आयकर अपीलीय अधिकरण "जे" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

श्री शक्तिजीत दे,न्यायिक सदस्य **एवं**
श्री मनोज कुमर अग्रवल, लेख सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आ करअपील सं./ I.T.A. No.2822/Mum/2017
(**निर्धारण वर्ष** / Assessment Year:2009-10)
&
आयकरअपील सं./ I.T.A. No.2823/Mum/2017
(**निर्धारण वर्ष** / Assessment Year:2010-11)

Voltas Limited Voltas House-A Dr. Babasaheb Ambedkar Road Chinchpokli, Mumbai-400 033	**बनाम**/ Vs.	**DCIT–Range-8(3)(2)** Aaykar Bhavan, M.K. Road Mumbai-400 020.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAACV-2809-D		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&
आयकरअपील सं./ I.T.A. No.3356/Mum/2017
(**निर्धारण वर्ष** / Assessment Year:2009-10)
&
आयकरअपील सं./ I.T.A. No.3357/Mum/2017
(**निर्धारण वर्ष** / Assessment Year:2010-11)

DCIT–Range-8(3)(2) Aaykar Bhavan, M.K. Road Mumbai-400 020.	**बनाम**/ Vs.	**Voltas Limited** Voltas House-A Dr. Babasaheb Ambedkar Road Chinchpokli, Mumbai-400 033
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACV-2809-D**		
(पीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Nitesh Joshi–Ld. AR
Revenue by	:	Shri Pankaj Kumar- Ld.DR

सुनवाईकीतारीख/ **Date of Hearing**	:	22/07/2019

घोषणाकीतारीख / **Date of Pronouncement**	:	17/10/2019

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1.1 Aforesaid cross-appeals for Assessment Years [AY] 2009-10 & 2010-11 contest separate orders of lower authorities on certain common grounds of appeal and hence, taken up together for the sake of convenience & brevity. First, we take up cross-appeals for AY 2009-10 which is against the order of Ld. Commissioner of Income Tax (Appeals)-58 Mumbai [CIT(A)], Appeal No. CIT(A)-58/301/3013-14 dated 23/01/2017.

1.2 The grounds raised by the revenue reads as under: -

1. Whether on the facts and circumstances of the case, the learned CIT(A) failed to appreciate the fact that the sale consideration shown by the assessee company is less than the Stamp duty valuation in contravention of the provision of Sec. 50C of the I.T. Act?
2. Whether on the facts and circumstances of the case the learned CIT(A) erred in directing the Assessing Officer to adopt the sales consideration at Rs.330.00 lakhs as against the stamp duty valuation adopted by the Assessing Officer while computing capital gains?
3. Whether the Ld. CIT(A) is right in deciding the ALP rate for the advance to be 5.76% for A. Y. 2009-10 without considering the situs and the currency of the transaction, on the basis of unverified assumptions?
4. Whether the Ld. CIT(A) has not erred by not computing the ALP interest rate in a scientific approach using the appropriate commercial databases which give the ALP rate to be 7.61 % instead of the 5.76 % for AY 2009-10 which has been computed in a adhoc manner?

   The Ld. CIT(A)'s order is contrary to law and on facts and deserves to be set aside and A.O 's order may be restored.

1.3 The grounds raised by the assessee reads as under: -

GROUND NO 1: DISALLOWANCE U/S 14A

The learned Commissioner of Income-tax Officer (Appeals) [hereinafter referred to as the CIT(A)] and the Assessing Officer [hereinafter referred to as the AO] failed to appreciate that the Appellant Company had on its own, offered Rs.13.50 lakhs as disallowance u/s.14A, being Operating & Administrative Expenses and Establishment / General Expenses, which could be considered as attributable towards earning exempt dividend income. The CIT(A) has disallowed 0.5% of average investments (excluding foreign investments, investment in Govt. Securities and FMP's which are subject to tax), which is unwarranted.

The Appellant Company therefore prays that the additional disallowance made by the CIT(A), over and above the disallowance of Rs.13.50 lakhs voluntarily offered by the Appellant Company be deleted.

GROUND NO 2: ADJUSTMENT ON ACCOUNT OF TRANSFER PRICING.

Advance of Rs. 11,41,62,123 was paid towards Share Application Money to Saudi Ensas Company for Engineering Services WLL (Saudi Ensas) in Kingdom of Saudi Arabia (a wholly owned subsidiary) by the Appellant Company during the financial year 2008-09, for which allotment of shares was pending on 31st March, 2009 due to time consuming legal process involved in Kingdom of Saudi Arabia. Delay in allotment of Shares cannot be construed that the amount paid as Advance Share Application Money was deemed Loan on which, notional interest has been charged. Re-characterization of Advance Share application as Loan is unwarranted. The approval / clearance granted by the Saudi Arabian General Investment Authority (SAGIA) for increase in Share capital of Saudi Ensas and the fact that the Appellant Company received the required clearance from the Ministry of Commerce, which was published in the Local Official Gazette on 17.12.2015 is sufficient to prove that the advance paid was towards Share Application Money and not a Loan.

The Appellant Company prays that the transfer pricing adjustment towards notional interest be deleted.

2. We have heard the rival submissions advanced by respective representatives, given thoughtful consideration to material on record and deliberated on judicial pronouncements cited before us. Our adjudication to the issues raised in cross-appeals is given in succeeding paragraphs.

3.1 The material on record would establish that the assessee being resident corporate assessee stated to be engaged in manufacturing of household electrical appliances was assessed for the impugned AY on 22/03/2013 u/s 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 by Ld. Addl. CIT- Range-7(3), Mumbai [AO] wherein the income of the assessee

was determined at Rs.361.21 Crores after certain additions / adjustments and disallowances as against returned income of Rs.353.25 Crores filed by the assessee on 29/09/2009 which was revised at same figure on 29/03/2011 to claim credit for additional TDS.

