IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad

Before Shri Rama Kanta Panda, Vice President
AND
Shri Laliet Kumar, Judicial Member

ITA-TP Nos.340 & 456/Hyd/2022		
Assessment Years: 2017-18 & 2018-19		
Neovantage Innovation Park Private Limited Building-450, Genome Valley Turkapally(V), Shamirpet Hyderabad-500 078 **PAN : AAKCM4735D**	Vs.	ITO, Ward-16(3) IT Towers, AC Guards Masab Tank Hyderabad-500 004
(Assessee)		(Respondent)
Assessee by:	Shri Padam Chand Khincha, CA	
Revenue by:	Shri Rajendra Kumar, CIT-DR	
Date of hearing:	04.07.2023	
Date of pronouncement:	27.09.2023	

O R D E R

PER LALIET KUMAR, J.M.

These appeals are filed by the assessee, feeling aggrieved by the separate orders passed by the Income Tax Officer, Ward 16(3), Hyderabad u/s 143(3) r.w.s. 144C(13) (hereinafter referred as "the Act") in pursuance to the directions of the Dispute Resolution Panel – "DRP", Bangalore-1 for the A.Y. 2017-18 and 2018-19, respectively since common issues are involved in both these appeals, therefore, these were heard together and are being disposed of by this common order.

2. The grounds raised by the assessee in ITA No.340/Hyd/2022 for A.Y. 2017-18 read as under :

"1. The order of the Ld. Assessing Officer (Ld. AO") pursuant to the directions of the Hon'ble Dispute Resolution Panel ("the Hon'ble DRP"), is bad in law and liable to be set aside.

Grounds relating to transfer pricing adjustment:

2. The Ld.AO/Hon'ble DRP erred in law and on facts in rejecting the Transfer Pricing ("TP") Documentation of the Assessee in relation to the international transaction involving payment of interest on non-convertible debentures to DB International (Asia) Ltd, without considering the fact that the Assessee's TP Documentation was in accordance with the Indian Transfer Pricing Regulations.

3. The Ld. AO/Hon'ble DRP erred in law and on facts by not appreciating the complete facts of the Assessee's international transaction Involving issuance of secured, rated, listed and Rupee denominated Non-convertible debentures (NCDs") to DB International (Asia) Limited which was, at the time of entering into, an uncontrolled transaction between independent entities.

4. The Ld. AO/Hon'ble DRP erred in law and on facts by alleging that the Assessee has resorted to profit shifting by paying higher rate of Interest on NCDs to DB International (Asia) Limited.

5. The Hon'ble DRP has erred in rejecting the following comparable companies selected by the Assessee:

(i) Shree Sukhakarta Developers Pvt Ltd (14%)
(ii) Rajesh Estates and Nirman Private Limited(15%)
(iii) Total Environment Machine-Craft Private Limited (17%)
(iv) Parinee Realty Private Limited (14%)

6. The Ld. AO/Hon'ble DRP erred in law and on facts by not appreciating that credit rating of an issuer of debenture constitute an appropriate filter while benchmarking the arm's length price of interest paid on debenture.

7. The Ld. AO/Hon'ble DRP erred in law and on facts in making an upward transfer pricing adjustment of INR 2,85,70,424/- by determining the ALP of the interest on NCDs paid to DB International (Asia) Limited at 581 base rate plus 50 basis points, on an adhoc basis.

8. The Ld. AO/Hon'ble DRP erred in law and on facts in making an upward transfer pricing adjustment of INR 2,85,70,424/- by determining the ALP of the interest on NCDs paid to DB Intonational (Asia) Limited without identifying any comparable.

9. The Ld. AO/Hon'ble DRP erred in law and on facts by determining the ALP of international transaction involving payment of debenture issue expenses by the Assessee to Deutsche Bank AG (Mumbai Branch), without appreciating that the TP provisions are not applicable as the terms of the transaction were decided between independent parties under uncontrolled circumstances.

10. The Ld. AO/Hon'ble DRP erred on facts and in law in making an upward transfer pricing adjustment of INR 3,37,09,375 by determining the ALP of international transaction involving payment of debenture issue expenses by the Assessee to Deutsche Bank AG (Mumbai Branch) at 0.5% of face value of NCDs on an adhoc basis, without identifying any comparables.

Grounds relating to addition under section 56 (2)(viia)of the Income-tax Act

11. The Hon'ble DRP has erred in directing the Ld. AO to make an addition under section 56(2)(viia) of the Act which was not proposed under the draft assessment order.

12. The Hon'ble DRP has erred in not appreciating that:

(i) the DRP's power under section 144C(8) of the Act is confined to adjustments proposed in the draft assessment order;

(ii) the DRP cannot direct the AO to make a new addition under section 56(2)(viia) of the Act.

13. On facts and circumstances of the case and law applicable, the Hon'ble DRP's direction to the Ld.

AO to make a new addition under section 56(2)(viia) of the Act is bad in law .

14. Without prejudice to above, the Ld. AO/Hon'ble DRP has erred in law and on facts in making further addition of INR 57,92,15,385/- u/s 56(2)(viia) of the Act on account of acquisition of equity shares of Takshila Tech Parks & Incubators (India) Private Limited ("TTPL") by determining the Fair Market Value ("FMV") of the shares under Rule 11UA(1)(c)(b) of the Income-tax Rules, 1962 ("IT Rules"), adopting the valuation date as 31 March, 2016.

15. The Hon'ble DRP has erred on facts in holding that the Assessee has requested to rely on unaudited financials of TTPL as on 31 August, 2016 for computing the FMV of shares of TTPL. The Hon'ble DRP has erred in not appreciating that the Assessee has requested to consider the audited balance sheet as on the valuation date i.e., 30 September, 2016 for computing the FMV of shares of TTPL.

16. The Hon'ble DRP has erred on facts by denying the impairment loss of INR 64,74,02,716/- in computation of FMV of shares of TTPL, on the premise that the impairment pertains to land parcels, whereas the impairment pertains to buildings.

17. The Ld. AO/ Hon'ble DRP has erred in law and on facts in making a disallowance of INR 37,86,302/- u/s 14A of the Act r/w Rule 80 of the IT Rules without appreciating the fact that in the absence of exempt income, disallowance u/s 14A of the Act based on the notional income is not warranted and is unjustifiable under the law:

18. The Hon'ble DRP has erred in confirming the disallowance under section 14A without appreciating that the disallowance has been made without satisfying the pre-conditions under section 14A(2) of the Act.

3. The grounds raised by the assessee in ITA No.456/Hyd/2022 for A.Y. 2018-19 read as under :

"1.The order of the Ld. Assessing Officer ("Ld. AO") pursuant to the directions of the Hon'ble Dispute Resolution Panel ("the Hon'ble DRP"), is bad in Law and liable to be set aside.

Grounds relating to transfer pricing adjustment:

2. The Ld.AO/Hon'ble DRP erred in law and on facts in rejecting the Transfer Pricing ("TP") Documentation of the Assessee in relation to the international transaction involving payment of interest on non-convertible debentures to DB International (Asia) Ltd, without considering the fact that the Assessee's TP Documentation was in accordance with the Indian Transfer Pricing Regulations.

3. The Ld. AO/Hon'ble DRP erred in law and on facts by not appreciating the complete facts of the Assessee's international transaction involving issuance of secured, rated, listed and Rupee denominated Non-convertible debentures ("NCDs") to DB International (Asia) Limited which was an independent party at the time of issuance of NCDs and hence is a transaction between uncontrolled independent parties.

4. The Hon'ble DRP has erred in rejecting the comparable NCD issues by the following independent companies selected by the Assessee:

(i) Shree sukhakarta Developers Pvt Ltd (14%)

(ii) Rajesh Estates And Nirman Private Limited (15%)

(iii) Total Environment Machine-Craft Private Limited (17%)

(iv) Parinee Realty Private Limited (14%)

5. The Ld. AO/Hon'ble DRP erred in law and on facts by not appreciating that credit rating of an issuer of debenture constitutes an important filter criteria while benchmarking the arm's length price of interest paid on debenture.

6. The Ld. AO/Hon'ble DRP erred in law and on facts in making an upward transfer pricing adjustment of INR 3,04,48,912/- by determining the ALP of the interest on NCDs paid to DB International (Asia) Limited at SBI base rate plus 50 basis points, on an adhoc basis.

7. The Ld. AO/Hon'ble DRP erred in law and on facts in making an upward transfer pricing adjustment of INR 3,04,48,912/- by determining the ALP of the interest on NCDs paid to DB International (Asia) Limited without identifying any comparable.

Grounds relating to addition under section 14A of the Income-tax Act, 1961 ("the Act")

8. The Ld. Assessing Officer / Hon'ble DRP has erred in law and on facts in making a disallowance of INR 37,75,415/- u/s 14A of the Act r/w Rule 8D of the IT Rules without appreciating the fact that in the absence of exempt income, disallowance u/s 14A of the Act based on the notional income is not warranted and is unjustifiable under the law.

9. The Hon'ble DRP has erred in confirming the disallowance under section 14A without appreciating that the disallowance has been made without satisfying the pre-conditions under section 14A(2) of the Act.

Grounds relating to Tax Deducted at Source ("TDS") Credit:

10. The Ld. AO has erred in law and on facts in not granting TDS credit of INR 3,11,17,286/-, without verifying the facts and providing an opportunity of being heard.

11. The Ld. AO has erred in law and on facts while not considering the TDs credit of INR 3,11,17,266/- ignoring the fact that the corresponding income has been offered for tax by the Assessee."

4. The assessee has also raised the following additional ground in both the appeals :

"Without prejudice to the above grounds, the interest rate on NCDs issued to DB International should be regarded to have been at arm's length as the same is less than the SBI Benchmark Prime Lending Rate (PLR)."

5. Before us, at the outset, both the parties submitted that the facts in both the appeals are identical. In view of the aforesaid submissions, we, for the sake of convenience proceed to dispose of both the captioned appeals by a consolidated order but however refer to the facts in ITA No.340/Hyd/2022 for the sake of brevity.

6. The brief facts of the case are that assessee company was formed as a result of the demerger of Takshila Tech Parks & Incubators (India) Private limited (TTPL) and Genome Valley Tech Park & Incubators Pvt Ltd (GVPL) w.e.f. 01.10.2016. Assessee is a private Company engaged in the business of developing, building and leasing of life sciences and bio-technology parks in India and also provides managerial services. Assessee filed original return of income on 31.03.2018 and thereafter, filed a revised return on 30.03.2019.

6.1. During the course of assessment proceeding, notices u/s 142(1) of the Act were issued to the assessee from time to time, to which the assessee has responded. Meanwhile, the assessee was served with a draft order u/s 144C of the IT Act, 1961 on 23.08.2021 by the NFAC. Thereafter, assessee approached the DRP raising objections regarding draft order u/s 143(3) r.w.s 144C of IT Act, 1961 for the AY. 2017-18. Consequently, DRP issued certain directions vide it's order dated 31.05.2022. Based on DRP's order, the transfer pricing officer passed an order dated 31/1/2021 under 92CA(3) of the I.T Act treating Rs. 95,76,38,835/- as the transfer pricing adjustment under 92CA(3) of the Act to arrive at arm's length price of the international transactions reported by the tax payer. Further, the said order states that if in case of TTPL, Rs. 26,96,57,437/- was offered to Tax u/s 56(2)(viia) of the Income Tax Act in the Revised return, the said adjustment may be reduced accordingly.

6.2. Pursuant to the said order, after verification, the total income of the taxpayer was enhanced by Rs.68,79,81,398/- in the draft assessment order. However, it is noticed that the TPO vide order dated 05.01.2022 redetermined the adjustment u/s 92CA of the Act at Rs.93,99,39,083/- in view of the excess adjustment in determination of purchase of shares to the tune of Rs. 1,76,99,752/-. With regard to deemed international transactions, DRP in its order held that since the payment made to the overseas entity is less than the ALP determined, no transfer Pricing adjustment needs to be made in respect of this international transaction. However, the DRP is of the view that provisions of Sec.56(2)(viia) are applicable in this case and hence, directed the Assessing Officer to apply the provisions of Sec 56(2)(viia).

6.3 Upon DRP directions, the TPO re-determined total adjustment u/s 92CA(3) at Rs. 6,22,79,799/- (interest on NCDs Rs. 2,85,70,424/- plus debenture issue expenses Rs.3,37,09,375/-). In view of the same, the total income of the tax payer was enhanced by Rs.6,22,79,799/-. The DRP directed the AO to add an amount of Rs.89,12,84,761/- to the income of the of the assessee being the difference between the Fair Market Value shares on the consideration paid for acquisition of shares u/s 56(2)(viia) of the Act. Thereafter, the TPO passed a rectification order on 05.01.2022 rectifying the mistake in adopting the number of shares purchased from M/s Takshila Techno Parks and Incubators (India) Pvt Ltd and revising the adjustment towards purchase of shares from the said entity at Rs. 84,88,72,822/-. As the assessee has already offered to tax Rs. 26,96,57,437/- u/s.56(2)(viia) in the case of M/s. Takshila Tech parks & incubators (India) Pvt. Ltd. in the revised return, as per directions of DRP, the same was reduced and the addition to be made was worked out at Rs. 57,92,15,385/-.

6.4. With regard to F.M.V. of shares of GVPL, the assessee objected that TPO erred on facts by considering incorrect figure of advance income tax paid, unamortized initial direct cost of lease and reserves and surplus while computing the fair market value of shares of GVPL under rule 11 UA(1)(c)(b) of the IT Rules. As mentioned, the DRP has directed to go through the submissions of the assessee and to rectify the arithmetical mistakes in the computation of FMV. After verifying the contentions of the assessee, the Assessing Officer determined adjustment u/s 56(2)(viia) with regard to purchase of shares of GVPL at NIL. Hence, the total adjustment u/s 56(2)(viia) on account of purchase of shares of the two entities i.e., GVPL and TTPL works out to Rs. 57,92,15,385/-.

