 48 of the draft assessment order, the AO has given reasons for rejection of the books of accounts of the assessee and why best judgment assessment u/s

144 of the IT Act is warranted in this case. The AO issued show cause notice to the assessee before resorting to Section 144 of the IT Act."

(Emphasis supplied)

Further, in para 5.13 of its directions, the DRP categorically held asunder:-

"5.13 Therefore, DRP is of the considered view that the corporate veil needs to be pierced in this case as has rightly been done by the AO. The action of the AO to that extent is upheld."

Corporate veil cannot be pierced without rejecting the account books of the assessee and without travelling beyond such account books after such rejection. Thus, by upholding the piercing of corporate veil after itself causing enquiries to be made u/s 144C (7), the DRP has upheld the rejection of account books of the assessee and has upheld completion of assessment u/s 144 by the AO. The AO after receipt of the directions of the DRP finalized assessment order u/s 144 r.w.sl44C (13) of the Act on 28.02.2014 in conformity with the directions of the DRP by determining total taxable income of Rs. 838.33 crore.

- *In this case the AO assumed jurisdiction u/s 144 of the Act by taking into account non-compliance of terms and conditions of the notice u/s 142(1) of the as well as by rejecting books of A/c of the assessee u/s 145(3) of the Act. It is pertinent to point out that even in the appeal bearing ITA No. 1212/Del/2014 filed by the assessee before the Hon'ble ITAT on 04.03.2014, the assessee has not taken any ground against the assumption of*

jurisdiction by the AO u/s 144 as also confirmed by the DRP. Thus, the assessee admits that assumption of jurisdiction u/s 144 by the AO was correct on facts and in law.

21. *Issue 4: Whether application of provision of section 145(3) will lead to assessment u/s 144 of the Act*

- *In a case where the provisions of section 145(3) are attracted, the AO is entitled to make an assessment in the manner as provided in section 144. Provisions of section 144 stipulate that the AO after taking into account all the relevant material which AO has gathered shall, after giving the assessee an "opportunity of being heard" make the assessment of the total income or loss to the best judgement and determine the sum payable by the assessee on the basis of such assessment. The Proviso to section 144(1) further explaining term used "opportunity of being heard" stipulates that such opportunity shall be given by the AO by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to best judgement. It was further provided that provisions of Proviso to section 144(1) shall not apply where a notice under sub-section (1) of section 142 has been issued prior to the making of an assessment under this section.*

- *In this case, the AO, after rejecting books of A/c u/s 145(3) and taking note of non-compliance to terms and conditions of the notice u/s 142(1), assumed jurisdiction u/s 144 of the Act as discussed in last paragraph on page 48 of the draft assessment order. However, due to typographical mistake on first page of draft order, section 143(3) read with section 144C was written instead of correct section 144 read with section 144C(1). However this rectifiable mistake was corrected as evident from directions of DRP u/s 144C(5) of the Act. (in this regard, paragraph 2.2.1 of the assessment order may be referred to).*

- *It is evident from above discussion that the assessee had neither complied with the terms and conditions of the notice u/s 142(1) nor had followed accounting standards as notified by Central Government, accordingly, the AO assumed jurisdiction u/s 144 of the Act and finalized assessment proceeding u/s 144 read with section 144C of the Act. This leads to an irresistible conclusion that the AO has assumed jurisdiction u/s 144 on two counts - one, rejection of books of A/c 145(3) and second, non-compliance of terms and condition of notice u/s 142(1) of the Act.*

- *For aforestated reasons, an argument that the assessment order should have been passed u/s 143(3) instead of section 144 of the Act is not found tenable. It is pertinent to mention here that assumption of jurisdiction under section 144 of the Act in cases of non-compliance of notices u/s 142(1) is clearly stipulated by clause (c) of subsection 1 of section 144 of the Act and assumption of jurisdiction u/s 144 due to rejection of books of A/c u/s 145 (3) is provided under section 145(3) of the Act by including wordings "...the Assessing Officer may make an assessment in manner provided in section 144".*

- *Several Courts including Hon'ble Apex Court have approved assessment u/s 144 in cases where books of A/cs were rejected u/s 145(3) of the Act which may be summarized as under:*

    - *Kachwala Gems vs. JCIT, Jaipur 288 ITR 10 (SC)*
    - *Bastiram Narayan Das vs. CIT (1994) 210 ITR 438 (Bom)*
    - *GundaSubahiya vs. CIT (1939) 7 ITR 21 (Mad-FB)*
    - *Amitabh Construction P. Ltd. vs. Addl. CIT (2011) 335 ITR 523 (Jhar)*

For the reasons mentioned, it is stated that the AO was legally justified in

passing assessment order u/s 144 read with section 144C(13) of the Act.

Prayer:

21. *In view of above, it is humbly stated that appeal of the assessee company against order of the AO u/s 144 r.w.s 144C (13) of the Act may be dismissed as being beyond jurisdiction.*

Annexure-A

Note in the case of NDTV regarding non-compliance before the AO and before the DRP

1. *Non-compliance of section 142(1) before the AO*

1.1 *During the assessment proceedings for AY 2009-10, the AO issued notice u/s 142(1) on 22.02.2011, wherein the assessee was required to furnish copies of Balance Sheet, Profit & Loss account, Tax Audit Report with annexures by 28.02.2011. The word 'Balance Sheet' is not defined in the Income Tax Act, 1961. As per the provisions of section 212 of the Companies Act, 1956 as these stood at the relevant period, the Balance Sheet of a holding company shall include copies of the balance sheet, profit and loss account, report of Board of directors and report of auditors, in respect of each of its subsidiaries. However, no such documents in respect of any subsidiary was furnished by the assessee.*

1.2 *Vide notice u/s 142(1) dated 15.02.2013, the AO specifically required the assessee to furnish Balance Sheet, Profit & Loss account, Audit Report, Notes on accounts along with supporting annexures in respect of all subsidiaries of the assessee. The information was sought by 22.02.2013. In response, vide letter dated 27.02.2013, the assessee furnished information*

regarding subsidiaries, but the information regarding NDTV Networks Plc, UK ("NNPLC") was not enclosed, although it was incorrectly written in the forwarding letter that information regarding NNPLC was enclosed.

1.3 *Vide further reply dated 11.03.2013, the assessee filed copies of Balance Sheet and Profit & Loss account of NNPLC, but the 'Notes on accounts', which is the key to understanding the financials, was not furnished. The 'Notes on accounts' of NNPLC was not furnished by the assessee even till the completion of the assessment proceedings.*

1.4 *The AO therefore issued show cause notice u/s 145(3) on 28.03.2013 specifically pointing out that the requisite information had not been furnished by the assessee. In response, vide reply dated 28.03.2013 filed on 30.03.2013, the assessee stated that the information regarding subsidiaries had not been filed earlier or attached with the Annual Report, because the assessee had obtained exemption u/s 212(8) of the Companies Act, 1956. The contention is not acceptable, because order u/s 212(8) was issued by the MCA on 03.07.2009, whereas Annual Report was signed on 30.04.2009. Further, para (v) of the exemption order mandates filing of such data to various regulatory and government authorities as may be required by them.*

1.5 *Apart from the above, the following documents were not furnished by the assessee during the assessment proceedings :-*

(i) *Copy of Share Subscription Agreement dated 23.05.2008 between Universal Studios International BV ("USBV"), NBC Universal, Inc. ("NBCU"), NDTV Networks BV ("NNBV"), NDTV Networks International Holdings BV ("NNIH") and NDTV along with copy of share certificate issued by NNIH regarding acquisition of shares by USBV.*

(ii) *Evidence in support of identity and creditworthiness of NBCU.*

(iii) *Evidence in support of genuineness of transaction with NBCU.*

(iv) *Copy of bank account of NNIH and NBCU as evidence of remittances received from NBCU.*

(v) *Copy of Balance Sheet, Profit & Loss account, Audit Report, Notes on accounts of NNIH.*

2. *Non-compliance before the DRP*

2.1 *Out of the above, the following documents were furnished by the assessee before the DRP by way of additional evidence :-*

(i) *Copy of Share Subscription Agreement dated 23.05.2008 between Universal Studios International BV ("USBV"), NBC Universal, Inc. ("NBCU"), NDTV Networks BV ("NNBV"), NDTV Networks International Holdings BV ("NNIH") and NDTV along with copy of share certificate issued by NNIH regarding acquisition of shares by USBV.*

(ii) *Copy of Annual Reports of NBCU for FY 2008, 2009 and 2010 filed before US Securities & Exchange Commission ("US SEC") to support identity and creditworthiness of NBCU.*

(iii) *Copy of Annual Report of NDTV for FY 2009-10 to support transaction with NBCU.*

(iv) *Copy of Annual Report of GE to support that NBCU was part of GE group before it was purchased by Comcast Corporation.*

(v) *Copy of Form 10K filed by Comcast Corporation before US SEC in support of identity and existence of NBCU.*

(vi) *Copy of bank account of NNIH in ING Bank at Kantoorrades, Netherlands as evidence of remittances received from NBCU.*

(vii) *Copy of audited accounts of NNIH in accordance with Companies Act, 1956.*

(viii) *Copy of confirmation letter dated 01.08.2013 from USBV.*

2.2 *However, the information regarding the investors in US $ 100 million Step Up Coupon Convertible Bonds due in 2012 was not provided by the assessee even before the DRP, although the assessee had made an addition of Rs. 110 crore to the amount reflected under such Bonds in its accounts, on the ground that the addition had been made not on account of any fresh infusion, but on account of forex adjustment. However, only names and addresses of 8 investors were provided before the DRP and no evidence regarding the identity of investors, their creditworthiness or genuineness of transactions was provided even before the DRP. This is inspite of the fact that most of the investors came from tax haven jurisdictions."*

27. The ld AR in rejoinder submitted that the assessee filed return of income on 30.09.2009 and the Transfer Pricing Officer passed u/s 92CA(3) on 30.01.2013 and consequently draft assessment order was passed on 31.03.2013 wherein, the ld Assessing Officer himself has mentioned that order is passed u/s 143(3) of the Act. He further referred to page No. 914 of the paper book, which is Form NO. 35A of objections to the draft order before the ld DRP were submitted to show that in the fifth column the details mentioned is that the draft order is passed u/s 143(3) read with Section 144C of the Act. He therefore submitted that as the draft order was not passed u/s 144 of the Act there was no occasion to mention such section in that Form. With respect to Form NO. 36B he submitted that as the assessment order is passed u/s 144 the assessee does not have any option but to mention that section only. He therefore vehemently stated that Revenue is misleading by quoting different sections in the orders and now trying to argue that appeal is not maintainable. He vehemently referred to the letter of the Assessing Officer forwarding the draft assessment order. He further referred to the provisions of section 144C of the Act to say that before the ld DRP only variations in the income or loss returned can be challenged and as the objection was not challengeable with respect to the order u/s

143(3) or section 144 as these are not variation to income returned. He therefore submitted that there was no occasion for the assessee to challenge and further there are no circumstances, which could entitle the assessee to challenge the observation of the AO of invoking the provision of section 144 before the ld DRP. He further submitted that assessee has disclosed complete investment as per page No. 926 of the paper book in its subsidiaries. Therefore, there was no circumstances exists to invoke the provisions of section 145(3) of section 144 of the Act. He further stated that annexure A of the submission of the ld DR with respect to the balance sheet not including the balance sheets of the subsidiaries. He referred to the decision of the Hon'ble Supreme Court in case of 39 ITR 202 specifically at page No. 208 in Charan Das Haridas and Another Vs. CIT to state that the assessee company and its subsidiary companies are different and it does not change the position of income tax of assessee if the accounts of subsidiaries are not available. He submitted that in the present case the ld Assessing Officer should have looked into the income tax laws and not the Companies Act, 1956.

28. He further referred with respect to the controversy in the dates of the approval by the MCA i.e. 03.07.2009 and the date of the board of Director's report dated 30.04.2009 he submitted that annual accounts were printed on 22.07.2009 and therefore, by that date the approval was available. Hence, he submitted that allegations of the Revenue with respect to the dates is incorrect and irrelevant for deciding whether the accounts are correct and complete. He further submitted note dated 04.07.2017 to address the above controversy as under:-

1. *That at the time of hearing, on 04.07.2017, the appellant had been directed to provide the*

   copy of the minutes maintained under the Companies Act, 1956 for adoption of the consolidated Financial Statement for the Financial Year 2008-09 on 30.04.2009, and thereafter the hearing was adjourned to be continued at 2.45PM on the same date.

2. *That appellant at the outset respectfully submits that the pages 1746-1859 of Paper Book*

Volume-V, is the copy of the annual report of the appellant company. It comprises of the following:

a. *Copy the index to the annual report (page 1746-1748);*
b. *Details of Board of Directors, Auditors, Compliance Officer, Company Secretary, Performance indicators (Page 1749-1753);*
c. *Letter to shareholders dated 22.07.2009 (Pages 1754-1755);*
d. *Directors Report dated 30.04.2009 (Pages 1757-1764);*
e. *Corporate Governance Report dated 30.04.2009 (Pages 1765-1778);*
f. *Management Analysis (Pages 1779-1790);*

Auditors Report (Pages 1791-1793);

h. *Consolidated Balance Sheet and Profit and Loss Account along with schedules (Pages 1794-1823);*
i. ***Consolidated Financial Statement of the appellant and subsidiaries duly audited on 30.04.2009 (Pages 1825-1857);***

3. *From the above, it is apparent that pages 1825 to 1857 are consolidated financial statement of the appellant company. It is submitted that out of the above, page 1825 is the Auditors Report to the Board of Directors dated 30.04.2009 on the Consolidated Financial Statement of the appellant Company and its subsidiaries. In this report, it has been stated that "We have audited the attached consolidated Balance Sheet of New Delhi Television Limited and its subsidiaries as at March 31, 2009, the Consolidated Profit & Loss Account for the year ended on that date annexed thereto...".*

4. *In view thereof, there was no non compliance of section 212(8) of the Companies Act, 1956.*

5. *Without prejudice, it is submitted that section 212(8) of the Companies Act, 1956 is a procedural Section and in February, 2011, the Ministry of Corporate affairs issued a general notification granting general exemption to all the companies under section 212(8) of the Companies Act, 1956.*

6. *Intact, in the instant case, the Board of Directors had having regard to the procedural requirements, made an application on 08.05.2009, to the Ministry of Corporate Affairs to grant an approval for waiving publication of the individual financial statement of subsidiaries, which was also granted on 03.07.2009.*

7. *Having regard to the above, the appellant respectfully submits that once the Ministry of Corporate affairs has specific exemption in respect of the publication of the individual financial statement of subsidiaries, after considering the consolidated audited financial statement, no adverse inference can be validly drawn vis a vis section 212(8) of the Companies Act, 1956 and that too under the proceedings under the Income Tax Act, 1961. It is submitted that Income Tax Act and Companies Act operate in different field and therefore in view of the judgment of the Apex court in the cases of CharandasHaridas v. CIT reported in 39 ITR 202, and Coca Cola Export Corporation vs. ITO reported in 231 ITR 200, section 212(8) of the Companies Act has no application.*

8. *It is also submitted that even the learned AO has found no defect whatsoever in the consolidated financial statement of the appellant company. In view of the above and the fact that exemption granted on 03.07.2009 was available on the date of AGM held on 22.07.2009, it is most respectfully submitted that the contention of the revenue to invoke section 145(3) of the Act on the pretext of section 212(8) of the Companies Act has no valid justification.*

9. *It is also clarified that as the accounts of all the companies were*

audited before 30.04.2009 and consolidated accounts were also prepared, inadvertently in corporate governance report it was stated that the Government of India has granted approval waiving the publication of the financial statement of the subsidiaries. In the application was made on 08.05.2009 and approval was also granted on 03.07.2009, as stated aforesaid which is prior to the AGM and also the date of filing of the return for the instant year and much prior to the draft of the proposed order of assessment dated 31.03.2013.

10. Further, as directed by the Hon'ble Bench, copy of the minutes maintained under the Companies Act, 1956 shall be produced in original by tomorrow morning."

29. He further submitted that before the ld DRP the Revenue had several occasions in remand as well as personal appearance but this objection was never raised there that order is not u/s 143(3) but u/s 144 of the Act. He therefore, submitted that in absence of any whisper by the Revenue now it could not contest that order is passed u/s 144 of the Act. He further submitted that decision of the coordinate bench in case of Allcargo Logistics Ltd has no application to the fact of the present case. He further stated that there is no evidence of non-compliance by the Assessing Officer as well as in the draft order or in final order. Therefore, now Revenue cannot say that there was noncompliance. He further stated that the draft order is passed u/s 143(3) of the Act by the AO otherwise there would have not been any reason to file an objection before the ld DRP and had it been so assessee would have approached the ld CIT(A).

30. In the end he referred to his final written submission page no 192 to 197 of his written submission as under:-

41	***GROUND NO. 1 OF GROUNDS OF APPEAL: THAT FURTHER MORE ASSESSMENT MADE IS WITHOUT JURISDICTION AS WELL AS BARRED BY LIMITATION***
41.1	*In this **grounds of appeal,** the appellant has challenged the validity of*

	instant assessment.
41.2	*It is submitted that in this case a draft order dated 31.3.2013 was framed which was titled as "Draft Order u/s 143(3) read with section 144C of the I.T. Act." However in the remand report dated 11.12.2013* ***(pages 118 of Appeal Set)*** *the learned Assessing Officer had stated that in the draft assessment order, the learned Assessing Officer has expressly invoked the provisions of section 145(3) of the Act and assumed jurisdiction u/s 144 of the Act by rejecting the books of accounts of the assessee and has given a specific finding in this regard at* ***pages: 48 and 49 of the said order(pages 1-62 of Appeal Set).*** *He further submitted that while passing the draft order on 31.3.2013, in the relevant column at the first page, the AO has mentioned the order as passed u/s 143(3) read with section 144C of the Act, which is mistake apparent from record. In his submission, the correct words of the order would be "section 144 read with section 144C(1) of the I.T. Act' 1961".*
41.3	*It is thus submitted that the learned Assessing Officer had alleged in his report at* ***page 118 (para 2.2)*** *that since the learned Assessing Officer had expressly invoked the provisions of section 145(3) of the Act and rejected books of account of the appellant company, the assessment had been made u/s 144 of the Act. It is submitted that if it is so, then the said order cannot be regarded as any draft order under the Act. It is submitted that when an assessment is made u/s 144 of the Act, the same is not subject to section 144C of the Act since while framing an assessment u/s 144 of the Act, he had to compute income to the best of his judgment and determine sum payable on the basis of such assessment; whereas in order dated 31.3.2013 he had stated the order to be draft order and no such sum was determined by him. There is a conceptual difference between an order where an assessment has been made to best of his judgment and a draft order*
41.4	*It is submitted that where a draft assessment order is made sum of tax payable is not determined and therefore in absence of any determination of tax, the draft order of assessment is not an order u/s 144 of the Act. It is submitted that this is also evident from provisions contained in section 145(3) of the Act, which read as under:* *"(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the* ***Assessing Officer may make an assessment in the manner provided in section 144.*** *" [Emphasis supplied*
41.5	*It will be evident from the aforesaid statutory provisions that invocation of provisions contained in section 145(3) of the Act does not tantamount to an order of assessment u/s 144 of the Act. It only provides that assessment has to be made in the manner provided u/s*

	144 of the Act. The aforesaid submission is also supported by provisions contained in section 246A of the Act which reads as under: *(1) Any assessee or any deductor aggrieved][15] by any of the following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals) against -* *(a) an order passed by a Joint Commissioner under clause (ii) of sub-section (3) of section 115VP or an order against the assessee] where the assessee denies his liability to be assessed under this Act or an intimation under sub-section (1) or sub-section (1B) of [section 143 or sub-section (1) of section 200A, where the assessee or the deductor objects] to the making of adjustments, or* ***any order of assessment [under sub-section (3) of section 143 [except an order passed in pursuance of directions of the Dispute Resolution Panel [or an order referred to in sub-section (12) of section 144BA][***] or section 144,*** *to the income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed" [Emphasis supplied]*
41.6	*In light of the above, the first submission of the appellant is that order dated 31.3.2013 was an order u/s 143(3) of the Act read with section 144C of the Act and was a draft order of assessment. The finding that the said order was an order u/s 144 of the Act is factually and legally misconceived and hence untenable.*
41.7	*Without prejudice for the sake of an argument assuming the said order was an order u/s 144 of the Act, then the instant order dated 21.2.2014 is barred by limitation and deserves to be quashed altogether. The appellant also seeks to place reliance on the judgment of Hon'ble Gujarat High Court in the case of* ***CIT vs. Purshottamdas T. Patel reported in 209 ITR 52*** *wherein it has been held as under:* *"In our opinion, this decision, far from helping the Revenue, goes against it. The Supreme Court has in terms stated that* ***assessment is one integrated process involving not only the assessment of the total income but also the determination of the tax. It has further observed that the latter is as crucial as the former. Therefore, unless the total income is determined and the determination of tax is also done, it cannot be said that the process of assessment is complete. What section 153 requires is that the assessment should be completed within the prescribed time-limit. The words "Order of assessment" cannot be construed to mean assessment of total income only. Those words would*** *mean an Order in writing whereby the total income of the assessee is assessed and the tax payable by him is determined. When an Order in writing in respect of both*

	these things is passed, it can be said that there is a complete Order of assessment. ***These two steps may be taken simultaneously or separately,*** *but it cannot be gainsaid that both of them will have to be taken within the time prescribed by the Act. Admittedly, in this case the second step was not taken within the prescribed time. After determining the total income, the Income-tax Officer possibly left the matter to his subordinates for the purpose of calculating the tax payable by the assessee on the basis of the assessed total income. Even if we assume in favour of the Assessing Officer that he approved the said calculation when the papers were put before him for signing the demand notice, and that he signed the same, the fact remains that that step was taken by him after the prescribed period was over.* ***The Tribunal was, therefore, right in holding that the assessment in this respect was time-barred." [Emphasis supplied]***

31. In view of this, he vehemently submitted that the claim of Revenue that accounts of the assessee are incorrect and incomplete is grossly incorrect. He therefore, stated that order cannot be passed u/s 144 of the Act but only can be passed u/s 143(3) of the Act. He therefore, submitted that final order is also wrongly titled as passed u/s 144 of the Act but in fact, it should have been passed u/s 143(3) of the Act. He therefore submitted that merely wrong mention of the section in the heading of the order is not relevant. He submitted vehemently that appeal of the assessee is maintainable under the provision of section 253(1)(d) of the Act.

32. We have carefully considered the rival contentions and perused the orders of the ld Assessing Officer i.e. draft assessment order as well as the final order passed u/s 144 of the Act and the direction issued by the ld Dispute Resolution Panel. The simple issue involved in this contest is that whether the order passed by the ld Assessing Officer can be challenged by the assessee before the coordinate bench or not. Admittedly, the assessee has preferred reference to Dispute Resolution Panel u/s 144C of the Income Tax Act. The provisions of section 144C relates to reference to Dispute Resolution Panel. According to that section the ld Assessing Officer shall first forward a draft of the proposed order of assessment to the eligible assessee which is defined u/s 144C(15)(b) of the Act. In the present case, there is no dispute that the assessee is an eligible assessee in terms of that section. The draft assessment order is required to be passed if the Assessing Officer proposes to

make any variation in the income or loss returned which are prejudicial to the interest of the eligible assessee, Within 30 day of receipt of the draft order the assessee is entitled to filed his acceptance of the variation to the AO or objection to such variation before the ld DRP. If the assessee accepts the variation or ld DRP does not receive such objection on the draft assessment order within 30 days of receipt of draft assessment order, the AO shall complete the assessment on the basis of draft order within one month from the end of the month in which the acceptance is received or period of filing of objection expires. The ld DRP on the objection shall issue the direction after considering the draft order, objections of the assessee, evidences furnished by the assessee, report of authorities, records of the draft order, evidence collected, and result of enquires made. The ld DRP is further empowered to make or cause further enquiry. Consequently, it may confirm, reduce, or enhance the variation proposed in the draft order but it has no power to set aside any proposed variation. Every direction issued by the ld DRP are binding to the Assessing Officer subject to the provisions of right of appeal to the Assessing Officer for some intermittent period before the tribunal. On receipt of the direction of the ld DRP , AO shall complete the assessment within 1 month from the end of the month of receipt of the direction without granting any further opportunity of hearing to the assessee. On above analysis of the provision of section 144C it is apparent that draft order is not required to be passed either u/s 143(3) of the Act or u/s 144 of the Act. in the present case the draft assessment order forwarded by the ld Assessing Officer to the assessee vide letter dated 31.03.2013 bearing reference No. FNO.DCIT/ Cir-13(1)/2013-14/1827 mentioning that copy of the draft assessment order u/s 143(3) of the Income Tax Act read with section 144C of the Act is forwarded. In the subject bearing also the ld AO has mentioned that draft assessment order is u/s 143(3) of the Act. it is also an undisputed fact that draft assessment order of the ld Assessing Officer passed on 31.03.2013 also mentions in the heading at Sl. No. 11 section and sub-section under which the assessment is as section 143(3) read with section 144C of the Income Tax Act, 1961. It is also undisputed fact that ld Assessing Officer has mentioned in the heading also "draft order u/s 143(3) read with section 144C of the Act." However such mentioning of the wrong section in the draft of the proposed assessment order cannot render it as

"Draft assessment order u/s 143(3) of the act" when there is no such provision in the statue. It is a settled proposition of law that mere mention of wrong provision of the law when the power exercise is available even though under the different provision is by itself not sufficient to invalidated the exercise of that power. The Hon'ble High Court has laid down the above principal in Collector of Central Excise Vs. Pradumna Steel Ltd (2003) 9 SCC 234. The above proposition has been reiterated in following subsequent decisions in Mehboob Vs. Zahira and others 2015 (110) ALR 437, Jagnnath Vs. State of UP and others 2011 (6) ADJ 89, Mehendra yadav Vs. Om Prakash and another 2006 (65) ALR 560, Commissioner of Income Tax Vs. Kay Kay Faimly Trust (2005) 278 ITR 620 (Alld), Commissioner of Income Tax Vs. Asha Family Trust (2005) 148 Taxman 578(all), Eric John Singh Vs. The District magistrate and others 1989 AWC 210 (all), Ram Chandra Misra Vs. State of UP 1982 (8) ACR 419 (all) and Govind Dass and others Vs. Prescribed Authority etc and another 1978 (4) ALR 753. In view of this we reject the contention of the ld AR that as the Assessing Officer has mentioned reference to Section 143(3) while making draft assessment order, so the draft order is not u/s 144 of the act but u/s 143(3) of the act. Even the provisions of section 144C does not provide that draft assessment order is required to be passed u/s 143(3) or u/s 144 of the Act. According to us the draft assessment order is required to be passed u/s 144C(1) of the Act. it is further to be noted that it is not the 'draft order' but it is draft of the proposed order of assessment. Therefore, there is no requirement of mentioning any sections by the Assessing Officer except 144C(1) in the draft of the proposed order of assessment. It is further required to be noted that the draft of the proposed order of assessment is altogether different from the assessment order as such draft does not include the notice of demand but also does not have any enforceability of tax dues from the assessee where as the assessment order has such ingredients and it is accompanies with notice of demand u/s 156 of the act. According to us the draft of the proposed assessment order is just like a statement of facts and reasons formed by the assessing officer during the assessment proceedings about the proposed additions etc for which assessee has right to go to higher forum of three commissioners to show that proposed variation by the ld AO is incorrect. It is an internal dispute resolution mechanism of revenue so that unnecessary disputes

between assessee and revenue do not arise. Further each and every observation and variation in the income or loss return, which is prejudicial to the interest of the assessee, is subject to objection against it by the assessee before the DRP. Even assessee in the present case has challenged the application section 145 (3) of the act before the ld DRP which did not result in to any variation to the income but may lead to such adjustment. Similarly assumption of jurisdiction u/s 144 by the AO may also lead to the variation of income. Therefore the contention of the ld AR is not digestible that such assumption of jurisdiction u/s 144 cannot be challenged before DRP.

33. It is important to note that the final assessment order passed by the ld Assessing Officer has been made u/s 144 of the Act is the argument of the Revenue whereas, the contention of the assessee is that order is passed u/s 143(3) of the Act. Therefore, it is necessary to look into why and how the Assessing Officer has passed order u/s 144 of the Act and whether the contention of the assessee is correct or not. Therefore , It is necessary to go to the draft assessment order for the relevant reasons /observation of the ld Assessing Officer. At page NO. 45 of 51 of the draft assessment order in para NO. 6 the ld AO has dealt with this issue as under:-

> ***"6. Unexplained Money***
>
> *Pursuant to receipt of information from various sources including Hon'ble Members of Parliament and Ld. Members of Bar, it came to the notice of the undersigned that the assessee company was issued summons u/s 131 of the IT Act, 1961 by ADIT(Inv.) Unit-II(2), New Delhi on 27.12.2010 to furnish as under:-*
>
> *(1) List of the subsidiaries of New Delhi Television Ltd. and their subsidiaries along with details of their directors and books of accounts since 01.04.2006.*
>
> *(2) Details of shareholders and investors of these subsidiaries with their names and complete address since 01.04.2006 and brief note on nature of activities carried by each subsidiary.*
>
> *(3) Details of loan given and taken fund raised and investment made by M/s New Delhi Television Ltd. and its subsidiaries after 01.04.2006. In regard to*

overseas investment approval/ sanction/intimation given/made to/by the relevant regulatory authority i.e. RBI, FIPB(furnish a copy of it).

(4) Details of shares sold and purchased by M/s New Delhi Television Ltd. and its subsidiaries alongwith their amount since 01.04.2006 with documentary evidence.

(5) PAN and IT Returns of these subsidiaries since 01.04.2006.

The assessee was directed to attend the office of the ADIT(Inv.) along with the above called for information on 31.12.2010. On that date no information was provided by the assessee and on behalf of M/s RRPR Holding Pvt. Ltd. a request was made for adjournment which was allowed and case was adjourned for 17.01.2011. Similar request was made by the assessee company and case was adjourned for 17.01.2011. However, on the next date also no information was provided by the assessee.

It is seen that the assessee company is having at least 21 subsidiaries as recorded by Ministry of Corporate Affairs OM No. 47/469/2009-CLIII dated 03.07.2009. However the documents as prescribed under section 212 of the Indian companies Act, 1956 were not attached nor any recital in terms of sub-section 6 of section 212 of the Indian Companies Act, 1956 was made in the Balance Sheet and Audited Accounts that was finalized and signed by the Board of Directors of the assessee company on 30.04.2009 and also certified by the auditors of the assessee company namely the Price Waterhouse . Thus it is clear that the accounts of the assessee stood closed and finalized as on 30.04.2009 for the year ended on 31.03.2009.

It is further seen that the accounts of the assessee were not made and submitted alongwith the Return of Income for the year ended 31.03.2009 as per the Indian Accounting Standard 1 as issued by the Central Government in so much as the necessary disclosures in terms of para 19 and para 20 were not made and it was not possible to have if fair and reasonable

assessment about the financial activities of the assessee company, more so its activities through its subsidiaries both in India and abroad.

Similarly, it was found that the necessary disclosures in terms of Indian Accounting Standard-24 as issued by the Central Government were also not complied with. The requirements of Indian Accounting Standard-7, 12, 18, 19, 27, 28, 33 and 107 as issued by the Central Government were also found not to be complied with.

The undersigned was in receipt of various complaints against the assessee alleging large scale money laundering and resultant evasion of tax which could not be verified because of non- compliance of the Indian Accounting Standard as issued by the Central Government referred to hereinabove by the assessee, the assessee was asked under the provisions of section 142(1) to furnish the necessary details pursuant to which the assessee filed a letter dated 27.02.2013 and enclosed some of the details asked for. However, the details related to M/s NDTV Network Plc was not enclosed though it was stated in the letter to have been enclosed and provided.

As the material information which was required under the law to be attached with the balance sheet of the assessee company was neither attached nor being provided pursuant to summons issued by the Department in December 2010 nor in response to notice issued in February 2013, a reasonable belief was formed that the accounts of the assessee are not maintained and prepared in accordance with the Accounting Standards issued by the Central Government and were therefore incomplete and incorrect based upon which the true and correct income of the assessee liable to tax cannot be determined.

In view of the above situation, a show cause notice was issued to the assessee under section 145(3) of IT Act, 1961 r.w. Provisions of Sections 209,210,211 and 212 of the Indian Companies Act, 1956 asking the assessee

to explain why the books of accounts of the assessee not in accordance with the provisions of section 145(3) of the IT Act, 1956 be rejected and assessment of the assessee company is completed in accordance with the provisions of section 144 of the IT Act, 1961. The said notice was served upon the assessee by fax on 29.03.2013 and in view of the scheduled limitation on 31.03.2013 assessee was requested to submit its reply by 30.03.2013.

The reply of the assessee was duly received on 30.03.2013 whereby it was stated by the assessee that the assessee company was exempted to attach the details of subsidiaries with its balance sheet and other accounts in terms of the provisions of sub-section 8 of section 212 of the Indian Companies Act, 1956 and for the first time a copy of the said permission granted by Central Government was furnished.

The order of Ministry of Corporate Affairs dated 03.07.2009 was a conditional order and therefore the same was required to be disclosed in the accounts of the assessee and a recital was required to be made by the assessee in its accounts to the effect of the said order. However, no such disclosure was made nor the conditions specified therein were complied with which said that the consolidated financial statement will be made in strict compliance with the accounting standard and listing agreement as prescribed by SEBI. As there was no disclosure or a recital about the order dated 03.07.2009 of the Central Government, it was not possible either for the undersigned or any other person or authority to know about the exact affairs of the assessee which was required to be known to determined its true and correct income liable to tax.

In any case the accounts of the assessee for the year ending 31.03.2009 i.e. the P Y 2008-09 relevant for AY 2009-10 was finalized, approved on April 30, 2009 while the order of the Central Government being relied upon by the assessee was issued only on 03.07.2009 which is not issued with

retrospective effect and which does not condone or regularize the lapses or omissions of the earlier period.

On 30.04.2009 when the accounts of the assessee was finalized and approve by the Board of Directors of the assessee, there was no exemption available to the assessee not to comply with the requirements of sub-section 1 of section 212 of the Indian Companies Act, 1956. And therefore the accounts of the assessee were required to be prepared and finalized disclosing all the details prescribed under section 212(1) of the Indian Companies Act, 1956. The same not having been done, the requirements of section 145(3) of the I T Act, 1961 are not complied with in so much as the accounts of the assessee were in accordance with the accounting standards prescribed by the Central Government as detailed hereinabove and therefore were neither correct nor complete.

The OM dated 03.07.2009 being relied upon by the assessee is of no help as it could not have been relied upon by the assessee prior to its issuance which was on or after 03.07.2009. As Central Government did not made the said OM effective retrospectively, the omission of the assessee in so much as not attaching the accounts of the subsidiaries and other prescribed reports with its annual accounts that were finalized on 30.04.2009 renders the accounts of the assessee to be incomplete and incorrect and contrary to the Indian Accounting Standards-1, 7,12, 18, 19, 24, 27, 28, 33 and 107 as issued by the Central Government from time to time and being in vogue during the relevant accounting period and when the accounts of the assessee were finalized and approved by the Board of Directors of the assessee company i.e. on 30.04.2009.

Vide its letter dated 30.03.2013 the assessee vide para 8 contended that section 145(3) of the Act, talks about correctness or completeness of the accounts of the assessee only and not of its subsidiary or affiliates and therefore the provisions of section 145(3) were claimed to be applicable only

in cases where the accounts of the assessee on stand alone were not complete and correct.

The contentions of the assessee is not maintainable as the provisions of section 212(1) of the Indian Companies Act, 1956 prescribed that accounts of the subsidiaries as well as reports prescribed therein are to be attached with accounts of the holding company and in the instant case the assessee being the holding company, it was mandatory to attached the documents in respect of its subsidiaries as prescribed in section 212(1) of the Indian Companies Act, 1956 and the same not having been done by the assessee, the accounts as prepared and attached by the assessee with its return of income was neither complete nor correct. The same was also in contravention and contrary to the accounting standards as issued by the Central Government.

The OM dated 03.07.2009 was available to the assessee on or after 03.07.2009 only and not before that and therefore the accounts as prepared finalized and approved by the Board of Directors of the company on 30.04.2009 had to be in compliance of the provisions of section 212(1) of the Indian Companies Act, 1956 which has not been done. Further the said OM prescribed that accounts were to be prepared in accordance with the accounting standards and the Indian Accounting Standard 24 as issued by the Central Government prescribed for full and complete disclosure of the related party information which was not done by the assessee.

The Income Tax Act, 1961 is a self-contained code and is not subordinated to the Indian Companies Act, 1956. The assessee was required to fulfill and comply with the requirements of the IT Act, 1961 independent of the requirements of the Indian Companies Act, 1956 .

In view of the breach of the conditions prescribed 145(3) of the IT Act, 1961 undersigned is not satisfied about the correctness and the completeness of the accounts of the assessee and is of the considered view

that the accounts of the assessee as notified by the Central Government has not been properly and completely followed by the assessee.

In view of the same as stated hereinabove, the undersigned holds and declares that the provisions of section 145(3) of the IT Act, 1961 is applicable to the case of the assessee for the assessment year 2009-10 in respect of previous year 2008-09 and undersigned thereby and therefore assumes jurisdiction under section 144 of the IT Act, 1961 to determine the true and correct income of the assessee company.

From the details submitted by the assessee on 30.03.2013, it is seen that the assessee company alongwith four of its subsidiaries has receipt on through an agreement dated 23.05.2008 has received an amount of Rs. 6,42,54,22,000/- equivalent to US $ 150 Million in lieu of some indirect stake by the claimed lender of the money but has not discharged its primary onus in terms of section 68, 69A and other applicable provisions. Vide para 2 of the letter dated 30.03.2013 of the assessee, it was admitted that no independent valuation for determining the value of the shares of the subsidiaries of the assessee was carried out or obtained by the assessee. The subscription price was a negotiated price arrived between the parties based on proposed business potential and business forecast and projections.

From the above it is more than clear that the money received by the assessee through its subsidiaries was not as per the fair value of the shares proposed to be transferred and the requirements of Indian Accounting Standard 18 as also elsewhere which defines the fair value "the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction" has not been complied with and the said transaction is merely colorable exercise to cover up the trail of money. "

In view of the above, it is held that assessee has failed to discharged its primary onus cast upon it and therefore the entire amount received by the assessee through its subsidiaries and through an agreement dated 23.05.2008 to which assessee is equally a party is covered by the provisions of section 69A of the IT Act, 1961 .

The said amount of Rs. 6,42,54,22,000/- was received by M/s NDTV Networks International Holdings BV (a subsidiary of the assessee company) on account of subscription to its shares by M/s Universal Studios International BV. As per requirements of law and accounting standards discussed above, the said sum should have been disclosed by the assessee. Whereas, the assessee has not disclosed the true nature of transactions in its books of accounts / financial statements . Moreover, it was only on 30/3/2013 i.e at the fag end of the limitation period that the assessee stated that this amount was received by its subsidiary company on account of subscription to shares by a foreign company. It was done deliberately by the assessee so as to avoid further scrutiny regarding the identity and creditworthiness of the share subscriber and genuineness of the transactions.

The genuineness of this transaction shown as receipt of share capital becomes all the more doubtful in view of the fact the assessee has itself admitted that no independent valuation report was obtained for determining the value of shares of its subsidiary company and that the subscription price was a negotiated price arrived at between the parties . Subscription to the shares of the subsidiary company of the assessee without determining any valuation for the same and receiving such funds by a foreign party raises suspicion regarding the true nature of the transactions.

It is a well settled law that it is the onus of the assessee to prove the identity and creditworthiness of the share subscribers and genuineness of the transactions. Whereas in the instant case, the assessee could not discharge the onus cast upon it to satisfactorily prove the nature and source of the funds received by it.

In view of the above, the assessee is found to be the owner of the unexplained money for which it could not furnish any satisfactory explanation. Therefore, the above said sum of Rs. 6,42,54,22,000/- is hereby held to be the income of the assessee from undisclosed sources and the same is hereby added to the income of the assessee."

34. On reading of the above observation of the ld Assessing Officer it is apparent that assessee company was having 21 subsidiaries, however, prescribed particulars u/s 212 of the Companies Act 1956 of those companies were not attached with the balance sheet of the a company. It is further observed by the AO that accounts of the assessee were not complied by making necessary disclosure in terms of accounting standard 24, 7, 12, 18, 19, 27, 28 and 33. According to the Assessing Officer it was material information, which was required under the law to be attached with the balance sheet of the assessee, was not at all attached and therefore the accounts of the assessee are not complete and correct. Notices were also issued to be assessee in February 2013 for compliance for submitting the balance sheet of its subsidiary companies. Therefore the AO was of the view that accounts of the assessee were incomplete and incorrect. Hence, he invoked the provisions of section 145(3) of the Act due to non-compliance of provision of section 209, 210, 211 and 212 of the Indian Companies Act, 1956. As the ld Assessing Officer has invoked the provisions of section 145(3) of the Act as he is not satisfied about the correctness and completeness of the accounts of the assessee, he is required to make the assessment in the manner provided u/s 144 of the act. Before the ld AO it was also contended by the assessee that non submission of the requisite details of subsidiary or its affiliate companies has nothing to do with the " Correctness and completeness of the accounts of the assessee and therefore, the invocation of section 145(3) is incorrect. To examine this aspect it is necessary to examine the provision of section 145(3) of the Act which are as under:-

"145(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) has not been regularly followed by the

assessee, or income has not been computed in accordance with the standards notified under sub-section (2) the Assessing Officer may make an assessment in the manner provided in section 144."

35. Therefore the statue has given a mandate to the assessing officer to pass the order in manner provided u/s 144 of the act when requirement of section 145(3) is satisfied.

36. Further with respect to the argument of the ld AR that while making an assessment of the assessee the ld AO should look only at the provision of Income tax act and should not be concerned about the violation or irregularities in the other laws, we are not impressed in the facts of the present case. It is the case of the company, which is statutorily required to maintain its books of accounts and to prepare its profit and loss account in the manner so provided in the Companies act. The Companies act provides that balance sheet and profit and loss should be true and fair and must necessarily disclose certain details. The Income tax Act also prescribes in case of companies to prepare the annul accounts as per the provision of the companies act 1956 . How important it is that can be ascertained by looking at the provision of section 115 JB of the act. Therefore it is too naïve to say that ld AO must shut his eyes in the case of the company if it does not prepare its annual accounts in accordance with the provision of the companies act. Wherever there is such requirement , the legislation on its own wisdom has given different treatment/ concessions to such companies such as electricity companies , NBFC , bank etc. The various authorities relied up on by the ld AR also does not say so. Therefore, in case of the companies it is mandatory to prepare their accounts in accordance with the provision of the companies act unless exempted.

37. The provision of section 212 of Companies Act 1956 provides with respect to the disclosure of the particulars of the subsidiary are as under:-

*"**212.** (1) There shall be attached to the balance sheet of a holding company having a subsidiary or subsidiaries at the end of the financial year as at which the holding company s balance sheet is made out, the following documents in respect of such subsidiary or of each such subsidiary, as the case may be :*

(a) a copy of the balance sheet of the subsidiary;

(b) a copy of its profit and loss account;
(c) a copy of the report of its Board of directors;
(d) a copy of the report of its auditors;
(e) a statement of the holding company s interest in the subsidiary as specified in sub-section (3);
(f) the statement referred to in sub-section (5), if any; and
(g) the report referred to in sub-section (6); if any.

(2) [55][(a) The balance sheet referred to in clause (a) of sub-section (1) shall be made out in accordance with the requirements of this Act,

(i) as at the end of the financial year of the subsidiary, where such financial year coincides with the financial year of the holding company;

(ii) as at the end of the financial year of the subsidiary last before that of the holding company where the financial year of the subsidiary does not coincide with that of the holding company.]

(b) The profit and loss account and the reports of the Board of directors and of the auditors, referred to in clauses (b), (c) and (d) of sub-section (1), shall be made out, in accordance with the requirements of this Act, for the financial year of the subsidiary referred to in clause (a).

(c) [56][Where the financial year of the subsidiary does not coincide with that of the holding company, the financial year aforesaid] of the subsidiary shall not end on a day which precedes the day on which the holding company s financial year ends by more than six months.

(d) Where the financial year of a subsidiary is shorter in duration than that of its holding company, references to the financial year of the subsidiary in clauses (a), (b) and (c) shall be construed as references to two or more financial years of the subsidiary the duration of which, in the aggregate, is not less than the duration of the holding company s financial year.

(3) The statement referred to in clause (e) of sub-section (1) shall specify

(a) the extent of the holding company s interest in the subsidiary at the end of the financial year or of the last of the financial years of the subsidiary referred to in sub-section (2);

(b) the net aggregate amount, so far as it concerns members of the holding company and is not dealt with in the company s accounts, of the subsidiary s profits after deducting its losses or vice versa

(i) for the financial year or years of the subsidiary aforesaid; and

(ii) for the previous financial years of the subsidiary since it became the holding company s subsidiary;

(c) the net aggregate amount of the profits of the subsidiary after deducting its losses or vice versa

(i) for the financial year or years of the subsidiary aforesaid; and

(ii) for the previous financial years of the subsidiary since it became the holding company s subsidiary;

so far as those profits are dealt with, or provision is made for those losses, in the company s accounts.

(4) Clauses (b) and (c) of sub-section (3) shall apply only to profits and losses of the subsidiary which may properly be treated in the holding company s accounts as revenue profits or losses, and the profits or losses attributable to any shares in a subsidiary for the time being held by the holding company or any other of its subsidiaries shall not (for that or any other purpose) be treated as aforesaid so far as they are profits or losses for the period before the date on or as from which the shares were acquired by the company or any of its subsidiaries, except that they may in a proper case be so treated where

(a) the company is itself the subsidiary of another body corporate; and

(b) the shares were acquired from that body corporate or a subsidiary of it;

and for the purpose of determining whether any profits or losses are to be treated as profits or losses for the said period, the profit or loss for any financial year of the subsidiary may, if it is not practicable to apportion it with

reasonable accuracy by reference to the facts, be treated as accruing from day to day during that year and be apportioned accordingly.

(5) Where the financial year or years of a subsidiary referred to in sub-section (2) do not coincide with the financial year of the holding company, a statement containing information on the following matters shall also be attached to the balance sheet of the holding company :

(a) whether there has been any, and, if so, what change in the holding company s interest in the subsidiary between the end of the financial year or of the last of the financial years of the subsidiary and the end of the holding company s financial year ;

(b) details of any material changes which have occurred between the end of the financial year or of the last of the financial years of the subsidiary and the end of the holding company s financial year in respect of

(i) the subsidiary s fixed assets;

(ii) its investments;

(iii) the moneys lent by it;

(iv) the moneys borrowed by it for any purpose other than that of meeting current liabilities.

(6) If, for any reason, the Board of directors of the holding company is unable to obtain information on any of the matters required to be specified by sub-section (4), a report in writing to that effect shall be attached to the balance sheet of the holding company.

(7) The documents referred to in clauses (e), (f) and (g) of sub-section (1) shall be signed by the persons by whom the balance sheet of the holding company is required to be signed.

[56a](8) The Central Government may, on the application or with the consent of the Board of directors of the company, direct that in relation to any subsidiary,

the provisions of this section shall not apply, or shall apply only to such extent as may be specified in the direction.

(9) If any such person as is referred to in sub-section (6) of section 209 fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to [57][ten] thousand rupees, or with both :

Provided *that in any proceedings against a person in respect of an offence under this section, it shall be a defence to prove [58][***] that a competent and reliable person was charged with the duty of seeing that the provisions of this section were complied with and was in a position to discharge that duty :*

Provided further *that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.*

(10) If any person, not being a person referred to in sub-section (6) of section 209, having been charged by the [59][***] [60][managing director, manager,] or Board of directors, as the case may be, with the duty of seeing that the provisions of this section are complied with, makes default in doing so, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to [57][ten] thousand rupees, or with both:

Provided *that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully."*

38. On reading of the above provision, it is apparent that the balance sheet of the holding company i.e. the assessee, must have details of the subsidiary as prescribed. The requirement of reconciling the financial year of the subsidiary and holding company is also mandatory, further the profit and loss account, report of the board of directors, and of auditors of those subsidiaries are required to be prepared

according to the provisions of the companies Act, 1956. It is also mandatory in case of foreign subsidiaries. Further, a statement is required to be prepared of the holding company's interest in the subsidiary, as well as other details shall be signed by the person by whom the balance sheet of the company is required to be signed. The provision of sub-section 9 also prescribe a punishment with imprisonment up to 6 months along with the fine or with the fine only for non-compliance of this section. In view of this the importance of compliance with this provision of the companies act cannot be undermined. Admittedly no such disclosure was made in the annual report of the assessee.

39. Further according to the provision of section 211 every balance sheet of a company should be in a prescribed format containing the requisite details. The profit and loss account of the company shall also give a true and fair view of the profits of the company. Every profit and loss account and balance sheet of the company shall comply with the accounting standards and if it does not comply then it shall disclose the deviation from the accounting standards and the reasons of such deviation. In view of the above provisions the argument of the assessee that non-disclosure of the details of the subsidiary in the annual accounts does not make them incomplete and incorrect. Admittedly no such compliance was made by the assessee.

40. Further, it is surprising to note that assessee has contended that it has been granted exemption for making such disclosure as required u/s 212 of the companies Act. To show this it was pointed out before us the relevant annual accounts of the company for the year ended on 31.03.2009 wherein in the Director's report placed at page No. 1757 to 1761 at page No. 13 of the financial statement signed on 30.04.2009 by one Dr. Pranoy Roy, Chairman as under:-

> *"Financial Statements of the subsidiary companies.*
>
> *The Ministry of Corporate Affairs, Government of India, has granted approval u/s 212(8) of the Companies Act, 1956 for the financial year ended on 31.03.2009, waiving the publication of individual balance sheets, profit and loss accounts, Director's Reports and Auditor's reports of the subsidiaries and other documents otherwise required to be attached to be company's accounts. However, the annual accounts of the subsidiary companies and the*

related detailed information will be made available to the members of the holding and subsidiary companies seeking such information at any point of time. The annual accounts of the subsidiaries companies will also be kept open for inspection by any investor in its Registered office and those of the respective subsidiary companies."

(Extracted from the Director's Report dated 30.04.2009 of assessee for the financial year ended 31.03.2009) (underline supplied by us)

41. Now the ld Departmental Representative has submitted before us the copy of approval obtained by the assessee u/s 212(8) of the companies Act 1956 for the Financial year ended on 31.03.2009 from the Ministry of Corporate Affairs. To our utter surprise the approval of the Ministry of Corporate Affairs was granted to assessee only on 3.07.2009 but in the Director's report dated 30.04.2009 Chairman of the company Dr. Pranoy Roy has disclosed to all the regulatory authorities such as SEBI and stock exchanges that approval has already been granted by the Ministry of Corporate Affairs. In fact the application for such approval was made only on 8th May 2009. Further, the above exemption was also subject to the following six conditions:-

"

I. The company will present in the annual report the consolidated financial statement of it is subsidiaries duly audited by the statutory auditors.

II. The consolidated financial statement will be prepared in strict compliance with the accounting standard and listing agreement as prescribed by SEBI

III. Following information in aggregate for each subsidiary should be disclosed in one page of the consolidated balance sheet respectively- (a) capital (b) reserves (c) total assets (d) total liabilities (e) details of investment (exempt in case of investment in the subsidiaries (f) turnover (g) profit before taxation (h) provision for taxation (i) profit after taxation (j) proposed dividend

IV. The holding company shall undertake in its annual report that annual accounts of the subsidiary companies and the related detailed information will be made available to the holding and subsidiary companies investors seeking

such information at any point of time. The annual accounts of the subsidiary companies will also be kept for inspection by any investor in its head office and that of the subsidiary companies concerned and a note to the above effect will be included in the annual report to the holding company.

V. The holding as well as subsidiary companies in question will regularly file such data to the various regulatory and government authorities as may be required by them.

VI. company will give Indian rupees equivalent of the figures given in foreign currency appearing in the accounts of the subsidiary companies along with exchange rate as on 31.03.2009."

42. Even the condition No. II of the above permission was also not satisfied. The condition No. V of the above permission also clearly states that holding company i.e. assessee as well as its subsidiaries should regularly file such data to various authorities and govt authorities as may be required by them. Therefore, the above approval by the Ministry of Corporate Affairs has not authorized the company to not to submit the relevant details of its subsidiary company to the ld Assessing Officer. Therefore, non-furnishing of such information along with the requisite details of its subsidiaries and non-compliance with the accounting standard, which is mandatorily to be followed by the company, has definitely rendered the accounts of the assessee as incorrect and incomplete. Therefore, we do not find any infirmity in the order of the ld Assessing Officer in invoking the provisions of section 145(3) of the Income Tax Act and then proceeded in making an assessment in the manner provided u/s 144 of the Act.

43. It is unfortunate that before making an application for exemption the assessee has disclosed in its one of the most important statement i.e. Director's report, the company has announced that it has been granted approval even when there was no application was made to the concerned authority and such a blatant violation of law involving the fiscal and corporate liability of the assessee go unnoticed so far. However, the tribunal in the present case except expressing anguish cannot cross the limits laid down by the law. It is for other regulatory and supervisory agencies to get alarmed with such an act. In view of these glaring facts we do not have any

hesitation to say that the conduct of the assessee shows that assessee had never an intention to disclose the details of its subsidiary companies and its financial transactions to its stakeholder and to regulatory authorities including the Income tax Authorities. Our statement also gets fortified by our other observations in this order.

44. The provision of section 144 of the Act prescribes four conditions under which the ld AO can make the best judgment assessment. The provisions are as under:-

"BEST JUDGMENT ASSESSMENT

Section 144

If any person--

(a) fails to make the return required under sub-section(1) of section 139 and has not made a return or a revised return under sub-section(4) or sub-section(5) of that section, or

(b) fails to comply with all the terms of a notice issued under sub-section(1) of section 142, or fails to comply with a direction issued under sub-section(2A) of that section, or

(c) having made a return, fails to comply with all the terms of a notice issued under sub-section(2) of section 143,the Assessing Officer, after taking into account all relevant material which the Assessing Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment.

Provided thatsuch opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment:

Provided further thatit shall not be necessary to give such opportunity in a case where a notice under sub-section(1) of section 142 has been issued prior to the making of an assessment under this section."

45. It is undisputed fact that the assessee was issued the notice u/s 142(1) of the Income Tax Act, 1961 on several occasions but the details were not complied with in full. The first such notice was issued on 22.02.2011 wherein the assessee was required to furnish the copies of balance sheet, profit and loss account, tax audit report etc. Naturally Annual accounts did not contain the information with respect to the subsidiaries of the assessee. The subsequent second notice was also issued on 15.02.2013 wherein the assessee submitted the details in part. Further, the Assessing Officer required the assessee to furnish the complete details about the investment wherein, the assessee failed to submit before the ld AO such as share subscription agreement along with the share certificate issued, the evidence in support of identity and creditworthiness of the investor and genuineness of the transaction as well as the bank statements of the investor and investee company. This is evident from the fact that some of the documents were filed before the ld DRP as additional evidence. The noncompliance with the notice u/s 142(1) is evident from the Vol-II and III of the paper book submitted by the assessee running from page No. 379 to 741 , which are the additional evidences, filed before the ld DRP. Therefore, we are of the opinion that the assessee has failed to comply with all the terms of the notice issued u/s 142(1) of the Act and therefore, the AO rightly assumed powers u/s 144 of the Act.

46. According to provisions of section 144(1)(b) if the assessee fails to comply with the all the terms of the notice issued u/s 142(1) then the ld Assessing Officer after taking into account all revenant material which he has gathered make the assessment of the total income or loss of the assessee to the best of his judgment. In the case where the notice u/s 142(1) has been issued to the assessee prior to the making of an assessment under the section, no further opportunity is required to be given to the assessee. As during the course of assessment proceeding the assessee has failed to comply with all the term of the notice issued u/s 142(1) the Assessing Officer cannot be found at fault for invoking the provisions of section 144 of the Act. Therefore , the ld Assessing Officer not satisfied with the completeness and correctness of the account of the assessee is duty bound to make an assessment in the manner provided u/s 144 of the Act and further as the assessee has failed to

comply with all the terms of the notice u/s 142(1) the assessment is correctly proposed to be made by the AO u/s 144 of the Act.

47. It is also pertinent to note that despite there being a finding in the draft assessment order of assuming the jurisdiction u/s 144 of the Act it was not challenged by the assessee before the ld DRP. However the invocation section 145(3) was challenged. On specific query by the bench on any objection raised by the assessee on this aspect the assessee could not point out any such objection raised before the ld DRP. Therefore, it is apparent that assessee was not serious about assumption of jurisdiction by the ld AO u/s 144 of the Act in the draft assessment order till the revenue challenged the maintainability of the appeal before us. Therefore, as the AO has assumed jurisdiction u/s 144 of the Act in the draft assessment order, which is unchallenged before the ld DRP , then the AO does not have any option other than to pass a final assessment order u/s 144 of the Act. Even before us the first ground of appeal , assessee admits that the order is passed u/s 144 of the Act.

48. Now it is required to be seen whether such an order passed u/s 144 of the act pursuant to the direction of the ld DRP is an appealable order before the tribunal. According to the provisions of section 253 of the Act the assessee aggrieved by certain specified order is entitled to file an appeal to the appellate tribunal against such order. The such specified order are as under:-

> *"(a) an order passed by a Deputy Commissioner (Appeals) before the 1st day of October, 1998 or, as the case may be, a Commissioner (Appeals) under section 154, section 250, section 271, section 271A or section 272A; or*
>
> *(b) an order passed by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st day of January, 1997; or*
>
> *(ba) an order passed by an Assessing Officer under sub-section (1) of section 115VZC ; or*
>
> *(c)an order passed by a Commissioner under section 12AA +or under clause (vi) of sub-section (5) of section 80G or under section 263 or under section 271 or under section 272A or an order passed by him under section 154*

amending his order under section 263 or an order passed by a Chief Commissioner or a Director-General or a Director under section 272A ; or

(d) an order passed by an Assessing Officer under sub-section (3) of section 143 or section 147 in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order.

(e) an order passed by an Assessing Officer under sub-section (3) of section 143 or section 147 or section 153A or section 153C with the approval of the Commissioner as referred to in sub-section (12) of section 144BA or an order passed under section 154 or section 155 in respect of such order.

(f) an order passed by the prescribed authority under sub-clause (vi) or sub-clause (via) of clause (23C) of section 10."

49. The orders passed according to the clause (d) are an order passed by the AO under section 3 of section 143 or section 147 or section 153A or section 153C in pursuance to the direction of the Dispute Resolution Panel or an order passed u/s 154 with respect to such orders are appealable. According to us the order passed u/s 144 of the Act pursuance to the direction of the Dispute Resolution Panel does not find place as an appealable order before the tribunal. It is also an accepted proposition of the law that unless the right to appeal is provided under the statute to a specified authority such authority are not authorized to entertain such appeal.

50. In the income tax act two appellate authorities are specified who can entertain appeals arising from the order of the Assessing Officer. The first is the Commissioner of Income Tax (appeals) where the appealable orders before him are prescribed u/s 246A of the Income Tax Act, 1961. According to section 246A(1)(a) the orders passed u/s 144 are appealable. Such fact has also been accepted by the assessee in its written note submitted which has been incorporated above in this order wherein in para No. 21 it is admitted by the ld AR that order passed u/s 144 of the Act are appealable before the ld CIT(A), however, he stated that for filing an appeal the AO ought to have determined the total assessed income and demand of tax and further issued notice of demand u/s 156 of the Act. He further stated that no notice of demand was issued along with the draft assessment order dated

31.03.2013. According to us the ld AR did not appreciate that it is the final assessment order which is passed u/s 144 of the Act in pursuance to the direction of the ld DRP is showing computation of total income as well as the computation of demand of tax and also accompanied by the notice u/s 156 of the Act. Therefore, such assessment order is appealable before the ld CIT(A). However, the ld AR is referring to the draft assessment order only and naturally u/s 144C of the Act there is no provision of issuing notice of demand. The notice of demand u/s 156 of the Act is required to be issued only with the final order passed in pursuance of the direction of ld Dispute Resolution Panel, which is not demined by the assessee. Therefore, according to us the tribunal is not right appellate forum where assessee should have filed such an appeal where the order is passed u/s 144 read with section 144C of the Act. Hence, according to us the appeal of the assessee is not maintainable.

51. In view of the above findings that appeal of the assessee is not maintainable against the order passed u/s 144 of the Act we do not take into cognizance the grounds of appeal filed by the assessee.

52. **In the result appeal of the assessee listed as ITA No. 1212/Del/2014 for AY 2009-10 is dismissed as non-maintainable.**

ITA No. 2658/Del/2014 for AY 2009-10 (by revenue)

53. The first ground of appeal is with respect to the disallowance of Rs. 415441111/- being commission paid to advertisement agency disallowed because of the reason of non-deduction of tax at source. During the year the assessee has shown total sales of Rs. 2354166296/- and the assessee was asked to furnish the details of commission paid to advertisement agency and tax deduction at source made thereon. The assessee submitted a detailed reply before the AO contesting that no tax is required to be deduced , however, the ld Assessing Officer has rejected the contention of the assessee and held that tax should have been deducted on such sum and disallowance of Rs. 415441111/- was proposed by giving following reasons in the draft assessment order:-

"The reply of the assessee has been considered and is not found tenable. The assessee has relied upon the case of CIT Vs Living Media India Ltd (supra), which is clearly distinguishable from the facts in the present case of the assessee. The same are enumerated hereunder:-

In the case of Living Media, the assessee was a publisher of magazines like India Today, Business Today etc., and was a principal on its own. It did not carry out directions of any other agencies and was the ultimate authority to publish the advertisements in its own magazines.- The space sold to its advertising agency or directly through advertiser were direct and direct only and no intermittent party or agency was involved. To be very clear it is Living Media India Vs Advertising agency and that is the reason why Hon'ble Court have held that the relationship is on a principal to principal-basis.

The assessee sells the space at a price through the agency/agents. The agents, further, in turn sell it to the advertisers. The assessee sells such time slot to the agents. The agents book the times slot to end user i.e. advertisers. This is done on behalf of the media (which is catering to all segments of public). Therefore, the relationship between the assessee and the agency is that of principal and agent and not the principal - principal as stated by the assessee. The contention of assessee that no services are said to be rendered by the Agency for facilitating sale particularly because it is the Agency only which is buying space from the media i.e. the assessee is also factually incorrect. It is true that the services of the Agency (to get advertisements) do not facilitate sale. But the services provided by the Agency definitely get a substantial amount of revenue in the form of advertisement to the Assessee. In turn the Agency is paid agency commission which is ubiquitously termed as 'commission' by the assessee, in its invoice as reproduced above.

It is a well settled proposition that a contract can exist with mutual consent or with intent, where there only has to be an offer and an acceptance which is

the case in the present matter.The modus operandi explained by the assessee was that as per 'industry practice' 15% of gross amounts received/receivable by the assessee were withheld by the Agency as its 'commission', as shown in the invoices also. However, the assessee has claimed that it is 'discount or trade discount, which is being retained by the agency and net payment is being made to the assessee.

The modus operandi of the assessee becomes clearer when we examine some of the bills/vouchers of Agencies through which the advertisements were procured. The examination of invoice of M/s TLG India Private Limited (Agency) raised by M/s NDTV Ltd. reveals that Invoice Cum Challan was issued to M/s TLG India Private Limited by NDTV Ltd. (assessee) wherein the client reference / caption was Jet Airways (I) Limited, for advertisement in the different programmes of NDTV Ltd. Invoice of gross amount of Rs. 28,75,600/- was raised; Agency Commission was deducted of Rs.4,31,340/- and net amount of Rs.24,44,260/- + service tax, education cess and secondary cess, was shown to be receivable from the client through the Agency i.e. M/s TLG India Private Limited (Agency). The details have already been reproduced in para above.

It is clear from the above invoice that the transaction is between assessee and the ultimate client i.e. owner of Jet Airways (I) Limited through the Agency i.e. TLG India Private Limited. The payment of gross amount' is remitted by the ultimate client to the Agency, which, after deducting its 15% commission, remits the net amount to assessee. In any case, the Agency is only acting in the capacity of facilitator and providing services both to the advertiser and as well as assessee. For these services, the Agency is being remunerated at the specified rates i.e. 15% commission as mentioned in the invoices. It is immaterial as to whether assessee makes payment to Agency as Commission for services rendered or the Agency first withholds its due and then remits the balance to assessee. The undeniable fact remains that the said amount of 15% of gross amount is in effect a charge on the assessee

and this fact cannot change simply because of the financial arrangement between assessee and Agent as per their convenience, further even the assesse has mentioned the said amount ascommission in its invoices.

In fact, if the entire transaction is seen, then, at one end of the spectrum is the controlling organization of the publications channels and at the other end is the client/advertiser who pays for the advertisement. All persons operating in between are actually performing services on behalf of both.

However, by no stretch of imagination can the Agency be described as a 'principal' because, as clear from the invoice (supra) it books advertisements by order on behalf of the clients receives payment, as clear from the invoice and remits the amount to NDTV Ltd. after deducting its commission. The invoice of TLG India Private ltd.raised clearly categorizes the amount as 'Commission'. The payment on account of 'Commission' flows directly from the nature of services rendered by the Agency and does not depend on case to case basis as rates are fixed. Since, the said amount withheld by Agency actually constitutes expenditure in the form of 'Commission' the assessee was obliged to deduct tax at prescribed rates, more so because the Agency does not pay from its own pocket but only remits amounts received from client to the assessee.

The relationship between TLG India Private Limited (Agent) and that of assessee is nothing but principal to agent because the ultimate principal is the client who makes the payment to the advertiser i.e. assessee though the agent. Hence the deduction of TDS on the gross amount of commission is squarely applicable in the hands of assessee. Since it is not possible for the Individual media company to procure advertisements regularly on its own it utilizes the facilities/services of various Agents/Agencies who procure advertisements on their behalf for telecast in the channels owned by the assessee.

It has been explained that the amounts remitted are after deducting @ 15% of gross amount received by Agency. Thus it is clear that for these services, Agencies are remunerated @ 15% of gross amount as is clear from the billing, the only difference[1] is that instead of reflecting a gross amount in its books (e.g. Rs. 28,75,600/- in the sample voucher of TLG India Private Limited, then deducting commission of Rs.4,31,340/- @ 15% of gross amount of Rs. 28,75,600/- the assessee is directly booking net amount of Rs. 24,44,260/- in its books of accounts. However, this is only a financial arrangement arrived at between assessee and the agent and it cannot be denied that expense has been incurred by the assessee, the only difference being that it is not in the form of direct payment to Agent, but rather in indirect form e. the Agent withholds amounts due to it and remits the balance to the assessee. This in no way takes away from the expenditure incurred by the assessee as the remuneration in the form of commission/discount received by the agent flows from the payments received by it.

From the above discussion it is amply clear that the assessee was fastened with expenses of commission which instead of being borne by it by way of actual payment has been withheld by the Agency before remitting net amount to the assessee and can be termed as Constructive receipt in the hands of the Agency in the form of 'Agency Commission', the nomenclature that is used in assessee's own vouchers (supra) and as a constructive payment in the hands of the assessee.