3.2 As evident from grounds in cross-appeals, the following issues crop up from the orders of lower authorities: -

No.	Nature of Additions	Amount (Rs.)
A.	**Non-transfer Pricing Grounds**	
1.	Disallowance u/s 14A	Rs.117.90 Lacs
2.	Capital gains u/s. 50C of the Act	Rs.342.23 Lacs
B.	**Transfer Pricing Grounds**	
3.	TP adjustment on Share Application Money	Rs.160.09 Lacs

The assessee is aggrieved on account of confirmation of disallowance u/s 14A and partial confirmation of Transfer Pricing adjustments whereas revenue is aggrieved by relief provided to the assessee by Ld. CIT(A) on account of Capital Gains and Transfer Pricing Adjustments.

A. Non-Transfer Pricing Grounds

3.3.1 Disallowance u/s 14A

During assessment proceedings, it transpired that the assessee earned exempt dividend income of Rs.15.82 Crores including dividend income from Indian Companies and Mutual Fund amounting to Rs.11.14 Crores. In its computation of income, the assessee offered suo-moto disallowance of Rs.13.50 Lacs which mainly comprised-off of proportionate salary and administrative expenses. In defense, it was submitted that it did not incur any interest cost on borrowings for investment purposes. It was further

submitted that investment portfolio was handled by its MIS department which primarily attend to the Accounts and Banking Operations and the assessee do not have any separate investment department. The attention was drawn to the fact that the staff cost and operating / administrative expenses of MIS department was apportioned at Rs.13.50 Lacs and the same was already disallowed. However, rejecting the same, Ld. AO proceeded to invoke Rule 8D and worked out expense disallowance of Rs.131.40 Lacs u/r 8D(2)(iii) which was computed @0.5% of average investments held by the assessee. After adjustment of suo-moto disallowance of Rs.13.50 Lacs, the net disallowance thus worked out to be Rs.117.90 Lacs.

3.3.2 Before Ld. first appellate authority, the assessee, *inter-alia,* pleaded that Ld. AO did not arrive at requisite satisfaction that the computation of disallowance by the assessee was incorrect before proceeding to apply Rule 8D and therefore, the additional disallowance was not justified. However, the said arguments could not find favor with Ld. CIT(A) and the same were rejected by observing as under: -

> With respect to the claim of the appellant that the AO has not arrived at a satisfaction that the computation of disallowance by the applicant company is incorrect. It is seen that the AO has discussed the issue in detail. He has observed that the expenses with reference to investment of such high magnitude did not involve time of only lower personnel but also the key management personnel. It is clear that the expenditure for MIS division has been allocated while the manhours of other persons has not been allocated. Accordingly, he has concluded that the computation of the appellant is not correct. There is no formal documentation which the AO is required to generate for rejecting the computation of the appellant. In the case of Indiabulls financial services Ltd [TS-643-HC-2016 (Del)], the Delhi High Court has ruled that it is not necessary for the AO to expressly record his satisfaction before invoking Rule 8D.

However, the assessee's plea for exclusion of investments in foreign companies whose dividend was taxable and companies under liquidation which were not going to give any income, found favor with Ld. first appellate authority, who directed for exclusion of aforesaid investments by observing as under: -

> The appellant has submitted that the investment amount taken by the AO includes investment in foreign companies whose dividend is taxable and companies under liquidation which are not going to give any income. It has claimed that these investments should be excluded while computing the average investment for the purpose of Rule 8D(2)(iii). The submission made by the appellant is found acceptable. The investment which generates taxable income and investment which is under write off should be excluded while adopting the average amount of investment which generates tax-exempt income. A similar view has been taken by CIT(A) in AY 2008-09 while deciding this very issue at para 2.6 of his order. The AO is directed to recompute the average investment value accordingly.

Still aggrieved, the assessee is in further appeal before us.

3.3.3 Upon due consideration, we find that Ld. first appellate authority has clinched the issue in the correct perspective. We are not convinced with the plea that Ld. AO has not recorded the requisite satisfaction before proceeding to apply Rule 8D(2)(iii). It is evident from the discussion made by Ld. AO in para 6.2 that the assessee did not furnish the basis of allocation of the expenses suo-moto disallowed by him. It was also observed that the part of salary and expenses attributed towards earning of dividend income bear no co-relation with the earning of the dividend income or the man-hours allotted to the activities resulting into the earning of dividend. Therefore, we are unable to concur with Ld. AR's argument, on this point.

3.3.4 So far as the merits of the case are concerned, we find that this issue was restored by Tribunal to the file of learned AO in AY 2008-09 vide para 4.3.4 of ITA No. 1667/Mum/2012 order dated 08/07/2016, wherein learned AO was directed to examine the sufficiency or correctness of suo-moto disallowance made by the assessee having regards to assessee's accounts and explanations and proceed further after recording speaking reasons for non-satisfaction. We note that, in this AY, learned AO has already rejected the assessee's working. Nevertheless, with a view to enable revenue to take consistent stand in the matter, we restore the matter back to the file of learned AO on similar lines. The learned AO is directed to reappreciate the disallowance made by the assessee and invoke Rule 8D only if not satisfied with assessee's working of disallowance. It is made clear that if the disallowance is computed in terms of Rule 8D(2)(iii) then apart from the directions of Ld. CIT(A) to exclude certain investments, those investments which have not yielded any exempt income during the year under consideration would also be excluded as per the decision of Delhi Tribunal (Special Bench) rendered in **ACIT Vs. Vireet Investment (P.) Ltd. [82 Taxmann.com 415].** Accordingly, Ground No.1 of assessee's appeal may be treated as partly allowed for statistical purposes.