6.5. The Assessing Officer further noted that the assessee company has made non-current investments of Rs.37,75,41,547/- in unlisted equity shares. Further, the assessee has not reported any expenditure attributable to investment made to earn exempt income. As the investments made by the assessee have potential to give exempt income, the assessee was asked to provide a note on applicability of Sec.14A of the Income Tax Act along with computation of its disallowance u/s 14(A) rwr 8D. Thus, assessment proceedings were completed by the Assessing Officer u/s 143(3) r.w.s. 144C(13) of the Act and penalty proceedings were also initiated u/s. 270A of I.T.Act of the Act.

7. Ground No.1 is general in nature and requires no adjudication, grounds of appeal Nos.2 to 10 relate to the transfer pricing issues, grounds Nos.11 to 16 relate to the addition u/s 56(2)(viia) of the Act and ground nos.17 and 18 relate to the addition u/s 14A of the Act.

8. **GROUND NOS.2 TO 8**

8.1. The first argument of the ld.AR for the assessee was that the assessee and M/s. DB International (Asia) Limited are not the associated enterprises and, therefore, are independent entities. It was submitted that assessee and M/s. DB International (Asia) Limited are not the AE and, therefore, the transfer pricing adjustment done by the TPO/DRP are without any merit. It was the contention of the assessee that the assessee had reported the investment made by M/s. DB International (Asia) Limited in form 3CEB. However, mere reporting of international transaction in form 3CEB will not automatically lead to determination of the character of M/s. DB International (Asia)

Limited as associated entity of the assessee. It was the contention of the AR that M/s. DB International (Asia) Limited is a foreign bank and is in the business of financing, innovative ventures, providing loans etc., to its clients. The said M/s. DB International (Asia) Limited had made investment in various companies including the assessee in the equity/loan however, the said company being the financial institution cannot be termed as the 'AE' within the meaning of section 92A of the Act.

8.2. It was the contention of the ld.AR that Section 92B of the Act defines international transaction and it refers to the transaction between two or more associated enterprises. The transaction referred to in section 92B of the Act should be between two or more existing associated enterprises. It was submitted that the relevant point to determine whether the parties entering into arrangement etc., are AE or not would be at the time of entering into the transaction. In other words, it is required to be understood as to whether the enterprises are AE at the time of entering into transaction or not?

8.3 It was submitted that first the enterprises should have the AE relationship and thereafter, the transaction if any, entered between them would be termed as international transaction. It was further submitted that the condition provided under section 92A(1) and section 92A(2) of the Act are required to be cumulatively certified for treating enterprises as an associated entities. It was the contention of the ld.AR that M/s. DB International (Asia) Limited was neither having participation in the management nor control of the assessee.

8.4. It was submitted by the assessee that the negotiations between the assessee and M/s. DB International (Asia) Limited were conducted on principal-to-principal basis and were concluded on 16th August, 2016 and a formal agreement incorporating the terms was drawn thereafter. The Debenture Trust Deed was executed on 27th September, 2016. It was submitted that when the negotiations and transactions were transacted between the assessee and the M/s. DB International (Asia) Limited as independent parties then there cannot be a reason to shift the profit from the Indian jurisdiction to outside. It was also the contention of the ld.AR that the foreign banks/Indian banks if making investment in the equity/loan of their customer like assessee, cannot partake the character of AE being by virtue of the fiction created by section 92A(2)(c) of the Act.

Rejection of TP Study

9. The second argument raised by the assessee was that the TPO had erred in rejecting the TP study of the assessee on the following grounds:

(I) The taxpayer has not furnished the search process (Accept reject matrix) claimed to be conducted in the Bloomberg and NSDL database;

(ii) Instruments having no or different coupon rate were rejected by the taxpayer, which would have led to cherry picking of comparables;

(i) Credit rating filter applied by the Assessee is subjective and has to be seen on a case to case basis;

(ii) Industry filter applied by the Assessee is subjective and has to be seen on a case to case basis;

(iii) Taxpayer has chosen functionally dissimilar companies;

(iv) Taxpayer did not exclude instruments not classified as NCDs.

9.1. The ld.AR had submitted that when the assessee assailed the order of the TPO before the DRP, the DRP had not concurred with the reasoning of the assessee and given the finding with respect to the TP study in paragraph Nos. 2.11.3 to 2.11.4 and had wrongly concluded that -

(i) *Appellant is incorrect in applying disputable credit rating filter.*

(ii) *Appellant has not used industrial filter of real estate sector in the benchmarking process.*

(iii) *Tenor of the NCDs of com parables selected by the Appellant are different.*

9.2. It is the contention of the ld.AR that the TPO/DRP, both erred in concluding that the credit rating filter is not the appropriate filter.

9.3. In support of the credit rating filter, the ld.AR submitted that the assessee was having credit rating in the range of BB-(SO). It was submitted that the companies/comparables having different credit rating would be liable to pay different rate of interest to the financial institutions. Therefore, the assessee had prudently applied the credit rating filter of BB-, BB-(SO) to B+, so that the comparables having the similar financial rating would be selected for the comparative analysis for determining the ALP. In this regard, the ld.AR had relied upon the following decisions:

I. *PCIT v India Debt Management (P) Ltd ITA No 266 of 2017 (Bombay),*

II. *Worley Parsons India (P) Ltd v DCIT 77 Taxmann.com 228 (Hyderabad),*

III. *Vedaris Technology (P) Ltd v ACTT ITA No 4372 / 2009 (Del),*

IV. *ACTT v Mundra International Container Terminal Pvt Ltd ITA No 2849/AHd/2014 (Ahd),*

V. *Red Fort Shahjahan Properties Pvt Ltd v DCIT 1TA No 7239 / Del/ 2018.*

9.4. To buttress his argument, the ld.AR also relied upon the UN TP Manual [Para 10.4.10.1], OECD's Transfer Pricing Guidance on Financial Transactions [Paras 10.62 to 10.70] and Indian Safe Harbour Rules. He submitted that the CBDT has emphasized on the importance of credit rating in determination of arm's length interest rates for loan transactions. The same is evident in Rule 10TD(2A), wherein the interest rate on intra-group loans is linked to the credit rating.

10. The third argument raised by the ld.AR is that the TPO /DRP had wrongly applied a real estate filter for finding the comparable though the assessee was not into real estate business. In this regard, the ld.AR submitted that the assessee is engaged in the business of leasing buildings for the purpose of earning lease rentals. The nature of business carried on by the assessee has not been questioned by the TPO or AO. Page 4 of the Audited Financials and Schedule 20 of the Audited Financials containing details of Revenue from operations establishes that the assessee is the business of leasing of buildings. In support of the above said argument, the ld.AR in the written submissions has submitted as under:

> *"1.15 Leasing business cannot be characterised as real estate business. This submission is supported by the definition of 'real estate business' given in Consolidated FDI Policy effective from 15.10.2020. The definition reads as follows [Page 44 of the Consolidated FDI Policy]*
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> *"It is clarified that FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farmhouses and trading in transferable development rights (TDRs). "Real estate business" means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent/ income on lease of the property, not amounting to transfer, will not amount to real estate business." (emphasis supplied)*
>
> *1.16. It is discernible from above that leasing of the property is not regarded as real estate business by the Government of India. The Appellant had also secured foreign direct investment in from of NCDs. If the Appellant was engaged in the real estate business, the Government / RBI would not have permitted investment by DB International in its NCDs. Thus, it is submitted that the DRP erred in stating that the Appellant should have applied real estate business filter while benchmarking the interest on NCDs."*

11. The fourth argument raised by the ld.AR for the assessee was that the authorities below have failed to appreciate that the tenor of the NCD of the selected comparables were different from that of the assessee and were not falling within the same band-width of the tenor of the assessee. Assessee had taken four to six years as tenor for selecting the comparables whereas both the authorities have rejected the comparables of the assessee. The DRP in the remand proceedings had called upon the TPO to provide the comparables and conduct fresh search of suitable comparables by applying the appropriate filters. In response there to the learned TPO had selected ten comparables and arrived at ALP at 9%. However, out of the said ten comparables, the DRP had rejected two comparables on the pretext that the said two comparables, namely, Assetz Premium Holdings Pvt. Ltd., having the coupon rate of 18% and Mahua Bharatpur Express Ltd., having the coupon rate of 18% (SBI PLR +400), have issued the NCDs to their related parties.

12. The fifth argument raised by the ld.AR for the assessee was that the DRP had wrongly erred in making the upward adjustment to the interest on NCDs based on SBI basis points without any basis. It was submitted that the DRP can take the guidance from the Safe Harbour Rules and the provisions of section 194 LD of the Act and RBI Circular issued for ECB frame work. The ld.AR in the written submission had given the following contentions on the above said issue:

> *"**Guidance from safe harbour rule:***
>
> *1.38. Assuming without admitting that the interest rate on NCDs should be benchmarked on the basis of SBI base rate, it is submitted that the learned AO erred in allowing spread of only 50 basis points. The Appellant submits that the spread should be in excess of 300 basis points. In' support of this contention, reliance is placed on safe harbour Rule 10TD of Income-tax Rules, 1961. As per rule 10TD(2), interest rate on intra group loans exceeding 50 crores should be a minimum of SBI base rate plus 300 basis points. The Delhi High Court in Rampgreen Solutions (P) Ltd v CIT [2015] 60 taxmann.com 355 and the Delhi*

Tribunal in New River Software Services (P) Ltd 56 taxmann.com 440 have relied on safe harbour rules to adjudicate on transfer pricing matters though the assessees in those cases had not opted for safe harbour rules.

1.39. The Appellant submission of adding in excess of 300 basis points is also based on the fact that the Appellant's credit rating is IND BB-(SO) by India Ratings and Research Limited. The rating has not been disputed by the lower authorities. In the following decisions, it has been held that the credit rating is an important factor for quantifying the spread and benchmarking the interest on loan from AE's:

(i) DCIT v JSW Energy Ltd 180 ITD 598 (Mum)

(ii) India Debt Management Pvt ltd v DCIT 69 taxmann.com 125 (Mum) [Affirmed by the Bombay High Court in 69 taxmann.com 125]

1.40. In fact, in Tega Industries Ltd v DCIT (2016) TaxCorp (AT.) 53503 (ITAT-KOLKATA) and UFO Movies India Ltd v ACIT (2016) 66 taxmann.com 120 (Delhi - Trib), the transfer pricing officer has argued that credit rating of borrower is to be considered for benchmarking the interest and quantifying the spread.

1.41. Considering the credit rating of the Appellant and other factors such as currency risk, the Appellant submits that a minimum of 300 basis points should be added to the SBI base rate as provided in Rule 10TD(2) to benchmark the interest on NCDs issue to DB International. If so, the rate at which the Appellant has paid interest to DB International [viz., 13.13%] would be at arm's length. It is also submitted that for benchmarking purposes, the rate of interest on NCDs paid to DB International should be considered at 12.50% (and not 13.13%). This is because 0.63% [13.13 minus 12.50] represents grossing up cost arising on account of TDS.

Guidance from section 194LD of the Act:

1.42. The Appellant's submission of increasing the spread in excess of 300 basis points is also supported by section 194LD(2) of the Act. Section 194LD(2) provides that the maximum allowable rate of interest for a rupee denominated bond of an Indian entity cannot exceed the rate as notified by the Central Government. The Central Government vide Notification No SO 2311 (E)dated July 29, 2013 has stated that the rate of interest for a rupee denominated bond cannot exceed SBI base rate + 500 basis points. SBI base rate as adopted by the learned TPO is 9.275. The arm's length interest rate would under the aforesaid notification after adding 500 basis point would be 14.275%. The rate of interest paid by the Appellant [13.13%] is to be regarded as being at arm's length as it is below 14.275%."

13. The last argument of ld. AR for the assessee is that DRP had wrongly concluded that the SBI base rate of 9% + nominal premium of 50 points would be the appropriate ALP. In this regard, the ld.AR submitted that the authorities should have applied the SBI PLR rate instead of SBI base rate while computing the ALP. It was his submission that the above said application of SBI PLR rate would be in conformity with the RBI external commercial borrowing circular and also in accordance with the decisions of the various Benches of the Tribunal in this regard. The assessee had filed the following submissions to buttress the above said arguments:

Guidance from RBI's External Commercial Borrowing (ECB) Framework:

1.43. The RBI's ECB framework also support the submission that the learned DRP erred in adding only 50 basis points as a spread. Para 2.1 of the Annex to ECB Framework RBI/2018-19/109 A.P. (DIR Series) Circular No. 17 dated 16.01.2019 indicates that interest cost on INR denominated borrowings [which includes debentures] should be arrived at by adding a spread on 450 basis points to the benchmark interest. Thus, it is submitted that a spread in excess of 300 basis points should be added to the SBI base rate.

1.44. In view of the above, it is submitted that the interest rate on NCDs should be benchmarked with SBI base rate plus a spread in excess of 300 basis points.