As is clear, assessee is trying to term the said expense as trade discount. In this context, it is stated that in order that any rebate in price is termed as Discount, it is necessary that the dealings between two transacting parties are on principal to principal basis. The assessee company, which sells time slot for advertisement has paid to several business parties who work as 'agents' for booking Advertisement from certain other parties (3rd parties.). In this process, the Advertising Agencies (Agents) are receiving commission from the assessee company for the services rendered by hem by way of booking

Advertisements from the advertisers/public for the assessee. By no stretch of imagination, can this amount received be called as 'Discount' as it is consideration for the services rendered to the 3rd parties. This is amply clear even from the nomenclature as appearing in the assessee's vouchers.

From a plain reading of Section 194H of the IT Act, it is evident that the commission and brokerage as per Section 194H fall within the purview of inclusive definition per section 194H and work of agency is squarely covered in it irrespective of the nomenclature. The discount as claimed by the assessee is nothing but commission and is very much within the ambit of section 194H of the IT Act.

Section 194H reads as follows:

'Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of five percent.

Provided that no deduction shall be made under this section in a case where the amount of such income or. as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of. or to, the payee .does not exceed two thousand five hundred rupees.

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits under clause (a) or clause (b) of section

44AB during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section.

Explanation - For the purpose of this section,-

(i) "Commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services)or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities:

(it) The expression "professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purpose of section 44AA;

(iii) The expression "securities" shall have the. meaning assigned to it in clause (h) of section 2 of the Securities Contracts (regulation) Act, 1956 (42 of 1956);

(iv) Where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.'

In support of Revenue's contention that the relationship between the assesse company and its agents is that of principal and agent, reliance is placed on CBDT Circular No 619 dated 4.12.1991. Relevant portion is reproduced hereunder :-

For the purposes of this section, commission or brokerage includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing.

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A question may arise whether there would be deduction of tax at source under section 194H where commission or brokerage is retained by the consignee/agent and not remitted to the consignor/principal while remitting the sale consideration. It may be clarified that since the retention of commission by the consignee/agent amounts to constructive payment of the same to him by the consignor/principal, deduction of tax at source is requested to be made from the amount of commission. Therefore, the consignor/principal will have to deposit the tax deductible on the amount of commission income to the credit of the Central Government, within the prescribed time, as explained in the succeeding paragraphs.'

A plain reading of CBDT Circular 619 clearly establishes the fact that in the cases where commission or brokerage is retained by the consignee/agent and not remitted to the consignor/principal while remitting the sale consideration, deduction of tax at source u/s 194H is clearly applicable. It has been further clarified in the said CBDT Circular that since the retention of commission by the consignee/agent amounts to constructive payment of the same

to him by the consignor/principal, deduction of tax at source is required to be made from the amount of commission. Thus, the assessee was obliged to deduct tax at source the payment to agents or amount withheld by agents.

More so, CBDTCircular No. 715 dated 08.08.1995 also specifies that commission received by the Advertising Agency from the Media would require deduction of tax at source u/s 194J.

Furthermore, reliance is placed on the following decisions, which are directly related to the crux of the matter under consideration :-

1) *CIT Vs Director, PrasarBharti (Kerala High Court)*
2) *CIT Vs Singapore Airlines ITANos 306/2005 & 123/2006 dated 13.4.2009(Delhi High Court).*
3) *CIT Vs Idea Cellular Ltd ITA Nos 145/2009 & 784/2009 dated 19.2.2010 (Delhi High Court).*
4) *ACIT VsBharti Cellular Ltd ITA No 1678 & 1679/Kol/2005 dated 4.4.2006 (ITAT, Kolkata Bench.)*
5) *Bharti Cellular Ltd Vs ACIT (2011) 12 Taxmann 30 (Cal.) (High Court of Calcutta)*
6) *Vodafone Essar Cellular Vs ACIT dated 17.8.2010 (Kerala High Court)*
7) *Around the World (268 ITR 477 (Mad.)*
8) *Tube Investment (223 CTR 99).*

The important aspects decided by Hon'ble Courts are discussed hereunder:-

The Kerala High Court in the case of Commissioner of Income Tax, Thiruvananthapuram vs. Director, Prasarbharti, DoordarshanKendra in ST Appeal Nos. 27 and 62 of 2009 has, vide its order dated 20.11.2009 discussed a similar issue at length and has held as under :-

"Section 194h of the Income-Tax Act, 1961 - Deduction of tax at source Commission or brokerage etc. Assessee was a fully owned Government of India undertaking engaged in telecast of news, various sports, entertainment, cinema and other programmes- Advertisement income was its major source of revenue Agents appointed by it canvassed advertisement on its behalf and advertisement charges recovered from customers were in accordance with tariff prescribed by assessee -Assessee paid commission at rate of 15 per cent on advertisement charges remitted by advertising agencies- Whether

commission paid by assessee would be subject to tax deduction at source under section 194H- Held, yes.

The Hon'ble Court also held that Advertisement charges collected by agents are for respondent and agents are allowed to retain 15 per cent of the commission by the respondent only to avoid the hassle of deposit of full amount and repayment of 15 percent thereof towards commission. Since permission given to agents is to withhold 15 per cent out of advertisement is nothing but a payment made to agents in advance by Doordarshan before remittance of net advertising charges to them by the agents. We are therefore of the view that permission granted by Doordarshan under the agreement to the agencies to retain 15 per cent of the commission amount to payment of commission by them to agents which is subject to deduction of tax at source under section 194H of the Act. It is clear from section 194H that payment includes credit of such sum to the account of the payee or at the time of payment of such income in cash or by the issue of cheque or draft or by any other mode. When the respondent receives 85 percent of the advertising charges from the advertising agency concerned.Doordarshan account full amount as received from the customer for whom advertisement was undertaken, crediting 85 per cent received in their account and simultaneously crediting 15 per cent in the account of the advertising agency. Irrespective of the pattern of account maintained by the respondent, what happens when the agent pay85 per cent of the advertisement charges collected from the customer is that the agent simultaneously gets paid commission of 15 per cent which he is free to appropriate as his income. TDS on the commission charges of 15 per has to be paid by the respondent to the income tax department with reference to the date on which 85 per cent of the advertisement charges are received from the agent. In fact, it is only to comply with the provision, clause 2(e) extracted above is incorporated in the agreement wherein it is stated that agent will pay to the Doordarshan through DD or cheque the TDS amount payable on the commission retained by agents which we have already found as payment of commission by the respondent to the agent."

In the case of CIT Vs Singapore Airlines Ltd., & Others reported in ITA No 306/2005 & 123/2006, judgment delivered on : 13.4.2009 (Delhi High Court) the relationship between principal and agent has been dwelt upon in detail. It has been held by the Hon'ble jurisdictional High Court that once an obligation is cast, it is for the assessee to retrieve the necessary information from the agents (travel agent) who works for the assessee and to deduct TDS on the actual income received by the agent on sale of such items. Even though the said judgment related to airline-travel agent case, but relevant portion of the order, with regard to the present case of the assessee, is summarized hereunder :-

".. where a person pays to a resident income which is of the nature of commission then that person is obliged to deduct tax at source at any of the said stages, that is, either at the time of credit of such income/commission or at the time of payment which may take the form of cash, cheque, draft or by any other mode.

Commission under Explanation (i) to Section 194H of the Act is defined in an inclusive manner. Commission under the definition includes payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any service in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing (not being securities). It takes into account a situation where a person renders services to another person for which the person rendering service either receives or is entitled to receive, directly or indirectly, payment from that another person to whom the service is rendered.

Therefore, the first question that needs to be answered is whether there is a principal-agent relationship between the assessee-airline and the travel agent?

For this purpose it would be profitable to look to the definition of an agent in Section 182 of the Contracts Act. Section 182 of the Contract Act reads as follows :-

An agent is a person employed to do any act of another or to represent another in dealings with third persons. The person for whom said act is done, or who is so represented is called the principal.'

It is clear from the definition that an agency comes into existence where one person is vested with the authority or capacity to create a legal relationship between person referred to as a principal and an outside third party. Therefore, the basic and essential requisites of an agency ordinarily would be that:

(i) *The agent makes the principal answerable to third persons whereby the principal can sue third parties directly and renders himself, that is, the principal, liable to be sued directly by the third parties;*

(ii) *The person who purports to enter into a transaction on behalf of the principal would have the power to create, modify or terminate contractual relationship between his principal, that is, the person whom he represents, and the third parties;*

(iii) *An agent, though bound by instructions given by him by the principal does not work under the direct control and supervision of the principal. The agent thus uses his own discretion to act on behalf of the principal subject to the limits to his authority prescribed by the principal.*

(iv) *There is no necessity of a formal contract of agency, it can be implied which could arise from the act of parties or situations in which parties are put.*

It is also the case of Revenue the essential ingredient of principal to agent as defined in Section 182 of Contract Act are all present in the case of the assessee, which is enumerated hereunder :-

RELATIONSHIP BETWEEN PRINCIPAL AND AGENT

(i)The agent makes the principal answerable to third persons whereby the principal can sue third parties directly and renders himself, that is, the principal, liable to be sued directly by the third parties	*In the case of the assessee, advertisements are being received through agents, apart from other direct modes. In so far as advertisements booked by assessee through agents from advertisers, the assessee is liable to publish the material/advertisement as per the wish of the advertisers and particularly on the date of publication, when the advertiser wishes. Hence the assessee is directly responsible and answerable to third parties i.e. in*
(ii)The person who purports to enter into a transaction on behalf of the principal would have the power to create, modify or terminate contractual relationship between his principal, that is, the person whom he represents, and the third parties;	*The agent, who is empowered to enter into a transaction on behalf of the principal (the assessee) possess the power to create, modify or terminate, the order if he finds any abnormality or any illegal contents in the advertisement material.*
(iii) An agent, though bound by instructions given by him by the principal does not work under the direct control and supervision of the principal. The agent thus uses his own discretion to act on behalf of the principal subject to the limits to his authority prescribed by the principal.	*The agent in this case is free to use his own discretion to act . The principal (assessee) is held responsible for any deviation or omission committed against the advertisers, even though the advertisement is booked through agents.*

The transactions entered into by the assesse clearly establishes the fact that the agencies act on behalf of the assesse whereby a legal relationship is established between the assesse and the third party (advertisers). Thus, the agents, by entering into such a legal relationship on behalf of the principal,

that is the assesse, by issuing receipts of advertisement material and the date on which the advertisement is to be telecast, the agent makes the assesse liable to a legal action by the advertisers i.e. the third party.

Further relying upon to the decision of Hon'ble High court of Delhi in the lead case of CIT Vs Singapore Airlines (Supra), The Hon'ble Court held that 'the word discout is normally used to describe a deduction from the full amount or value of something, especially a price (see Black's Law Dictionary VIIth Edition page 477) whereas a commission is defined in Explanation (1) to Section 194H as any payment received or receivable, directly or indirectly by an agent for services rendered acting on behalf of the assesse, is defined in explanation (1) to section 194H as any payment received or receivable , directly or indirectly by an agent for services rendered acting on behalf of the assessee.

In view of the fact, relying upon the decision of Hon'ble High Court: is concluded that the payment retained by the agent is inextricably linked to the advertisement to be published by the assessee, it cannot but lead to a that the payment retained by the agents is a commission within the meaning 194H of the Act. This is especially so, as indicated above, at no point in time obtains proprietary rights to the advertisement, it is clearly not a case of disc case since there is no value or price paid by the assessee on which the a deduction. The price or value is received by the assessee company through the medium of the agent from the advertisers which is also one of the facets of services offered by the agents. The price or value of the advertisement to be published in the media received from the advertisers by the agents for and on behalf of the assesse is held in trust. Thus, the money retained by the assessee is commission within the meaning of Section 194H of the Act and in no stretch of imagination this can be termed as 'trade discount'.

To say that the revenue is seeking to cast the liability on the assessee tax when there is no evidence of income received by the agent is factually an incorrect submission. It should be remembered that what is relevant is whether the Section 194H casts on the assessee to deduct tax at source. Once an obligation is cast, it is for the assessee to retrieve the necessary

information from the agent who works for the assessee and put itself in a position to deduct tax on the actual income received by the agent from the advertisers/third parties.

Further reliance is placed on the judgment of Hon'ble High Court of Delhi in the case of CIT vs Idea Cellular Ltd., in ITA No 145 of 2009 with ITA No 784 of 2009 dated 19.2.2010. Though the issue involved related to mobile phone - pre paid/post paid, but there are certain facts which are common/relevant to the case of the assessee. The issue 'whether the transaction in question between the assessee and the agents amounted to contract of sale (thereby constituting relationship of principal and principal) or it amounted to contract of agency (thereby resulting in principal and agent) relationship has been discussed in detail. The important issues culled out of the said decision of Hon'ble High Court of Delhi are :-

(a)The expression 'commission' or 'brokerage' was not given in statutory definition under the Act, one had to take into account the expression as judicially defined.

(b)Two provisions which would be relevant for determining the issue and to decide the real nature of transaction between the parties are Section 4 of the Sale of goods Act and Section 182 of the Indian Contract Act. Section 4 of the Sale of Goods Act defines 'sale', where discounts are dealt with. Section 182 of the Indian Contract Act, on the other hand, defines an agent, which definition becomes important to consider as to whether the relationship between the assessee and the agents is that of principal and agent, where commission are dealt with.

(c) Commission is prima facie the payment made to an agent for agency work, usuallyaccording to a sale, it may be on advalorem scale, but not necessarily on ad valorem scale. It is the most general word that can be used to describe the remuneration paid to an agent for an agency work other than a salary.

(d) Again, a commission is the recompense of reward of an agent, factor, broker or bailee, when the same is calculated as a percentage on the amount of his transaction or on the profit to the principal.

(e) Commission generally denotes the compensation which an agent receives on Sales.

(f) Commission is compensation paid to another for services rendered in the handling of another's business or property and based proportionately upon the amount or value thereof.

(g) The Hon'ble Court in the above cited case has given a passing remarks, that if the principal is asked to deduct tax at source in respect of commissions paid to their agents, it does not affect the principals. The concerned agent can always file their income tax returns and claim the credit for the payments already made on their behalf by theassessee. On the other hand, such a provision serves public purpose inasmuch as viz.,such distributors who would be otherwise liable to pay tax, but are evading the tax, would come under the Income Tax Act. This is only a passing remarks, which justifies the incorporation of such a provision like putting obligation on the payer to deduct the tax at source and the view we have taken subserves this rationale behind such a provision as well.

Applying the said ratio to the present case; it is seen that in the instant matter too, the amount withheld by the Agent is in the nature of a recompense that is calculated as a percentage of the amount of transaction i.e. @ 15% of gross amount in the present case.

Further reliance is also placed in the case of ACIT VsBhartt Cellular Ltd., ITAT Kolkata Bench in ITA Ncs. 1678 & 1679/Kol/2005 dated 4.4.2006, whereby the Hon'ble Tribunal held that there exists relationship of principal and agent where the agent acts on behalf of the principal and executes and sells the products of the principal.

The Hon'ble High Court of Calcutta in the above cited case has upheld the order of ITAT and has further held that 'we conclude thus that there has been indirect payment by the assessee to the franchisee of the commission and the same is attractable under section 194H of the Act.

In the Guidance Note on Terms used in Financial Statements published by ICAI, the expression 'Commission on sales' includes sales payable to the consignee/third person and it should not be deducted from the figure of turnover. Therefore, the assessee should have recognized its revenue at gross value instead of net of commissions allowed to agents. There are three rungs starting from the advertiser, then comes the agent, finally is the assessee .

The assessee has also contended that disallowance of the amounts not shown in the profit and loss or not claimed or not debited as an expenditure cannot be eligible for disallowance u/s 40(a)(ia). In this context, the provisions of Section 40 are elaborated hereunder :-

'Section 40 - Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'profits and gains of business or profession'-(a) in the case of any assessee-

(ia) any interest, commission or brokerage, rent,on which tax is deductible at sourceunder Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid or before the due date specified in sub section (1) of section 139 '

The question that remains is that only when the expenses are claimed as a deduction, only then the related amount would be disallowed on account of non-compliance of the provisions.

From the invoice raised, as per method of accounting guidance note of ICAI, the assessee is supposed to credit the gross amount of Rs.28,75,000/- in the receipt side and debit Rs.4,31,340/- under the head agency commission in the profit and loss account. The net effect would be offering income of Rs.24,44,260/- in P&L a/c. Instead, the assessee has straight away credited the net amount on Rs. 24,44,260/- in the receipts side. What has missed is that the expenditure of Rs 4,31,340/- which is supposed to be routed through

profit and loss account is shadowed and omitted to be debited in the net income but it does not mean that the said expenses have not been incurred. The provisions of Sec 40 as discussed supra contain the expression 'following amounts shall not be deducted in computing the income chargeable under the head ...'. The word 'deducted' in the section is not followed by the word in 'profit and loss account'. The intent of Legislature is very clear that even if the gross amount is 'deducted' by any sum, which is not shown directly in the P&L a/c, net effect will be same and carries the same meaning as if it has been routed through profit and loss account. Let us see this in a mathematical manner. Suppose the Gross receipt of an assessee is say Rs 100/-, he expended a sum of Rs 20/-related to earning of such grqss amount, and offers balance Rs 80/- as net profit in the books of accounts. It bears only one meaning that (a) Total. Receipts from such venture is Rs 100/- (b) Expenses involved are Rs 20 and (c) Net profit offered for taxation is Rs 80/-. There is no second alternative left in this scenario. What has to be seen is whether any expenditure has been 'deducted' from the total receipts. Even if the said expenditure is not appearing in the profit and loss account, it does not mean that the assessee has not expended any sum.

In the case of the assessee, the important question is not whether the said expense has been routed through P&L a/c or not routed through P&L a/c. The question is that the gross amount is 'reduced' by sums as given in the Tax Invoice issued to agents and the net amount is offered for taxation. It does not mean that no expenses have been claimed as expenditure. In this case whether any expenditure is 'deducted' or not. The answer is, yes, expenditure is 'deducted'.

Since agency commission of Rs.4,31,340/- is deducted from the gross receipts, it will have the same meaning as if such sum is 'deducted in computing the income chargeable under the head profits and gains of business' as per the provisions of Section 40. Since TDS has not been deducted as provided under Chapter XVII-B, the provisions of sub section (a)(ia) of Section 40 of the Act are clearly attracted.

Reliance is placed in the case of CIT VsLN.Dalmia, 207 ITR 89, and in the case of CIT. VsDurgadass More 82 ITR 540 (Supreme Court), the hon'ble Apex Court has held that 'a little probing was sufficient in the present case to show that apparent was not real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into surrounding circumstances to find out the reality of recitals made in the documents.'

If Corporate veil is lifted one can see the real picture and modus operandi of the business activities carried out by the assessee.

As per reply dt. 07.03.2013, the assessee has submitted details of quantum of advertisement revenue generated to advertising agencies, which amounts to Rs. 235,41,66,296/-, which is net of commission paid to the agencies @15%. The assessee was asked to furnish gross amount charged during the year under consideration but no details have been furnished by assessee. Therefore considering the 15% commission paid by the assessee, as per assessee's letter dated 07.03.2013, on a revenue of Rs. 235,41,66,296/- the grossed up revenue comes to Rs.276,96,07,407/- and commission on the gross revenue @15% comes to Rs.41,54,41,111/- which has been paid by the assessee.

In view of the facts as discussed in the foregoing paragraphs it is clear that the transactions (on which discount as claimed by the assessee) was not paid on principal to principal basis but was in the nature of principal- agents for the services rendered to 3rd parties, and by no stretch of imagination can be termed as discount and the assessee has itself in its invoices categories the said amount as commission. Therefore, the discount (as claimed by assessee) paid by the assessee is nothing but agency commission liable for deduction of TDS either in section 194H or 194J or both. However, it has not deducted the TDS at all on such amount. Therefore Rs 41,54,41,111/- is disallowed u/s 40a(ia) of the Income Tax Act., 1961 and added to the income of the assessee. In this context, the assessee may plead that no amount of Commission has actually been paid to the Act. However, as discussed in the preceding paras the amounts withheld by the Agencies in the form of

Commission are actually constructive receipts in their hands and the said amounts having been netted from the receivable of the assessee construe constructive payment or constructive debit in the accounts of the assessee as amplified in CBDT Circular No. 619 also (discussed supra). Accordingly, an amount of Rs. 41,54,41,111/- is disallowed and added back to the total income of the assessee. I am satisfied that the assessee has furnished inaccurate particulars of its income and has concealed its correct income on this issue, therefore, penalty proceeding U/s 271(1)(c) of I, Tax Act have been separately been initiated"

54. The assessee preferred objection before the ld Dispute Resolution Panel who vide direction dated 31.12.2013 vide para No. 6 has held as under:-

"6. Disallowance of commission paid u/s 40(a)(ia) amounting to Rs. 41,54.41.111/-

The AO has disallowed the sum on the ground that the assessee should have deducted tax on the gross amount received by the advertisement agency. On the other hand, the assessee had stated that its case is squarely covered by the decision of the jurisdictional High Court in the case of CIT vs. Living Media India Ltd. and in the case of JagranPrakashan Ltd. vs. DCIT [345 ITR 288 (2012)] of the Allahabad High Court. The AO has tried to differentiate the decision in the case of Living Media India Ltd. by stating that the assessee is in electronic media whereas the decision quoted is on the facts of print media company. The assessee's submission is extracted below:

"The assessee/companies who are engaged in the business of running of print and electronic media houses, the main source of revenue is advertisement charges. The advertisers approach classified agents or accredited advertising agencies to advertise. The agents / agencies upon receipt of advertisement requirement procure the airtime from the media companies at a discount. Advertisers while making payment to

accredited agencies duly deduct tax as required under law under section 194C of the Act on the amount paid by the advertiser. This customary practice is consistently followed in this above business and is governed in accordance with guidelines of Indian Newspaper Society (in short INS) for print or Indian Broadcasters Federation (in short IBF) for electronic.

An advertiser engages an advertising agency and the advertising agency in turn approaches print and electronic media for publication/broadcast of the advertisement. There is no direct link between the print and electronic media and the advertiser. In the normal course when orders are released by the advertising agencies, the name of the client is always disclosed on it, though there is no principal agent relationship between the print and electronic media on one hand and the advertising agencies on the other hand. As per the rules of INS, accreditation is awarded by INS to the advertising agency which becomes eligible to receive 15 per cent discount from media companies on procuring advertisement space for/time in publication/broadcast for advertisers. It may be noted that even the discount is not at the will or contractual discretion; it is governed by INS regulations."

DRP has carefully examined the above issue. DRP is convinced that the decision of the Hon'ble Jurisdictional High Court in the case of Living Media India Ltd. is applicable in this case since the issue is of treatment of commission paid to the advertising agencies. Therefore, the AO is directed to not to make this addition in the assessment order. In this way, objection 2 along with its sub-objections are disposed off."

55. Before us the ld DR relied upon the draft assessment order whereas the ld AR vehemently submitted that the issue is squarely covered by the decision of Hon'ble Delhi High Court in case of CIT Vs. Living Media India Ltd. He therefore stated that there is no error in the order of the ld DRP.

56. We have carefully considered the rival contentions and also perused the facts of the case as well as the decision of the Hon'ble Delhi High Court. We are convinced with the argument of the ld AR that the issue is squarely covered by the decision of Hon'ble jurisdictional high court. The ld DR could not controvert that how this issue is not squarely covered in favour of the assessee and he also could not show us any other judicial precedent so as to persuade us to disagree with the views of the ld DRP. Further merely because the revenue has filed an SLP before the hon'ble Supreme Court against the decision of Delhi High Court cannot be a reason for sustaining the disallowance. In view of this we do not find any infirmity in the direction of the ld DRP in directing the ld Assessing Officer to delete the disallowance commission paid amounting to Rs. 415441111/-. In the result the ground No. 1 of the appeal of the Revenue is dismissed.

57. The second ground of appeal is against the deletion of disallowance of Rs. 78123855/- on account of transmission and up linking charges paid by the assessee to Intelsat Corporation USA without deduction of tax at source. During the course of assessment proceedings it was found by the ld AO that assessee has made payment of transmission and up linking charges of Rs. 145251704/- and out of which a sum of Rs. 78123855/- was paid to M/s. Intelsat Corporation USA. The ld Assessing Officer was of the view that above is deemed income of the recipient u/s 9(1) of the Act and therefore, the assessee was liable to deduct tax at source on such payment. Hence, he disallowed the above sum holding as under:-

"4. Transmission and uplinking Charges

In the P & L Account the assessee had debited Rs.14,52,51,704/- under the head Transmission and Uplinking Charges. In the notes to account the assessee has furnished the details of expenditure in foreign currency. It has been reported that Rs. 14,52,51,704 has been incurred under the head subscription, uplinking and news service charges. Vide order sheet dt.15.02.2013, the assesses was required to furnish the details regarding TDS on uplinking and transmission charges.

The assessee in its reply dt. 11.03.2013 and 22.03.2013, submitted that the payment has been made to a foreign company and in view of the decision of

Hon'ble ITAT Delhi, in DCIT vs. PanAmSat International System Inc. 103 TTJ 861 (Del), it is not obliged to deducts TDS. The relevant para of reply dt. 11.03.2013 and 22.03.2013 are reproduced as under:

Relpy dated 11.3.2013 (filed on 22.03.2013)

We have been show-caused as to why disallowance be not be made in respect of transmission and uplinking charges for the non-deduction of TDS u/s 40(1)(ia) paid to Intelsat? Please note that we have already given the details of transmission and uplinking charges to your honour vide our submission dated 11th March'2013. We reiterate that the provisions of TDS/withholding taxes were fully complied with. The payments were made after obtaining the requisite certificates from the Chartered Accountant as defined in the explanation to section 288B of the Income Tax Act'1961. Copies of Form 15CA/CB issued by an independent chartered accountant were also placed before you.

We respectfully submit that there should not be any disallowance on account of non-deduction of TDS/withholding taxes from the payments made to Intelsat Corporation, we are giving below a brief note on the same:

During the year under consideration, the assessee Company booked the expense of Rs. 7,81,23,855/- on account of transponder services received from M/s Intelsat Corporation (Intelsat) in terms of its agreement for the use of satellite (transponder capacity).

Before we proceed to our specific submission and a fact of the case, we here-in-below submits the nature of transaction entered between the assessee Company and Intelsat Corporation to understand its taxability and application of provisions of section 195 of the Act.

The assessee Company is engaged in the business of broadcasting, operating a TV channel. The assessee Company video-graphs events that takes place as and when they happen in the form of programs and by using transmission and up-linking facilities, it sends signals to a satellite that is

hovering in space. The signals sent to the satellite are decoded and down-linked over the area covered by the satellite. A transponder is a part of the satellite which receives such signals from the earth stations and re-transmits the same back to the earth with or without amplifying them.

The assessee Company entered into an arrangement with Intelsat Corporation, a Company incorporated in and resident of USA for using such transponder capacity, to make the signals available to the cable operators, who in turn beam the signals to the viewers in their homes.

The above services are like standard facility used for transmission of programs by various media companies. The assessee Company makes use of such facility during the year provided by the Intelsat Corporation.

The assessee Company most respectfully submits the following points for favourable consideration on merits:

The payments in question made to Intelsat Corporation are not a "Royalty" within the provisions of Act as they exist during the year in question. (A retrospective amendment is made in Section 9(1)(vi) by the Finance Act 2012 to include consideration paid for the use or right to use of transmission by satellite within the ambit of the definition of "Royalty")

Even after the above amendment in the Income Tax Act, 1961, there is no change in definition of the tern 'Royalty" under the DTAA between the India-USA. Therefore, even today the payments in question could not be taxed as "Royalty" in the hands of recipient in view of the favourable position on this issue in relevant DTAA.

These payments were made after obtaining the requisite certificates from the Chartered Accountant ('CA') who certified that the above sums were not chargeable to tax in India, as it constituted business income under Article 7 of

the DTAA and in the absence of Permanent Establishment ('PE'), same could not be liable to tax in India.

Intelsat Corporation is a non-resident company incorporated under the laws of USA and is a tax resident of USA and, therefore, the provisions of DTAA entered between India and USA are applicable on Intelsat which are more beneficial to Intelsat.

For the year in question, the revenue of transmission and up-linking facilities in the hands of Intelsat Corporation were already held not taxable by the Hon'ble Delhi High Court vide order dated 28/9/2012.

The issue whether the recipient of such charges is liable to tax in India is also settled by the Jurisdictional High Court in the case of ***Asia Satellite Telecommunications Co. Ltd. vs. DIT, (332 ITR 340)*** *in favour of the taxpayer. Similarly, such charges were also held not liable to tax in India in view of Article 12(3) of DTAA entered between India and USA in the case of* ***DCIT vs. PanAmSat International System Inc (103 TTJ 861) (Del).***

In view of the facts and the legal position stated above, it is clear that the assessee Company had no liability to deduct tax on such payments under section 195 of the Act which provides that any person would liable to deduct tax if the payments made to non-resident are ***chargeable to tax.*** *When it has already been held be the jurisdictional High Court/Tribunal that such sum is not taxable in India in the recipient, no liability could be fastened on the payer to deduct on such sum. Thus, the disallowance of above sum by invoking the provisions of section 40(a)(i) of the Act will be arbitrary and unwarranted.*

The legal view prevailing at the time of previous year 2008-09 was that such payments were not chargeable to tax in India under section 9(1)(vi) read with section 195 of the Act. Therefore the assessee Company was correct in law in not deducting tax at source on such payments at that point of time. The

case of the assessee Company is also supported from the fact that Intelsat Corporation was held not liable to tax in India by the Jurisdictional High Court.

Without prejudice to above submissions on merit and in alternate, *the assessee Company most respectfully submits that on the facts of the case the disallowance under section 40(a)(i) of the Act is unwarranted as the above provisions are applicable only in a situation where the expenses remain unpaid/payable as on 31st March of the previous year and no taxes have been deducted/deposited on the same, are not applicable in the present case. To support the above, reliance is placed on the decision in the case of* ***Merilyn Shipping & Transports Vs Addl. CIT, 146 ITJ 1, ITAT (Vishakhapatnam) wherein it has been held that section 40a(ia) of the Act can be invoked only to disallow expenditure of the nature referred to therein which is shown as payable as on the date of balance sheet.***

It is admitted fact in present case that the above amount were paid during the year in the foreign currency as disclosed in the Audited Accounts of the year in question Therefore, the provision of section 40(a)(ia) of the Act could not be invoked in view of the decision in the case of ***Merilyn Shipping & Transports (supra)*** *as no expenses remained as payable as on March 31, 2009. Thus, in alternate on this account also no addition is warranted.*

The submission of assessee was duly considered and are not acceptable. *The payments made under the head Transmission and uplinking charges are covered under the definition of royalty as define in section 9 of the I. T. Act. The provisions of the section 9 which defines the term royalty are reproduced as under:*

Section 9 Income deemed to accrue or arise in India.

(1) The following incomes shall be deemed to accrue or arise in India....

(vi) income by way of royalty

payable by-

(a) The Government; or

(b) A person who is a resident, except where the royalty is payable in respect of any right,property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or....

(c)

Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of , any data, documentation, drawing or specification relating to any patent, invention, model, design,

secret formula or process s or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government.

87a. Explanation 6 - For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for downlinking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret...

(87a. Inserted by the Finance Act, 2012, w.r.e.f. 1-6-1976.

The provisions of section 9(1)(vi) regarding income by way of royalty were very clear and specific. The word "process" included the Transmission and uplinking charges however, looking to the disputes

in the various courts and contrary judgments in this regard, a clarification / amendment has been inserted by the Finance Act, 2012 (with retrospective effect from 01.06.1976) which clearly says that the "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal). In view of the present status of the legislation the Transmission and uplinking charges paid by the assessee without deducting any TDS would invite the consequences of provisions of section 40(a)(i).

The assessee argument that no technical knowledge has been made available to it therefore it is not covered in the included services. The submission of the assessee is acceptable to the extent that no technical knowledge has been made available. However, for royalty the requirement of make available of technical knowledge is not required under the DTAA. It is only in the case of fee for technical services/include services. Therefore the clause regarding make available in the DTAA will not help the assesse in any way, from the liability of deducting TDS on Transmission and Uplinking charges

The decision of Hon'ble ITAT Delhi in the case of PANM international system is also not applicable because the payment of transmission and uplinking charges has now been covered under the definition of royalty through amendment in Finance Act,2012. In the case of PANM International system the issue examined by the Hon'ble ITAT was regarding making technical knowledge available for the TV Channels. Where in the case under consideration the uplinking and transmission charges are being taken as royalty as defined u/s 9(1)(vi).

The above definition clearly indicates that transmission and uplinking charges are covered under the definition or royalty (process) and it has been categorically introduce by the finance 2012 that process includes

and shall be deemed to have always included transmission by satellite (including up-linking , amplification, conversion for down-linkiong of any signal). Since the transmission and uplinking charges are covered under the definition of royalty as define under the provision of section 9 therefore any payment made in respect of royalty to a person who is not resident in India ; will also be a income deemed or accrue or arising in India. As the expense of transmission and uplinking charges of Rs.7,81,23,855/- to M/s Intelsat corporation is a deemed income which has arisen in India therefore, the assesse was liable to deduct TDS on this payment, under the provision of section 195 therefore, this payment of transmission and uplinking charges to M/s Intelsat Corporation is not allowable under the provisions of section 4 (a)(i). I am satisfied that the assesse has furnished inaccurate particulars of its income and has concealed its correct income on this issue, therefore, penalty proceedings u/s 271 (1)(C) of I.Tax Act have been separately been initiated."

58. Aggrieved by the draft order of the ld Assessing Officer assessee preferred objection before the ld DRP who vide para No. 7 of its direction directed the AO to delete the above disallowance as under:-

> 6. *Disallowance of transmission and up-linking charges u/s 40(a)(i) amounting to Rs. 7.81.23.855/-*
>
> *Assessee had paid the above amount to Intelsat Corporation, a company incorporated in USA for using transponder capacity, to make the signals available for the cable operators. The AO has disallowed this sum because no TDS was made. Assessee has contended that in the case of Intelsat Corporation, the Hon'ble High Court of Delhi vide order dated* 28.09.2012 *has held that no tax was payable by the company on account of the revenue of transmission and up-linking facilities. In view of this, there is no question of TDS on the amounts payable to Intelsat Corporation.*

DRP has considered the argument of the assessee. In view of the binding decision coming from jurisdiction Delhi High Court, the contention of the assessee is accepted. The AO is directed to drop the proposed disallowance."

59. Before us the ld DR relied upon the draft assessment order whereas the ld AR vehemently submitted that the issue is squarely covered by the decision of Hon'ble Delhi High Court in case of Intelsat Corporation dated 28.09.2012. He therefore stated that there is no error in the order of the ld DRP.

60. We have carefully considered the rival contentions and also perused the facts of the case as well as the decision of the Hon'ble Delhi High Court. We are convinced with the argument of the ld AR that the issue is squarely covered by the decision of Hon'ble jurisdictional high court. The ld DR could not controvert that how this issue is not squarely covered in favour of the assessee and he also could not show us any other judicial precedent so as to persuade us to disagree with the views of the ld DRP. Further merely because the revenue has filed an SLP before the hon'ble Supreme Court against the decision of Delhi High Court cannot be a reason for sustaining the disallowance. In view of this we do not find any infirmity in the direction of the ld DRP in directing the ld Assessing Officer to delete the disallowance transmission and up linking charges paid to Intelsat Corporation USA of Rs. 78123855/- In the result the ground No. 2 of the appeal of the Revenue is dismissed.

61. Ground No. 3 of the appeal of the Revenue is against direction of the ld DRP to delete the disallowance of Rs. 8245612/- on account of software expenses. During the year the assessee has incurred expenditure of Rs.32435619/- on software expenses and claimed the same as revenue expenditure. The ld Assessing Officer was of the view that it is capital in nature and therefore depreciation @60% thereon is allowable and not the whole expenditure. After considering the submission of the assessee ld Assessing Officer held that computer software expenses to the extent of Rs. 20614030/- shown by the assessee is disallowable as it is capital expenditure. Therefore he allow depreciation @60% on Rs. 20614030/- amounting to Rs. 12368618/- and thus disallowed a sum of Rs. 8245612/-. The Assessing Officer was

of the view that assessee has purchased accounting software and its upgradation and also on software such as google earth, pro Microsoft server calls are purchased which gives the assessee an advantage of enduring nature. The assessee aggrieved with the order of the ld Assessing Officer preferred objection before the ld DRP who directed the ld Assessing Officer delete the above disallowance vide para No. 8 of its order as under:-

"8. Disallowance of software expenses amounting to Rs. 82,45,612/-

Theassessee regularly purchases softwares which are used for its programming purposes. TheAO has treated itas capital expenditure. This issue was litigated in the earlier years and Commissioner of Income Tax(Appeals) has made the following observation on the same issue for the AY 2007-08 which isreproduced below:

"From the submission of the appellant it is clear that the appellant has capitalized certain software purchases on its own. The 'up-gradation of software' and under the head 'other software' were treated as capital in nature by the AO and depreciation at the rate of 60% was allowed by him. However, on going through the details, it is noticed that these software need regular up-gradation or change as per the requirements of fast changing broadcasting industry. The life of these software are for a shorter period and therefore it cannot be said the same is providing enduring benefit to the appellant. For the AY 2006-07 also, my predecessor CIT(A)-XVI has allowed such expenditure as revenue expenditure in para 3.2 of the appeal order dated 30.09.2011 in appeal no. 228/08-09. The nature of software purchased and the business of the appellant for which the software so purchased were applied remains the same. In view of this, the expenditure under the head up-gradation of software and other software amounting to Rs. 2,07,009/- and 5,58,006/- respectively is held as allowable deduction during the year. AO is directed to delete the addition made in this regard."

Therefore, DRP is also of the view that these expenditures are revenue in nature and hence allowable. AO is directed not to make this addition in

assessment order. Objection 1 is treated as disposed off."

62. The ld DR relied upon the order of the ld Assessing Officer whereas the ld AR relied upon the orders of the ld DRP.

63. We have carefully considered the rival contentions. The assessee has been allowed the identical claim in earlier years by the ldCIT(A) and based on that decision the ld DRP was also of the view that the above expenditure incurred by the assessee is revenue in nature. The ld DR could not controvert that why the order of the ld DRP is erroneous. In view of this we do not find any infirmity in the direction issued by the ldDRP. In the result we confirm the direction of the DRP. In view of this ground No. 3 of the appeal of the revenue is dismissed.

64. **In the result ITA No. 2658/Del/2014 filed by the Revenue is dismissed.**

CO No. 233/Del/2014 in ITA No 2658/Del/2014 (By Assessee)

65. The ground No. 1 of the cross objection filed by the assessee the assessee has stated that the appeal filed by the assessee is barred by limitation and therefore could not be entertained and liable to be dismissed. However, during the course of hearing no arguments were advanced by the ld AR to show that the appeal of the Revenue is barred by limitation. In view of absence of any argument on the same we dismiss ground No. 1 of the CO of the assessee.

66. Ground No. 2, 3 and 4 of the CO of the assessee are against ground No. 1 to 3 of the appeal of the Revenue. As we have already dismissed all the above three grounds of the appeal of the revenue, therefore ground Nos. 2 to 4 of the cross objection are also deserves to be dismissed. In view of this we dismiss ground No. 2 to 4 of the cross objection filed by the assessee.

67. The ground No. 5 of the cross objection of the assessee was modified by the letter dated 11.05.2016 as under:-

"Modified Objection

Cross Objection No. 5

That in view of the decision of the Hon'ble Tribunal dated December 20, 2013 in appellant's own case on the allowability of ESOP expenditure for AY 2006-

07, the ld AO ought to have allowed the ESOP expenditure of Rs. 33835748/- in the year under consideration in accordance with the aforesaid decision as against Rs. 125271933/- claimed in AY 2006-07, Rs. 212841993/- claimed in AY 2007-08 and Rs. 178656690/- claimed in AY 2008-09 and further, ought to have excluded the reversal of ESOP expenditure offered to tax amounting to Rs. 8331150/- in the computation of income in the year under consideration."

68. In the above ground of appeal assessee is submitting that ESOP expenditure has already been allowed to it in AY 2006-07, AY 2008-09, however during this year assessee has credited a sum of Rs. 8331150/- which is required to be reversed for this year. Such reversal is also required to be excluded from the income chargeable to tax of the assessee. The ld AR submitted the same plea and ld DR stated that it may be dealt with in accordance with the law by the ld Assessing Officer, as requisite facts are not available at present.

69. We have carefully considered the rival contentions and perused the objection of the assessee. It is stated that ESOP expenditure has already been allowed in AY 2006-07 of Rs. 33835748/- whereas the assessee claimed it in three different years. The coordinate bench for AY 2006-07 has already dealt with this issue in favour of the assessee. With respect to the reversal of Rs. 8331150/- in the current year as stated by the ld AR it has been credited to the profit and loss account but has not been adjusted in the computation of total income. Therefore, according to him the sum of Rs. 8331150/- has already been charged to tax twice. Though the above ground was not raised before the ld DRP as well as before the ld AO, in the interest of justice we set aside this ground of cross objection back to the file of ld Assessing Officer to deal it in accordance with the law.

70. In the result cross objection No. 5 is allowed with above direction.

71. Now we come to the prayer of the assessee for the grant of permission to raise additional cross objection as under:-

1. The hearing in the aforesaid cross-objection No. 233/del/2014 filed by the assessee- appellant is fixed for hearing on 30th July 2015. Along with the

aforesaid cross-objection seven more connected matters have been fixed. In respect of all the eight matters, the assessee has filed six paper books as well as its detailed written submissions filed before the Hon'ble separately in order to expedite hearing in appeals.

2. *Out of the eight matters as aforesaid, four of the matters i.e. two appeals,(one by the assessee ITA No. 1212/Del/2014 and another by the revenue ITA No. 2658/D/2014* ***and*** *two cross objections, (one by the assessee Cross Objection No. 233/D/2014 and another by the revenue (Cross Objection No. 313/D/2014 pertains to the assessment year 2009-2010) In respect of the cross - objection No. 233/del/2014 the assessee cross –objector prays that, it be kindly permitted to raise following additional cross – objection which have been set out in para 8 here below and are such grounds of cross objections, which have been raised by the assessee-appellant on its appeal No. 1212/Del/2014. It is submitted that, such grounds of additional cross – objections have been raised only because in the C.O. by the revenue (which are highly belated) that the appeal filed by the assessee be held not maintainable as according to the A.O. an assessment has been made u/s 144 of the Act. The assessee-appellant though is disputing the contention of the revenue, yet as advised to it and by of abundant- precaution is praying by this application that, it be permitted to raise such grounds as additional grounds of cross-objection.*

3. *Remaining four matters pertains to two assessment year i.e. AY 2007-08 and 2008-09 which are tabulate hereunder:*

Assessment Year	Filed by	
	Assessee	Revenue
	ITA No.	ITA No.
2007-08	**2851/ DEL/2013**	**2752/DEL/2013**
2008-09	**3865/ DEL/2014**	**3996/DEL/2014**

4. *All the additions which have been raised as grounds of additional cross-objections were made in the assessment order in pursuant to the directions of Hon'ble DRP under section 144C(5) of the Act and as stated above, the assessee had already filed an appeal in ITA No. 1212/Del/2014, raising of all grounds in its ground of appeal.*

5. *The revenue however in the Cross Objection filed and arising from the appeal No. 1212/Del/2014, has since raised one objection that, the said appeal of the assesee is not maintainable on the ground that the assessment has been framed by the AOunder section 144 of the Act, the assessee in order to avoid, avoidable controversy is seeking permission to raise all such grounds as additional ground of cross objection in the appeal filed by the revenue i.e. ITA No. 2658/De/2014.*

6. *The assessee thus without prejudice to its contention that, appeal filed by the assesee bearing ITA No. 1212/Del/2014 is maintainable, respectfully prays that, it be permitted to raise such ground as additional grounds of cross – objection.*

Additional/ Modified objections:-

Cross objection No. 6:-

That the Learned Assistant Commissioner of Income Tax (Ld. AO), Circle 13(1), New Delhi has erred both on facts and, in law in determining income of the Appellant at Rs. 8,38,33,37,197 /- as against the returned loss of Rs. 64,83,91,422 in an order of assessment dated February 21, 2014 framed u/s 144 read with section 144C (13) of the Income-tax Act, 1961 (Act) and the assessment framed is apparently without jurisdiction as well as barred by limitation.

Cross objection No. 7:-

That the various findings recorded by the Ld. AO/Ld. DRP in the impugned orders are highly perverse and have been recorded with preconceived notions and without considering the submissions/evidences/material produced on

record and hence, such findings are vitiated and deserve to be rejected and the additions so made in the impugned assessment order deserve to be deleted.

Cross objection No. 8:-

That the Ld. AO/Ld. DRP has grossly erred in law and on facts of the instant case in making an addition of Rs. 642,54,22,000/- (as sum equivalent to $150 Million) by invoking section 69A of the Act purely on surmises, conjectures and suspicion, failing to appreciate that under section 69A of the Act, the burden lay upon him to establish that, Appellant had made an investment of which it is an owner and has not been recorded by it in its books of accounts.

1.4 That the Ld. AO/Ld.DRP has grossly erred in law and on facts of the instant case in making an addition of the aforesaid sum of Rs. 642,54,22,000/- by invoking section 69A of the Act even without appreciating that the aforesaid sum was not an unexplained sum of money as the said sum was a capital contribution made by M/s Universal Studios International BV against the subscription of share capital and had also duly been recorded in the books of accounts of the investee company i.e. NDTV Networks International Holdings BV(NNIH).

1.5 That the findings of the Ld. AO that the Appellant had not complied with the provisions of section 212 of Companies Act, as the prescribed documents were not attached with the audited accounts is highly arbitrary and not in accordance with the provisions of the Act and has been recorded by brushing aside the order of the Ministry of Corporate Affairs, which has exempted the assessee to attach the details of the subsidiary companies with its balance sheet.

1.6 That the Ld. AO/Ld. DRP erred in applying the provisions of section 69A of the Act by failing to appreciate that the transaction in question

does not pertain to the Appellant and the Appellant is not a party to the said transaction.

Cross objection No. 9:-

That the Ld. AO/Ld. DRP has grossly erred in law and on facts of the instant case in making an addition of Rs. 2,54,75,00,000/- (as sum equivalent to $50 Million) by invoking provisions of section 68 of the Act purely on extraneous or irrelevant consideration and in failing to appreciate that there was no credits in the books of Appellant and as such section 68 of the Act had no application.

9.2 That the Ld. AO/Ld DRP grossly erred in not appreciating that the borrower of the loan namely NDTV Networks Plc, UK (NNPLC) is a separate assessee which is liable to be taxed separately for its income and no addition is warranted of the aforesaid loan transaction in the total income of the Appellant under section 68 of the Act.

Cross objection No. 10:-

Without prejudice to Cross objection No. 9 above, that the Ld. DRP exceeded its jurisdiction while directing the Ld. AO to enhance the variations as a result of further enquiry in respect of the loan transaction between the NDTV Networks Plc. UK and NDTV Networks BV, as such a direction is outside the purview of powers of the Ld. DRP in view of section 144C(8) of the Act.

10.2 That the Ld. DRP failed to appreciate that being an appellate authority in view of the amendment in Finance Act 2012, the Ld. DRP ought not to have issued any directions for taxing any new source of income which is not emanating from the impugned draft assessment order.

Cross objection No. 11:-

That the Ld. DRP has grossly erred in law and on facts of the case in directing the Ld. AO to record his reasons before invoking Rule 8D of the Income Tax Rules (Rules), 1962, without appreciating that the provisions of section 14A of the Act are not applicable to the facts of the instant case.

11.2 That the Ld. AO erred in making an addition of Rs. 78,40,990 by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules by rejecting the claim of the Appellant that it has not incurred any expenditure in respect of the investments from which the earnings are exempt under the Act.

Cross objection No. 12:-

That on facts of the case and in law, the Ld. TPO/AO has erred in not discharging their statutory onus to establish that any of the conditions specified in clause (a) to (d) of Section 92C (3) of the Act have been satisfied before disregarding the arm's length price determined by the Appellant and proceeding to determine the arm's length price themselves.

Cross objection No. 13:-

That Ld. AO erred in enhancing the ALP by Rs. 74,63,229/- in respect of the international transaction pertaining to provision of business support services ('BSS') to its associated enterprises (AE) by arbitrarily rejecting the comparables adopted by the Appellant and by selecting the comparables which were not comparables on the basis of FAR (functions performed, assets employed and risks assumed).

13.2 That the Ld. TPO erred in inadvertently considering the amount of price received for the impugned international transaction (BSS) as Rs 7,46,87,177 instead of Rs 7,52,77,881 while computing the adjustment thereby, resulting in incorrect computation of the adjustment.

Cross objection No. 14:-

That the Ld. AO/Ld. TPO has grossly erred in making an addition of Rs. 4,35,02,400/- in respect of the alleged international transaction of provision of Corporate Guarantee on the ground that the Appellant should have been compensated for providing such alleged guarantee.

14.3 That the Ld. AO/Ld. TPO failed to appreciate that the Appellant did not provide any corporate guarantee during the year but merely gave an undertaking to provide guarantee for and on behalf of its AE and had not actually provided any guarantee.

14.4 That the Ld. AO/Ld. TPO erred in computing the arm's length guarantee commission rate erroneously based on flawed methodology and adjustments (without prejudice to the Appellant's contention that it had not provided any guarantee).

Cross objection No. 15:-

That on the facts of the case and in law, the Ld. AO has erred in levying interest under 234B/D of the Act while completely disregarding the provisions of the Act and the judicial precedence in this regard.

Cross objection No. 16:-

That on the facts of the case and in law, the Ld. AO has erred in withdrawing interest under section 244A of the Act while completely disregarding the provisions of the Act.

Cross objection No. 17:-

That on the facts of the case and in law, the Ld. AO has grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The above grounds of appeal are mutually exclusive and without prejudice to each other.

7. *The assessee cross objection further submits that, each of the aforesaid cross- objection has already been raised by the assessee in its appeal and thus none of the ground of cross-objection, can either be stated to be not arising from the impugned assessment order or are fresh issues which would warrant any investigation of any fresh fact and that it had filed an appeal before the expiry of period of limitation and thus here can be no justifiable basis to contend that, a right had vested in the revenue in respect of such additions as the assessee had not filed an appeal within the statutory period of limitation."*

72. The ld AR vehemently submitted that assessee has out of the sheer apprehension has raised this additional grounds of cross objections because of the reason that revenue is contending that the appeal filed by the assessee is not maintainable as the assessment has been framed u/s 144 of the Act. Though the assessee seriously disputed it and maintains that contention of the Revenue is incorrect but still out of abundant caution has raised additional grounds of cross objection in this appeal. It was further submitted that it could not be raised earlier as they were already raised in the appeal of the assessee in ITA No. 1212/Del/2014 and the contention of the revenue about the non-maintainability of the appeal of the assessee has arisen during the course of hearing of this appeal. He otherwise submitted that all the grounds raised by the assessee are legal grounds and facts are already available on record, as the coordinate bench has heard them completely in the appeal of the assessee. Therefore, no fresh facts are required to be examined. He therefore, pleaded that these additional grounds of cross objection are required to be dealt with on merits and hence, may be admitted.

73. The ld Standing Counsel for the Revenue vehemently objected about the admission of the additional grounds stating that it amounts to a back door entry to the assessee

when revenue is contending that original appeal filed by the assessee is not maintainable. He, therefore, vehemently objected the prayer of the additional cross objection of the assessee.

74. We have carefully considered the rival contentions and noted the additional grounds of the cross objection raised by the assessee. In fact all these additional grounds of CO are with respect to the original grounds taken by the assessee in its appeal. At the time of hearing of the appeal of the assessee we have heard all these grounds of appeal on merits for the sake of completeness because if the appeal of the assessee survives on the issue of maintainability then the appeal would have been required to be heard once again which would have caused great hardship to both the parties. Therefore, we have heard the appeal of the assessee on all the grounds including the ground of maintainability. While deciding the appeal of the assessee we have held that as the order passed by the ld Assessing Officer is u/s 144 of the Income Tax Act against which the appeal of the assessee is not maintainable. The assessee has raised the similar grounds now in this cross objection. It is undisputed that all these issues has arisen out of the order of the ld Dispute Resolution Panel and ld Assessing Officer. The assessee has also given reasons that why it could not be raised earlier. Further, the grounds raised could not be raised by the assessee for bonafide reason. In view of this in the interest of justice we admit additional grounds of cross objection raised by the assessee and deal with them on merit.

75. The ground No. 6 and 7 of the CO are against the challenge to the assessment framed as well as general averments against the finding recorded by the ld AO as well as the ld DRP. On these grounds no specific arguments were raised by the assessee therefore, we dismiss both of them clarifying that the order is without jurisdiction and barred by limitation has already been considered by us while deciding the appeal of the assessee. In no uncertain terms we have held that ld Assessing Officer is correct in passing order u/s 144 of the Act after invoking provisions of section 145(3) coupled with noncompliance by the assessee to various notices issued u/s 142(1) of the Act. In view of this ground Nos 6 and 7 of the CO are dismissed.

76. Now we come to the ground No. 8 of the cross objection wherein the assessee challenges an addition of Rs. 642,54,22,000/- which is equivalent 150 million US$

made by the ld AO invoking the provisions of section 69A of the Income Tax Act. The main issue with respect to the addition is that assessee has a subsidiary namely NDTV Networks International Holdings BV (investee Company) (herein after referred to as 'NNIH') formed in Netherland on 10.04.2008 has received a sum of Rs. 642,54,22,000/- on account of subscription of its shares by one company namely M/s. Universal Studios International BV (Investor Company)(hereinafter referred to as 'USBV") which was incorporated with limited liability having its corporate seat in Amsterdam. Investor company is also wholly owned subsidiary of CA Holding CV legally seated in Amsterdam, Netherland. The issued share capital of the investor company is comprising of 2680 shares of Euro 453.78 each held by NBCU Dutch holding (Bermuda) Ltd acting in its capacity as General Managing Partner of CA Holding CV, Bermuda. The ld Assessing Officer was of the view that the assessee has not discharged its primary onus in terms of section 68, 69A and other applicable provisions. Furthermore, there was no independent valuation for determining the value of the shares of the subsidiaries of the assessee was carried out and it was the claim of the assessee that the subscription price was arrived at on the basis of negotiation between the parties based on proposed potential and business forecast and projections. Therefore, ld Assessing Officer was of the view that the money received by the assessee through its subsidiary on account of this investment by other company is not as per the fair value of the shares and vide agreement dated 23.05.2008 of which assessee is a party therefore, the above transaction is covered by the provisions of section 69A of the Income Tax Act. The ld AO further held that assessee submitted only at the fag end of the assessment proceedings that the sum was received by its subsidiary deliberately so as to avoid further scrutiny with regard to identity and creditworthiness of the sale subscriber and genuineness of the transaction. The ld Assessing Officer was further of the opinion that the transaction of the share capital is more doubtful in view of the admitted fact by the assessee that the share issue price are not supported by any valuation report. Therefore, he made an addition of Rs. 642,54,22,000/- to the total income of the assessee. Assessee being aggrieved with the order of the ld Assessing Officer preferred objection before the ld Dispute Resolution Panel. The ld Dispute Resolution Panel vide para No. 5 of the direction held as under:-

"Unexplained money added u/s 69A of the IT Act

Shares of a subsidiary company of the assessee located abroad was sold for Rs. 642.5 crores and bought back within a short span for Rs. 58 crores is the focal point of this controversy.

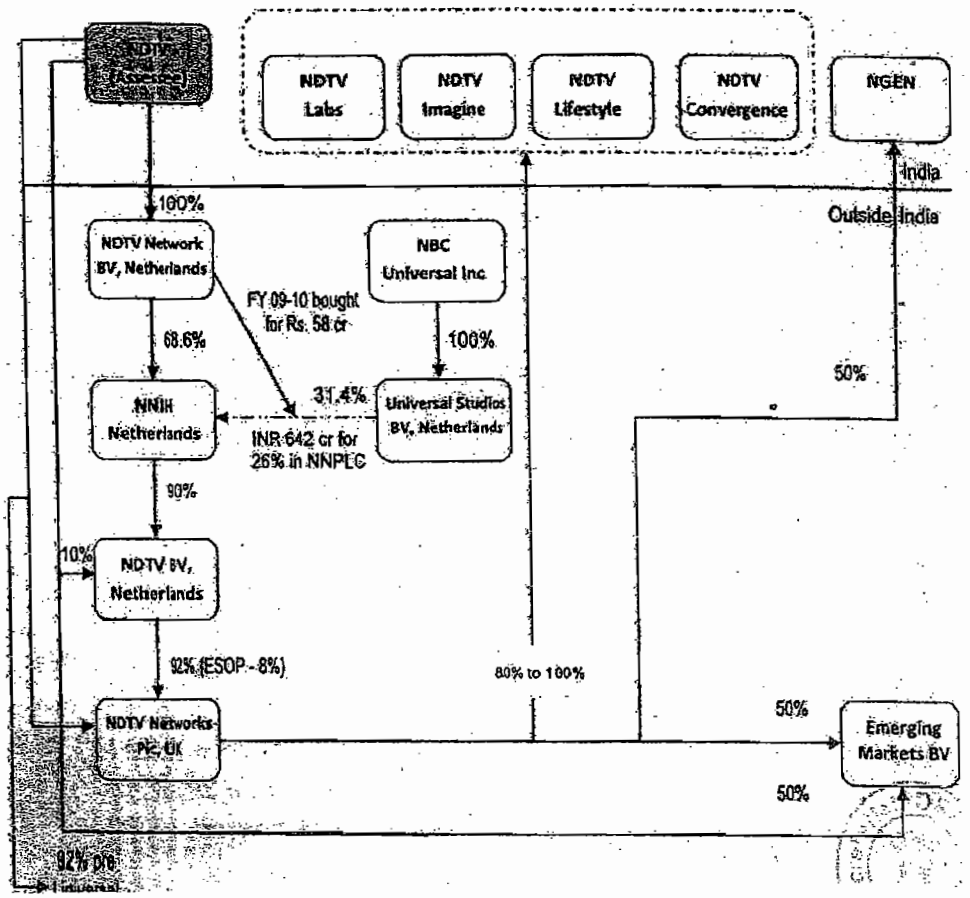
The AO has mentioned that she was in receipt of information from various sources including Hon'ble Members of Parliament and Ld. Members of Bar. Further, the Investigation Wing of the Income Tax Department had also issued summons u/s 131 to the assessee to obtain information. During the course of the draft assessment proceedings, AO has ***issued*** *enquiry letters calling for the details of the information about the assessee and its* ***subsidiary*** *companies. Assessee had filed additional evidence before the DRP. The same*

was sent to the AO for examination and report. DRP had also sent the material received from certain sources during the course of the DRP hearing to the AO for remand report.

Complex structure of subsidiaries and transactions

5.1 The assessee is the parent company of its subsidiaries located in different parts of the world. The share holding pattern of the group entities relevant to the present proceedings was submitted by the assessee during the course of the hearing which is placed in the diagram below. Assessee holds 100% shares in NDTV Networks BV, Netherlands. Further, the step down subsidiary of NDTV Networks BV, Netherlands holds 68% of shares of NNIH Netherlands. The next step down subsidiary NDTV BV, Netherlands has 90% share holding from NNIH Netherlands and 10% share holding from NDTV India Ltd. (i.e. assessee). NDTV BV, Netherlands holds 92% of shares of NDTV Networks Pic, UK and remaining 8% of its share is held under ESOP scheme. This UK company i.e. NDTV Networks Pic, UK has 80%- 100% shares in four different media entities located in India, namely,

NDTV Labs, NDTV Imagine, NDTV Lifestyle and NDTV Convergence. Further, NDTV India Ltd. and NDTV Networks Pic, UK have floated a company called Emerging Markets BV, a Netherlands based company in which they have 50% shares each. NGEN is an entity in India which has 50% equity coming from NDTV Networks Pic, UK and Emerging Markets BV, Netherlands. This complex share holding structure is simplified through the diagram.



*Remarks : Prior to subscription of shares of NNIH by Universal Studios, indirect shareholding of NDTV in NDTV Networks Pic was 92% {(100% * 100% * 90% * 92%) + (10% * 92%)}. Subsequently, post acquisition of 31.4% stake in NNIH by Universal Studios BV, the indirect shareholding of NDTV in NDTV Networks Pic was 66% [(100% * 68.6% * 90% * 92%) + (10% * 92%)]*

5.2 NBC Universal Inc. is an incorporated entity in United States of America. This company has a 100% subsidiary called Universal Studios BV, Netherlands. The transaction which is the subject matter of this dispute is related to the acquisition of shares of NDTV Network Plc., UK (NNPLc) by Universal Studios BV, Netherlands indirectly by subscribing to the shares of NNIH Netherlands. This transaction took place during the course of the Financial Year i.e. 2008-09 which is relevant to the present assessment year i.e. 2009-10. The shares were sold for INR 642 croresand were bought back by NDTV Networks BV, Netherlands for INR 58 crores in the next financial year. The starting point of the enquiry and all other subsequent proceedings are revolving around this transaction.

Non disclosure of vital information

5.3 *According to AO, as per Section 212 of the Companies Act, 1956 as well as the Indian Accounting Standards 7, 12, 18, 19, 27, 28, 33 and 107, the transactions of the subsidiaries were to be consolidated and disclosed in the audited accounts of the assessee since it is the parent company of all the Netherland and UK based companies. On being asked, the assessee produced a conditional order dated 03.07.2009 of the Ministry of Corporate Affairs which exempted from attaching the details of subsidiaries with its balance sheet and other accounts in terms of provision of sub-section 8 of Section 212 of the Companies Act, 1956. The AO has pointed out that even this order of the Ministry of Corporate Affairs was not fully complied with. The assessee is a listed company. The disclosure of accounts prescribed by Security and Exchange Board of India (SEBI) was not adhered to in spite of the fact that the assessee has committed so to do under listing agreement with Stock Exchange. The order of the Ministry of Corporate Affairs was issued on 03.07.2009 whereas the audited accounts of the assessee was finalised much before that. In any case, this order exempting the assessee was not retrospectively operative. Therefore, the lapses or omissions of not making full and true disclosure in the audited accounts of the assessee were not condoned by the exemption order of Ministry of Corporate Affairs.*

5.4 The AO had asked for details about these transactions through her letters during the course of the assessment proceedings. The AO has mentioned that the requisite information was not produced before ADIT Investigation, Unit-II(2), New Delhi nor produced before her during the course of assessment proceedings. Therefore, the AO has come to the following conclusion (which is narrated on Page 46 of the draft assessment order):

"As the material information which was required under the law to be attached with the balance sheet of the assessee company was neither attached nor being provided pursuant to summons issued by the Department in December 2010 nor in response to notice issued inFebruary 2013, a reasonable belief was formed that the accounts of the assessee are not maintained and prepared in accordance with the Accounting Standards issued by the Central Government and were therefore incomplete and incorrect based upon which the true and correct income of the assessee liable to tax cannot be determined."

5.5 A show cause notice was issued by the AO to the assessee u/s 145(3) of the IT Act r/w relevant sections of the Companies Act by stating 'why the books of accounts should not be rejected' in accordance with Section 144 of the IT Act and why the assessment should not be concluded under that section. Further, the AO also contended that the assessee has also failed to comply with the requirements of Income Tax Act as well. On Page 46 to 48 of the draft assessment order, the AO has given reasons for rejection of the books of accounts of the assessee and why best judgment assessment u/s 144 of the IT Act is warranted in this case. The AO issued show cause notice to the assessee before resorting to Section 144 of the IT Act.

5.6 The AO examined the selling of shares of NDTV Networks Pic, UK and buying back of the same within a short span. Neither the buyer nor the seller had done any valuation of the shares from an independent valuer. The price of the shares was claimed to have been negotiated by the buyer and the

seller based on the proposed business potential and business forecast and projections. The AO has come to the following conclusion which is reproduced for the sake of convenience:

"In view of the above, it is held that assessee has failed to discharged its primary onus cast upon it and therefore the entire amount received by the assessee through its subsidiaries and through an agreement dated 23.05.2008 to which assessee is equally a party is covered by the provisions of section 69A of the IT Act, 1961.

The said amount of Rs. 6,42,54,22,000/- was received by M/s NDTV Networks International Holdings BV (a subsidiary of the assessee company) on account of subscription to its shares by M/s Universal Studios International BV. As per requirements of law and accounting standards discussed above, the said sum should have been disclosed by the assessee. Whereas, the assessee has not disclosed the true nature of transactions in its books of accounts /financial statements . Moreover, it was only on 30/3/2013 i.e at the fag end of the limitation period that the assessee stated that this amount was received by its subsidiary company on account of subscription to shares by a foreign company. It was done deliberately by the assessee so as to avoid further scrutiny regarding the identity and creditworthiness of the share subscriber and genuineness of the transactions.

The genuineness of this transaction shown as receipt of share capital becomes all the more doubtful In view of the fact the assessee has itself admitted that no independent valuation report wasobtained for determining the value of shares of its subsidiary company and that the subscription price was anegotiated price arrived at between the parties. Subscription to the shores of the subsidiary company of the assessee without determining any valuation forthe same and receiving such funds by a foreign party raises suspicion regarding the true nature of the transactions.

It is a well settled law that it is the onus of the assessee to prove the identity and creditworthiness of the share subscribers and genuineness of the transactions. Whereas in the instant case, the assessee could not discharge the onus cast upon it to satisfactorily prove the nature and source of the funds received by it.

In view of the above, the assessee is found to be the owner of the unexplained money for which it could not furnish any satisfactory explanation.

Therefore, the above said sum of Rs. 6,42,54,22,000/- is hereby held to be the income of the assessee from undisclosed sources and the same is hereby added to the income of the assessee."

5.7 *The AO in his remand report dated 13.12.2013 has illuminated the transaction involved in this dispute.*

1) *Neither NNIH nor NNPLC were having any business activities. NNIH was a holding company and NNPLC was incorporated to promote the interest of NNIH and other group companies.*
2) *NNPLC did not have any business activity nor any fixed assets and there was no rent paid. Apart from incorporation in the United Kingdom (UK), NNPLC had no presence in UK.*
3) *The address of NNPLC in UK was that of a company secretary dealing with its tax matters.*
4) *Directors of NNPLC were Indian and the ultimate owner of this company is assessee itself. The step down subsidiaries of the assessee and the share holding structure make it very clear that the assessee is in control of all its subsidiaries. (See the diagram above)*
5) *The authorized share capital of NNPLC was only about Rs. 46 lakhs.*
6) *NNPLC had declared a loss of Rs. 8.67 crores for the year ending 31.03.2009.*
7) *The shares of NNIH was not valued by an independent valuer at the time of transaction.*
8) *The value of the share of NNIH at the relevant time of transaction was $ 1 per*

share i.e. around Rs. 40 to Rs. 50 approximately. These shares were sold/ subscribed at the rate of Rs. 7015.05 per share to Universal Studios BV Netherland.