3.4.1 Capital gains u/s 50C of the Act

The assessee reflected capital gains from sale of certain Land & Building situated at *Sangareddy, Hyderabad*. Upon perusal of details, it transpired that the assessee sold freehold land admeasuring 11 acres along with building to Sri Shiva Sai Constructions [SSSC] vide Sale Deed dated

18/07/2008 for aggregate consideration of Rs.325 Lacs. This Land and Building formed part of fixed assets. Accordingly, the sales proceeds of Rs.325 Lacs were apportioned in the following manner: -

No.	Head	Amount (Rs.)
1.	Land	280.75 Lacs
2.	Building	43.91 Lacs
3.	Electrical Fittings	0.34 Lacs
	Total	**Rs.325 Lacs**

The said apportionment was done as per valuation done by independent Chartered Engineers & Govt. registered value namely M/s G.D. Rao & Associates vide valuation report dated 02/06/2007. The resultant gains of Rs.271.38 Lacs on sale of land were offered to tax as Long-Term Capital Gains. However, Ld. AO noticing that stamp duty value of the property was more than agreement value, proceeded to apply the provisions of Section 50C to the stated transactions.

3.4.2 The assessee defended the same by submitting that the property under consideration was allotted to erstwhile *Hyderabad Allwyn Ltd [HAL]* in the year 1986 by the Government of Andhra Pradesh. HAL got amalgamated with the assessee with effect from 1.4.1993 and resultantly, the said property got vested with the assessee. As per the stipulations, the property could be used only for the purpose of manufacturing industrial sewing machines. However, in view of serious losses suffered by HAL, it discontinued this activity and the property remained idle since then. Subsequently, the assessee agreed to sell the property vide dated 06/07/2000 to a party – M/s Sri Shiva Sai Constructions [SSSC] for sale

consideration of Rs.46 Lacs and accepted advance of Rs.25 Lacs. The balance Rs.21 Lacs was to be paid upon receipt of permission from Andhra Pradesh Government for alienation of the said property and upon execution of deed of conveyance. As per the terms, the responsibility to obtain the permission was with the assessee, however, despite vigorous follow-up, the assessee could not succeed in obtaining the permission. As SSSC was keen to purchases the property, they agreed to take up the responsibility of obtaining the said permission and despite best efforts, the permission could not be obtained till March, 2007. Since considerable time had lapsed, SSSC was advised to revise sale consideration amount of Rs.46 Lacs earlier offered by them in 2000 as the property prices in the area had increased. In response, SSSC gave fresh offer of Rs.151 Lacs including notional interest of Rs.17 Lacs on advance of Rs.25 Lacs paid by them earlier. Although the revised offer was better than offer made by other parties, the management decided not to proceed with the transaction and refunded the advance of Rs.25 Lacs along with interest thereon. However, rejecting the same, SSSC filed civil suit for specific performance of the contract. During the intervening period, the assessee made independent efforts to sell this property, however, the same did not fetch much fruits. Finally, in June 2007, the assessee got the property valued by M/s G.D. Rao & Associates, Chartered Engineer and Govt. Registered Valuer, who valued the land at Rs.330 Lacs and structure thereon at Rs.51.61 Lacs. However, taking a conservative view, the assessee estimated the realistic value of Land and Building at around Rs.321.25 Lacs. Thereafter, SSSC expressed willingness to revise

the offer and offered to purchase the property for Rs.325 Lacs on 'as-is-where-is' basis, which was accepted by the assessee and accordingly, the final deal was struck at Rs.325 Lacs. The Sale Deed was executed on 18/07/2008 and at the time of registration, the Stamp Duty was adjudicated and paid by SSSC on market value of Rs.667.23 Lacs as determined by the Stamp Authorities. In the above background, the assessee submitted that based on the actual circumstances and various impediments including reservations/government permission involved and the fact that the initial agreement was entered in the year 2000, the proceeds received by the assessee from the sale of the aforesaid property must be considered and accepted.

3.4.3 However, disregarding the same and invoking the provisions of Sec. 50C, Ld. AO adopted Sale value to be Rs.667.23 Lacs and worked out additional Long-Term Capital Gains of Rs.342.23 Lacs and added the same to the income of the assessee.

3.4.4 The Ld. CIT(A), concurring with assessee's submission, deleted the additions by observing as under: -

> 5.3. The submission made by the appellant has been examined. It is seen that the appellant has disputed the Stamp Duty Valuation before the AO and has made an elaborate submission on this issue. It has brought out the fact that the original agreement was made in year 2000 and was inordinately delayed on account of lack of approvals from concerned authorities as well as initiation of litigation from the original bidders. The company has also submitted that it had invited public bids for the property without any enthusiastic response. The appellant has got the land valued from an approved valuer and has negotiated the deal with the other party to the litigation resulting in final sale of the property.
>
> **5.4.** Looking at the facts of the case, it is seen that there has been considerable litigation with respect to the property. Further, the property has negative covenants with respect to its use and necessary permissions are required from various authorities which have not been obtained by the seller. Hence, the property indeed has

encumbrances which would tend to reduce its value. Hence there appears valid ground for the property being sold at a price lower than the stamp duty registration price. I find the claim of the appellant tenable that if the AO-did-not want to accept the sale consideration, since the appellant had disputed the stamp duty valuation before the AO, the AO should have referred the matter to the Valuation Officer under section 50C(2) of the Act. No such reference has been made by the AO.

5.5. The AO has acknowledged existence of special circumstances under which the property has been sold. He has reproduced the entire factual submission made by the appellant in this regard. The fact that the appellant had called off the transaction by returning the amount received from the buyer as advance and the efforts taken to sell the property through public tender is also known to the AO. However, the AO has merely held that the provisions of section 50C do not provide allowances for the circumstances under which the property was transacted. This does not appear to be a factually correct statement. In case of a dispute between the sale consideration and the value determined for stamp duty purposes, the AO is mandated to refer the transaction to Valuation Officer who is competent to go into such special circumstances and arrive at a fair value. The AO has not made such reference. He has also not rejected the contention of the appellant with reference to the valuation report produced by the appellant.