1.45. As stated above, the ECB Framework provides that the interest cost on INR denominated borrowings [including debentures] should not exceed benchmark rate plus spread of 450 basis points. The Framework states that prevailing yield of the Government of India securities of corresponding maturity should be adopted as the benchmark rate qua INR denominated borrowings (including debentures) [Para 1.5 of the Annex to ECB Framework]. The debentures in the present case was issued for a period of 5 years. The corresponding yield of the Government of India Bond as on the date of finalisation of terms of NCDs [viz., 16 August 2016] was 7.051 [https://in.investinq.com/rates-bonds/india-5-year-bond-vield-historical-datal. The Appellant submits that the benchmark rate of 7.051 plus 450 basis points should be further increased on account of poor credit rating of (BB-) the Appellant. Once the same is factored, the rate of interest on NCDs paid to DB International Ltd [13.13%] would be less than the benchmark rate of 7.051 plus 450 basis points plus additional basis points for poor credit rating of Appellant. Thus, even if ECB Framework is considered as a benchmarking base, the rate of interest paid to DB International on NCDs is at arm's length. The transfer pricing adjustment made to interest on NCDs should be deleted.

Additional ground - Interest rate on NCDs is less than SBI Prime Lending Rate (PLR):

1.46. Without prejudice to the above submissions, the Appellant submits that the interest on NCDs issued to DB International (Asia) Ltd is at arm's length as the same is less that the SBI Benchmarking PLR. Reliance in this connection is made on the regulatory mandate contained in the RBI's "Master Direction - Borrowing and Lending transactions in Indian Rupee between Persons Resident in India and Non-Resident Indians/ Persons of Indian Origin' ("Master Directions") which is placed on record [https://rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10191]. Para 2.1.2(iv) of the RBI Master Direction stipulates that the rate of interest shall not be more than the Prime Lending Rate (PLR) of State Bank of India plus 300 basis points. Although the said regulations have been issued in the context of borrowings from NRI/PIO, it is submitted that the same carries a substantial persuasive value.

1.47. During the hearing, the honourable Bench had pointed out to para 2.1.2(i) of the RBI's Master Direction. The said clause stipulates that a company incorporated in India would not be covered under this Master Directions if it, inter alia, carries on agricultural / plantation / real estate business. The honourable Bench sought an explanation as to why the Appellant cannot be regarded as a company engaged in real estate business. The phrase 'real estate business' is not defined in the RBI's Master Directions. As submitted earlier [Paras 1.15 to 1.16 above], the said phrase is defined in the Consolidated FDI Policy. The said definition establishes that the business of the Appellant [viz., leasing of buildings for the purpose of earning lease rentals] is not to be regarded as a real estate business. It is thus submitted that the persuasive value of the RBI's Master Directions applies to the Appellant for the purpose of benchmarking the rate of interest paid on NCDs.

1.48. The Bangalore Tribunal in Vena Energy KM Wind Power (P.) Ltd v DCIT 2022] 141 taxmann.com)557 (Bangalore - Trib) relied on the above RBI Master Directions to hold that no transfer pricing adjustment is warranted if the interest rate on rupee denominated NCDs is less than the SBI PLR rate. The Bangalore Tribunal decision was concerning the ALP of interest grid on NCD's which is also the security under consideration in the Appellant's case. In Bennett Coleman &

Co. Ltd. (as successor to times infotainment media limited) v DCIT (2021) Taxcorp (AT) 91749 (ITAT-Mumbai), the Tribunal noted that the DRP has taken a view that SBI PLR rate is the rate at which persons other than banks can lend/borrow in India.

1.49. The SBI PLR rate during financial years 2016-17 and 2017-18 are as under [https://sbi.co.in/web/interest-rates/interest-rates/benchmark-prime-lending-rate historical-data]:

Date	*PLR*
01.01.2017	*14%*
01.04.2017	*13.85%*
01.07.2017	*13.75%*
01.10.2017	*13.70%*
01.01.2018	*13.40%*
01.04.2018	*13.45%*

1.50. The effective rate of interest paid by the Appellant on NCDs issued to DB International is 13.13%. The rate of interest paid by the Appellant is less than the SBI PLR rate prevailing during the FY 201617 and 2017-18. It is thus submitted that the interest rate on NCDs issued to DB International should be regarded at arm's length. The adjustment made by the lower authorities should be deleted."

14. Per contra, the Ld. DR relied upon the findings of the DRP and stated that the ALP of SBI Base rate + 0.5% is appropriate.

15. We have heard the rival contentions of the parties and perused the material available on record. The assessee in the present appeal has raised the grounds and objections that M/s. DB International (Asia) Limited cannot be considered as AE for the reason mentioned herein above. As per section 92A(2)(c) of the Act, when one enterprise advances loan to another and such loan constitutes more than 51% of the total book value of the assets of the other enterprises, then, the enterprises (M/s. DB International (Asia) Limited) shall be deemed to be the associated entity of the assessee. Undoubtedly, M/s. DB International (Asia) Limited had invested the amount as an advance/loan in the form of equity which is more than 51% of the total book value of the assets, hence, we do not find any error in the application of the transfer pricing regulations to the subject transaction. However, the other contention of the assessee that the point of determination for deciding whether the other party (M/s. DB International (Asia) Limited) is the AE of the assessee or not would

be prior to entering into transaction is required to be considered. In this regard, the learned DRP in the order had relied upon the report in Form 3CEB filed by the assessee disclosing the transaction as an international transaction. In this regard, it is appropriate to reproduce the relevant portion of form 3CEB more particularly serial No. 10 at page No. 14 of paper book No. 2A, which is as under:

"10. List of associated enterprises with whom the assessee has entered into international transaction, with the following details:

Name of the associated enterprise	*Nature of the relationship with the associated enterprise as referred to in section 92A(2)*	*Brief description of the business carried on by the associated enterprise*
LC Cerestra Core Opportunities Fund Pte. Ltd.	*One enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the other enterprise*	*Investment company*
DB International (Asia) Limited	*A loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one-per cent of the book value of the total assets of the other enterprise.*	*Provides investment banking services*
Deutsche Bank AG	*A loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise.*	*Provides banking services*

16. In our opinion, once the assessee itself declared the international transaction of loan/advances received from M/s. DB International (Asia) Limited by it being more than 51% of the book value of the assets, then the DRP had committed no error in deciding the above said issue against the assessee. The argument of the assessee is that the threshold point for determining the AE would be prior to the point of time when the investment was made. In the present case, the negotiations for NCD were concluded between the Deutsche Bank and LC Core on 16th

August, 2016 and thereafter, a formal agreement incorporating the terms of NCD were drawn. After conclusion of the above, a Debenture Trust Deed was executed on 27th September, 2016. Thereafter the investment was made by M/s. DB International (Asia) Limited in the NCDs of the assessee. Though a cursory look of the transaction and the submission of the assessee appears to be correct that the point of determination would be prior to entering into agreement and not thereafter, however, this view is not correct for the following reasons. In this regard, we may reproduce the provisions of section 92A of the Act which read as under:

92A. *(1) For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise—*

(a)	*which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or*
(b)	*in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.*

(2) [90][For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year,—]

(a)	*one enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the other enterprise; or*
(b)	*any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in each of such enterprises; or*
(c)	*a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise; or*
(d)	*one enterprise guarantees not less than ten per cent of the total borrowings of the other enterprise; or*
(e)	*more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise; or*
(f)	*more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons; or*
(g)	*the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or*

	specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights; or
(h)	*ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise; or*
(i)	*the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced[90a] by such other enterprise; or*
(j)	*where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual; or*
(k)	*where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family or by a relative of a member of such Hindu undivided family or jointly by such member and his relative; or*
(l)	*where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals; or*
(m)	*there exists between the two enterprises, any relationship of mutual interest, as may be prescribed.*

16.1. Section 92A(2) provides that two enterprises shall be deemed to be associated enterprises if **at any time during** the previous year any condition mentioned in sub-clause (2) is fulfilled. The legislature had deliberately used 'at any time' during the previous year for the purpose of determining the status of an enterprise as AE, if at any time either prior to or thereafter of entering into transactions, the condition is fulfilled. Thus, the contention of the assessee that the status of the enterprise should be examined before entering into the transaction is contrary to the literal meaning of section 92A(2) of the Act which has not restricted the application of the provision, based on prior or subsequent transaction. In view of the above, we are of the opinion that it makes no difference whether the condition of 51% of the book value of total assets is not fulfilled prior to advancing the loan or subsequent thereto. In view of the above, this

objection of the assessee is also without any basis and accordingly dismissed.

16.2. The next argument raised by the assessee is that the TPO had applied the real estate filter for selecting the comparables. The case of the assessee is that the assessee is not a real estate company and is into leasing of the assets and, therefore, it was not appropriate for the authorities to apply real estate filter. In this regard, we may like to refer to page No. 121 of the paper book No.1 wherein the assessee had placed before us the objection in form 35A and at Sr. No. C at page No. 121 it is mentioned as under:

> *(c) Assessee is a newly setup company*
>
> *LC Cerestra Core Opportunities Fund Pte Ltd ("LC Core") is a real estate assets focused private equity firm, based out of Singapore. LC Core expressed its interest in taking over the assets held by Alexandria group in India, which were held for sale. The initial discussions and negotiations of the terms and conditions of the transfer of assets were held between LC Core and Alexandria group.*
>
> *Pursuant to above, LC Core set-up MN Takshila Industries Private Limited "MN Takshila") to act as a SPV for the acquisition of assets held by Alexandria group in India. MN Takshila was incorporated in July, 2016 and the funds required by MN Takshila to acquire the assets of Alexandria Group in India, were infused by LC Core through equity of INR 4,87,500,000 and Compulsorily Convertible Debentures ("CCDs") of 14,50,50,000. The CCDs carried a coupon rate of 10% p.a., with a moratorium on interest for first 2 years. Further, MN Takshila also raised funds of INR 167,50,00,000 by issuing Non-Convertible Debentures ("NCDs") to M/s. DB International (Asia) Limited, and independent investment firm based out of Singapore."*

16.3. Further, at page No. 26 of paper book 2A under the heading "executive summary" under 1.1.4 it is mentioned as under:

> *"MN Takshila is held by LC Cerestra Core Opportunities Fund Pte. Ltd ('LC Fund'). The company incorporated in 9 July, 2016, is engaged in the business of developing, building and leasing of life-sciences and bio-technology parks in India. Further, it*

provides managerial services or any other assistance in relation to the management of the parks."

From the reading of the TP study of the assessee (executive summary) and also the submissions made by the assessee before the DRP it is clear that the assessee is in the business of developing building and leasing of life sciences and bio-technological parks which in our view is nothing but a real estate activity and, therefore, the authorities below have committed no error in taking the real estate filter as an appropriate filter for selecting the comparables. In view of the above, this issue is also decided against the assessee.

Credit Rating Filter and Tenor Filter

16.4. In this regard, it is relevant to note that the credit rating of the assessee as per agencies was BB-SO whereas the credit rating of Gujarat Road Infrastructure Company Ltd., (GRICL) was AAA/Stable (referred page No. 736 of the paper book Vol.3). In our view, the credit rating of the enterprise like the assessee is an important criteria/factor which determines the eligibility of the borrower and will also impact the interest rate and terms of the funding. The credit rating of GRICL which was AAA/Stable cannot be compared with that of the assessee having credit rating of BB-SO. Therefore, in our view the learned DRP as well as the TPO has committed an error while selecting the comparable for the purpose of benchmarking the transaction.

16.5. Besides the above, the term of NCD received by the assessee from M/s. DB International (Asia) Limited was only five years whereas the term of GRICL was fourteen years. In this regard, we may fruitfully rely upon the decision of the Hon'ble

Bombay High Court in the case of PCIT v India Debt Management (P) Ltd ITA No 266 of 2017 (Bombay), wherein it was observed as under :

"15. The last leg of the controversy is, whether the benchmarking analysis done by the assessee is correct or not and whether the average rate of interest of 11.30% paid by the assessee to its AE is at ALP or not. So far as the assessee's benchmarking analysis as done in TP Study report based on external data using Thomson Reuters' DealScan, and Bloomberg Database, we find that such an approach is not correct, firstly, there are no INR denominated debt issuance available on such databases and; secondly, in absence of such a data the assessee has to carry out huge adjustments on account of country risk, currency risk and tenor risk. With all these factors of adjustments, it would be difficult to arrive at an appropriate arm's length range of price; therefore, in our opinion such an approach of the assessee for benchmarking the arm's length interest rate may not be correct. However, as regards the search undertaken for comparable debt issuances in BSE data, we find that the assessee has shortlisted two comparables namely; Starlight Systems Private Limited and Share Microfin Limited which have a coupon rate of 15% and 13.75%. Since these data belong to year 2013, the assessee had made minor tenor adjustment to factor the time period to arrive at interest rate of 15.97% and 14.05% giving a mean rate of 15.01%. Though the assessee was required to benchmark its transaction by taking the financial year data for year 2009-10, but, if such a data were not available then it cannot be held that such a tenor adjustment for taking into time period cannot be made under CUP, if it has been made quite accurately taking into account the material factors relating to time of the transaction affecting the price. We though agree that, a high degree of comparability is required under CUP, but in absence of such a comparable data, a minor adjustment can be made to eliminate the material effect of time difference for arriving at a comparable uncontrolled price. Now before us, the assessee had filed two comparable transactions for the year 2009, that is, for the same financial year in the case of Shriram Transport Financial Company Ltd. and Tata Capital Ltd., wherein, for credit rating of AA Enterprises the coupon rate of interest per annum was between 11% to 12% for a tenor of 60 months. The yield on redemption is also around 11.25% to 12%. If for a credit rating company AA or AA(+) the interest rate is ranging between 11% to 12%, then in the case of the assessee which is admittedly BBB(-) credit rating company, 11.30% interest paid by the assessee to its AE is much within the arm's length rate. This data/document from public domain now made available before us is worth relying to benchmark and analyze the current transaction of coupon rate of interest paid/payable on CCDs issued by the assessee. Accordingly, we hold that 11.30% interest rate is at arm's length price. Thus, in our conclusion, the transfer pricing adjustment made by the TPO and as confirmed by the DRP at Rs.48,53,19,310/- stands deleted and consequently ground no. 1 is allowed.'