9) *These very shares were bought back by one of the step up subsidiaries of NNIH (the step down subsidiary of the assessee) (see the diagram above) namely, NDTV Networks BV, Netherlands for Rs. 634.17 per share in the financial year 2009-10.*

10) *The effect of the above transaction was money introduced in the books of subsidiaries of the assessee and booking of loss in the hand of Universal Studios BVNetherland. By selling the shares in the very next year NBC Universal Inc. has booked a loss of Rs. 584.46 crores and assessee has introduced Rs. 642.54 crores.*

11) *As the assessee is the ultimate parent company having controlling stakes in all its subsidiaries, it is the assessee's dictates which mattered, this is also evidenced by the share subscription agreement dated 23.05.2008.*

12) *The AO in his remand report in Para 2.3.11.1 has concluded by stating that "This subscription of shares of the assessee's group company, having face value of Rs. 40-45 per share (equivalent to one $ in INR) by NBCU @ Rs. 7,015.05 per share and its subsequent sale back to the assessee's another group company @ Rs. 634.17 per share, is therefore a sham transaction and it is a fit case, which requires the lifting of the corporate veil."*

13) *The AO stated that the arrangement had neither commercial purpose nor any economic substance but was only for tax evasion. The AO concluded that it is sham, colourable or bogus transaction with the pretence of corporate and commercial trading.*

5.8 *Based on the above material, the AO concluded that the money so received by the assessee is received through a sham transaction. The corporate veil should be lifted. The assessee is in the control of money through its controlling stakes in the subsidiaries. The real ownership of the money was with the assessee. The money is not recorded in the books of the assessee. Therefore, this money should be added u/s 69A of the IT Act in the*

hands of the assessee.

Assessee'sdefence

5.9 *The assessee has contended through its submissions and oral arguments before the DRP that the transactions are genuine and the parties to the transactions are real and their creditworthiness is beyond doubt. The AO cannot make an addition on mere suspicion. The conditions u/s 69A are not fulfilled to make any such addition. The detailed submissions of the assessee are summarized in the following paragraphs.*

1) India has a tax treaty with Netherlands. Netherlands is a well governed tax jurisdiction. The subsidiaries of the assessee are located in Netherlands for the purpose of business.

2) Universal Studios BV is a subsidiary of NBC Universal USA which is in turn owned by GE Corporation USA. GE Corporation is one of the world renowned corporations which has well established internal governance. It is a listed company in US. It has a huge and deep pocket to invest in ventures across the globe. This group has invested into the shares of NNIH Netherlands. The creditworthiness of this group who has bought/ invested into the shares of thesubsidiary company cannot be doubted.

3) The assessee also filed annual reports of NBC Universal for FY 2008 to 2010 filed before the SecuritiesExchange Commission USA. Further, a copy of the annual report of GE Corporation, copy ofbank account of NNIH in ING Bank Netherlands, copy of the auditedaccount of NNIH were produced before the AO to establish the genuineness of the transaction. The holding structure of the NBC Universal is public available document. The transaction was recorded in the books of all the concerned parties.

4) The transaction was through banking channels.

5) Notes to the accounts forming part of the audited accounts of the assessee for the FY 2008-09 in Schedule 21B clearly mentions about the transaction in item no. 20 regarding the share holders agreement between

NDTV group companies with NBC Universal Inc and its affiliate Universal Studios International BV for subscription of 26% of effective interest stake in NNPLC for an amount of USD 150 million. Further, the notes to accounts which is part of the audited account of the assessee in Schedule 21B(3) clearly mentions about the transaction in the year 2009-10 about the buyback of Universal Studios International BV's 26% indirect holding in NDTV Network Plc for a consideration of Rs. 58.8 crores: Assessee retained majority stake in NDTV Networks Plc.

6) *Notarized confirmation letter was filed before the DRP on 23.12.2013 wherein a confirmation letter of one Mr. IJ Broadband was filed about this transaction.*

7) *The negotiated price of shares was based on the future projections. The representative of the assessee explained that during the period when the transaction took place, the Indian economy was booming. The assessee, being in the creative field of television broadcasting, was in a position to 'sell the dream' to a prospective investor. However, 'the dream' went bust subsequently. Therefore, the investor sold back the investment to the assessee at a reduced price. This was a perfectly legal and normal investment from all angles. Investor takes huge risks and accordingly makes huge gains or huge losses. This is part of the business. The investor being a group company of GE had many such ventures succeeding or failing in a particular year. USD 150 million is not a big sum to a corporation which has turnover of billions of USDs in a year. Therefore, there is no need to suspect the transaction.*

8) *Ownership of the money was certainly not with NDTV India Ltd. i.e. assessee because this was with NNIH, Netherlands. Therefore, the first limb of Section 69A is not fulfilled. It was certainly not 'recordable' in the books of the assessee since this was recorded in the books of the subsidiary. India recognizes independent entity approach. Therefore, the subsidiary in the*

Netherland was an independent entity. In view of this, the assessee was not expected to record the transaction of its subsidiary in its books of accounts. The bank account of the subsidiary company was given to the AO. The source of money is from a well known group of companies in the US. The money has come through the banking channels. Assessee has made all efforts to explain the source of money to the best of its abilities. There is a full disclosure on the part of the assessee. Therefore, AO cannot make any addition only on the basis of suspicion. There is no evidence to back the theory of money laundering.

9) *Assessee relied on the following judgments to strengthen its claim apart from relying on Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Netherlands:*

a) *G.V. Films Ltd. vs. S. Priyadarshan and Anr. (C.S. No. 454 of 2005, O.A. Nos. 543 and 2302 of 2005 and W.P.M.P. No. 19093 of 2005 and W.P. No. 17576 of 2005)*

b) *Vodafone International Holdings B.V. vs. Union of India and Anr. (Civil Appeal No. 733 of 2012 (Arising out of S.L.P. (C) No. 26529 of 2010))*

c) *CIT vs. K.T.M.S. Mahamood (Tax Case No. 1117 of 1984)*

d) *Chuharmal vs. CIT, M.P. (Special Leave Petition (Civil) No. 1863 of 1986)*

Consideration of the DRP

5.10 *DRP has considered all the material available with it, the draft assessment order and the remand reports of the AO. Before proceeding further, it will be of use to put the entire controversy in global perspective. Organization for Economic Co-operation and Development (OECD) and G20 countries are running a project known as Base Erosion and Profit Shifting (BEPS). The website of OECD - http://www.oecd.org/ctp/beps.htm (accessed on 24.12.2013) has the following on this issue :*

"In an increasingly interconnected world, national tax laws have not kept pace with global corporations, fluid capital, and the digital economy, leaving gaps that can be exploited by companies who avoid taxation in their home countries by pushing activities abroad to low or no tax jurisdictions. This undermines the fairness and integrity of tax systems. The project, quickly known as BEPS (Base Erosion and Profit Shifting) is looking at whether the current rules allow for the allocation of taxable profits to locations different from those where the actual business activity takes place and if not, what could be done to change this.

At the request of G20 Finance Ministers, in July 2013 the OECD launched an Action PTan on Base Erosion and Profit Shifting (BEPS), identifying 15 specific actions needed in order to equip governments with the domestic and international instruments to address this challenge. The plan recognises the importance of addressing the borderless digital economy, and will develop a new set of standards to prevent double non-taxation. This will require closer international co-operation, greater transparency, data and reporting requirements. To ensure that the actions can be implemented quickly, a multilateral instrument to amend bilateral tax treaties will be developed.

This Action Plan was fully endorsed by the G20 Finance Ministers and Central Bank Governors at their July 2013 meeting in Moscow as well as the G20 heads of state at their meetingIn Saint-Petersburg in September 2013. The actions outlined in the plan are aimed to be deliveredwithin the coming 18 to 24 months. For the first time ever in tax matters, non-OECD/G20countries are involved on an equal footing.

Taxation is at the core of countries' sovereignty, but in recent years, multinational companies have avoided taxation in their home countries by pushing activities abroad to low or no tax jurisdictions. The G20 asked OECD to address this growing problem by creating this action plan to address base

erosion and profit shifting. This plan identifies a series of domestic and international actions to address the problem and sets timelines for the implementation."

The introduction to Action Plan On Base Erosion And Profit Shifting document has the following statement which is pertinent in this case which is reproduced for the ease of reference.

"These developments have opened up opportunities for MNEs to greatly minimize their tax burden. This has led to a tense situation in which citizens have become more sensitive to tax fairness issues. It has become a critical issue for all parties:

- *Governments are harmed. Many governments have to cope with less revenue and a higher cost to ensure compliance. Moreover, Base Erosion and Profit Shifting (BEPS) undermines the integrity of the tax system, as the public, the media and some taxpayers deem reported low corporate taxes to be unfair. In developing countries, the lack of tax revenue leads to critical under-funding of public investment that could help promote economic growth. Overall resource allocation, affected by tax-motivated behavior, is not optimal.*

- *Individual tax pavers are harmed. When tax rules permit businesses to reduce their tax burden by shifting their income away from jurisdictions where income producing activities are conducted, other taxpayers in that jurisdiction bear a greater share of the burden.*

- *Businesses are harmed. MNEs may face significant reputational risk if their effective tax rate is viewed as being too low. At the same time, different businesses may assess such risk differently, and failing to take advantage of legal opportunities to reduce an enterprise's tax burden can put it at a competitive disadvantage. Similarly, corporations that operate only in domestic markets, including family-owned businesses or new*

innovative companies, have difficulty competing with MNEs that have the ability to shift their profits across borders to avoid or reduce tax. Fair competition is harmed by the distortions induced by BEPS."

India is a signatory and part of G20 Project.

5.11 *The above references are important and pertinent in this case. Two conglomerates are involved in this transaction. One is the assessee- NDTV India Ltd. and its subsidiaries. The second is GE Group of Companies. As is well known, NDTV has its operation mainly in India and the proposed venture of NDTV Labs etc. (please see the diagram above) were also located in India. It is not possible to fathom out the intention of the assessee or the businessrationale to float the companies in Netherlands to indulge in such complex and layered transactions. This is the precise kind of holding structures which are the subject matter of BEPS project.*

5.12 *The decision of the Constitutional Bench of the Hon'ble Supreme Court in the case of McDowell and Co. Ltd. v. CTO (1985) 3 SCC 230 is squarely applicable to this case. Further, even the judgment in the case of Vodafone International Holdings BV vs. Union of India (345 ITR 1) has held as follows:*

"67. Similarly, if an actual controlling Non-Resident Enterprise (NRE) makes anindirect transfer through "abuse of organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of Non-Resident Holding Company, re-characterize the equity transfer according to its economic substance and impose the tax on the actual controlling Non-Resident Enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of

substance over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense).

68. The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members. It is the decision of the House of Lords in Salomon v. Salomon (1897) A.C. 22 that opened the door to the formation of a corporate group. If a "one man" corporation could be incorporated, then it would follow that one corporation could be a subsidiary of another. This legal principle is the basis of Holding Structures. It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e., without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. However, taxation of such Holding Structures very often gives rise to issues such as double taxation, tax deferrals and tax avoidance. In this case, we are concerned with the concept of GAAR. In this case, we are not concerned with treatyshopping but with the anti-avoidance rules. The concept of GAAR is not new to India since India already has a judicial anti-avoidance rule, like some other jurisdictions. Lack of clarity and absenceof appropriate provisions in the statute and/or in the treaty regarding the circumstancesIn which judicial anti-avoidance rules would apply has generated litigation inIndia. HoldingStructures are recognized in corporate as well as tax laws. Special PurposeVehicles (SPVs) and Holding Companies have a place in legal structures in India, be it in company law, takeover code under SEBI or even under the income tax law. When it comes

to taxation of a Holding Structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a Holding Structure an entity which has no commercial/ business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such inter-positioning of that entity. However, this has to be done at the threshold. In this connection, we may reiterate the "look at" principle enunciated in Ramsay (supra) in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature [See Craven v. White (supra) which further observed that genuine strategic tax planning has not been abandoned by any decision of the English Courts till date]. Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/ Courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the Holding Structure exists: the period of business operations in India: the generation of taxable revenues in India: the timing of the exit: the continuity of business on such exit."

(Emphasis added)

5.13 *Therefore, DRP is of the considered view that the corporate veil needs to be pierced in this case as has rightly been done by the AO. The action of the AO to that extent is upheld.*

5.14 *The principles laid down in Vodafone case (as underlined above) can be applied to this case. The AO has filed the remand report,the most relevant part of which is quoted below:*

"2.3.10.1 I have gone through the additional evidence filed by the assessee vide its applications dated 29.04.2013 and 24.10.2013. The assessee has filed in the following documents in the shape of additional evidence vide its letter dated 29.04.2013 :-

(i) Copy of Share Subscription Agreement dated 23.05.2008 and Share Certificate.
(ii) Copies of Annual Reports of NBCU for FYs 2008 to 2010 filed before Securities Exchange Commission, US.
(iii) Copy of Annual Report of NDTVfor FY 2009-10.
(iv) Copy of Annual Report ofGE.
(v) Copy of Form 10K filed by the Comcast Corporation before US Securities and Exchange Commission.
(vi) Copy of bank account of NNIH in ING Bank, Netherlands.
(vii) Copy of Audited Accounts of NNIH.

2.3.10.2 Further, vide letter dated 24.10.2013, the assessee has filed copies of submissions claimed to have been filed during the assessment proceedings, copy of Ld. CIT(A)'s order for AY 2007-08 in the case and copies of some notices issued by the AO.

2.3.10.3 No confirmation from NBCU regarding the transaction has been filed at

all. Had it been a normal business transaction, it would be necessary for the assessee to file confirmation from NBCU, which would be subject to verification by the AO, by calling upon the assessee to file an affidavit from NBCU or to produce the authorized representative of NBCU to confirm the assertions. However, no such confirmation has been filed by the assessee and therefore, it cannot be said that the onus has been discharged by the assessee even in the context of section 68 or section 69A of the Act, as sought to be justified by the assessee in its letter dated 29.11.2013.

2.3.10.4 However, the fact remains that the transaction of subscription of shares of NNIH by NBCU is not a normal transaction and lacks commercial purpose or economic substance in view of the facts as discussed in para 2.3.9 above. Hence, not only the assessee has failed to discharge its onus u/s 68 / 69A as claimed by the assessee, but also in the present case, the facts of the case cast a serious shadow on the genuineness of the impugned transaction, which has neither any commercial purpose nor any economic substance.

2.3.11 The assessee has also contended that regarding the subscription rate, share premium forms part of share capital and is to be decided by the Board of Directors. It is contended that there is no bar in law regarding the amount of premium that a company can charge. However,it remains to be a part of the share capital only. It is further contended that the channels of NDTV had a huge potential for growth and hence, it formed direct and indirect subsidiaries abroad to attract foreign investment, one of which is NNPLC. It is also contended by theassessee that the investments of NNPLC in various companies of entertainment verticalsalready existed much before the share subscription and all those invested companies were functional. On this basis, it was claimed that the amount of share premium charged was genuine.

2.3.11.1 *On this issue, it is observed that the factual matrix of the case reveals that 915948 shares of NNIH having face value of Rs. 50 approx, per share were purported to be subscribed by NBCU @ Rs. 7015.05 per share. Although it is correct that in appropriate circumstances, a company can always decide the amount to be charged as share premium and there is no bar in law, which prohibits the company from doing so, yet in the present case, mere assertion regarding the right to charge the desired share premium does not absolve the assessee, when it is established that there is no commercial purpose or economic substance to the transaction for NBCU. The explanation that NNPLC was already holding investments in running entertainment verticals is of no value, when it is observed that NNPLC was making losses and during the relevant year, NNPLC had made a loss of Rs. 8.34 crores app. and the book value of its share was in the negative. What economic substance or commercial purpose could be there for NBCU in subscribing shares of a company, whose shares have a face value of only Rs. 40-45 per share, which would result in acquiring 26% effective indirect stake in NNPLC, which is only an investment company, has no business of its own, having recently formed, does not have any proven performance record, whose shares have a negative book value and which was actually liquidated within 3 % years of the transaction,* ***(the duration of time during which the Holding Structure exists-*** *factor as in Vodafone case} Needless to say, any investment, not to say an investment of Rs. 642.54 crores, would be made only with a view to earn profits, because that is the only commercial purpose or the economic substance. It is also pertinent to reiterate that no independent valuation was ever carried out by the group companies or by the NBCU and the issue rate as well as the repurchase rate are claimed to be solely based on estimates and business projections. Hence, there could not be any commercial purpose or the economic substance for NBCU to invest Rs. 642.54 crores in NNIH and barely a year later, to sell the said equity back to NDTV group company for merely Rs. 58.08 crores.* ***(the timing of the exit-*** *factor as in Vodafone case}77)e only purpose apparent from the transaction is to create a loss of Rs. 584.46 crores for NBCU and to bring the taxable income of the assessee amounting to Rs. 642.54 crores, earned from undisclosed sources, into*

the books of accounts of the assessee through its subsidiaries. This subscription of shares, of the assessee's group company, having face value of Rs. 40-45 per share by NBCU @ Rs. 7,015.05 per share and its subsequent sale back to the assessee's another group company @ Rs. 634.17 per share, is therefore a sham transaction and it is a fit case, which requires the lifting of the corporate veil.

2.3.11.2 It is settled law that if an arrangement has no commercial purpose or economic substance and its purpose is merely to evade tax and to constitute sham, colourable or bogus transactions with the pretence of corporate and commercial trading, then in such circumstances, it is not only possible but necessary to lift the corporate veil. Once we lift the corporate veil in the context of the impugned transaction in the present case, the clear facts emerging regarding the transaction reveal that the transaction isengineered to result in claim of loss to NBCU and corresponding routing of the assessee's own undisclosed money through its subsidiary.

2.3.12 Regarding the NNPLC's accounts being signed in India and its directors being India, it was contended that this was factually incorrect. The accounts of NNPLC placed on record were stated to be those which were used for the purpose of consolidation of financial statements of NDTV group as a whole to comply with the provisions of the Companies Act. The assessee further claimed that this office had received information from HMRC, UK through the Treaty provisions, whereby the existence of NNPLC was confirmed.

2.3.12.1 On this issue, it is observed that the assessee was the ultimate parent company and the issue of shares and subsequent repurchase as above by its group companies was not without its directions. Rather, the assessee was itself a party to the agreement and thus, it was the assessee, which dictated terms as to the transaction. The position of the group company NNIH or NNPLC was no more than an agent of the assessee. Regarding the money amounting to Rs. 642.54 crores also, it was the assessee, which was in ultimate control of the money. As discussed above, the facts only necessitate lifting of corporate veil in the case, as the assessee cannot be permitted to hide behind the corporate veil

in a case of the impugned colourable device engineered to result in tax evasion.

2.3.13 Reliance in this regard was also placed by the assessee on the following case laws :-

(i) CIT vs Sofia Finance Ltd. 205 ITR 98
(ii) CIT vs Divine Leasing & Finance Ltd. 207 ITR 38
(iii) CIT vs Allahabad Bank Ltd. 73 ITR 745
(iv) Green Infra Ltd. Vs ITOITA No. 7762/Mum/2012

2.3.13.1 The cited cases do not help the assessee, because these are all different on facts. In none of the cited cases, there is any finding of buyback of shares at a nominal price or that of being a colorable device in place, resulting in tax evasion.

2.3.14 Lastly, the assessee also stated that the Hon'ble DRP's directions were limited to objections with respect to additions made under section 69A of the Act and were to examine the additional evidence filed by the assessee vide applications dated 29.04.2013 and 24.10.2013, but the queries raised by this office regarding the transaction of NNIFI were stated by the assessee as not arising from the said directions. The assessee also suggested that this office was changing its opinion to make fishing and roving enquiries to tax the aforesaid sum on one pretext or the other.

2.3.15 Regarding the above, it is observed that the assessee's contention is factually *Incorrect. It is Incorrect* to *suggest that the Hon'ble DRP's directions were limited to objections with respect to*additions made under section 69A of the Act and were to *examine the additional*evidence filed by the assessee vide applications dated 29.04.2013 and 24.10.2013. As stated in para 2.1.4 above, the Hon'ble DRP remanded the matter regarding proposed addition of Rs. 642,54,22,000/- u/s 69A with directions to ascertain the taxability of this sum for AY 2009-10. Hence, the assessee's contention, being based on a factual inaccuracy, is not acceptable.

2.3.15 In view of the above, it is submitted that it is necessary to lift the corporate veil in the case and to assess the transaction in view of its real purport.

2.3.17 In its further reply dated 10.12.2013, the assessee has reiterated its earlier contentions, which are repetitive in nature and have already been addressed in the earlier part of this report. The assessee has further discussed the ingredients of section 69A and has contended that these are not present in its case.

2.3.16.1 In respect of the assessee's above contentions, it is observed that upon lifting the corporate veil, which is both permissible and necessary in the case, it is clearly visible that the assessee is the ultimate parent company and the issue of shares and subsequent repurchase as above by your group companies was under the dictates of the assessee, which as per agreement also, was also a party to the transaction. Accordingly, the assessee was in ultimate control of the money. The real ownership of money was with the assessee. Hence, the addition u/s 69A is correctly made by the AO in the draft assessment order. The condition for applicability of section 69A is not that the money should be in actual possession or control of the assessee. Rather, the condition is that the assessee should be the owner of the money, which is fulfilled in the present case.

2.1.16.2 The second condition of section 69A is that the money is not recorded in the books of accounts of the assessee. In the present case, it is undisputed that the money is not recorded in the assessee's account books.

2.1.16.3 The third condition is that the explanation offered by the assessee about the nature and source of money is not satisfactory. As elaborately discussed in the above paras of this report, the explanation given by the assessee about the nature and source of this money is neither satisfactory nor tenable.

2.3.18 Conclusion

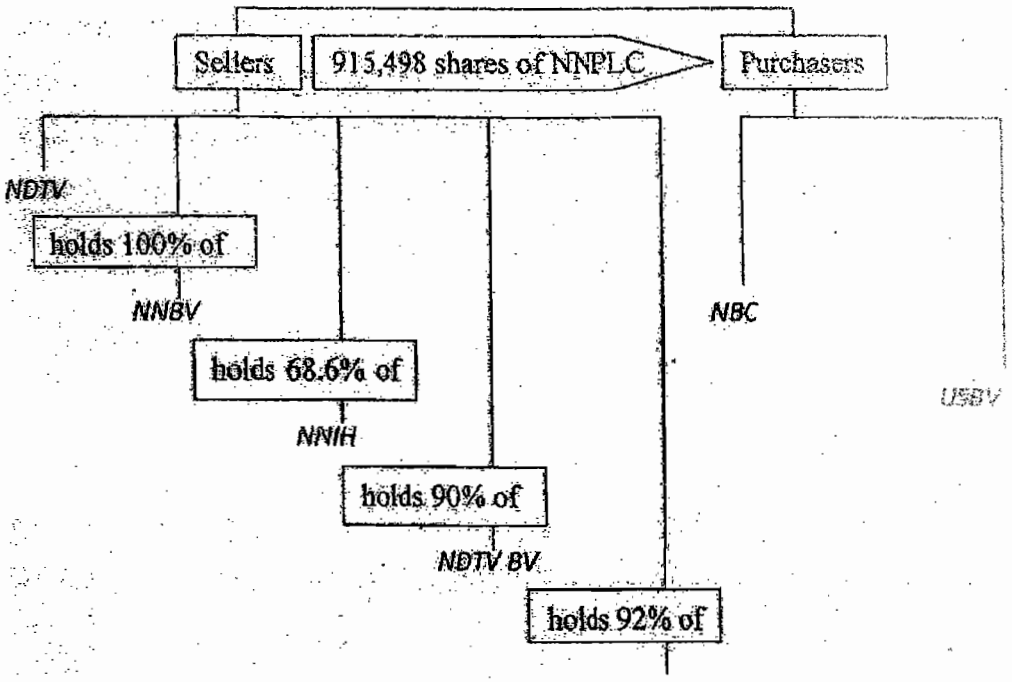
2.3.17.1 In view of the above facts and circumstances of the case, involving the round tripping involving such huge variations in the rates without any basis or valuation, the transaction lacks economic substance and commercial purpose and necessitates the piercing of corporate veil. It is therefore submitted that the amount of Rs. 642,54,22,000/- represents theassessee's own taxable income earned by it from undisclosed sources and the same is taxable u/s 69A.

2.3.19 Taxability of capital gains in respect of transaction involving receipt of Rs. 642,54,22,000/-

2.3.18.1 As discussed above, the receipt of Rs. 642,54,22,000/- represents the assessee's own taxable income earned by it from undisclosed sources and the same is taxable u/s 69A and the AO has correctly proposed the addition on this account in the draft assessment order. However, without prejudice to the above, it is submitted that the transaction also results in arising of income from capital gains in the hands of the assessee.

2.3.18.2 At the cost of repetition, it is stated that during the year under consideration, the assesse New Delhi Television Ltd. (NDTV), along with four of its subsidiaries namely NDTV BV, NDTV Networks BV (NNBV), NDTV Networks International Holdings BV (NNIH) and NDTV Networks Pic (NNPLC), had entered into an agreement dated 23.05.2008 with NBC Universal Inc. (NBC) and Universal Studios International BV (USBV). As a result, an amount of Rs. 642,54,22,000/- (US $150 million) was received during the year by NNIH. The amount was received on account of subscription of 915,498 shares into NDTV Networks International Holdings BV equivalent to 26% effective indirect stake in NDTV Networks Pic.

2.3.18.3 The corporate structure used for the transaction is as under



2.3.18.4 From the above, it is clear that NDTV had a 56.80% stake in its indirect subsidiary NNPLC, 915,498 shares (26% equity) of which was reduced on account of referred transaction with NBC and USBV as stated above. As per the provisions of the Income Tax Act, 1961rthe Act"), the transaction attracts tax on resultant capital gains in the hands of NDTV.

2.3.18.5 NDTV is a tax resident of India and section 5 of the Act provides that its global Income It taxable In India. Under section 45 of the Act, gain arising from transfer of a capital Quit It chargeable to tax under the head 'Income from Capital Gains'. Capital asset has been defined by section 2(14) as being property of any kind held by the assessee andExplanation of section 2(14) provides that property includes the rights of management and control, or any rights whatsoever, in a company by virtue of shareholding in the company.

2.3.18.6 Prior to the referred transaction, NDTV was having 56.80% stake in NNPLC. As such, it was having the rights of participation, management and control in the NNPLC to that extent, which was the property of NDTV and was also a capital asset of NDTV within the meaning of section 2(14) of the Act. Vide agreement date

23.05.2008, this capital asset owned by NDTV was transferred to NBC and USBV, because by disposing of 26% equity in NNPLC, the stated stake, and consequently, the corresponding rights of participation, management and control owned by NDTV in NNPLC are extinguished to that extent. As such, the gains rising to NDTV as a result of this transfer of capital asset were chargeable to tax under section 45 of the Act.

2.3.18.7 As such, vide letter dated 11.11.2013, the assessee was asked to explain the issue. In response, vide reply dated 26.11.2013, the assessee contended that it was a case of fresh issue of shares and there was no transfer of property within the meaning of section 2(47) of the Act. It was further contended that mere transfer will not trigger capital gains tax unless it results in accrual of consideration. However, it is observed that as explained above, the transaction has resulted in transfer of interest in equity as defined in section 2(14) of the Act. Further, the assessee was itself a party to the transaction and was therefore instrumental in dictating the terms of the agreement. Although the consideration is claimed to have been credited in the account books of NNIH, yet in reality, the owner of the money is the assessee only.

2.3.18.8 In view of the above, it is submitted that without prejudice to the submissions that the impugned amount is taxable u/s 69A in the assessee's hands, it is submitted that the said amount is otherwise also taxable u/s 45 of the Act."

5.15. Further, the AO was asked to summarize his oral submissions presented before the DRP during the course of hearing on 23.12.2013. The AO summarized his oral argument and filed a letter dated 26.12.2013. The relevant part of which is reproduced below:

"2.1.17 From the above position as reflected in the Annual Reports of the assessee, which are also available on the assessee's website http://www.ndtv. com/ converaence/ndtv/corDorateDage/annual reports.asox?Daae=fr. it is observed that the assessee company had incorporated NNPLC in UK in November, 2006 as its 100% subsidiary and

thereafter, NNPLC was made subsidiary of NNBV, when a month after incorporation of NNPLC, NNBV was incorporated in December, 2006. Thus, being 100% subsidiary, NNPLC was conceived and controlled by NDTV. Although NNPLC cannot be said to be an agent or mere extension of NDTV solely on the ground of its being 100% subsidiary of NTDV, the facts regarding the control exercised by NDTV over the affairs of NNPLC are discussed below.

2.1.18 NNPLC was incorporated on 30.11.2006 with a meager capital of about Rs. 40 lacs only and was liquidated on 20.10.2011. The stated purpose of NNPLC was to create new business areas for NDTV as well as to unlock value of existing operations and skills, however.

NNPLC did not carry on any business activities on its own. In between its incorporation and liquidation, the activities of NNPLC as the role of NDTV therein, are summarized below :-

Financial Year	Activities	Role of NDTV
2007-08	*USD 100 million were raised through Step Up Coupon Convertible Bonds.*	*NNPLC had only a meager capital of Rs. 40 lacs and did not have any business activities, any fixed assets, any place of business except a postal address in UK, was a new entrant without any performance record, was a loss making company having incurred loss of about Rs. 8.34 crores during the year, had invested in loss making companies and had its share's face value of Rs. 40-45 per share and book value in the negative. The raising of USD 100 million was possible* ***solely because the assessee company NDTV had given an undertaking to provide a corporate guarantee for and on behalf of NNPLC, as and when required, in accordance with the terms of the Contracts and the Supplemental Trust Deed to be***

		executed by the Company.
2008-09	*26% of its stake was transferred to NBCU for Rs. 642.54 crores by way of issue of subscription equity of parent company NNIH.*	*Again, NNPLC had only a meager capital of Rs. **40** lacs and did not have any business activities, any fixed assets, any place of business except a postal address in UK, was a new entrant without any performance record, was a loss making company having incurred loss of about Rs. **8.34** crores during the year, had invested in loss'making companies and had its share's face value of Rs. **40- 45** per share and book value in the negative. Looking at the facts objectively, no prudent investor would be investing Rs. **642.54** crores in such a loss making company having investments also in loss making companies, more so, no prudent investor would be paying a rate of Rs. **7,015/-** per share in the situation. The reflected transaction of subscription of shares at the stated rate, as already submitted in the remand report dated **11.12.2013,** is a sham transaction. Not only this, the entity **NNPLC is no more than a controlled agent of NDTV, which itself dictated theterms by being a party to the purported Agreement and thus, introduced its own unaccounted income from undisclosed sources with the help of this reflected transaction.** Out of this, Rs. 254.75crores is stated to have been transferred in the account books of NNPLC in the shape of unsecured loan from NDTV BV. Again, the assessee NDTV is aparty to the Loan Agreement.*

2009-10	*(i) NDTV through its subsidiary NDTV Networks BV repurchased 26 percent indirect stake held by NBCU in NNPLC.* *(ii) NNPLC repurchased US$ 100 Million Step up Coupon Convertible Bonds issued by it earlier.*	*(i)NDTV has stated in its Annual Report that* ***NDTV through its subsidiary NDTV Networks BV, repurchased 26 percent indirect stake held by NBC Universal Inc., in its subsidiary NDTV Networks Pic.*** *Though the shares purportedly subscribed, not purchased, by NBCU were those of NNIH and not of NNPLC, the 2nd in vertical subsidiary of NNIH, yet it can be seen that the emphasis is on NNPLC and there is no reference to NNIH or NDTV BV.* *It is further pertinent to mention that the repurchase, occurring barely after 18 months, was for about Rs. 58 crores only as against the 'purchase' for Rs. 642.54 crores. There is no rationale in this transaction - no commercial purpose or economic substance, other than to create a loss of Rs. 584 crores for NBCU and introduction of own unaccounted money for NDTV.* *(ii) The final transaction before the liquidation of NNPLC was the purported repurchase of Step Up Coupon Convertibie Bonds. However, the price of the coupons reflected at Rs. 399 crores as on 31.03.2008 and at Rs. 509.50 crores as on 31.03.2009 (the difference of Rs. 110.50 crores stated to be on account of currency fluctuation) would further escalate at the time of repurchase and when NNPLC had a capital of Rs. 40 lacs only and investment in loss making companies, then it remains to be verified as to how NDTV / NNPLCdischarged its liability towards the principal andinterest payable to the investors on the said repurchase.* *{the generation of taxable revenues in India -* ***factor as in Vodafone case}***

2.1.19 From the above, the inevitable conclusion is that NNPLC was a Special Purpose Vehicle (SPV) created by NDTV, which acted as agent of NDTV for the

purposes of NDTV and was liquidated as soon as it had outlived the purpose of its creation;{the continuity of business on such exit- factor as in Vodafone case}

2.1.20 In the case of Adams vs Cape Industries Pic [(1990) 2 WLR 6578], it was held that one of the three circumstances in which the corporate veil may be lifted would be in a situation, where the subsidiary is an agent of the company. In the present case, the situation is the same and the business affairs of the holding company NDTV and the subsidiary NNPLC are so intertwined that it is not only permissible but necessary to lift the corporate veil. The intertwining is evident from the fact that NNPLC carried out only two major transactions during its existence - the 1st transaction was to raise USD 100 million through Step Up Coupon Convertible Bonds, which was possible only due to undertaking for corporate guarantee offered by NDTV and NDTV was a party to the Agreement along with NNPLC and the 2nd transaction was the indirect transfer of 26% of its stake to NBCU by way of subscription in equity of parent company NNIH, in which again, NDTV was a party to the Agreement along with NNPLC. In both transactions, it was NTYDV which dictated the terms and in neither of the two transactions, NNPLC acted independently. Under these circumstances, it is evident that NNPLC is a mere fagade entity on behalf of NDTV ; and without prejudice to this, NNPLC is beyond doubt an agent of NDTV.

2.1.21 As such, it is a fit case, in which corporate veil needs to be lifted and once the veil is lifted, with regard to the present proceedings for AY 2009-10, it can be observed as under :-

(i) NDTV through NNPLC has introduced its own unaccounted income from undisclosed sources amounting to Rs. 642.54 crores in the garb of equity subscription. Detailed report regarding taxability of this sum has already been submitted to the Hon'ble DRP vide letter no. 1794 dated 11.12.2013.

*NDTV through NNPLC has enhanced the liability on account of Step Up Coupon Convertible Bonds by Rs. 110.50 crores in the Balance Sheet of NNPLC from Rs. 399 crores to Rs. 509.50 crores, which is stated to be on account of currency translation. Further, NDTV has introduced unsecured loans amounting to Rs. 254.75 crores from NDTV BV in the books of NNPLC. The tax implications of this issue are the subject matter of the present report, which necessitated the lifting of corporate veil first, as discussed in the preceding paras of this report**

[Bold and underlined lines In flower brackets are added by the DRP]

5.16 DRP has carefullyconsidered entire gamut of transaction and is of the opinion that the structure of holding/subsidiary companies and the transaction as narrated above,without any commercial substance, do warrant lifting the corporate veil to identify the true nature of the transaction. Though AO in his remand report has said that the money has not been recorded in the books of assessee, after lifting the corporate veil, the DRP finds that in this case a sum of Rs. 642,54,22,000/- has been found credited in the books of assessee/ its subsidiary for the previous year (FY 2008-09) under consideration. Though the assessee has sought to explain the above amount through the lengthy and circuitous transactions, the commercial substance/ economic rationale for such transaction has not been satisfactorily explained. Assessee's theory of having sold a "Dream" to the investor has not been substantiated by any credible evidence as no details have been filed whatsoever for the so called business projections and the basis for computation of the sale price of the share at the astronomical price of Rs. 7,015/- which is 159 times of its face value of Rs. 45/-. Needless to mention that the subject company whose shares were sold was incurring huge losses and there was hardly any worthwhile business to justify the above sale price. Interestingly, the assessee/ subsidiaries have again repurchased the same share in the very next financial year at the price of Rs. 634.17 per share totallingRs. 58 crores. Here also no details/ justification has been given by the assessee as to how the above buy back price was fixed by the assessee when the so called

"Dream" went bust, as being claimed by assessee. What was the justification for the assessee to buy back the shares of nearly defunct and own subsidiary company at a value which was more than 12 times of the face value. The totality of the transaction clearly lead to the inescapable conclusion that the entire transaction of sale & subsequent buy back of shares was a "sham" transaction entered into by the assessee with the sole motive of introducing Rs. 642,54,22,000/- in its books and providing loss of Rs. 584.46 crores to Universal Studios BV Netherlands.

5.16.1. *In view of the facts and finding as mentioned above and taking the totality of the picture into consideration, it is held that assessee has brought an amount of Rs. 642,54,22,000/- being unexplained money in to its books through its subsidiary NDTV Networks BV Netherlands. It is pertinent to mention that, as per the admission of the assessee the above subsidiary has been subsequently liquidated, which shows that the same was floated only to create a front for introducing the above amount.*

5.16.2. *The DRP has considered the addition proposed by the AO and finds the addition is fully justified in view of facts mentioned above. The DRP is of the considered opinion that the facts of the case fits for making addition u/s 68 of the IT Act as unexplained cash credit. Even addition u/s 69A as proposed by the AO is also justified, as after lifting the corporate veil, the assessee is found owner/ controller of the money under reference.*

5.17. *AO has brought to the notice of the DRP through his letter dated 20.08.2013 forwarded by the Addl. CIT,Range-13, New Delhi that an amount of Rs. 365.25 crores was raised by the assessee company which needed further examination. The relevant part of the letter of the AO is as under:*

"10. Another issue involved in the case is that during the year, the assessee company, through its guarantees, raised an amount of Rs.

365,25,00,000/- as unsecured loans through its subsidiary NNPLC. As the information was stated to be furnished by the assessee on 30.3.2013 i.e. just one day before the expiry of limitation, therefore, this aspect also could not be probed by the AO as to the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions."

5.18. *Accordingly, the AO was directed to examine this issue and send a remand report. The remand report was given to the assessee who strongly objected to the proposed addition made by the AO in the remand report. The remand report dated 11.12.2013 and the summary of the oral argument of the AO dated 26.12.2013 are reproduced below:*

Extract of remand report dated 11.12.2013

"2.4 Tax implication of unsecured loans amounting to Rs. 365.25 crores received by NDTV through its subsidiary NNPLC

2.4.1 The Hon'ble DRP vide letter no. 262 dated 28.10.2013 had directed further enquiries to be made regarding the unsecured loans amounting to Rs. 365.25 crores allegedly received by NDTV through its subsidiary NDTV Network Pic ("NNPLC") and the tax implication thereof.

2.4.2 Vide this office's letter no. 1705 dated 11.11.2013, the assessee was asked to explain on the issue as under :-

"2.3 During the year, the assessee company, through its guarantees, raised an amount of Rs. 365,25,00,000/- as unsecured loans through its subsidiary NNPLC. Please furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions...."

2.4.3 In response, vide letter dated 26.11.2013, the assessee contended that during the year under consideration, there was an increase of Rs. 110.50 crores in the amount of unsecured loans in the Balance Sheet of NNPLC, which represented

an increase due to currency fluctuation. The assessee further stated that during the previous AY 2008-09, it had raised loans amounting to Rs. 399 crores by way of Step Up Coupon Bonds and the enquiry regarding the source and genuineness thereof had already been completed during the course of assessment proceedings for AY 2008-09. It was claimed that complete evidence regarding the same had been filed before the AO during the said assessment proceedings and the AO had also obtained information from HMRC through FT & TR. Vide further reply dated 29.11.2013, the assessee also filed copy of exchange rates for the relevant period.

2.4.4 Vide this office's letter dated 05.12.2013, the assessee was confronted as under :-

> *"2.2 Regarding the raising ofRs. 365.25 crores as unsecured loans*

2.2.1 Regarding the raising of an amount of Rs. 365,25,00,000/- as unsecured loans through your subsidiary NNPLC, vide letter dated 11.11.2013, you were requested to furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions. Youhave stated in your reply filed on 26.11.2013 that sum of Rs. 254.75 crores was raised by NNPLC from its immediate subsidiary NDTV Networks BV. Another addition of Rs. 110.5 crores is stated to be on account of currency translation. However, no evidence has been filed by you in support of your assertions.

2.2.2 In your above reply, you have also alleged as under :-

> *"Further, the complete list of the subscribers of bonds, subscription agreement and other relevant details were duly filed during the course of the assessment of AY 08-09. The above bond amount is duly confirmed by NNPLC to HMRC, UK on the requisition of FT & TR. Further, the complete information with respect to raising of bonds were duly filed before Investigation Officer and DIT (Inti) during the course of assessment and was also disclosed in the Audited Accounts of the NDTV for AY 2008-09 and onwards. In view of the above, we request your goodself to kindly consider the documents submitted in the*

assessment of AY 2008-09 and report obtained in the course of assessment from HMRC which are already on record."

2.2.3 In this regard, it is stated that the assessment record in your case for AY 2008-09 has been perused and it is found that there are no such documents on record. Accordingly, you are given an opportunity to now file the following documents, which are stated to have been filed by you earlier :-

(i) Complete list of the subscribers of bonds, subscription agreement and other relevant details claimed to have been filed during the course of the assessment proceedings for AY 2008-09.

(ii) Complete information with respect to raising of bonds claimed to have been filed before Investigation Officer and DIT (Inti) during the course of assessment proceedings.

2.2.4 In this regard, please also refer to letter filed by you on 29.11.2013, wherein you have stated that the increase of Rs. 110.50 crores in the Step Up Coupon Bonds is merely the reinstatement of foreign currency liability. In this regard, please furnish the relevant copies of accounts along with complete book entries made in Journal, Ledger, etc. in respect of the said increase reflected in the accounts. Also furnish copies of accounts regarding interest paid to the said investors during the year.

2.2.5 Regarding the balance addition of Rs. 254.75 crores in the unsecured loans, you have claimed that the relevant documents have been filed during the assessment proceedings. Perusal of the assessment record reveals that there are no such documents on record. Accordingly, you are given anopportunity to now file these documents, which are claimed to have been filed by you earlier.

2.2.6 In the absence of the discharge of onus by you in respect of the above transactions of raising unsecured loans, in the light of facts of the case discussed in the foregoing paras of this letter read with letter dated 27.11.2013, please explain and substantiate your position."

2.4.5 In response, vide letter dated 10.12.2013, the assessee stated that out

of the total addition of Rs. 365.25 crores appearing in the Balance Sheet of NNPLC, an amount of Rs. 110.50 crores was on account of adjustment of fluctuation in exchange rate of currency and regarding the balance amount of Rs. 254.75 crores, the assessee stated that this was the unsecured loan obtained from NDTV BV. However, no confirmation was filed nor this office was afforded any verification regarding the creditworthiness of the lender or the genuineness of the transaction. In the absence of these, the assessee has not discharged its onus u/s 68 and there is no alternative but to propose that the amount of Rs. 254.75 crores may be added to the assessee's taxable income for the year under consideration. Further, it is pertinent to mention that although the assessee claimed that "the complete list of the subscribers of bonds, subscription agreement and other relevant details were duly filed during the course of the assessment of AY 08-09", yet no such details were found in the assessment records, which was specifically confronted to the assessee and yet, the assessee has failed to substantiate its claim."

5.19. *The copy of the remand report was given to the assessee on 16.12.2013 to submit its rejoinder and on the day of hearing i.e. on 17.12.2013 they were asked to treat the forwarding letter of the DRP enclosing the remand report as enhancement notice by DRP to cut short the time as matter is getting time barred on 31.12.2013. The same was recorded in the order sheet vide entry dated 17.12.2013.*

5.20. *In response to the above, the assessee vide its letter dated 23.12.2013 has filed a document which is purported to be a loan agreement concluded between NBCU, NDTV Limited, NDTV PLC and NDTV Networks BV and requested to admit the same. The assessee has further submitted as below:*

- *The appellant was not able to produce the above documents since the issue came up for the first time before the DRP and the assessee as unable to submit the same due to paucity of time.*
- *The loan agreement was not specifically asked for by the Ld. AO.*
- *The evidence submitted in this submission is correct and very much relevant for deciding the appeal of the appellant.*

It is requested to your good self that the evidences be admitted and be considered for deciding the matter.

Your goodself may exercise the powers conferred on yourself by the law, which are very much required to be exercised in the light of facts and circumstances of the case.

5.21. *The additional evidence in the form of copy of the purported loan agreement (supri) has been admitted in the interest of natural justice and was handed over to the AO for his response. The response is received, the extract of which is reproduced below:*

Extract of response of the AO dated 26.12.2013

"2.2 Regarding enhancement of liability on account of Step Up Coupon Convertible Bonds by Rs. 110.50 crores

2.2.1 As discussed above, USD 100 million were reflected to have been raised through Step Up Coupon Convertible Bonds during FY 2007-08. As stated in para 2.1.2 of this report, vide this office's letter no. 1705 dated 11.11.2013, the assessee was asked to explain on this issue, and in response, vide letter dated 26.11.2013, the assessee stated that the source of investment in Bonds was duly verified by the AO during the assessment proceedings for AY 2008-09 and also through information obtained from UK tax authorities through FT & TR. It was contended that complete details regarding investors and source of investment was given to the AO at the relevant time. The details were also stated to have been furnished before Investigation officer and DIT (Inti) during enquiries by these officers.

2.2.2 Vide this office letter dated 05.12.2013, the assessee was informed that no such documents were found in the aissessment record for AY 2008-09. The assessee vide letter dated 09.12.2013 stated that it was again filing copy of the submission dated 08.02.2012 filed in the course of assessment of AY 2008-09 before AO, which consisted of the complete list of the subscribers to bonds, subscription agreement and other relevant details and documents enclosed as Annexure B. Copies of submissions dated 28.05.2012,

31.05.2012, 11.06.2012 and 20.07.2012 stated to have been filed before the then AO and copies of submissions dated 18.02.2011, 03.03.2011, 08.03.2011, 29.03.2011 and 30.03.2011 stated to have been filed before the Investigation Officer and DIT were also claimed to have been enclosed as Annexure C1-C5.

2.2.3 However, perusal of the documents enclosed by the assessee reveals that inresponse to requisition to prove the identity of the investors, their creditworthiness and genuineness of the transactions, the assessee has filed merely a list titled 'The Initial Investors", listing out 8 entities, many of them from Cayman Islands and furnishing of such list does not discharge the assessee of its onus to prove the identity and creditworthiness of the entities or the genuineness of the transactions.

2.2.4 It is pertinent to mention that even though the original amounts on account of these bonds are claimed to have been received last year and not in the financial year relevant to AY 2009-10, yet when the original amount itself is not proved to be on account of genuine transaction, any escalation in the same whether due to currency translation or otherwise must necessarily meet the same fate. Hence, the amount of Rs. 110.50 crores, being enhancement during the year, in the original liability from unproved source, is proposed to be added to the assessee's taxable income forAY 2009-10.

2.3 Regarding introduction of unsecured loans amounting to Rs. 254.75 crores from NDTV BV in the books ofNNPLC

2.3.1 During the year under consideration, NDTV through NNPLC has raised unsecured loan amounting to Rs. 254.75 crores as mentioned in the relevant Schedule to Balance Sheet as on 31.03.2009. When asked vide this office's letter no. 1705 dated 11.11.2013, the assessee replied that the unsecured loan amounting to Rs. 254.75 crores hadbeen raised from NNPLC's intermediate holding company NDTV Networks BV and the relevant details had been filed during the course of assessment proceedings forAY2008-09.

2.3.2 Vide letter dated 05.12.2013, it was intimated to the assessee that on perusal of assessment record for AY 2008-09, no such documents were found. Accordingly, the assessee was given an opportunity to now file these documents, which were being claimed to have been filed by it earlier. The assessee was also intimated that it had not discharged the onus cast upon it in respect of the above transactions of raising unsecured loans.

2.3.3 In response, the assesse filed reply dated 09.12.2013 stating that with respect to the unsecured loans amounting to Rs. 254.75 crores, the source thereof was loan form NDTV Networks BV and the amount was duly disclosed in the books of NNPLC and NDTV Networks BV and the copies of the financials statements of both the above subsidiaries were filed before the Ld. AO during the course of assessment vide submission dated 27.02.2013 & 11.03.2013. The copies of the said submissions were claimed to be duly enclosed as Annexure El & E2 of the reply dated 09.12.2013.

2.3.4 I have perused the assessee's letters dated 27.02.2013 (running into 10 pages)&11:03.2013 (running into 2 pages) marked as Annexure El and Annexure E2 respectively. At the outset, it is submitted that there is no reference to the impugned issue of unsecured loans amounting to Rs. 254.75 crores raised during the year. The contents of the referred letters address certain queries raised by the AO and query regarding unsecured loans is not one of such queries. The bare letters are not even supported by any Annexures mentioned ion the said letters.

2.3.5 Under the circumstances, when the attached annexure-less letters do not contain any reference to query regarding unsecured loans nor attempt to address such query, therefore, filing of such letters does not serve any purpose.

2.3.6 It is pertinent to mention that during the course of hearing before the Hon'bleDRP on 23.12.2013,the assessee has filed a reply on the issue. It has been stated by the assessee that theImpugned unsecured loan has been raised pursuant to Loan Agreement dated 10,11.2008betweenUniversal Studios International BV, NDTV, NNPLC and NDTV NetworksBV. Confirmationfrom Universal Studios International BV is also stated to be attached,However,

perusal ofthe attached confirmation reveals that although there is a ffltntlOnregarding the bank accountof Universal Studios International BV, namely BNP Paribas and copy of bank certificate Isstated to have been attached, yet no bank certificate has been actually attached.

2.3.7 In view of the above, it is submitted that the assessee cannot be said to havedischarged its onus of proving the identity of the lender, creditworthiness of the lender and the genuineness of the transaction. Even the copies of documents, wherever furnished by the assessee, are photocopies, not subject to any verification or enquiries. It is pertinent to place on record that any specific issues can be proved only by specific evidence and not on the strength of claimed reputation or volume of business of the lender. Hence, the assessee has not been able to prove the source of addition in unsecured loans and the same is proposed to be added to the assessee's taxable income."

5.22. DRP has carefully considered this issue. Out of Rs. 365.25 crores representing unsecured loan, under reference, an amount of Rs. 110.5 crores is due to the restatement of the original amount pertaining to a transaction happened in the FY 2007-08 which was the subject matter of assessment for the AY 2008-09. It appears from the report that there was no disallowance made on the amount in the first place in the AY 2008-09. Therefore, to disallow Rs. 110.5 crores on account of reinstatement of the amount is not called for as rightly mentioned by the AO in his remand report dated 11.12.2013. (quoted in the earlier paragraph no. 5.18 on Page no. 22 onwards)

5.23. The AO has examined the said agreement and in his response dated 26.12.2013 has clearly brought out that even after the production of the copy of the agreement assessee has not discharged its onus of explaining the genuineness of the transaction. From a bare reading of the so called agreement copy by the DRP, it is found that the above loan is advanced without any interest, the reason for which has not been explained. The amount involved is quite a large sum of money. Further, as per this document, the interest free credit facility was to be granted on the basis of a duly completed utilization request, where as no such utilization request or basis fpr seeking the above credit facility has been produced by the assessee before the AO or before the DRP. We are therefore in agreement with the

AO's finding that the onus of proving the genuineness of the loan transaction has not been discharged by the assessee. The AO is, therefore, directed to make addition of Rs. 254.75 crores."

77. Based on the above direction of the ld DRP, the ld Assessing Officer held that transaction involved in the receipt of Rs. 642,54,22,000/- by the assessee's company during the year is a sham transaction through which the assessee has introduced its own unaccounted money and therefore, it represents the unexplained money owned by the assessee regarding the nature and source of which the assessee has not been able to offer satisfactory explanation, hence, the ld AO made the addition u/s 69A of the Act of Rs. 6425422000/-. Therefore, the assessee being aggrieved has preferred the ground in cross objection.

78. The ld AR vehemently contested the addition. He referred to page No. 1 to 104 of the paper book, wherein, a shareholders agreement was entered into on 23.05.2008 between seven parties was placed. He submitted that this agreement shows the fact that NBC Universal Inc., Universal Studios International BV, New Delhi Television Ltd, BDTV BV, NDTV Networks BV, NDTV Networks International Holding BV and NDTV Networks PLC has entered into an agreement for the purpose of regulating the affairs of company i.e. NDTV networks International Holding BV, NDTV PLC and other group companies and the NBC Universal Inc. wishes to expand its presence in India. He submitted that NDTV Network International Holdings BV at that time was holding almost 90% of the share capital of NDTV BV who in turn holds 92% of issued share capital of NDTV PLC. By this agreement it was agreed that the Universal Studios International BV which subscribes for share in the NDTV Network International Holding BV pursuant to the further shares subscription agreement of the even date. He further referred to share subscription agreement dated 23.05.2008 which his placed at page No. 107 to 222 of the paper book. The above agreement was an agreement dated 23.05.2008 entered into between NDTV Networks International Holdings BV, NDTV Networks BV, Universal Studios International BV, NBC Universal Inc. and New Delhi Television Ltd. According to that agreement it was mentioned in Clause NO. 4 that subscription share consideration of US$ 150

million is payable to NDTV Networks International Holdings BV by the subscriber i.e. Universal Studios International BV. He therefore, submitted that subsidiary of the assessee has received a subscription of the share capital through another company and therefore, such sum cannot be the income of the assessee holding company. He further referred to page no. 651 of the paper book which is the statement of account of the ING Bank to show that a sum of US$ 150 million has been transferred in the bank account of NDTV Network International Holdings by the investor company. He further referred to the annual account of the investee company placed at page No. 652 to 665 of the paper book to show that 915498 shares are held by Universal Studios International BV. He further referred to note No. 2 of schedule 6 of the schedules to the accounts of the investee company wherein the details of investment is mentioned. He further referred to the confirmation letter dated 01.08.2013 placed at Page No. 668 and 669 to show the confirmation of the investor company. He also referred to page No. 670 to 673 of the paper book to show the share issue deed evidencing that the shares were issued to the investor company on receipt of share capital of US$ 150 million. He further referred to page No. 674 to show the bank certificate from BNP PARIBAS from which account a sum of US$150 million was transferred to the account of the investee company. He further referred to page NO. 722 to 725 of the paper book which is a Apostled company of confirmation from the investor dated 11.12.2013. He further referred to page No. 676 to 718 wherein, the annual report of Universal Studios International BV for 2008 was submitted . He referred to the fact that the investor company has invested in the investee company. He specifically referred to page No. 692 to 693 of the paper book to show that investor company has acquired 31.4% participating interest in the investee company. He further submitted that investor is a part of General Electric (GE) group company, which is one of the largest global business conglomerate whose identity and creditworthiness could not have been doubted. He referred to the balance sheet of GE for 2009 annual report for this purpose. He further referred to Form No. 10K of the United States Securities and Exchange Commission which is an annual report for the year ended 31.12.2011 which shows that COMCAST Corporation of USA were later on the majority share holder in the business of Universal Studios International BV. He further referred to the annual report of 2008,

2009 and 2010 of NBC Universal Corporation which is the parent of investor company who sold in 2009, 26% interest in New Delhi Television BV for $25 million and recognized a pre tax loss of Rs. US$180 million. He submitted that original investment was made for US$150 million in May 2008 and it was subsequently off loaded in November 2009 at a loss of US$118 million. He further referred to agreement dated 14.10.2009 which is agreement for sale and purchase of shares to NDTV BV between Universal Studios International BV as a seller and NDTV Network BV as the purchaser where other parties are also such as NBC Universal Inc., NDTV BV, NDTV Network PLC and New Delhi Television Ltd (assessee). According to that agreement for a consideration of US$12527250/- the shares of the NDTV BV were sold and for US$12472750/- were also paid by the buyer in respect of receivables. Accordingly, it was stated that subsequent repurchase of shares were agreed by the parties as per discussion between them. It was further submitted that above transaction is also supported by email dated 02.10.2009 wherein the mail is addressed by Mr. Smith Pete, President of NBCEL Inc. to Shri KVL Narayan Rao, Vikram Chandra and one Mr. IT Vajpayee wherein, there was an acceptance offer made by the seller at US$ 25 million to exist from the business of unsuccessful partnership between the NDTV Group and NBC Universal. He further stated that this offer price was quoted by the seller and therefore, it is agreed between the parties. He further submitted that with respect to the receivables which was included in the consideration of US$25 million is with respect to loans outstanding with other group companies given by the seller i.e. NBC Universal Inc. Group.

79. After making above submission the ld AR referred to the profile of the NBC Group downloaded from Wikipedia to state that investor company is a very large group of highest repute which was founded in 1926 and therefore allegation against such a group is unfounded. He further submitted that all receipts are not income and in the present case whatever is received is on account of share capital which cannot be considered as income at all. For the proposition, he referred to the decision reported at 27 ITR 532.

80. He further submitted that subsidiary of the assessee company has issued share capital to the company evidencing the identity, creditworthiness and genuineness of the transaction. He further referred to the decision of Sofia Finance Ltd 205 ITR 98

and further referred to page No. 104 of that decision. He submitted that if the amount credited is capital receipt then it cannot be taxed but it is for the income tax officer to be satisfied that the true nature of the receipt is that of capital. He submitted that the amount received by the subsidiary is on account of capital receipt. He further referred to the decision of Hon'ble Delhi High Court in case of CIT Vs. Kamdhenu Steel and Alloy Ltd 361 ITR 220 to submit that assessee is explaining source of money for share capital along with identities of the applicant and their creditworthiness is established then burden of proof is discharged by the assessee and then it shifts to the department. He submitted that in the present case squarely falls within the ratio laid down by the above decision.

81. He further referred to page No. 1822 being the annual report of the assessee wherein in Note No. 20 it was stated that shareholders agreement dated 23 May 2008 was entered into by the company along with its subsidiaries NDTV BV, NDTV Networks BV, NDTV Networks International Holdings BV (NNIH) and NDTV Networks Plc (NNPLC) with NBC Universal Inc. and one of its affiliates Universal Studios International BV (NBCU) for subscription of 915498 shares into NNIH equivalent to 26% effective indirect stake in NNPLC for an amount of US$150 million. The agreement also contemplates that NBCU will be granted an option to acquire an additional effective indirect stake up to 24% in NNPLC through NNIH in the third year of the joint venture at the then fair market value of the shares, subject to receipt of all necessary consents and approvals. Therefore, he submitted that in the annual report the complete transaction is disclosed.

82. He further stated that transaction is supported by shareholders agreement and share subscription agreement both dated 23rd May 2008 and also the share purchase agreement for repurchase of the shares dated 14/10/2009. He further submitted that investor is a group of repute whose annual accounts are also placed before the Assessing Officer. Therefore, it is proved that investor is not a sham company, Paper Company or a bogus or shell company as it is in business and shareholder of that company is Universal Studios, which is an internationally renowned name.

83. He further submitted that as the sum is not found credited in the books of account of the assessee hence, there is no application of section 68 of the Act. Further, he also said that there is no application of section 69A of the Income Tax Act, 1961 as the

assessee is not found to be the owner of the money. He stated that owner of the money is the investor who has invested the sum. He further stated that confirmation is also submitted of the Investor. In the end he submitted that the transaction is through banking channel duly disclosed in the balance sheet of the investor and further confirmed by the investor, the transaction is deserved to be accepted.