5.6.I find the contention of the appellant tenable. The first agreement with reference to the property has been entered into in year 2000. Admittedly, the use of land at that time was restricted to manufacturing activity. It is also admitted that appellant has not been able to obtain approval of competent authorities for altering land use even till the final transfer of, land. After a series of litigation, the land has been finally sold with the same encumbrances and an indemnification by the buyer with reference to liabilities of the appellant company. Further, the appellant has issued public tenders which have seen bids of Rs.85 lakhs and Rs. 105 lakhs only. The Appellant Company in June 2007 got the property valued by M/s. G D Rao & Associate Engineers, Chartered Engineers and Government Registered Valuers who valued the land at Rs.330 lakhs and structures thereon at Rs.51.61 lakhs, thus making the total value of the property at Rs.3 81.61 lakhs. It is clear that the appellant has been exploring various avenues of disposing off this property through contact with independent and unrelated parties but the price offered has been lower than the present price at which registration has been done.

5.7. The appellant has claimed that the valuation report has not taken into consideration any discount on the prevailing market rate on account of the fact that permission for alienation was to be obtained from the Andhra Pradesh Government. Some of the valuers had indicated that this discount factor could be in the range of 10% - 20%. However, taking a conservative view of discounting the value by 5%, the value of the land worked out to Rs.313.50 lakhs and considering salvage value of the structures at Rs.7.75 lakhs, the realistic value of the property was around Rs.321.25 lakhs.

5.8 It is seen that the registration has been done on 18.7.2008. The valuation has been done in June 2007. Hence, any discount on permission would have been set off by some appreciation of the property. In my view, it would meet the ends of justice if the value of the land is adopted at Rs 330 lakhs and capital gains is computed accordingly. It is so directed. The ground is decided accordingly.

Aggrieved, the revenue is in further appeal before us.

3.4.5 After due consideration of factual matrix as enumerated by us in the preceding paragraphs, we find that Ld. CIT(A) has clinched the issue in correct perspective. Undisputedly, the property was not free from encumbrances. The original agreement was made in the year 2000 and there was inordinate delay on account of lack of approvals from concerned authorities and the property was subject matter of litigation. The property had negative covenants as to its use which would reduce its value. Further, the assessee had disputed the valuation before Ld. AO, but no reference was made to Valuation Officer u/s 50C(2). The factual submissions made by the assessee were not controverted by Ld. AO. Therefore, the action of Ld. AO in adopting the Stamp Duty Value could not be held to be justified. Therefore, finding no infirmity in the impugned order on this issue, we dismiss ground nos. 1 & 2 of revenue's appeal.

B. Transfer Pricing Grounds

3.5.1 Transfer Pricing [TP] adjustment on account of Share Application Money

Certain international transactions carried out by the assessee with its Associated Enterprises [AE] during the year were referred to Ld. Transfer Pricing Officer [TPO] u/s 92CA (1) for determination of Arm's Length Price [ALP]. One such transaction was Share Application money of Rs.11.41 Crores stated to be advanced by assessee to one of its AE namely Saudi Ensas Company for Engineering Services WLL, Saudi Arabia [Saudi

Ensas]. The said entity was a joint venture company and engaged in electromechanical business in the Kingdom of Saudi Arabia [KSA]. The assessee held 49% of its shareholding whereas the balance 51% shareholding was held by the local partner in Saudi Arabia. During 2006-07, the local laws in KSA were relaxed and the foreign company was permitted 100% shareholding in local company. Since Saudi Ensas provided good business potential, it was decided that Saudi Ensas should continue to operate in KSA and would be provided with required financial assistance for rehabilitation. However, since the local partner was not keen to participate in the rehabilitation of the said entity, a decision was taken to purchase the entire shareholding of local partner. Consequently, Saudi Ensas became a wholly-owned subsidiary of the assessee company with effect from 28/01/2009. The assessee had Share Application Money of Rs.11.81 Crores with the said entity as on 31/03/2009.

3.5.2 It was noted that although the money was advanced in the month of April, 2008 and the Share Allotment was not done till 31/03/2009, yet the assessee did not receive any interest on such share application money pending allotment. The Ld. TPO opined that under similar circumstances, independent parties would expect on interest if allotment is delayed beyond reasonable period of time. Reliance was placed on Ministry of Corporate Affairs (MCA) notification dated 14/12/2011 which stipulated that all allotment of securities was to be completed within a period of 60 days from the date of receipt of share application money and if the allotment was not made in that period, the money was to be refunded within

15 days, failing which entity shall be required to pay interest of 12% per annum. No independent party would wait beyond reasonable time period and therefore, allowing for time period of 60 days, the assessee, in the opinion of Ld. TPO, should have received interest on Share Application Money from July, 2008 to March, 2009.

3.5.3 Upon show-cause notice, the assessee argued that share application money was given as a business prudence and MCA notification was not applicable for Share Application Money pending with foreign companies. The attention was drawn to the fact that average cost of borrowings for overseas projects was only 2.7% per annum. However, the said submissions, in the opinion of Ld. TPO, would not impact the pricing since two uncontrolled parties would expect financial compensation in similar situation. Noticing that in case of assessee, the loan is unsecured, Ld. TPO, adopting Arm's Length Interest rate of 17.78%, proposed TP adjustment of Rs.152.23 Lacs for 9 months.