3. *Having heard learned Counsel for the parties and having perused the materials on record, we are broadly in agreement with the view of tribunal. The significant features of the assessee's case were that the assessee was mainly engaged in identifying the companies in financial distress whose products were otherwise viable and taking over or financing of such companies. The business of the assessee was thus froth with inherent risks. Its credit rating therefore was relatively low of 'BBB-'. The assessee was raising funds for such investments through issuance of debentures to*

its AEs. The tribunal even on comparison found that the average rate of interest of 11.30% paid by the assessee to its AEs was not excessive and was in any case lower than in the comparable instances. The tribunal rejected the transfer pricing adjustment comparing the rate of return for the assessee's US based AE. This later conclusion of the Tribunal is supported by following decisions.

And also in the case of *CIT v. Cotton Naturals (I) (P.) Ltd. [2015] 55 taxmann.com 523/231 Taxman 401, had held and observed as under;*

"39. The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, in our considered opinion, must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates payable on currency specific loans/deposits are significantly universal and globally applicable. The currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. Klaus Vogel on Double Taxation Conventions (Third Edition) under Article 11 in paragraph 115 states as under:-

"The existing differences in the levels of interest rates do not depend on any place but rather on the currency concerned. The rate of interest on a US $ loan is the same in New York as in Frankfurt-at least within the framework of free capital markets (subject to the arbitrage). In regard to the question as to whether the level of interest rates in the lender's State or that in the borrower's is decisive, therefore, primarily depends on the currency agreed upon (BFH BSt. B1. II 725 (1994), re. 1 AStG). A differentiation between debt-claims or debts in national currency and those in foreign currency is normally no use, because, for instance, a US $ loan advanced by a US lender is to him a debt-claim in national currency whereas to a German borrower it is a foreign currency debt (the situation being different, however, when an agreement in a third currency is involved). Moreover, a difference in interest levels frequently reflects no more than different expectations in regard to rates of exchange, rates of inflation and other aspects. Hence, the choice of one particular currency can be just as reasonable as that of another, despite different levels of interest rates. An economic criterion for one party may be that it wants, if possible, to avoid exchange risks (for example, by matching the currency of the loan with that of the funds anticipated to be available for debt service), such as taking out a US $ loan if the proceeds in US $ are expected to become available (say from exports). If an exchange risk were to prove incapable of being avoided (say, by forward rate fixing), the appropriate course would be to attribute it to the economically more powerful party. But, exactly where there is no 'special relationship', this will frequently not be possible in dealings with such party. Consequently, it will normally not be possible to review and adjust the interest rate to the extent that such rate depends on the currency involved. Moreover, it is questionable whether such an adjustment could be based on Art. 11 (6). For Art. 11(6), at least its wording, allows the authorities to 'eliminate hypothetical' the special relationships only in regard

to the level of interest rates and not in regard to other circumstances, such as the choice of currency. If such other circumstances were to be included in the review, there would be doubts as to where the line should be drawn, i.e., whether an examination should be allowed of the question of whether in the absence of a special relationship (i.e., financial power, strong position in the market, etc., of the foreign corporate group member) the borrowing company might not have completely refrained from making investment for which it borrowed the money."

5. *Similarly, in case of CIT v. Tata Autocomp Systems Ltd. [2015] 374 ITR 516/230 Taxman 649/56 taxmann.com 206, had observed as under;*

"7. We find that the impugned order of the Tribunal inter alia has followed the decisions of the Bombay Bench of the Tribunal in cases of VVF Ltd. v. Dy. CIT (supra) and Dy. CIT v. Tech Mahindra Ltd. (supra) to reach the conclusion that ALP in the case of loans advanced to AEs would be determined on the basis of rate of interest being charged in the country where the loan is received/consumed. Mr. Suresh Kumar the learned counsel for the Revenue informed us that the Revenue has not preferred any appeal against the decision of the Tribunal in VVF Ltd. v. Dy. CIT (supra) and Dy. CIT v. Tech Mahindra Ltd. (supra) on the above issue. No reason has been shown to us as to why the Revenue seeks to take a different view in respect of the impugned order from that taken in VVF Ltd. v. Dy. CIT (supra) and Dy. CIT v. Tech Mahindra Ltd. (supra). The Revenue not having filed any appeal, has in fact accepted the decision of the Tribunal in VVF Ltd. v. Dy. CIT (supra) and Dy. CIT v. Tech Mahindra Ltd. (supra). "

16.6. Similarly, the Co-ordinate Bench of the Tribunal in the case of Mundra International Container Terminal (P.) Ltd. [2020] 116 taxmann.com 617 (Ahmedabad - Trib.) had examined the issue of credit rating and held as under:

14.4 *We also note that the rate of interest paid by the assessee cannot be compared with the Torrent pharmaceutical Ltd as proposed by the AO. It is because there lie certain differences between both the companies as enumerated below:*

i.	*The assessee has shown earning per share at a loss at Rs. -5.89 whereas torrent pharmaceutical Ltd has shown earning per share at Rs. 13.35 only.*
ii.	*The natures of activities of both the companies are not comparable.*
iii.	*The debt-equity ratio of the assessee is 2.61:1 whereas the debt-equity ratio of torrent pharmaceutical Ltd is 0.60:1.*
iv.	*The assessee is not a cash-rich company whereas torrent pharmaceutical Ltd is a cash-rich company.*
v.	*The credit rating of the assessee and torrent pharmaceutical Ltd is altogether different as submitted by assessee reproduced as under:*
	Credit Rating given by ICRA
	Credit Rating given to Torrent Pharmaceuticals Ltd by ICRA during F.Y.2009-10.

	ICRA has reaffirmed LAA rating to Long Term fund based limits of Rs. 4700 million indicating high credit quality. Further the ICRA has also reaffirmed A1 to Rs. 100 million short term non fund based facilities and Rs. 600 million Commercial paper programme indicating highest credit quality. Please find attached herewith letter showing credit rating given by ICRA to Torrent Pharmaceuticals Ltd vide Annexure 2
	Credit Rating given to MICT pvt ltd by ICRA during F.Y.2009-10.
	ICRA has assigned LA rating to long Term Borrowing of Rs. 8.0 million of MICT pvt Ltd. ICRA has also assigned A2 to the Rs. 600 million short term non fund based facilities. ICRA has placed both rating watch with negative implications. Please find attached herewith letter showing credit rating given by ICRA to MICT Pvt Ltd. vide Annexure-3
vi.	*The assessee in the year under consideration has incurred losses whereas the torrent pharmaceutical Ltd has shown a profit. Moreover, the profit of torrent pharmaceutical Ltd has increased by 37% in comparison to the immediately preceding year.*
vii.	*The assessee has borrowed money from its associated enterprise whereas there is no clarity about the money borrowed by the torrent pharmaceutical company whether it was borrowed from the bank or the AE.*
viii.	*The assessee has taken a loan from its AE without any collateral whereas there is no information about torrent pharmaceutical Ltd whether it has borrowed loan on the collateral furnished to the lender.*

In view of the above, we are of the considered opinion that the rate of interest paid by torrent pharmaceutical Ltd cannot be compared with the rate of interest on the money borrowed with the assessee."

16.7. We find in the case DCIT v JSW Energy Ltd 180 ITD 598 (Mum) it was held that credit rating is an important factor for quantifying the spread and benchmarking the interest on loan from AE's.

16.8. In view of the above, the GRICL in or opinion cannot be said to be the comparable with the assessee company on both the counts, namely, on the credit rating and term of the NCD. In view of above, we are of the opinion that the rate of interest paid on the NCD by GRICL cannot be compared with the rate of interest paid by the assessee to M/s. DB International (Asia) Limited. Having held that the interest paid by the GRICL cannot be compared with

the interest paid by the assessee on the NCD to M/s. DB International (Asia) Limited, now the question that remained un-answered is at what would be the appropriate interest rate on NCD.

16.9 Ld.AR for the assessee, had submitted that the DRP had disagreed with the TP study of the TPO as well as the assessee by holding it to be inconclusive and has held SBI base rate plus a nominal premium of 50 basis points as ALP (Para 2.13.10). It was submitted by the Ld.AR that the above finding is without any basis as the rate of interest paid on NCDs to M/s. DB International should be considered at 12.50%, as 0.63% represent grossing up cost arising on account of TDS. In support of the above said rate, the assessee relied upon the Safe Harbour Rule, Section 194 LD, RBI Circular for external and commercial borrowing and SBI prime lending rate being 14% as on 01.07.2017.

17. We have heard the rival contentions and perused the material available on record. Undoubtedly, strictly speaking, Safe Harbour Rules are only applicable if a person exercises a valid option for application of safe harbour rule in accordance with Rule 10TE. Though, in the present case, the assessee had not opted for Safe Harbour Rule, however, Rule 10TD(5) provides that in case the advancing of intra group loans referred to in item No.IV of Rule 10TC exceeds Rs.50,00,00.000/- (fifty crore), then the interest rate declared in relation to the eligible international transaction is not less than base rate of State Bank of India as on 30th June of the relevant previous year +300 basis points. The assessee, in this regard relied upon the Hon'ble Delhi High Court decision in Rampgreen Solutions (P) Ltd v CIT [2015] 60 taxmann.com 355 and the Delhi Tribunal in New River Software

Services (P) Ltd 56 taxmann.com 440 who have relied on safe harbour rules to adjudicate on transfer pricing matters though the assessees in those cases had not opted for safe harbour rules.. In the present case, the base rate of the SBI is 9.275% and on that 300 basis points would make 12.275%. However, as against the 12.275%, the assessee has paid interest to M/s. DB International at 13.13% (including grossing up cost arising out of TDS). Even as per the above mentioned Safe Harbour Rule, the interest paid by the assessee was exceeding 12.275% as it was 13.13% claimed by the assessee.

18. Similarly, the assessee relied on the RBI circular dt. 01/01/2016 which provides application of PLR rate in case the borrowing is done by the Indian currencies by the Indian companies. The ld.AR had pointedly referred to paragraph No. 2.1.2 of the said circular to buttress his argument that the SBI PLR rate should be applied. The relevant portion of 2.1.2 of the circular provides as under:

> *"2.1.2. Borrowing in INR by companies in India: A company incorporated in India may borrow in INR, on repatriation or non-repatriation basis, from NRIs/PIOs after satisfying the following terms and conditions:*
>
> *i. Borrowing company does not and shall not:*
>
> *a.* ***Carry on agricultural/plantation/real estate business; or***
>
> *b. Trade in transferable development rights; or*
>
> *c. Act as Nidhi or Chit Fund Company.*
>
> *ii. Borrowing is by issuance of non-convertible debentures (NCDs);*
>
> *iii. The issue of NCDs is made by public offer;*
>
> *iv. The rate of interest is not more than the prime lending rate of State Bank of India as on the date on which the resolution approving the issue is passed in the borrowing company's General Body Meeting Plus three per cent;*
>
> *v. Period of loan shall not be less than three years;*

vi. .....

vii. .....

18.1. From the bare reading of the above clause of RBI circular, it is clear that this circular is not applicable in case the borrowing company is carrying on business in real estate. As mentioned herein above, the assessee is engaged in the business of developing, building and leasing of life-sciences and bio-technology parks in India and these activities of the assessee are essentially in the nature of real estate business and, therefore, the RBI circular dt. 01/01/2016 bearing No. RBI/FED/2015-16/2 is not applicable to the activities of the assessee.

18.2. The assessee has relied upon the decision of the Co-ordinate Bench of the Tribunal in the case of Vena Energy KM Wind Power (P.) Ltd v DCIT 2022] 141 taxmann.com 557 (Bangalore - Trib) wherein it was held that no transfer pricing adjustment is warranted if the interest rate on rupee denominated NCDs is less than the SBI PLR rate after relying upon RBI Master Directions. As mentioned herein above, the above said decision is not appliable to the facts of the case as the assessee happens to be a real estate company and, therefore, the SBI PLR rate as contemplated under RBI circular is not applicable.

18.3 In our opinion, the finding recorded by the DRP that SBI base rate plus a nominal premium of 50 basis points as ALP, is incorrect as no basis of 50 nominal basis wih was given by the DRP. In fact, the comparable selected by the Assessing Officer namely, Mahua Bharatpur Express Ltd., was paying the interest @ 18% (SBI PLR + 400 basis points). Similarly, Assetz Premium Holdings Pvt. Limited was paying the interest @ 14%. These two comparables selected by the Assessing Officer were excluded by the DRP on the pretext that the NCDs were subscribed by the

related parties. As held hereinabove, Gujarat Road Infrastructure Company Limited cannot be compared with the assessee for the reasons mentioned hereinabove and therefore, there is no comparable available with which the rate of the assessee can be compared as DRP has also not relied upon TP Study of TPO as well as assessee for the reasons "in conclusive". In this scenario, we deem it appropriate to take a guidance from the Safe Harbour Rule and Section194 LD and hold that 12.275% interest rate (SBI base rate +300 basis points) would be the appropriate ALP for the purposes of benchmarking the interest paid by the assessee on NCD to M/s. DB International as against 13.13%. Thus, the ground nos. 2 to 8 of the assessee are partly allowed.