84. During the course of hearing he made an offer that assessee is ready to produce the investor before the bench. In the end he requested that his submission at page No. 43 onwards which are as under may further be considered:-

Sr. No.	CONTENTION OF THE APPELLANT:
26	GROUND NO. 3 TO 3.3 OF GROUNDS OF APPEAL" ADDITION OF RS. 642,54,22,000/- REPRESENTING ALLEGED UNEXPLAINED SHARE CAPITAL RAISED BY THE SUBSIDIARY OF THE APPELLANT COMPANY AND, BROUGHT TO TAX BY HOLDING THE SAME TO UNEXPLAINED MONEY U/S 69A OF THE ACT
26.1	The crux of the dispute in the present case is, whether the learned A.O. was correct in holding that the amount received by way of subscription of shares by NDTV Networks International Holdings BV of the subsidiary is assessee's own money and the transaction of issue of shares by assessee's subsidiary to M/s Universal Studios International BV is a sham transactions despite the fact that the identity, existence of the aforesaid shareholder was duly established in terms of the judgment of Apex Court in the case of CIT v Lovely Exports (P) Ltd reported in 319 ITR 5 (St.)
26.2	It is submitted at the outset that the said share subscription was received by the assessee's subsidiary company namely NDTV Networks International Holdings BV and not by the assessee and were subscribed by the Universal Studio International BV a company incorporated in London which is GE group company. In fact, the holding company of the said investor is NBC Universal Inc., a company incorporated in USA and thus to hold the transaction as a sham transaction and the money invested was the money of the assessee is merely an allegation and, is unsupported by any evidence. In fact all what the assessee wants to submit is that, the transaction was not a sham transaction and the allegation that money belonged to assessee is contrary to material on record and unsubstantiated
26.3	That the learned A.O. had proceeded to frame the order on an incorrect assumption of the facts that confirmation from investor company namely M/s Universal Studios International BV had not been filed by

	the appellant company in his comments before DRP (see Para 2.3 to 10.3 of DRP order (page 136 of Appeal Set).
26.4	*Lastly it is submitted that so long the assessee has unable to identify the shareholder, who has also confirmed that he has made investment and is one of the largest US company, the . The allegation of the A.O. is wholly arbitrary.*
26.5	*In any case and without prejudice it is submitted that the provisions of section 69A of the Act has no application as the same is duly recorded in the books of the investee company when the investment was made and thus on neither of the grounds, the addition is tenable.*
26.6	*In light of the above back ground it is submitted that from the aforesaid it would be seen that the admitted facts are:* *i) That the assessee M/s NDTV Ltd. has twenty one subsidiary companies. The details thereof are as under:* *Sr. No. | Particulars* *i) | Subsidiary companies within India* *ii) | Subsidiary companies outside India* *| Total* *The details of subsidiary companies (outside and within India) are enclosed as Annexure 1 of this synopsis* *ii) One of its subsidiaries listed at Item No. (xvii) in the name of NDTV Networks International Holdings BV, is a company established under the Laws of Netherlands, had issued shares to M/s Universal Studios International BV, a company incorporated in Netherlands.* *iii) That the said company i.e. M/s Universal Studios International BV, had acquired shares of M/s NDTV Networks International Holdings BV.* *iv) Such shares were acquired through banking channel, when it made the payment of USD 150 million.* *v) That the said shareholder of the assesses's subsidiary is a subsidiary of NBC Universal Inc.* *vi) That the holding company of M/s NBC Universal Inc. is a company incorporated in USA and is a group company of GE group companies.* *vii) That the investee company had acquired the said shares through payment by banking channels which were duly entered in their books of accounts and is also reflected in their balance sheet.* *viii) The said shares so acquired were duly confirmed in writing to have been acquired by M/s Universal Studios International BV*
26.7	*In fact, despite the fact that the assessee had furnished such confirmation before the learned Assessing Officer, in the course of remand proceedings, he still ignored such confirmation and went on record in his order of assessment that the assessee had not furnished such confirmation (page 126 of Appeal Set).*

26.8	*There is no denial by the said investee company that it had made no such investment. There is no material on record by the revenue in support of the allegation that the transaction is sham other than mere unsubstantiated allegation. It is also not a case where the aforesaid shareholder is found to be involved in any manner of providing accommodation entries. In other words, the shareholder is not an accommodation entry provider. On the contrary, it is a case wherein the shareholder who had acquired the shares had in its business interest and for commercial expediency acquired the stake in the company namely NNIH at the then prevailing market conditions.*
26.9	*In support of the aforesaid facts, the assessee has placed the following evidence on record during the course of proceedings before the DRP as the A.O. in the course of assessment proceedings had never given any opportunity whatsoever to the appellant company:* *i) Share holder agreement dated 23.5.2008 (pages 1-104 of Paper Book)* *ii) Share subscription agreement dated 23.05.2008 (pages 107–222 of Paper Book)* *iii) Annual report of calendar year 2008, 2009 and 2010 of NBCU i.e. the allottee of shares issued by NNIH (NDTV Networks International Holding BV) (pages 223–262 of Paper Book)* *iv) Annual report of NDTV for financial year 2009-10 (pages 263–278 of Paper Book)* *v) Annual report of GE (pages 379–502 of Paper Book)* *vi) Form 10K of S.E. Act of US (pages 503-650 of Paper Book)* *vii) Bank account No. 02.01.28.342 of NDTV, Networks International Holdings BV. (page 651 of Paper Book)* *viii) Annual accounts of NDTV Networks International Holdings BV (pages 652–665)* *ix) Confirmation letter from Universal Studios International BV dated 1.8.2013 (pages 668-669 of Paper Book)* *x) Share issued deed dated 25.3.2008 (pages 670-673 of Paper Book)* *xi) Bank certificate from BNP Paribus evidencing payment of 150 million USD (pages 674-675 at pages 680 of Paper Book)* *xii) Annual report of Universal Studios BV (pages 676-719 of Paper Book)* *xiii) Apostilled copy of confirmation from Universal Studios International BV (pages 722-725 of Paper Book)* *xiv) Agreement dated 14.10.2009 (pages 1239-1263 of Paper Book)* *xv) E-mail dated 2.10.2009 (pages 1254-1265 of Paper Book)* *xvi) FIPB approval (pages 1860-1863 of Paper Book)* *xvii) FIPB application (pages 1864-1872 of Paper Book)* *xviii) Order of Assessment order and Transfer Pricing order of NDTV Networks Plc, UK for AY 2010-11 (pages 1876-1882 of Paper book)*
26.10	*In view of the aforesaid facts, the first and basic submission which the assessee seeks to make is, that the finding/observation/allegation of*

	the A.O. and the DRP that the transaction is sham is merely a matter of conjecture, surmises and is based on illogical conclusion which it is submitted is unilateral. It is submitted, though it may be permissible for tax authorities to draw inference yet such inference had to be drawn based on material and not on mere ipsi-dixit.
27	*In the instant case, it is submitted that, the findings of the authorities that the `transaction is sham is based on a finding that the structure of the assessee company is complex (see para 5.1 page 3 of Appeal Set). It is respectfully submitted that, appellant had not been able to comprehend the basis for such finding and conclusion. It is apparent that the basis for such an allegation is that, it has large number of companies, who are its subsidiaries. It is submitted firstly, that out of twenty one subsidiaries, 10 companies are incorporated under Companies Act 1956 in India and the remaining 11 companies are incorporated outside India under the respective laws of such companies. The fact that, there are large numbers of subsidiary company does not by itself make the structure of the company to be complex. Thus the foundation on which the revenue has proceeded to hold the transaction to be sham is entirely misconceived and misplaced*
27.1	*It further appears that in so far as the some of the companies which are incorporated outside India are concerned, it has been alleged that, (i) such companies did not carry on any business or (ii) they were incorporated for a short duration. However, it is submitted that the fact, they did not carry on any business or that they existed only for a short duration cannot be regarded as any valid basis unless until it could have been established that, such a company was either not incorporated in law or was a dummy concern of the appellant company. In any case, admittedly the shareholder of in M/s NDTV Networks International Holdings BV was M/s NDTV Networks BV, who had acquired all the shares of in M/s NDTV Networks International Holdings BV. It is submitted that M/s NDTV Networks BV, is a company incorporated on 9.1.2008 in Netherland. It is submitted that, it is also on record that the said company is an investment company. It is also undisputed fact that there has been no finding or adverse observation made by the assessing authority that either under the Income Tax Act or any other Act that such company was dummy or non-existing company. In view of the aforesaid it is submitted the observation/ finding by the authorities in their respective orders i.e. directions of the DRP and the assessment order impugned before the Bench that the transaction was sham, is based on speculation, surmises and conjectures.*
27.2	*It is submitted that it is well accepted that a subsidiary and its holding company are distinct and separate entities. They are subject to income tax on the profits derived by them on standalone basis, irrespective of their actual independence and regardless of whether the profits are reserved and distributed to shareholders/participants. It is well settled law that holding and its subsidiary are totally separate and distinct taxpayers. In the present case, it is an undisputed fact and admitted by*

	the Ld. AO/DRP that the NBC Universal Inc, (a leading and an independent Group and the Joint Venture of the GE group) through its group company, Universal Studios International BV, subscribed to new shares amounting to USD 150 Mn (Rs. 642.54 crores) in a NDTV Group Company namely NDTV Networks International Holdings BV (NNIH) (a company incorporated as per the laws of Netherlands and resident of that country) on May 23, 2008. Thus, it is most respectfully submitted that the action of the Ld. AO in making said addition in the hands of the Appellant company (ultimate holding company) and the action of the Hon'ble DRP in confirming said addition is devoid any merit and has no legal basis.
27.3	*In order to come over from well settled legal position of distinct and separate entities of corporate personality, both AO and DRP had made ingenious attempt to invoke the doctrine of lifting of corporate veil on misconceived grounds. It well settled in legal jurisprudence that the corporate veil could be lifted in the case of fraud or sham or any device designated to defeat the interest of shareholders, investors and contractual parties. No doubt, the revenue is entitled to invoke the lifting of corporate veil if the facts so warranted, but the onus is on Revenue to establish the dominant object of the transaction and how the said transaction resulted into evasion or avoidance of tax. It is most respectfully submitted that the revenue on the facts of the case failed to bring any material on record which could establish that the transaction of subscription of shares would result in any form of tax evasion or avoidance by the assessee company or its subsidiary. It is well settled law that the share capital is in the nature of capital receipt and could not be brought to tax in the hands of the recipient company. In the case of CIT vs. Stellar Investment Ltd. reported in 192 ITR 287 (Delhi) Hon'ble Delhi High Court has held that if the shareholders are identified and it is established that they have invested money in the purchase of shares then the amount received by the company would be regarded as a capital receipt. The above decision is also approved by the Apex Court in CIT vs. Stellar Investment Ltd. reported in 251 ITR 263(SC) and CIT vs. Lovely Exports Pvt. Ltd. reported in 319 ITR 6 (St.). Further, the above ratio is also approved by Full Bench of Delhi High in the case of CIT vs Sophia Finance Ltd reported in 205 ITR 98 (Del)(FB).*
27.4	*It is submitted that the aforesaid judgment of the Apex Court has been also followed in the following judicial pronouncements:* *i) 356 ITR 65 (MP) CIT vs. Peoples General Hospital Ltd.* *"It is not the case of any of the parties that M/s Alliance Industries Limited, Sharjah is a bogus company or a non-existent company and the amount which was subscribed by the said Company by way of share subscription was in fact the money of the respondent assessee. In the present case, the assessee had established the identity of investor who had provided the share subscription and it was established that the transaction was genuine though as per contention of the respondent the creditworthiness of the creditor was also*

	established. In the present case, in the light of the judgment of Lovely Exports (P.) Ltd.'s (supra) we have to see only in respect of the establishment of the identity of the investor. The Delhi High Court also in Divine Leasing & Finance Ltd.'s case (supra), considering the similar question held that the assessee Company having received subscriptions to the public/rights issue through banking channels and furnished complete details of the shareholders, no addition could be made under section 68 in the absence of any positive material or evidence to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented company's own income from undisclosed sources. The similar view has been taken by the other High Courts. 17. As the Apex Court has considered the law in Lovely Exports (P.) Ltd.'s case (supra) and in view of law laid down by the Apex Court, we find that the substantial questions framed in these appeals do not arise for our consideration. Accordingly, all these appeals are dismissed with no order as to costs." [Emphasis supplied]\ ii) 294 ITR 661 (Mad) CIT vs. Electro Polychem Ltd. iii) 166 Taxman 7 (All) Jaya Securities Ltd. vs. ACIT iv) 307 ITR 334 (Del) CIT vs. Value Capital Services Pvt. Ltd. v) 361 ITR 10 (Del)CIT vs. Gangeshwari Metal (P) Ltd. vi) 361 ITR 147 (Del) CIT vs. Expo Globe India Ltd. vii) ITA No. 298/2012 (Del) dated 16.5.2012 CIT vs. Dalmia Bros Pvt. Ltd. viii) 45 taxmann.com 204 (All) CIT vs. Vacment Packaging (India) (P) Ltd It is submitted that on the basis of the aforesaid Apex Court judgement, the Hon'ble MP High Court has further held that the settled rule of law is that where an investor being a foreign company (not taxable in India) makes an investment by acquiring shares, no addition could legally be made. It has been further held that the aforesaid judgement of the Hon'ble Apex court is binding authority under Article 141 of the constitution of India.
27.5	In view of the above, it is submitted that it absolutely cannot be a case of lifting the corporate veil as the transaction in question could not be termed as fraud or sham or device designated to avoid tax liability, especially when the assesee beyond any suspicion established and discharged its onus to prove the identity and creditworthiness of the share subscriber and to prove the nature and the source of the funds by way of additional evidence filed with applications dated April 29, 2013,October 24, 2013 and December 23, 2013 with the Hon'ble DRP. In any case, mere complex structure of subsidiaries and the business of the assesee's subsidiaries in India would not justify lifting of the corporate veil
27.6	In regard to reliance of the Ld. AO/DRP on stray observations of the Hon'ble Supreme Court in the case of Vodafone's Case (supra), it is submitted that the complete reading of the above decision gives an

	impression that an attempt to lift the corporate veil is available to the Revenue in certain circumstances only if they first establish that the transaction so entered is a device to avoid taxes by interposing the subsidiaries and hiding the true nature of the transaction. In other words, in order to lift corporate veil, it needs to be establish beyond doubt that the transaction in question is taxable in the charging section of the Income Tax Act and the taxes were avoided by the group by interposing the subsidiaries. It is further submitted that the assumption and action of the Ld. AO/DRP of lifting the corporate veil in respect of the foreign subsidiaries which are incorporated and governed by the laws of their respective countries and had treaty protection is complete defiance of the decision in the case of UOI vs. Azadi Bachao Andolan reported in 263 ITR 706 wherein it has been held as under: *"The decision of the Chancery Division in F.G. Films Ltd., In re 53 (1) WLR'483 was pressed into service as an example of the mask of corporate entity being lifted and account be taken of what lies behind in order to prevent 'fraud'. This decision only emphasises the doctrine of piercing the veil of incorporation. There is no doubt that, where necessary, the Courts are empowered to lift the veil of incorporation while applying the domestic law. In the situation where the terms of the DTAC have been made applicable by reason of section 90 of the Income-Tax Act, 1961, even if they derogate from the provisions of the Income-tax Act, it is not possible to say that this principle of lifting the veil of incorporation should be applied by the court."*
27.7	*The DRP in its directions (pages 11-12 of Appeal Set) has referred to para 68 of judgment of Apex Court in the case of Vodafone International Holdings BV vs. UOI reported in 341 ITR 1*
27.8	*At the outset it is submitted that the aforesaid observations of the Apex Court have absolutely no application to the facts of the instant case. In the said case, the issue involved was whether the transaction of sale of shares outside India was a bonafide transaction and, if the answer to the question was affirmative, whether the assessee would be liable to tax in India in respect of the transfer of shares under the head 'capital gains'.*
27.9	*It is submitted that the issue involved however in the instant appeal as to whether the assessee is liable to be assessed in respect of the amount received on issue of shares by its subsidiary to another unrelated company M/s Universal Studios International BV, who has made investment in acquiring the shares and has so admitted to have made investment. It is thus submitted that the issue involved in the two cases are different.*
27.10	*However, without prejudice thereto, to the above submissions it was held by the Apex Court in the said case that, if the transaction is between two independent companies, the 'look at' theory is to be applied instead of 'look through theory. It is thus submitted that look at theory had to be followed in respect of instant transaction of investment*

	and acquisition of shares between independent and unrelated legal entities. It is submitted that the efforts of the authorities to hold the transaction to be 'sham' is based on their appreciation which is not only unsupported by evidence but by following the 'look through' theory.
27.11	*Further, there is no basis to lift the corporate veil. The Apex Court in the aforesaid judgment itself, has held that the same could be done only if the purpose of creation of NDTV Network International Holding BV was tax avoidance. In the instant case, it is submitted that, even assuming that the shares were acquired by Universal Studios International BV, the same cannot be said by any sense of understanding it was with a purpose of tax avoidance. It is submitted that the fact that shares had been acquired by Universal Studios International BV when it paid consideration cannot be disputed. It is submitted that Universal Studios International BV has not merely confirmed the investment but has also established source of funding of investment thus whether such shares were acquired of assessee company or of subsidiary cannot be any ground to enable the revenue to lift the corporate veil.*
27.12	*The only basis to allege that the transaction is 'sham' is issuance of share at astronomical price and repurchase at a lower rate. However, in the process, the revenue is overlooking the, same could make no difference. To clarify the same, it is submitted that, had the shares been issued by the appellant company instead of subsidiary, could it have made any difference in law, since is either of the two cases, there was no tax implication much less avoidance. Thus, the basic threshold condition being non existing the effort of the authorities to lift the veil is totally beyond jurisdiction.*
27.13	*It further observed that, while doing so, the revenue/courts should keep in mind the following factors:* • *The concept of participation investment;* • *The duration of time during which the holding structure exists;* • *The period of business operations in India;* • *The generation of taxable revenue in India;* • *The timing of the exit;* • *The continuity of business on such exit.*
27.14	*It thus held that, in short the onus will be on the revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colorable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device*
27.15	*It is submitted that the said observations had been made by Apex Court in the context of taxability of capital gain or business income arising in the context of any investment when is made by an identifiable foreign party. The court has held that, substance over form and piercing the corporate veil are permissible only after it is able to establish that impugned transaction is a 'sham' or 'tax avoidance'. In case*

	illustrations i.e. corporation has been structured for circular trading or round tripping or to give bribes. It is submitted that there is no basis to allege that there is either any circular trading or round tripping or even giving bribes.
27.16	*One of the basis which led the learned DRP to hold that the transaction is sham is based on the assumption that shares were issued by NDTV Network International BV", to "Universal Studio International BV" at a premium of Rs. 7,015/- per share and repurchased at Rs. 159/- per share though face value was of RS. 45/- per share. In fact in so doing it has been overlooked that what was acquired by the investor company was 31.4% stake is NDTV Network International Holding BV and not merely the share as such. Further, by acquiring 31.4% of the share in the said company, what was indirectly acquired was 26% in M/s NDTV Networks Plc, a UK company and thus, the fact that face value was Rs. 45/- is a wholly irrelevant factor. Be that as it may, it was a commercial transaction and it was a prudence of the investor to determine the value of such shares. In any case and without prejudice, the shares of USD 20 Million were issued to Fuse+Media LP, wherein they required 5% equity in the company M/s NDTV Network Plc. Now when it had issued 26% even on that basis, it would be USD 105 million as against investment of USD 150 million. Further, again convertible bonds were issued for conversion into equity shares after 5 years, when 20% of the holding was to the allotted to the bond holder namely. These bonds were issued for 100 million, and thus transaction was a genuine transaction. In any case, it is a commercial decision and the same has no consequence. Further, it is submitted that, when the shareholder who had acquired the share felt that, it is commercially unviable for it to remain invested it sold the same and as such so far raising of capital is concerned, the same is an irrelevant consideration.*
28	*Without prejudice to the allegation that M/s NDTV Networks International Holdings BV being a group company came into existence for a short period and did not carry on any business as alleged, the same by itself is not any ground or, basis to hold that the transaction of the subscription of shares by M/s Universal Studios International BV, is a sham transaction. It is submitted from the submissions made above, it is apparent that M/s Universal Studios international BV, the shareholder was a subsidiary of NBC Universal Inc. and was group company of GE Group one of the largest company in the world. Thus where the funds have come through banking channels from an well-established entity, the assumption and presumption of the authorities that the transaction is sham and the amount received by the subsidiary of the assessee was the assessee's own money is a matter which cannot stand the test of judicial scrutiny. It has been not shown that either no funds came or it was the assessee's own funds by leading positive material. The conclusion is based on frivolous, unsubstantiated allegation that, it was assessee's own money.*
28.1	*It is submitted that the basis on which A.O. has proceeded to make addition u/s 69A of the Income Tax Act is that, investment is not*

	recorded in the books of accounts; whereas it has been held by the authorities that the investment is duly recorded in the books of the assessee's subsidiary M/s. NDTV Networks International Holdings BV and therefore by no logic it could be held that provisions of section 69A of the Act are applicable. It is added here that the learned DRP in its order has held that the addition is to be made u/s 69A of the Act. It has also held that, addition is to be made u/s 68 of the Act. This finding itself shows contradiction in terms. Even assuming for an argument that section 68 of the Act has been invoked, and has been invoked then the fact remains that there is a credit in the books of the assessee subsidiary, the source of which is well established that the funds have been received through banking channel and has been confirmed by the shareholder who had acquired the shares
28.2	*It is submitted that the learned Assessing Officer could not have proceeded to draw unilateral opinion without even either calling upon the assessee itself or having examined the investors by making or independent enquiry to hold that the source is not explained or transaction is sham. It is submitted, that in the course of proceedings before the learned Assessing Officer no effort has been made by the revenue to call upon the assessee to produce the investor shareholder to satisfy the commercial or business prudency of the investor who make investment by acquiring shares at high premium. It is neither rule of law nor a rule of prudence that merely because a person seeks to make investment by acquiring assets at a higher premium holds the transaction to be sham, unless and until, the same is demonstrated by the tangible evidence. It is the alleger who has to establish the fact by leading positive evidence in support of his allegation that, apparent is real unless proved to be contrary. In the instant case, apparent is that there is a company incorporated under the laws of Netherlands and that it had made investment in assessee's subsidiary and had made the payment through its accounts which is duly reflected in its final account and that it has been further confirmed by it and also its holding company as also reflected such investment in their final balance sheet.*
28.3	*It is submitted that the charging of premium on fresh issue of shares is based on the business potential of the group which mainly consists of the entertainment vertical of the business. It is settled in law that the share premium received on the issue of shares has to be included in the paid up capital irrespective of whether the share premium has been maintained in a separate account apart from the reserve as held in the case of the Hon'ble Supreme Court in the case of CIT Vs Allahabad Bank Ltd. reported in 73 ITR 745. Drawing support from this decision of the Hon'ble Supreme Court, it is submitted share premium being a capital receipt; the same cannot be taxed as a revenue receipt under section 68/69A of the Act. A detailed note on the formation of subsidiaries, their activities and the basis of valuation of USD 150 Mn. is separately enclosed as Annexure 2 of this Synopsis, though it is specific averment of the appellant that it would not be material in order to invoke the provisions of section 68 or 69A of the Act.*

28.4	*It is submitted the other factor which has made basis by the revenue is that, such shares were offloaded by the said company at a lower premium is also misconceived, as would be evident from Annexure 2 to this Synopsis.*
28.5	*It is submitted that in the judgment of the High Court in the case of CIT vs. Divine Leasing & Finance Ltd. reported in 299 ITR 268 (Del) which has been upheld by the Apex Court in the case of CIT vs. Lovely Exports Pvt. Ltd. reported in 319 ITR 5 (ST), it was held that where there was an investment by way of share capital, no addition can be made in the hands of investee company. The only requirement is to establish the identification of the shareholder. In this case, it is submitted there is no whisper or suggestion that, assessee had failed to establish the existence of the said company. On the contrary, it is an admitted fact that the said company exists and was a group company of NBCU, which is one of the largest media entertainment company and is a part of GE company. There is no allegation by any of the companies that, they did not make investment. The question that whether they made investment at a higher value or at a lower value is wholly irrelevant and an extraneous consideration. The observation was made that the appellant has failed to establish the price of the shares which is 159 times of the face value. The appellant had placed on record necessary evidence to establish that the value of the share of the appellant company was 138 times, which was stated in the stock exchange. This submission has been made because the revenue has made an attempt to lift the veil of the corporate entity and if it be so, then obviously it is the value of the share of the said company that has to be considered.*
28.6	*In any case and without prejudice, what was the value of the share of the said company and at what rate the shareholder company acquired the share is totally irrelevant consideration and cannot be made any ground whatsoever to hold that, it is an unaccounted income of the assessee so as to invoke section 69A of the Act, which had absolutely no application.*
28.7	*On the facts of the present case, it is an admitted and undisputed fact that the transaction in question is subscription of the share capital in a foreign subsidiary of the assesee company by the Investor which in the normal charging provisions of the Act is not chargeable to tax. Thus, there is no basis to lift the corporate veil. It is further submitted that the addition in the present case was sustained by invoking the provisions of section 68 and 69A of the Act which in itself are complete and deeming provisions, therefore, the ingredients of said sections need to be construed strictly, and there is no scope to bring the fiction and assumption of lifting a corporate veil to hold the holding company liable to be taxed in that sections. In other words and without admitting, it is submitted that no addition could be made in the hands of assessee company being a holding company of the company whose share capital was introduced under section 68 or 69A of the Act in the grab of lifting of corporate veil.*

29	*The assessee further submits that in the report of the learned Assessing Officer as has been extracted at page 140 it has been alleged that the transactions "involves round tripping".*
29.1	*It is not known on what basis it has been alleged that, "it involves round tripping". Further, it has stated that there are huge variations in the rates, which it is submitted is of no consequence at all.The appellant seeks to place reliance on the following judgments:* *i) 350 ITR 220 (All) CIT vs. Jay Dee Securities and Finance Ltd.* *ii) 91 DTR 217 (All) CIT vs. Misra Preservers (P) Ltd.*
29.2	*At this juncture, the appellant submits the finding of the learned Assessing Officer in the remand report was that the transactions involved round tripping (page 140 of the Appeal Set). However, the learned DRP finding that such an observation is unsubstantiated has held in its direction (page 146 of the Appeal Set) that "though the assessee has sought to explain the above amount through the lengthy and circuitous transactions, the commercial substance/economic rationale for such transaction has not been satisfactorily explained.*
29.3	*The appellant most respectfully submits that the aforesaid observations of the learned DRP are not merely flimsy and vague but are in disregard of the fact that explanation tendered could not be by any stretch of logic or imagination or the transaction was circuitous or otherwise lacking commercial substance/economic rationale. On the contrary, the appellant company had established that such a transaction of issue of shares by its subsidiary was a genuine transaction. It was submitted that M/s. Universal Studios International BV, an independent company incorporated in Netherlands had under a shareholder agreement acquired 26% stake in NDTV PLC UK at an aggregate consideration. It is respectfully submitted that the learned DRP has completely ignored and overlooked the fact that the assessee company or its subsidiary had no role to play and the decision of investment was of an independent company. The learned DRP has failed to appreciate that the said company is subsidiary of GE group, one of the largest companies of the world. It is thus submitted that the finding of the learned DRP that assessee had sought to explain the share capital receipt of Rs. 642.54 crores through lengthy and circuitous transactions and commercial substance/economic rationale for which have not been satisfactorily explained lacks credence or any merit.*
29.4	*It is submitted that there is no basis to allege that explanation was either lengthy or transactions were circuitous. It is submitted that in what manner, the explanation was either lengthy or the transactions was circuitous lies only in one's imagination. No basis or any material has been led by the learned DRP to conclude and hold that explanation of the assessee in respect of the share capital received by its subsidiary from a global company was lengthy and furthermore, such a transaction was circuitous transaction. In such circumstances, the opinion of the learned DRP is based on hypothetical assumptions, theoretical considerations and imaginative suppositions and hence in*

	the respectful submission of the appellant, absolutely and entirely arbitrary, unjustified and untenable.
29.5	*It is further submitted that the observation of the learned DRP that appellant has not been able to satisfactorily explain the commercial substance and rational for such transactions, is also misconceived, misplaced and overlooks the factual matrix. It is submitted that there is no basis to hold that there was either no commercial substance or economic rationale for such transactions. It is not known on what basis, the learned DRP has proceeded to allege and assume that either the commercial substance or economic rationale for transactions has not been satisfactorily explained by the appellant. The directions of the learned DRP are highly vague and unsubstantiated. It was for the learned DRP to establish and not allege on subjective suppositions that the transaction lacks commercial substance or economic rationale. The learned DRP has failed to comprehend that there is exists, no material to arrive at such a finding or conclusion. Infact, there had been no examination of the parent company or investor company or even books of accounts to suggest that explanation of the appellant overlooks commercial substance. On the contrary, the assessee received valid consideration after due negotiation when it issued shares to the investor company. It is a matter of record that such issue of shares was based on valuations, which had been accepted by other investors and are not in dispute in the instant appeal and thus, the entire approach of the learned DRP to direct the learned Assessing Officer to make the addition is based on unsound principles and complete misconception of facts and circumstances of the case of the appellant company.*
29.6	*Further, even the observation that economic rationale has not been explained is also vague but is contrary to fact that the assessee has received an amount which is not an astronomical price. It is submitted that face value of Rs. 45/- is the face value of the investee company namely M/s. NDTV Networks International Holding and is an irrelevant consideration. It is submitted that the investment was made by the investor namely M/s. Universal Studio International VV to acquire 26% indirect stake in M/s. NDTV Networks PLC UK. It is submitted that valuation of Rs. 7115/- per share is not an astronomical price as entire 26% stake had been subscribed by the investor company by making an investment to the tune of 150 million US Dollar which gives an enterprise valuation of 500 million US Dollar. It is submitted and as stated above, this enterprise valuation is supported by preceding investments made in NDTV Networks PLC UK in the preceding years whereby 5% stake had been allotted to an independent investor for a sum of 20 million US Dollar giving an enterprise value of 400 million US Dollar. Later, preference shares had also been allotted for 100 million US Dollar by NDTV Networks PLC UK. It is thus submitted that observation of the learned DRP overlooks the fundamental facts and proceeds on surmiseful assumptions to direct the learned Assessing Officer to make an addition on willy nilly basis and mere ipsi dixit which*

	is not a valid basis to make an addition
30	*It is submitted that the conclusion that transaction lacks economic substance and commercial purpose is a matter of mere figment of imagination as the learned Assessing Officer of the assessee company cannot hold that it lacks economic substance or commercial purpose without even calling upon the investor, who had made investment to hold so.*
30.1	*It is submitted that while subscribing to the shares in the subsidiary, the investor/capital contributor namely (USBV) had agreed to the business plan which is the part of the shareholder agreement dated May 23, 2008. The amounts so received on subscription of capital were utilized in accordance with said plan, and there is no dispute on the same and had been confirmed by the investor in writing. Therefore, the allegation that the amount so received consists of premium would be misconceived and devoid of any merit and is merely based on suspicion and conjectures which could not be any basis for making an addition.*
30.2	*Be that it may so, it is well settled in the business world that the share premium is to be decided by the Board of Directors and there is no prohibition under the law so far as the amount of premium is concerned which a company could charge from its subscribers. It is well within the right of the issuer and subscriber to negotiate the price for the contribution of capital and the manner in which it had to be classified. The said fact has also been accepted by the Ld. AO in his remand report at Para No. 2.3.11.1. Thus, the issue whether the shares could be issued on premium or not cannot be a test to determine the characterization of the transaction in the present case.*
30.3	*To support that the issuance of share premium without having valuation done have no consequence, the Applicant placed its reliance on the ruling of the Mumbai Tribunal in the case of M/s. Green Infra Ltd vs ITO reported n 159 TTJ 728 wherein the newly incorporated company issued shares of Rs. 10 at share premium of Rs. 490, though it had yet to start its business. The relevant extracts of the above case are as under:-* *"....During the course of the assessment proceedings, the AO sought details and information u/s. 133(6) of the Act from the subscribers to the share capital and share premium account. The necessary details and explanations were received and were duly placed on record. After considering the entire submissions and the documents filed by the assessee in response to the specific queries raised by the AO, the AO was of the firm belief that the premium charged on allotment of shares is not justified. The AO was of the opinion that these funds were introduced by the assessee through share holders under the guise of the premium. The AO further observed that the company had a paid up share capital of Rs. 5,00,000/- on the date of incorporation. The certificate of registration issued by the*

Registrar of Companies on 29.4.2008 and the business plan valuation and justification for issue of shares at a premium was prepared and submitted to the subscribers on 14.4.2008. There are no reserves and surplus as on these dates available with the company. The Book value per share of the company is at Rs. 10/- per share could not justify charging of any premium on shares.

The AO further observed that the assessee does not have any hidden assets in the form of patents, copy rights, intellectual property rights or even investments etc belonging to the company based on which the assessee would be likely to substantially enhance its profits, which may have a bearing on the premium to be charged on allotment of the fresh shares

In the above facts, the Hon'ble Tribunal has held as under:-

"....No doubt a non-est company or a zero balance company asking for a share premium of Rs. 490/- per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the share holders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. Details of subscribers were before the Revenue authorities....."

Reliance is also placed on the judgment of Jurisdictional High Court in case of CIT vs. Empire Buildtech (P) Ltd. reported in 43 taxmann.com 269 has held as under:

"3. The facts in brief are that the assessee filed its income tax return for the year 2006-07. It is a matter of record that the assessee was incorporated on 20.10.2005 and commenced business thereafter.

The assessee had reported receipt of share capital to the tune of Rs. 11 lakhs; it sold them at 1000% premium and claimed to have received Rs. 1.1 crores on that count. During the enquiry made at the time of assessment proceedings, the AO required the assessee to furnish various particulars which have been set out in pages 21-23 of the paper book and contained in about 10 columns. He also proceeded to make further enquiry to that end and issued notices under Section 133 (6) of the Income Tax Act, 1961 to the individuals and entities who had applied as shareholders directly. This yielded certain information. 28 of the 39 investors responded to

the queries. Out of the balance of 11, 2 of them did not receive the notice and 9 received the notices and apparently had responded. Based on the materials on record, the AO framed the assessment adding the entire amount under Section 68. The assessee claiming to be aggrieved approached the Commissioner (Appeals) and successfully argued that once the identity of the investors had been disclosed, it had discharged the burden imposed upon it by law and that the amount could not be added back under Section 68. The Commissioner of Income Tax (Appeals) directed the deletion of Rs. 1.10 crores holding that since these individuals had responded and furnished the particulars elicited, the AO should not have added the amount as income. Almost similar approach was adopted in respect of the other 11 investors on the reasoning that the assessee did all that was required of it under the law by disclosing the identity of investors. The ITAT confirmed the order of the CIT (A). The Revenue, therefore, is in appeal before us.

7. In Lovely Exports (supra), the Supreme Court emphasized that the initial burden is upon the assessee to show as to the genuineness of the identity of the individuals or entities which seek to subscribe to the share capital. Once the relevant facts are furnished, the onus, stated the Supreme Court, shifts to the Revenue. In the present case, what this Court is to determine, therefore, is whether the burden had been fully discharged and whether the AO recorded its conclusion on the basis of the material on record. The AO in its order has produced the tabular statement describing the number of shares subscribed by the investors, the amounts paid by them, the individuals who paid the amount towards such capital and the gross income reported by each of such investors to the Revenue. A look at that chart - the contents of which have nowhere been disputed - would show that the investors had by and large reported amounts far less as compared to the sums invested by them, towards share capital. Furthermore, the AO had during the course of the assessment issued notices under Section 133 (6) to the investors - 28 of them responded; 2 did not receive the notice and 9 of them received the notices and responded, but did not submit any confirmation. While entertaining this appeal on 12.11.2013, the Court had issued notice restricting to the addition of Rs. 31,94,000/-, i.e., so far as it pertained to 11 subscribers/investors whose particulars could not be

	verified and who did not respond to the notices issued by the AO. *8. Having regard to the circumstances, particularly, the fact that these investors not only did not submit any confirmation and had concededly reported far less income than the amounts invested, this Court is of the opinion that the assessee could not under the circumstances be said to have discharged the burden which was upon it in the first instance in view of the law declared in Lovely Exports (supra) matter. It is not sufficient for the assessee to merely disclose the addresses or identities of the individuals concerned. The other way of looking at the matter is that having given the addresses, the inability of the noticees who are approached by the AO to afford any reasonable explanation as to how they got the amounts given the nature of their income which was disproportionally less than what they subscribed as share capital would also amount to the Revenue having discharged the onus if at all which fell upon it. This Court also notices that the assessee in this case was incorporated barely few months before the commencement of the assessment year, and there is no further information, or anything to indicate why its mark up of the share premium thousand folds in respect of the shares which were of the face value of Rs. 10 lakhs was justified.* *9. In view of the above discussion, this Court is of the opinion that the Revenue's appeal has to be partly allowed.* *10. The impugned order is accordingly set aside to the extent it deleted the addition of Rs. 31,94,000/-. The said amount is directed to be restored and added back to the assessee's income under Section 68.* *11. The appeal is partly allowed to the above extent."* *The said judgment support the submission of the appellant where a shareholder confirms the investment made in acquisition of shares despite the fact that shares were issued on premium, no addition is sustainable. However, it held that, the addition wherein shareholders did not confirm acquisition of shares then the circumstances that shares were issued at premium was regarded as a an addition basis to sustain the addition.*
30.4	*Thus, it would be incorrect to allege that NNIH could not charge a premium especially when it had already made huge investment at the beginning of the year in its subsidiary who holds the operating subsidiaries companies.*
30.5	*Your Honours attention is also drawn to the amendment made by the Finance Act, 2012, wherein the legislature had inserted section*

	56(2)(vii)(b) of the Act, wherein they have intended to tax the amount of share premium received in excess of the Fair Market Value of the shares as "Income from Other Sources". The said provision (as amended) is not applicable to the Applicant Company as NDTV is a company in which public is substantially interested. Therefore, no adverse inference could have been drawn in the facts of the present case in respect of charging premium. It is also important to note that the said provision is not applicable in the case of the investor being a foreign company investing in share capital of an Indian company at a premium. Further, it is a fact that both investor and investee companies are non-resident companiesand the provisions of the domestic law would have no application whatsoever.
30.6	*Secondly, both AO/DRP had alleged that subsequently in a short period of time said share capital was repurchased at a much lesser price which resulted into capital loss in the hands of the investor (USBV) which rendered entire transaction sham as it had no commercial and economic substance. It is submitted that the said allegation is completely misconceived and devoid of any merits on account of the following reasons:* *i) The subsequent event of repurchase would not be material to determine the nature of the original transaction specially when the provisions of section 68 and 69A of the Act were invoked. On the contrary, the reliance on the same proved that original transaction of subscription of shares is beyond any suspicion and ingredients of section 68 and 69A of the Act to tax the original transaction do not survive. In other words, the fact that the investments were repurchased subsequently shows that the original transaction is neither a tainted or illegal which warranted the lifting of corporate veil or would be held 'cash credits' under section 68 of the Act or 'unexplained money' under section 69A of the Act in the hands of the assessee company.* *ii) As far as the losses in the hands of the investor (USBV) on account of subsequent repurchase is concerned, the same is also irrelevant as it is not the case of the Revenue that such losses have benefited the assesee or its group companies in any manner. On the contrary, presuming but not admitting that the losses so incurred by the investor (USBV) are not genuine in that case also the appropriate recourse would be non allowance of such losses, if it is claimed in the hands of the investor (USBV) and in no manner could make the "good money" as "bad money" received on subscription of shares under section 68 or 69A of the Act in the hands of assessee or its group companies.*
30.7	*Having said so, the decision of USBV/NBCU to exit from the company M/s NNIH was based on the fact that entertainment business in India was based on the reasons that the business of NDTV Imagine Group has suffered huge losses and to revive the same the fresh equity infusion was required. It is a fact that the entire business of NDTV Imagine Group was later on sold by NNPLC at a total consideration of*

	USD 7,34,85,427 to Turner Asia Pacific Ventures after due negotiation which included consideration to be paid to minority stakeholder amounting to USD 66,73,551 . The disclosure to that effect was also made (below the note on re-purchase of stake from USBV) in the Annual Report of the Group for FY 2009-10 which read as under:- *"...The Company and NDTV Networks Plc, on 8 December 2009, entered into an agreement with Turner Asia Pacific Ventures, Inc. ("TAPV") for the sale of controlling stake in Turner General Entertainment Networks India Limited (Formerly NDTV Imagine Limited - "NDTV Imagine"). Pursuant to the said agreement, NDTV Networks Plc, on 23 February 2010 ("Closing Date"), transferred to TAPV 12,638,592 shares representing 85.68% of the issued and paid up equity share capital of NDTV Imagine on the Closing date resulting in a decrease of NDTV networks Plc's stake in NDTV Imagine from 90.68% to 5% for a cash consideration aggregating to US$ 73.48 million. The transaction also involved a further infusion of a sum of US$ 50 million as equity capital in NDTV Imagine by TAPV, which has resulted in further dilution to 3.18%."*
30.8	*From the above, your Honours would appreciate that the total consideration of USD 12.5 million for re-purchase of the 26% stake is fair, reasonable and was negotiated by the parties on the basis of the commercial consideration and not with any ulterior motive or as a device to evade any tax liability. In addition to the above, the applicant has also submitted the copies of the mails wherein NBCU had shown it's desire to exit from the joint venture on the above stated consideration. Therefore, it is factually and legally incorrect to allege that the transactions of subscription of shares and subsequent repurchase were not genuine and had no commercial and economic substance.*
30.9	*In view of the above, it is submitted that the addition was merely based on surmises and conjectures which is impermissible and in complete disregard to the facts of the case. It is further submitted that the revenue on subjective opinion which is based on surmises and conjectures applied the doctrine of lifting of corporate veil and therefore, the addition deserves to be deleted in the hands of hands of the assesee company on this ground alone in view of the following decisions:* *i) <u>26 ITR 775 (SC) Dhakeswari Cotton Mills Ltd. vs. CIT</u>* *"As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making the*

	assessment under sub-section (3) of Section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23(3)." ii) 37 ITR 271 (SC) Umacharan Shaw & Bros. vs. CIT "...Taking into consideration the entire circumstances of the case, we are satisfied that there was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine. There are many surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof in these matters."
31	The assessee also seeks to refer to page 12 (Directions of DRP), wherein in para 5.12, the DRP has recorded its finding and has stated that the duration of time during which the holding structure exists: the period of business operations in India; the generation of taxable revenues in India, the timing of the exit; the continuity of business on such exit" is a relevant consideration.
31.1	The aforesaid observations were in the context of determination of capital gain and not for the purpose of business profit and had nothing to do with the issue related to the instant case. It is submitted that, no such additions has either been proposed by the A.O. nor has even been directed to be made by the learned DRP.
31.2	Further the appellant also does not dispute the proposition of law that while computing assessee's income what is taxable in law is the entire income earned anywhere in India and in fact such is not a issue. The issue involved is limited and i.e. whether the amount received by way of share subscription by the assessee subsidiary in Netherland could be regarded as assessee's income u/s 69A of the Act, despite the fact as stated above.
32	It is submitted that, there can be no opinion other than what has been held by Apex Court in the case of CIT vs. Lovely Exports Pvt. Ltd. reported in 319 ITR 5 (St) that where an assessee identifies the shareholder he discharges his obligation. In this case no shares were issued by the assessee and shares issued by the assessee's subsidiary which were duly identified by the subsidiary to have been contributed by the shareholder, who not only existed but has substantial financial background.
33	In such circumstances, the submission of the appellant is that the following findings of the authorities: i) That "transaction" is sham; ii) That corporate veil is to be lifted; iii) That share capital received is assessee's own money; iv) That no investment has been made by the investor i.e. M/s Universal Studios International BV, is totally untenable in law and is based on flimsy consideration.
33.1	Having said so, the applicant further submits as under to state the correct facts and affairs of its subsidiaries which have not been

	considered and appreciated by the Ld. AO/DRP which shows that the transaction in question is genuine and provisions of section 68 or 69A of the Act are not applicable on the facts of the case and no addition could be made in the hands of assessee company by invoking these sections. *i) That the Company had complied with all Accounting Standards in accordance with provisions of the Companies Act, 1956 while preparing the accounts for the year under consideration and the Ld. AO is factually and legally incorrect in alleging that there is non-compliance of Accounting Standards.* *ii) That the Company had disclosed the true nature of above transaction in its consolidated books of accounts / financial statements which is clearly evident from the disclosures made in the notes of accounts and had even explained the objective and rationale of the said transaction in the Annual Report for the year under consideration. Therefore, the Ld. AO is factually incorrect and wrong in stating that the applicant had failed to disclose the true nature of the above transaction.* *iii) The AO had alleged that the applicant company failed to prove the identity and creditworthiness of the share subscriber and also failed to satisfactorily prove the nature and the source of the funds. In respect of the above allegations, though the applicant had discharged its primary onus to prove the identity and creditworthiness of the share subscriber and to prove the nature and the source of the funds, yet in order to substantiate the above filed additional evidences vide its letters dated April 29, 2013October 24, 2013 and December 23, 2013 with the Hon'ble DRP and and the same were forwarded to the Ld. AO in the course of the remand proceedings. The applicant adduced the evidences tabulated above in its various applications which the Hon'ble DRP and learned AO failed to appreciate the same in accordance with law.*
33.2	*The aforesaid evidences filed clearly substantiate that transaction in question is genuine and done in accordance with law and could not be alleged or rejected on mere suspicion and vague allegations. The assessee most respectfully submits that said evidences and explanations could not be rejected by merely stating that evidences have no evidentiary value in light of the suspicious, imaginary and irrelevant grounds, especially when the evidences and explanations of the assessee shows and prove beyond doubt that the receipt in the hands of NNIH is not of a nature of an income. It is a settled principle in law that the Revenue could not "convert good proof" into "no proof" or otherwise act unreasonably and arbitrary which it seemed to have acted without commenting and stating the specific reasons and grounds that why such evidences have no evidentiary value. The Applicant fervently believes that the evidences so filed is good enough proof to support that the transaction is genuine and driven with objective of business needs, and there is no reason whatsoever to cast doubts on imaginary, vague and misconceived facts.*

33.3	*It is also submitted that under law the burden of proof is on Assessee to prove the genuineness of the transaction, however, the review of the judicial dicta on this issue reveals that the initial burden is upon the assessee to explain the nature and source of the share application money received by the assessee, and once it has been discharged the onus on revenue to prove that the same is not correct or false. In the event, the revenue fails to discharge such onus in the absence of any cogent material on record or any evidences, the explanation and evidences adduced by the assessee ought to accepted, and no adverse inference could be drawn.* *In order to discharge this burden, the assessee is required to prove:* *i) Identity of shareholder;* *ii) Credit worthiness of shareholders.; and* *iii) Genuineness of transaction*
34	*Apart from the above the applicant submits that invoking of provisions of section 68 and 69A of the Act on the same amount, itself shows complete non application of mind by the Ld. AO/DRP. The applicant is saying so as the provisions of section 68 and 69A of the Act are parallel to each other, and basic ingredients of these two sections are opposite to each other as stated below:*

Section 68 of the Act	*Section 69A of the Act*
Conditions for applicability of section 68 of the Act:- • *The existence of the books maintained by the assesee himself, and* • *A credit entry in the books of account*	*Conditions for applicability of section 68 of the Act:-* • *assessee is found to be owner of any money, bullion, jewellery or other valuable article; and* • *Such money, bullion, jewellery or valuable articleis not recorded in the books of account, if any, maintained by the assessee for any source of income*

34.1	*From the above highlighted portion above, it is clear that if the there is a credit entry in the books of accounts which is not satisfactorily explained that would be covered in section 68 of the Act. On the other hand, if the person is found to be the owner of any money, bullion, jewellery or other valuable article which is not recorded in the books of accounts, in that case the provisions of section 69A of the Act is*

	applicable. Thus, it is submitted that the provisions of section 68 and 69A of the Act run opposite to each other, and therefore, the addition, if any (though not admitted) could be made in either of the sections and not in both. It is also submitted that once the assesee proved the genuineness of the transaction within the parameters of section 68 of the Act, then no addition could be made for the same amount under section 69A of the Act as the basic ingredients of section 69A of the Act that said money, bullion, jewellery or other valuable article is not recorded in the books of accounts would not be satisfied because of the overriding finding that it is recorded in the books of accounts of the assessee.
34.2	*Be that it may so, the applicant submits that the provisions of section 69A of the Act could not be invoked in the present case in addition to what has already been submitted above.*
34.3	*It is further submitted and reiterated that the ingredients of section 69A of the Act are not present in the facts of the case and the addition is not legally sustainable on this ground in view of the submission made here-in-below:* *The Applicant submits that the deeming part of section 69A of the Act, dealing with unexplained money etc. comes into play only if the following two conditions are fulfilled:* *1) The assessee is found to be owner of any money, bullion, jewellery or other valuable article; and* *2) Such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by the assessee for any source of income.*
34.4	*The applicant most respectfully submits that both the ingredients i.e. the assessee is the owner of money and such money not been recorded in the books of the assessee are not fulfilled in the present case.*
34.5	*It is well settled law that the deeming provisions need to be construed strictly, and there is no room for construction of the said provisions on the basis of fiction, assumption or surmises by alleging that since assessee was an ultimate parent company, therefore, the assessee company was in ultimate control of the said money.*
34.6	*In this regard, it is submitted that in the impugned assessment order as well as on the basis of the material on record it had been admitted and is an undisputed fact that the amount in question was the money received by the subsidiary of the Applicant company who would be treated as the owner of such money.*
34.7	*In addition to above, the acceptance of the Ld. DRP/AO in their respective orders that the share capital was subsequently re-purchased by the another subsidiary assessee of company from the erstwhile investor later on also shows and support that at no point of time the assesee or its any subsidiary was the owner of the said share capital. On the contrary, it is proven by the material on record and admission by the Ld. AO/DRP that investment was made by the group company of General Electric namely USBV, thus, leaving no doubt that provisions of*

	section 69A of the Act could not be invoked in the facts of the case.
34.8	A company is a separate legal person and the fact that all its shares are owned by one person or by its parent company has nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and not the parent company, would get hold of the assets of the subsidiary and the assets of the subsidiary would in no circumstance be held to be those of the parent. Even though a subsidiary company may normally comply with the request of the parent company, it is not a mere puppet of the parent. The distinction is between having power and having a persuasive position. Thus, the inferences drawn by the Ld. AO/DRP on surmises and conjectures in this regard are not correct in light of the well settled jurisprudence and principles settled by the various courts which are summarised here-in-below:- i) AIR 1951 SC 41 Charanjit Lal Chowdhury vs. UOI ii) AIR 1955 SC 74 Bacha F. Guzdar vs. CIT iii) 131 ITR 445 (MP) Maharani Ushadevi vs. CIT iv) AIR 1982 SC 697 Western Coalfields Ltd vs. Special Area Development Authority v) AIR 1988 SC 1370 LIC of India vs. Escorts Ltd. The Hon'ble Court's had summarised the position of law in this regard as under:- i) A shareholder's interest in a company is represented by his shareholding, which is immovable property, with all the attributes thereof. ii) A company as a juristic person is distinct from its shareholders. It is the company which owns the property, not the shareholders. iii) The rights of shareholders are such as are delineated under the provisions of the Companies Act. A shareholder while having no rights of ownership in the assets of the company has a voice in administering the affairs of the company and would be entitled, as provided by the Articles of Association, to dividends, distribution out of the profits of the company.
34.9	The above principles find resonance in several other decisions including RC Cooper vs. Union of India reported in ((1970) 2 SCC 298 (the Bank nationalization case) where the Court reiterated the principle that a company registered under the Companies Act is a legal person, separate and distinct from its individual members; its property is not the property of the shareholders who have merely an interest in the company arising under the Articles of Association, measured by a sum of money for the purpose of liability and for sharing the profit, and that where companies are incorporated for a lawful purpose their properties are owned by them and there is no reason for even taxation purposes that their property should be treated as belonging to the shareholders
34.10	34.10 The above proposition of law has been accepted and approved in Vodafone's case parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises

	shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. In other words, the Supreme Court recognises the separate existence of the holding company and its subsidiary companies for tax purposes.
34.11	*The second condition which needs to be satisfied cumulatively with the first condition is "the said money has not been recorded in the books of account of the assessee". It is a fact that the money in question is duly recorded in the books of NNIH, therefore, this condition is also not satisfied in the present case. Therefore, the provisions of section 69A of the Act have no application in the present case.*
34.12	*The applicant further submits that the intention of the legislature behind section 69A of the Act is to tax the money not recorded in the books of accounts of the assessee though the assessee is the owner of such money. Such provisions would normally get invoked in cases where in the assessee is found to be owner of money and valuable article which he failed to record in its books. However, it could not be invoked in a situation where the money has been duly reported and had been recorded in the correct books of accounts which in fact had been admitted by the revenue when they invoked the provisions of section 68 of the Act as stated above.*
34.13	*Thus, it is submitted that the deeming fiction of 69A of the Act that the person is an owner of said unexplained money could not be invoked in the facts of the present case. Similarly, the question of not recording the above transaction in the books of the Applicant company would not arise at all and on the contrary it is submitted with full conviction, that the transaction is genuine and a bonafide transaction and had duly been recorded in the books of NNIH. Therefore, there is no question that the said money be treated as unexplained money in the hands of the assessee under section 69A of the Act.*
34.14	*The applicant most respectfully further submits that the Applicant had duly discharged its onus as required under the law. Further, it is well settled law that mere allegations that the transaction in question is sham on surmises and conjectures would be not be justified in the eyes of law. The Applicant had explained the transaction in question in a detailed manner and had also filed the confirmation letter of USBV as additional evidences which is already placed on record wherein the buyers identity, creditworthiness and source of making an investment is confirmed and authenticated and also corroborated by the Financial Statements of USBV and NBCU.*
34.15	*In light of the confirmation received from the party who had invested in NNIH, its identity and credit worthiness had been duly established. Accordingly, we submit that the assertions of the Ld. AO that the documents do not have any evidentiary value is not correct in law and is totally devoid of any merit as it is well settled law that mere suspicion on the transaction could not be a basis of making an addition. In support of the above, the applicant company placed its reliance in the case of Dhakeswari Cotton Mills Ltd. v. CIT reported in 26 ITR 775*

	(SC)andUmacharan Shaw & Bros. v CIT reported in 37 ITR 271.
34.16	For your Honours ready reference, the Applicant here-in-below again explains the nature and source of said money in order to appreciate the facts here-in-again to make the case of the applicant beyond suspicion and doubt:
34.17	During the year, NDTV as a Group entered into a strategic long term partnership with NBC Universal, Inc. (NBCU) for NDTV's Networks business. The Group has raised US$ 150 million from NBCU for an effective stake of 26% in NDTV Networks Plc. The NDTV - NBCU strategic partnership was a coming together of two leading professional organizations with similar ethics and goals with a promise to be a major force in the media scene in India and beyond.
34.18	NBCU as a strategic partner infused the fresh capital on issuance of new shares. Thus, it is evident that nature of the said transaction is infusion of the share capital which is evident and supported by the Share Subscription and Shareholder Agreement dated May 23, 2008. The legal sanctity of the said documents could not be displaced on surmises and conjectures as alleged in the impugned assessment order.
34.19	In respect of the identity of NBCU and USBV, it has already been submitted that NBCU, now a part of Comcast Corporation (GE Venture), is one of the world's leading media and entertainment companies in the development, production, and marketing of entertainment, news, and information to a global audience. NBC Universal owns and operates a valuable portfolio of news and entertainment television networks, a premier motion picture company, significant television production operations, a leading television stations group, world-renowned theme parks, and a suite of leading Internet-based businesses.
34.20	In so far as even the credit worthiness of the investor could not have been suspected since the revenues from operations of past calendar years alone far exceeded the amount of contribution made by way of share capital of USD 150 million. It may be stated that the revenues for the preceding calendar years as evident from the balance sheet are as under.

Calendar Year	Revenue (Millions USD)
2007	1676
2008	2062

Similarly, the investor in the above two years holds the Tangible and Financial Assets investments in various companies as under:-

Calendar Year	Investments (Millions USD)
2007	384
2008	902

	Infact, even as a group of the shareholder (NBCU) the revenues from operations of past three calendar years are as under.

Calendar Year	Revenue (In USD, in millions)
2008	16802
2009	15085
2010	16590

34.21	*Thus, it is submitted with full conviction that the transaction is genuine and a bonafide transaction and had duly been recorded in the books of NNIH. Therefore, there is no question that the said money be treated as unexplained money in the hands of the applicant under section 69A of the Act. Even the Revenue had not brought any material on record which could displace or controvert the above submission/evidences of the assessee which is necessary and desirable in order to make an addition under section 68 or 69A of the Act.*
34.22	*It is submitted that, on the survey of the order of assessment which has resulted into a finding the said transaction pertaining to the receipt by the subsidiary which has been as sham, it is submitted that the same is based on complete conjectures and surmises without bringing any material. It is well settled rule of law that apparent is real unless is proved to be contrary. The learned A.O. in order to arrived at the aforesaid conclusion has firstly at pages 119 to 120 extracted assessee's reply in response to his notice dated 11.11.2013 and thereafter again at the same page (Pages 120 -123) as extracted the submissions of the assessee dated 27.11.2013 (pages of 1164 to 1169 paper book- Volume IV) while dealing with the submissions of the assessee in para 2.3.9 (page 124) he has stated that "it is undisputed fact that 915948 shares of NNIH i.e. NDTV Network International Holding BV, were having a face value of around $1 per share, equivalent to Rs. 40 to 50/- per share approx. at the relevant time and that the rate at which the shares were subscribed comes to Rs. 7015.05 per share."*
34.23	*He has further stated that, it is an undisputed fact that, "no independent valuation at all was ever carried out by the group companies or by the NBCU i.e. Investor company and the issue rate as well as was the repurchase rate are claimed to be solely based on estimates and business projections." He has further stated that, it is an undisputed fact that, during the immediately succeeding F.Y. 2009-10, relevant to A.Y. 2010-11, the very same shares were bought back by NDTV BV, a subsidiary of NDTV, for Rs. 58.08 crores @ Rs. 634.17 per share. On the aforesaid basis he called upon the assessee, why such transaction may not be proposed to be treated as sham and the amount be not proposed to be added as its taxable income. It is thus apparent, the fundamental basis for making the addition as has been stated by the learned DCIT in his order at page 124 para 2.3.9 was that the shares were subscribed by the group companies or by the NBCU @ 7015.05 per share and the same shares were bought back by NDTV BV @ Rs. 634.17 per share; whereas the face value of such shares was Rs. 40/-*

	to 45/- per share.
34.24	*A finding to hold a transaction as sham cannot be reached, merely because on giving such a finding a higher revenue can be generated. Infact, something more than, the mere yielding of revenue is required is necessary and by establishing that the purported transaction was merely a paper transaction and was neither intended to be acted nor in fact it was acted and was a mere paper transaction, as against a transaction where such a transaction had factually been undertaken not on papers but has also been implemented in letter and spirit too. Further it has to be established that the parties to the transactions had motives to avoid tax whereas in the instant case it has not been shown that either the assessee had any motive to reduce its tax liability nor has been shown the shareholder a totally unconnected company had in any manner reduced their tax liability. The burden to establish the transaction is from being on revenue, could not be stated to have been discharged without establishing that the funds by which the shares are subscribed come from the assessee. It is submitted that this in the absence of any material, the funds flowed from the assessee's subsidiary or from the assessee, such a finding that the transaction is sham is on a result of an arbitrary approach, and is based on mere hypothetical assumptions.*
34.25	*In response to the aforesaid suspicion of the learned A.O. the assessee vide its submissions dated 29.11.2013 (pages 1170-1183 of Paper Book) submitted that, the A.O. in the draft assessment order had proposed the addition by invoking section 69A of the Act and the assessee discharged its primary onus which lay upon it, that section 69A of the Act is inapplicable by its submissions dated 29.04.2013 and 24.10.2013 filed with DRP containing additional evidences*
34.26	*The assessee further submitted that, it had also discharged its onus u/s 68 of the Act, which was sought to be invoked by the A.O. when it had filed necessary evidence establishing the identity of the payer i.e. subscriber of the shares, the creditworthiness of the shareholder and the genuineness of the transaction. The aforesaid transaction was carried out through banking channels, which was duly recorded in the books of accounts.*
34.27	*The learned A.O. thereafter at page 125 in para 2.3.10.1 has recorded that, the additional evidence furnished by the assessee in response to his notice establishing the genuineness of the transaction the identity of the payer i.e. the subscriber of the shares, creditworthiness has discharged when it had furnished the following evidences:* *(i) Copy of Share Subscription Agreement dated 23.05.2008 and Share Certificate.* *(ii) Copies of Annual Reports of NBCU for FYs. 2008 to 2010 filed before Securities Exchange Commission, US.* *(iii) Copy of Annual Report of NDTV for F.Y. 2009-10.* *(iv) Copy of Annual Report of GE.* *(v) Copy of Form 10K filed by the Comcast Corporation before US Securities and Exchange Commission.*

	(vi) Copy of bank account of NNIH in ING Bank, Netherlands., (vii) Copy of Audited Accounts of NNIH.
34.28	It is submitted that, despite the aforesaid evidence the learned A.O. in his order at page 125, para 2.3.10.3 has observed that, "no confirmation from NBCU regarding the transaction has been filed at all." It is respectfully submitted that, the aforesaid observation of the learned A.O. has factually incorrect as it would be seen from page 722-725 of Paper Book-III that the assessee had furnished a confirmation from NBCU regarding the transaction. It is pertinent to be stated here that, at page 125 the learned A.O. has observed as under: "No confirmation from NBCU regarding the transaction has been filed at all. Had it been a normal business transaction, it would be necessary for the assessee to file confirmation from NBCU, which would be subject to verification by the A.O. by calling upon the assessee to file an affidavit from NBCU or to produce the authorized representative of NBCU to confirm the assertions. However, no such confirmation has been filed by the assessee and therefore, it cannot be said that the onus has been discharged by the assessee even in the context of section 68 or section 69A of the Act, as sought to be justified by the assessee in its letter dated 29.11.2013."
34.29	It is thus absolutely clear that, the learned A.O. had proceeded on an assumption that the assessee did not filed any confirmation from NBCU regarding the transaction. It is further be noted that, he himself admitted that, had it been a normal business transaction such confirmation would have been furnished and it was thereafter for him to have rebutted the said material in the shape of confirmation. It is submitted that, the assumption so made is thus by not only overlooking the aforesaid additional evidence but failing to discharge its burden in the face of documentary evidence furnished which in his opinion was highly relevant to establish the genuineness of transaction. The appellant had submitted that, the learned A.O. has proceeded to misconceived facts in making the aforesaid addition and holding the transaction to be sham. It is worthwhile to be stated here that the learned A.O. without any material assumes when he records in his order at page 125 that the transaction of subscription of shares of NNIH by NBCU is not a normal transaction and lacks commercial purpose or economic substance in view of the facts and discussed in para 2.3.9. (page 124) i.e. the issue of the shares at normally high price which was unsupported by any valuation and repurchase of the same in the succeeding year for a lower sum then admitted it was the issued.
34.30	The appellant submits that, the assumption of the learned A.O. that the shares were issued by the assessee's subsidiary at an abnormally high price and then repurchased the same at a lower rate without there being any valuation made both at the time of purchase and sale, it is respectfully submitted is highly misconceived. At the first instance, it is submitted the same is absolutely no test in the eyes of law as the Apex

	Court has held in the case of CIT vs. Lovely Exports Ltd (Supra). that, when a subscription is received by the company from its shareholder, the amount of share subscription cannot be assessed in the hands of the company so long it establishes the identity of the shareholder. In the instant case, it is respectfully submitted that, the learned A.O. has failed to comprehend that, under Article 141 of the Constitution of India, he is bound by the said judgment and any further probe is highly unwarranted and is beyond jurisdiction. The Apex Court has nowhere held that, where shares have been subscribed at a higher value than the face value, in such cases, an amount received by the company by way of share subscription can be added to the income of the company so long it establishes the identity. In the instant case, it is neither an allegation nor is the finding that the subscriber of the shares has not established the identity or even the shareholder has denied to have subscribed the shares.
34.31	*It appears to the appellant the aforesaid conclusion, if it is not a afterthought is based on such material, which has been brought on record by Shri S. K. Srivastava and has been taken on record by the learned DRP. It is submitted that Shri S. K. Srivastava an Ex IRS, is the person, who is acting adversely against persons in general and keeps on feeding his imaginative ideas before the authorities in order to harass them. The appellant at this stage is making no further submission but to only add that, it has no difficulty, if such material which has been brought on record by Shri S.K. Srivastava is even taken on record for purpose of determination of issued by Hon'ble Tribunal but only with one prayer that the issue be examined dispassionately and, not be influenced by his inferences, as had been stated by him and noted by DRP, as its own findings. In other words, the submission is that such material, which is general to the issue, be examined dispassionately but not as Shri S. K. Srivastava, desired to do so*
35	*To highlight the aforesaid submission, the appellant seeks to refer straightway to page 125 of the Appeal Set where the learned Assessing Officer has made an attempt to justify his conclusion that transaction in sham by observing that no confirmation has been filed for the transaction at all. He further admits that had it been a normal business transaction then it would be necessary for the assessee to file confirmation from NBCU, which would be subject to verification by the AO, by calling upon the assessee to file an affidavit from NBCU or to produce the authorized representative of NBCU to confirm the assertions. It is submitted that the aforesaid finding is not only factually incorrect but is clear attempt on part of learned Assessing Officer to support his arbitrary conclusion by disregarding evidence, which is considered necessary and filed by assessee (pages 668-669 of Paper Book-II). It is thus submitted at the first instance the order is a vitiated order, as it is repeated at the risk of repetition that the learned Assessing Officer framed the assessment with predetermined mind having a focus and mission to make the addition and for that purpose*

	he has to necessary record the transaction to be "sham" or "not genuine"
35.1	*What a "genuine" or "ingenuine" is not a matter of mere discretion but has to be arrived at a consideration of all such evidence, which are relevant to the determination. In the instant case despite AO's own finding, he ignored such a foundational evidence, which in his opinion would have clinched the issue. At this stage, there was so done, as he had a fear in his mind, he will face the wrath of Shri S. K. Srivastava. Infact Hon'ble High Court of Delhi in the case of P. K. Misra Ex. IRS and CIT had made an adverse inference based against the role of Shri S. K. Srivastava.*
35.2	*Apart from the above, a finding to hold a transaction as "sham" cannot be reached, merely because on giving such a finding a higher revenue can be generated. Infact, something more than, the mere yielding of revenue is required is necessary and by establishing that the purported transaction was merely a paper transaction and was neither intended to be acted nor in fact it was acted and was a mere paper transaction, as against a transaction where such a transaction had factually been undertaken not on papers but has also been implemented in letter and spirit too. Further it has to be established that the parties to the transactions had motive to avoid tax; whereas in the instant case it has not been shown that either the assessee had any motive to reduce its tax liability nor has been shown that the shareholder a totally unconnected company had in any manner reduced their tax liability. The burden to establish the transaction is "sham" is on revenue, which could not be stated to have been discharged without establishing that the funds by which the shares are subscribed came from the assessee. It is submitted that in the absence of any material, the funds flowed from the assessee's subsidiary or from the assessee, such a finding that the transaction is "sham" is a result of an arbitrary approach, and is based on mere hypothetical assumptions.*
35.3	*It is further submitted that the finding of the DRP is that the issue of shares and subscription made by the shareholder is a sham transaction. It is submitted that, merely because the DRP has concluded the transaction to be sham by itself is insufficient to hold the transaction which has in reality been undertaken to be a sham on the ground that the investor at the time of making subscription did not have any material to satisfy itself that the value of shares subscribed by it represented the value of shares or that subsequently after a period of about 18 months, said shares had to be transferred by the shareholder at a price which was far lower than the value at which it had subscribed the shares. It is submitted that a transaction can be held to be a sham transaction which was not intended to be operative, and was merely a cloak to conceal a different transaction. Reliance is placed on the following judicial pronouncements:* *i) 49 ITR 165 (SC) Kalwa Devadattam and Two Others vs. UOI* *ii) 149 TTJ 537 (Cal) ADIT vs Maersk Line UK Ltd* *iii) 356 ITR 25 (Kar) Bhoruka Engg. Industries Ltd. vs DCIT*

35.4	*It is also added here that a shares transaction connotes a transaction as a 'non-genuine' transaction. A transaction can be said to be 'non-genuine' which not entered by the parties to the transaction or if the same is entered but is merely a paper transaction and, same represents a façade without any initiation to enter into such a transaction. Further the expression 'sham' has not been defined under the Act. To determine, whether transaction is 'sham' a 'non-genuine' the same has judicially been examined is various decisions: Diplock L.J. in Snook vs. London and West Riding Investment reported in 1967 2Q.B. 786 has held that, " I apprehend that, if it has any meaning in law, it means acts done, or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". Further Hon'ble Bombay High Court in the case of CIT vs. Seksaria Sons Pvt. Ltd. reported in 138 ITR 419 at page 424 has held that a transaction without substance can be regarded as 'sham'. But a transaction brought in existence for ulterior purpose does not necessarily become a sham transaction. The Apex Court in the case of Sree Meenakshi Mills Ltd. reported in 31 ITR 28 had held that, to establish the transaction to be sham, the relevant consideration is whether such a transaction in fact did or did not take place in reality. In otherwords a transaction can be held to be a sham transaction which was not intended to be operative and was merely a cloak to conceal a different transaction. A list of few more cases on this issue are stated in Annexure "B" to this synopsis but a judgment of Apex Court of two judgments in its judgments in the case of UOI vs. Azadi Bachao Andolan reported in 263 ITR 706 after considering the judgment in the case of McDowell and Co. Ltd. reported in 154 ITR 148 in para 141 at pages 761-762 have observed as below:* *"Though the words "sham", and "device" were loosely used in connection with the incorporation under the Mauritius law, we deem it fit to enter a caveat here. These words are not intended to be used as magic mantras or catch-all phrases to defeat or nullify the effect of a legal situation. As Lord Atkin pointed out in Duke of Westminster's case [1936] AC 1 (HL); [1935] 19 TC 490, 511):* *"I do not use the word device in any sinister sense: for it has to be recognised that the subject, whether poor and humble or wealthy and noble, has the legal right so to dispose of his capital and income as to attract upon himself the least amount of tax. The only function of a court of law is to determine the legal result of his dispositions so far as they affect tax."* *Lord Tomlin said:* *"There may, of course, be cases where documents are not bona fide nor intended to be acted upon, but are only*

	used as a cloak to conceal a different transaction." *In Snook v. London and West Riding Investments Ltd. [1967] 1 All ER 518 at 528 (CA) Lord Diplock L. J., explained the use of the word "sham" as a legal concept in the following words:* *"...it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived*
35.5	*In the instant case, by no stretch of imagination, it can be alleged that the assessee's subsidiary did not issue the shares or the subscriber to the share capital which acquired 26.% indirect stake in NNPLC did not make any investment in the subsidiary of appellant*
35.6	*It is submitted there is no denying of the fact that such subscriber contributed the consideration from its own funds and it was duly recorded in their books of accounts. There is no evidence in rebuttal which has been brought on record to establish that any such consideration which was contributed by the share capital came from the sources of the appellant company. Thus the sources of consideration for acquiring the shares came from the resources of the investors and appellant's subsidiary or appellant had at no stage contributed the said sum. The allegation of the revenue is based on assumption, and no evidence has been brought on record to show the value of said shares was otherwise, than at which it had been acquired. It is submitted the value of the said shares at which the shareholder had agreed to make investment was not a price at which it had been acquired. Even assuming it was so, even then too, the transaction cannot be regarded as sham so long it is duly confirmed by the shareholder who has contributed towards the share capital. It is submitted that the revenue does not have license to hold each and every transaction to be sham as the same according to it lacks logic. It is submitted that the burden of proving that a transaction is sham or that the person in whose name the property stands is not the real owner but is only a sham, is on the taxing authorities. The presumption is in favour of good faith and non-*

	concealment of income, but that presumption may be displaced by circumstantial evidence, e.g. the state of affairs which admittedly existed in earlier years and the extent of the assessee's business in the relevant accounting year. The initial burden of finding some material, however slight, to support a finding of concealed income, is on the Department. (CIT vs. K. Mahim Udma reported in 242 ITR 133 (Ker), Indian Gum Industries Ltd. vs. Asst. CIT (Civil Sales Tax Revisions No.183/2003, 194/2003, 195/2003, 230/2003, 231/2003 dated 29thAugust, 2013) HC Rajasthan, Sheikh Baboo vs. Madanlal Jaiswal & Anr reported in (2013) CLT 13 (CN). In CIT versus Daulat Ram Rawat Mull reported in *87 ITR 349, the Supreme Court held that onus of proving what was apparent is not real is on the party who claims it to be so. There should be some direct nexus between the conclusions of fact arrived at by the authorities concerned and the primary facts upon which the conclusion is based. Use of extraneous or irrelevant material in arriving at the conclusion would vitiate the conclusion of fact, because it is difficult to predicate to what extent, the extraneous and irrelevant material has influenced the authority in arriving at the conclusion of fact.*
35.7	*It is well settled rule of law that the prudency and commercial decision can alone be taken by a business men and It is also a settled law that it is the prerogative of the businessman to organize its affairs in a manner best suited to it and the revenue authority cannot step into the shoes of the businessman and it is not for the revenue to attack a transaction on the ground that the same was imprudent and thereafter to record the finding that the same was sham. Attention in this regard is invited to the following decisions:* *i) 53 ITR 140 (SC) CIT vs. Malayalam Plantations Ltd.* *ii) 65 ITR 381 (SC) CIT v. Walchand & Co. etc* *iii) 72 ITR 612 (SC) J K Woollen Manufacturers v. CIT:* *iv) 82 ITR 166 (SC) CIT v. Birla Cotton Spg. And Wvg. Mills Ltd.* *v) 288 ITR 1 (SC) S.A. Builders Ltd. vs. CIT* *vi) 331 ITR 502 (Del) CIT vs. Bharti Televentures Ltd* *vii) 155 Taxmann 268 (Bom) CIT vs. Padmani Packaging (P) Ltd.* *viii) 331 ITR 401 (P&H) (FB) CIT v. Rockman Cycle Industries Ltd* *ix) ITA No. 1068/2011 & 1070/2011 (Del HC) CIT vs. EKL Appliances Ltd* *x) 254 ITR 377 (Del) CIT v. Dalmia Cement (P.) Ltd:*
35.8	*It is submitted that the learned Assessing Officer in the order of assessment has stated that, no confirmation from NBCU was filed and had the same was filed it is obvious as he states he could have made an enquiry to verify after calling upon the assessee to furnish their affidavit, the purpose to making the investment. 35.40 It is submitted that, on both the aforesaid grounds, the revenue is factually incorrect. Firstly, the evidence was furnished before the DRP only when it was called upon to do so that the value of the shares was based on commercial consideration and was arrived at on the basis of proper*

	working. This submission was placed before the learned DRP Likewise the A.O.'s finding that the assessee had not furnished the certificate/confirmation from M/s NBCU is also contrary to the material on record. In any case and without prejudice, to hold the transaction to be sham, the test would be applied that the transaction should not be a facade. However, where the parties to the agreement accept that such a transaction has been entered into, there can be no justification to call the same as facade.
36	*In view of the aforesaid, the addition made of Rs. 642,54,22,000/- may kindly be deleted.*

85. Against this, the ld DR referred to the structure of the various entities of the group and referred to the date when they are formed and when they are struck off/ merged/ liquidated. He specifically referred to the corporate structure of the assessee. He submitted that the assessee formed a 100% subsidiary in the name of NDTV Network BV, Netherland on 09.01.2008 and it went into liquidation on 25.03.2011. Another subsidiary company in the name of NDTV Network International Holding, Netherlands was formed on 10.04.2008, wherein, 68.6% holding was of NDTV Network BV and 31.4% holding was of Universal Studios International BV. This company was merged with another entity NDTV Network BV on 01.04.2009. In this company the amount of US$150 million (Rs.642 crores) were received for 31.4% stake. Further, on 28.12.2006 NDTV BV, Netherland was formed and subsequently, on 15.10.2010 it was merged with NDTV Network BV. The NDTV BV, Netherland was holding 92% of equity in NDTV Network PLc UK which was formed on 30.11.2006 and liquidated on 28.03.2011. This company was holding shares of various operating companies in India such as NDTV Labs, NDTV Imagine, NDTV Lifestyle, NDTV Convergence and NGEN and emerging markets BV. From the above facts, it was submitted that first subsidiary company was formed 09.01.2008 and second company was formed on 10.04.2008 and both the companies either were liquidated or merged with another entity within a very short span of time after receipt of Rs. 642 crores as share capital. He further submitted that after the merger of the subsidiaries with another companies immediately within a short span of time the amalgamated company was also liquidated. He further submitted that shareholders agreement, share subscription agreement and share purchase agreement entered into by the assessee coupled with the above creation of the

subsidiaries and their liquidation and merger along with the money trail shows that the transaction is sham.