3.5.4 Aggrieved, the assessee challenged the proposed adjustment before Ld. first appellate authority by way of elaborate written submissions which have already been extracted in para 7.3 of the impugned order. The assessee, reiterating the submission as made before Ld. TPO, pleaded that share application money was utilized by Saudi Ensas for repayment of outstanding dues of South Holland Bank and other statutory dues so that it could turn around and submit tenders for executing contracts in KSA and avail credit facilities for issuing bank guarantees to the clients. The clearances in the case of Saudi Ensas were delayed, initially to give effect

to transfer of 51% shareholding of the local partner and subsequently due to certain complications arising on account of assignment of existing shareholding from Metrovol, a wholly owned subsidiary of Voltas to Voltas Netherlands BV, another wholly owned subsidiary of Voltas. Unfortunately, while the process was under review, main partner of Law firm Hassan Mahassni passed away which resulted into major setback to the entire process initiated by the assessee. Based on fresh search carried out to identify a good local law firm, the assessee had to go through entire process and documentation afresh with a new local lawyer. Finally, the regulatory / controlling authority namely Saudi Arabian General Investment Authority (SAGIA) granted approval / clearance for increase in Share Capital which ultimately became effective from 17/12/2015. In the said background, the assessee submitted that no notional interest could be attributed to Share Application money and the adjustment was not justified. To support the explanation *qua* delay in allotment of shares, various email correspondences were placed on record evidencing efforts on the part of various parties to ensure speedy execution of the task. Finally, it was submitted that shareholding activity was wrongly characterized as a loan amount and Transfer Pricing adjustment against the same was uncalled for.

3.5.5 Reliance was placed on the decision of Hon'ble Bombay High Court rendered in Vodafone India Services Pvt. Ltd. dated 10/10/2014 for the submissions that the transactions was on capital account and therefore, the Transfer Pricing provisions were not applicable to these transactions. Reliance was also placed on various judicial pronouncements to support

the submissions, which have already been tabulated in para 7.3.10 of the impugned order.

3.5.6 The Ld. CIT(A), after due consideration, *inter-alia,* took note of the fact that the capital was infused in tranches as Share Application money towards additional capital after due approvals by relevant authorities and the share allotment finally took place in financial Year 2015-16. Further, assessee's AE was not in sound financial health and the money so remitted was utilized in payment of business debts and to meet working capital requirements. However, noticing that there was inordinate delay of almost 6 years between infusion of money and allotment of shares, the assessee's AE stood benefitted from the infusion whereas no benefit accrued to the assessee. The cited decision of Vodafone India Services Pvt. Ltd. was found to be applicable only in case of Share Capital and not in the case of Share Application money, which was the fact in the present case. Therefore, the amount was to be treated as advance to the AE which has been utilized by the AE for its own use. Further, the amount was liable to be treated as loan for interim period till allotment of Shares. The relevant observations of first appellate authority, for ease of reference, could be extracted in the following manner: -

> 7.4 The submission made by the appellant has been examined and the reason for delay **in** allotment of shares has been perused. It is seen that the capital in the appellant company has been infused in tranches during the period April 2008 and March 2009 as Share Application Money towards additional capital after due approvals by relevant authorities. The final allotment of shares has occurred in financial year 2015-16, It is also seen that the AE was not in sound financial health at that time and the money so remitted was immediately utilized in payment of business debts and used as working capital requirements so that the AE could return to normal operations.

7.5 The various decisions quoted by the appellant with reference to characterization of share application money have also been examined. It is found that a delay in allotment of shares pursuant to introduction of share application money has been taken to be beyond the control of the appellant or AE and hence such amount has been treated as being on capital account during the intervening period.

7.6 However, in the present case, it is seen that the delay in such allotment has been inordinate. There is a delay of almost 6 years between infusion of money and allotment of shares. The AE required the funds immediately and hence, these funds were utilized immediately on their disbursal. They were not kept in any escrow account pending allotment. Hence while the AE benefited from the infusion immediately, the appellant has not been granted benefit of this amount as share capital eligible for a dividend. Nor has the amount been treated as loan and any interest has been paid to the appellant at arm's length. The sequence of events indicates that there was hardly any activity with reference to such allotment during the period 2011 to 2014. Hence, the entire period during which the amount remained unallotted cannot be treated as a genuine period during which the pendency can be attributed to regulatory requirements.

7.7 It is seen that the TPO himself has allowed a rebate of six months for which no interest has been computed by him. Although the claim of the appellant that the regulatory requirements in India are not applicable to the AEs is found to be correct, these give a guidance as to the normal period wherein the shares should have been allotted. In the present instance, it is seen that the first correspondence is in December, 2009 although the share application money has started flowing in from April 2008 onwards. Further, there is hardly any significant activity till February 2014. It is only after Feb, 2014 that significant efforts have been made by the group members to ensure that the process of regulatory approvals is speeded up. The regulatory delays would have been only after February 2014 and not earlier. Hence, the delay upto February 2014 is not found to be on account of regulatory requirements. In light of the same the decisions cited above will not be applicable to the period under review.

7.8 The reliance on the decision in the case of Vodafone is applicable only if the amount is treated as being in the nature of share capital and not otherwise. The same decision approves transaction on capital account in the nature of loan or machinery purchase etc. as being in the nature of international transaction as the revenue account is affected on account of interest and depreciation. In the present case, the issue relates to characterization of share application money and not an amount which represents share capital.

7.9 In light of the above discussion, for the period under review, the amount is treated as an advance to the AE which has been utilized by the AE for its own use. The amount is liable to be treated as loan for the interim period during which the appellant was liable to an arm's length interest on this amount.

7.10 The second issue relates to the arm's length rate of interest liable to be charged in this case. The TPO has computed average cost of borrowing in the case of the appellant at 14.78% and has added a 3% risk margin to arrive at an interest of 17.78%. The appellant has objected to this computation. He has submitted that the average cost of funds to the appellant is 5.51%. He has also submitted that the appellant has availed credit facilities in the same financial zone i.e. in Bahrain, UAE and Qatar with average

interest payment of 2.7% pa. He has also submitted that generally Libor is used as a benchmark rate in respect of such loans and the Libor during the period was 1.76% per annum.