GROUND NOS.9&10

19. With respect to ground nos. 9 and 10, the ld. AR for the assessee submitted that DB International (Asia) Limited, Singapore provides investment banking services and Deutsche Bank AG (Mumbai branch) is the Indian branch office of Deutsche Bank AG. Deutsche Bank is a leading European bank with global reach supported by a strong home base in Germany. DB International in Singapore is a subsidiary of Deutsche Bank AG and provides investment banking services in the nature of funding companies in Asia Pacific Region by way of debt or equity routes. The written submissions filed by the assessee in this regard are to the following effect :

> *"1. Ld.AR further submitted that Deutsche Bank AG (Mumbai Branch) is neither a related party nor an AE of the Assessee in any manner. By the virtue of section 92A(2)(C) of the Act, since the value of NCDs issued by the Assessee to DB international exceeds 51% of the book value of assets of the Assessee, DB International became a deemed AE of the Assessee. The shareholder of the deemed AE i.e., Deutsche Bank AG (Mum bai Branch) is not an AE of the Assessee.*

2. Ld.AR further submitted that the terms and conditions for the NCDs have been negotiated between DB International and the Assessee, which are independent unrelated parties. The term sheet for subscription of NCDs states that Deutsche Bank AG (Mumbai Branch) shall structure and arrange the debt funding for which a fee of 2.5% of the facility amount shall be payable by the Assessee. Ld. AR further submitted that the negotiations with Deutsche Bank (DB) on the structuring fee were undertaken on a third-party footing as there was no controlling relationship with DB. The most appropriate method for justifying the fees paid is 'Other Method'. As the issue expenses were negotiated with DB on a third-party footing, the Appellant claimed that the transactions were at Arm's length under 'other method'. [page no 50 of paper book 2A.

3. The Ld. TPO in his order stated that the Taxpayer has not shown any comparable transaction. There was no analysis as to whether the payment is commensurate with the benefit received by Appellant. The most appropriate method for is Other method. Under the Other method considering that (a) Basis of fees is not determined; (b) The payment is not commensurate with benefit, fees of 0.5% was considered appropriate. [Pg no 11 of TPO order]. Adjustment of INR 3,37,09,375 was made on this account. Feeling aggrieved by the order passed by the assessing Officer the assessee preferred the proceedings before the DRP. The DRP has confirmed the order passed by the assessing Ofc and the Ld.AR had drawn our attention to pay 16 of the DRP order. The assessing officer had made Adjustment of INR 3,37,09,375 was made to the total income of the Appellant in conformity to the DRP directions.

4. Ld.AR also submitted that the learned TPO/AO/DRP erred in making a transfer pricing adjustment of Rs 3,37,09,375/- by determining the ALP of debenture issue expenses. The Appellant submits that the impugned adjustment has been made without appreciating that the debenture issue expense has been paid to Deutsche Bank AG (Mumbai). Deutsche Bank AG (Mumbai) is not an associate enterprise of the Appellant. Merely because DB International Ltd constitutes a deemed AE of the Appellant, it does not lead to assumption that all DB entities ipso facto become AE's of the App Ilant. As a result, the transaction of payment of debenture issue expense does not constitute international transaction under section 92B. The learned TPO/AO/DRP have failed in understanding this aspect.

5. Without giving any cogent reasons as to why transfer pricing provisions are applicable qua debenture issue expense, the impugned adjustment even otherwise has been made on an adhoc basis. No comparable have been identified by the learned TPO. The Appellant submits that the impugned transfer pricing adjustment of Rs 3,37,09,375/- without identifying any comparable is bad in law. This submission is supported by the decisions, among others, in Luwa India Pvt Ltd TS-281-HC-2021 (Karnataka-HC), DCIT v Air Liquide Engineering India (P) Ltd ITA No 1408/Hyd/2010; CIT v SI Group India Ltd ITA No 447 of 2017 (Bom-HC); CIT v Lever India Exports Ltd TS-23-HC-2017 (Bom-

HC); Agro Tech Foods Ltd v DCIT TS-136-ITAT-2021 (Hyd) [These decisions and others are compiled at Pages 428 to 559 of the Case law Compilation]

6. In view of the above, the Appellant submits that the transfer pricing adjustment to debenture issue expenses is bad in law and deserves to be deleted."

20. Per contra, the Ld.DR relied upon the order passed by the DRP / TPO and our attention was drawn to para 2.17.1 of the DRP in this regard, wherein the DRP had held as under :

"….. This was supposedly done owing to the AE relationship with DP International which is a related party to Deutsche Bank. However, in the TP study no benchmarking study has been provided. It is seen hat even in response to the show cause notice of the TPO, no such comparable instances of debenture issue expenses / bank charges were furnished by the assessee. In view of the above, we uphold the determination of ALP by the TPO at 0.5% as against 2.5% paid by the assessee."

21. We have heard the rival contentions of the parties and perused the material available on record. Admittedly, the assessee has benchmarked the expenses paid to its deemed AE as international transaction and therefore, had mentioned in its TP Study. The assessee has paid the interest @ 2.5% to Deutsche Bank, AG, Mumbai Branch for facilitating the issuance of NCD to DB International (Asia) Limited. The TPO / DRP both have determined the ALP at 0.5% as against 2.5% on the pretext that the assessee being AE of Deutsche Bank, Mumbai and further, the assessee has not provided any comparable instance of debenture issue for the purposes of benchmarking the expenses / bank charges. In our view, the assessee had claimed 2.5% on actual basis whereas the DRP has restricted it to 0.5% on estimate basis. In our view, both the views cannot be approved by us as "no person can earn the profit from himself". This principle applies to the fact to the present case as DB International had been held to be AE of the assessee for the reasons mentioned hereinabove, and therefore, to issue the NCD by the branch of DB

International, it is highly improbable that they will charge 2.5% as expenses for issuing the debenture / bank charges. In view of the above and also on the account of the fact that the DRP has estimated it at 0.5%, we are of the opinion that a balance is required to be drawn between the rights of the assessee and as well as the Revenue, and therefore, we restrict the determination of ALP by the TPO at 1.5% as against 2.5% paid by the assessee. Thus, the ground nos.9 and 10 are partly allowed.

Ground Nos.11 to 16 - Addition u/s 56(2)(viia) of the Act :

22. Briefly, the facts are that the assessee and the holding entity of the assessee, LC Core Opportunities Fund Pte. Ltd. ("LCCOF"), has entered into share purchase agreement ("SPA") with ARE Mauritius No 1 Ltd. and ARE Mauritius No.2 and the target entity Takshila Tech Parks & Incubators (India) Private Limited ("TTPL"). The Assessee acquired 86,54,020 shares of TTPL @ Rs.138.16 per share. Given the involvement of the AE in negotiations (i.e LC Core), the transaction was reported as a deemed international transaction u/s 92B(2) of the Act. The FMV per share of TTPL was determined at Rs. 169.32 in accordance with Rule 11UA(1)(c)(b) r.w.r. 11U(b) of the Income-tax Rules, 1962 and the shares acquired being less than the FMV, the assessee offered addition of Rs. 26,96,57,437/- u/s 56(2)(viia) of the Act in the revised return of income.

22.1 During the assessment proceedings, the assessee had submitted that it has followed DCF Method, whereby the FMV value was derived at Rs.147.81 per share. The ld.TPO rejected the valuation report on the pretext that the terminal value of the cash flow is less than the net worth. Thereafter, the TPO benchmarked the transaction as deemed international transaction under Rule 11U and 11UA of Income Tax Rules r.w.s. 56(2)(viia) of

the Act. For the above said purposes, the TPO took the financial statement of assessee on 01.04.2016 and rejected the contention of the assessee for taking the financial statement / audited financial statement as on 30.09.2016 and thereby determined the FMV value at Rs.236.25 per share.

23. Feeling aggrieved by the order of TPO/Assessing Officer, the assessee challenged the order before the DRP. The DRP vide its impugned directions, decided the issue against the assessee. The primary findings of the DRP are given in paragraph No. 2.1.7, wherein the DRP held that the transaction of acquisition of shares by the assessee through its AE (LC fund) was a transaction which falls within the purview of section 92B(2) of the Act. Further, the DRP in paragraph 2.6.3 have noted down that no TP additions as proposed by the Assessing Officer are required as the payment made to the overseas entities (Rs.157,42,69,222/-) was less than the ALP determined (Rs.211,29,36,353/-). However, the DRP in paragraph 2.6.4 had directed the Assessing Officer to apply the provisions of section 56(viia) of the Act as the assessee has received the shares for a consideration which was less than aggregate fair market value of the assets.

24. On the basis of the directions issued by the DRP, the Assessing Officer passed the order giving effect and made the addition of Rs. 57,92,15,385/- u/s. 56(2)(viia) of the Act. Feeling aggrieved by the order passed by the lower authorities, the assessee is in appeal as per the grounds 11 to 16 reproduced herein above. At the time of argument, the ld.AR had restricted his submission only with respect to the ground No. 14 to 16.

25. Before us, ld. AR has submitted that DCF valuation adopted whereby the FMV per share was derived at Rs. 147.81, however, the TPO had rejected the valuation report contending that Terminal value of the Cash flows was less than the net worth. Thereafter, the TPO had benchmarked the deemed international transaction by relying upon the Rule 11U and 11UA of the Income-tax Rules, 1962 relevant for Section 56(2)(viia) of the Act. For the above purposes, the TPO did not consider the audited financial statements as on 31.08.2016 stating that huge amount of deduction of assets has been claimed towards impairment loss and for that purposes, TPO had relied upon balance sheet as on 01.04.2016. The TPO derived the FMV at INR 236.25 per share and thereafter applied Rule 11U & 11UA for computing the income u/s 56(2)(viia) of the Act.

26. Feeling aggrieved, the assessee approaches the DRP, however, the DRP had also decided the issue against the assessee. The contention of the assessee was that the DRP had wrongly issued the direction to the Assessing Officer to determine the income of the assessee under Rule 11UA(1)(c)(b) of the Income Tax Rules (Rules) by considering the balance sheet as on 31/03/2016 without including the impairment loss of Rs. 64,74,02,716/-.

27. It was the submission of the ld.AR that the valuation of shares is required to be done under Rule 11UA(1)(c)(b) of the Rules. However, the fair market value is required to be computed on the valuation date as provided by the Rules. He had drawn our attention to the definition clause namely, Rule 11U of the Rules wherein in sub-clause (b) the **balance sheet** has been defined and at sub-clause (j), the **valuation date** has been defined. On the basis of the above, it was submitted that the learned DRP had committed an error by directing the Assessing Officer to take the

valuation date as on 31/03/2016 instead of 30/09/2016. For the above said cognizance, he had relied upon the decision in the case of Electra Paper and Board (P.) Ltd., vs. ITO [2022] 137 taxmann.com 74 (Chandigarh – Trib.) wherein it was held that – *even if the balance sheet is audited subsequently, it would be sufficient compliance of the provisions of Rule 11U(b).*

28. In view of the rules referred herein above, it was contended by the ld.AR that the balance sheet as drawn on 30/09/2016 should be considered for determining the fair market value of the shares. Further it was submitted that the assessee had already determined the fair market value on the basis of the balance sheet as on 30/09/2016 and offered the difference in price and offered Rs. 26,96,57,437/- u/s. 56(2)(viia) in the revised return of income.

29. The ld.AR for the assessee further raised the contention that the finding of the DRP that impairment loss as recorded in the books of accounts of TTPL cannot be considered, was not in accordance with law as the DRP had wrongly noted that impairment loss was done with respect to land parcel (para 2.8.3). It was submitted that the DRP had further pointed out that *'the assessee has not furnished the guideline value in respect of the land nor given details of instances of sale transactions in the vicinity to demonstrate the fall in price'.* Ld.AR had drawn our attention to page 897 of the paper book wherein the impairment loss has been referred to the building. The table depicting/mentioning the impairment loss, provides as under:

Takshila Tech Parks & Incubators (India) Private Limited
Notes to the financial statements for the period beginning on April 1, 2016 and ended on September 30, 2016
(All amounts in Rupees unless otherwise stated)

9 Tangible assets

	Gross block				Depreciation					Net block
	April 1, 2016	Additions	Disposals	September 30, 2016	April 1, 2016	For the period	On disposals	Impairment for the period**	September 30, 2016	September 30, 2016
Land	71,610,200	-	-	71,610,200	-	-	-	-	-	71,610,200
Buildings*	1,768,257,391	-	-	1,768,257,391	167,707,807	29,421,373	-	647,402,716	844,531,896	923,725,495
Lab Equipment*	281,763,309	-	-	281,763,309	129,909,293	11,187,413	-	-	141,096,706	140,666,603
Furniture and fixtures*	112,968,804	-	-	112,968,804	57,864,349	3,978,713	-	-	61,843,062	51,125,742
Office Equipment	3,858,891	-	-	3,858,891	2,039,184	567,422	-	-	2,606,606	1,252,285
Plant and Equipment*	232,568,213	854,820	-	233,423,033	50,715,081	8,726,947	-	-	59,442,028	173,981,005
Total	2,471,026,808	854,820	-	2,471,881,628	408,235,714	53,881,868	-	647,402,716	1,109,520,298	1,362,361,330

* Includes assets given on operating leases.
** During the period the Company has recognised an impairment loss of Rs. 647,402,716. Also refer note 26.