86. He further submitted that confirmation was filed by the assessee only in December 2013 when there was no time limit available for verification by the Assessing Officer. He further submitted that assessee has stalled the whole process of examining the evidences by not furnishing the evidences which are required. He referred to the agreement of sale and purchase of share to show that a company who has invested US$150 million has made no valuation at the time of investment, no due diligence but within a very short time has exited by selling those shares at US$12 million by incurring huge loss of US$138 million. He further submitted that the investment was made on this date 23.05.2008 and sold on this date 14.10.2009. He therefore, stated that above structure and the transactions were created in such a manner that it does not catch eye of the Revenue. He submitted that the whole series of events of forming of the subsidiaries and their merger or liquidation is done for the sole purpose of evading tax on Rs. 642 crores.

87. To substantiate his argument he submitted that trail of the money received by the subsidiary company also shows that shareholder of the investor company is by NBCU Dutch holding (Bermuda Ltd). He therefore, submitted that the claim of the assessee that the money is invested by well-known group of highest repute is just eyewash. He further submitted that Rs. 642 crores was received by NDTV Networks International Holdings BV on account of securities premium from the Universal Studios International BV and a sum of Rs. 643 crores was paid by that company as dividend. Therefore, whatever sum was received by that company was paid as dividend to NDTV Group Company i.e.NDTV Networks BV the holding company of NDTV Networks International Holdings BV who is just holding 68% shares of that company. He referred to page No. 663 of the paper book of the assessee. He therefore submitted that immediately on receipt of the money of Rs. 642 crores byNDTV Networks International Holdings BV the money was siphoned out by way of dividend. He further referred to the balance sheet of NDTV BV which is also placed at page No. 764 of the paper book to show that from that money the NDTV Network BV invested a sum of Rs. 450 crores as an investment in NDTV Mauritius Media Ltd and also in NDTV Networks International Holdings BV. Therefore, he submitted that

complete train of Rs. 642 crores received by the one of the subsidiary has found its way from that subsidiary company to the parent assessee or its 100% subsidiary. He therefore, submitted that there is a complete trail of the money which has been proved by the revenue beyond doubt to show that assessee is the owner of the sum of Rs. 642 crores. He then referred to the decision of the Hon'ble Supreme Court in case of Vodaphone International Vs. Union of India and another 341 ITR 1 and specifically para No. 67 and 68 of that judgment to show that corporate veil has rightly been lifted by the ld Assessing Officer and the share capital issued in the books of one of the companies is correctly re-characterized as income of the assessee. He justified the order of the lower authorities to show that beneficiary of the above whole transaction through series of subsidiaries is the assessee. He further relied upon the decision of Hon'ble Supreme Court in 34 ITR 807 and 53 ITR 623 to say that Revenue need not locate the exact source. On that basis, he submitted that income has been correctly taxed in the hands of the assessee.

88. Ld DR also filed an application dated 05.07.2017 for admission of additional evidence in the form of

I. show-cause notice dated 15.06.2016 issued u/s 271(1)(c) of the Act for the same Assessment Year and

II. application dated 13.05.2016 filed by the assessee for compounding of contraventions under FEMA 1999.

The application for admission of the additional evidences raised the following contentions:-

1. *That against the returned income declaring loss of Rs. 64,83,91,422/- for AY 2009-10 filed by the assessee on 30.09.2009, draft assessment order was passed by the AO on 31.03.2013 under section 144 after detailed discussion in the order, however, in column 11 of the table at 1st page of the order, due to typographical mistake, it was typed as 143(3)/144C(1) and the income of the assessee was proposed to be assessed at ₹641,08,11,990/- as against loss of ₹64,83,91,422/- declared by the assessee in its return of income.*

2. *The assessee filed objections before the Dispute Resolution Panel ("**DRP**") and the DRP issued directions dated 31.12.2013 under section 144C(5) of the Act and deleted addition on account of disallowance of Rs. 41,54,41,111/- proposed under Section 40(a)(ia) out of commission paid, addition of Rs. 7,81,23,855/- on account of disallowance under Section 40(a)(i) proposed out of transmission & uplinking charges and addition of Rs. 82,45,612/- on account of disallowance of software expenses. Further, the DRP directed the AO to re-compute the amount of transfer pricing adjustment, which led to revision of addition from Rs. 12,41,29,846/- to Rs. 5,09,65,629/-.*

3. *The DRP confirmed the addition of Rs. 78,40,990/- proposed by the AO on account of disallowance under Section 14A. The DRP also confirmed the addition of Rs. 642,54,22,000/- under Section 69A proposed by the AO on account of unexplained money. Further, the DRP enhanced the income of the assessee by another Rs. 254.75 crore under Section 68 of the Act on account of unexplained credit.*

4. *The AO passed final assessment order under Section 144/144C(13) on 21.02.2014 and assessed the income of the assessee at Rs. 838,33,37,197/- as against loss of Rs. (-) 64,83,91,422/- declared by the assessee in its return of income.*

5. *Against the final assessment order passed on 21.02.2014, the assessee has filed appeal-bearing ITA No. 1212/Del/2014 and the Revenue has also filed appeal bearing ITA No. 2658/Del/2014, which are pending before the Hon'ble Tribunal.*

6. *The Revenue humbly prays that after the passing of final assessment order on 21.02.2014, during the penalty proceedings u/s 271(1)(c) of the Act, certain facts have come to light which have a vital bearing in*

the matter. These are explained in detail in the show cause notice dated 15.06.2016 issued u/s 271(1)(c) of the Act, copy of which has already been filed with the Tribunal by the assessee while praying for stay of penalty proceedings and wherein the Hon'ble Tribunal vide order dated 16.09.2016 in SA No. 376/Del/2016 (in ITA No. 1212/Del/2014) has directed the revenue not to pass final penalty order.

7. *That information has been gathered during the penalty proceedings that the assessee had applied for compounding of contraventions admittedly made by it in respect of the provisions of FEMA 1999 while introducing funds through the corporate structure created by it. Certain admissions have been made by the assessee in the said compounding applications, which are relevant to the matter before the Hon'ble Tribunal.*

8. *That the above documents are sought to be filed as additional evidence before the Hon'ble Tribunal, as the same have a vital bearing for adjudication of matter before the Hon'ble Tribunal.*

9. *That the documents sought to be filed could not be filed earlier, because it is the case of revenue that this Hon'ble Tribunal does not have the jurisdiction to entertain the assessee's appeal and hence, filing of application for additional evidence could be construed as admission of jurisdiction of the Hon'ble Tribunal with respect to the assesse's appeal.*

10. *In view of the above, it is humbly prayed that the said documents may kindly be permitted to be filed as additional evidence."*

89. The contention of the revenue for the admission of the additional grounds was that after passing the final assessment order on 21.02.2014 u/s 144 of the Act the

penalty proceedings u/s 271(1)(c) of the Act were initiated and during the penalty proceedings certain vital facts have come to the knowledge of the revenue which have direct bearing on the issue involved in this appeal. He submitted that the documents were sought to be filed now could not be filed earlier because the revenue strongly believed that appeal of the assessee is not maintainable. However, when the bench has decided to proceeded with the merits of the issue , then these additional evidences are required to be looked into as they go to the root of the matter. He referred to the several clauses of the show cause notice dated 15.06.2016 to show that various email exchanges between various persons should be looked into to show that it is complete and full proof case of tax fraud. He further submitted that during the course of penalty proceedings it is proved that money is routed back into NDTV(assessee) through complex cobweb of sham and shell subsidiaries floated abroad which were created for the sole purposes of this specific financial transaction of money from one party to the assessee without any obligation of repayment by assessee. He further submitted that during the penalty proceedings the statement of Shri KVL Narayan Rao was recorded who is the director of the company on 23.07.2015 as well as of Mr. Sanjay Dutt on 09.07.2015 where it is found that assessee has entered into bringing back money invested into subsidiaries through Bermuda Route in India. He further submitted that application for compounding of offence under FEMA also shows that while investing of such money the assessee has used ingenuine methods and violated the provisions of that Act. He therefore submitted that in fact penalty proceedings are closely linked and are arising from the assessment proceedings, therefore, the evidences requested to be admitted as additional evidence.

90. The ld AR vehemently objected to the application of admission of additional evidences which was raised by written submission filed on 06.07.2017 as under:-

> 1. *That on 5th of July' 2017 revenue has filed a paper book containing 80 sheets containing additional evidence, which has been prayed to be admitted in terms of Rule 29 of ITAT Rules. The documents furnished as aforesaid are being tabulated here below:*

Sr. No.	*Particular*	*Page No(s)*
i)	*Application for admission of additional evidence*	*1-3*

ii)	Show cause notice dated 15.6.2016 issue u/s 271(1)(c) of the Act Enclosures - Statement of Shri K.V.L. Narayan Rao recorded on 23.7.2015 u/s 131 of the Act	4 – 17 18 - 50
	- Statement of Shri Sanjay Dutt recorded on 9.7.2015 u/s 131 of the Act .	51 – 57
iii)	Application dated 13.5.2016 for compounding of contraventions under FEMA 199 section 15 Foreign Exchange (Compounding Proceedings) Rules, 2000-Compounding application filed by appellant company. (MCO 399)	58 - 65
iv)	Application dated 13.5.2016 by NDTV for compounding of contraventions under FEMA1999	66 - 80

2 It is submitted that, Rule 29 of the ITAT Rules' 1962 when is read closely, it would be seen that the Rule has negatively been worded and mandates that, ITAT shall not admit additional evidence and thus, neither parties can lead additional evidence. However, it further provides i.e. the second that, additional evidence be admitted if ITAT requires any document to be produced. In the instant case, it is submitted the aforesaid evidence as tendered as has been 'required' to be produced by the Hon'ble Tribunal. The only other requirement is "for any substantial cause" if the said "substantial cause" is read with operative provision, then such evidence can only be admitted when no opportunity has been granted to the assessee. Thus it is only where an assessee complains that there has been lack of opportunity such evidence can be either produced or is admitted and not otherwise. Under the Rules the revenue is not permitted to adduce any fresh evidence. In fact the Hon'ble Rajasthan High Court in the case of CIT vs. Rao Raja Hanumant Singh reported in 252 ITR 528 had held that even before the CIT(A), the AO has not been empowered to lead fresh evidence. Further it is submitted that the Hon'ble Supreme Court in the case of Mahavir Singh vs. Naresh Chander reported in AIR 2001 SC 134, a copy of which is enclosed herewith, while examining the provisions of Order 41 Rule 27 of CPC, which is para-materia with Rule 29 of ITAT Rules, had exceeded in it jurisdiction of additional evidence, the

appellate proceedings. A copy of the judgment is annexed and is being separately explained to state the scope of Rule 29 of the powers of the appellate court.

2.1 *Apart there from, it is submitted that the additional evidence as aforesaid is being sought to be 'adduced' after the assessee's counsel had concluded his arguments/submissions in respect of the ground Nos. 2 & 3. It is submitted if revenue considered to adduce any additional evidence, it should have sought the liberty' to produce such evidence before the commencement of hearing and not after the opening submissions were concluded. The appellant further submits that in fact such evidence is still to be examined and adjudicated upon by the appropriate authority and thus such evidence as is alleged to be evidence is not one which deserves to be considered. The aforesaid submissions are being made which are without prejudice to the fact that no adverse inference is warranted to be drawn against the appellant and such evidence has no adverse effect at all. The appellant however seeks to furnish and place on record copy of its reply furnished in response to show cause notice dated 15.06.2016 along with annexures. (Annexure 'A')*

2.2 *It is also submitted that, under Rule 27 of Order 41, production of additional evidence, whether oral or documentary is permitted only under three circumstances which are: Where (i) the trial Court had refused to admit the evidence though it ought to have been admitted, (ii) the evidence was not available to the party despite exercise of due diligence, and (iii) the appellate court required the additional evidence so as to enable it to pronounce better judgment or for any other substantial cause or like nature.[Deverapu Narasimharao vs. Yerrabothula Peda Venkaiah, 1992 (2) ALT 513, 529 (DB)].*

3 *It is further submitted that contents of para 1 of the application are incorrect. It is submitted that there is no material to show that in column 11 at page 1 of the draft order dated 31.3.2013, it was typographically typed as 143(3)/144C instead as 144 of the Act. In fact it is contrary to the*

forwarding letter dated 31.03.2013 (Page 178A of a compendium of documents filed on 03.07.2017)

3.1 On the contrary reading of the draft order of assessment, would show that the said draft order was prepared u/s 143(3) of the Act. It is submitted that jurisdiction to frame order u/s 144 of the Act was confined to compute income in view of section 145(3) of the Act which too was based on misconception. The detailed submissions made are at pages 193 – 197 and further in the compendium of documents filed on 03.07.2017 at pages 69 – 80, a copy which was separately furnished. The appellant had referred to the judgment of Privy Council in 6 ITR 414 in the case of KhemChand Ram Das.

4 The contents of paras 2 to 5 of the application are factual and therefore need no rebuttal with the submission that in para 4, it is incorrectly stated that the assessment has been framed u/s 144 read with section 144C(13) as the draft was prepared u/s 143(3) and there was no direction by DRP to frame assessment u/s 144 of the Act. Indeed it is submitted that the conditions under which assessment u/s 144 could be made were absent and lacking.

5 The contents of paras 6 to 11 are disputed and it is submitted and it is well settled law that penalty proceedings and assessment proceedings are separate independent proceedings. In fact, the revenue has filed a writ petition before the High Court in this very case, where the stand of the revenue is that the proceedings are separate and independent. Reliance is placed on the following judgments:

i) 83 ITR 369, 376 (SC) CIT vs. Khoday Eswarsa
ii) 123 ITR 457 (SC) Anantharam Veerasinghaiah vs. CIT
iii) 190 Taxman 157 (Del) CIT v. Arctic Investment (P) Ltd
iv) 145 Taxman 530 (Del) CIT v. Globe Sales Corporation
v) 219 ITR 267 (Del) CIT v. J. K. Synthetics Limited
vi) 160 ITR 94 (AP) (FB) CIT V. H. Abdul Bakshi
vii) 292 ITR 11 (SC) T. Ashok Pai v. CIT
viii) 219 CTR 447 (Kar) Bhadra Advancing (P) Ltd. v. ACIT

5.1 *In view of the above any alleged evidence which had not been tested as yet even by the AO and allegedly gathered in the penalty proceedings does not warrant admission under Rule 29 of the Rules.*

5.2 *It is submitted that mere fact that during independent stay proceedings a prayer was made to stay the penalty proceedings does not automatically warrant that the show cause notice as placed on record in the stay proceedings forms part of the instant proceedings.*

5.3 *It has been admitted that stay proceedings stood concluded vide order dated 16.9.2016 in SA No. 376/D/2016. Thus in absence of satisfaction of Rule 29 of the Rules the said evidence does not warrant any admission.*

5.4 *Likewise application for compounding of offence under FEMA' 1999 also is a fresh evidence, for which no substantial cause is shown and, its reliance is contrary to the principles laid out in the cases of Charandas Haridas v. CIT reported in 39 ITR 202 (SC) and Coca-Cola Export Corpn. vs. ITO reported in 231 ITR 200 (SC)*

6 *It is therefore respectfully submitted that, since additional evidence furnished was not available when the assessment had been framed, the same may kindly not be taken on record.*

7 *Without prejudice even otherwise it is submitted that none of the evidence warrant a different view in the matter. It is submitted none of the evidences placed on record show that appellant either is the "owner" of money or the share subscription/capital account transaction between two independent existing genuine entities through banking channels which is duly disclosed is not a "genuine" transaction.*

8 *Likewise compounding under FEMA further establishes the genuineness of transaction and not otherwise.*

9 It is thus submitted that looking from any angle no addition is warranted of Rs. 642,54,22,000/- u/s 69A of the Act and, also the additional evidence as furnished does not warrant admission under Rule 29 of the ITAT Rules."

91. The ld AR further submitted that Revenue does not have any authority for adducing any fresh evidence. He relied upon the decision of Hon'ble Rajasthan High Court in CIT Vs. Rao Raja Hanuat Singh 252 ITR 528 and the decision of the Hon'ble Supreme Court in Mahavir Singh Vs. Naresh Chander AIR 2001 SC 134. He further objected that after conclusion of the argument by assessee the revenue cannot make request for admission of additional evidence. It should have been made only before commencement of the hearing. He further submitted that show cause notice is based on the statement of Mr. Sanjay Dutt who was not granted cross examination by the AO and therefore it cannot be said to be an evidence at all. It was further submitted that proceeding for compounding of offence under FEMA is a fresh evidence for which no substantial cause shown for its admission.

92. He further stated that even otherwise the none of the evidence warrant a different view in the matter for the simple reason that none of the evidences placed on record for admission as additional evidence shows that assessee is the owner of the money. It was further stated that no evidence has been placed before the bench to show that the transactions are ingenuine. In view of this, he vehemently objected the application for additional evidence of the Revenue.

93. In response ld DR first submitted that there is, no Rule that revenue cannot make an application for additional evidences. He placed reliance on the decision of the Delhi Bench in UOPLLC Vs. Additional Director of Income Tax 108 ITD 186 to show that in the peculiar facts and circumstances of the case the Revenue can adduce additional evidence. He submitted that looking to the facts of the assessee the additional evidence must be admitted. He further submitted that order of the coordinate bench in SA NO. 376/Del/2016 in the appeal of the assessee has granted the interim injunction for passing of the penalty order. He submitted that tribunal while granting the stay has exercised its power as it is related to the proceedings

relating to the appeal. He submitted that assessee while seeking the stay has itself stated that the penalty proceedings are relating to the appeal therefore, it cannot be said that show cause notice issued cannot be admitted as additional evidence. With respect to the cross examination of the witness he referred to the para No. 8 of the stay order against passing of the penalty order and submitted that till the order in the appeal of the assessee tribunal has not allowed to confront the assessee with result of enquiries conducted with the sole purpose of multiplicity of the proceedings. Therefore, the stage of cross-examination of Mr. Sanjay Dutt has not arisen. He further submitted that Shri K V L Narayn Rao is the director of the company who has signed the appeals and also given the statement then there is no provision for examination of self. He is acting on behalf of the company. By saying that assessee wants to cross-examine its own director who is at helm of all the proceedings of income tax , assessee is making a mockery of judicial process. The assessee has also accepted the above stay order and now therefore, cannot question the directions of the tribunal. It was further submitted that revenue is ready to grant the opportunity of cross-examination to the assessee of any of the persons whose statement including the director of the company were recorded as soon as the appeals in quantum proceedings are decided. Regarding the request for admission at the time of commencement of argument he submitted that though it cannot be a rule and neither there is a law but still the above additional evidences are submitted in response to the arguments of the counsel of the assessee. He further submitted that the arguments are not concluded yet and hopefully assessee has full chance to rebut those evidences in the rejoinder. He further referred to Rule 29 of the ITAT Rules to state that there is no bar in adducing the additional evidences by the Revenue.

94. We have carefully considered the rival contentions. The rule 29 of the ITAT Rules provides that

> **Production of additional evidence before the Tribunal.**
>
> 29. The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or , if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for

reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.]

According to that parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the tribunal, but if the tribunal requires any document to be produced or witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause or if the income tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or otherwise, the tribunal for reasons to be recorded may allow such evidence to be adduced. On reading of Rule 29 we do not find any bar against application for admission of additional evidence by revenue if there is substantial cause. The above view has further been considered in the decision of coordinate bench in 108 ITD 186 considering the decision of Mahavir Singh Vs. Naresh Chandra of Hon'ble Supreme Court and decision of Hon'ble Rajasthan High Court in case of CIT Vs. Rao Raja Hanumat Singh relied upon by the ld AR. The Coordinate bench has held as under :-

> **"9.** In connection with the main issue relating to PE, the Department has sought to file additional evidence before the Tribunal. In this regard, it has moved an application dated 9-5-2006 under rule 29 of Income-tax Appellate Tribunal Rules, 1963 for admission of additional evidence comprising of pages 1A to 3 of Annexure-A, pages 12 to 24 of Annexure-B, pages 28 to 80 of Annexure-C and pages 81 to 84 of Annexure-D. While supporting the said application, the learned CIT-DR submitted that the nature of additional evidence sought to be produced by the Department does not give rise to any new principle and by filing the same, the Department is not seeking to make any fresh line of enquiry. He submitted that the said additional evidence merely supports the case of the revenue further and thus, would be of help to enable the Tribunal to adjudicate the issue relating to PE involved in the present appeal.
>
> **10.** The learned counsel for the assessee, on the other hand, raised a strong objection for entertaining the application n moved by the Department under rule 29 for admission of the additional evidence. He contended that as per Rule 29, there is a complete bar for the revenue to furnish any additional evidence unless it is so required by the Tribunal. In this regard, he submitted that no additional or fresh evidence can be furnished by the revenue in an appeal filed by the assessee before the Tribunal as per the mandate of Rule 29 and only the assessee alone can be allowed to adduce additional evidence provided that he establishes before the Tribunal that his case has been decided without giving sufficient opportunity to him by the authorities below and the Tribunal is satisfied on this aspect for the reasons to be recorded in writing. He submitted that the Tribunal, no doubt, has the discretion to allow the

production of fresh evidence if it requires the same to enable it to pass an order or for any other substantial cause. However, the Tribunal in the present case has not required the revenue to furnish any document as additional evidence.

11. The learned counsel for the assessee submitted that the words "or for any other substantial cause", as held by Hon'ble Supreme Court in the case of *Mahavir Singh* v. *Naresh Chandra* AIR 2001 SC 134, must be read with the word "requires" so that it is only where the appellate court requires additional evidence, the Rule will apply. He also relied on the decision of Hon'ble Rajasthan High Court in the case of *CIT* v. *Rao Raja Hanut Singh* [2001] 252 ITR 528[1] (at page 535) to contend that the revenue is obviously not entitled to place any fresh or additional evidence before the ITAT under rule 29. According to him, the revenue is not even entitled to make a prayer for admission of additional evidence as placed in the form of a bunch of papers and that too after the conclusion of arguments from the side of the assessee. If at all it was entitled to do so, then also such evidence ought to have been initially placed on record with the leave of the Tribunal before the commencement of hearing.

12. The learned counsel for the assessee further submitted that none of the documents sought to be filed as additional evidence by the revenue pertains to the year under consideration *i.e.*, assessment year 2001-02 and the same are also not complete or self-contained documents which could be relied upon to draw any inference. He contended that the said documents, therefore, cannot be said to be relevant evidence which may be required by the Tribunal for adjudicating upon the issues involved in the present appeal filed by the assessee and since the Tribunal has neither required any such documents nor it could have required the same, the mandate of Rule 29 clearly prohibits the Department to produce the same.

13. Referring to rule 27 of Order 41 of CPC, the learned counsel for the assessee submitted that as per the said Rule, which is absolutely *pari materia* to Rule 29 of the Appellate Tribunal Rules, 1963, the production of additional evidence is permitted only under the following three circumstances :—

(*a*)Where the trial court had refused to admit the evidence though it ought to have been admitted;

(*b*)Where the evidence was not available to the party despite exercise of due diligence; and

(*c*)Where the appellate court required the additional evidence so as to enable it to pronounce better judgment or for any other substantial cause of like nature.

He contended that none of the aforesaid conditions, however, is satisfied in the present case so as to warrant the admission of additional evidence even under Rule 27 of Order 41 of CPC much less under Rule 29 of the Appellate Tribunal Rules which specifically prohibits the revenue from producing such additional evidence.

14. The learned counsel for the assessee also argued that the discretion given to the appellate authority *i.e.*, Tribunal to allow the production of additional evidence is strictly circumscribed by the limitations specified in the aforesaid Rule and the said Rule is not intended to enable a party to patch up the weak points of his case as held in the case of *Muneswari* v. *Jugal Mohini* AIR 1952 (Cal.) 368 and in the case of *N. Kamalam* v. *Ayyasamy* [2001] 7 SCC 503 at page 514. He also relied on the decision of Hon'ble Punjab & Haryana High

Court in the case of *Gram Panchayat, Kanehi, Tehsil & District Gurgaon* v. *Ram Kumar* [2001] (2) Punj. LR 186 to contend that the additional evidence in an appellate court cannot be produced by a party as a matter of right and the essentials of Order 41, Rule 27 have to be satisfied.

15. The learned counsel for the assessee submitted that there was no evidence available on record before the Assessing Officer to support the adverse findings recorded in the order of assessment to the effect that assessee has an agency PE in India and the additional evidence now being sought to be produced by the revenue seeks to patch up this weak part of the case attempted to be made out by the Assessing Officer. He contended that it is thus a clear attempt being made by the revenue to get the assessment set aside to be made *de novo* by seeking the admission of additional evidence and thereby it fill up the omission by having a second innings which is not permissible as held by ITAT in the case of *Asstt. CIT* v. *Anima Investment Ltd.* [2000] 73 ITD 125 (Delhi)(TM).

16. The learned counsel for the assessee emphasized that none of the authorities cited by the learned DR supports the contention of the Department that it is entitled to lead additional evidence before the Tribunal. On the other hand, the statement giving details of the various decisions of High Courts as well as the Tribunal placed at page Nos. 28 and 29 clearly shows that in none of the cases, the additional evidence sought to be produced by the Department was admitted by the Tribunal and even such a request made by the assessee also was not acceded to in some cases. He submitted that even the assessee has not been able to find any case decided wherein an application has been made by the revenue under rule 29 of the Appellate Tribunal Rules and the Tribunal, on an interpretation of Rule 29, has held that the revenue is entitled to produce additional evidence before it. He contended that this position clearly supports the stand of the assessee that under rule 29 of the Appellate Tribunal Rules, there is a complete bar for the revenue to adduce any additional evidence and its application made for admission of the additional evidence, therefore, is liable to be rejected.

17. In support of his aforesaid contentions raised while strongly opposing the application moved by the Department for admis- sion of additional evidence, the learned counsel for the assessee has also cited the following case laws :—

(*i*) *Syed Abdul Khader* v. *Rami Reddy* AIR 1979 SC 553.

(*ii*) *Municipal Corporation of Greater Bombay* v. *Lala Panchan* AIR 1965 SC 1008.

(*iii*) *Gurudev Singh* v. *Mehnga Ram* [1997] 6 SCC 507.

(*iv*) *Arjan Singh* v. *Kartar Singh* AIR 1951 SC 193.

(*v*) *Natha Singh* v. *Financial Commissioner, Taxation* AIR 1976 SC 1053.

(*vi*) *Krishna Reddi* v. *Ramireddi* AIR 1954 Mad. 848.

(*vii*) *Smt. Girijamma* v. *Kamala Engg. Works* AIR 2000 (Kar.) 239.

(*viii*) *Mandala Madhava Rao* v. *Mandala Yodagiri* AIR 2001 AP 407.

(*ix*) *CIT* v. *Motilal Hirabhai Spg. & Wvg. Co. Ltd.* [1978] 113 ITR 173 (Guj.).

(*x*) *Charbhai Biri Works* v. *Asstt. CIT* [2003] 87 ITD 189 (Pune)(TM).

(*xi*) *CIT* v. *Smt. Kamal C. Mehboobbani* [1995] 214 ITR 15 [1] (Bom.).

18. The learned CIT-DR contended that the Tribunal may refuse to admit additional evidence raised before it by any of the parties only if the said evidence lead to investigation into fresh facts or the same was within the knowledge of the party and could have been produced earlier. He also contended that the additional evidence being sought to be produced by the revenue in the present case, however, does not lead to investigation into fresh facts and the same having been come to the knowledge and possession of the Department only during the course of survey carried out at the liaison office of the assessee as well as at the office of UOPIPL on 10-3-2006, it could not have been produced earlier before the authorities below. In support of this contention, he placed reliance on the decision of Hon'ble Supreme Court in the case of *Manji Dana* v. *CIT* [1966] 60 ITR 582. He also cited the decision of Hon'ble Madras High Court in the case of *Anaikar Trades & Estates (P.) Ltd.* v. *CIT* [1990] 186 ITR 313[2] wherein certain affidavits given by the five purchasers affirming receipt of excess consideration than shown in the documents were sought to be filed by the revenue as additional evidence to support its case that the provisions of section 52(2) were applicable and the Tribunal admitted the same and restored the matter to the AAC observing that in order to decide the question of applicability of section 52(2) which was the subject-matter of appeal before it, it would be necessary in the interest of justice to consider the said affidavits. On appeal preferred by the assessee against the order of the Tribunal, Hon'ble Madras High Court held that the Tribunal had discretion to allow production of additional evidence under rule 29 of the Appellate Tribunal Rules, 1963 if the same was found to be required to enable it to pass orders or for any other substantial cause.

19. The learned CIT-DR submitted that there are various cases decided by the different High Courts wherein the additional evidence sought to be filed by the revenue was allowed to be admitted before the Tribunal and the same, therefore, clearly shows that there is no merit in the contention raised by the learned counsel for the assessee that there is a complete bar for the Department to even seek the admission of additional evidence. In this regard, he cited the decision of Hon'ble Gujarat High Court in the case of *Smt. Urmila Ratilal* v. *CIT* [1982] 136 ITR 797[1] wherein it was held after examine the issue of admission of additional evidence under rule 29 of the Appellate Tribunal Rules, 1963 that the ITAT was within its jurisdiction in allowing revenue to produce additional evidence, subject however to the condition, that an opportunity should be given to the assessee to explain or rebut the said evidence. He also cited the decision of Hon'ble Punjab & Haryana High Court in the case of *CIT* v. *Saligram Prem Nath* [1989] 179 ITR 239 [2], wherein it was held that the Tribunal is vested with requisite authority and jurisdiction to admit additional evidence and material in order to do substantial justice between the parties. He submitted that to the similar effect are the decisions of Hon'ble Delhi High Court in the case of *R. Dalmia* v. *CIT* [1978] 113 ITR 522 and that of Hon'ble Bombay High Court in the case of *Smt. Suhasinibai Goenka* v. *CIT* [1995] 216 ITR 518 [3] which fully support the application moved by the revenue for admission of additional evidence.

20. Reliance was also placed by the learned CIT-DR on the decision of Hon'ble Calcutta High Court in the case of *ITO* v. *B.N. Bhattacharya* [1978] 112 ITR 423 wherein it was held that appel- late courts have power to allow additional evidence not only if they require such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". Further reliance was also placed on the decision of Hon'ble Madras High Court in the case of *R.S.S. Shanmugam Pillai & Sons* v. *CIT* [1974] 95 ITR 109, wherein it was held that if the Tribunal finds that the documents filed are quite relevant for the purpose of deciding the issue before it, it would be well within its powers to admit the evidence, consider the same or remit the matter to the lower authorities. The learned CIT-DR contended that the additional evidence being sought to be produced by the Department in the present case was not available for production before the lower authorities for the reason that the same was recovered during the course of survey carried on subsequently on 10-3-2006 and the same, therefore, deserves to be admitted accepting the application filed under rule 29 of Appellate Tribunal Rules, 1963 as held by Hon'ble Kerala High Court in the case of *Asstt. CIT* v. *Gautam Investments (P.) Ltd.* [2001] 250 ITR 324[1].

21. We have considered the rival submissions and also perused the relevant material on record in the light of various case laws cited at the bar. In the present case, the application moved by the Department under rule 29 for admission of additional evidence comprising documents found during the course of survey car- ried out subsequently at the assessee's premises has been strongly opposed by the learned counsel for the assessee. First of all, his contention is that as per Rule 29 of Appellate Tribunal Rules, 1963 there is a complete bar for the revenue to furnish any additional evidence unless it is so required by the Tribunal. In effect, his argument is that only if the Tribunal requires any additional evidence for the purpose of disposing of an appeal before it, it can direct the Department to furnish the same available in its possession and it is not permissible to the revenue to move any application *suo motu* under Rule 29 seeking admission of additional evidence. In support of this contention, he has cited six cases decided by the various High Courts and five cases decided by the Tribunal as enumerated at page Nos. 28 and 29 of his Paper Book-IV wherein the issue relating to admission of additional evidence was considered and decided. As rightly pointed out by him, out of these eleven cases, there were only two cases wherein the revenue had moved an application under Rule 29 for admission of additional evidence and in both these cases reported as *CIT* v. *Rao Raja Hanut Singh* [2001] 252 ITR 528 [1] (Raj.) and *CIT* v. *Smt. Kamal C. Mahboobbani* [1995] 214 ITR 15 [2] (Bom.), the Department was not allowed to produce the additional evidence and its applications for admission thereof were rejected. However, a perusal of decisions rendered by the Hon'ble High Courts in both these cases shows that it was nowhere laid down that there is a complete bar for the revenue to seek admission of additional evidence as sought to be contended by the learned counsel for the assessee before us.

22. For instance, in the case of *Rao Raja Hanut Singh* (*supra*), the assessee was a renowned international polo player and a distinguished sportsman. He frequently used to visit Britain especially during the polo session and had bank accounts in Britain throughout the relevant period. He received certain

payments in the said bank accounts from companies and the said amounts had been utilized by him for meeting his expenses. The assessee claimed that the amounts so deposited in his bank accounts were not any consideration on remuneration but only for reimbursement of expenditure incurred by him in UK. This claim of the assessee, however, was negated by the Assessing Officer and entire deposits were included by him in the taxable income of the assessee. On appeal, the Appellate Asstt. Commissioner, however, deleted the said additions. The revenue appealed to the Tribunal and moved an application for permission to produce additional evidence to prove that the deposits made by the companies in the bank accounts of the assessee were in the nature of commission paid to him and not by way of reimbursement of expenses as claimed by him. The Tribunal found that there was no necessity of fresh evidence and accordingly, declined to admit the fresh evidence sought to be produced by the revenue. Aggrieved by the order of the Tribunal, the revenue preferred a reference application before the Hon'ble Rajasthan High Court which was rejected by their Lordships holding that the discretion to admit the additional evidence was that of the Tribunal as circumscribed by Rule 29 of the Appellate Tribunal Rules, 1963 and the Tribunal having exercised the said jurisdiction in accordance with the said rule, no question of law arose from its order. In this context, Hon'ble Rajasthan High Court referred to the relevant Rule 29 of the Appellate Tribunal Rules, 1963 and observed on page 535 of the report that the second limb of the condition of Rule 29 is if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them. It was observed by the Hon'ble Rajasthan High Court that a case before it was not a case where the assessee had raised any grievance that the assessing authority has decided the case without giving sufficient opportunity to adduce evidence on any specified or unspecified points and, therefore, this limb of the conditions obviously was not invoked at all. These observations of the Hon'ble Rajasthan High Court clearly indicate that insofar as the second limb of the conditions specified in Rule 29 relating to "deciding the case without giving sufficient opportunity to adduce evidence" is concerned, the assessee and assessee alone can be permitted to adduce additional evidence simply because the situation as contemplated in this condition can cause prejudice only to the assessee. Insofar as the first condition in the Rule 29, *viz.*, "if the Tribunal requires the additional evidence to enable it to pass orders or for any other substantial cause" is concerned, Hon'ble Rajasthan High Court, however, noticed on page 535 of the report that this expression is often used in the Statute in clothing the appellate courts or Tribunals with powers to allow "parties" to lead additional evidence provided the same enables it to pass orders or for any substantial cause. It is pertinent to note here the expression used by the Hon'ble Rajasthan High Court in this context is "parties" which includes the Department also in its capacity as appellant or respondent.

23. Similarly, in the case of *Smt. Kamal C. Mabhoobbani* (*supra*) cited by the learned counsel for the assessee, the facts involved were that the assessee was an individual who declared of having 21 high denomination notes of Rs. 1,000 each totalling to Rs. 21,000. Her contention of having withdrawn the equivalent amounts of lower denomination notes from her bank account and

kept the same at home before converting into high denomi- nation notes through a family friend was not found acceptable by the Assessing Officer on scrutiny of her passbook. He, there- fore, treated the amount of Rs. 21,000 as income of the assessee from undisclosed sources and added the same to her total income. On appeal, this addition, however, was deleted by the AAC accepting the stand of the assessee. This relief given by the AAC to the assessee was challenged by the revenue in an appeal before the Tribunal and additional evidence in the form of a letter dated 3-4-1979 was sought to be produced by it by way of additional evidence before the Tribunal. The Tribunal, however, did not admit the said additional evidence mainly on the ground that it required investigation of facts and proceeded to uphold the order of the AAC. Aggrieved by the refusal of the Tribunal to admit the additional evidence sought to be produced by it, the revenue filed a reference application before the Hon'ble Bombay High Court and considering that the additional evidence sought to be produced by the revenue was not found to be required by the Tribunal to pass the orders, no fault was found by their Lordships with the order of the Tribunal refusing to admit the additional evidence sought to be produced by the revenue. It was observed by the Hon'ble Bombay High Court that although the parties to appeal are not entitled to produce additional evidence before the Tribunal, it has been given a power to require any document to be produced or any witness to be examined to enable it to pass order or for any other sufficient cause as per Rule 29 of the Appellate Tribunal Rules, 1963.

24. It is thus clear that none of the decisions cited by the learned counsel for the assessee lays down a proposition that there is a complete bar for the revenue to adduce any additional evidence before the Tribunal under Rule 29 of the Appellate Tribunal Rules, 1963 as sought to be canvassed by him while opposing the application moved by the revenue for admission of additional evidence in the present case.

25. Before us, the learned counsel for the assessee has submitted that he has not been able to find any case wherein an application moved by the revenue under Rule 29 has been accepted by the Tribunal allowing it to produce the additional evidence on inter-pretation of Rule 29. He has also submitted that none of the authorities cited by the learned CIT-DR supports the contention of the Department that it is entitled to lead additional evidence before the Tribunal. On perusal of the decisions cited by the learned CIT-DR, we, however, find it difficult to accept these submissions of the learned counsel for the assessee. For instance, in the case of *Anaikar Trades & Estates (P.) Ltd. (supra)* cited by learned CIT-DR, the assessee had sold several plots of land to various parties and the value of properties shown in the docu- ments of sale was Rs. 2,58,338. The Valuation Officer of the Department estimated the market value of the property sold at Rs. 4,17,000 and adopting the said value under section 52(2), the difference of Rs. 2,76,066 (Rs. 4,17,000 - Rs. 1,40,934 as the cost of acquisition of the properties) was brought to tax by him as capital gains. On appeal, the Appellate Assistant Commissioner held that it was not established that anything more than the disclosed consideration had been received by the assessee and accord- ingly, he directed the ITO to recompute the capital gain taking the sale consideration at Rs. 2,58,338. On appeal to the Tribunal by the Department, it was contended that the provisions of section

52(2) were clearly applicable and reliance in support of this contention was placed on certain affidavits given by the concerned purchasers affirming therein on oath that the sale consideration received by them was actually more than what was shown in the document. The said affidavits were sought to be produced by the revenue as additional evidence before the Tribunal which was objected by the assessee on the ground that the said affidavits were available at the time of assessment proceedings and also at the time of consideration of appeal by the Appellate Assistant Commissioner and still the revenue did not make use of that material. The Tribunal, however, took the view that in order to decide the question of the applicability of section 52(2) of the Act which was the subject-matter of appeal before it, it would be necessary in the interest of justice to consider these affidavits and in that view, directed the restoration of the matter before the Appellate Assistant Commissioner after allowing the revenue to produce the said affidavits as additional evidence. The matter was carried before the Hon'ble Madras High Court and their Lordships upheld the action of the Tribunal in admitting the additional evidence filed by the revenue observing that under Rule 29 of the Appellate Tribunal Rules, if the Tribunal required any document to be produced or affidavit to be filed to enable it to pass order or for any other substantial cause, it may allow the document to be produced or the affidavits to be filed. It was also held by the Hon'ble Madras High Court that this power conferred upon the Tribunal under Rule 29 was properly exercised by it in the facts and circumstances of the case.

26. Similarly, in the case of *R. Dalmia* (*supra*) cited by the learned DR, the assessee was in control of a number of companies in particular "JT". The ITO held certain cash credits appearing in the name of the JT as unexplained and treated the same as the income of the assessee. When the matter went in second appeal, the learned counsel for the revenue sought the permission of the Tribunal to place on record the balance sheets and profit and loss accounts of JT for the relevant periods as additional evidence which was vehemently opposed by the counsel for the assessee. The Tribunal was of the opinion that the additional evidence sought to be adduced by the revenue was relevant to the points at issue and would be of assistance to it in deciding the appeal. The objection of the counsel for the assessee, therefore, was overruled by the Tribunal and the additional evidence produced by the revenue was admitted. At the same time, the Tribunal thought that it was only fair that the assessee should be given an opportunity to explain the additional evidence and the AAC, therefore, was directed by the Tribunal for giving the assessee to offer his explanation on the additional evidence and also to lead any further evidence which he may wish to produce to rebut the said additional evidence. This action of the Tribunal in admitting the additional evidence comprising balance sheets and profit & loss accounts of JT was challenged by the assessee before the Hon'ble High Court submitting that the Tribunal was in error in admitting the said additional evidence at the time of hearing of the appeal. This submission made on behalf of the assessee, however, was found to be devoid of foundation by the Hon'ble Delhi High Court observing that whether to admit the additional evidence or not was in the discretion of the Tribunal and no prejudice was caused to the assessee because the matter was remitted to the AAC for affording an opportunity to the assessee to explain the said additional evidence as well as for recording such further evidence as the assessee might wish to offer.

27. Even in the case of *B.N. Bhattacharya* (*supra*) cited by the learned CIT-DR, the production of the record of the process server by the Department at the first time before the Hon'ble Calcutta High Court during the course of hearing was strongly objected by the counsel for the assessee contending that such additional evidence could not be relied upon or should not be allowed to be relied upon in view of the provisions of Order 41, Rule 27 of the CPC. Relying on the decision of Hon'ble Supreme Court in the case of *K. Venkataramiah* v. *A. Seetharama Reddy* AIR 1963 SC 1526, it was, however, held by the Hon'ble Calcutta High Court that under Rule 27(1) of Order 41 of the CPC, the appellate court has the power to allow additional evidence not only if it requires such an evidence "to enable it to pronounce judgment" but also for "any other substantial cause". Explaining further, it was also observed by the Hon'ble Calcutta High Court that there might well be cases where even though the Court found that it was able to pronounce judgment on the state of record as it was and so it could not strictly say that it required additional evidence to enable it to pronounce judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce the judgment in a more satisfactory manner, such a case would be one for allowing additional evidence for any other substantial cause under Rule 27(1)(*b*) of Order 41 of the Code. To the similar effect is the decision of Hon'ble Punjab & Haryana High Court in the case of *Saligram Prem Nath* (*supra*) cited by the learned CIT- DR wherein it was held that a Tribunal is vested with the requisite authority and jurisdiction to admit additional evidence and material in order to do substantial justice between the parties. Accordingly, the Tribunal was directed by Hon'ble Punjab & Haryana High Court to decide the matter afresh by taking into account the material placed on record by the revenue after affording an opportunity to the assessee to rebut it if necessary by adducing additional evidence. It was also clarified by their Lordships that it would be open to the Tribunal either to deal with the matter itself or to remand the case for this purpose to the ITO.

28. The decision of Hon'ble Kerala High Court in the case of *Midas Rubber (P.) Ltd.* v. *CIT* [1998] 232 ITR 824[1] also supports the case of the revenue that it can move an application for admission of additional evidence before the Tribunal. In the said case, additional evidence comprising of work sheets showing calculation of surtax was filed by the Department and admitting the same, the issue relating to change of previous year under the Income-tax Act was decided by the Tribunal against the assessee relying thereon. When this decision of the Tribunal was challenged by the assessee, Hon'ble Kerala High Court upheld the action of the Tribunal in admitting the additional evidence filed by the Department. However, keeping in view the facts of the case, it was held by the Hon'ble Kerala High Court that while deciding the appeal of the assessee, proper procedure was not followed by the Tribunal in the sense that the matter should have been remanded by it to the Assessing Officer.

29. Keeping in view the aforesaid decisions of various High Courts cited by the learned CIT-DR which were decided after taking into consideration Rule 29 of the Appellate Tribunal Rules, we find it difficult to accept the contention of the learned counsel for the assessee that there is a complete bar for the revenue to produce any additional evidence *suo motu* and it can be permit- ted to do so only if the Tribunal requires such evidence and accordingly directs the Department to produce the same. In our opinion, the first limb of condition

stipulated in rule 29 clearly permits both the parties to the appeal to produce additional evidence and seek the leave of the Tribunal for admission thereof making out a case that the same shall enable it to pass orders or for any substantial cause and if the Tribunal is satisfied that the additional evidence so produced is required to enable it to pass orders or for any other substantial cause, it can allow the parties including the revenue to produce such additional evidence exercising its discretion in terms of the said Rule.

30. It is a settled position that production of additional evidence at the appellate stage is not a matter of right to litigating public and allowing of production of additional evidence is in the discretion of the Tribunal. The said discretion however, is to be exercised judicially and not arbitarily. As held by Hon'ble M.P. High Court in the case of *CIT* v. *Kum. Satya Setia* [1983] 143 ITR 486 [1], it is within the discretion of the appellate authority to allow production of additional evidence if the said authority requires any document to enable it to pass orders or for any other substantial cause. The Tribunal is the final fact-finding body under the scheme of the Income-tax Act and powers, therefore, have necessarily to be exercised by it for deciding the questions of fact. While exercising its powers, if the Tribunal is of the opinion that additional evidence is material in the interest of justice for deciding a particular issue, its discretion cannot be interfered with unless it has been exercised on non-existing or imaginary grounds. In the case of *Mahavir Singh* (*supra*) cited by the learned counsel for the assessee, it was held that section 107 of CPC enables an appellate court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order 41 of Rule 27 of CPC. It was also held that the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the court which is of course to be exercised judicially and sparingly. It was observed that Order 41, Rule 27 of CPC envisages certain circumstances when additional evidence can be adduced and one of such circumstances is where the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. It was also clarified that the expression "to enable it to pronounce judgment" contemplates a situation when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands. In this context, it was further clarified that the ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of court delivering it. This position was reiterated again by the Hon'ble Supreme Court in the case of *Syed Abdul Khader* v. *Rami Reddy* AIR 1979 SC 553 cited by the learned counsel for the assessee. In the case of *Municipal Corporation of Greater Bombay* v. *Lala Panchan* AIR 1965 SC 1008 cited by the learned counsel for the assessee, it was observed by the Hon'ble Supreme Court that the power to admit additional evidence does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way and it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. In the case of *Arjan Singh* v. *Kartar Singh* AIR 1951 SC 193, it was held that the discretion given to the appellate court by Order 41, Rule 27 of CPC to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations specified in that Rule. It was also held that the legitimate occasion for the application of the said Rule is

when on examining the evidence as it stands some inherent lacuna or defect becomes apparent. To the similar effect is another decision of Hon'ble Supreme Court in the case of *Natha Singh* v. *Financial Commissioner, Taxation* AIR 1976 SC 1053.

31. As per rule 29 of the Appellate Tribunal Rules, 1963, the Tribunal has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also "for any other substantial cause". There may be cases where even though the Tribunal finds that it is able to pronounce judgment on the state of record as it is and so it cannot strictly say that it requires additional evidence to enable it to pronounce judgment, it still considers that in the interest of justice, something which remains obscure, should be filled up so that it can pronounce the judgment in a more satisfactory manner. Such requirement of the Tribunal is likely to arise ordinarily when some inherent lacuna or defect becomes apparent upon its appreciation of the evidence. The power of the Tribunal to admit additional evidence in support of the claim in appeal is discretionary and no fetters can be imposed on the exercise of such power. However, as held by Hon'ble Allahabad High Court in the case of *Ram Prasad Sharma* v. *CIT* [1979] 119 ITR 867[1] and by the Hon'ble Andhra Pradesh High Court in the case of *A.K. Babu Khan* v. *CWT* [1976] 102 ITR 756, it is not an arbitrary power but it is a judicial one circumscribed by the limitations given in Rule 29 of the Appellate Tribunal Rules, 1963. The conditions precedent for the exercise of power under Rule 29 must, therefore, be found to have been established. However, where there is no lack of evidence but yet the plea in support of admitting the evidence is so decisive and of clinching value with reference to the points at issue, it is open to the Tribunal to invoke its power of allowing additional evidence to render substantial justice and not to deprive the party of such justice on technical grounds. Further, as held by Hon'ble Bombay High Court in the case of *Velji Deoraj & Co.* v. *CIT* [1968] 68 ITR 708, when the evidence was available to the party at the initial stage and had not been produced by him, the mere fact that evidence sought to be produced is vital and important does not provide a substantial cause to allow its admission at the appellate stage. The admissibility of additional evidence depends on whether or not the Tribunal requires it to enable it to pass orders or for any other substantial cause and not to enable the assessee or the Department to tender fresh evidence to support a new point or to make out a new case. In the case of *N. Kamalam* (*supra*) it was held that the provisions of Rule 27, of Order 41 of Civil Procedure Code, 1908 are not designed to help parties to patch up weak points and make up for omissions earlier made.

32. In the case of *Smt. Girijamma* v. *Kamala Engg. Works* AIR 2000 Kar. 239, it was held that when there was a failure on the part of the applicant to produce the documentary evidence during trial in spite of having knowledge as to its existence, he could not be permitted to adduce the same as additional evidence in appeal. This position has been reiterated in the case of *Mandala Madhava Rao* v. *Mandala Yodagiri* AIR 2001 AP 407 wherein it was held that additional evidence can be adduced, *inter alia*, where the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within their knowledge or could not after the exercise of due diligence be produced by him at the time when the decree

appealed against was passed and the appellate court requires the said evidence to be produced to enable it to pronounce the judgment. Similarly, in the case of *Ram Kumar* (*supra*) cited by the learned counsel for the assessee, it was held by the Hon'ble Punjab & Haryana High Court that additional evidence cannot be claimed as a matter of right in the appellate court and it has to be shown by the litigants that the proposed additional evidence was not in their power or possession or was not in their knowledge.

33. It is also well-settled that once additional evidence is taken into consideration, it has to be read as part of the record and before drawing any inference on the basis of contents of that document admitted as additional evidence, an opportunity has to be given to the other side to explain or rebut the same. As held by Hon'ble Madras High Court in the case of *R.S.S. Shanmugam Pillai & Sons* (*supra*), if the Tribunal finds that the documents filed are quite relevant and for the purpose of deciding the issue before it, it would be well within its powers to admit the evidence, consider the same on merits or remit the matter to the lower authorities for examining the same. In the case of *Smt. Urmila Ratilal* (*supra*), Hon'ble Gujarat High Court has held that when the additional evidence filed by the revenue was admitted by the Tribunal overruling the objection raised by the assessee, interest of justice demanded that the assessee was given an opportunity to explain or rebut the additional evidence before relying on the same. In the case of *Charbhai Biri Works* v. *Asstt. CIT* [2003] 87 ITD 189 cited by the learned counsel for the assessee, it was held by Pune Bench of ITAT in its Third Member decision that when the documents which were not available before the Assessing Officer were produced before the Tribunal for the first time and the same were admitted as additional evidence being material and relevant for adjudicating the matter, the issue was required to be restored to the file of the Assessing Officer to verify correctness and authenticity of such documents and to adjudicate the matter afresh after providing adequate opportunity to the assessee of being heard.

34. Keeping in view the legal position as regards the matter of admission of additional evidence by the appellate authority as emanating from the various judicial pronouncements discussed above, we can now endeavour to examine the various documents being sought to be filed by the revenue in the present case as additional evidence by appreciating and ascertaining their relevancy as well as requirement to adjudicate upon the issue in dispute in the present appeal or for any other substantial cause in terms of Rule 29 of the Appellate Tribunal Rules, 1963.

The above evidences were not in possession of revenue at the time of passing of the original order or before ld DRP but have been collected during the course of penalty proceedings and also after filing of the appeal by the assessee. In fact the additional evidences are two statements of different persons one of them is the director of the company and second is also of the close associate of the assessee. The close associates of the assessee have produced certain copies of emails where he is one of the recipient of such mails along with others. In fact the mails

are already available with the assessee as senior officers including chairman is recipient of those mails and has actively communicated through those mails. Hence they were in facts in possession of assessee since the mails are exchanged. Furthermore, regarding not making the prayer at the time of the commencement of the hearing we do not find that such an argument is at all relevant, as the assessee will get ample opportunity to rebut those evidences. Further with respect to the utility of those evidence in deciding the issue before us we are of the opinion that revenue has challenged that copy of the agreement dated 23.05.2008 filed during the course of assessment proceedings is not a reliable evidence as same was not signed by the actual parent of the company. It was further submitted that the revenue has further found that the agreement does not have any evidentiary value, as it was neither apostle certified or were signed by any of the parties on each page. it is further found by the revenue that parent company of Universal Studios International BV which invested US$150 million in the subsidiary company of the assessee and it was stated by the assessee NBC Universal Inc. , USA was its parent company which was found to be incorrect as 100% share of investor company were held by NBCU Dutch Holding Bermuda Ltd as a general managing partner of CA holding CB Bermuda. Even this company was not a party to any of the agreement placed before the lower authorities. Furthermore, the revenue has found that money introduced as share application money and securities premium is transferred to NDTV (assessee) in the form of dividend. It was further found by revenue that various emails between the group of persons completely show the modus operandi employed by the assessee for rerouting the money through complex cobweb of sham subsidiaries abroad. It is further alleged that various subsidiaries formed by the assessee for a limited period were in the nature of 'shell companies' and which lacks substances in those jurisdiction. As the issue involved in the present ground before us relates on these aspects of agreements and formation of various structure by the assessee and the financial train of investment made by investor company and subsequent shown to the assessee group companies at a phenomenal loss without any justifiable reason. All these evidences go to rot of the matter. If we do not admit these evidence which are so vital that they clearly speaks about the mind of the persons to achieve ultimate objective and what is to be disclosed selectively to whom and in

what matter so the user of such communication is not able to reach at the intent and purposes of the transaction. Therefore, there is just cause for admission of these additional evidences for deciding the issue. Regarding the issue of cross-examination of Mr. Sanjay Dutt we fully agree that no cross-examination was granted to the assessee and therefore, it cannot be used against the assessee. However, with respect to the various mails referred by the ld AO in the show cause notice replied by the assessee vide letter submitted on 02.11.2016. As per page No. 32 of the reply of the assessee 8 emails exchange were recorded and assessee has not denied the existence of such mail. The assessee has merely requested the ld AO to verify the authenticity and genuineness of such mail. In view of this these email exchanges are not denied or said to be fraudulent by the assessee their evidentiary values cannot be discarded. The correspondence in those mails clearly throws light on the state of arrangements made by the assessee and further corroborated by the various evidences produced by the assessee in its paper book submitted before us. With respect to the statement of Mr. Narayan Rao , who is the director of the company, filing the appeals before his under his signature for the company and who is part of the complete transaction as one of the main executors we donot find it necessary that unless the cross examinination is granted to assessee of Mr. Narayan Rao it cannot be used. Further the compounding of offences under FEMA is a statutory record only of submission before other statutory authorities. In view of this we are of opinion that the application for the admission of the additional evidence of the Revenue deserves to be accepted and for the reasons recorded by us as above we are of the opinion that those evidences are required to be admitted for the substantial cause of adjudication on the merits of the addition. Therefore, the application of the revenue for admission of additional evidence succeeds.

95. The ld AR in rejoinder to the argument of the ld DR on ground of addition of Rs. 6425422000/- is as under:-

1. *Ground Nos. 3 to 3.3 of Grounds of Appeal relate to addition made of Rs. 642,54,22,000/- representing share capital raised by NDTV Networks International Holdings BV, a subsidiary of the appellant company (hereinafter*

referred to as "NNIH" or alternatively as "investee company") and brought to tax as income of the appellant company u/s 69A of the Act.

1.1 The learned Assessing Officer in pursuance to directions of Dispute Resolution Panel ("DRP") has made the aforesaid addition by holding (pages 148-149 of Appeal Set) as under:

> *"8.14 In view of the above detailed facts and circumstances of the case and in compliance with the directions of the Hon'ble DRP as reproduced above, it is held that the transaction involving the receipt of Rs. 642,54,22,000/- by the assessee's subsidiary company during the year is a "sham" transaction, through which the assesee has introduced its own unaccounted money and the same therefore represents the unexplained money owned by the assessee, regarding the nature and source of which the assessee has not been able to offer satisfactory explanation. The amount of Rs. 642,54,22,000/- is hence added to the assessee taxable income u/s 69A of the Act."*

2 The learned counsel for the revenue in support of the aforesaid addition has conceded that he neither disputes the identity of the investor company, namely Universal Studios International BV (hereinafter referred to as "USBV" or alternatively as "investor company") and nor the creditworthiness of the investor company.

2.1 He however submitted that he only disputes the genuineness of the transaction of investment made by the investor company into the investee company so as to contend that the said sum is assessable as income in the hands of the appellant company.

2.2 It is submitted that the aforesaid contention is misconceived both on facts and in law.

2.3 It is well settled law that subscription to "share capital" is in the nature of "capital receipt" and could not be brought to tax even in the hands of the investee company, much less in the hands of appellant company. Reliance is placed on the following judicial pronouncements:

i) 192 ITR 287 (Del) CIT vs. Stellar Investment Ltd. approved by the Apex Court in the case of CIT vs. Stellar Investments reported in 251 ITR 263 (SC)

ii) 319 ITR 5 (St.) CIT vs. Lovely Exports Pvt. Ltd.

iii) 361 ITR 220 (Del) CIT vs. M/s Kamdhenu Steel and Alloys Ltd

iv) 205 ITR 98 (Del)(FB) CIT vs. Sophia Finance Ltd.

v) 356 ITR 65 (MP) CIT vs. Peoples General Hospital Ltd.

vi) 307 ITR 334 (Del) CIT vs. Value Capital Services Pvt. Ltd.

2.4 Moreover, the Hon'ble Delhi High Court in the case of CIT v. Kamdhenu Steel and Alloys Ltd. reported in 361 ITR 220 at page 227 has held as under

> "The genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers from that very shareholder. The Division Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be the copies of the shareholders

register, share application forms, share transfer register, etc." (Emphasis supplied)

2.5 *It is undisputed that share subscription was received from the investor company through banking channels and thus the aforesaid contention disputing the genuineness of investment by way of share subscription lacks valid justification.*

2.6 *It is submitted from the evidence on record, it is apparent that M/s Universal Studios International BV, the shareholder was an associate of NBC Universal Inc. which is a group company of GE Group one of the largest company in the world. (see page 684 of PB Vol. II). Thus where the funds have came through banking channels from an well established entity, the assumption and presumption of the authorities that the transaction is sham and the amount received by the subsidiary of the assessee was the assessee's own money is a matter, which it is submitted cannot stand the test of judicial scrutiny. It has been not been shown that either no funds came as reflected in the bank account of investee company or it was the assessee's own funds by leading positive material. The conclusion is based on frivolous, unsubstantiated allegation that, it was assessee's own money and without leading any tangible material. Contention has been raised only on the basis of suspicion and without any material.*

2.7 *It is emphasized that there is no material much less any valid evidence either emerging from orders of authorities below or even from the contentions of the learned counsel for the revenue to show that appellant is the "owner" of the sums received as share subscription by the NDTV Networks International Holdings BV ("NNIH") from USBV, an independent investor company.*

2.8 *It is thus respectfully submitted that mere allegation based on an erroneous assumption that the transaction is "non genuine" does not imply statutorily or even otherwise that appellant is "owner" of money received as share subscription by the subsidiary of the appellant company and, therefore the addition u/s 69A of the Act is perse without jurisdiction.*

3 *The revenue instead of discharging the aforesaid burden u/s 69A of the Act to show that appellant is "owner" of money by leading any valid evidence has attempted to side track the aforesaid issue by essentially making two fold submissions:*

a) *That there is no burden on the revenue to locate the source of income and reliance has been placed on two judgments of Apex Court in the case of A. Govindarajulu Mudaliar v. CIT reported in 34 ITR 807 and CIT v. M. Ganapathi Mudaliar reported in 53 ITR 623;*

b) *That since the structure is complex and the subscription is at a huge premium (which is not explained through any valuation) and there has been winding up of the structure in short duration and, ultimately since the flow of money is to appellant company establishes that transaction is "sham" and, thus not a genuine transaction;*

4 *It is submitted that none of the aforesaid contention even remotely lead to an in-escapable conclusion that assessee is the "owner" of money received as share subscription by NNIH through banking channel from USBVso as to invoke section 69A of the Act.*

4.1 *The appellant seeks to emphasize here at the risk of repetition (though not disputed) that burden u/s 69 A of the Act is on revenue to show that capital received by an independent subsidiary company from an independent*

investor company as the income of the appellant company, which burden in the respectful submission remains undischarged, when no evidence has been placed on record, other than rhetorical submissions based upon arbitrary inferences from no tangible material.

4.2 *At this juncture it is submitted that it is undisputed that not only the confirmation from USBV had been filed (pages 724-725) but following evidences were also furnished in support on the issue of shares by NNIH to USBV:*

Sr. No.	Date of filing	Particulars	Pages of Main Paper Book	Pages of concise Paper Book	Nature of documents
i)	30.3.2013 and 29.4.2013	A copy of the shareholder agreement Share subscription agreement dated 23.5.2008	1-104	1-7	The shareholder agreement acknowledges the fact that the parties namely NBCU and USBV and NDTV (Appellant), NDTV BV, NDTV Networks BV, NNIH and NDTV Network PLC are to participate and have agreed to participate and enter into share subscription agreement to own the initial interest in the group company of the appellant
ii)	29.4.2013	Share subscription agreement dated 23.5.2008	107-222	8-12	Share subscription agreement between the parties evidences the investment of USD 150 Mn. (INR 642 crores)
iii)	29.4.2013	Bank account No. 02.01.28.342 of Investee company	651	28	Evidencing receipt of money of share capital under share subscription agreement dated May 23, 2008 in the bank account of NNIH.
iv)	29.4.2013	Annual accounts of Investee	652-665	29-41	Annual accounts of NNIH evidencing receipt of share application money of USD 150

		company			Mn.
v)	24.10.2013	Confirmation letter from Universal Studios International BV dated 1.8.2013	668-669	42-43	Confirmation of USBV (ultimate shareholder) making subscription of USD 150 Mn under the share subscription agreement date May 23, 2008
vi)	24.10.2013	Share issue Deed dated 23.5.2008	670-673	43A – 43D	Evidencing that shares were issued on receipt of share capital of USD 150 Mn.
vii)	24.10.2013	Bank certificate from BNP Paribus evidencing payment of USD 150 million	674-675	44-45	Bank certificate evidencing the bank account from which the subscription money of USD 150 Mn. was paid by USBV
viii)	24.12.2013	Apostilled copy of confirmation from Universal Studios International BV	722-725	89-92	Legally executed documents evidencing the identity, genuineness of nature of transaction and credit worthiness of USBV (investor in NNIH)
ix)	24.10.2013	Annual report of Universal Studios International BV	676-718	46-88	Evidence related to investment made in NNIH of USBV in its audited accounts
x)	29.4.2013	Annual report of GE	379-502	23-24	Evidencing that NBCU is part of GE group, one of the largest global business conglomerate whose identity, creditworthiness could not be doubted
xi)	29.4.2013	Form 10K of Comcast Corp. under S.E. Act of	503-650	25-27	Comcast was later on the majority shareholder in the business of NBCU which fortifies that its identity and

		US			creditworthiness is undisputed
xii)	29.4.2013	Annual report of calendar year 2008, 2009 and 2010 of NBCU i.e. the parent of allottee (USBV) of shares issued by NNIH ("Investee Company")	223-262	13-18	Evidences that NBCU through its subsidiary namely, USBV made an investment of USD 150 Mn in May, 2008 and subsequently off- loaded its equity in Nov, 2009
xiii)	10.12.2013	Agreement dated 14.10.2009	1239-1263	93-96	Evidencing the subsequent repurchase of shares as agreed in the discussions between parties, which also gathers support from an email of Pete Smith (President NBCU International) dated Oct 2, 2009
xiv)	10.12.2013	Email dated 2.10.2009	1264-1265	97-98	Email settling on the proposal of NBCU's exit from NNIH

4.3 It is submitted that the learned Assessing Officer has not made any adverse observations with regard to the documentary evidence led by the appellant company. The Hon'ble Delhi High Court in the case of CIT vs. M/s Kamdhenu Steel and Alloys Ltd. reported in 361 ITR 220 has held that, no addition can be made by disbelieving the material placed by assessee, as he could have used coercive powers available to him. Reliance is also placed on the judgment of Hon'ble Allahabad High Court in the case of Nathu Ram Prem Chand v. CIT reported in 49 ITR 561 and EMC Machine Works v. CIT reported in 49 ITR 650 wherein it has been held that, burden is on the Assessing Officer to enforce the attendance of the creditors. Likewise Hon'ble Delhi High

Court in the case of CIT vs. Jitin Gupta decided on 03.03.2009 has held that once necessary evidence has been placed on record and the learned Assessing Officer has not led any material to the contrary; no adverse inference can be drawn. Also in the case of CIT vs. Genesis Commet (P) Ltd reported in 163 Taxman 482 (Del) it has been held that, an officer, if he was not inclined to believe the material placed by assessee he could have used coercive powers available to him

4.4 *It is thus submitted that revenue is blowing "hot" and "cold". It is submitted that having accepted the genuineness of the documents tabulated in para 4.2 above, including the agreements contention that further enquiries could not be made on account of delay in filing of apposilited confirmation is an afterthought. It is submitted at no stage either during the proceedings before passing the draft order or in the remand proceedings before DRP, the revenue attempted to make any enquiries and thus in absence of enquiries; adverse inference drawn is highly untenable.*

4.5 *It was contended at the time of hearing that in the course of assessment proceedings before the draft was prepared on 31.03.2013 the assessee had filed no confirmation from the investee company. The contention is based by overlooking the fact that there was no investment was made by the investee company with the assessee and the AO had made no enquiry whatsoever on the contrary before the ADIT, as submitted the due details as required were furnished and as such there arose no occasion to furnish any such confirmation. The assessee however on 24.10.2013 furnished the confirmation before the DRP, a copy whereof was forwarded by DRP and in the report dated 11.12.2013, the AO never stated that such a confirmation is to be ignored as the same was not apostilled. However the assessee by way of abundant precaution considered appropriate to have the confirmation apostilled and as such was furnished. The submission*

made by the learned counsel is not only an afterthought but is an attempt to wriggle out from the submissions made by the assessee that the revenue did not dispute the confirmation. In fact as stated above all such documents which were not also apostillised are also not disputed. Further the bank account of the investee company which reflect the remittances is sufficient to establish the confirmation supported by audited accounts, no other confirmation in fact is required.