7.11 The computation of arm's length interest rate by the TPO on the basis of average cost of borrowings is not found to be in accordance with various judicial decisions. The currency of all Middle East countries is tied to US$. Hence, a US$ based interest rate represents proper arm's length interest rate with respect to the loans in these jurisdictions. In such a scenario, it has been held by Delhi High Court in the case of Cotton Naturals(I) P. Ltd. v. DCIT [2013] 32 taxmann.com 219 (Del), that the bench mark rate has to be in the currency in which the loan is liable to be returned. It has also been judicially approved that the cost of funds to the lender is an immaterial consideration in benchmarking loans using CUP. What is important is determination of an interest rate between two independent parties and not cost of funds to the lender. To this extent, the action of the TPO is not found in accordance with the law and is liable to be quashed.

7.12 In a situation where the loans have been advanced in foreign currency, there has been substantive judicial approval of the use of Libor (or a benchmark rate in the currency of loan) as a benchmark rate along with reasonable spread in cases where loans have been advanced in foreign currencies and are liable to be returned in those currencies only. In the present case, undisputedly the loans have been advanced in a currency tied to US$ and are to be returned in with same currency. Hence, use of Libor as benchmark rate by the appellant is found to be in line with this approach. It is also seen that the appellant itself has charged 6% on some of the loans outstanding with the AE. It has also claimed that the annual Libor for the current year is 1.76%. Since Libor represents a base rate, looking at the financial position of the AE and the functional requirement of the AE with respect to the business requirements of the appellant company, a spread of 4% is found to be a reasonable risk spread. Hence, a interest rate of 5.76% is found to be at arm's length for the amount advanced as share application money to the AE. Similarly, since an interest rate of 5.76% has been found to be an arm's length interest rate in case of the appellant, the 6% rate charged by the appellant from the AE in respect of loans given to the AE is also found to be at arm's length and no further adjustment is required to be made.

It is evident from the directions of Ld.CIT(A) that Ld. AO was finally directed to adopt a spread of 4% over LIBOR of 1.76%. In other words, the ALP of the transactions was directed to the computed by adopting a rate of 5.76% instead of 17.78% as proposed by Ld. TPO.

The aforesaid adjudication has given rise to cross-appeals before us. The assessee is agitating the adjustment sustained by Ld. first appellate

authority whereas the revenue is agitating the stand of Ld. CIT(A) in directing Ld. AO to apply LIBOR based rate of 5.76%.

3.5.7 Upon careful consideration of factual matrix as enumerated by us in the preceding paragraphs, the undisputed position that emerges is the fact that the assessee has advanced Share Application Money to one of its AE situated in Saudi Arabia with a view to acquire further stake in that entity. The entity has become wholly owned subsidiary of the assessee company during the month of January, 2009. The financial health of its AE was not good and the money was advanced with a view to infuse further capital in the AE and with a view to acquire controlling stake in its AE. The money has been utilized by its AE to pay-off business debts and to meet working capital requirements. Another undisputed fact is that ultimately the shares have been allotted to the assessee during December, 2015 after getting the desired regulatory approvals from concerned authority i.e. SAGIA. It is also undisputed fact that there was delay in the legal process which has been substantiated by the assessee, *inter-alia,* by furnishing email correspondences etc. The entirety of the facts and circumstances would demonstrate that the investment made by the assessee was for genuine business purpose and the stated transaction was not found to be a sham transaction, in any manner. Another fact is that whatever benefit would accrue to assessee's AE, they would indirectly accrue to the assessee since AE ultimately became wholly owned subsidiary of the assessee company. No doubt, there was inordinate delay in allotment of shares, nevertheless, the assessee was successful in explaining the delay

in allotment of share and was able to demonstrate with evidences the circumstances which led to delay in allotment of shares. Therefore, re-characterization of this transaction as advance / loan by revenue authorities, in our considered opinion, was not correct approach and this transaction could not be equated with loan transactions. The Ld. DR has contended that the transactions have not been re-characterized as loan but the same has been benchmarked since certain benefits have accrued to AE by infusion of fund which must be shared with the assessee. However, we find that ALP of the transaction has been computed in similar manner as it would be computed for a loan transaction. Further as already noted, assessee's AE ultimately became wholly owned subsidiary of the assessee and therefore, whatever benefit would accrue to AE, the same would indirectly accrue to the assessee. Therefore, not convinced with the approach of lower authorities, we hold that no addition would be warranted on this account. To arrive at aforesaid conclusion, we draw strength from the observation of Hon'ble Bombay High Court in **Pr. CIT V/s Aegis Limited (ITA No. 1248 of 2016 dated 28/01/2019)** wherein Hon'ble court has observed that in the absence of finding that the transaction was sham, the TPO could not have treated such transaction as a loan and charge interest thereon on notional basis.

3.5.8 Our view is further fortified by the decision of co-ordinate bench of Delhi Tribunal rendered in **Bharti Airtel Limited V/s Addl. CIT (ITA No. 5816/Del/2012 dated 11/03/2014)** wherein Hon'ble Bench has observed as under: -