30. It was submitted that the DRP had committed an error in understanding that the impairment loss recorded in the books was for land whereas the impairment loss recorded by the assessee was for building. It was further submitted that the impairment loss was done by the holding company of the TTPL in accordance with the internationally accepted accounting principles in the quarter ended 31/03/2016 when the Alexandria Group decided to exit from the Indian market and classified the asset in India as 'held for sale'. The said financials of Alexandria Group were furnished to the US authorities in accordance with the USGAAP. It was the contention of the assessee that the corresponding impairment loss were carried out in the books of accounts of TTPL as per AS28. It was submitted that impairment loss has to be carried on the date of balance sheet as they were indicator from external sources/information. As the impairment was done in the books of Alexandria Group as on 31/03/2016, therefore, the said information being the external indicator for TTPL, therefore, the corresponding adjustment in the financials of TTPL was done as on 30/09/2016 as a natural corollary.

31. It was submitted that the impairment of building recorded in the audited balance sheet as on 30/09/2016 cannot

be tinkered with for the purpose of determining the fair market value u/s.56(2)(viia) of the Act. The ld.AR relied upon the following case law, in support of the case of the assessee :

i. *Shahrukh Khan vs. DCIT [2018] 90 taxmann.com 284 (Bombay High Court);*

ii. *Medplus Health Services (P.) Ltd. vs. ACIT [2016] 68 taxmann.com 29 (Hyderabad Tribunal);*

iii. *Minda S M Technocast (P.) Ltd. vs. ACIT [2018] 92 taxmann.com 29 (Delhi Tribunal);*

iv. *Smiti Holding & Trading Co. (P.) Ltd. vs. PCIT [2018] 99 taxmann.com 157 (Mumbai Tribunal);*

v. *DCIT vs. M/s. Kilitch Healthcare India Ltd., ITA No. 7061/Mum/2019 (Mumbai Tribunal);*

vi. *ITO vs. M/s. Mystical Infaratech Pvt. Ltd. ITA No. 4266/Mum/2017 (Mumbai Tribunal);*

vii. *ACIT vs. Y. Venkanna Choudary [2019] 112 taxmann.com 71 (Visakhapatnam Tribunal);*

viii. *K. Vijaya Bhaskar Reddy vs. ACIT, ITA No. 619/Hyd/2019 (Hyderabad Tribunal);*

ix. *Convergys India Services Pvt. Ltd. vs. DCIT, ITA No. 782/Del/2021 (Delhi Tribunal);*

32. Per contra, the Ld.DR relied upon the order passed by the DRP and our attention was drawn to paragraph No. 2.7.1 to 2.7.3 and paragraph No. 2.8.1 to 2.8.4 to the following effect:

> *"2.7.1 In respect of the assessee's contention that balance sheet as on 31st august 2016 should be taken, we are inclined to dismiss the argument in view of the following facts.*
>
> *1) The financials of august attached to SPA is unaudited*

2) Even if one were to take the net worth as on 31 August 2016, it is seen that, barring the impairment(64.7crores) there is no significant difference between net worth as on 31 Aug2016 (Rs 150 crores) and net worth as on March 2016 (216 crores)

2.7.2 We therefore hold that the request of the assessee for the adoption of the unaudited balance sheet as on August 31, 2016 as the basis for valuation is not acceptable

2.7.3 We therefore, direct the AO add an amount of Rs. 89,12,84,761 to the income of the assessee being the difference between the fair market value of the shares and the consideration paid for acquisition of the shares under section 56(2)(viia).The AO should give credit for the amounts already returned by the assessee in respect of this transaction u/s 56(2) (viia) after verifying whether the revised return was filed within the time prescribed by the Act or not.

2.8.1 Having considered the submissions, as stated earlier Takshila Tech Park Company (whose shares were transferred) had net worth of Rs. 21,607 as on 31.03.2016. The transfer took place on 12 September 2016.

2.8.2 It is seen that Takshila Tech Parks has recorded an impairment of INR 16 in its books as on 31 August 2016. The assessee has stated that the recognition of impairment is based on internationally accepted accounting principles and standards and that the impairment loss was done to bring on the land parcels located in India to their fair value less cost to sell as required by the relevant accounting standard under US GAAP. Assessee also states that as per AS 28 issued by ICAI, an asset is said to be impaired when the carrying amount of the asset exceeds its recoverable amount. Thus, according to the assessee the impairment loss as recognised in the books of account on Takshila Tech Parks as on 31 August 2016 is in order.

2.8.3 In our view, assessee's reliance on US GAAP as a reason for recording of impairment in an Indian company cannot be accepted. Even the reliance on AS 28 no way supports the huge amount of impairment claimed as the accounting standard merely given the procedure that is to be followed where .there is a reduction in the value of assets. The assessee contends that the impairment loss was done to bring the land parcels located in India to their fair value .Such a huge amount of impairment especially in the case of a land parcel ,which traditionally only appreciates in India, is hard to accept. The assessee has not furnished the guideline value in respect of the land nor given details of instances of sale transactions in the vicinity to demonstrate the fall in price.

2.8.4 Therefore, we dismiss the objections of the assessee regarding the non-consideration of the impairment loss as computed in its valuation report.

33. We have heard the rival contentions of the parties and perused the material available on record. The findings of the DRP are reproduced herein above.

33.1 As per the balance sheet of the TTPL as on 31/08/2016 (page 513 of paper book 2A), the impairment loss has been mentioned as Rs. 64,74,02,716/-.

33.2 In the audited balance sheet dt.30.09.2017 at page No. 706 of the paper book the impairment loss has been mentioned for Rs. 64,74,02,716/-. At Note 9, the assessee had mentioned the impairment loss at Rs. 64,74,02,716/-. At Note 27 of the financials of TTPIIPL at page 897 it was mentioned as under:

> *"During the year, the Company's former ultimate holding company, Alexandria Real Estate Equities Inc. took a decision to permanently exit the Indian market, and to sell or otherwise dispose of all its interests in India. During the course of implementation of such decision, the erstwhile management of the Company earned out an impairment lest of the assets and it was assessed that then* ***carrying values of cash generating unit, buildings as per books are higher than the recoverable amounts, i.e., the net selling prices.*** *The net selling prices are determined by reference to the estimated releasable values obtainable in an active market. As a matter of measurement, the Company has written down the* ***carrying values of buildings*** *to their estimated recoverable amounts and recorded a impairment loss of Rs. 64,74,02,716/- during the quarter ended September 30, 2016."*

33.3 At page 46 and 47 of the paper book (financials of Alexandria Group) the said company has mentioned about the impairment of the asset classified as 'held for sale' the narration was given by the said Alexandria Group at page 433 of the paper book to the following effect:

> *18. Assets classified as held for sale (continued)*
>
> *On March 31, 2016, we evaluated two separate potential transactions to sell land parcels in our India submarket aggregating 28 acres. We determined that these land parcels met the criteria for classification as held for sale as of March 31, 2016, including among others, the following: (i) management having the authority committed to sell the real estate, and (ii) the sale was probable within one year. Upon*

classification as held for sale as of March 31, 2016, we recognized an impairment charge of $29.0 million to lower the carrying amount of the real estate to its estimated fair value less cost to sell. During the second and the third quarters of 2016, we sold these two land parcels in two separate transactions for an aggregate sales price of $12.8 million at no gain or loss. As of December 31, 2015, and March 31, 2016, all our investments in Asia were classified as held for use, except for two land parcels in India, described above, which were classified as held for sale as of March 31, 2016. As of December 31, 2015, and March 31, 2016, we concluded that all our investments that were classified as held for use were recoverable under the held for use model as the projected probability-weighted undiscounted cash flows from each operating property and land parcel exceeded our net book value, including our projected costs to complete or develop each land parcel.

On April 22, 2016, we decided to monetize our remaining real estate investments located in Asia in order to invest capital into our highly leased value-creation pipeline. We determined that these investments met the criteria for classification as held for sale when we achieved the following, among other criteria: (i) committed to sell all of our real estate investments in Asia, (ii) obtained approval from our Board of Directors, and (iii) determined that the sale of each property/land parcel was probable within one year. On April 22, 2016, upon classification as held for sale, we recognized an impairment charge of $154.1 million related to our remaining real estate investments located in Asia, to lower the carrying costs of the real estate to its estimated fair value less cost to sell.

During the third quarter and fourth quarter of 2016, we updated our assumptions of fair value for real estate investments located in Asia and, as a result, we recognized additional impairment charges of $7.3 million and $3.9 million, respectively.

As of December 31, 2016, we had two operating properties aggregating 634,328 RSF remaining in China, which continued to meet the classification as held for sale, and no remaining investments in real estate in India. We expect to complete the transactions of our remaining real estate investments in Asia over the next several quarters.

The following table summarized the 2016 disposition activity and remaining assets held for sale as of December 31, 2016, in Asia (dollars in thousands):

	Rental Properties		Land Parcels		
	Number	RSF	Number	Acres	Sales Price
Completed dispositions during 2016	6	566,355	6	196	$ 66,131
Remaining assets held for sale in China	2	634,328	-	-	TBD
Total_	8	1,200,683	6	196	

We evaluated whether our real estate investments in Asia met the criteria for classification as discontinued operations, including, among others, (i) if the properties meet the held for sale criteria and (ii) if the sale of these assets represents a strategic shift that has or will have a major effect on our operations and financial results. In our assessment, we considered, among other factors, that our total revenue from properties located in Asia was approximately 1.5% of our total consolidated revenues. At the time of evaluation, we also noted total assets related to our investment in Asia were approximately 2.5% of our total assets. Consequently, we concluded that the monetization of our real estate investments in Asia did not represent a strategic shift that would have a major effect on our operations and financial results and, therefore, did not meet the criteria for classification as discontinued operations.

The following is a summary of net assets as of December 31, 2016 and 2015, for our real estate investments in Asia that were classified as held for sale as of December 31, 2016 (in thousands)

	December 31,	
	2016	2015
Total assets	39,643	$ 79,588
Total liabilities	(2,342)	(1,631)
Total accumulated other comprehensive loss (gain)	828	(1,897)
Net assets classified as held for sale - Asia	38,129	$ 76,060

33.4 The auditors of the special purpose vehicle of TTPL have done the audit of the company on 31/03/2018 for the year beginning on 1st April, 2016 and ending 30th September, 2016 and mentioned the impairment loss for the period at Rs. 64,74,02,716/- .

33.5. The auditor of the assessee have determined the fair market value of the shares under rule 11UA r.w.s.56(2)(viia) vide their report dated 31/03/2018 (page 903 of paper book 2B). As per the said report, the fair market value per share was determined at Rs. 169.32. The calculation is given at page 907. In the said calculation, the book value of the assets in the balance sheet was taken as Rs.

169,83,06,012/-. The said book value had factored in the impairment loss at Rs. 64,74,02,716/- .

33.6 In the present case, the property has been received by the assessee as on 4th October, 2016 when the shares were actually transferred to the appellant. Thus, the valuation date which is required to be considered is 4th October, 2016. For the purposes of determining the fair market value, the balance sheet as drawn on the valuation date which has been audited by the auditors of the company after being appointed u/s. 224 of the Companies Act is required to be considered. AO/DRP have made addition under section 56(2)(viia) of Rs 57,92,15,385 by determining the fair market value (FMT of Takshila Tech Parks & Incubators (India) Private Limited (TTPL') shares under Rule 11UA(1)(c)(b) by adopting the balance sheet as on 31.03.2016 as against the balance sheet as on 30.09.2016. *Explanation to section 56(2)(viia) provides the manner of computing the FMV of shares for the purposes of section 56(2)(viia), which is mentioned in Rule 11UA. Rule 11UA(1)(c)(b) is relevant for determination of FMV of unquoted equity shares. The FMV of shares of TTPL should therefore be made in terms of Rule 11UA(1)(c)(b). As per this rule, the FMV of unquoted equity shares should be determined on the 'valuation date'. 'Valuation date' is defined in Rule 11U(j) to mean the date on which the property is received by the assessee. The property in the present case is shares of TTPL. Such shares were received by the Appellant on 04.10.2016. The FMV under Rule 11UA(1)(c)(b) should be determined by reckoning 04.10.2016 as the valuation date. Rule 11UA(1)(c)(b) provides the following formula for determining the value.*

Formulae	A-L/(PE) * (PV)
A	Book value of assets in the **balance sheet** as reduced by:
	(i) Any amount of tax paid as TDS or TCS or advance tax; (ii) Any amount shown in the balance sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;
L	Book value of liabilities shown in the **balance sheet** except certain
	liabilities enumerated in the rule.

PE	Total amount of paid up equity share capital as shown in the **balance sheet**
PV	The paid up value of such equity share.