5 *Furthermore it is submitted the aforesaid two contentions stated in para 3 are neither here and nor there. It is submitted that it is not any or every assertion is a material. There has to be relevant material to establish ownership and further to establish the explanation furnished is unsatisfactory. What is supported by evidence cannot be regarded as no evidence or not sufficient material.*

6 *Taking up the former contention, it is submitted that, both the judgments of Apex Court in the case of A. Govindarajulu Mudaliar v. CIT reported in 34 ITR 807 and CIT v. M. Ganapathi Mudaliar reported in 53 ITR 623 have no application to the facts of the appellant company.*

6.1 *It is well-settled that judgment is a proposition what it actually decides and, not what logically or remotely can be deduced therefrom as has been held in the following cases:*

i) 188 ITR 402 (SC) Goodyear India Ltd. v. State of Haryana (SC)

ii) 255 ITR 153 (SC) Padmasundara Rao v. State of Tamil Nadu

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be

remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [1972] 2 WLR 537 (HL). Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

iii) 198 ITR 297 (SC) CIT v. Sun Engineering Works P. Ltd.

6.2 *It is submitted that in the case of A. Govindarajulu Mudaliar v. CIT reported in 34 ITR 807 (SC) there was a credit in the accounts of the assessee in the books of the firm in which assessee was a partner. The AO rejected the explanation regarding the credits in the account of the assessee in the books of the firm. It was thus held that said credits are income of the assessee. It is submitted in the instant case it is undisputed that there is no credit in the name of the appellant in the books of NNIH. The credit in the books of NNIH is to account of USBV and therefore even assuming that explanation is not found satisfactorily (though wholly disputed) it does not lead to any conclusion that assessee is the owner of the money received as share subscription by NNIH from USBV. It is thus submitted that the aforesaid judgment has no application to the facts of the case of the appellant company.*

6.3 *As regards the judgment of Apex Court in the case of M. Ganapathi Mudaliar reported in 53 ITR 623, the revenue has relied on the following observation in the judgment:*

> *"Once it is held that 86,500 dollars was the income of the assessee, it was not necessary for the revenue to locate its exact source. On this material, we cannot say that there is no evidence in support of the finding of the Tribunal."*

6.4 *It will be apparent that in the above judgment it was found as a matter of fact that it was "income" of the assessee and therefore the revenue was not required to locate the exact source of such income. However, there is no such evidence to show that share subscription by USBV of NNIH is income of the assessee and on that ground alone, the reliance placed on the above judgment is bereft of any merit. Furthermore even otherwise it will be noted that in the said judgment, the real controversy between assessee and revenue was on the issue whether the sum of 87,500 dollars, which was credited to one Ayyaru in the assessee's account on January 7, 1946, was Ayyaru's money, which had been borrowed by the assessee or whether the entry was fictitious and the money really belonged to the assessee himself. However, in the instant case, there is no credit in the books of accounts of the assessee and thus even factually speaking, the said judgment has no application.*

6.5 *In view of the above it is submitted that in absence of any evidence to show that the money came from coffers of the assessee instead of coffers of the shareholder so as to allege that assessee is the "owner" the addition made is factually and legally misconceived.*

7 *Now taking up the latter contention it will be seen that the revenue has referred to the following three agreements:*

i) Share subscription agreement dated 23.5.2008(pages 107-222 of Paper Book-I)

ii) Share holder agreement dated 23.5.2008(pages 10-104 of Paper Book-I)

iii) Agreement dated 14.10.2009 for the sale and purchase of shares in NDTV BV between Universal Studios International B.V., NBC Universal, INC, NDTV Networks B.V., NDTV BV., NDT Networks PLC and NDTV (pages 1239-1263 of Paper Book-IV)

7.1 *It is submitted that on the basis of the aforesaid agreements the learned counsel has contended that it is not a case of pure and simple purchase and sale of shares, as claimed by the appellants but is a device created by which in a short duration, funds received as a share capital has been received by the appellant (instead of funds received as a share capital by M/s NDTV Networks International Holdings). The aforesaid allegation it is submitted is totally disputed which lacks any substance to hold that the fund received were the sums owned by the assessee to be taxed u/s 69A of the Act.*

7.2 *The Hon'ble Bench during the course of hearing directed the assessee to file a copy of the memorandum of agreement dated 22.1.2008 entered between USBV, NBCU and NDTV Networks B.V. It was also directed to clarify that whether such MOU has been placed on record by the appellant company.*

7.3 *It is submitted that the copy of the MOU had been on record during the course of assessment proceedings for assessment year 2008-09 in pursuance to the direction of the learned Assessing Officer. A copy of MOU dated 22.1.2008 alognwith the reply is enclosed at pages 5-20 of PB Volume-VIII. It may be stated here that no adverse inference had ever been drawn on the basis of the aforesaid MOU in order of assessment dated 03.08.2012 u/s 143(3) of the Act.*

7.4 *The assessee also hastens to add here that there was no direction ever to produce the aforesaid MOU by any of the authorities below during the assessment/DRP proceedings and thus the contention of the learned counsel the same is not on record is firstly factually incorrect and secondly is misconceived as there is nothing in the MOU which is adversely considered.*

7.5 *Apart from the above it is also stated that the Hon'ble Bench sought copies of list of documents Annexure as Annexure I (page 215 of Paper Book) to the share subscription agreement. The copies of the*

following agreement as enclosed herewith in compliance to the aforesaid direction of the Hon'ble Bench:

i) Amended and Restated Trademark License Agreement between NDTV Parent and NDTV Imagine Limited at pages 21-38 of PB Volume-VIII.

ii) Amended and Restated Trademark License Agreement between NDTV Parent and NDTV Labs Limited at pages 39-56 of PB Volume-VIII.

iii) Amended and Restated Trademark License Agreement between NDTV Parent and NDTV Lifestyle Limited at pages 57-74 of PB Volume-VIII.

iv) Amended and Restated Trademark License Agreement between NDTV Parent and NDTV Convergence Limited at pages 75-96 of PB Volume-VIII

v) Intellectual Property Assignment and Licence between NDTV Parent and NDTV Imagine Limited at pages 97-104 of PB Volume-VIII.

vi) Intellectual Property Assignment and Licence between NDTV Parent and NDTV Lifestyle Limited at pages 105-114 of PB Volume-VIII.

vii) Intellectual Property Assignment and Licence between NDTV Parent and NDTV Labs Limited at pages 115-126 of PB Volume-VIII.

viii) Intellectual Property Assignment and Licence between NDTV Parent and NDTV Convergence Limited at pages 127-134 of PB Volume-VIII.

ix) Intellectual Property Assignment and Licence between NDTV Parent and NDTV Emerging Markets B.V. at pages 135-142 of PB Volume-VIII.

x) *Intellectual Property Assignment and Licence between NDTV Parent and NGen Media Services Pvt. Ltd at pages 143-150 of PB Volume-VIII.*

xi) *Amended and Restated Co-operation Agreement between the NDTV Parent, Networks PLC, Imagine, Labs, Lifestyle and Convergence at pages 151-162 of PB Volume-VIII.*

xii) *Amended and restated domain name transfer agreement between the NDTV Parent and Convergence at pages 163-166 of PB Volume-VIII.*

7.6 *Further even the copies of the agreements as stated in Annexure 2 (page 217 of Paper Book) are enclosed herewith:*

i) *The General Shared Services Agreement dated 6.2.2007 between NDTV Lifestyle Ltd., NDTV Networks PLC and New Delhi Television Limited at pages 167-172 of PB Volume-VIII.*

ii) *The General Shared Services Agreement dated 6.2.2007 between NDTV Convergence Limited, NDTV Networks PLC and New Delhi Television Ltd at pages 173-178 of PB Volume-VIII.*

iii) *The General Shared Services Agreement dated 6.2.2007 between NDTV Imagine Limited, NDTV Networks PLC and New Delhi Television Ltd at pages 179-184 of PB Volume-VIII.*

iv) *The General Shared Services Agreement dated 6.2.2007 between NDTV Labs Ltd., NDTV Networks PLC and New Delhi Television Ltd. at pages 185-190 of PB Volume-VIII.*

v) *The General Shared Services Agreement dated 3.3.2008 between NDTV Emerging Markets Ltd., NDTV Networks PLC and New Delhi Television Ltd. at pages 191-196 of PB Volume-VIII.*

vi) *The General Shared Services Agreement dated 3.3.2008 between NDTV Networks PLC and New Delhi Television Ltd at pages 197-202 of PB Volume-VIII.*

7.7 *Apart from the above the Hon'ble Bench also specifically directed to place on record the names of nominees of USBV on board of NDTV Networks PLC.*

7.8 *It is submitted that in pursuance to the aforesaid share subscription agreement and the shareholder agreement following directors were appointed on the board of M/s NDTV Networks PLC:*

i) *Mr. Peter Smith*

ii) *Ms. Roma Khanna*

7.9 *Further the minutes of the meetings to show effective participation of the investor company in NDTV Networks PLC are also enclosed herewith:*

		Pages of PB Volume-VIII
i)	*8.5.2008*	*203-222*
ii)	*16.7.2008*	*223-226*
iii)	*25.8.2008*	*227-230*
iv)	*7.11.2008*	*231-234*
v)	*3.2.2009*	*235-238*
vi)	*27.6.2009*	*239-242*
vii)	*9.7.2009*	*243-246*
viii)	*22.9.2009*	*247-252*
ix)	*16.11.2009*	*253-256*

8 *Apart from the above, the learned counsel for the revenue has stated that a reading of the aforesaid agreements shows that there was complete due diligence made by NBCU but the valuation as part of the aforesaid due diligence has not been shared by the assessee. It is submitted that it is obvious that such a due diligence as was got done by NBCU is to be with NBCU and not with the assessee and as such*

their contention the same has not been shared, overlooks the fact that assessee being not a privy to such a document could not be in possession thereof. In any case it is submi9tted the same is inconsequential. In fact the assessee had obtained valuation in respect of its enterprise value which had been valued at 526 million USD in November, 2006. (Copy of furnished) It is added here that in fact on the basis of same report investments were made in May 2007 and March 2007 by Institutional Bond holders and FUSE Plus Media who had made investment of USD 100 million and USD 20 million respectively for proposed equity stake of 20% to 30%. Further, the investor (NBCU) and NDTV Group had agreed for business projection under the shareholders agreements itself which is titled as Annexure – 1, (Business plan) (Pg. 73 – 93 of PB)

8.1 *He further contended that shares have been issued at an exorbitant premium though the company was incorporated only in April' 2008 and thereafter also wound up in April' 2009.*

9 *It is submitted that charging of premium on fresh issue of shares is based on the business potential of the group which mainly consists of the entertainment vertical of the business. It is settled in law that share premium received on the issue of shares has to be included in the paid up capital irrespective of whether the share premium has been maintained in a separate account apart from the reserve as held in the case of the Hon'ble Supreme Court in the case of CIT Vs Allahabad Bank Ltd. reported in 73 ITR 745. A detailed note on the formation of subsidiaries, their activities and the basis of valuation of USD 150 Mn. is separately enclosed as Annexures I and 2 of Note 1 already on record, though it is specific averment of the appellant that it would not be material in order to invoke the provisions of section 69A of the Act.*

9.1 *To support that the issuance of share premium without having valuation done has no consequence, the appellant placed its reliance on the ruling of the Mumbai Tribunal in the case of M/s. Green Infra Ltd*

v ITO reported in 159 TTJ 728 wherein the newly incorporated company issued shares of Rs. 10 at share premium of Rs. 490, though it had yet to start its business. The aforesaid decision has been affirmed by the judgment of Hon'ble Bombay High Court in the case of CIT v. Green Infra Ltd. reported in 392 ITR 1.

9.2 *Also Hyderabad Tribunal, in ITA No 1775/HYD/2014 in Harion Concast & Steel (P) Ltd vs ITO, vide judgment dated 05.10.2016 has held that:*

> *"8. The other case law relied on by assessee is also on the issue that share premium cannot be brought to tax invoking the provisions of Section 68, unless there is a link with either quid pro quo transaction or investing by assessee-company in their accounts so as to receive it back as share capital. No such, evidence was brought on record. On the given facts of the case, and on the basis of the confirmation filed by the companies, we cannot hold that this amount can be brought to tax invoking the provisions of Section 68. The genuineness and credit worthiness of those companies is not in dispute. What AO disputed was the amount of premium. Moreover, if the amounts are doubted from those companies, the amount of share capital at Rs.10 was not doubted. Only amount of premium was doubted. Therefore the companies' transactions with assessee are partly accepted as genuine. On facts of the case provisions of Sec. 68 cannot be invoked. Respectfully following the principles laid down by the Co- ordinate Bench in the case of M/s.Green Infra Ltd., in ITA No. 7762/Mum/2012 dt. 23-03-*

2013 (supra), we have no hesitation in holding that the orders of the AO and CIT(A) are bad in law. In view of this, we delete the addition so made by AO and confirmed by CIT (A)."

9.3 *Reliance is also placed on the judgment of Jurisdictional High Court in case of CIT vs. Empire Buildtech (P) Ltd. reported in 366 ITR 110.*

9.4 *The appellant also submits that the amendment made by the Finance Act, 2012, wherein the legislature had inserted section 56(2)(vii)(b) of the Act, wherein they have intended to tax the amount of share premium received in excess of the Fair Market Value of the shares as "Income from Other Sources". The said provision (as amended) is not applicable to the Applicant Company as NDTV is a company in which public is substantially interested. Therefore, no adverse inference could have been drawn in the facts of the present case in respect of charging premium. It is also important to note that the said provision is not applicable in the case of the investor being a foreign company investing in share capital of an Indian company at a premium. Further, it is a fact that both investor and investee companies are non-resident companies and the provisions of the domestic law would have no application whatsoever.*

10 *The learned counsel for the revenue also contended that subsequently in a short period of time said share capital was repurchased at a much lesser price which resulted into capital loss in the hands of the investor (USBV) which rendered entire transaction sham as it had no commercial and economic substance.*

10.1 *It is submitted that the said allegation is completely misconceived and devoid of any merits on account of the following reasons:*

i) *The subsequent event of repurchase would not be material to determine the nature of the original transaction specially when the provisions of section 69A of the Act are invoked. On the contrary, the reliance on the same proves that original transaction of subscription of shares is beyond any suspicion and ingredients of section 69A of the Act to tax the original transaction do not survive. In other words, the fact that the investments were repurchased subsequently shows that the original transaction is neither tainted or illegal which warranted the lifting of corporate veil or invocation of under section 69A of the Act in the hands of the assessee company. Reliance is placed on the judgment of Hon'ble Delhi High Court in the case of CIT v. Five Vision Promoters (P) Ltd. reported in 380 ITR 289.*

ii) *As far as the losses in the hands of the investor (USBV) on account of subsequent repurchase is concerned, the same is also irrelevant as it is not the case of the revenue that such losses have benefited the assesee or its group companies in any manner. On the contrary, presuming but not admitting that the losses so incurred by the investor (USBV) are not genuine in that case also the appropriate recourse would be non allowance of such losses, if it is claimed in the hands of the investor (USBV) and in no manner could make the "good money" as "bad money" received on subscription of shares.*

10.2 *It is also submitted that the decision of USBV/NBCU to exit from the company M/s NNIH was based on the fact that entertainment business in India was based on the reasons that the business of NDTV Imagine Group has suffered huge losses and to revive the same the fresh equity infusion was required. It is a fact that the entire business of NDTV Imagine Group was later on sold by NNPLC at a total consideration of USD 7,34,85,427 to Turner Asia Pacific Ventures after due negotiation which included consideration to be paid to minority*

stakeholder amounting to USD 66,73,551 . The disclosure to that effect was also made (below the note on re-purchase of stake from USBV) in the Annual Report of the Group for FY 2009-10 which read as under:-

> "...The Company and NDTV Networks Plc, on 8 December 2009, entered into an agreement with Turner Asia Pacific Ventures, Inc. ("TAPV") for the sale of controlling stake in Turner General Entertainment Networks India Limited (Formerly NDTV Imagine Limited - "NDTV Imagine"). Pursuant to the said agreement, NDTV Networks Plc, on 23 February 2010 ("Closing Date"), transferred to TAPV 12,638,592 shares representing 85.68% of the issued and paid up equity share capital of NDTV Imagine on the Closing date resulting in a decrease of NDTV networks Plc's stake in NDTV Imagine from 90.68% to 5% for a cash consideration aggregating to US$ 73.48 million. The transaction also involved a further infusion of a sum of US$ 50 million as equity capital in NDTV Imagine by TAPV, which has resulted in further dilution to 3.18%."

10.3 The above submission also overlooks Annexure – 2 of shareholders agreement (Pg. 94 – 134 of PB -1) which itself provides for merger of M/s NNIH, NDTV Networks BV after approval of all stake holders.

11 The learned counsel for the revenue has referred to para 68 of judgment of Apex Court in the case of Vodafone International Holdings BV vs. UOI reported in 341 ITR 1.

11.1 It is submitted that the observations of the Apex Court in paras 67 and 68 has absolutely no application to the facts of the instant case. In the said case, the issue involved was whether the transaction of sale of shares outside India was a bonafide transaction and, if the answer to the question was affirmative, whether the assessee would be liable to tax in India in respect of the transfer of shares under the head 'capital gains'.

11.2 It is submitted that the issue involved however in the instant appeal as to whether the assessee is liable to be assessed in respect of the amount received on issue of shares by its subsidiary to another unrelated company M/s Universal Studios International BV, who has made investment in acquiring the shares and has so admitted to have made investment. It is thus submitted that the issue involved in the two cases are different.

11.3 It was held by the Apex Court in the said case that, if the transaction is between two independent companies, the 'look at' theory is to be applied instead of 'look through theory. It is thus submitted that look at theory had to be followed in respect of instant transaction of investment and acquisition of shares between independent and unrelated legal entities. It is submitted that the efforts of the authorities to hold the transaction to be 'sham' is based on their appreciation which is not only unsupported by evidence but following the look through' theory.

11.4 It is added here that a complete reading of the above judgments would only shows that in order to lift corporate veil, it needs to established beyond doubt that the transaction in question is taxable in the charging section of the Act and the taxes were avoided by the group by interposing the subsidiaries; which has not been done and, can be neither established.

11.5 It is further submitted that the assumption and action of the revenue of lifting the corporate veil in respect of the foreign subsidiaries which are incorporated and governed by the laws of their respective countries and had treaty protection is in complete defiance of the decision in the case of UOI vs. Azadi Bachao Andolan reported in 263 ITR 706.

12 Further even the contention as to lifting of corporate veil the same is also not tenable.. It is submitted that the fact that shares had been acquired by Universal Studios International BV when it paid consideration cannot be disputed. It is submitted that Universal Studios International BV has not merely confirmed the investment but has also established source of funding of investment thus whether such shares were acquired of assessee company or of subsidiary cannot be any ground to enable the revenue to lift the corporate veil.

12.1 The appellant most respectfully submits that the contention of learned counsel for revenue are flimsy and vague and also in disregard of explanation tendered by the appellant company. The appellant company has established that transaction of issue of shares by its subsidiary was a genuine transaction. It was submitted that M/s. Universal Studios International BV, an independent company incorporated in Netherlands had under a shareholder agreement acquired 26% stake in NDTV PLC UK at an aggregate consideration. It is respectfully submitted that the revenue has completely ignored and overlooked the fact that the assessee company or its subsidiary had no role to play and the decision of investment was of an independent company. The revenue has failed to appreciate that the said company is subsidiary of GE group, one of the largest companies of the world. It is thus submitted that the of the revenue that contention of the learned counsel of the assessee had sought to explain the share capital receipt

of Rs. 642.54 crores through lengthy and circuitous transactions and commercial substance/economic rationale for which have not been satisfactorily explained lacks credence or any merit.

13 *It is well settled rule of law that the prudency and commercial decision can alone be taken by a business men and It is also a settled law that it is the prerogative of the businessman to organize its affairs in a manner best suited to it and the revenue authority cannot step into the shoes of the businessman and it is not for the revenue to attack a transaction on the ground that the same was imprudent and thereafter to record the finding that the same was sham. Attention in this regard is invited to the following decisions:*

i) 288 ITR 1 (SC) S.A. Builders Ltd. vs. CIT

ii) 345 ITR 421 (Del) CIT vs. EKL Appliances Ltd

14 *In nutshell, the appellant's submission is that revenue overlooks fundamental evidence furnished by appellant company. In the present case, it is an undisputed fact and admitted by the AO/DRP that NBC Universal Inc, (a leading and an independent Group and the Joint Venture of the GE group) through its group company, Universal Studios International BV, subscribed to new shares amounting to USD 150 Mn (Rs. 642.54 crores) in a NDTV Group Company namely NDTV Networks International Holdings BV (NNIH) (a company incorporated as per the laws of Netherlands and resident of that country) on May 23, 2008. It is also undisputed that investee had issued shares to USBV, a subsidiary of NBCU, a world-wide-known company, engaged in entertainment business, which had duly confirmed the transaction of acquisition of 31.4% stake in the investee company. It is also quite true that, by so doing, it acquired indirect 26% stake in NDTV Networks, PLC, UK (hereinafter referred to as "NNPLC"); however, no interest whatsoever had been acquired directly or indirectly in the*

appellant company. It has not been shown by any material whatsoever that USBV had not acquired the shares or paid the said sum to NNIH without any consideration.

15 *It is thus submitted that the fact that claim that group companies either allegedly did not carry on any business or that they existed only for a short duration cannot be regarded as any valid basis unless until it could have been established that, such companies were either not incorporated in law or was a dummy concern of the appellant company. In any case, admittedly the shareholder of M/s NDTV Networks International Holdings BV was M/s NDTV Networks BV, who had acquired all the shares of M/s NDTV Networks International Holdings BV. It is submitted that M/s NDTV Networks BV, is a company incorporated on 9.1.2008 in Netherland. It is submitted that, it is also on record that the said company is an investment company. It is also undisputed fact that there has been no finding or adverse observation that either under the Income Tax Act or any other Act that such company was dummy or non-existing company.*

16 *It is also submitted that it is well accepted that a subsidiary and its holding company are distinct and separate entities. They are subject to income tax on the profits derived by them on standalone basis, irrespective of their actual independence and regardless of whether the profits are reserved and distributed to shareholders/participants. It is well settled law that holding and its subsidiary are totally separate and distinct taxpayers.*

17 *The appellant also seeks to add that the assessment for NDTV for AY 2010-11 was completed after due enquiries including enquiries through FT & TR from Netherland tax authority and no adverse inference was drawn with respect to buy back of shares vis-à-vis with a settlement of loan of US BV. It is pertinent to emphasize that transaction of receipt of*

loan and repayment of loan have never been disputed which itself shows inherent inconsistency in the stand of the revenue.

18 *it is already brought on record that money to the extent of Rs. 242 crores was advanced as loan to NDTV Network Plc. which is also subject matter of ground no. 4. Remaining amount of approximately Rs. 398 crores was introduced as equity in NDTV Mauritius which was further introduced as equity contribution in NDTV Studios. The above investments stands duly examined and verified after making due verification in the order of assessment of NDTV for AY 2009-10 and 2010-11 along with financial statements as is annexed herewith at pages 288-304 of PV-VIII.*

19 *Thus, it is most respectfully submitted that the action to make addition in the hands of the appellant company, a ultimate holding company has no legal basis.*

20 *Before concluding, it is submitted the aforesaid brief submissions are being made within a short time to less than 18 hours."*

96. Subsequent to the assessment proceedings, the penalty proceedings initiated u/s 271(1) (c) were going on and on 15.06.2016 a show cause notice was issued to the assessee consisting of 14 pages. During the penalty proceedings, the revenue collected further evidence by recording statements of Shri KVL Narayan Rao u/s 131 on 23.07.2015 in presence of two witnesses Shri Ajay Mankotia and Mr. Satish Minocha. A further statement u/s 131 of the Act was recorded of Mr. Sanjay Dutt on 09.07.2015. consequently, the show cause notice issued contained following facts and charges against the assessee:-

"Sub : Show cause notice regarding imposition of penalty u/s 271(1)(c) of the Act in the case of M/s. New Delhi Television Limited for AY 2009-10 – Regarding –

Please refer to the above subject.

2. The draft order u/s 144C(1) of the Income Tax Act, 1961 (the "Act") in your case for AY 2009-10 was passed on 31.03.2013 and your income was proposed to be assessed at Rs. 641,08,11,990/- as against loss of Rs. 64,83,91,422/- as declared by you in your return of income. Additions totalling Rs. 705,92,03,412/- were proposed in the draft order.

Findings during the assessment proceedings

3. Against the proposed additions, M/s. New Delhi Television Limited ("NDTV"/the "assessee company") filed objections before the Dispute Resolution Panel ("DRP"), which issued directions u/s 144C(5) of the Act on 31.12.2013 and confirmed additions amounting to Rs. 648,42,28,619/- as proposed in the draft order and further enhanced your taxable income by another Rs. 254,75,00,000/-.

4. In compliance with the directions, the final assessment order was passed u/s 144/ 144C(13) on 21.02.2014 at an income of Rs. 838,33,37,197/- , wherein the following additions totaling Rs. 903,17,28,619/- were made :-

(in INR)

S. No.	Nature of addition	Amount of addition
1	Disallowance u/s 14A	78,40,990
2	Transfer Pricing adjustments	5,09,65,629
3	Addition u/s 69A on account of unexplained money	642,54,22,000
4	Addition u/s 68 on account of unexplained unsecured loans	254,75,00,000
	Total	903,17,28,619

5. Penalty proceedings u/s 271(1)(c) of the Act were simultaneously initiated and notice u/s 274 read with section 271(1)(c) of the Act was issued to you on 21.02.2014. However, no reply has been received from you on the merits of the case till date.

6. The facts of the case regarding the addition of Rs. 642,54,22,000/- are that during the year under consideration, New Delhi Television Ltd. (NDTV), along with four of its subsidiaries namely NDTV BV, NDTV Networks BV (NNBV), NDTV Networks International Holdings BV (NNIH) and NDTV Networks Plc (NNPLC), had entered into an agreement dated 23.05.2008 with NBC Universal Inc. (NBC) and Universal Studios International BV (USBV). As a result, an amount of Rs. 642,54,22,000/- (US $150 million) was received during the year by NNIH. The amount was received on account of subscription of 915,498 shares into NDTV Networks International Holdings BV equivalent to 26% effective indirect stake in NDTV Networks Plc.

7. It is further noticed that taking into account the consideration of Rs. 642,54,22,000/- for 915,498 shares, the sale value per share thus comes to Rs. 7,015.05 per share. The face value of share of NNIH at the relevant time was around $ 1 per share, i.e. equivalent to Rs. 45/- to Rs. 50/- per share approx.

8. The above sale value was despite the fact that neither NNIH nor NNPLC were having any business activities. NNIH was a holding company and NNPLC was incorporated to promote the interests of NNIH and other group companies. NNPLC did not have any business activities. It had no fixed assets and there was no rent paid. NNPLC did not even have any employee in UK and the only employee in NNPLC was Mr. Vikramaditya Chandra, who was designated as CEO of this company. However, Mr. Chandra was also based in India only. Apart from incorporation in UK, NNPLC had no presence in UK. The address of NNPLC in UK was that of the Company Secretary dealing with its tax matters. Most of the Directors of NNPLC were Indians and the audit report of NNPLC was signed at Gurgaon in India. The authorized share capital of NNPLC was only about Rs. 47 lacs. NNPLC had declared loss of Rs. 8.67 crores for the year ending 31.03.2009. The subscription of a

share of the value around Rs. 50/- per share by USBV was @ Rs. 7,015/- per share, i.e. 140 times of the face value.

9. It is also pertinent to record that before purchasing the subscription, NBCU did not even obtain any independent valuation from a third party. Vide reply dated 30.03.2013, NDTV has admitted and confirmed that no independent valuation report for determining the value of shares of NNIH was obtained. The subscription price is stated to be "a negotiated price arrived between the parties based on proposed business potential and business forecast and projections". Since no prudent businessman will purchase the shares of a paper company at a price, which was more than 140 times of the face value without any credible valuation, the transaction was held as a part of scheme of routing own fund of the assessee company in the assessment order.

10. It was observed during the assessment proceedings that subsequently, during the immediately succeeding FY 2009-10, the very same shares were bought back by NDTV BV for Rs. 58.08 crores @ Rs. 634.17 per share. If the transactions were not sham, how could the same shares having face value of Rs. 50/- per share approx. be issued @ Rs. 7015.05 per share and further bought back @ Rs. 634.17 per share. That also is claimed in a situation when the issue of shares and the repurchase of shares are by an entity and its immediate subsidiary respectively. The transaction resulted in a claim of loss amounting to Rs. 584.45 crores for USBV and simultaneously resulted in an introduction of undisclosed income of Rs. 642.54 crores in the books of accounts of the NDTV group. As already recorded, no independent valuation was ever carried out by the group companies or by the USBV and the issue rate as well as the repurchase rate are claimed to be solely based on estimates and business projections. It is pertinent to mention that although the agreement dated 23.05.2008 stipulated a 5 Year Business Plan, which involved annual review and the 1st annual review was scheduled to be carried

out before the end of financial year 2009-10 on 31.03.2010. However, even before the 1st annual review could take place, the shares were allegedly bought back by NDTV Networks BV without any review of progress of business plan and without any valuation carried out by either party. These facts made it evident during the assessment proceedings that the transaction was not genuine.

11. The whole transaction thus had no commercial purpose or economic substance and its purpose was merely to evade tax and to constitute sham, colorable or bogus transactions with the pretense of corporate and commercial trading and in such circumstances, the corporate veil was therefore pierced while making the assessment of the assessee company. Once the corporate veil was lifted in the context of the impugned transaction in the present case, the clear facts emerging regarding the transaction revealed that the transaction was engineered to result in claim of loss to USBV and corresponding routing of the assessee's own undisclosed money through its subsidiary. This finding has been confirmed by the DRP.

12. While confirming the above findings, the DRP has specifically observed that the impugned transaction was sham and engineered to bring unexplained money of Rs. 642.54 crore by way of routing through a complex corporate structure, which lacked any commercial substance. The observations of the DRP in this regard are reproduced below :

> *"5.16 DRP has carefully considered the entire gamut of transaction and is of the opinion that the structure of holding/ subsidiary companies and the transaction as narrated above, without any commercial substance, do warrant lifting the corporate veil to identify the true nature of the transaction. Though AO in his remand report has said that the money has not been recorded in the books of assessee, after lifting the corporate veil, the DRP finds that in this case a sum of Rs.*

642,54,22,000/- has been found credited in the books of assessee/ its subsidiary for the previous year (FY 2008-09) under consideration. Though the assessee has sought to explain the above amount through the lengthy and circuitous transactions, the commercial substance/ economic rationale for such transaction has not been satisfactorily explained. Assessee's theory of having sold a "Dream" to the investor has not been substantiated by any credible evidence as no details have been filed whatsoever for the so called business projections and the basis for computation of the sale price of the share at the astronomical price of Rs. 7,015/- which is 159 times of its face value of Rs. 45/-. Needless to mention that the subject company whose shares were sold was incurring huge losses and there was hardly any worthwhile business to justify the above sale price. Interestingly, the assessee/ subsidiaries have again repurchased the same share in the very next financial year at the price of Rs. 634.17 per share totalling Rs. 58 crores. Here also no details/ justification has been given by the assessee as to how the above buy back price was fixed by the assessee when the so called "Dream" went bust, as being claimed by assessee. What was the justification for the assessee to buy back the shares of nearly defunct and own subsidiary company at a value which was more than 12 times of the face value. The totality of the transaction clearly lead to the inescapable conclusion that the entire transaction of sale & subsequent buy back of shares was a "sham" transaction entered into by the assessee with the sole motive of introducing Rs. 642,54,22,000/- in its books and providing loss of Rs. 584.46 crores to Universal Studios BV Netherlands.

5.16.1. In view of the facts and finding as mentioned above and taking the totality of the picture into consideration, it

is held that assessee has brought an amount of Rs. 642,54,22,000/- being unexplained money in to its books through its subsidiary NDTV Networks BV Netherlands. It is pertinent to mention that, as per the admission of the assessee the above subsidiary has been subsequently liquidated, which shows that the same was floated only to create a front for introducing the above amount."

[Emphasis supplied]

13. From the above, it is evident that there is a finding arrived at in the assessment order regarding creation of a façade in the nature of complex corporate structure and routing of money through sham transactions using this structure and this finding has been confirmed by the DRP as narrated above.

Findings during the course of penalty proceedings

14. Copy of agreement dated 23.05.2008 filed during the course of assessment proceedings was not reliable evidence

14.1 During the assessment proceedings for AY 2009-10, the assessee company filed copy of agreement dated 23.05.2008 in respect of alleged transaction of subscription by USBV in the shares of NNIH, however, this document had no evidentiary value. It was a photo copy, which was neither apostle certified nor was signed by any of the parties on each page nor it was signed by all the parties even on the same page. Further, the impugned agreement was not even signed by CA Holding CV, Bermuda, which was the actual parent company of USBV. Even the terms and conditions of the agreement were not complied with, because the agreement dated 23.05.2008 stipulated a 5 Year Business Plan, which involved annual review and the 1st annual review was scheduled to be carried out before the end of financial

year 2009-10 on 31.03.2010. However, even before the 1st annual review could take place, the shares were allegedly bought back by NDTV Networks BV without any review of progress of business plan and without any valuation carried out by either party. The celerity with which the shares were bought back without waiting for even the 1st review makes it evident that the agreement was not genuine and there was no intention to comply with the said agreement.

15. Parent company of USBV is in Bermuda and not in USA

15.1 It is pertinent to mention that NDTV had represented throughout before the AO, the DRP and the ITAT that NBC Universal Inc., USA ("NBCU") is the parent company of Universal Studios International BV ("USBV"), which invested US $ 150 million (INR 642,54,22,000) in subscription of shares of NDTV Networks International Holdings BV ("NNIH"). However, this is found to be factually incorrect. The correct position is that 100% of shares of USBV were held by NBCU Dutch Holding (Bermuda) Limited, which was holding them in its capacity as General Managing Partner of CA Holding CV, Bermuda. It is pertinent to point out that the parent company in Bermuda was not even a party to the agreement for subscription of shares of NNIH by USBV.

15.2 Perusal of Annual Report of Universal Studios International BV for the year 2008 reveals that the parent company of USBV is NBCU Dutch Holding (Bermuda) Limited, which is holding the shares of USBV acting in its capacity as General Managing Partner of CA Holding CV Bermuda. The Annual Report mentions as under :-

"The authorised share capital amounts to EUR 2,268,900 (2007: EUR 2,268,900) and consists of 5,000 shares (2007: 5,000 shares) of EUR 453.78 each.

The issued and fully paid share capital comprises 2,680 shares (2007: 2,680 shares) of EUR 453.78 each and has been translated into USD at the year-end exchange rate (December 31,2008: EUR 1 = 1.35240; December 31,2007: EUR 1 = USD 1.447890).

All shares are held by NBCU Dutch Holding (Bermuda) Limited acting in its capacity as General Managing Partner of CA Holding CV, Bermuda."

[Emphasis supplied]

16. *Money introduced as share application money and securities premium transferred to NDTV in the form of dividend*

16.1 NNIH was also a shell company 100% owned by NDTV. It had no assets, employee, business or commercial activities. The only asset was the direct ownership of shell company NDTV Networks BV and indirect ownership of another shell company NNPLC. The entire capital of NNIH was a mere Rs. 12 lacs invested by NDTV. Inspite of this, NNIH was able to issue fresh shares of the value of Rs. 6 lacs and was able to sell those fresh shares of Rs. 6 lacs value at an astronomical share premium of Rs. 642.48 crores received from USBV, the subsidiary of an entity based in tax haven jurisdiction Bermuda. In another surprise move, immediately after receipt of money ostensibly in lieu of fresh shares, NNIH declared dividend out of its securities premium account terming it as 'freely distributable reserves' and distributed dividend amounting to Rs. 643.35 crore to NDTV Networks BV, which was 68.60% shareholder, whereas no dividend was distributed to USBV, which was 31.40% shareholder and which had brought the entire money of Rs. 642.54 crore into NNIH.

16.2 In this regard, it is pertinent to mention that the statement of Mr. KVL Narayan Rao, Director of the assessee company and the then Group CEO, was recorded on oath u/s 131 of the Act on 23.07.2015, copy of which is enclosed. In this statement, in response to question no. 3, when asked about the rationale of incorporation of plethora of foreign subsidiaries, he admitted that the foreign subsidiaries were incorporated to circumvent the restriction imposed by Indian regulations, which confined the foreign direct investment in news channel companies to a maximum of 26%. No other rationale could be provided by him for creation of these many foreign subsidiaries, all like NNPLC without any commercial activities and without any employee or assets, except stating that it was on the advice of experts and for efficiencies. The explanation given by Mr. Rao regarding the objective of defeating the bar of 26% in news channels is not plausible, because the terms of agreement and subsequent events reveal that the fund of USD 150 million was introduced in companies connected with entertainment channels and no fund was introduced in any news channel company. Now if the fund was to be introduced in non-news companies only (like NDTV Imagine Limited, in which 100% FDI was permissible), then there was no bar in bringing the fund directly through FDI into India. This shows the inherent fallacy of the argument raised by Mr. Rao and also exhibits the lack of any commercial purpose or economic substance behind creation of cobweb of foreign subsidiaries. Even otherwise, regulations restricting FDI cannot be flouted by taking recourse to a well-planned scheme for both routing of money and circumventing the FDI regulations. It is a settled proposition of law that what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance.

16.3 Further, Mr. Rao also admitted in replies to question no. 13, 15 and 16 that no valuation was ever carried out in respect of value of shares of NNIH, neither at the time of alleged subscription by UCBV nor at the time of buyback

by NDTV Networks BV. The alleged purpose of the impugned transaction of introduction of funds of USD 150 million by USBV in NNIH was stated to be acquisition of effective indirect stake of 26% in NNPLC. As discussed in para 8 above, NNPLC was a paper company having no worth. In his statement, Mr. Rao fairly admitted in response to question no. 13 that NNPLC got a value of USD 400 million, when ComVentures (now Fuse+ Capital) invested USD 20 million for 5% stake in NNPLC. It is thus clear that even the value ascribed to NNPLC was not based on any real worth, rather, it was a mathematical value, and the transaction of infusion of USD 20 million in NNPLC was an instrument for creating such artificial value. By infusion of USD 20 million corresponding to 5% of shares of NNPLC, mathematically taking the multiplier of 20, the value of NNPLC was artificially put at USD 400 million, apparently in order to make a ground for larger infusion of funds, as actually happened subsequently. However, this does not go to create the actual value in NNPLC. This has already been so held in the TPO's order and the reassessment order for AY 2007-08.

16.4 It is pertinent to mention that during the penalty proceedings, statement of Mr. Sanjay Dutt, Director, M/s. Quantum Securities Private Limited was recorded on oath u/s 131 of the Act on 09.07.2015. Copy of his statement is enclosed. Mr. Sanjay Dutt is the person, who along with Mr. Sanjay Jain was hired as Financial Consultants/Advisors for the impugned corporate structuring. His credibility is established from his statement that he had family relations with Dr. Prannoy Roy and Mrs. Radhika Roy for over 30 years and he studied with Mr. Vikramaditya Chandra, Group CEO in Doon School during the period 1977-1980 and he along with his family and associate companies held shares of NDTV ranging from 100 to 17,00,000 in number at various times and in FY 2006-07, such shareholding was of the value of more than Rs. 70 crore and that he was approached by Dr. Prannoy Roy for the task of corporate structuring. He also stated that he was part of core group led by Mr. Vikram Chandra, in active consultation with PWC and

KPMG, which also included the Roys and Mr. Rao and this group was referred to as 'Nines'.

16.5 Mr. Dutt has stated that he along with Mr. Sanjay Jain quit when he became aware that the real purpose was to route the money without any intention of paying taxes and in violation of the various legal provisions. In support of his averments, he has also furnished copies of emails, as described in his statement also, which are reproduced below :-

(i) Mail dated 21.05.2008 at 10:16 PM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others :

"Subject: Press Announcements etc

Dear Prannoy and all above

Now that we are reaching the conclusion I wanted to remind everybody that all press releases.. stock exchange releases etc etc both by NDTV and NBCU should be whetted by us We must ensure that what is stated is that NBCU is subscribing to shares for a sum of $ 150 m in NDTV Networks group company Overseas for an effective 26 percent stake. We must not mention that NDTV is receiving the 150 m as dividend or otherwise.

If asked a question what will the money be used for ??? We need to decide how to answer this question carefully .

Thanks Vivek"

(ii) Mail dated 22.05.2008 at 02:09 AM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others :

"Subject: Re: Press Announcements etc

For everyone ...This is very important ...

Could we please have a draft press release Vivek ... Which we can use and send to nbcu. ...

If possible, it's important that the press release should make clear that the money comes in to NDTV and does not stay in Networks"

(iii) Mail dated 22.05.2008 at 07:58 AM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others :

"Subject: Re: Press Announcements etc

Prannoy...

I need to start with a base case draft ...can somebody give that to me.

Your second requirement is something I would avoid saying... let's discuss after I have seen a base draft

BR Vivek"

(iv) Mail dated 22.05.2008 at 02:14 PM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others :

"Subject FW: Press Announcements etc

Dear Vivek ... Need your final version on this please ... It will be released In a few hours and will need to be cleared by NBCU before that...

The problem we have it that in the last communication we created a real mess:

Thx
Prannoy

Dear Vivek ... Here's a first bash

NDTV and NBCU successfully closed their strategic partnership in the NDTV subsidiary NDTV Networks.

For a consideration of US $150 million, NBCU now has an indirect and effective stake of 26 % in NDTV Networks PLC. This effective 26 % stake is held through a proportionate stake in the holding company of NDTV Networks PLC

NBCU has the option in three years to increase their stake in the Networks PLC's holding company to 50%. The NBCU option to increase their stake will be at FMV (Fair Market Value) at the time the option is exercised.

It has been agreed that management control will always remain with NDTV Ltd.

As a consequence of this successful closing of the partnership with NBCU, the parent company NDTV Ltd now has funds of US $150 which gives it the flexibility to use for any opportunities in the future including acquisitions, expansion in the news space, or in the beyond-news space as and when they arise.

The NDTV - NBCU strategic, partnership in the Networks businesses is a coming together of two leading professional media organizations with similar ethics and goals and promises to be a major force in the media scene in India."

(v) *Mail dated 22.05.2008 at 03:06 PM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others :*

"Subject: Re: FW: Press Announcements etc

Dear Prannoy,

Here is a shot at it, based on your draft Appreciate your problems but honestly the problem could become worse if we give a handle to the tax authorities. I am concurrently discussing with other partners now the draft below. Let's get on a call ASAP,

Regards
Vivek"

(vi) Mail dated 22.05.2008 at 03:43 PM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others :

"Subject: Press Announcements — Final ?

Thanks very much Vivek ... based on our discussion over the telephone, I just wanted to confirm that this is what you have suggested as the final version:

NDTV group and NBCU group have successfully concluded their strategic partnership initiative for the NDTV Networks business.

By a subscription of shares for US $150 million, NBCU group now has an effective indirect stake of 26 % in NDTV Networks PLC UK

NBCU has the option in three years to increase their stake, at the then fair market value, in the holding company of Networks PLC to 50% with NDTV group holding an equal 50% stake. Management control will always remain with NDTV group.

As a consequence of this successful closing of the partnership with NBCU group, the parent company NDTV Ltd and it's wholly owned subsidiaries now have access to funds of US $150 mn which gives it the flexibility to use for any opportunities in the future including acquisitions, expansion in the news space, or in the beyond-news space as and when they arise."

(vii) Mail dated 22.05.2008 at 05:30 PM from Mrs. Radhika Roy to Mr. KVL Narayan Rao, Dr. Prannoy Roy & others :

"Subject: RE: Press Announcements - Final ? Dear Narayan,

But this doesn't really address prannoy's concerns arising from our earlier communication and it would be a pity to miss this opportunity to correct any misconceptions. Just to remind you prannoy's four points below:

"1. Everyone thought the money was to be put into Networks ... As a result we got no shareholder value for the Rs 600 crs in NDTV

2. It's very important to state that the money is not in Networks ...But in NDTV ... As this affects the valuation analysts give to the deal... And it's a big boost if they know it's not in Networks and it is in NDTV ... I know we can't say stake sale (which it is not anyway)... But we do need to clarify that the money is not in Networks"

[Emphasis supplied]

16.6 From the above, it is evident that even on 22.05.2008, i.e. a day in advance of the date of alleged agreement, it was clear to all that the money introduced through USBV was not at all an investment to be made by USBV, rather, it was a façade created to introduce the money amounting to Rs. 600 crore in NDTV by showing it as investment, immediately converting it to dividend, distributing dividend to NDTV subsidiary only to the exclusion of the other shareholder and then to route it in a circuitous manner through a cobweb of foreign subsidiaries till it finally reached NDTV. The valuation for the subsequent buyback by NDTV group for Rs. 58 crore in October, 2009 was also evidently based on an adjusted figure of Rs. 42.54 crore (received over and above Rs. 600 crore) after giving the effect of forex fluctuation, etc.

16.7 Thus, the real nature of transaction was actively and deliberately concealed under a thorough, methodical and calculated planned strategy.

17. Money is routed back into NDTV through complex cobweb of sham subsidiaries abroad

17.1 Pursuant to INR 643.35 crore transferred by NNIH to NDTV Networks BV in the form of dividend, NDTV Networks BV further transferred money as under :-

Trail 1

- Out of Rs. 643.35 crore received, NDTV Networks BV invested INR 389 crore in NDTV (Mauritius) Media Limited, a 100% subsidiary of NDTV
- NDTV (Mauritius) Media Limited invested Rs. 387.59 crore in NDTV Studios Limited on 29.09.2008 [NDTV (Mauritius) Media Limited merged in NDTV One Holdings Limited, Mauritius on 30.09.2011]
- NDTV Studios Limited merged in NDTV w.e.f. 01.04.2010

Trail 2

- Out of Rs. 643.35 crore received, NDTV Networks BV advanced INR 254.75 crore as unsecured loan to NDTV Networks Plc, UK ("NNPLC")
- NNPLC was liquidated and merged in NDTV One Holdings Limited on 30.09.2011
- NDTV One Holdings Limited merged in NDTV on 02.11.2012

Conscious, deliberate and well planned attempt to conceal particulars of income

18. From the above, it is evident that the funds amounting to USD 150 million, which was the assessee company's own unexplained money, were introduced in NNIH through USBV under a pre-meditated and well planned strategy, taking all factors into account so that the real transaction is not detected by the tax authorities. The mail dated 21.05.2008 written by Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy is an unambiguous advice to Dr. Roy

to conceal the true import of the transaction and not to mention that NDTV was receiving the 150 million as dividend or otherwise. It is interesting to observe that even before the inception of shareholding of USBV in NNIH on 23.05.2008, the payment of dividend exclusively to NDTV was fixed. Another mail dated 22.05.2008 written by Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy honestly cautions Dr. Roy that the problem could become worse if NDTV gave a handle to the tax authorities.

18.1 It is pertinent to mention that all agreements, whether pertaining to alleged subscription of stake by USBV in NNIH or alleged buyback by NDTV Networks BV, are invariably signed by NDTV itself. As the other companies signing the agreement are mere paper companies and only the assessee company is a real company, therefore, it is clear that the actual party is the assessee company only and the paper companies are only namesakes.

18.2 This proves it beyond doubt that the transaction, which was a colorable device as explained by the Hon'ble Supreme Court in the case of McDowell & Co. Ltd. V. CTO [154 ITR 148 (SC)], was a conscious, deliberate and pre-meditated attempt aimed at tax evasion to conceal the assessee company's own unexplained income. The assessee company was always aware of the untrue façade to be created through this sham transaction and was also aware that the true facts could be discovered by the tax authorities. Being so aware, the assessee company deliberately and under the expert advice of PWC chose to conceal the true facts.

19. <u>Facts concealed by the assessee</u>

19.1 It is observed that the assessee company has concealed the following facts :-

(i) It has been concealed that the parent company of USBV was CA Holding CV Bermuda. There is not even a single reference to the Bermuda parent in the impugned agreement dated

23.05.2008 entered into between the complete chain of parent and all intervening subsidiaries on the one hand and NBCU and USBV on the other hand.

(ii) It has been concealed that immediately after introduction of money amounting to Rs. 642.54 crore in NNIH, NNIH declared and paid dividend of Rs. 643.35 crore and this dividend was entirely paid to NDTV Networks BV, in exclusion of the other shareholder USBV, which had brought in the entire money of Rs. 642.54 crore as share premium. Instead, the assessee company created a façade of investment by USBV though knowing fully well that money was to be introduced in the form of dividend exclusive to NDTV group.

(iii) It has been concealed that the actual ownership and control over the money amounting to Rs. 642,54,22,000/- was always with the assessee company only, which introduced this money by creating complex cobweb of sham subsidiaries in Netherlands and UK and later routed this money through sham subsidiaries in Mauritius until the money was ultimately ploughed back into the assessee company in India.

(iv) It is observed that not only during the assessment proceedings but in the present penalty proceedings also, the assessee company has continued to conceal the true facts. This is apparent from the statement of Mr. KVL Narayan Rao, Director as discussed in para 16.2 above, wherein Mr. Rao has given the rationale for creation of foreign subsidiaries as being the restriction imposed in FDI in news channel companies, whereas actually the funds introduced through foreign subsidiaries were meant for non-news companies only, which could be

accomplished through obtaining direct FDI into these companies in India.

19.2 *Furnishing of inaccurate particulars by the assessee*

(i) *The assessee company has furnished documents, which had no evidentiary value, because the agreement dated 23.05.2008 is not signed by all the parties on the same page, the copy of agreement given is not apostle certified and the Bermuda parent of USBV is not even a party to this agreement.*

20. *Conclusion*

20.1 In view of the above facts and circumstances of the case, which involve active, deliberate and planned concealment and misrepresentation of facts, this is a fit case, which merit levy of penalty @ 200% of the tax sought to be evaded. Accordingly, you are requested to show cause as to why penalty u/s 271(1)(c) of the Act read with Explanation 1 thereof may not be imposed upon the company for concealment of the particulars of its income in respect of the impugned addition of Rs. 642,54,22,000/-.

20.2 Similarly, regarding the other three additions as mentioned in para 4 above, you are requested to show cause as to why penalty u/s 271(1)(c) of the Act read with Explanation 1 thereof @ 100% may not be imposed upon the company for concealment of the particulars of its income in respect of these additions.

21. *Quantum of penalty*

21.1 In accordance with the above, the quantum of proposed penalty in the case of the assessee company will be as under :-

Penalty @ 200% in respect of addition of Rs. 642,54,22,000/-

Tax sought to be evaded : Rs. 218,40,00,938/-

Penalty proposed u/s 271(1)(c) @ 200% : Rs. 436,80,01,876/- ...(i)

Penalty @ 100% in respect of other additions of Rs. 260,63,06,619/-

Tax sought to be evaded : Rs. 88,58,83,620/-

Penalty proposed u/s 271(1)(c) @ 200% : Rs. 88,58,83,620/- ...(ii)

Total amount of proposed penalty u/s 271(1)(c): Rs. 525,38,85,496/- ... (i) + (ii)

22. Your reply on the merits of the case should reach this office by 22.06.2016, failing which it shall be presumed that you have nothing to state in the matter and the decision in the matter will be taken ex parte and on merits."

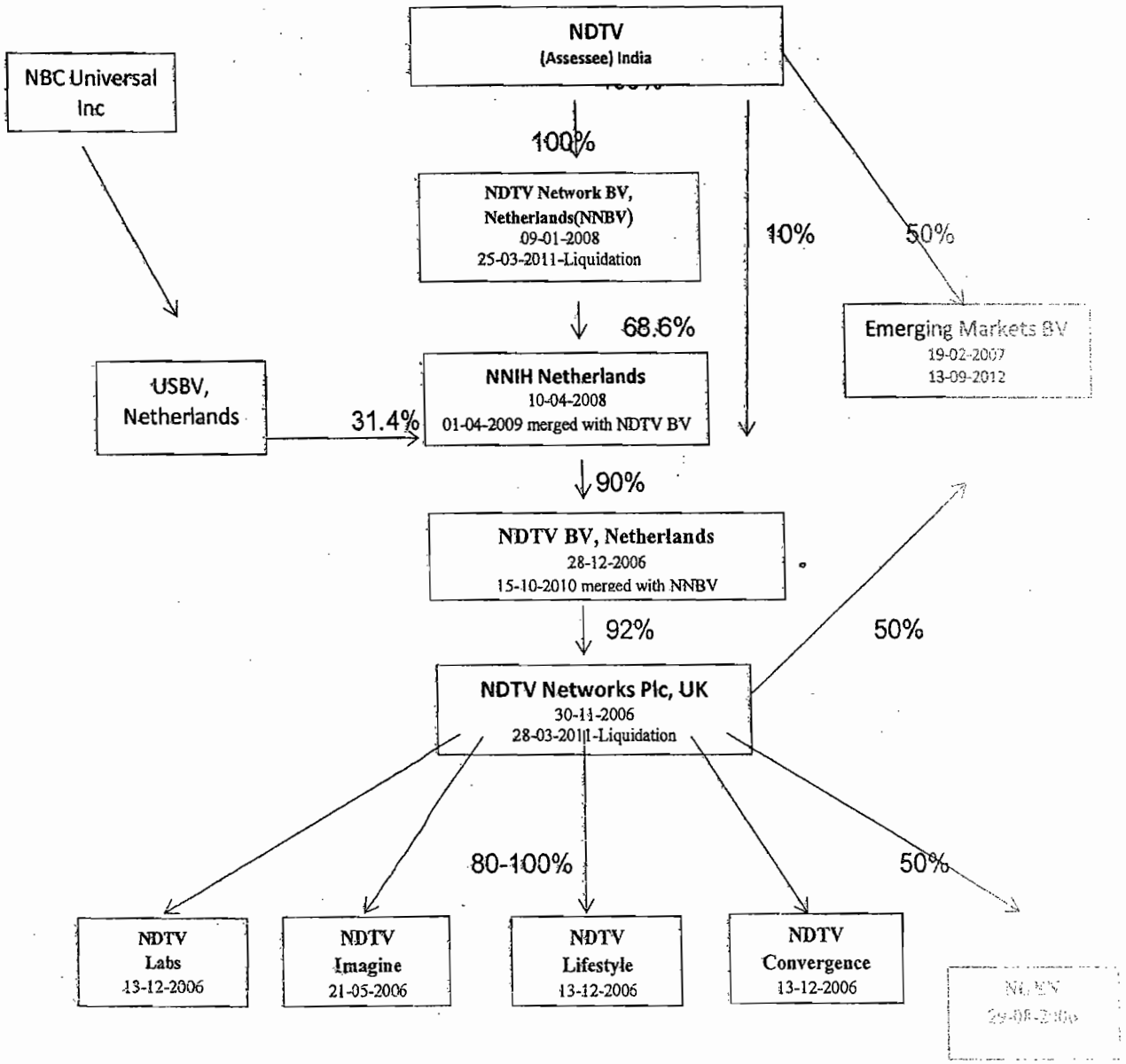
97. The ld DR referred in detail the various issues raised in the penalty proceedings wherein the statement of the Director of the company was recorded.

98. We have carefully considered the rival contentions. The short issue involved in this ground is that by agreement dated 23.05.2008 titled as agreement for the subscription of shares in NDTV Networks International B.V. by Universal Studios International B.V. it was agreed that a sum of US$150 million would be a consideration for purchase of shares. Accordingly, 915498 shares were subscribed and therefore, the price per share as Rs. 7015.05 shares. The above subscription money was received by NDTV Networks International Holdings B.V. Subsequently, vide agreement dated 14.10.2009 Titled as agreement for the sale and purchase of shares in NDTV BV between Universal Studios International BV as the seller and

NDTV Networks BV as the purchaser of the shares of NDTV BV. According to that agreement it was stated that seller has subscribed for the sale of shares pursuant to subscription agreement dated 23.05.2008 and now the seller wishes to sell and the purchaser wishes to purchase the sale shares. The consideration of shares was US$12527250 whose approximate valuation is Rs. 634.17 per share. Therefore, the shares which were purchased by Universal Studios International BV on 23.05.2008 for US$150 million (Rs. 6,42,54,22,000/-) were being sold on 14.10.2009 for US$ 12527250 (RS. 58.08 crores). Meaning thereby, that the shares were purchased by the investor on 23.05.2008 @ Rs. 7015.05 per share were sold on 14.10.2009 @Rs. 634.17 per share. During the course of assessment proceedings it was submitted that determination of the price for the purchase of share on 23.05.2008 was an agreed price between the two parties and therefore there was no valuation report. However, in the agreement dated 23.05.2008 for the subscription of share clause No.6 provided for an option to the investor for exit. According to clause 6.2 of that agreement at the time of exist the fair market value of the share was required to be determined according to clause No. 6.8. However, clause No. 6.8 was only referring to the methodology of the appointment. It was explained by assessee that consideration at the time of exist was also the price requested by the seller of US$25 million, which was bifurcated into 12527250 with respect to the shares and balance 12472750 with respect to the receivable. Therefore the total consideration for shares and receivable was US$25 million. To understand the above transaction it is necessary to note the structure of the subsidiary companies formed by the assessee for above transactions.

99. The assessee an Indian resident company formed on 09.01.2008 its 100% subsidiary in Netherland in the name of NDTV Networks BV (NNBV). On 10.04.2008 the assessee where the investor is Universal Studios International BV (USBV)formed another company in the name of NDTV Network International Holdings BV (NNIH) in Netherland. In NNIH the 68.6 % holding was of NNBV and 31.4% holding was of USBV of Netherland. The assessee has another company in the name of NDTV BV in the Netherland, which was formed on 28.12.2006 wherein 10% share holding was with NDTV assessee, and 90% holding was of NNIH. The assessee another company which was formed on 30.11.2006 in the name of NDTV

Network PLC, UK wherein 90% share holding was owned by NDTV BV and balance 8 percent were held by others as ESOP etc. The NDTV Network PLc was having different share holding in five operating companies in India. The above structure can be pictorially presented as under:



100. From the above corporate structure it is apparent that assessee is in India whereas NNBV, NNIH, and NDTV BV are in Netherland Jurisdiction and NDTV Network PLc

In UK . The NNBV was liquated on 25.03.2011, NNIH was merged with NDTV BV on 01.04.2009, NDTV BV was merged with NNBV on 15.10.2010 and NNBV was liquidated on 25.03.2011. from the above structure. It is apparent that three companies in the Netherland Jurisdiction were formed by the assessee and all of them were liquated on 25.03.2011. Therefore, the appellant structure is that two companies were formed in Netherland on 09.01.2008 and 10.04.2008 and by 25.03.2011 all the three companies in the Netherland jurisdiction were liquated after merger and liquidation.

101. After understanding the above structure it is also relevant to note that a sum of Rs. 2642.24 crores (US$150 million) were received by NNIH by share subscription agreement dated 23.05.2008 for 31.4 % stake bifurcating the above consideration of share capital of Rs. 6 lakhs and share premium of Rs. 642.54 cores. As subsequently, the NNIH in which the money was received was merged with NDTV BV. Therefore it is apparent at the time of repurchase of the shares i.e. 14.10.2009 when share purchase agreement was executed NNIH not in existence but was merged with NDTV BV. Therefore, on the date of agreement of the sale and purchase i.e. 14.10.2009 NNIH is not in existence as it is merged with NDTV BV and therefore the shares of NDTV BV (amalgamated company) were repurchased by NNBV. Apparently at that time the shareholders of NDTV BV were NNBV and USBV. Therefore, NNBV purchased from USBV on 14.10.2009 shares for Rs. 58 crores which were acquired by USBV on 23.05.2008 by making subscription in NNIH. To substantiate the transaction the assessee submitted the copies of the agreement such as shareholders agreement and share subscription agreement dated 23.05.2008. Copies of the bank account of the investor company i.e. USBV, the annual accounts of the investee company i.e. NNIH, the confirmation letter from USBV, annual report of USBV to substantiate the above transaction. The assessee also stated that the parent company of USBV is NBC Universal Inc. and NBC Universal is a part of GE Group (General Electric) which is as submitted by the assessee was one of the largest global business group and hence it was claimed by the assessee that identity and creditworthiness of the transaction was proved.

102. However, the case of the revenue is that the above transaction entered into by the assessee through creating a complex structure of cobweb of subsidiaries and

routing the money in India or under the ownership of the assessee is sham and ingenuine transaction. The revenue has also alleged that subsidiaries created in the Netherland Jurisdiction are mere paper companies, does not have any substance and the investor company has source of funds from Bermuda which is also one of the questionable jurisdiction. Based on the above findings recorded in the draft assessment order, in the order of the ld DRP and the final assessment order which resulted into the addition of Rs. 6425422000/-.

103. Now firstly we need to examine what the company in which money is invested is engaged in to, purposes of its formation, its activities, and its life span and jurisdiction. We come to the financial affairs of NDTV Networks International Holding BV (NNIH), the investee company, from the audited accounts produced before us at page No. 652 to 665 of the paper book. The above company was formed in Netherland Jurisdiction on 10.04.2008 and subsequently, it was merged with another group company i.e. NDTV BV on 01.04.2009. Therefore, this company remains in existence for less than a year and the accounts available for the audit were from 10.04.2008 to 31.03.2009. the accounts were audited on 30.04.2009. According to the profit and loss account of the company it earned only interest on fixed deposits of Rs. 13.33 lakhs and has an expenditure of operation and administration of Rs. 6.77 lakhs. As per profit and loss statement It has earned loss before taxes of Rs. 54.35 lakhs. The company has issued 2915498 equity shares of the face value of Euro 0.01 each fully paid amounting to Rs. 18.40 lakhs. During the year it earned premium of Rs. 642, 54,22,169. The share holding pattern of the company was that 20 lakhs shares were held by NDTV Networks BV and 915498 shares were held by USBV. Therefore, investment of NDTV Network BV in the company for 20 lakhs shares was Rs. 12.62 lakhs which is part of the issued share capital and the USBV has invested Rs. 577000/- in equity capital and a premium of Rs. 6425422169/-. Therefore, the person who was holding 68.6 % has just invested Rs. 12.62 lakhs and the entity who has acquired 31.4% stake has invested Rs. 642.54 crores in securities premium and Rs. 5.77 lakhs in the equity of the company. The company in its notes to accounts in schedule 6B has mentioned that this company was incorporated on 10.04.2008 by NDTV Network BV to create the

corporate structure for the global media and non-news media related business. The balance sheet was prepared on 30.04.2009 for the period ended on 10.04.2008 to 31.03.2009 as the company was merged on 01.04.2009. Admittedly as per the balance sheet as well as the profit and loss account there were no business activity. There was no explanation from the assessee for what kind of activity this company was doing and for what reason the Netherland Jurisdiction was selected. Furthermore, in Schedule-II to the annual accounts in the securities premium accounts of Rs. 642,54,22,169/- in the same year dividend was paid out of that security premium amounting to Rs. 643,35,00,000/-. Therefore, the company which did not have any business and did not have any worth but because of the share premium collected has declared the dividend more than the security premium received by it. It is interesting to note that at the end of the first accounting period the company went into negative net worth having share capital of Rs. 18,40,227 and negative reserve of Rs. 38,88,870 resulting into negative net worth of Rs. 20.48 lakhs. Generally it is understood that whenever a dividend is declared it goes to the entire share holders of the company and in the present company as stated above 68% is held by NDTV Network BV and 31% is held by USBV. However, looking at the note No. 7 of schedule 6B of the Act wherein it is mentioned that during the year the company has declared dividend out of its reserve amounting to US$150 million (Rs. 643,35,00,000/-) to NDTV Network BV the holding company only. Meaning thereby that to the entity which has invested Rs. 643 crores and acquired 31.4% of the equity was not paid dividend of single rupee and from that investors sources of money the investee company paid dividend to the company which has just invested Rs. 12 lakhs was paid dividend of Rs. 643.35 crores in the first year of its investment. That to when the company does not have any revenue stream. The only activity this company has carried out is evident from note No. 5 of schedule 6B wherein it is mentioned that during the year the company has invested in NDTV BV being 100% subsidiary of NDTV by subscribing 8820 shares of Euro 100 each equivalent to 90% of the post issue paid up capital of NDTV BV. The value of such investment is Rs. 56562660/- and to finance this acquisition is apparently the company does not have money a loan of Rs. 6,00,33,600/- obtained from the NDTV Network BV the holding company. Therefore, for making an investment in the step

down subsidiary this company borrowed money from its holding company. On analysis of the financial statement of the NNIH it is apparent that this company does not have any substance but was merely created for the purpose of issue of above shares of Rs. 642 crores from USBV and taking away the dividend from it to the assessee's group company which is 100 % owned by the assessee. Looking to the Board of Directors of the company it is apparent that most of the directors of assessee are the directors in this company. It is apparent that anybody appointed from the side of investor USBV were just merely puppet directors otherwise, they would not have allowed assessee's group company to be paid dividend of such a magnitude of Rs. 643 crores to a shareholder holding 68% without getting a single penny for 31% shareholder. It is also not clear that how the dividend was not paid to USBV when there is a share issue deed. There is no plausible explanation from the assessee on this issue. It creates a suspicion that whether for all understanding the share holding of the NDTV BV and USBV are having similar rights or not. From the conduct it appears that they are not. Further the valuation exercise of the shares of the company was stated to be not done, as it is a mutually agreed price based on business potential. No such evidences were led before lower authorities or even before us to show that whether there is any cash flow stream available, whether there is any IPR existing with the investee company which has such a huge valuation. There is no iota of evidences led before us. On the issue of the premium of the shares assessee has merely done the lip services. Further it is also stated that due diligence is not to be done by the assessee or its group company but it is the requirement of the investor. When the assessee is ready to produce investor before the bench but is not in a position to enquire from the investor about any due diligence process at the time of investment, term sheets, etc, the mere assertion of the assessee of production of investor before us is also a hollow legal argument without any substance. Further the ld AR has also produced the minutes of the board of directors of the company NDTV Network PLC to show that the board of directors of the company includes the two representatives of the NBCU group and they were actively participated in the business decision of the company .For this the relevant minutes were produced in paper book no VIII at page no 203 to 256 of the paper book. It is fact that in meeting of the board of directors of NNPLC Mr. Pete

Smith and Ms Roma Khanna were appointed as directors of that company. Subsequent to that Mrs. Roma Khanna attended the meeting on 25th August 2008 and in that meeting there were no strategic decision were taken and also the annual accounts for the March 2008 were approved. Naturally in that NBCCU has no role to play. Subsequently, on 7.11.2008 in meeting at London Mr. Pete and Mrs. Roma Khanna both attended where the presentations were made by the board Chairman and no role is played by those Directors. Further, in the minutes dated 27.06.2009 both the directors attended in New Delhi and there was discussion about the funding requirement of loan from NBCU and where it was decided to discuss a short term loan of US$10 million to NDTV Imagine Ltd and intercompany investment were only discussed. On the meeting held on 09.07.2009 there is no details where and when it was held (Page No. 243). However, in those meeting further discussion was with respect to share swap only where NBCU directors were to revert back. The meeting held on 22.09.2009 once again there is no mention where and when the meeting was held. Where also the funding proposal were discussed of various verticals. In that meeting in Sl No. 26 NBCU say that it has repeated offer to exit the business for US$25 million a sum which includes repayment of 12.5 million$ loan and no liability of the bonds or the business. NBCU said it was still happy to exit. Therefore, from the above board meeting it is apparent that on 22.09.2009 the NBCU expressed its desire to exit and it was repeated offer. Meaning thereby that NBCU wanted to exit quite earlier. It is also not known that when originally the NBCU expressed its desire to exit. In this in the same board meeting Mr. Pete Smith suggested that the board of company should seek independent advice with respect to their role in view of the difficult financial situation of the company. Because of these events it is apparent that the board of directors of NBCU was also not interested in being on the Board of this company. On reading of the minutes it is apparent that there was no interest of those directors in the business of NDTV Group. It is also apparent from the minutes that none of the directors objected to the distribution of dividend by NNIH. The NNIH did not have any representation in the board of that company where the decision to distribute the dividend was taken. No rationale were produced before us for distribution of the dividend by producing the board meeting of NNIH to exhibit the business consideration behind declaration of dividend of Rs. 643 crores only to

NDTV Group subsidiary and not also to USBV was holding 31% share in that company. The rationale behind formation of this company in Netherland jurisdiction was also not placed before us despite the DRP and ld Assessing Officer has challenged the substance of the transaction. Netherland jurisdiction did not have any tax on the distribution of dividend at that particular time and also there is no need of establishing the substance in that jurisdiction. In view of this looking at the whole of the transaction the Netherland jurisdiction was one of the best jurisdiction internationally available to the assessee to bring somebody as a partner with finance and to take away the funds from that company in one of its subsidiaries and then to route it in its own books. However, we are not concerned what are the reasons for transferring money from the original payer through USBV to the assessee group companies and ultimately to the assessee and it is for others to look into, our mandate is restricted to test the chargeability of the above sum in the hands of the assessee as contended by the Revenue. on the basis of above facts we do not reach at a conclusion different from the decision of the ld AO and ld DRP that the investee company did not have any substance and it is merely a ploy adopted for transferring money from one entity to another entity which is the assessee only.