47. We find that in the present case the TPO has not disputed that the impugned transactions were in the nature of payments for share application money, and thus, of capital contributions. The TPO has not made any adjustment with regard to the ALP of the capital contribution. He has, however, treated these transactions partly as of an interest free loan, for the period between the dates of payment till the date on which shares were actually allotted, and partly as capital contribution, i.e. after the subscribed shares were allotted by the subsidiaries in which capital contributions were made. No doubt, if these transactions are treated as in the nature of lending or borrowing, the transactions can be subjected to ALP adjustments, and the ALP so computed can be the basis of computing taxable business profits of the assessee, but the core issue before us is whether such a deeming fiction is envisaged under the scheme of the transfer pricing legislation or on the facts of this case. We donot find so. We donot find any provision in law enabling such deeming fiction. What is before us is a transaction of capital subscription, its character as such is not in dispute and yet it has been treated as partly of the nature of interest free loan on the ground that there has been a delay in allotment of shares. On facts of this case also, there is no finding about what is the reasonable and permissible time period for allotment of shares, and even if one was to assume that there was an unreasonable delay in allotment of shares, the capital contribution could have, at best, been treated as an interest free loan for such a period of ' inordinate delay' and not the entire period between the date of making the payment and date of allotment of shares. Even if ALP determination was to be done in respect of such deemed interest free loan on allotment of shares under the CUP method, as has been claimed to have been done in this case, it was to be done on the basis as to what would have been interest payable to an unrelated share applicant if, despite having made the payment of share application money, the applicant is not allotted the shares. That aspect of the matter is determined by the relevant statute. This situation is not in pari materia with an interest free loan on commercial basis between the share applicant and the company to which capital contribution is being made. On these facts, it was unreasonable and inappropriate to treat the transaction as partly in the nature of interest free loan to the AE. Since the TPO has not brought on record anything to show that an unrelated share applicant was to be paid any interest for the period between making the share application payment and allotment of shares, the very foundation of impugned ALP adjustment is devoid of legally sustainable merits.

48. Let us also deal with two judicial precedents which have been heavily relied upon by the TPO, as also by the learned Departmental Representative, on which their case rests. None of these decisions, however, deal with the core issue before us i.e. whether a capital contribution can be deemed to be partly an interest free loan, for the period till the shares were actually allotted, and partly as capital contribution, after the subscribed shares were issued by the subsidiary in which capital contribution was made. In the case of *Perot Systems TSI India Ltd* (*supra*), a coordinate bench of this Tribunal had an occasion to deal with the arm's length price adjustment with regard to interest free advances to the subsidiaries. That was a case in which the assessee, an Indian company, advanced interest-free loans to its 100% foreign subsidiaries. The subsidiaries used those funds to make investments in other step- down subsidiaries. On

the question whether notional interest on the said loans could be assessed in the hands of the assessee under the transfer pricing provisions of Chapter X, the assessee argued that the said "loans" were in fact "quasi - equity" and made out of commercial expediency. It was also argued that notional income could not be assessed to tax. However, both of these arguments were rejected by a coordinate bench of this Tribunal. While doing so, the coordinate bench observed that there was no material on record to establish that the loans were in reality not loans but were quasi-capital and that there is also no reason why the loans were not contributed as capital if they were actually meant to be a capital contribution. It was observed that, "It is not the case that there was any technical problem that the loan could not have been contributed as capital originally, if it was meant to be a capital contribution". The argument of loan being in the nature of quasi capital was thus rejected on facts. It was not even a case of quasi capital, and, therefore, this case has no bearing on the question before us i.e. whether ALP adjustments can be made in respect of payments towards share application money in a situation in which the shares have been issued several months after the payments for share application money have been made. Similarly, in *VVF's* case (*supra*), the transaction was admittedly in the nature of interest free loan between AEs and the commercial expediency in advancing interest free loans was on account of ownership and control of subsidiary being in the hands of the assessee, which was recognized as a significant factor for commercial expediency. However, as we have seen in the earlier discussions, such commercial expediency of granting interest free loans is wholly irrelevant because it is the impact of this interrelationship, on account of management, capital and control, which is sought to be neutralized by arm's length price adjustments. This was also not a case in which a capital contribution was deemed to be partly an interest free loan (i.e. for the period till the shares were actually allotted) and partly as capital contribution (i.e. when the subscribed shares were allotted by the subsidiary). Revenue, therefore, does not derive any advantage from these judicial precedents either.

49. In any event, it is not open to the revenue authorities to recharacterize the transaction unless it is found to be a sham or bogus transaction. While there are no specific powers vested in the TPO to recharacterize the transaction, even under the judge made law, such rechracterization can be done by the revenue authorities when the transactions are found to be substantially at variance with the stated form. In the present case, there cannot even a suggestion to hold that this is a bogus transaction because admittedly the subscribed shares capital has indeed been allotted to the assessee. The transaction is thus accepted to be genuine in effect.

50. In view of these discussions, as also bearing in mind entirety of the case, we are of the considered view that the authorities below were in error in treating the payment of share application money, as partly in the nature of interest free loans to the AEs, and, accordingly, ALP adjustment based on that hypothesis was indeed devoid of legally sustainable merits. We delete the impugned adjustment of Rs.19,15,45,943. The assessee gets the relief accordingly. As we have decided this ground of appeal on the fundamental issue that the payment of share application money could not be partly

treated as interest free loan to AE, we see no need to deal with other aspects of the matter.

This decision has subsequently been followed by Mumbai Tribunal in **Parle Biscuits Pvt. Ltd. V/s DCIT (ITA No.9010/Mum/2010 dated 11/04/2014)** and also in **Aditya Birla Minacs Worldwide Ltd. V/s DCIT (ITA No.7033/Mum/2012 25/03/2015)** wherein similar ratio has been laid down.

3.5.9 Keeping in the view the facts and circumstances, we delete the impugned TP adjustment as proposed by Ld. TPO. Ground No.2 of assessee's appeal stand allowed which makes Ground Nos. 3 & 4 of revenue's appeal infructuous and therefore, dismissed.

3.6 Finally, the assessee's appeal stand partly allowed whereas the revenue's appeal stand dismissed.

Cross Appeals for AY 2010-11

4. Facts as well as issues are more or less pari-materia the same in this AY. The assessee has been assessed u/s 143(3) r.w.s.144C(3) on 30/03/2014 and saddled with identical additions / adjustments. Therefore, our observation, conclusion as well as adjudication as for AY 2009-10 shall mutatis-mutandis apply to this year also. The issue of disallowance u/s 14A, which is subject matter of assessee's appeal, stand restored to Ld. AO on similar lines. Ground-2 challenges TP adjustment on account of Share Application money. This ground stands allowed. The assessee's appeal stand partly allowed. Ground Nos. 3 & 4 of revenue's appeal, being connected to Ground No.2 of assessee's appeal, stand dismissed.