33.7. The definition clause provided in rule 11U of the Rules, had defined balance sheet and valuation date, which is to the following effect:

11U. For the purposes of this rule and rule 11UA,—

(b)		*"balance sheet", in relation to any company, means,—*
(i)		*for the purposes of sub-rule (2) of rule 11UA, the balance sheet of such company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date which has been audited by the auditor of the company appointed under section 224 of the Companies Act, 1956 (1 of 1956)[26] and where the balance sheet on the valuation date is not drawn up, the balance sheet (including the notes annexed thereto and forming part of the accounts) drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the annual general meeting of the shareholders of the company; and*
ii		*in any other case,—* *(A) in relation to an Indian company, the balance sheet of such company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date which has been audited by the auditor of the company appointed under the laws relating to companies in force; and* *(B) in relation to a company, not being an Indian company, the balance sheet of the company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date which has been audited by the auditor of the company, if any, appointed under the laws in force of the country in which the company is registered or incorporated;]]*
j)		*"valuation date" means the date on which the property or consideration, as the case may be, is received by the assessee.]*

33.8. As per clause (ii) of Rule 11U [extracted above], the 'balance sheet' including the notes annexed thereto should be (i) drawn up on the valuation date and (ii) the same should be audited by the auditor appointed under section 224 of the Companies Act, 1956. There is no quarrel with respect to the drawing of the balance sheet of Takshila Tech Parks & Incubators (India) Private Limited

(TTPL') as on 31.08.2016 [Exhibit B unaudited Financial to share purchase agreements] and it's audit by the auditor appointed under the, Companies Act. Subsequently, in the present case, the lower authorities have adopted the balance sheet [unaudited financials] was available on 01.04.2016 thereby negating the very provisions of the Act mentioned in rule 11 UA (1)(1)(c)(b) read with rule 11U(b)(ii). In our considered opinion when the balance sheet was available as on date of receipt of shares i.e., 04.10.2016 which were subsequently audited on 31.03.2018 by the auditor in terms of the Companies Act, then it is not permissible in law for the lower authorities to take the balance sheet as on 01.04.2016. Undoubtedly, the assessee is not expected to get its accounts audited/balance sheet audited on the date of transfer itself. What is contemplated under the Act is that the balance sheet should be drawn by the assessee and it should be audited thereafter. In the present case, the balance sheet was drawn up to 31.08.2016 which formed the basis of the valuation done to arrive at the FMV of 169.32 (Page 907 of the paper book) and difference, if any, to be taxed under section 56(2)(viia) of the Act. In fact, assessee filed its revised return dt.31.03.2018 [Page 913 of the Paper Book 2A] and had offered Rs.26,96,57,437/- towards tax u/s 56(2)(viia) of the Act. The audit report for the financials drawn on 31.08.2016 is dated 31.03.2018 [Page 889 of Paper Book 2B] which is also of the same date of filing of the revised return of income. Such accounts were audited by the statutory auditors of M/s. Takshila Tech Parks & Incubators (India) Private Limited (TTPL) appointed under section 224 of the Companies Act. Based on this audited balance sheet, another firm of Chartered Accountants arrived at the value of Rs.169.32 per share as per Rule 11UA(1)(c)(b) [Report dated 31.03.2018 - Page 903 of Paper Book 2B]. The value determined in the said report

was adopted for offering the income to tax under section 56(2)(viia) in the revised return of income.

33.9 As per law, the only requirement is drawing of Balance sheet as on the valuation date. There is no further stipulation that the audit of balance sheet should also be completed before the transaction date. The audit normally happens subsequently after the receipt of the shares. The audited balance sheet would be available for filing the return of income and offering the income under section 56(2)(viia) of the Act to tax. For the purposes of determining the fair market value, the guiding principle has been provided by the Act for the benefit of the assessing authority i.e., to adopt the valuation as per the balance sheet drawn on the date of transfer subject to it being audited. This should be the basis of making the valuation by the assessing officer for making the addition under section 56(2)(viia) of the Act. Further the law does not expect the assessee to perform the impossible act. It is unimaginable that the assessee will get its accounts audited on the date of drawing up of the balance sheet itself. The accounting standard provides that the accounts of the assessee are required to be audited after the finalization of balance sheet and even it has provided that the subsequent events occurring after the balance sheet date can also be factored in while finalizing the audited accounts. Our above said view is fortified by the decision of the Chandigarh Bench of the Tribunal in Electra Paper and Board Private Ltd v ITO [20221194 ITD 391. The Chandigarh Tribunal in this case held that it is justifiable to accept the unaudited balance sheet as on the valuation date when the same has been audited at a later date with no material variance in the financials. In the present case, the audit of balance sheet drawn as on 31.08.2016 was completed on 31.03.2018 after taking into account financials as on 31.08.2016. In view of the above, we

hold that the balance sheet as drawn on 31.08.2016 being the closest approximation to the balance sheet on valuation date (date of transfer) should be considered under Rule 11U(b)(ii) read with Rule 11UA(1)(c)(b).

34. In view of the above discussions, the finding of DRP recorded in paragraphs 2.7.2 and 2.7.3 are not in accordance with law and, therefore, we set aside the same. The assessing officer is duty-bound to calculate the fair market value of the shares as per the balance sheet drawn on 31.08.2016. Therefore, the addition made in the hands of the assessee based on the balance sheet as on 31 March 2016, is held to be without any basis and therefore, we quash the same.

35. We further find that the DRP in Para 2.8.3 of its order has recorded as under :

> *" 2.8.3 In our view, assessee's reliance on US GAAP as a reason for recording of impairment in an Indian company cannot be accepted. Even the reliance on AS 28 no way supports the huge amount of impairment claimed as the accounting standard merely given the procedure that is to be followed where .there is a reduction in the value of assets. The assessee contends that the impairment loss was done to bring the land parcels located in India to their fair value .Such a huge amount of* ***impairment especially in the case of a land parcel*** *,which traditionally only appreciates in India, is hard to accept. The assessee has not furnished the guideline value in respect of the land nor given details of instances of sale transactions in the vicinity to demonstrate the fall in price. (emphasis supplied by us)*

36. The conclusion of the DRP, is not acceptable as it was premised on incorrect appreciation of facts. The DRP has categorically recorded in above noted paragraph that there was impairment of the land, which is contrary to the realities in India. In our view, the above said finding of fact has been wrongly recorded as the assessee has never claimed the impairment of land whereas the assessee has only claimed the impairment of the building. At Page 897 of the Paper Book, a tabulation is provided

which categorically mentioned impairment of the building and not the land. At Sl.No.2, it is mentioned against building under the depreciation and net block as under :

	Depreciation					Net block September 30, 2016
	April 1, 2016	For the period	On disposa ls	Impair-ment for the period	September 30, 2016	
Land	--					
Build -ing	167,707,807	29,421,373	--	647,402,716	844,531,896	923,725,495

37. Therefore, the finding of the DRP that there is impairment of land is without any basis and contrary to the facts, furthermore, the DRP had recorded a finding that the assessee has not provided the guidance value in respect of the land nor given the details of sale transaction in the vicinity. During the hearing, the assessee was asked to provide the guidance value of the immovable property of the assessee as well as the land situated nearby. The assessee had filed the guidance value in support of ground no.16, which is as under :

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(/index.html)

REGISTRATION & STAMPS DEPARTMENT

Government of Telangana

Unit Rates - Locality Wise

District Name

: MEDCHAL-MALKAJGIRI

Mandal Name

: SHAMIRPET

City/Town/Village

: LALGADIMALAKPET

S.No.	Ward-Block	Locality	Apartment value (Rs. per Sq.Ft)			Classification	Effective Date (dd/mm/yyyy)	Door No. Wise Details - Rates
			Ground Floor	First Floor	Other Floors			
1.	1 - 0	LALGADIMALAKPET	2,200	2,200	2,200	01(Residential)	01/02/2022	Get

Back

Note :

1. *This is provisional information as per records maintained by registration department for the purpose of helping the registering public to estimate the stamp duty only, subject to change due to revision of market value once in a year OR adhocly due to anomalies.*
2. For further details contact Sub Registrar office
   SHAMIRPET,
   01/01/2010,
   SHAMIRPET, Shamirpet
   Shamirpet
   Phone: 244423

Office of the Sub-Registrar
Shamirpet, Medchal Dist

ANNEXURE – II

Certificate of the Market Value of the properties involved in a proposed suit, issued in terms of A.P. Court fees and suits, Valuation Rules 1987.

1.NAME OF THE VILLAGE/MANDAL/ DISTRICT: Lalgadimalakpet(V) Shamirpet(M) Medchal- Malkajgiri Dist

Name of the Applicant: R. Arvind Kumar

3. Description of the property:-

Sy. Nos.	Plot No.	Extent Acre Sq. Yard	Revenue If Any	Applicants Value as per Acre Sq. Yard as on 01/04/2016
101, 101/2	—	Ac 12-00 gts	—	5,00,000/- per Acre (Rupees five lakhs only)

Cash Reciet No: 3556/2023

Date of Issue:- 05/05/2023

Office of the Sub-Registrar Shameerpet.

Sub-Registrar
Shamirpet

SIGNATURE OF THE REGISTERING OFFICER

SUB-REGISTRAR SHAMERPET.

38. From the perusal of the above noted document, it is clear that the value of the land, which is the subject matter of the present dispute, has not been higher as compared to the guidance value.

39. The last reasoning given by the DRP was that the assessee has relied upon Accounting Standard - 28 for passing of the impairment claim in the account. The DRP had recorded that AS28 has merely provided the procedure which was to be followed where there is reduction in the value of the asset. As per the ld.AR, the impairment was initially done in the parent company

namely, Alexandria Group Inc in the quarter ended of 31.03.2016, by following the US GAAP. Before, reporting the impairment, the Alexandria Group Inc has furnished the financials to the concerned authorities and have also provided the valuation report to the US Authorities. It was submitted that thereafter, the impairment of the asset was carried out in the balance-sheet of TTPL Books as per AS28. It was submitted that the finding of the DRP that AS-28 merely provides the procedure to be followed for reporting of the impaired assets, and therefore, merely following it by the assessee would not justify the impairment of the assets was without any basis as no reasons have been provided by the DRP for arriving at the above said finding, we have gone through the objective and scope of Accounting Standard – 28, which provides as under :

> ***"Objective:***
>
> *The objective of this Standard is to prescribe the procedures that an enterprise applies to ensure that its assets are carried at no more than their recoverable amount. An asset is carried at more than its recoverable amount if its carrying amount exceeds the amount to be recovered through use of sale of the asset. If this is the case, the asset is described as impaired and this Standard requires the enterprise to recognize an impairment losses. This standard also specifies when an enterprise should reverse an impairment loss and it prescribes certain disclosures for impaired assets."*
>
> ***Scope***
>
> *1. This Standard should be applied in accounting for the impairment of all assets, other than :*
>
> *(a) inventories (see AS 2, Valuation of Inventories);*
>
> *(b) assets arising from construction contracts (see AS 7, Construction Contracts);*
>
> *(c) financial assets1, including investments that are included in the scope of AS 13, Accounting for Investments; and*
>
> *(d) deferred tax assets (see AS 22, Accounting for Taxes on Income).*
>
> *2. This Standard does not apply to inventories, assets arising from construction contracts, deferred tax assets or investments because existing Accounting Standards applicable to these assets*

already contain specific requirements for recognizing and measuring the impairment related to these assets.

3. This Standard applies to assets that are carried at cost. It also applies to assets that are carried at revalued amounts in accordance with other applicable Accounting Standards. However, identifying whether a revalued asset may be impaired depends on the basis used to determine the fair value of the asset:

(a) if the fair value of the asset is its market value, the only difference between the fair value of the asset and its net selling price is the direct incremental costs to dispose of the asset:

(i) if the disposal costs are negligible, the recoverable amount of the revalued asset is necessarily close to, or greater than, its revalued amount (fair value). In this case, after the revaluation requirements have been applied, it is unlikely that the revalued asset is impaired and recoverable amount need not be estimated; and

(ii) if the disposal costs are not negligible, net selling price of the revalued asset is necessarily less than its fair value. Therefore, the revalued asset will be impaired if its value in use is less than its revalued amount (fair value). In this case, after the revaluation requirements have been applied, an enterprise applies this Standard to determine whether the asset may be impaired; and

(b) if the asset's fair value is determined on a basis other than its market value, its revalued amount (fair value) may be greater or lower than its recoverable amount. Hence, after the revaluation requirements have been applied, an enterprise applies this Standard to determine whether the asset may be impaired."

40. The reading of the scope and objective of Accounting Standard – 28 clearly provides that this Accounting Standard was required to be mandatorily followed. The assessee is a real estate company and is drawing revenue from renting of the properties and therefore, the assessee was not able to specify which asset would continue to generate the revenue in future, therefore, the assessee had rightly followed Para 64 of AS-28 and estimated the recoverable amount of cash generating unit. Paras 64 of AS-28 provides as under :

"Identification of the Cash-Generating Unit to which an Asset belongs

64. If there is any indication that an asset may be impaired, the recoverable amount should be estimated for the individual asset. If it is not possible to estimate the

recoverable amount of the individual asset, an enterprise should determine the recoverable amount of the cash-generating unit to which the asset belongs (the asset's cash-generating unit).”

Hence, we do not find any error in following Accounting Standard – 28, by the TTPL for valuation of its assets.

40.1. In view of the above said discussion, we find force in the submissions of the assessee and accordingly, the findings of the DRP is required to be set aside and the addition made in the hands of the assessee is required to be deleted.

40.2 There is yet another reason for the assessee to consider the impairment of assets in the balance-sheet as on 30.09.2016 (Page 889 of the paper book). As per the scope of Standard of Accounting – 560, it is the auditor’s responsibility to take into account the events occurring after balance-sheet date. The scope and objective of Standard of Accounting – 560 provides as under :

“1. This Standard on Auditing (SA) deals with the auditor's responsibilities relating to subsequent events in an audit of financial statements. It does not deal with matters relating to the auditor's responsibilities for other information obtained after the date of the auditor's report, which are addressed in SA 720(Revised).1 However, such other information may bring to light a subsequent event that is within the scope of this SA. (Ref: Para. A1)

4. The objectives of the auditor are to:

(a) Obtain sufficient appropriate audit evidence about whether events occurring between the ***date of the financial statements and the date of the auditor's report that require adjustment of, or disclosure in, the financial statements are appropriately reflected in those financial statements; and***

(b) Respond appropriately to facts that become known to the auditor after the date of the auditor's report, that, had they been known to the auditor at that date, may have caused the auditor to amend the auditor's report.”