104. Now we look at the profile of the investor company, USBV which are placed at page No. 676 to 718 of the paper book wherein the annual accounts of the company as on 31.12.2008 signed on 25.06.2010 were placed. This company is wholly owned subsidiary of CA holding CV legally seated in Amsterdam, Netherland. It belongs NBCU group which is owned 80% by General Electric company and 20% by Vivendi. This company has participating interest in more than 45 companies ranging from 100% to 95 % and having other participating interest in seven companies. On looking at the shareholder equity statement of this company it is mentioned that all shares of this company are held by NBCU Dutch holding (Bermuda)Ltd acting in its capacity as general managing partner of CA Holding CV Bermuda. The annual accounts were published on 10/6/2010, by which date NNIH was already merged with NDTV BV , for such an investment there was only a statement that there was a significant acquisition concerns an indirect minority interest of a subsidiary company of New Delhi Television Limited . It was further stated that this USD 150 Million investment provides immediate access to the Indian television market in the

whole of the report there was no reference about the payments of dividend by NNIH but not received by this company USBV despite being such a huge investor. Even USBV was also formed in Netherlands jurisdiction. Further it incurs this year the loss in diminution of participation investments of 17470 thousands USD as loss from group companies. Therefore it is apparent that this company is mainly an investment company formed in Netherlands as its tangible fixed assets are very low compared to its financial assets of investments. Further, its group investments are very rare in Netherlands but its participating interest investments are mostly in Netherlands in non-group companies. One must take a clue that an investor who has invested Rs 643 Crores is not aware about the merger of the investee company and not caring about the dividend income how serious that investor is. Further, within a short span of time of signing the board reports this company is making an offer to sell its stake in that company for substantially lower sum. There is no mention in the company's report about the activities for exploring the access to Indian television market and there is no such information coming from the assesse about the joint business plan which was devised and executed. Therefore it is apparent that statements made in the Report of board of director were just eyewash. In any way because of our finding at the time of examining the profile of the investee company it becomes apparent that investor is no more interested about the fate of its investment.

105. It is vehemently claimed by the assessee that investor in NNIH is GE group. However on looking at the structure of the investments in this company its part of NBCU group of which 80 % stake is held by the GE group. There is no reference of the amount invested in the USBV by GE group for making investments in USBV. No details has been placed by the assessee before us or before lower authorities except stating that the investor company is part of GE group and that group has made investment in this company which is in turn invested in NNIH. There is no reference about the participation of that group in the affairs of the investing company. Therefore in absence of complete structure of investment including the control by the directorship it cannot be established that investor in the company is GE group. In any case credibility and genuineness of the investments cannot be solely determined by the showing names but only by showing the substances of

the transactions. Because of our finding while examining the profile of the investee company and investor company. It is apparent that transaction entered into by the parties lack substance and therefore, whoever is the party and howsoever credible it is, heavier burden is cast on them to explain the purpose and rationale of so-called investment. In view of this we are not swayed by the profile of the investor. It is also not an ingredient to test the chargeability of otherwise of a receipt.

106. Now we come to various agreements entered in to by the various entities for the investments in NNIH and exiting from those investments .

Parties	Shareholder agreement dated 23.05.2008 for investment in NNIH by USBV and parties to the agreement	Share subscription agreement dated 23.05.2008 for investment in NNIH by USBV	Agreement for the sale and purchase of share in NDTV BV dated 14.10.2009 by USBV (seller) and NDTV Network BV (purchaser) (NNBV)
NBC Universal Inc.	As NBCU parent	Parent of the investor company	Parent of the existing company
Universal Studios International BV	The company who invested initial interest of 9145998 being 31% share in NNIH but 26% indirect stake in NDTV PLC	A subscriber to the shares being investor	Seller of the shares of NDTV BV
New Delhi Television Ltd	Assessee ultimate holding company of NNIH and other companies	The parent of investee company	As the NDTV parent
NDTV BV	A group subsidiary in Netherlands		As the company whose shares are not being transferred on account of merger with NNIH with this company on 01.04.2009
NDTV Networks BV	Another group subsidiary in Netherland	As a share holder of the NDTV group in the investee company	Is the purchaser of the share from USBV on behalf of NDTV Group
NDTV Networks PLC	A company incorporate in England who holds the shares of operating companies		As part of the owner of the operating companies
NDTV	NNIH is the investee	The investee company	This company was not

Networks international holdings BV	company in Netherland jurisdiction		there in this agreement for the reason that it got merged on 01.04.2009 with NDTV BV
Purpose of the agreement	For investing an initial interest by USBV of 9145918 ordinary shares in the company i.e. NNIH to acquire indirect share holding of 26% in NDTV PLC a holding company of the operating company in UK. The face value of the share was 0.01 EURO per share and the premium was Rs 642 crores.	The purpose of this agreement is to facilitate acquisition of shares.	To sell the shares being 27695 ordinary shares of face value of 0.01 EURO in the capital owned in the company NDTV BV by the seller USBV for US$ 12527250 (Rs. 58 crores)
Date of the execution of the transaction	23.05.2008	23.05.2008	14.10.2009
Whether supported by any valuation report at the time of execution of the agreement justifying the transaction value	No	-	No There was no valuation report obtained but a mail dated October 2, 2009 at 1.12 PM on Friday from Mr. Smith Pete , President of NBC International address to Shri KVL Narayan Rao, Shri Vikram Chandra, Shri IP Bajpayee and CC to Tomkins Juliang of NBC Universal, Syed Tarikh of NBC Universal and Warde Anne, NBC Universal with subject matter as "fw: NDTV response". The above is placed at page No. 1264, 1265 of the paper book.
Content of the valuation	NA		It seems that NBC Universal gave an offer to exit the business with NDTV Group at US$25 million. There is no detail of the fair

			valuation of the asset which is being transferred. There were no details submitted about the earlier correspondence between the two groups about the negotiation for deriving this valuation. There was no reference of any earlier mails or trail mails.
Whether any due diligence report/ study was carried out by either of the parties	NO	No	No
Whether any directors etc were appointed by the investor for looking after the investment made	There were no appointment of any nominee in the investee company but the investor appointed two directors in the NDTV Network PLC UK company.	-	The directors also exited.
The role of directors for safeguarding the interest of NBC Group	They could not safeguard even the distribution of dividend to USBV despite holding 31% share out of dividend declared by NNIH. This despite there being a share issued dated 23.05.2008 placed at page No. 670 to 673 of the paper book Vol-II. The role of the director has already been discussed in earlier paras where the financial profile of investee company was discussed.	-	
Whether there were any evidences of	The NBCU wanted to expand its presence in India. There is no evidence of such an		The exit agreement was only containing the provisions for reversing all the

the parties acting in accordance with the terms and condition of the agreements	action of the NBCU Group. On reading of the minutes produced by assessee of NDTV Network PLC UK the intention could not be seen about entering of that company into the business in India. There were no action demonstrated with respect to the bond purchases, there is no evidence of secondment of the employees by the NBCU, there is no evidence placed on record of the joint venture between NBCU parent and NDTV in India and no such joint venture company was stated to have been operating, there were no opportunities noted and recorded with respect to digital media and India, there was no documented evidence produced with respect to investment opportunity in India in relation to cable platform, there were no acquisition or any efforts put for such acquisition were demonstrated, the dividend policy was violated by distributing Rs. 643.35 crores.		documents which were executed at the time of share purchase agreement.
Whether it is strategic partnership or a financial partnership	On the reading of the agreement and looking at the conduct of the parties in pursuance of these agreements it is clear that except the financial transaction which are under challenge there is no		

	other activities demonstrated before us for the growth or development of the business. Therefore, the real fact that emerges is that it is the financial transaction which was the only important aspect of these agreements.		

107. The parties have entered into several agreements having plethora of conditions, however, on looking into the conduct of the party it clearly emerges to our mind that these agreements were merely created/ executed for executing the financial transaction. The form of the transaction on reading of the agreement shows that two groups coming together for development of the business but the substance of the transaction is to pass money from one group to another group by creating complex holding subsidiary structure, lengthy and complex agreement which were never acted upon. The investment decision by the investor was taken without any valuation report, due diligence report i.e. financial and legal both, and the exit decision was also taken by investor without getting its assets fairly valued. It is really unbelievable in the corporate world that an investor behaves in that manner. It can only happen in case the investor is not concerned with what happens with the money he invests but only interested in completing preconceived financial transaction. It may be possible that it may benefit both the investor as well as the investee. However, in the present case it is certain and evident that it has definitely benefited the investee company i.e. the subsidiary of assessee. In the present corporate world and complex business environment courts cannot shut their eyes and close their ears by accepting the complex cobweb of structures for tax avoidance devices adopted like this. The time has come when the judicial officers must understand the real intent behind various forms created by assessee in different jurisdictions across the globe for such a dubious financial transaction. The Hon'ble Supreme Court in case of Vodaphone International Holdings BV Vs. Union of India 341 ITR 1 in para No. 67 and 68 has discussed the international tax aspect of holding structure as under:-

"International tax aspects of holding structures

65. In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be ex-communicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle.

66. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle, i.e., treat a company as a separate person. The Indian Income-tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to Income-tax. Companies and other entities are viewed as a separate person. The Indian Income-tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to Income-tax. Companies and other entities are viewed as economic entities with legal independence vis-a-vis their shareholders/ participants. It is fairly well accepted that a subsidiary and its parent are totally distinct taxpayers. Consequently, the entities subject to Income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/participants, that are subject to (personal or corporate) Income-tax, are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Nowadays, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct taxpayers.

67. It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the

parent company resides. Further, if a company is a parent company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end. This obviously implies a restriction on the autonomy of the subsidiary's executive directors. Such a restriction, which is the inevitable consequences of any group structure, is generally accepted, both in corporate and tax laws. However, where the subsidiary's executive directors' competences are transferred to other persons/bodies or where the subsidiary's executive directors' decision making has become fully subordinate to the holding company with the consequence that the subsidiary's executive directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling nonresident enterprise (NRE) makes an indirect transfer through "abuse of organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of non-resident holding company, re- characterise the equity transfer according to its economic substance and impose the tax on the actual controlling non-resident enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense).

68. The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members. It is the decision of the House of Lords in Salomon v. A. Salomon and Co. Ltd. [1897] AC 22 that opened the door to

the formation of a corporate group. If a "one man" corporation could be incorporated, then it would follow that one corporation could be a subsidiary of another. This legal principle is the basis of holding structures. It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e., without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. However, taxation of such holding structures very often gives rise to issues such as double taxation, tax deferrals and tax avoidance. In this case, we are concerned with the concept of GAAR. In this case, we are not concerned with treaty-shopping but with the anti-avoidance rules. The concept of GAAR is not new to India since India already has a judicial antiavoidance rule, like some other jurisdictions. Lack of clarity and absence of appropriate provisions in the statute and/or in the treaty regarding the circumstances in which judicial anti-avoidance rules would apply has generated litigation in India. Holding structures are recognised in corporate as well as tax laws. Special purpose vehicles (SPVs) and holding companies have a place in legal structures in India, be it in company law, takeover code under the SEBI or even under the Income-tax law. When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial antiavoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a holding structure

an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such inter-positioning of that entity. However, this has to be done at the threshold. In this connection, we may reiterate the "look at" principle enunciated in Ramsay (supra) in which it was held that the Revenue or the court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature (See Craven v. White (supra) which further observed that genuine strategic tax planning has not been abandoned by any decision of the English courts till date). Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/courts should keep in mind the following factors : the concept of participation in investment, the duration of time during which the holding structure exists ; the period of business operations in India ; the generation of taxable revenues in India ; the timing of the exit ; the continuity of business on such exit. In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device."

108. In the present case, according to us it is a clear cut case of "abuse of organization form/ legal form and without reasonable business purpose and therefore, no fault can be found with the order of the ld Assessing Officer/ ld DRP in charging to tax Rs. 642 crores by re-characterizing the conditions according to its economic substance and imposing the tax on the actual controlling Indian entity. In the present case we

do not have any doubt that the transaction used principally as a devise for the distribution/ diversion of sum to the Indian entity on review of all the facts circumstances surrounding the present transaction. In the present case the beneficial owner of the money is the assessee.

109. No doubt when it comes to taxing the real owner or beneficial owner of the financial transaction higher burden is cast on the revenue and therefore, revenue is duty bound to prove the money trail. According to us the revenue has established that the money has come back to the assessee. Before us, the revenue has also submitted a chart showing transaction-involving introduction of Rs. 642.54 crores and the money trail how it travelled to the assessee. The moment the amount was invested by USBV in NNIH, NNIH declared dividend of Rs. 643.35 crores to a lone shareholder despite there being other shareholders also, to NDTV Networks BV. Therefore, Rs. 643 crores was infused in NNIH and simultaneously they were siphoned from that company to NDTV Networks BV who is the part of NDTV Group. At this stage itself all financial interest of USBV and NBCU or any other group attached with the investor company has come to an end with the single motive to only conclude the transaction by liquidating the investment at substantial discount to give it a color of 'failed investment decision'. The dividend received by the NDTV Network BV was transferred in to trenches to two different companies owned by NDTV Group. A sum of Rs. 448.49 crores was invested in NDTV Mauritius Multimedia Ltd , Manutius which is 100% subsidiary company of NDTV Ltd crores(assessee). A further sum of Rs. 254.75 crores was given as unsecured loan to NDTV network PLC which is existing in UK jurisdiction and where 92% of shareholding is with NDTV (assessee). Subsequently, the NDTV Mauritius Multimedia Ltd which received Rs. 448.49 crores merged with NDTV one Holding Ltd, Mauritius w.e.f September 2011 and the amalgamated entity also the 100% subsidiary of NDTV. The NDTV one Holding Ltd Mauritius merged with NDTV Studious ltd and NDTV Studious Ltd then merged with NDTV (assessee) w.e.f 01.09.2012. in view of this money trail established by the Revenue could not be controverted by the assessee. This money trail stares so glaringly on the various complex structures created by the assessee that without proving any substance one cannot reach to any other conclusion but to the conclusion that series of the

transaction entered into by the assessee were to transfer Rs. 642 crores from the investor company or the owner of the investor company to the assessee.

110. It is interesting to note that certain emails were gathered by revenue through enquiry during the course of penalty proceedings by examination of some person. Such exchange of mails was recorded at para No. 6.5 of the show cause notice issued by the ld Assessing Officer u/s 271(1)(c) of the Act. These emails were given to the ld Assessing Officer by one Mr. Sanjay Dutt, who was examined u/s 131 of the Act by the ld AO. These mails are pertaining to the transaction where Mr. Sanjay Dutt is one of the recipients. The other recipients are purportedly the highest officers of the company including the chairman. When these mails were confronted to the assessee the reply was submitted by the assessee vide letter undated but submitted to the Assessing Officer on 02.11.2016. In that letter at para No. 15(c) the seven email communication are referred and the reply of the assessee was as under:-

"15. Be that as it may, it is seen from the perusal of your notice that in the notice dated 15.06.2016, you have referred to certain fresh evidences which are not part of the assessment proceedings. Such evidences which have been stated by you are:

(a) Statement of Mr. KVL Narayan Rao, whose statement was recorded by you on 23.07.2015, but the said statement was not furnished till 15.06.2016, despite repeated requests.

(b) Statement of Sanjay Dutt, Director of M/s Quantum Securities Pvt. Ltd. whose statement was again recorded by you on 09.07.2015 and whose statement was not furnished till 15.06.2016.

(c) In the statement recorded by you of Sanjay Dutt, he has furnished before you the following documents namely:

(i) Mail dated 21.05.2008 at 10:16 PM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others.

(ii) Mail dated 22.05.2008 at 02:09 AM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others.

(iii) Mail dated 22.05.2008 at 07:58 AM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others.

(iv) Mail dated 22.05.2008 at 02:14 PM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others.

(v) Mail dated 22.05.2008 at 03:06 PM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others.

(vi) Mail dated 22.05.2008 at 03:43 PM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others.

(vii) Mail dated 22.05.2008 at 05:30 PM from Mrs. Radhika Roy to Mr. KVL Narayan Rao, Dr. Prannoy Roy & others.

(d) The assessee submits that before assuming them to be valid evidence on which reliance can be placed in the present proceedings, you may kindly establish the genuineness, authenticity and source of the said documents so that the assessee could made its specific submission and originals of the above may also be made available for verification.

(e) In addition to the above, the assessee also submits that given the peculiar facts and investigation conducted by your office and in order to make meaningful representation, we request you to provide details of all such material , enquiries, complaints and other evidence collected in relation to assessment of the year in question as well as in present proceedings or advise the assessee to seek these details under Right to Information irrespective of the fact that whether the same is adverse to the assessee or in favour of the assessee. The above request has been made in the interest of justice and equity and to be considered favourably."

111. On reading the reply of the assessee, it is apparent that emails are not denied that the executives of the assessee are recipient, sender, and part of the correspondence. The assessee has strategically avoided to comment on the content

of the email by simply stating that AO must establish the genuineness, authenticity and source (GAS) of the said document so that assessee could make specific submission and originals of the above may also be made available for verification. Had these mails were inappropriate/ false evidence assessee would have denied them vehemently. Instead, the assessee has asked LD AO to establish the genuineness, authenticity, and sources of the evidence without denying it. According to us, there is no occasion to establish the genuineness, authenticity, and sources of the evidences unless assessee denies them. It shows that assessee is trying to avoid answers to these evidences. We cannot fall prey to such an attitude of the assessee and therefore in absence of any denial by the assessee the above evidence are presumed to be true. Now we discuss the consents of the mails as incorporated in the show cause notice issued to the assessee are discussed as under:-

> *"16.5 Mr. Dutt has stated that he along with Mr. Sanjay Jain quit when he became aware that the real purpose was to route the money without any intention of paying taxes and in violation of the various legal provisions. In support of his averments, he has also furnished copies of emails, as described in his statement also, which are reproduced below:-*
>
> *(i) Mail dated 21.05.2008 at 10:16 PM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others :*
>
> *"Subject: Press Announcements etc*
>
> *Dear Prannoy and all above*
>
> *Now that we are reaching the conclusion I wanted to remind everybody that all press releases.. stock exchange releases etc etc both by NDTV and NBCU should be whetted by us We must ensure that what is stated is that NBCU is subscribing to shares for a sum of S 150 m in NDTV Networks group company Overseas for an effective 26*

percent stake. We must not mention that NDTV is receiving the 150 m as dividend or otherwise.

If asked a question what will the money be used for ??? We need to decide how to answer this question carefully .

Thanks Vivek"

(ii) Mail dated 22.05.2008 at 02:09 AM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others :

"Subject: Re: Press Announcements etc

For everyone ...This is very important ...

Could we please have a draft press release Vivek ... Which we can use and send to nbcu. ...

If possible, it's important that the press release should make clear that the money comes in to NDTV and does not stay in Networks"

(iii) Mail dated 22.05.2008 at 07:58 AM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others :

"Subject: Re: Press Announcements etc

Prannoy...

I need to start with a base case draft ...can somebody give that to me...

Your second requirement is something I would avoid saying... let's discuss after I have seen a base draft

BR Vivek"

(iv) Mail dated 22.05.2008 at 02:14 PM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others :

"Subject FW: Press Announcements etc

Dear Vivek ... Need your final version on this please ... It will be released in a few hours and will need to be cleared by NBCU before that...

The problem we have it that in the last communication we created a real mess:

Thx
Prannoy

Dear Vivek ... Here's a first bash

NDTV and NBCU successfully closed their strategic partnership in the NDTV subsidiary NDTV Networks.

For a consideration of US $150 million, NBCU now has an indirect and effective stake of 26 % in NDTV Networks PLC. This effective 26 % stake is held through a proportionate stake in the holding company of NDTV Networks PLC

NBCU has the option in three years to increase their stake in the Networks PLC's holding company to 50%. The NBCU option to

increase their stake will be at FMV (Fair Market Value) at the time the option is exercised.

It has been agreed that management control will always remain with NDTV Ltd.

As a consequence of this successful closing of the partnership with NBCU, the parent company NDTV Ltd now has funds of US $150 which gives it the flexibility to use for any opportunities in the future including acquisitions, expansion in the news space, or in the beyond-news space as and when they arise.

The NDTV - NBCU strategic, partnership in the Networks businesses is a coming together of two leading professional media organizations with similar ethics and goals and promises to be a major force in the media scene in India."

(v) Mail dated 22.05.2008 at 03:06 PM from Mr. Vivek Mehra (PWC) to Dr. Prannoy Roy & others :

"Subject: Re: FW: Press Announcements etc

Dear Prannoy,

Here is a shot at it, based on your draft Appreciate your problems but honestly the problem could become worse if we give a handle to the tax authorities. I am concurrently discussing with other partners now the draft below. Let's get on a call ASAP,

Regards
Vivek"

(vi) Mail dated 22.05.2008 at 03:43 PM from Dr. Prannoy Roy to Mr. Vivek Mehra (PWC) & others :

"Subject: Press Announcements — Final ?

Thanks very much Vivek ... based on our discussion over the telephone, I just wanted to confirm that this is what you have suggested as the final version:

NDTV group and NBCU group have successfully concluded their strategic partnership initiative for the NDTV Networks business.

By a subscription of shares for US $150 million, NBCU group now has an effective indirect stake of 26 % in NDTV Networks PLC UK.

NBCU has the option in three years to increase their stake, at the then fair market value, in the holding company of Networks PLC to 50% with NDTV group holding an equal 50% stake. Management control will always remain with NDTV group.

As a consequence of this successful closing of the partnership with NBCU group, the parent company NDTV Ltd and it's wholly owned subsidiaries now have access to funds of US $150 mn which gives the flexibility to use for any opportunities in the future including acquisitions, expansion in the news space, or in the beyond-news space as and when they arise."

(vii) Mail dated 22.05.2008 at 05:30 PM from Mrs. Radhika Roy to Mr. KVL Narayan Rao, Dr. Prannoy Roy & others :

"Subject: RE: Press Announcements - Final ? Dear Narayan,

But this doesn't really address prannoy's concerns arising from our earlier communication and it would be a pity to miss this opportunity to correct any misconceptions. Just to remind you prannoy's four points below:

"1. Everyone thought the money was to be put into Networks ... As a result we got no shareholder value for the Rs 600 crs in NDTV

2. It's very important to state that the money is not in Networks ...But in NDTV ... As this affects the valuation analysts give to the deal... And it's a big boost if they know it's not in Networks and it is in NDTV ... I know we can't say stake sale (which it is not anyway)... But we do need to clarify that the money is not in Networks"

[Emphasis supplied]"

112. From contains of the mail, the addressee and recipients of the mail it is quite apparent that whole structuring is an eye wash with the only intention to bring 150Mn USD to NDTV (assessee) without there being and liability to pay it back. This what is achieved by the assessee by creating all these agreements, subsidiary in different jurisdictions etc. We are not inclined or to waste our time on the discussion of these emails because they are so obvious and glaring to show the intention of the parties.

113. It is also important at this moment to mention that the subsidiary structure created by the assessee and investor in Netherland. The creation of a subsidiary in a particular jurisdiction has to have a business case. It is a matter of common knowledge that Netherland was classified as one of the low tax jurisdiction. Netherland at that particular time had too generous tax exemption of dividend received, no beneficial owner test for withholding tax on dividends, not putting details of trust on public record, does not require company accounts or beneficial ownership to be publicly available and does not maintain company ownership details in official records. Netherland jurisdiction also known for "virtually no substance requirement" in the

form that holding does not have employees which can also be run through trust and management services in Netherland. Therefore, it is apparent that the assessee has created this structure in Netherland by creating multiple subsidiaries for the purpose of fulfilling the above transaction. It is also explained that in the subsidiaries formed by the assessee did not have any substance such as activities, people etc. The subsidiaries companies were only having investments and capital and in the case of the investor company. In the investor company, the equity share capital was also held through the entity from Bermuda jurisdiction, which is also similar jurisdiction for tax purposes as Netherland. While discharging its onus it is the prime responsibility of the assessee to fully disclose all parts of a transaction when taxability of a transaction being tested. The assessee cannot show part of the picture without disclosing the complete movie, which comprises of the series of transaction without explaining each step and business rationale behind that.

114. The assessee has further contested that transaction in question does not pertain to the appellant and appellant is not a party to the said transaction. Further, the provisions of section 69A speaks about the ownership of the assets. According to the assessee as the money has been received by the subsidiary company it cannot be taxed in the hands of the assessee. We have also carefully perused this argument of the ld AR but are not convinced. The assessee cannot say that it is not a party to the said transaction when in each and every agreement the assessee is a party to the agreement. It cannot also be accepted for the reason that the subsidiary companies were having almost same set of directors or the persons controlled by the director that. Further, in the emails the chairman of the company and directors are communicating on this transactions it is not correct to say that the assessee was not a party, in fact the assessee is the beneficiary of whole transaction. Further, the reason for rejection of argument about chargeability u/s 69A is that it applies wherein, in any financial year where the assessee is found to be an owner of any money etc which is not recorded in the books of account if any maintained by him and the assessee offers no explanation about the nature and source of the acquisition of the money or the explanation offered by him is not in the opinion of the ld Assessing Officer satisfactory then such money may be deemed to be the income of the assessee for that financial year. In the present case, the assessee is found to

be the owner of the money by the ld Assessing Officer which has been received by the subsidiary in offshore jurisdiction and which has travelled to the coffers of the assessee. The explanations offered by the assessee with respect to the ownership of such sum was not satisfactorily explained according to the Assessing Officer and therefore, such some has rightly been deemed to be the income of the assessee. Furthermore the argument of the ld AR that money is received by the subsidiary company of the assessee and not by the assessee himself is also devoid of any merit because of the reason that provision of section 69A does not make any distinction but merely says that the assessee is found to be an owner in that case it can be charged to tax in the hands of the assessee.

115. The ld AR has further offered during the course of hearing to produce the investor before the coordinate bench. We are amused with the offer because of the reason that the information is required to be furnished before the lower authorities were not furnished in the proper manner and in time and therefore the assessment has been framed u/s 144 of the Act. The manner of furnishing the information before the lower authorities is also evident from the fact that certain basic evidences were filed by the assessee very late, which should have been filed before the ld Assessing Officer , as additional evidence before the ld DRP. In view of this, we reject the contention of the ld AR on this count. Off course assessee can do so in penalty proceedings u/s 271(1) (c) of the act , if it so wishes.

116. With respect to the valuation and subsequent buyback of shares by the group entities at substantial discount, the ld AR heavily relied upon the decision of the Hon'ble Delhi High Court in case of CIT Vs. Five Vision Promoters Pvt. Ltd 65 Taxmann.com 71 (Del). The ld AR stated that shares of the investor subsequently repurchased by assessee through its subsidiaries is not at all relevant. According to him, the chargeability must be seen only at the time of receipt of the money. We have carefully considered the argument of the ld AR and also perused the decision of the Hon'ble Delhi High Court. According to us the ratio laid down by the Hon'ble Delhi High Court do not apply to the facts of the case before us and our reasons are that in that case no additional material existed other than the details of purchase and sale of shares. In the case before us, there are additional material in the form of trail of money coming back to the assessee and also the corroborative emails where

the chairman of the group is also communicating on the financial transaction that are in question before us. Furthermore, in that particular case there was no business of the assessee, which has started, and therefore, the allegation of the revenue that assessee being a developer is charging on money, which is taken in cash, is incorrect. In the present case, it is the statement of the assessee that funds have been raised for the purposes of the business. Further revenue has established the complete modus operandi of the assessee to show that money provided by other parties in offshore jurisdiction have come back into the coffers of the assessee without any obligation of repayment. Further, in that particular case there were contradictory claims of the revenue that assessee was a conduit company and still some addition in that particular company was made holding it to be undisclosed income of the assessee. There was also no close connection between the investors as well as the company. In the present case there is no allegation that assessee is a paper company , in fact it is in business but the only allegation is that assessee is found to be an owner of Rs. 642 crores invested by a third party in foreign jurisdiction without any substance in the transaction and therefore, revenue charged it into the hands of the assessee. Further, in that particular case all the investors were regularly assessed to income tax and some of them appeared before the assessing officer also. However, in the present case no evidences has been laid by the assessee about the taxability of these companies and no efforts have been made to produce the investor before the revenue authorities. Regarding the most forceful argument of the ld AR was that repurchase of the shares later on at substantive discount cannot lead to any adverse inference. We would have agreed to that contention of the assessee had the issue been merely of the correctness of transaction value, such is not the case here before us. Hence, we do not agree with that contention in view of our findings in the order about the modus operandi of the whole transaction. Further, the issue decided by the Hon'ble Delhi High Court was with respect to the provisions of section 68 of the Act where the fact was that according to the order of the coordinate bench once the capital raised should explained the issue of disinvestment by the shareholder subsequently was a non-issue. It was further stated that addition if at all was to be examined in the hands of the person who is purchasing the shares. In the present case the subsequent sale of

the shares as well as the original investment both considered as one transaction as the revenue has established that amount invested as a capital by an overseas investor has landed into the hands of the assessee without repayment obligations through series of subsidiaries and a complex structure of money trail , and such rooting of the money is also evidenced by the emails exchanged, ld AO has correctly made addition in the hands of the beneficiary. In view of this, the reliance placed on this decision is devoid of any merit as the fact of that case and the facts of this case are materially different. Similarly, the ld AR has relied upon several decisions of various courts to state that the re-characterization of the transaction is not permitted, however, Hon'ble Supreme Court in case of Vodaphone has already decided this issue for re-characterization of income. In view of this after perusing all the decisions cited by the ld AR looking to the specific facts and circumstances of the case without discussing their fact but comparing with the facts of the case of the assessee we reject them, as they are not comparable.

117. The ld AR has also relied upon the decision of Hon'ble Delhi High Court in case of CIT Vs. Kamdhenu Steel and Alloy Ltd 361 ITR 220 and specifically page No. 227 to submit that when the money is transmitted through banking or other indisputable channels the transactions would be proved and for the purpose of genuineness of the transaction the copies of the share holder register, share application form, share transfer register would suffice. The creditworthiness of the creditor can be proved by producing the bank statement then the assessee has discharged the onus. He therefore, submitted that in the present case the complete details as mentioned in the decision has been submitted by the assessee and therefore, the onus has been discharged. We have carefully considered this decision and we have no hesitation in rejecting the reliance because of the reasons that in the present these details were made available before the ld DRP and then ld Assessing Officer carried on enquiry in remand proceedings. During the course of hearing before us the revenue has produced the money trail as well as certain emails, which were not at all denied by the assessee. Therefore in our view the assessee has submitted scanty details and also tried to hide certain facts by not denying or owning the emails exchanged. Further it is too naïve to accept in the facts and circumstances of the case that any transaction carried out through banking channel should be believed as genuine. In

fact the money mostly rout through banking channels only and for these transactions only various sections in the income tax act are incorporated dehors the banking transitions such as section 69, 68 etc. It is only the banking transactions through which the tax evaders bring their unaccounted money in to the books by creating or dealing with entities/ persons without substances. In the present era where the business is carried on through and from complex, dynamic and multi jurisdictional, diverse entities, the transaction through banking channel does not have much credence, especially in like cases before us. During the course of hearing assessee was asked about KYC certificate of the foreign banks along with the beneficiary disclosure forms from the bankers from where the transactions have originated which is not submitted before us or before ld AO. Hence, the decision relied upon does not help the assessee.

118. In view of the above facts and circumstances and for the reasons given by us we are of the opinion that ld Assessing Officer has correctly made the addition of Rs. 6425422000/- by invoking section 69A of the Act on account of money transferred by by M/s. Universal Studio International BV which was routed to the coffers of the assessee by entering in to series of mergers and liquidation by payment of dividend, loans without any obligation for repayment. Hence, we do not find any infirmity in the order of ld Assessing Officer as well as ld DRP and hence the addition of Rs 642.54 crores in the hands of the assessee u/s 69A is confirmed. In the result ground no 8 of the CO is dismissed.

119. Ground No. 9 of the cross objection is against the addition of Rs. 2457500000/- (US$50 million) by invoking the provisions of section 68 of the Act despite there being no credit in the books of the appellant.

120. The brief facts of the case is that during the year under consideration the assessee through bonafide subsidiary NLPLc has raised unsecured loan amounting to Rs. 254.75 crores. On query the assessee submitted that it has been raised from NNPLCs intermediate holding company NDTV Network BV and the relevant details has been filed during the course of assessment proceedings for AY 2008-09. Assessee further filed that the source of the loan was from NDTV Networks BV and above amount was disclosed in the books of NNPLC and NDTV Network BV. The assessee further supported the same with the copies of the financial statement of

both the above subsidiaries. The unsecured loan was also pursuant to loan agreement dated 10.11.2008 between Universal Studio International BV, NDTV, NNPLC and NDTV networks BV. Assessee further submitted the confirmation of the loan, however, as the loan confirmation did not have the bank certificates along with the confirmation therefore, the AO was of the view that assessee has failed to discharge its onus of proving the identity and creditworthiness of the lender and genuineness of the transaction. The ld AO was also of the view that the copies of the documents furnished by the assessee were only photocopies. The ld DRP on consideration of the issue found that out of Rs. 365.25 crores Rs. 110.50 crores is due to the restatement of the original amount pertaining to FY 200-08. It was also noted by the ld DRP no disallowance was made in AY 2008-09 and therefore, the disallowance/ addition to the extent of Rs. 110.5 crores cannot be made. However, the ld DRP held that above loan was advanced without interest and the reason for it was not explained. The ld DRP was of the view that the amount involved is quite large and further as per the agreement the interest free credit facility was to be granted on the basis of utilization request and no such request was produced by the assessee before the AO or before the ld DRP. Hence, the ld DRP confirmed the finding of the ld Assessing Officer that the onus of proving the genuineness of the loan transaction has not been discharged by the assessee and therefore, confirmed the finding of the ld Assessing Officer and directed to make addition of Rs. 254.75 crores. Consequently, the ld Assessing Officer made the addition vide para NO. 9 of his final order as under:-

> *"9.* ***Addition on account of unsecured loans amounting to Rs. 254.75 crores***
>
> *9.1 It was observed that during the year, the assessee company, through its guarantees, raised an amount of Rs. 365,25,00,000/- as unsecured loans through its subsidiary NDTV Networks Plc ("**NNPLC**"), United Kingdom. However, the reply on the issue was furnished by the assessee during the assessment proceedings on 30.03.2013, i.e. one day before expiry of limitation for completion of assessment. Therefore, the DRP was requested to*

exercise its powers u/s 144C(7) of the Act and to cause further enquiry as it thinks fit on the facts and in the circumstances of the case.

9.2 Consequently, the DRP remanded the matter to the AO u/s 144C(7) of the Act and directed the AO to conduct further enquiries in the case, as directed vide the following letters issued by the DRP :-

(i) F.No. DRP-II/Del/2013-14/259 dated 24.10.2013
(ii) F.No. DRP-II/Del/2013-14/262 dated 28.10.2013
(iii) F.No. DRP-II/Del/2013-14/278 dated 01.11.2013

9.3 During the remand proceedings, the assessee was asked to explain regarding the impugned transaction and after examining the issue and considering the various aspects of the transaction, report was submitted to the Hon'ble DRP vide this office's letter F.No. ACIT/Circle-13(1)/NDTV/2013-14/1794 dated 11.12.2013, the relevant extract of which is reproduced as under :-

"2.4 Tax implication of unsecured loans amounting to Rs. 365.25 crores received by NDTV through its subsidiary NNPLC

2.4.1 The Hon'ble DRP vide letter no. 262 dated 28.10.2013 had directed further enquiries to be made regarding the unsecured loans amounting to Rs. 365.25 crores allegedly received by NDTV through its subsidiary NDTV Network Plc ("NNPLC") and the tax implication thereof.

2.4.2 Vide this office's letter no. 1705 dated 11.11.2013, the assessee was asked to explain on the issue as under :-

"2.3 During the year, the assessee company, through its guarantees, raised an amount of Rs. 365,25,00,000/- as unsecured loans through its subsidiary NNPLC. Please furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions. ..."

2.4.3 In response, vide letter dated 26.11.2013, the assessee contended that during the year under consideration, there was an increase of Rs. 110.50 crores in the amount of unsecured loans in the Balance Sheet of NNPLC, which represented an increase due to currency fluctuation. The assessee further stated that during the previous AY 2008-09, it had raised loans amounting to Rs. 399 crores by way of Step Up Coupon Bonds and the enquiry regarding the source and genuineness thereof had already been completed during the course of assessment proceedings for AY 2008-09. It was claimed that complete evidence regarding the same had been filed before the AO during the said assessment proceedings and the AO had also obtained information from HMRC through FT & TR. Vide further reply dated 29.11.2013, the assessee also filed copy of exchange rates for the relevant period.

2.4.4 Vide this office's letter dated 05.12.2013, the assessee was confronted as under :-

"2.2 Regarding the raising of Rs. 365.25 crores as unsecured loans

2.2.1 Regarding the raising of an amount of Rs. 365,25,00,000/- as unsecured loans through your subsidiary NNPLC, vide letter dated 11.11.2013, you were requested to furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of

the transactions. You have stated in your reply filed on 26.11.2013 that sum of Rs. 254.75 crores was raised by NNPLC from its immediate subsidiary NDTV Networks BV. Another addition of Rs. 110.5 crores is stated to be on account of currency translation. However, no evidence has been filed by you in support of your assertions.

2.2.2 In your above reply, you have also alleged as under :-

"Further, the complete list of the subscribers of bonds, subscription agreement and other relevant details were duly filed during the course of the assessment of AY 08-09. The above bond amount is duly confirmed by NNPLC to HMRC, UK on the requisition of FT & TR. Further, the complete information with respect to raising of bonds were duly filed before Investigation Officer and DIT (Intl) during the course of assessment and was also disclosed in the Audited Accounts of the NDTV for AY 2008-09 and onwards. In view of the above, we request your goodself to kindly consider the documents submitted in the assessment of AY 2008-09 and report obtained in the course of assessment from HMRC which are already on record."

2.2.3 In this regard, it is stated that the assessment record in your case for AY 2008-09 has been perused and it is found that there are no such documents on record. Accordingly, you are given an opportunity to now file the following documents, which are stated to have been filed by you earlier :-

(i) Complete list of the subscribers of bonds, subscription agreement and other relevant details claimed to have been filed during the course of the assessment proceedings for AY 2008-09.

(ii) Complete information with respect to raising of bonds claimed to have been filed before Investigation Officer and DIT (Intl) during the course of assessment proceedings.

2.2.4 In this regard, please also refer to letter filed by you on 29.11.2013, wherein you have stated that the increase of Rs. 110.50 crores in the Step Up Coupon Bonds is merely the reinstatement of foreign currency liability. In this regard, please furnish the relevant copies of accounts along with complete book entries made in Journal, Ledger, etc. in respect of the said increase reflected in the accounts. Also furnish copies of accounts regarding interest paid to the said investors during the year.

2.2.5 Regarding the balance addition of Rs. 254.75 crores in the unsecured loans, you have claimed that the relevant documents have been filed during the assessment proceedings. Perusal of the assessment record reveals that there are no such documents on record. Accordingly, you are given an opportunity to now file these documents, which are claimed to have been filed by you earlier.

2.2.6 In the absence of the discharge of onus by you in respect of the above transactions of raising unsecured loans, in the light of facts of the case discussed in the foregoing paras of this letter read with letter dated 27.11.2013, please explain and substantiate your position."

2.4.5 In response, vide letter dated 10.12.2013, the assessee stated that out of the total addition of Rs. 365.25 crores appearing in the Balance Sheet of NNPLC, an amount of Rs. 110.50 crores was on account of adjustment of fluctuation in exchange rate of currency and regarding the balance amount of Rs. 254.75 crores, the assessee stated that this was the unsecured loan obtained from NDTV BV. However, no confirmation was filed nor this office was afforded any verification

regarding the creditworthiness of the lender or the genuineness of the transaction. In the absence of these, the assessee has not discharged its onus u/s 68 and there is no alternative but to propose that the amount of Rs. 254.75 crores may be added to the assessee's taxable income for the year under consideration. Further, it is pertinent to mention that although the assessee claimed that "the complete list of the subscribers of bonds, subscription agreement and other relevant details were duly filed during the course of the assessment of AY 08-09", yet no such details were found in the assessment records, which was specifically confronted to the assessee and yet, the assessee has failed to substantiate its claim."

9.4 The copy of the remand report dated 11.12.2013 referred to and reproduced in para 9.3 above was forwarded by the Hon'ble DRP to the assessee on 16.12.2013 and the assessee was asked to treat the same as enhancement notice by the DRP. In response, the assessee sought to furnish additional evidence, which was handed over by the DRP to this office for report on the same. Consequently, in continuation to the remand report dated 11.12.2013, another report was submitted to the Hon'ble DRP vide this office's letter F.No. ACIT/Circle-13(1)/NDTV/2013-14/1832 dated 26.12.2013, the relevant extract of which is reproduced as under :-

" Kindly refer to the proceedings during the hearing conducted by the Hon'ble DRP on 23.12.2013, wherein the assessee was to furnish documentary evidence in this office on 24.12.2013 and the undersigned was to submit the final report on the issue of unsecured loans to the tune of Rs. 365.25 crores.

2. In this regard, and in continuation to this office's letter no. 1705 dated 11.12.2013, the report in the matter is submitted as under :-

2.1 Tax implication of unsecured loans amounting to Rs. 365.25 crores received by NDTV through its subsidiary NNPLC

2.1.1 The Hon'ble DRP vide letter no. 262 dated 28.10.2013 had directed further enquiries to be made regarding the unsecured loans amounting to Rs. 365.25 crores allegedly received by NDTV through its subsidiary NDTV Network Plc ("NNPLC") and the tax implication thereof.

2.1.2 Vide this office's letter no. 1705 dated 11.11.2013, the assessee was asked to explain on the issue as under :-

> *"2.3 During the year, the assessee company, through its guarantees, raised an amount of Rs. 365,25,00,000/- as unsecured loans through its subsidiary NNPLC. Please furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions. ..."*

2.1.3 In response, vide letter dated 26.11.2013, the assessee contended as under :-

> *"5.Furnish the details in connection with assessee company, through guarantees, raising an amount of Rs. 362,25,000/- as unsecured loans through its subsidiary NNPLC and show cause why the penal provisions and other consequence may not be invoked for this default*
>
> *5.1 At the outset, it is submitted that the said show cause is misconceived and without jurisdiction as the proceedings*

which are pending on date are pursuant to draft assessment order passed under section 143(3) read with section 144C of the Act which in no manner suggest that the assessing officer could initiate penal provisions or issue show cause for penalty provisions and other consequences.

5.2 Be that it may so and without prejudice to above and the right to challenge the validity of the above show cause at an appropriate or appellate stage, it is submitted that the show cause is completely misconceived in the assessment of NDTV as the unsecured loans which are in question are part of the Financial Statements and Balance Sheet of the NNPLC which is a separate legal entity and this has no effect and consequence on the assessment of the assessee. Thus, it is prayed that the same may kindly be withdrawn.

5.3 Having said so and without prejudice, it is also submitted that the amount which is stated in the show cause seems to be incorrect as no such amount was raised by the NNPLC through the guarantees issued by NDTV during the year in question. On the contrary, the amount stated in the said show cause is a difference between the liabilities as exist on March 31, 2008 and March 31, 2009 in the Balance Sheet of the NNPLC. (The copy of the same is already on record and for the ready reference is enclosed as Annexure — 1 of this submission)

5.4 In view the above, the assessee herein below explains the nature of the above liabilities of NNPLC as understood in Para 5.3 of this letter in order to facilitate completion of the remand proceedings arising in course of the proceedings pending before the Hon'ble DRP for the year in question :-

5.5 During the year under consideration NNPLC raised a sum of Rs. 254.75 Crores from its intermediate holding company NDTV Networks BV. Further, there is an increase in the liability towards the repayment of Bond holders from Rs. 399 Crores to Rs. 509.5 Crores as on 31st March'2009, thus, there is an increase of Rs. 110.5 Crores due to currency translation.

Therefore, the total increase in liabilities during the year was Rs. 365 Crores. The copy of account in this regard is enclosed as Annexure - 2 of this submission.

5.6 In respect of the loan liability of Step up Coupon Bonds, during the immediately preceding year i.e. AY 08-09, the complete enquiry was made by AO of NDTV in respect of issuance of bonds by NNPLC. In this regard that the reference was also made to FT & TR and the information was called from HMRC, UK. The assessment for AY 08-09 was completed and the addition of guarantee fee under section 92C of the Act was made. The reason for said addition was based on premise that NDTV had provided an undertaking to give guarantee to Bondholders during the period of bond holders agreement, thus, it ought to have charged guarantee fee, being an international transaction under the section 92B of the Act, from NDTV Networks Plc. The similar addition of Guarantee fee was also made in AY 09-10 by TPO. Further, the complete list of the subscribers of bonds, subscription agreement and other relevant details were duly filed during the course of the assessment of AY 08-09. The above bond amount is duly confirmed by NNPLC to HMRC, UK on the requisition of FT & TR. Further, the complete information with

respect to raising of bonds were duly filed before Investigation officer and DIT (Intl) during the course of assessment and was also disclosed in the Audited Accounts of the NDTV for AY 2008-09 and onwards. In view of the above, we request your goodself to kindly consider the documents submitted in the assessment of AY 2008-09 and report obtained in the course of assessment from HMRC which are already on record.

5.7 In regard to loan from NDTV Networks BV, the amount is duly disclosed in the books of NNPLC and NDTV Networks BV and the copies of the financials statements of both the above subsidiaries were filed before the Ld. AO during the course of assessment. This loan was given out of the proceeds of share subscription received from NBCU. All necessary documents with respect to the amount received from NBCU that is confirmation, identity, creditworthiness is already placed on record before your goodself by the Hon'ble DRP, thus, we request same may also kindly be considered in respect of this transaction. In order to substantiate the identity of the Creditor, its creditworthiness and the genuineness of the transaction, the copy of the Audited Accounts of NDTV Networks BV is enclosed as Annexure — 3 of this submission.

5.8 At this juncture, the assessee fervently believes in light of the facts submitted above that there is no cause of action or default committed by the assessee which warrants initiation of penal provisions or other consequences under the Act, thus, it is prayed that the above show cause may kindly be withdrawn."

2.1.4 Vide letter no. 1741 dated 27.11.2013, the assessee was again confronted on this issue as under :-

"2.2 Regarding the raising of an amount of Rs. 365,25,00,000/- as unsecured loans through your subsidiary NNPLC, vide letter dated 11.11.2013, you were requested to furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions. You have stated in your reply filed 26.11.2013 that sum of Rs. 254.75 crores was raised by NNPLC from its immediate subsidiary NDTV Networks BV. Another addition of Rs. 110.5 crores is stated to be on account of currency translation. However, no evidence has been filed by you in support of your assertions."

2.1.5 Vide the same letter, the control and management of M/s. NDTV Network Plc, UK being with the assessee company M/s. New Delhi Television Limited was also confronted as under :-

"2.1.1 Neither NNIH nor NNPLC were having any business activities. NNIH was a holding company and NNPLC was incorporated to promote the interests of NNIH and other group companies. NNPLC did not have any business activities. It had no fixed assets and there was no rent paid. Apart from incorporation in UK, NNPLC had no presence in UK. The address of NNPLC in UK was that of the Company Secretary dealing with its tax matters. The Directors of NNPLC were Indian and the audit report of NNPLC was signed at Gurgaon in India. The authorized share capital of NNPLC was only about Rs. 47 lacs.

2.1.6 In response, the assessee vide its letter dated 29.11.2013 replied as under :-

""1.13 Without prejudice to our submission, i.e. the transaction in question is genuine transaction and has been done through banking channel and in accordance with shares subscription agreement, therefore no adverse inference could be drawn in any manner, your attention is also drawn to the recent amendment of Finance Act, 2012 wherein the legislature has inserted section 56(vii)(b) wherein they have intended to tax the amount of share premium received in excess of the Fair Market Value as other source of income. The said provision (as amendment) is also not applicable to assessee Company as NDTV is a company in which public is substantially interested and said provision is not applicable for the year in question.

1.14 It is well settled that a typical large business corporation consists of subsidiaries and each of such entities is legal entity which is also recognized by company law and laws of taxation. Thus, your assertion that NNPLC has no fixed assets and no rent paid is not material for determination of the premium.

1.15 In the subsequent para of your showcause, your goodself has alleged that the NNIH and NNPLC were holding companies having no business activities apart from holding the investments in various group companies. Therefore, the premium which has been paid by USBV on the face value on shares of NNIH is prima facie not in the realm of the possibility. You will appreciate that the investments of NNPLC in the various companies of entertainment verticals already

existed much before entering into the share subscription agreement and all those invested companies were functional and doing their business. Thus, the above fact also shows that the amount invested by the investor by way of share capital was commensurate with the business prospect. Accordingly, it is submitted that the share premium received by the NNIH is a genuine transaction.

...

1.18 In our earlier submission, we have already informed you that NNPLC is UK tax resident and your allegation that the accounts were signed in India and the directors were also Indian is not correct. On the contrary, the fact is that the accounts which you have perused are the accounts which have been used for the purpose of consolidation of Financial Statements of NDTV group as a whole in order to comply with Companies Act provisions. Thus, the financials statement formed part of the consolidated financial statements of NDTV (including its subsidiaries) and used for only that limited purposes. It is also submitted that it is factually incorrect that all the directors are Indian on the board of NNPLC as there are other non-resident directors as well.

1.19 Further, in our earlier submissions, we have informed your goodself that through proper channels under india UK treaty, the HMRC UK has sent a report to FT & TP to your office wherein they have provided all the information regarding existence of NNPLC and tax compliance in accordance with UK tax laws i.e. filing of its tax returns, WHT returns, etc.

3. *Furnishing of evidence in relation to reinstatement of forex liability amounting to Rs. 110.5 Crores*

As earlier submitted, the increase of Rs. 110.5 Crores in the Step up Coupon Bonds at year end in books of NNPLC is merely the reinstatement of foreign currency liability in accordance with Accounting Standards. It is most respectfully submitted that no fresh loan whatsoever was raised by NNPLC in respect of the Step up Coupon Bonds. The amount so increased in debited to Currency Translation Reserve in the books of accounts of NNPLC (Please refer to Schedule - 2 Reserves & Surplus).

In respect of your specific query with respect of the evidence of such reinstatement, please find attached the complete details of the quarterly reinstatement as Annexure -1 to this submission. In respect of the evidence of the exchange rates applied in the above computation, the quarterly rates as available are annexed as Annexure -2 of this submission."

2.1.7 Further, vide this office letter dated 05.12.2013, the assessee was confronted as under :-

"2.2 Regarding the raising of Rs. 365.25 crores as unsecured loans

2.2.1 Regarding the raising of an amount of Rs. 365,25,00,000/- as unsecured loans through your subsidiary NNPLC, vide letter dated 11.11.2013, you were requested to furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of the

transactions. You have stated in your reply filed on 26.11.2013 that sum of Rs. 254.75 crores was raised by NNPLC from its immediate subsidiary NDTV Networks BV. Another addition of Rs. 110.5 crores is stated to be on account of currency translation. However, no evidence has been filed by you in support of your assertions.

2.2.2 In your above reply, you have also alleged as under :-

"Further, the complete list of the subscribers of bonds, subscription agreement and other relevant details were duly filed during the course of the assessment of AY 08-09. The above bond amount is duly confirmed by NNPLC to HMRC, UK on the requisition of FT & TR. Further, the complete information with respect to raising of bonds were duly filed before Investigation Officer and DIT (Intl) during the course of assessment and was also disclosed in the Audited Accounts of the NDTV for AY 2008-09 and onwards. In view of the above, we request your goodself to kindly consider the documents submitted in the assessment of AY 2008-09 and report obtained in the course of assessment from HMRC which are already on record."

2.2.3 In this regard, it is stated that the assessment record in your case for AY 2008-09 has been perused and it is found that there are no such documents on record. Accordingly, you are given an opportunity to now file the following documents, which are stated to have been filed by you earlier :-

(i) Complete list of the subscribers of bonds, subscription agreement and other relevant details claimed to have been

filed during the course of the assessment proceedings for AY 2008-09.

(ii) Complete information with respect to raising of bonds claimed to have been filed before Investigation Officer and DIT (Intl) during the course of assessment proceedings.

2.2.4 In this regard, please also refer to letter filed by you on 29.11.2013, wherein you have stated that the increase of Rs. 110.50 crores in the Step Up Coupon Bonds is merely the reinstatement of foreign currency liability. In this regard, please furnish the relevant copies of accounts along with complete book entries made in Journal, Ledger, etc. in respect of the said increase reflected in the accounts. Also furnish copies of accounts regarding interest paid to the said investors during the year.

2.2.5 Regarding the balance addition of Rs. 254.75 crores in the unsecured loans, you have claimed that the relevant documents have been filed during the assessment proceedings. Perusal of the assessment record reveals that there are no such documents on record. Accordingly, you are given an opportunity to now file these documents, which are claimed to have been filed by you earlier.

2.2.6 In the absence of the discharge of onus by you in respect of the above transactions of raising unsecured loans in the light of facts of the case discussed in the foregoing paras of this letter read with letter dated 27.11.2013, please explain and substantiate your position."

2.1.8 The assessee filed reply dated 09.12.2013 stating as under :-

"2. Regarding the raising of Rs.365.25 Crores as unsecured loans

In this regard and as earlier submitted, the amount in question in not related to the books of accounts (standalone) of the assessee which is the subject matter of the present assessment proceedings. The amounts were shown as a liability in one of the subsidiaries of the assessee company, namely NDTV Plc.

Be that as it may, the following documents are enclosed as desired by your goodself:-

i. A copy of the submission dated 8^{h}Fcbruary'12filed in the course of assessment of AY 2008-09 before the Ld. AO which consists of the complete list of the subscribers to bonds, subscription agreement and other relevant details and documents is enclosed as Annexure B. We are also enclosing herewith the copies of submissions dated 28th May'12, 31stMay'12, 11thJune'12and 20thJuly'12filed before the then AO are also enclosed as Annexure B-1 to B4.

ii. Copy of submissions dated 18thFebruary'11 3rdMarch'11, 29th March'11, 30thMarch'11 and 8th March'11 filed before the Investigation Officer and DIT are enclosed as Annexure-C1-C5.

Here it is pertinent to add that you have not adverted to the fact that the reference had been made to FT & TR for seeking

information from HMRC, UK with respect to business of NDTV Plc in the assessment year 2008-09.We have been given to understand by the then Ld. AO that he was in receipt of the said information and the assessment was completed after considering the same.

A copy of the ledger accounts of the Step-up Coupon Bonds since beginning as recorded in the books of accounts of NDTV Plc. made in the Indian Currency and used for the purposes of consolidation of the accounts in the Annual Report of NDTV group is enclosed as Annexure D.

With respect to the balance amount of Rs. 254.75Crores, it is already submitted that it represents the loan form NDTV Networks BV and the amount is duly disclosed in the books of NNPLC and NDTV Networks BV and the copies of the financials statements of both the above subsidiaries were filed before the Ld. AO during the course of assessment vide submission dated 27th February'13 & 11th March'13. The copy of the submission is duly enclosed as Annexure E1 & E2 for your kind reference."

2.1.9 Keeping in view the above facts and circumstances of the case, the facts of the case emerge as under :-

2.1.10 While passing the draft assessment order, the then AO had recorded in the Office Note to the Draft Assessment Order dated 31.03.2013 as under :-

"During the year the assessee company through its guarantees raised an amount of Rs.365,25,00,000/- as unsecured loans through its subsidiary M/s NDTV Networks Plc. At the present stage

the assessee has not discharged its primary onus regarding receipt of this amount by way of unsecured loan and therefore is liable to be proceeded against under the provisions of section 68 and 69A of I T Act, 1961. However, the assessee has not been afforded the reasonable opportunity to discharge its primary onus for the simple reason that the relevant and material information was furnished by the assessee only on 30.03.2013 and there was simply no time humanly available to afford such an opportunity to draw a balance between the interest of public revenue and the rights of the assessee, for the present the adverse inference against the assessee is not being drawn and appropriate remedial measures will be taken in due course."

2.1.11 Accordingly, vide this office's letter no. 961 dated 29.08.2013 as forwarded vide CIT, Delhi-V, New Delhi's letter no. 1269 dated 03/09.09.2013, the Hon'ble DRP was requested to consider causing further enquiries to be made in the case u/s 144C(7) of the Act. The Hon'ble DRP vide letter no. 262 dated 28.10.2013 directed further enquiries to be made on the impugned issue.

2.1.12 The facts of the case are that NDTV Network Plc, UK ("NNPLC") is an indirect subsidiary of the assessee and it was incorporated by the assessee in UK on 30.11.2006. It is stated in the assessee's Annual Report for FY 2006-07 that NNPLC became a subsidiary of a newly created intermediate holding company, NDTV Networks BV ("NNBV"), incorporated in the Netherlands on December 28, 2006 the Netherlands Company being a 100% subsidiary of the assessee company. The aim of NNPLC is stated to be both to create new business areas for NDTV as well as to unlock value of existing operations and skills.

2.1.13 As per the referred Annual Report, NNPLC had proposed to raise funds by issuing $100m convertible bonds due 2012. In connection with this, the assessee Company had given an undertaking to provide a corporate guarantee for and on behalf of NNPLC, as and when required, in accordance with the terms of the Contracts and the Supplemental Trust Deed to be executed by the Company.

2.1.14 In the Annual Report for FY 2007-08, it is stated that NDTV Networks Plc has successfully raised US $ 100 Million by issue of Convertible bonds through a private placement. This became possible solely due to the undertaking given by the assessee for and on behalf of NNPLC and the resultant liability has been accepted by the assessee and stated under the head "Contingent Liabilities not provided for in respect of" in Part B. Notes to Accounts of Schedule 21 to the assessee's Balance Sheet.

2.1.15 In its Annual Report for FY 2009-10, it is stated as under :-

> *"The Company through its subsidiary NDTV Networks BV, repurchased 26 percent indirect stake held by NBC Universal Inc., in its subsidiary NDTV Networks Plc."*

2.1.16 In the above referred report, it is further stated as under :-

> *"NDTV Networks Plc repurchased US$ 100 Million Step up Coupon Bonds issued by it earlier."*

2.1.17 From the above position as reflected in the Annual Reports of the assessee, which are also available on the

assessee's website http://www.ndtv.com/convergence/ndtv/corporatepage/annual_reports.aspx?page=fr, it is observed that the assessee company had incorporated NNPLC in UK in November, 2006 as its 100% subsidiary and thereafter, NNPLC was made subsidiary of NNBV, when a month after incorporation of NNPLC, NNBV was incorporated in December, 2006. Thus, being 100% subsidiary, NNPLC was conceived and controlled by NDTV. Although NNPLC cannot be said to be an agent or mere extension of NDTV solely on the ground of its being 100% subsidiary of NTDV, the facts regarding the control exercised by NDTV over the affairs of NNPLC are discussed below.

2.1.18 NNPLC was incorporated on 30.11.2006 with a meager capital of about Rs. 40 lacs only and was liquidated on 20.10.2011. The stated purpose of NNPLC was to create new business areas for NDTV as well as to unlock value of existing operations and skills, however, NNPLC did not carry on any business activities on its own. In between its incorporation and liquidation, the activities of NNPLC as the role of NDTV therein, are summarized below :-

Financial Year	Activities	Role of NDTV
2007-08	USD 100 million were raised through Step Up Coupon Convertible Bonds.	NNPLC had only a meager capital of Rs. 40 lacs and did not have any business activities, any fixed assets, any place of business except a postal address in UK, was a new entrant without any performance record, was a loss making company having incurred loss of about Rs. 8.34 crores during the year, had invested in loss making companies and had its share's face value of Rs. 40-45 per share and book value in the negative. The raising of USD 100 million was possible solely becausethe assessee company NDTV had given an undertaking to provide a corporate guarantee for and on behalf of NNPLC, as and when required, in accordance with the terms of the Contracts and the Supplemental

		Trust Deed to be executed by the Company.
2008-09	*26% of its stake was transferred to NBCU for Rs. 642.54 crores by way of issue of subscription equity of parent company NNIH.*	*Again, NNPLC had only a meager capital of Rs. 40 lacs and did not have any business activities, any fixed assets, any place of business except a postal address in UK, was a new entrant without any performance record, was a loss making company having incurred loss of about Rs. 8.34 crores during the year, had invested in loss making companies and had its share's face value of Rs. 40-45 per share and book value in the negative. Looking at the facts objectively, no prudent investor would be investing Rs. 642.54 crores in such a loss making company having investments also in loss making companies, more so, no prudent investor would be paying a rate of Rs. 7,015/- per share in the situation. The reflected transaction of subscription of shares at the stated rate, as already submitted in the remand report dated 11.12.2013, is a sham transaction. Not only this, the entity NNPLC is no more than a controlled agent of NDTV, which itself dictated the terms by being a party to the purported Agreement and thus, introduced its own unaccounted income from undisclosed sources with the help of this reflected transaction. Out of this, Rs. 254.75 crores is stated to have been transferred in the account books of NNPLC in the shape of unsecured loan from NDTV BV. Again, the assessee NDTV is a party to the Loan Agreement.*
2009-10	*(i) NDTV through its subsidiary NDTV Networks BV repurchased 26 percent indirect stake held by NBCU in NNPLC.*	*(i) NDTV has stated in its Annual Report that NDTVthrough its subsidiary NDTV Networks BV, repurchased 26 percent indirect stake held by NBC Universal Inc., in its subsidiary NDTV Networks Plc. Though the shares purportedly subscribed, not purchased, by NBCU were those of NNIH and not of NNPLC, the 2nd in vertical subsidiary of NNIH, yet it can be seen that the emphasis is on NNPLC and there is no reference to NNIH or NDTV BV.* *It is further pertinent to mention that the repurchase, occurring barely after 18 months, was for about Rs. 58 crores only as against the 'purchase' for Rs. 642.54 crores. There is no rationale in this transaction – no*

		commercial purpose or economic substance, other than to create a loss of Rs. 584 crores for NBCU and introduction of own unaccounted money for NDTV.
	(ii) NNPLC repurchased US$ 100 Million Step up Coupon Convertible Bonds issued by it earlier.	(ii) The final transaction before the liquidation of NNPLC was the purported repurchase of Step Up Coupon Convertible Bonds. However, the price of the coupons reflected at Rs. 399 crores as on 31.03.2008 and at Rs. 509.50 crores as on 31.03.2009 (the difference of Rs. 110.50 crores stated to be on account of currency fluctuation) would further escalate at the time of repurchase and when NNPLC had a capital of Rs. 40 lacs only and investment in loss making companies, then it remains to be verified as to how NDTV / NNPLC discharged its liability towards the principal and interest payable to the investors on the said repurchase.

2.1.19 From the above, the inevitable conclusion is that NNPLC was a Special Purpose Vehicle (SPV) created by NDTV, which acted as agent of NDTV for the purposes of NDTV and was liquidated as soon as it had outlived the purpose of its creation.