5.1 In Ground No. 1, the revenue is agitating the relief granted by first appellate authority u/s 50C of the Act with respect to sale of Nala Land

at Thane, Maharashtra. During assessment proceedings, it transpired that the assessee on 01/04/2009, entered into development agreement with respect to 3950 Sq. Mtr. Sanad land bearing Survey No. 526 of Village Pachapakhadi, Taluka and District at Thane, Maharashtra with M/s Sheth Developers Ltd. for consideration of Rs.255.10 Lacs which was subsequently reduced to Rs.238.17 Lacs due to delineation of land of 262.12 Sq. Mtrs. The said land was stated to be purchased in the year 1961 for Rs.7.37 Lacs and the indexed cost of the same was worked out to Rs.46.61 Lacs. The assessee offered Long Term Capital Gain of Rs.191.56 Lacs from this transaction. Since the reckoner value of land worked out to be Rs.461.14 Lacs, Ld. AO proceeded to apply the provisions of Section 50C disregarding assessee's contention that there were negative covenants with the property as half the unearned revenue was liable to be shared by the buyer of the property with the Government and therefore, the sale consideration was bound to be below the reckoner value. However, disregarding the same, Ld. AO, invoking provisions of Section 50C, enhanced the gains by Rs.222.96 Lacs.

5.2 Before Ld. CIT(A), the assessee drew attention to the negative covenants attached with the land which would ultimately affect its market value. It was submitted that all the requisite permissions were to be obtained by the developer and the buyer was also liable to pay unearned revenue to the government which would work out to be Rs.230.57 Lacs. If the same is added to consideration of Rs.238.17 Lacs, the aggregate would work out to be Rs.468.75 Lacs and the same would be more than reckoner

value of Rs.461.14 Lacs. In support, the valuation report from Cushman & Wakefield was also furnished. The attention was also drawn to the fact that the assessee had transferred only the development rights of the land and it was not a case of outright sale and therefore, the reckoner value could not be applied to stated transaction.

5.3 Convinced with assessee's submissions, Ld. CIT(A) deleted the impugned additions, by observing as under: -

> 5.5 The submission made by the appellant has been examined. The deed of allotment of land by the Thane Collector to the appellant vide his letter dated 21st March, 1961 has been examined wherein it has been mandated at condition no. 4 that the Govt will be entitled to half the unearned increment in the event of sale or transfer, whether outright or mortgage. The development agreement between the appellant and M/s Sheth Developers Private Limited dated 31st March, 2009 has also been examined.
>
> 5.6 The AO has acknowledged existence of special conditions associated with the land at the time of sale. He has reproduced the entire factual submission made by the appellant in this regard. While observing that the conditions to the allotment of land to the appellant do include a condition that 50% of the unearned revenue will go to the government, the AO has merely held that the provisions of section 50C do not provide allowances for the circumstances under which the property was transacted. This does not appear to be a factually correct statement. In case of a dispute between the sale consideration and the value determined for stamp duty purposes, the AO is mandated to refer the transaction to Valuation Officer who is competent to go into such special circumstances and arrive at a fair value. The AO has not made such reference. He has also not rejected the contention of the appellant with reference to the valuation report produced by the appellant.
>
> 5.7 I find the contention of the appellant tenable. The developer, as per the conditions of the development agreement, has to bear the burden of payment required to be made to the Collector towards unearned revenue from the land based on ready reckoner rates. If it is presumed that the sale price has to be the consideration arrived at by adopting ready reckoner rates, then such consideration comes to Rs 4,61,14,372/-. The share which is liable to go to the Collector, Thane would be Rs 2,30,57,186/- (being 50% of the value). Hence, the consideration in the hands of the appellant would reduce to that extent as this amount would have to be paid by the developer before he gets any permission for development of this property.
>
> 5.8 The property being encumbered with the amount equal to 50% of the unearned revenue, this amount will have to be factored while deciding the fair market value as this represents a real encumbrance in the hands of the purchaser. Even the valuation report obtained by the appellant takes into account this encumbrance before arriving at the final price. The correct approach for the assessing officer would have been to refer the

matter to the Valuation Officer who was competent person to factor all such aspects before arriving at a fair market value. In absence of such reference and a clear evidence of substantial encumbrance with respect to the land, the fair price determined by the valuer is found to be in order and liable to be accepted.

5.9 Keeping in view the above facts, it is directed that the AO should adopt the actual sales consideration as the sale consideration while computing capital gains. The ground raised by the appellant stands allowed.

Aggrieved, the revenue is in further appeal before us.

5.4 After due consideration, we are of the opinion that Ld. CIT(A) has clinched the issue in the right perspective. The Ld. AO has ignored the fact that developer had to bear the burden of payment of unearned revenue to the Government. After adding the said burden to sale consideration received by the assessee, the aggregate would be more than reckoner value. Secondly, the matter was not referred to valuation officer since the assessee had contested the reckoner value and furnished valuation report. Thirdly, it is observed that the transaction under consideration is mere development agreement and not a transaction of outright sale of land. Therefore, the provisions of Section 50C, in our opinion, were not applicable to such transactions since there was no transfer of capital assets rather it was a case of transfer of few rights out of bundle of rights available with the assessee. Therefore, concurring with the stand of Ld. first appellate authority, we dismiss Ground No.1 of revenue's appeal. The revenue's appeal stands dismissed.

Conclusion

6. The revenue's appeal, for both the years stands dismissed whereas the assessee's appeal, for both the years, stand partly allowed in terms of our above order.

Order pronounced in the open court on 17th October, 2019.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांकDated : 17/10/2019
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**