40.3. Similarly, in SA-700, it is mentioned as under :

Date of the Auditor's Report

48. The auditor's report shall be dated no earlier than the date on which the auditor has obtained sufficient appropriate audit

evidence on which to base the auditor's opinion on the financial statements, including evidence that: (Ref: Para. A58–A61)

(a) All the statements that comprise the financial statements, including the related notes, have been prepared; and

(b) Those with the recognized authority have asserted that they have taken responsibility for those financial statement

Date of the Auditor's Report (Ref: Para. 48)

A58. The date of the auditor's report informs the user of the auditor's report that the auditor has considered the effect of events and transactions of which the auditor became aware and that occurred up to that date. The auditor's responsibility for events and transactions after the date of the auditor's report is addressed in SA 560.34

40.4. A conjoint reading of SA 560 and SA 700, makes it abundantly clear that it is the bounden duty of the auditor to obtain appropriate audit evidence about the events occurring between the date of financial statement and the date of audit report that require adjustment. Moreover, the audit report would relate back to the date of balance-sheet drawn. In the present case, the financial statement was drawn up on 30.09.2016 and the audit took place on 31.03.2018. Therefore, as per SA 700, the audit date would be 30.09.2016. In our considered opinion, the impairment of assets has taken place prior to the drawing of the balance-sheet and after the end of the financial year 31.03.2016, therefore, the auditor was obliged to take into account this event while auditing the balance sheet as on 30.09.2016 as per SA-560. Therefore, the valuation arrived by the assessee on the basis of the working and determining the Fair Market Value cannot be faulted with.

40.5 There is yet another reason to allow the grounds raised by the assessee. As on December 12, 2017, the Hon'ble National Company Law Tribunal, Hyderabad Bench, sanctioned a scheme of demerger between Takshila Tech Parks and Incubators (India) Private Limited (Demerged Company) and MN Takshshila

Industries Private Limited ("Resulting Company"). Pursuant to the scheme, all assets and liabilities pertaining to the demerged business of the Demerged company have been transferred and vested with Resultant company with retrospective effect from October 1 2016. The consideration for the demerger to the equity shareholders of the demerged company has been discharged by issuance of equity shares of the Resulting Company. Further, pursuant to the provisions of the scheme, the value of investment in the demerged company in the books of the resulting company is to be suitably adjusted considering the net assets transferred pursuant to demerger. In the said scheme of merger, the valuation of the assets were also considered and no objections were raised as to the valuation of the fixed assets acquired by the assessee. The scheme of amalgamation was statutory and therefore, it also shows that the valuation adopted by the assessee was appropriate. For the reasons stated hereinabove, the ground nos. 11 to 16 raised by the assessee with respect to Section 56(ii)(via) are allowed. The Assessing Officer is accordingly directed to delete the addition of Rs.57,92,15,385/-.

GROUND NOS. 17 & 18 :

41. During the year under consideration, the assessee had investments amounting to Rs.37.86 crores in its subsidiaries. However, it had not earned / received any dividend income exempt from tax during the year. The Assessing Officer made addition of Rs.37,86,302/- for A.Y. 2017-18 and Rs.37,75,415/- for A.Y. 2018-19 u/s 14A r.w.s. Rule 8D of the Act. Thereafter, the DRP confirmed the disallowance made by the Assessing Officer on the pretext that 14A is applicable even if there is no exempt income received by the assessee.

42. Before us, ld. AR had submitted that in the absence of exempt income, disallowance u/s 14A of the Act is not attracted

and cited various decisions of Hon'ble Supreme Court and High Courts. Whereas, the Assessing Officer had held that the investment in unlisted equity shares has the potential of giving rise to exempt income and hence triggers the provisions of Section 14A r.w.r 8D of IT Rules. Accordingly, the TPO proposed the disallowance @ 1% of monthly average investment. The ld. AR had filed the following written submissions in support of the case of assessee, which is to the following effect :

> *"4.9. The Appellant submits that the learned DRP erred in not appreciating that the explanation to explanation to section 14A was incorporated by the Finance Act 2022 with effect from AY 2022-23. The explanation is not applicable to any assessment year prior to AY 2022-23. In other words, the explanation to section 14A is not retrospective and hence cannot be made applicable to AY 2017-18 and 2018-19. In support of this submission the Appellant relies on the following decisions:*
>
> *(i) PCIT v ERA Infrastructure {India) Ltd 448 /TR 674 (Del)*
>
> *(ii) PCIT v Delhi International Airport (P.) Ltd [2023] 291 Taxman 490 (Delhi)*
>
> *(iii) Babu/ Fiscal Services (P) Ltd v ACIT /TA No 318/KOU2022 (Kol)*
>
> *4.10. The jurisdictional Tribunal following the decision in AC/T v. Williamson Financial Services Limited [in /TA Nos. 154 to 156 I Gau /2019 & /TA No.159/Gau/2019] had held that explanation to section 14A is retrospective in Victory Electricals Ltd v. DCIT [in /TA No.738/Hyd/2017] and DCIT v. Mandava Holdings (P) Ltd [in /TA No.2089/Hyd/2017]. The Jurisdictional Tribunal had rendered these decisions prior to the decision of the Delhi High Court in ERA Infrastructure (Supra).*
>
> *Subsequent to the decision of the ERA Infrastructure (supra}, the Jurisdictional Tribunal followed its earlier decisions in Walden Properties (P) Ltd v. DCIT /TA No. 643 & 644/Hyd/2017. However, the decision of the Delhi High Court in ERA Infrastructure was not citied before the tribunal in this case. Subsequently, the Gauhati Tribunal in ABC/ Infrastructure Private Limited v. ACIT /TA No. 43/GTY/2022, ITA No. 2 I GTYI 2023, ITA Nos. 37, 38 & 39/GTY/2022 followed the decision in ERA Infrastructure (supra) and took a view that the explanation to section 14A is not retrospective and hence no disallowance under section 14A should be made in years prior to AY 2022-23 if no exempt income has been earned.*
>
> *4.11. The jurisdictional ITAT decisions had been rendered in the light of the Gauhati ITAT's decision holding that the explanation to section 14A is retrospective. With the rendering of*

the decision of the Delhi High Court, the Gauhati Tribunal itself as noted above, has revered its stand and held that the explanation to section 14A is not retrospective in effect. In the light of a High Court decision, without anything contrary from any other High Court, as also the changed decision of the Gauhati Tribunal, it is prayed that the disallowance under section 14A be deleted.

4.12. Prior to enactment of explanation to section 14A with effect from AY 2022-23, the courts had consistently held that no disallowance under section 14A is warranted in the absence of exempt income. The leading decisions in this connection are of the Delhi High Court in Cheminvest Ltd. v CIT (2015) 378 /TR 33 (Delhi - HC) and Special Bench in Vireet Investment (P.) Ltd 82 taxmann.com 415 (Delhi - Trib.). In the case of the Appellant, there was no exempt income earned during the year. No disallowance under section 14A is therefore called for.

4.13. In view of above, the Appellant submits that the learned DRP has erred in confirming the disallowance under section 14A. The disallowance deserves to be deleted."

43. The Ld. D.R. relied upon the orders passed by the AO / DRP wherein it was mentioned that the amendment to the finance Act, 2022 is retrospective in nature and therefore, even if there is no dividend income for the year under consideration then also the assessee is liable for disallowance u/s 14A r.w. Rule 8D of the Income Tax Act, 1961.

44. We have heard the rival submissions and perused the material on record. It is the settled principle of law that the disallowances u/s.14A of the Act read with Rule 8D of the Rules cannot exceed the amount of exempt income. In the case of Pr. CIT Vs State Bank of Patiala, (2018) 99 taxmann.com 285, the Hon'ble Supreme Court, while dismissing SLP filed by the Revenue against order of the Hon'ble Punjab & Haryana High Court in the case of Pr.CIT Vs State Bank of Patiala, held that disallowance u/s.14A has to be restricted to amount of exempt income only. The Hon'ble High Court of Madras in the case of Marg Ltd Vs. CIT (2020) 120 Taxmann.com 84, has taken a similar view and held that disallowances under section 14A read with Rule 8D can never exceed exempt income earned by the assessee during particular assessment year. Recently, Hon'ble

Delhi High Court in the case of PCIT Vs. Delhi International Airport (P.) Ltd, reported in [2022] 144 taxmann.com 80 (Delhi) had held as under :

> *"8. In the opinion of this Court, the present case is covered by the Division Bench judgment in Cheminvest Ltd. v. CIT [2015] 61 taxmann.com 118/234 Taxman 761/378 ITR 33 (Delhi), wherein this Court has held that the expression 'does not form part of the total income' in section 14A of the Act means that there should be an actual receipt of income which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year.*
>
> *9. Furthermore, this Court in Pr. CIT v. Era Infrastructure (India) Ltd. [2022] 141 taxmann.com 289/288 Taxman 384 (Delhi) has dealt with the issue of amendment made by the Finance Act, 2022 to Section 14A of the Act. The relevant portion of the said judgment is reproduced hereinbelow:*
>
> *"8. Consequently, this Court is of the view that the amendment of Section 14A, which is "for removal of doubts" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood."*
>
> *10. Consequently, this Court is of the view that no substantial question of law arises for consideration in the present appeal. Accordingly, the same is dismissed."*

44.1 In our opinion, the present case is covered by the decision of Hon'ble Delhi High Court in the case of Cheminvest Ltd. v. CIT [2015] 61 taxmann.com 118/234 Taxman 761/378 ITR 33 (Delhi), wherein the Court has held that the expression *'does not form part of the total income'* in section 14A of the Act means that there should be an actual receipt of income which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year.

44.2 Furthermore, the Hon'ble Delhi High Court in Pr. CIT v. Era Infrastructure (India) Ltd. [2022] 141 taxmann.com 289/288 Taxman 384 (Delhi) has dealt with the issue of amendment made by the Finance Act, 2022 to Section 14A of the Act. The relevant portion of the said judgment is reproduced hereinbelow:

> *"8. Consequently, this Court is of the view that the amendment of Section 14A, which is "for removal of doubts" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood."*

44.3 Similarly, the Special Bench of the Tribunal in the case of ACIT Vs. Vireet Investment P. Ltd., (2017) [165 ITD 27] (Delhi) (SB) has held as under :

> *"11.16 Therefore, in our considered opinion, no contrary view can be taken under these circumstances. We, accordingly, hold that only those investments are to be considered for computing average value of investment which yielded exempt income during the year."*

44.4 In the present case, no exempt income has been earned by the assessee from the investment made by it and therefore, no disallowance can be made by the Assessing Officer. Therefore, respectfully following the judgments of the Hon'ble Delhi High Court, Punjab and Haryana High Court and Hon'ble Madras High Court cited (supra), we are of the considered opinion that the ground raised by the assessee is required to be allowed as there is no exempt income for the year under consideration. Thus, this ground pertaining to section 14A of the Act is allowed in favour of the assessee. The Assessing Officer is rejected to delete the addition of Rs.37,86,302/-.

45. In the result, the appeal of the assessee in ITA No.340/Hyd/2022 for A.Y. 2018-18 is partly allowed.

ITA 456/Hyd/2022

46. As far as the other appeal i.e. ITA 456/Hyd/2022 is concerned, it is the submission of both the parties that the facts in both the appeal are identical. We, therefore, for the reasons stated hereinabove while deciding the appeal in ITA 340/Hyd/2022 and for similar reasons, ground nos.1 to 7 i.e., T.P. Grounds are partly allowed in favour of the assessee, similarly, ground nos.8 and 9 relating to addition u/s 14A of the Act, is allowed in favour of the assessee.

47. Now we will come to the other grounds i.e., 10 and 11 relating to TDS Credit, which were raised by the assessee in ITA 456/Hyd/2022 for A.Y.2018-19 only.

48. With respect to the disallowance of TDS Credit, the assessee submitted that as per Section 199 of the Act, TDS deducted on the income assessed in the hands of the assessee should be considered as the taxes paid by the assessee. The ld. AR for the assessee also emphasized that the TDS credit should be allowed to the assessee to offer the corresponding income, when the genuineness of TDS credit was not in dispute.

49. On the other hand, ld. DR submitted that the orders of lower authorities are in accordance with law.

50. We have heard the rival submissions and perused the material on record. On perusal of the draft assessment order, we find that during the course of assessment proceedings, though the Assessing Officer had not raised any doubts on the correctness / legitimacy of the TDS credits claimed in the ITR filed by the assessee but however, allowed only the TDS credit appearing in form 26AS of the assessee. In view of the above circumstances, we deem it appropriate to remand this issue to the file of Assessing Officer for the limited purpose of verification of the correctness of the TDS credits claimed by the assessee in its income tax return and thereafter, give a categorical finding in its order. In the light of the above, we remand the issue of TDS claim for re-adjudication to the jurisdictional Assessing Officer. Needless to say that the assessee shall file all the documents as and when called for by the Assessing Officer / TPO. Thus, this ground of the assessee is allowed for statistical purposes.

51. In the result, the appeal of assessee in ITA No.456/Hyd/2022 is partly allowed for statistical purposes.

52. To sum up, the appeal of assessee in ITA No.340/Hyd/2022 is partly allowed and the appeal of assessee in ITA No.456/Hyd/2022 is partly allowed for statistical purposes. A copy of this common order may be placed in respective files.

Order pronounced in the Open Court on 27th September, 2023.

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(LALIET KUMAR)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Hyderabad, dated 27th September, 2023
TYNM, SPS

Copy to:

S.No	Addresses
1	Neovantage Innovation Park Private Limited Building-450, Genome Valley Turkapally(V),Shamirpet Hyderabad-500 078
2	ITO, Ward-16(3) IT Towers, AC Guards Masab Tank Hyderabad-500 004
3	DRP-1, Bengaluru
4	The DIT – (IT-TP)- Hyderabad.
5	The Addl.CIT (T.P.), Hyderabad.
6	DR, ITAT Hyderabad Benches
7	Guard File

By Order