2.1.20 In the case of Adams vs Cape Industries Plc [(1990) 2 WLR 6578], it was held that one of the three circumstances in which the corporate veil may be lifted would be in a situation, where the subsidiary is an agent of the company. In the present case, the situation is the same and the business affairs of the holding company NDTV and the subsidiary NNPLC are so intertwined that it is not only permissible but necessary to lift the corporate veil. The intertwining is evident from the fact that NNPLC carried out only two major transactions during its existence – the 1st transaction was to raise USD 100 million through Step Up Coupon Convertible Bonds, which was possible only due to undertaking for corporate guarantee offered by NDTV and NDTV was a party to the Agreement along with NNPLC and the 2nd transaction was the indirect transfer of 26% of its stake to NBCU by way of subscription in equity of parent

company NNIH, in which again, NDTV was a party to the Agreement along with NNPLC. In both transactions, it was NTYDV which dictated the terms and in neither of the two transactions, NNPLC acted independently. Under these circumstances, it is evident that NNPLC is a mere façade entity on behalf of NDTV ; and without prejudice to this, NNPLC is beyond doubt an agent of NDTV.

2.1.21 As such, it is a fit case, in which corporate veil needs to be lifted and once the veil is lifted, with regard to the present proceedings for AY 2009-10, it can be observed as under :-

(i) NDTV through NNPLC has introduced its own unaccounted income from undisclosed sources amounting to Rs. 642.54 crores in the garb of equity subscription. Detailed report regarding taxability of this sum has already been submitted to the Hon'ble DRP vide letter no. 1794 dated 11.12.2013.

(ii) NDTV through NNPLC has enhanced the liability on account of Step Up Coupon Convertible Bonds by Rs. 110.50 crores in the Balance Sheet of NNPLC from Rs. 399 crores to Rs. 509.50 crores, which is stated to be on account of currency translation. Further, NDTV has introduced unsecured loans amounting to Rs. 254.75 crores from NDTV BV in the books of NNPLC. The tax implications of this issue are the subject matter of the present report, which necessitated the lifting of corporate veil first, as discussed in the preceding paras of this report.

2.2 Regarding enhancement of liability on account of Step Up Coupon Convertible Bonds by Rs. 110.50 crores

2.2.1 As discussed above, USD 100 million were reflected to have been raised through Step Up Coupon Convertible Bonds during FY 2007-08. As stated in para 2.1.2 of this report, vide this office's letter no. 1705 dated 11.11.2013, the assessee was asked to explain on this issue, and in response, vide letter dated 26.11.2013, the assessee stated that the source of investment in Bonds was duly verified by the AO during the assessment proceedings for AY 2008-09 and also through information obtained from UK tax authorities through FT & TR. It was contended that complete details regarding investors and source of investment was given to the AO at the relevant time. The details were also stated to have been furnished before Investigation officer and DIT (Intl) during enquiries by these officers.

2.2.2 Vide this office letter dated 05.12.2013, the assessee was informed that no such documents were found in the assessment record for AY 2008-09. The assessee vide letter dated 09.12.2013 stated that it was again filing copy of the submission dated 08.02.2012filed in the course of assessment of AY 2008-09before AO, which consisted of the complete list of the subscribers to bonds, subscription agreement and other relevant details and documents enclosed as Annexure B. Copies of submissions dated 28.05.2012, 31.05.2012, 11.06.2012 and 20.07.2012 stated to have beenfiled before the then AO and copies of submissions dated 18.02.2011, 03.03.2011, 08.03.2011, 29.03.2011 and 30.03.2011 stated to have been filed before the Investigation Officer and DIT were also claimed to have been enclosed as Annexure C1-C5.

2.2.3 However, perusal of the documents enclosed by the assessee reveals that in response to requisition to prove the identity of the investors, their creditworthiness and genuineness of the transactions, the assessee has filed merely a list titled "The

Initial Investors", listing out 8 entities, many of them from Cayman Islands and furnishing of such list does not discharge the assessee of its onus to prove the identity and creditworthiness of the entities or the genuineness of the transactions.

2.2.4 It is pertinent to mention that even though the original amounts on account of these bonds are claimed to have been received last year and not in the financial year relevant to AY 2009-10, yet when the original amount itself is not proved to be on account of genuine transaction, any escalation in the same whether due to currency translation or otherwise must necessarily meet the same fate. Hence, the amount of Rs. 110.50 crores, being enhancement during the year, in the original liability from unproved source, is proposed to be added to the assessee's taxable income for AY 2009-10.

2.3 Regarding introduction of unsecured loans amounting to Rs. 254.75 crores from NDTV BV in the books of NNPLC

2.3.1 During the year under consideration, NDTV through NNPLC has raised unsecured loan amounting to Rs. 254.75 crores as mentioned in the relevant Schedule to Balance Sheet as on 31.03.2009. When asked vide this office's letter no. 1705 dated 11.11.2013, the assessee replied that the unsecured loan amounting to Rs. 254.75 crores had been raised from NNPLC's intermediate holding company NDTV Networks BV and the relevant details had been filed during the course of assessment proceedings for AY 2008-09.

2.3.2 Vide letter dated 05.12.2013, it was intimated to the assessee that on perusal of assessment record for AY 2008-09, no such documents were found. Accordingly, the assessee was given

an opportunity to now file these documents, which were being claimed to have been filed by it earlier. The assessee was also intimated that it had not discharged the onus cast upon it in respect of the above transactions of raising unsecured loans.

2.3.3 In response, the assesse filed reply dated 09.12.2013 stating that with respect to the unsecured loans amounting to Rs. 254.75 crores, the source thereof was loan form NDTV Networks BV and the amount was duly disclosed in the books of NNPLC and NDTV Networks BV and the copies of the financials statements of both the above subsidiaries were filed before the Ld. AO during the course of assessment vide submission dated 27.02.2013 & 11.03.2013. The copies of the said submissions were claimed to be duly enclosed as Annexure E1 & E2 of the reply dated 09.12.2013.

2.3.4 I have perused the assessee's letters dated 27.02.2013 (running into 10 pages) & 11.03.2013 (running into 2 pages) marked as Annexure E1 and Annexure E2 respectively. At the outset, it is submitted that there is no reference to the impugned issue of unsecured loans amounting to Rs. 254.75 crores raised during the year. The contents of the referred letters address certain queries raised by the AO and query regarding unsecured loans is not one of such queries. The bare letters are not even supported by any Annexures mentioned ion the said letters.

2.3.5 Under the circumstances, when the attached annexure-less letters do not contain any reference to query regarding unsecured loans nor attempt to address such query, therefore, filing of such letters does not serve any purpose.

2.3.6 It is pertinent to mention that during the course of hearing before the Hon'ble DRP on 23.12.2013, the assessee has filed a

reply on the issue. It has been stated by the assessee that the impugned unsecured loan has been raised pursuant to Loan Agreement dated 10.11.2008 between Universal Studios International BV, NDTV, NNPLC and NDTV Networks BV. Confirmation from Universal Studios International BV is also stated to be attached. However, perusal of the attached confirmation reveals that although there is a mention regarding the bank account of Universal Studios International BV, namely BNP Paribas and copy of bank certificate is stated to have been attached, yet no bank certificate has been actually attached.

2.3.7 In view of the above, it is submitted that the assessee cannot be said to have discharged its onus of proving the identity of the lender, creditworthiness of the lender and the genuineness of the transaction. Even the copies of documents, wherever furnished by the assessee, are photocopies, not subject to any verification or enquiries. It is pertinent to place on record that any specific issues can be proved only by specific evidence and not on the strength of claimed reputation or volume of business of the lender. Hence, the assessee has not been able to prove the source of addition in unsecured loans and the same is proposed to be added to the assessee's taxable income.

3. The report is submitted for kind perusal and consideration."

9.5 After considering the above facts, the Hon'ble DRP vide its directions dated 31.12.2013 issued u/s 144C(5) of the Act held that out of Rs. 365.25 crores reflected as increase in liabilities, an amount of Rs. 110.50 crores was due to restatement of the original amount pertaining to the transaction occurring in FY 2007-08 relevant to AY 2008-09. Regarding the balance amount of Rs. 254.75 crores, the DRP held that the assessee failed

to discharge its onus of proving the genuineness of the transaction. The observations of the DRP are reproduced below :-

"5.17. AO has brought to the notice of the DRP through his letter dated 20.08.2013 forwarded by the Addl. CIT, Range-13, New Delhi that an amount of Rs. 365.25 crores was raised by the assessee company which needed further examination. The relevant part of the letter of the AO is as under:

"10. Another issue involved in the case is that during the year, the assessee company, through its guarantees, raised an amount of Rs. 365,25,00,000/- as unsecured loans through its subsidiary NNPLC. As the information was stated to be furnished by the assessee on 30.03.2013, i.e. just one day before the expiry of limitation, therefore, this aspect also could not be probed by the AO as to the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions."

5.18. Accordingly, the AO was directed to examine this issue and send a remand report. The remand report was given to the assessee who strongly objected to the proposed addition made by the AO in the remand report. The remand report dated 11.12.2013 and the summary of the oral argument of the AO dated 26.12.2013 are reproduced below:

Extract of remand report dated 11.12.2013

"2.4 Tax implication of unsecured loans amounting to Rs. 365.25 crores received by NDTV through its subsidiary NNPLC

2.4.1 The Hon'ble DRP vide letter no. 262 dated 28.10.2013 had directed further enquiries to be made regarding the unsecured loans amounting to

Rs. 365.25 crores allegedly received by NDTV through its subsidiary NDTV Network Pic ("NNPLC") and the tax implication thereof.

2.4.2 Vide this office's letter no. 1705 dated 11.11.2013, the assessee was asked to explain on the issue as under :-

> *"2.3 During the year, the assessee company, through its guarantees, raised an amount of Rs. 365,25,00,000/- as unsecured loans through its subsidiary NNPLC. Please furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions...."*

2.4.3 In response, vide letter dated 26.11.2013, the assessee contended that during the year under consideration, there was an increase of Rs. 110.50 crores in the amount of unsecured loans in the Balance Sheet of NNPLC, which represented an increase due to currency fluctuation. The assessee further stated that during the previous AY 2008-09, it had raised loans amounting to Rs. 399 crores by way of Step Up Coupon Bonds and the enquiry regarding the source and genuineness thereof had already been completed during the course of assessment proceedings for AY 2008-09. It was claimed that complete evidence regarding the same had been filed before the AO during the said assessment proceedings and the AO had also obtained information from HMRC through FT & TR. Vide further reply dated 29.11.2013, the assessee also filed copy of exchange rates for the relevant period.

2.4.4 Vide this office's letter dated 05.12.2013, the assessee was confronted as under :-

> *"2.2 Regarding the raising ofRs. 365.25 crores as unsecured loans*

2.2.1 Regarding the raising of an amount of Rs. 365,25,00,000/- as unsecured loans through your subsidiary NNPLC, vide letter dated 11.11.2013, you were requested to furnish the complete details along with documentary evidence regarding the source thereof, viz. the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions. You have stated in your reply filed on 26.11.2013 that sum of Rs. 254.75 crores was raised by NNPLC from its immediate subsidiary NDTV Networks BV. Another addition of Rs. 110.5 crores is stated to be on account of currency translation. However, no evidence has been filed by you in support of your assertions.

2.2.2 In your above reply, you have also alleged as under :-

> *"Further, the complete list ofthe subscribers ofbonds, subscription agreement and other relevant details were duly filed during the course of the assessment of AY 08-09.The above bond amount isduly confirmed by NNPLC to HMRC, UK onthe requisition of FT & TR.Further, the complete information with respect to raising of bonds were duly filed before Investigation Officer and DIT (Intl) during the course ofassessment and was also disclosed inthe Audited Accounts ofthe NDTVfor AY2008-09and onwards. Inview ofthe above, we request your goodself to kindly consider the documents submitted inthe assessment ofAY 2008-09and report obtained in the course of assessment from HMRCwhich are already on record."*

2.2.3 In this regard, it is stated that the assessment record in your case for AY 2008-09 has been perused and it is found that there are no such documents on record. Accordingly, you are given

an opportunity to now file the following documents, which are stated to have been filed by you earlier :-

(i) Complete list of the subscribers of bonds, subscription agreement and other relevant details claimed to have been filed during the course of the assessment proceedings for AY 2008-09.

(ii) Complete information with respect to raising of bonds claimed to have been filed before Investigation Officer and DIT (Intl) during the course of assessment proceedings.

2.2.4 In this regard, please also refer to letter filed by you on 29.11.2013, wherein you have stated that the increase of Rs. 110.50 crores in the Step Up Coupon Bonds is merely the reinstatement of foreign currency liability. In this regard, please furnish the relevant copies of accounts along with complete book entries made in Journal, Ledger, etc. in respect of the said increase reflected in the accounts. Also furnish copies of accounts regarding interest paid to the said investors during the year.

2.2.5 Regarding the balance addition of Rs. 254.75 crores in the unsecured loans, you have claimed that the relevant documents have been filed during the assessment proceedings. Perusal of the assessment record reveals that there are no such documents on record. Accordingly, you are given an opportunity to now file these documents, which are claimed to have been filed by you earlier.

2.2.6 In the absence of the discharge of onus by you in respect of the above transactions of raising unsecured loans, in the light of facts of the case discussed in the foregoing paras of this letter read

with letter dated 27.11.2013, please explain and substantiate your position."

2.4.5 In response, vide letter dated 10.12.2013, the assessee stated that out of the total addition of Rs. 365.25 crores appearing in the Balance Sheet of NNPLC, an amount of Rs. 110.50 crores was on account of adjustment of fluctuation in exchange rate of currency and regarding the balance amount of Rs. 254.75 crores, the assessee stated that this was the unsecured loan obtained from NDTV BV. However, no confirmation was filed nor this office was afforded any verification regarding the creditworthiness of the lender or the genuineness of the transaction. In the absence of these, the assessee has not discharged its onus u/s 68 and there is no alternative but to propose that the amount of Rs. 254.75 crores may be added to the assessee's taxable income for the year under consideration. Further, it is pertinent to mention that although the assessee claimed that "the complete list of the subscribers of bonds, subscription agreement and other relevant details were duly filed during the course of the assessment of AY 08-09", yet no such details were found in the assessment records, which was specifically confronted to the assessee and yet, the assessee has failed to substantiate its claim."

5.19. The copy of the remand report was given to the assessee on 16.12.2013 to submit its rejoinder and on the day of hearing i.e. on 17.12.2013 they were asked to treat the forwarding letter of the DRP enclosing the remand report as enhancement notice by DRP to cut short the time as matter is getting time barred on 31.12.2013. The same was recorded in the order sheet vide entry dated 17.12.2013.

5.20. In response to the above, the assessee vide its letter dated 23.12.2013 has filed a document which is purported to be a loan agreement concluded between NBCU, NDTV Limited, NDTV PLC and NDTV Networks

BV and requested to admit the same. The assessee has further submitted as below:

- *The appellant was not able to produce the above documents since the issue came up for the first time before the DRP and the assessee as unable to submit the same due to paucity of time.*
- *The loan agreement was not specifically asked for by the Ld. AO.*
- *The evidence submitted in this submission is correct and very much relevant for deciding the appeal of the appellant.*
- *It is requested to your goodself that the evidences be admitted and be considered for deciding the matter.*

Your goodself may exercise the powers conferred on yourself by the law, which are very much required to be exercised in the light of facts and circumstances of the case.

5.21. The additional evidence in the form of copy of the purported loan agreement (supri has been admitted in the interest of natural justice and was handed over to the AO for his response. The response is received, the extract of which is reproduced below:

Extract of response of the AO dated 26.12.2013

"2.2 Regarding enhancement of liability on account of Step Up Coupon Convertible Bonds by Rs. 110.50 crores

2.2.1 As discussed above, USD 100 million were reflected to have been raised through Step Up Coupon Convertible Bonds during FY 2007-08. As stated in para 2.1.2 of this report, vide this office's letter no. 1705 dated 11.11.2013, the assessee was asked to explain on this issue, and in response, vide letter dated 26.11.2013, the assessee stated that the source of investment in Bonds was duly verified by the AO during the assessment proceedings for AY 2008-09 and also through information

obtained from UK tax authorities through FT & TR. It was contended that complete details regarding investors and source of investment was given to the AO at the relevant time. The details were also stated to have been furnished before Investigation officer and DIT (Intl) during enquiries by these officers.

2.2.2 Vide this office letter dated 05.12.2013, the assessee was informed that no such documents were found in the assessment record for AY 2008-09. The assessee vide letter dated 09.12.2013 stated that it was again filing copy of the submission dated 08.02.2012 filed in the course of assessment of AY 2008-09 before AO, which consisted of the complete list of the subscribers to bonds, subscription agreement and other relevant details and documents enclosed as Annexure B. Copies of submissions dated 28.05.2012, 31.05.2012, 11.06.2012 and 20.07.2012 stated to have been filed before the then AO and copies of submissions dated 18.02.2011, 03.03.2011, 08.03.2011, 29.03.2011 and 30.03.2011 stated to have been filed before the Investigation Officer and DIT were also claimed to have been enclosed as Annexure C1-C5.

2.2.3 However, perusal of the documents enclosed by the assessee reveals that in response to requisition to prove the identity of the investors, their creditworthiness and genuineness of the transactions, the assessee has filed merely a list titled "The Initial Investors", listing out 8 entities, many of them from Cayman Islands and furnishing of such list does not discharge the assessee of its onus to prove the identity and creditworthiness of the entities or the genuineness of the transactions.

2.2.4 It is pertinent to mention that even though the original amounts on account of these bonds are claimed to have been received last year and not in the financial year relevant to AY 2009-10, yet when the original amount itself is not proved to be on account of genuine transaction, any escalation in the same whether due to currency translation or otherwise must necessarily meet the same fate. Hence, the amount of Rs. 110.50 crores, being enhancement during the year, in the

original liability from unproved source, is proposed to be added to the assessee's taxable income for AY 2009-10.

2.3 Regarding introduction of unsecured loans amounting to Rs. 254.75 crores from NDTV BVin the books of NNPLC

2.3.1 During the year under consideration, NDTV through NNPLC has raised unsecured loan amounting to Rs. 254.75 crores as mentioned in the relevant Schedule to Balance Sheet as on 31.03.2009. When asked vide this office's letter no. 1705 dated 11.11.2013, the assessee replied that the unsecured loan amounting to Rs. 254.75 crores had been raised from NNPLC's intermediate holding company NDTV Networks BV and the relevant details had been filed during the course of assessment proceedings forAY 2008-09.

2.3.2 Vide letter dated 05.12.2013, it was intimated to the assessee that on perusal of assessment record for AY 2008-09, no such documents were found. Accordingly, the assessee was given an opportunity to now file these documents, which were being claimed to have been filed by it earlier. The assessee was also intimated that it had not discharged the onus cast upon it in respect of the above transactions of raising unsecured loans.

2.3.3 In response, the assesse filed reply dated 09.12.2013 stating that with respect to the unsecured loans amounting to Rs. 254.75 crores, the source thereof was loan form NDTV Networks BV and the amount was duly disclosed in the books of NNPLC and NDTV Networks BV and the copies ofthefinancials statements of both the above subsidiaries were filed before the Ld. AO during the course of assessment vide submission dated 27.02.2013 & 11.03.2013. The copies of the said submissions were claimed to be duly enclosed as Annexure El & E2 of the reply dated 09.12.2013.

2.3.4 I have perused the assessee's letters dated 27.02.2013 (running into 10 pages) &11.03.2013 (running into 2 pages) marked as

Annexure E1 and Annexure E2 respectively. At the outset, it is submitted that there is no reference to the impugned issue of unsecured loans amounting to Rs. 254.75 crores raised during the year. The contents of the referred letters address certain queries raised by the AO and query regarding unsecured loans is not one of such queries. The bare letters are not even supported by any Annexures mentioned ion the said letters.

2.3.5 Under the circumstances, when the attached annexure-less letters do not contain any reference to query regarding unsecured loans nor attempt to address such query, therefore, filing of such letters does not serve any purpose

2.3.6 It is pertinent to mention that during the course of hearing before the Hon'ble DRPon 23.12.2013, the assessee has filed a reply on the issue. It has been stated by the assesseethat the Impugned unsecured loan has been raised pursuant to Loan Agreement dated 10.11.2008between Universal Studios International BV, NDTV, NNPLC and NDTV Networks BV.Confirmation from Universal Studios International BV is also stated to be attached. However,perusal of the attached confirmation reveals that although there is a mention regarding the bankaccount of Universal Studios International BV, namely BNP Paribas and copy of bankcertificate Is stated to have been attached, yet no bank certificate has been actually attached.

2.3.7 In view of the above, it is submitted that the assessee cannot be said to have discharged its onus of proving the identity of the lender, creditworthiness of the lender and the genuineness of the transaction. Even the copies of documents, wherever furnished by the assessee, are photocopies, not subject to any verification or enquiries. It is pertinent to place on record that any specific issues can be proved only by specific evidence and not on the strength of claimed reputation or volume of business of the lender. Hence, the assessee has not been able to prove

the source of addition in unsecured loans and the same is proposed to be added to the assessee's taxable income."

5.22. DRP has carefully considered this issue. Out of Rs. 365.25 crores representing unsecured loan, under reference, an amount of Rs. 110.5 crores is due to the restatement of the original amount pertaining to a transaction happened in the FY 2007-08 which was the subject matter of assessment for the AY 2008-09. It appears from the report that there was no disallowance made on the amount in the first place in the AY 2008-09. Therefore, to disallow Rs. 110.5 crores on account of reinstatement of the amount is not called for as rightly mentioned by the AO in his remand report dated 11.12.2013. (quoted in the earlier paragraph no. 5.18 on Page no. 22 onwards)

5.23. The AO has examined the said agreement and in his response dated 26.12.2013 has clearly brought out that even after the production of the copy of the agreement assessee has not discharged its onus of explaining the genuineness of the transaction. From a bare reading of the so called agreement copy by the DRP, it is found that the above loan is advanced without any interest, the reason for which has not been explained. The amount involved is quite a large sum of money. Further, as per this document, the interest free credit facility was to be granted on the basis of a duly completed utilization request, where as no such utilization request or basis for seeking the above credit facility has been produced by the assessee before the AO or before the DRP. We are therefore in agreement with the AO's finding that the onus of proving the genuineness of the loan transaction has not been discharged by the assessee. The AO is, therefore, directed to make addition of Rs. 254.75 crores."

9.6 In view of the above detailed facts and circumstances of the case and in compliance with the directions of the Hon'ble DRP as reproduced above, it is held that the assessee has failed to discharge its onus of proving the genuineness of the transaction of raising unsecured loan through its

subsidiary NDTV Networks Plc and hence, the amount of Rs. 254.75 crores representing the amount of such unsecured loan is added to the assessee' taxable income u/s 68 of the Act.

9.7 As I am satisfied that on this issue, the assessee has concealed the particulars of its income within the meaning of section 271(1)(c) of the Act, therefore, penalty proceedings are separately initiated."

121. The ld AR further submitted that copies of the loan agreement are provided wherein the credit facility of US$ 15 million (Rs.254.75 crores) was provided by NDTV Networks BV to NDTV Networks PLc. He submitted that the loan transaction supported by the balance sheet of the NDTV Network PLc and NDTV Network BV. He further referred to the bank statement of the lender as well as the borrower to show that above loan transactions have been executed by the bank account of NDTV Networks BV with Syndicate Bank, London. He also supported that the same money has been received in the bank account of NDTV Network PLC with Syndicate Bank. He further submitted that the copies of the ledger account of borrower from the books of the lender and of lender from the books of borrower. For the identity of the lender he submitted the deed of incorporation as well as the tax residency certificate issued by the Netherland Tax Authority. In view of this he submitted that assessee has proved the identity, creditworthiness and genuineness of the transaction. He further referred to written submission vide para No.

37	*GROUND NO. 4 TO 4.1 AND 5 TO 5.1 OF GROUNDS OF APPEAL ADDITION OF RS. 254,75,00,000/- REPRESENTING ALLEGED UNEXPLAINED UNSECURED LOANS RAISED BY THE STEP DOWN SUBSIDIARY OF THE APPELLANT COMPANY AND BROUGHT TO TAX IN THE HANDS OF THE APPELLANT COMPANY BY INVOKING SECTION 68 OF THE ACT*
37.1	*During the year under consideration, NNPLC raised a sum of Rs. 254.75 Crores from its intermediate holding company NDTV Networks BV under a loan agreement*
37.2	*No addition with respect to the above was made in the draft assessment order objected before the DRP. The addition was made by the DRP on the basis of the remand report of the AO made in pursuance of a specific request raised by the AO to the DRP to cause further enquiry as certain issue had not been considered while completing the draft assessment order. Such request was made by the AO for the following two issues which are mentioned at page 865 of the paper book Volume - III wherein it has been stated that unsecured loans were allegedly received by the appellant through its subsidiary NNPLC and the tax implications*

	thereof (factually this assertion is wrong as the amount in question was raised by NNPLC – a separate assessee, which raised funds from its group company namely NNBV and no amount was received by the appellant in respect of the alleged transaction).			
37.3	A tabular chart stating the basis of the disputed addition and contentions of the appellant is given below			
		Basis adopted for making the addition or disallowance	Appellant's rebuttal submission	Evidenc
		In the draft order No addition was proposed in the draft assessment order		
		In the final order (1) The allegation in the remand report is that the appellant failed to establish the identity, creditworthiness of the lender and also the genuineness of the loan transaction.	The allegation is incorrect. The appellant had duly filed the balance sheets of NNBV (lender) and NNPLC (borrower) in the course of assessment and remand proceedings. In addition to the above, on 23.12.2013 & 24.12.2013, the appellant had further submitted additional information/details which include copy of loan agreement, copy of bank statement of NNPLC and NNBV, copy of loan account in both lenders and borrowers books, copy of tax residency certificate of NNBV, copy of deed of incorporation of NNBV. The issue of non	Copy of ba sheet of N vide submission 26.11.2013 also 27.02.0213 Copy of ba sheet of NI vide submission 26.11.2013 also 11.03.2013 Copy of l account NNPLC in books of NN Copy submission (along annexures) with AO/DR 24.12.2013 Copy submission 24.12.2013 (along annexures

			charging of interest as well as utilization of credit has not been confronted to the appellant and in order to reject the evidences the addition was made which came to the knowledge only on receipt of DRP directions. On merits charging of interest to a group company is based on commercial expediency having a holding and subsidiary relationship. *Further, the loan given is utilised in accordance with the request of credit utilisation.*	*additional evidence) with DRP*	*filed*	
		(2) DRP alleged that the transaction could not be genuine on account of a reason that such a huge amount of loan is given without interest and further as per the loan agreement, utilization of credit is not submitted by the appellant.				
37.4	*In addition to the above, following issues also need to be considered which is given separately in the detailed note.* • *Powers/jurisdiction of the AO to make request to the DRP to cause further enquiry on issues which were not raised in the draft assessment order* • *Powers/ jurisdiction of DRP for enhancement of total income on account of taxing a new source of income.* • *NNPLC is a separate assessee and therefore, no addition could be made in the hands of the appellant.*					
37.5	*In regard of the above addition, firstly the applicant most respectfully submitts that on the facts of the case and in law, the Ld. DRP had exceeded its jurisdiction while directing the Ld. AO to conduct an enquiry by invoking provisions of section 144C (7)(b) of the Act on the matters which have been reported by the Ld. AO himself after completing the draft assessment order by way of application dated*					

	August 20, 2013 at the back of the assessee which in itself is bad in law and is not in consonance with the provisions of section 144C of the Act. (Copy of the said request of the AO to DRP is enclosed as Annexure –and copy of directions issued by the DRP to the AO dated October 28, 2103 at page 856 of Paper Book-III) In addition of the above, the show cause of enhancement issued on the basis of the remand report on the above addition and the direction thereof by the Hon'ble DRP to add the above amount in the total income of the assesee is completely illegal and without any jurisdiction.
37.6	*The applicant most respectfully submits that before it proceeds with facts of the case and merits of the additions, the jurisdictional issue arising on account of the above addition needs to be adjudicated first. Accordingly, the applicant here-in-below address the jurisdiction issue first which applicant fervently believes would be decided in favour of the assesee, and thus, said addition deserves to be deleted on this ground alone. On the facts of the case and from the order of the Hon'ble DRP, following legal/jurisdiction issues would emerge in respect of the above additions:-* *i) Whether an assessing officer who became ex-officio by passing a draft assessment order could make request of further enquiry on issues which are not part of the draft assessment order?* *ii) Whether the DRP could issue directions on such request under section 144C(7)(b) of the Act?* *iii) Whether the DRP could make enhancement in the total income of the assesee on a completely new source of income which is not emanating from the draft assessment order?* *These questions are bound to be decided in favor of the applicant and hence no tax demand can be raised on the Applicant based on the enhancement made by the Ld. AO pursuant to the directions of the Ld. DRP.*
37.7	*The applicant most respectfully submitted that the action of the Ld. AO to make a request of further enquiries on issues which are not part of the draft assessment order was unprecedented, completely illegal and in violation of the principles of the due process of law. In the given facts of the case, it was submitted that the effect of such request of the AO to make further enquiries would result into a scenario where an ex-officio authority i.e. assessing officer, would re-commence the assessment proceedings or get jurisdiction over the applicant for assessment which stands concluded by passing a draft assessment order. The legislature had never intended to give such powers to the AO to interfere with proceedings pending before the appellate/higher authority to conduct a fresh draft assessment. It is now well settled principle that an assessment once made is final and that it is not open to the assessing officer to make fresh enquiries on any issue except by reopening the assessment under section 147 of the Act subject to the limitations, restrictions and conditions laid down in section 147 of the Act. In the given case, the draft assessment once made can be enquired, modified or interfered only in accordance with law and in the manner provided under section 144C of the Act. The Hon'ble Bench would appreciate that there is no provision in section 144C where an assessing office could made such request suo moto, therefore, it is submitted that the request of the AO dated August 20, 2013 and the directions of the DRP dated October 28, 2013 are completely illegal and without jurisdiction. Accordingly, it is submitted that no addition could be made on the basis of the illegal action under section 144C(8) of the Act.*
37.8	*The applicant further submits that the DRP has exceeded its jurisdiction in*

	bringing to tax the aforesaid amount of Rs. 254.75 Crores in the hands of the applicant company. Section 144C(8) of the Act empowers the DRP not only to confirm or reduce the variation proposed in the draft assessment order to the benefit of the assessee but also to enhance it to the prejudice of the assessee. This power of enhancement which is impliedly embedded in the matter of issuing directions, due to the use of expression `as it thinks fit', in section 144C(5) of the Act is now expressly set out in s. 144C(8) of the Act. If the DRP reaches the conclusion that the Ld. AO/TPO has erred in determining the total income of the assessee and thereby warranting further adjustments/additions, in that case the Hon'ble Panel could do so subject to the embargo that the said enhancement of income should either be emanating from the objections of the assessee before the Hon'ble Panel or the Hon'ble Panel suo moto finds out that the Ld. AO had failed to make such additions to the total income though the material was available on record.
37.9	*The Explanation to section 144C(8) of the Act inserted by the Finance Act, 2012 with retrospective effect from 01.04.2009 has widened the DRP's power of enhancement to all the matters arising out of the assessment proceedings irrespective of whether they were raised or not by the assessee. With this amplification of the power, even the matters not agitated by the assessee before the DRP can also be considered for the purposes of enhancement. Accordingly, in principle, the DRP was entitled to embark upon the question of enhancement in the draft assessment, however, such issue of enhancement would be based on an independent and suo moto directions of the Hon'ble Panel and not at the behest of the Ld. AO/CIT as done in the present case. Under the provisions of the Act, both the Ld. AO and CIT have enough powers to make enquiries for escapement of income or have revisionary powers under section 263 of the Act which could be exercised if there is any escapement of income or where the order is erroneous and prejudicial to the interests of the revenue.*
37.10	*Thus, it most respectfully submitted that no enhancement can be made in the present case on the issues for which enquiry has been conducted on the specific request of the Ld. AO/CIT as it amounts to abuse of due process of law and principles of natural justice.*
37.11	*Further, the assessee though not disputing the above powers of the Hon'ble DRP for enhancement, however, would like to bring to your Honours notice that by Finance Act 2012 an amendment has also been made under section 253 (2A) of the Act wherein the Commissioner has the right to appeal against the directions of the DRP under section 144C(5) of the Act. Thus, the entire scheme existing as on date shows that the DRP has a power similar to what is available with the CIT(A) under section 251 of the Act.*
37.12	*Therefore, the issues in respect of the powers of enhancement of CIT(A) as decided by the various courts are squarely applicable while making an enhancement in the present case, if any, based on the said remand report forwarded by the Ld AO.*
37.13	*In the case of CIT vs. Sardari lal and Company reported in 251 ITR 864 (Full Bench) on the issue that whether the CIT(A) has the power to tax a new source of income by exercising the powers of enhancement embedded u/s 251(1A) of the Act, it was held as under. The relevant paragraph of the decision is reproduced below.*

	"Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, decision in Union Tyres'case (supra) of this Court expresses the correct view and does not need re-consideration. This reference is accordingly disposed"
37.14	*Thus, the power of enhancement does not vest with the DRP in respect of any new source of income which was not at all considered by the Ld. AO during the course of the draft assessment proceedings. The direction of the DRP to bring to tax an amount of Rs. 254.75 crores in the hands of the applicant company is totally arbitrary and is not warranted under the present scheme of the provisions of the Act. Thus, any addition of a new source of income is totally unwarranted and deserves to be struck down on these jurisdictional issues.*
37.15	*On merits of the case, the applicant further submits that during the year under consideration, NNPLC raised a sum of Rs. 254.75 Crores from its intermediate holding company NDTV Networks BV under a loan agreement already furnished on record during the course of DRP proceedings.*
37.16	*It is further submitted that in respect of Rs. 245. 75 crores, the Ld. AO had alleged that no confirmation has been filed and no verification regarding the credit worthiness of the lender was afforded to this office, thus, in the absence of the same the said amount should be added under section 68 of the Act in the hands of NDTV. Here it is pertinent to add that with respect to an amount of Rs. 254.75 Crores, it is already submitted before the Ld. AO that the sum in question represents the loan form NDTV Networks BV and the amount is duly disclosed in the books of NNPLC and NDTV Networks BV and the copy of the financials statements of both the above subsidiaries were duly already on record. In order to substantiate that the transaction has been undertaken through ordinary banking process the copy of the bank statements of NNPLC and NNBV were also placed on record which now leaves no room of doubt about the genuineness of the said transaction.*
37.17	*The credit worthiness as well as the source of investment is duly substantiated from the cash flow statement of NNBV which is part of the financial statement and that the above loan was given out of the proceeds of share subscription by NBCU. All necessary documents with respect to the amount received from NBCU that is confirmation, identity, creditworthiness has already been placed on record during the course of the proceedings. Thus, the same could not be ignored as conclusive evidence that the loan transaction was genuine and making additions on account of surmrises and conjectures by the AO/DRP was completely unjustified.*
37.18	*In light of the above, Applicant company had duly discharged its onus in the course of the proceedings beyond any suspicion or doubt, though the transaction in question was not related to the books of accounts (standalone) of the applicant which was the subject matter of the impugned assessment proceedings. The amounts were shown as a liability in one of the subsidiaries of the assessee*

company, namely NDTV Networks Plc ('NNPLC'). Therefore, the directions of the DRP to add the said sum in the total income is arbitrary, illegal and deserves to be quashed on these grounds also in addition to jurisdictional issue as submitted above.

The Ld AO in spite of the above facts chose to draw incorrect inferences on the existence of NDTV Networks Plc by making misleading and erroneous submission, though in fact in the same proceedings assessee company had suffered a transfer pricing adjustment on account of Guarantee fee not being charged from NDTV Networks Plc.

Here it is pertinent to add that the Ld. AO had wrongly stated in questionnaire as well as in his request to DRP that the appellant had raised an amount of Rs 365,25,00,000/-. On the contrary the facts were that NDTV Networks plc (separate assessee) raised funds from its group subsidiary. The above fact was duly submitted before the Ld AO by the appellant in its submission dated November 26, 2013 (enclosed at page 1159 of paperbook IV, para 5) and in the same submission submitted that the existence of NDTV Networks plc, being a separate entity is supported by the fact that in immediate preceding year (AY 2008-09) due enquiry of its affairs were made in the course of the assessment proceedings.

Be that it may so, the finding to make such additions is based on following two accounts.

1. *Non charging of interest on such loan*
2. *Non production of utilisation request to seek such loan facility.*

At the outset it is submitted that the above findings are contrary to well settled law in making additions u/s 68 of the Act in view of the following submissions:-

Figures in Mn ($)	*Total*	*Nov 08*	*Dec 08*	*Jan 09*	*Feb 09*
Funding to NDTV Network Plc	*50.0*	*21.3*	*9.2*	*11.0*	*8.5*
Investment in verticals by NNPLC					
Imagine	*37.6*	*15.1*	*3.1*	*5.1*	*8.0*
Convergence	*1.2*	*0.0*	*1.2*	*0.0*	*0.0*
Lifestyle	*1.0*	*0.0*	*1.0*	*0.0*	*0.0*
Labs	*0.5*	*0.0*	*0.0*	*0.0*	*0.5*
NGEN	*0.6*	*0.6*	*0.0*	*0.0*	*0.0*
Total (A)	*41.0*	*15.7*	*5.4*	*5.1*	*8.5*
Interest Payment	*3.8*				
Loan repayment	*4.3*				
Other Expenses	*0.9*				

	Total (B)	*9.0*					
	Total (A+B)	*50.0*					

37.19	*In light of the above, it is further submitted that no addition is warranted on the preliminary objection that the said transaction is not related to the applicant and belongs to NNPLC which is a separate regular assessee before DDIT (International Circle) – 2(1), New Delhi. Thus, any addition in respect of this transaction is legally unsustainable and needs to be rejected.*
37.20	*At this stage, the applicant also submits that though for the above addition the lifting of corporate veil had not been specifically invoked as done in another addition, yet for the sake of argument, if it is assumed though not admitting that revenue intended to invoke lifting of corporate veil with respect of this addition as well. The consequent result of said assumption is that one of the subsidiaries of the assessee group i.e. NNBV had given a loan to other subsidiary of the assesee group i.e. NNPLC and for the fiscal nullity the existence of both the subsidiaries need to be ignored and to be assumed the transaction have been undertaken by the applicant company with self by debiting and crediting its own account which in no manner could result into a taxable event. The Hon'ble Supreme Court in the case of in the case of KikaBhai Premchand (Sir) vs. CIT reported in 24 ITR 506 (SC) has laid down that no man can be supposed to be trading with himself for the purpose of ascertaining taxable profits. The facts of the aforesaid case is not identical to facts of the assesee as stated above, yet the ratio of the said decision of Hon'ble Supreme Court canvassed that no income could arose to assesee while trading with self. In view of the above also, the transaction reported in NNBV and NNPLC books of accounts can have no implications on the taxable income of the Applicant Company. Accordingly, it is submitted that any addition in respect of this transaction is legally unsustainable and needs to be rejected*
37.21	*In view of the aforesaid, the addition made of Rs. 254,75,00,000/- may kindly be deleted.*

122. The ld DR submitted that in the statement recorded of the Director of the company Shri KLV Narayan Rao on 23.07.2015 wherein it has been stated in response to question No. 34 that most of the funds came to the Indian subsidiaries through NNPLC, which also included the loan of US$15 million. Therefore, this issue is still required to be examined.

123. We have carefully considered the rival contentions. The director of the company who is also signatory to the appeals as well as most correspondences was examined by the ld Assessing Officer on 23.07.2015. the copy of the statement was provided to the assessee along with the show cause notice dated 15.06.2016 issued u/s 271(1)(c) of the Act. In the reply submitted by the assessee before the Assessing Officer the request for cross-examination of Mr. Rao was not shown to have been made. The assessee has explained the statement of Mr. Rao and submitting its

reply at page no. 23 to 25 of its reply submitted on 02.11.2016. Even otherwise, Mr. Rao is the Director of the company and director of the some subsidiaries. He was also the CEO of the company. During the course of his examination, he was asked question No. 34 wherein the details of funds raised and retained of the foreign subsidiaries was asked. He replied that most of the funds came to the Indian subsidiaries particularly NDTV Imagine through NNPLC. According to him this included a loan of US$ 50 million, which came to NNPLC as a loan from NDTV BV and was in fact was out of subscription money received from NBCU. In view of this statement of the Director of company who was at the helm of the affairs we do not have any option but to set aside this ground of cross objection back to the file of the ld Assessing Officer with a direction to make a proper enquiry with respect to the loan of US$50 million. The ld Assessing Officer is further directed to carry enquiry also with respect to the fact that whether this loan amount was also out of subscription sum received from NBCU and is part of the total consideration of Rs. 642 crore to avoid any duplication of addition in the interest of justice. The assessee is also directed to submit the complete explanation with respect to the above loan with exhaustive evidences before the ld Assessing Officer. Needless to say that ld Assessing Officer after enquiry as deem fit confront the assessee with the result of the enquiry and after seeking the explanation of the assessee deal with the issue in accordance with the law. In the result ground No. 9 of the cross objection of the assessee is allowed with above direction.

124. Ground No. 10 of the CO is against the direction of the ld DRP stating that it has exceed its jurisdiction while directing the ld Assessing Officer to enhance the variation as a result of further enquiry in respect of loan transaction between NDTV Network PLC UK and NDTV Networks BV as such direction is outside the purview of the powers of the ld DRP. It was further contested that the ld DRP ought not to have issued any direction for taxing new source of income, which is emanating from the draft assessment order.

125. We have carefully considered the ground of cross objection as well as the argument of the assessee. According to the provision of section 144C(a) the Dispute Resolution Panel has power for enhancement to the variation proposed and further explanation added therein by the Finance Act 2012 with retrospective effect from

01.04.2009 also provides that the ld DRP has power to enhance the variation on any matter arising out of assessment proceedings relating to the draft order. Notwithstanding that such matter was raised or not by the eligible assessee. In view of this we dismiss ground No. 10 of the cross objection.

126. Ground No. 11 of the cross objection is with respect to the addition of Rs. 7840990/- u/s 14A of the Act.

127. The ld AR submitted that during the year assessee has shown investment of Rs. 49.42 crores however, no disallowance has been made u/s 14A of the Act read with Rule 8D. during the year, the company has received the dividend of Rs. 2512924/- only from one company and all other investments are outstanding from the earlier years. However, the ld Assessing Officer rejected the explanation of the assessee and invoked the provisions of Rule 8D and disallowed Rs. 7840990/- u/s 14A. Before the ld DRP the assessee did not object to the applicability of Rule 8D and method of calculation, however objected to the fact that AO has not recorded reasons before invoking Rule 8D. in view of this, the ld DRP directed the AO to record the reasons accordingly. Consequently, in the final assessment order vide para No. 5.2 at page No. 38 recorded the reasons and retained the disallowance.

128. The ld AR further placed before us his written submission at para NO. 38 to submit that no disallowance can be made as under:-

<table>
<tr><td>38</td><td><u>GROUND NO. 6 to 6.1 OF GROUNDS OF APPEAL:
DISALLOWANCE OF RS.78,40,990/- OF CLAIM OF DEDUCTION U/S 14A OF THE ACT</u></td></tr>
<tr><td>38.1</td><td>The Appellant is a listed company in Bombay Stock Exchange (BSE) / National Stock exchange (NSE). In the course of its business of news broadcasting it had made investments in its subsidiaries in India as well as outside India. In addition to the same, the company had also made investment in share capital of other Indian companies. The details of such companies are reproduced at page 95 of the appeal set wherein the appellant disclosed the year of investment as well as the dividend received during the year. For the sake of ease of reference, the details are reproduced in a tabulated manner below
<table>
<tr><th>Sr. No.</th><th>Particulars</th><th>Nature of Investment</th><th>Year on Investment</th><th>Amount Invested (Rs.)</th></tr>
<tr><td>1</td><td>NDTV News Limited</td><td>Equity Share Capital</td><td>Prior to 2002-03
2002-03</td><td>98,80,500
4,99,800</td></tr>
<tr><td>2</td><td>NDTV Media Limited</td><td>Equity Share Capital</td><td>2002-03
2003-04</td><td>507,000
79,93,000</td></tr>
</table></td></tr>
</table>

	3	NDTV BV (F.Co)	Equity Share Capital	2006-07	57,45,960
	4	NDTV Convergence Limited	Equity Share Capital	2006-07 2008-09	1,02,410 10,930
	5	NDTV Emerging Market BV (F.Co)	Equity Share Capital Share Application Money	2006-07 2008-09	5,17,500 622,92,000
	6	Metronation Chennai Limited	Equity Share Capital Share Application Money	2007-08 2008-09 2008-09	5,204,080 3,55,95,920 73,86,000
	7	NDTV One Holding Ltd (F.Co)	Equity Share Capital	2008-09	22,52,800
	8	EMAAR MGF Land Limited	Equity Share Capital	2008-09	12,52,89,565
	9	Delhi Stock Exchange	Equity Share Capital	2007-08	20,951,000
	10	Jai Prakash Power Venture Ltd.	Equity Share Capital	2008-09	21,00,08,682
			Total		49,42,37,147

38.2 It was submitted that out of the above investments, Rs. 6.97 crores is share application money against which shares are yet to be allotted (S. No 5 & 6). Accordingly, no exempt income can be earned. Further, a sum of Rs. 57.46 lacs was invested in shares of foreign companies, the dividend from which is not exempt under the provisions of the Act (S.No.3, 5 & 7). It was submitted that the balance investments were made out of retained earnings and were made in prior years, and those made in the year in question were also made out of retained earnings

38.3 The assessee incurred an interest expense of Rs. 14,64,77,381/-, out of which Rs. 421,22,422/- was incurred against the term loans, which can be utilized for specific purposes only. Further, there no expenditure incurred directly or indirectly in respect of making an investments in the shares of the above company. Therefore, the provisions of section 14A read with Rule 8D are not applicable on the facts of the case.

38.4 Here, the assessee respectfully submits that in order to invoke provisions of section 14A of the Act, the assessee had to incur any expense in relation to the investments from which an exempt income is earned.

38.5 A tabular chart stating the basis of the disputed addition and contentions of the appellant is given below.

Re: Disallowance u/s 14A	
Basis adopted for making the addition or disallowance	Appellant's rebuttal subm
In the draft order The Ld.AO applied provisions of section 14A read with Rule 8D and made disallowance under clause (B) & (C) of Rule 8D i.e. proportionate disallowance of interest expense paid on term loan for working capital and 0.5% of average investment held during the year	(i) The assessee has there is no expenditure ir or indirectly in connectio of an exempt income. The appellant also subr

	aggregating to Rs. 78,40,990/-	AO had failed to record his sa that expense had been incurre an exempt income.
	In the final order The DRP had rejected the contention of the appellant on application of section 14A read with Rule 8D and further, directed the AO to record his satisfaction (please refer to para 9 at page 30 of the appeal set) The AO in pursuance of the directions of DRP recorded his satisfaction wherein he stated that the claim of the appellant that no managerial expenses were incurred could not be accepted as the appellant is using the common infrastructure and common personnel for earning an exempt income from the mutual funds (appellant had not invested in any mutual funds).	The DRP had erred in law accepting the contention appellant that no expenditu incurred directly or indirectly appellant to earn an exempt and had also erred in directing to record his satisfaction and as per section 14A of the Act. The satisfaction recorded by th devoid of any merit as it fails to record that the appellant had any expenses or interest c earning an exempt income.
38.6	The appellant submits that no disallowance was made under section 14A of the Act till AY 2007-08 by the Ld AO in the assessments completed u/s 143 (3) of the Act and therefore, the investments made prior to AY 2007-08 should not have been considered at all by the AO while making a disallowance u/s 14A of the Act for the year under consideration. It is further submitted that the investments were made by the Appellant in its group companies on account of the business expediency as the same were engaged in the same line of business.	
38.7	In view of the above, the appellant places reliance on the decision of the Chandigarh Tribunal in the case of Spray Engineering Devices Ltd. reported in 23 taxmann.com 267 (Chd.) wherein the Honourable Tribunal has accepted the plea of the Appellant that the investments being made in the course of business do not warrant any disallowance under section 14A of the Act in view of the ratio laid down by the Hon'ble Supreme Court in S.A. Builders Ltd. reported in 288 ITR 1. In this regard, the Tribunal has made the following observation. "....Once the assessee has been found to have made a business investment by way of shares in related line of business, the said investment though held by way of shares in the said company cannot be subjected to disallowance under section 14A of the Act, which in any case is relatable to disallowance of the expenditure out of the exempt income earned by the Appellant, by way of its investment in shares of other company."	
38.8	Further, the appellant also submits that the AO failed to appreciate that the investments made in the share capital were from the retained earnings and no borrowing whatsoever had been made to make such investments. Therefore, in light of judgement in the case of East India Pharmaceutical Works Ltd. vs. Commissioner of Income Tax reported in 224 ITR 627 (SC) and Woolcombers of India Ltd. vs. Commissioner of Income Tax (Central) reported in 134 ITR 219, the Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities and power Ltd. reported in 313 ITR 340 held that as under: "If there be interest free funds available to an assessee sufficient to meet its investments and at the same time the assesssee had raised a loan it can be presumed that the investments were from the interest free funds available. In our opinion the Supreme Court in East India Pharmaceutical Works Ltd. (supra) had the occasion to consider the	

	decision of Calcutta High Court in Woolcombers of India Ltd. (supra) where a similar issue had arisen before the Supreme court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions....." *"It then noted that in Woolcombers's case (supra) the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the over draft account of the assesssee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business."*
38.9	*In view of the above, appellant prays that no disallowance u/s 14A of the Act read with clause (B) & (C) of Rule 8D is warranted.*
38.10	*The assessee is the ultimate holding company of the various group companies and had made investments in the earlier years in the group companies and others through its internal accruals only and not from the borrowings on which interest is paid. Accordingly, the assessee in the return of income did not make any disallowance under section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962.*
38.11	*It was further stated that the balance investments were made out of retained earnings and were made in prior years, and those made in the year in question were also made out of retained earnings. During the year the assessee had incurred an interest expense of Rs. 14,64,77,381/- out of which Rs. 421,22,422/- was incurred against the term loans, which could be utilized for specific purposes only and not for investments. Further, the remaining interest has been paid in relation to loans taken for working capital requirements and other expenses and no amount of interest bearing fund is utilized for making the investments in shares whose income is exempt so as to warrant any disallowance under section 14A of the Act.*
38.12	*The Ld. AO in complete disregard of above facts and on surmises observed that since the assessee has made investments in shares and the income from which in the form of dividend is tax exempt, therefore, the interest paid and other administrative cost were incurred by the assessee to earn such tax free income. Accordingly, the provisions of section 14A were attracted and in the absence of identification of such expenses recourse was taken to Rule 8D of the Rules.*
38.13	*The applicant being aggrieved with the above addition filed its objections before the Hon'ble DRP wherein it was submitted that in order to invoke provisions of section 14A of the Act following conditions need to be satisfied i.e.* • *Income should be earned during the year and such income should not form part of total income and;* • *Expenditure should have been incurred towards earning such income (claimed as deduction).*
38.14	*The applicant further submitted that it was also imperative for the Ld.AO to establish a direct or indirect nexus between expenditure alleged to have been incurred and exempt income. Thus, merely because the assessee made an investment in shares would not per se give rise to vague suspicion that for making investment there is an expenditure incurred. In order to invoke provisions of section 14A of the Act, the assessing officer ought to record his satisfaction that the claim of the assessee that no expenses were incurred in relation to making investments in shares is incorrect before applying the provisions of Rule 8D of the*

	Rules.
38.15	In this regard, reliance was placed on the following judicial precedents; • 326 ITR 1 (SC) CIT vs. Walfort Share and Stock Brokers Pvt. Ltd. • 347 ITR 272 (Del.) Maxopp Investment Limited vs. CIT
38.16	Further, the allegation in the assessment order is devoid of any merit as the Ld. AO failed to appreciate that the majority of investments were made in prior years out of the accumulated reserves and capital, and there could not be any administrative cost incurred during the year as there was no material movement in portfolio of investment in shares of group companies and the investments were made in order to maintain majority stake in such companies, and therefore, no disallowance could be made under section 14A of the Act.
38.17	Reliance was also placed on the following judicial precedents; • 323 ITR 518 (P&H) CIT vs. Hero Cycles Ltd. • 319 ITR 204 (P&H) CIT vs. Winsome Textile Industries Ltd.
38.18	The Hon'ble DRP has exceeded its jurisdiction and erred in directing the Ld. AO to record his reasons before invoking the Rule 8D of the Income Tax Rules, 1962 and proceed as per section 14A of the Act without first disposing off the issue of applicability of section 14A of the Act on merits as raised by the Applicant in the proceedings before the Hon'ble DRP.
38.19	The applicant most respectfully submits that on the facts of the present case no addition is warranted under section 14A of the Act in light of the submissions made above. In addition to the above, it is most respectfully submitted that the majority of investments were made by the assessee company in its subsidiaries to acquire majority stake in furtherance of its business objectives in media space, therefore, such strategic investments cannot be deemed to have made for earning dividends and no addition whatsoever could be made under section 14A of the Act.
38.20	Apart from the above it is also submitted that mechanical and, erroneous application of section 14A of the Act is not tenable. The appellant in support of the above, seeks to rely upon the following judgments: i) 360 ITR 68 (Del) CIT vs. M/s Hero Management Service Ltd. "4. The assessee had made investment of Rs.2,44,71,261/- in mutual funds. The substantial investment of Rs.2 crores was made, as noticed above, from share allotment money. Dividend of Rs.3,95,439 was received from this fund. Dividend of Rs.153/- and Rs.1649/- was received from two mutual funds. Thus in all dividend income of Rs.3,97,241/- was received. The assessee had himself disallowed an amount of Rs.99,310/- under Section 14A. The tribunal has held that the aforesaid disallowance was reasonable. The Assessing Officer had disallowed an amount of Rs.69,65,686/- and held this was the reasonable expenditure incurred to earn dividend income of Rs.3,95,439/-. In view of the facts noticed above, the contention of the revenue is rather far-fetched, if not perverse and illogical. 5. Calculation mistakes while applying Rule 8D were pointed out by the respondent-assessee, but these have not been adverted to in view of the findings recorded by the tribunal on merit. Rule 8D is not retrospective as held by this Court in Maxopp Investment Limited v. CIT, (2012) 347 ITR 272 (Del.). Further to invoke Rule 8D, the Assessing Officer has to first record a finding that he was not satisfied with the correctness of the claim for expenditure made by the assessee in relation to income, which did not form part of the total income under the Act. No

such satisfaction has been recorded by the Assessing Officer." [Emphasis supplied]

ii) 347 ITR 272 (Del) Maxopp Investment Ltd. vs. CIT
"The expression "in relation to "does not have any embedded object. It simply means "in connection with" or "pertains to". If the expenditure en question has a relation or connection with or pertains to exempt income it cannot be allowed as a deduction even if it qualifies under other provisions of the Act. The actual expenditure that is in contemplation under section 14A(1) f the Act is the "actual" expenditure in relation to or in connection with or pertaining to exempt income. The corollary to this is that if no expenditure is incurred in relation to the exempt income, no disallowance can be made under section 14A of the Act"

iii) 328 ITR 81 (Bom) M/s Godrej and Boycee Mgf. Co. Ltd. vs. DCIT
iv) ITA No. 1050/Mum/2010 Assessment Year 2008-09 dated 5.8.2011 M/s Multi Commodity Exchange of India Ltd. vs.
v) ITA No. 814/De/2011 for A.Y: 2008-09 Jindal Photo Ltd. vs DCIT
vi) ITA No. 3185/Mum/2011 Assessment Year 2008-09 dated 30.4.2012 M/s Auchtel Products Ltd. vs. ACIT
vii) ITA No. 47/Kol/2012 Assessment Year 2008-09 dated 22.8.2012 Hindusthan Paper Corporation Ltd. vs. DCIT
viii) 140 TTJ 73 (Cal) Balarampur Chini Mills Ltd. vs. DCIT

"8. Here in the present case, there is no linkage or nexus between the funds borrowed by assessee and the impugned investments, hence, no interest expenditure can be disallowed by mechanically applying the Provisions of Rule 8D of the Rules. The assessee has explained that the share capital and reserves, that is its own funds, were utilised for the purpose of investment in shares for earning dividend income and this has not been negated by lower authorities i.e. neither CIT(A) nor AO. The assessee has explained each and every investment with sources of funds and its utilization as well as opening application of funds and closing application of funds as noted above. It is an admitted position in law that expenditure can be disallowed U/s.14A of the Act if and only if it is incurred in relation to income which does not form part of total income.
From the facts of the present case, it is clear that there is no link with expenditure for earning of dividend income incurred by the assessee and once the facts are clear, no disallowance can be made by invoking rule 8D of the Rules. Neither the AO nor CIT(A) has recorded any finding that having regard to the account of the assessee, they are not satisfied with the correctness of the claim of expenditure made by assessee or the claim made by assessee that no expenditure has been incurred in relation to income which do not form part of the total income under the Act for the relevant assessment year. In the absence of any such finding, facts of the present case shows that the investment in shares was made out of own capital employed and not from borrowed funds, no disallowance on account of interest expenditure can be made by invoking rule 8D of the Rules. Accordingly, in the given facts and circumstances, we delete the addition and allow this issue of assessee's appeal."
ix) ITA No. 16/Chd/2012 Assessment Year 2008-09 dated 6.3.2012 DCIT vs. M/s Oswal Wollen Mills Ltd.
x) ITA NO. 5231/D/2002 A.Y. 2008-09 dated 17.1.2014 M/s J.H. Fin-vest Pvt. Ltd. vs. DCIT
xi) ITA No(s) 3463/D/2011 & 4697/D/2011 A.Y(s) 2007-08 and 2008-09 dated

	17.01.2014 ACIT vs. M/s ACB (India) Ltd. *"12 In view of the above language of section 14A(2) and (3) and also relying upon the decision of Hon'ble jurisdictional High Court in the case of Maxopp Investment Ltd., we hold that the Assessing Officer is required to record the satisfaction that he is not satisfied with the claim of the assessee with regard to incurring of no expenditure or the amount of the expenditure as specified by the assessee for earning of exempt income before embarking upon the determination of the amount of expenditure incurred in relation to exempt income under section 14A(2). Accordingly answer to question no. (ii) is also in affirmative."*
38.21	*It is submitted that disallowance cannot be made in respect of shares from whom dividend was not received by the appellant as has been held in the following judicial pronouncements:* *i) 160 TTJ 107 (Kol) M/s REI Agro Ltd. vs. DCIT* *ii) 45 taxmann.com 116 (Guj) CIT vs. Corretch Energy (P) Ltd.* *iii) ITA No. 88/2014 (All) CIT vs. M/s Shivam Motors (P) Ltd.* *iv) ITA NO. 110/2009 (Bom) CIT vs. Delite Enterprises*
38.22	*Based on the factual and legal arguments given above, your Honours would appreciate that the provisions of section 14A of the Act read with Rule 8D ought not to be invoked in the Applicant's case and the proposed disallowance deserves to be deleted.*
38.23	*In view of the aforesaid, the disallowance made of Rs. 78,40,990/- may kindly be deleted.*

129. The ld DR submitted that AO has recorded his satisfaction about the assessee's calculation and therefore his conclusion would not be rejected. For this, he relied upon the decision of the Hon'ble Delhi High Court in case of Indiabulls Financial Services Ltd. Vs. DCIT 76 Taxmann.com 268. He further relied upon the decision of Hon'ble Supreme Court in case of Godrej and Boyce Manufacturing Co. Ltd Vs. DCIT 81 Taxmann.com 117. In the end, he submitted that the matter must be set aside to the file of the AO.

130. We have carefully considered the rival contentions and have also considered the reasons recorded by the ld Assessing Officer vide para No. 5.2 of the final order. The ld Assessing Officer has recorded the satisfaction as under:-

> *"5.2 On this issue, it is observed that no managerial expenses in respect of investment made by the assessee in group companies and other companies have been reflected or disallowed and offered for taxation. The assessee has claimed having incurred Nil expenditure in respect of these investments. It is pertinent to mention here that the assessee company has common*

infrastructure and common personnel for earning income under various heads, but still, no separate expenditure was booked for earning the exempt income comprised in the mutual funds. Therefore, it is fair and reasonable to conclude that the assessee has earned both exempt as well as taxable income by using common facilities and common manpower. Hence, it cannot be said that no part of expenditure was incurred to receive income under any particular head. In the absence of separate accounts being maintained by the assessee, the expenditure in relation to the income, which does not form part of total income, has been worked out on the basis of guidelines provided in Notification No. 45/2008 dated 24.03.2008 and the method prescribed under Rule 8D of I.Tax Rules, which has not been objected by the assessee, as recorded by the DRP in its directions, and which is as summarized as follows :-

Sl. No.	*Procedure to be followed to work out the expenditure in relation to exempt income*	*Amount disallowable*
1	*The amount of expenditure directly relating to the income, which does not form part of total income*	*NIL*
2	*Where the assessee has incurred expenditure by way of interest, which is not directly attributable to any particular income or receipt, then the amount computed = (A x B)/ C* *A= Intt. Other than interest included in clause (i)* *B= average value of investment in Balance sheet on the 1st day and last day of previous year, income from which does not or shall not form part of the total income* *C= average of total assets in Balance sheet on the 1st day and last day of previous year*	*Rs. 66,88,490/-**
3	*An amount equal to ½% of average value of investment in Balance sheet on the 1st day and last day of previous year, income from which does not or shall not form part of the*	*Rs. 11,52,500/-**

	total income	
	Expenditure incurred in relation to exempt income	Rs. 78,40,990/-

* As computed in draft assessment order and reproduced in para 5 above.

5.2 On this issue, it is observed that no managerial expenses in respect of investment made by the assessee in group companies and other companies have been reflected or disallowed and offered for taxation. The assessee has claimed having incurred Nil expenditure in respect of these investments. It is pertinent to mention here that the assessee company has common infrastructure and common personnel for earning income under various heads, but still, no separate expenditure was booked for earning the exempt income comprised in the mutual funds. Therefore, it is fair and reasonable to conclude that the assessee has earned both exempt as well as taxable income by using common facilities and common manpower. Hence, it cannot be said that no part of expenditure was incurred to receive income under any particular head. In the absence of separate accounts being maintained by the assessee, the expenditure in relation to the income, which does not form part of total income, has been worked out on the basis of guidelines provided in Notification No. 45/2008 dated 24.03.2008 and the method prescribed under Rule 8D of I.Tax Rules, which has not been objected by the assessee, as recorded by the DRP in its directions, and which is as summarized as follows :-

Sl. No.	Procedure to be followed to work out the expenditure in relation to exempt income	Amount disallowable
1	The amount of expenditure directly relating to the income, which does not form part of total income	NIL
2	Where the assessee has incurred expenditure by way of interest, which is not directly attributable to any particular income or receipt, then the amount computed = (A x B)/ C A= Intt. Other than interest included in clause (i)	Rs. 66,88,490/-*

	B= average value of investment in Balance sheet on the 1st day and last day of previous year, income from which does not or shall not form part of the total income *C= average of total assets in Balance sheet on the 1st day and last day of previous year*	
3	*An amount equal to ½% of average value of investment in Balance sheet on the 1st day and last day of previous year, income from which does not or shall not form part of the total income*	*Rs. 11,52,500/-**
	Expenditure incurred in relation to exempt income	*Rs. 78,40,990/-*

** As computed in draft assessment order and reproduced in para 5 above.*

131. In view of the above of the ld Assessing Officer that the assessee has not been disallowed any expenditure and further the Nil expenditure could not have been incurred in relation to exempt income because of common infrastructure and expenditure. Therefore, relying on the decision of the Hon'ble Delhi High Court in Indiabulls Financial Services Ltd Vs. DCIT(supra) the disallowance is required to be made u/s 14A of the Act. Further, the income of the dividend income from the foreign subsidiary is not exempt. Therefore, that investment must not be included while working disallowance u/s 14A. further, if the assessee has tax-free funds available more than the amount of investment then no disallowance with respect to the interest expenditure can be made of the nexus is not proved by the Assessing Officer. in view of all these facts in the interest of justice we set aside the issue of disallowance u/s 14A back to the file of the ld AO with a direction to recomputed disallowance after giving assessee a reasonable opportunity of hearing. The assessee is also eligible to raise relevant contention and submit the relevant details to support its claim. In view of this ground No. 11 of the cross objection is allowed accordingly.

132. Ground No. 12, 13 of the appeal are with respect to computation of arms length price with respect to the business support services where the ALP was determined an adjustment of Rs. 7463229/- was made. The contention of the assessee is that price received was Rs. 74687177/- is taken instead of Rs. 75277881/-. The ld AR

submitted that assessee has been denied the benefit of working capital benefit while considering the adjustment. He further submitted that the objection were raised before the ld Dispute Resolution Panel, however, same were not considered by the ld DRP.

133. The ld DR fairly agreed that if the assessee is entitled for working capital adjustment then the ld Transfer Pricing Officer may be given an opportunity to examine the claim of the assessee and if same is found in accordance with the law then it may be granted.

134. We have carefully considered the rival contentions. The only claim of the assessee is to grant assessee the adjustment on account of working capital. The ld DR has also fairly agreed to that. Therefore, we set aside ground Nos 12 and 13 of the appeal of the assessee back to the file of the ld TPO with a direction to the assessee to submit the details of working capital adjustment to the ld Transfer Pricing Officer and if the ld TPO find it after examination in accordance with the law then same may be granted to the assessee. In the result ground Ns. 12 and 13 of the cross objection are allowed with above direction.

135. Ground No. 14 of the appeal is with regard to an addition of Rs. 43502400/- in respect of alleged international transaction of provision of corporate guarantee on the ground that appellant has been compensated from providing such alleged guarantee. The assessee has also challenged that merely giving an undertaking to provide guarantee on behalf of its associated enterprise does not amount to providing any guarantee.

136. Bothe the parties agreed that whether corporate guarantee is an international transaction or not is a matter pending before the Special Bench of the Tribunal. In view of this both the parties requested to setting aside this ground of appeal to file of TPO with a direction to decide after the order of the Special Bench.

137. We have carefully considered the request of both the parties, which is fair and proper. As the matter is pending before the special bench it would also not be proper for us to decide the issue now. in view of this we set aside this ground of cross objection of the assessee to the file of the ld TPO with a direction to decide the issue after the decision of the Special Bench of tribunal. In the result ground No. 14 of the CO is allowed with above direction.

138. Ground No. 15, 16 and 17 are with respect of charging of interest u/s 234B and 234D of the Act, withdrawal of interest u/s 244A of the Act and initiation of penalty proceedings u/s 271(1)(c) of the Act respectively.

139. Both the parties agreed before us that all the three above grounds of the cross objection are consequential to the determination of income of the assessee. Therefore, these grounds may be dismissed.

140. We have carefully considered the rival contentions and we agree with the agreement of the parties that above three grounds of cross objection are consequential in nature. Therefore, we dismiss them.

141. **In the result, cross objection filed by the assessee succeeds partly.**

142. In the end, we are expressing our sincere gratitude to the Ld Counsel for the assessee Sr. Advocate Shri C S Agarwal, Standing Counsel of the revenue Shri Girish Dave and Advocate Shri K.M. Gupta and CA Shri Gautam Jain assisting Shri Agarwal for their excellent exposition of law on the facts of the present case for continuous four days before us explaining their side on each and every aspects of the structuring and transactions involved, at least we are enriched by their wisdom

Order pronounced in the open court on 14/07/2017

(I.C.SUDHIR)
JUDICIAL MEMBER

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 14/07/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi