

offers green teas (both pan fried and steamed – the Japanese Sencha variety), decaffeinated teas – both black and green, herbal and fruit teas along with a large variety of flavoured teas as they have in house flavouring capabilities. It has a large customer base both in India and abroad. The company was incorporated in the year 1950 and now has processing factories in different parts of India from which guaranteed quality products are provided. It has a comprehensive in house quality system called Quality Assurance System (QAS). This covers various aspects including certification of ISO guidelines, GMP (US FDA's Good Manufacturing Practices guidelines) , HACCP (Hazard Analysis of Critical Control Points, a food safety monitoring system of the food industry). The assessee's product range spans across various types of tea products (including black tea, green tea, red tea and tea bags). During the relevant time, the assessee's manufacturing and packaging operations span across three key locations namely, Kolkata, Coimbatore and Guwahati. Through consistency in product quality, the assessee has established itself as one of the most reliable and trusted names in the USA, Russian, Australian and European Markets. The assessee company exports its products to both AEs and Non-AEs and had maintained the transfer pricing documentation as required u/s 92D of the Act.

3.1. The return of income for the Asst Year 2011-12 was filed on 30.11.2011 declaring total loss of Rs 4,20,94,625/-. The said return was revised on 30.11.2012 u/s 139(5) of the Act declaring total loss of Rs 4,24,54,826/-. The assessee has entered into the following international transactions with its Associated Enterprises (AEs) during the year under consideration and the method used by the assessee as per Form 3CEB for each of the transactions are as under:-

Export of Tea	Rs 2913.74 lacs – CPM as MAM
Export of PP Bags / PP Geo fabrics	Rs 454.93 lacs - CPM as MAM
Export of Packing Materials	Rs 246.36 lacs – TNMM as MAM

Sale of Machinery Parts	Rs	0.48 lacs – TNMM as MAM
Import of Packing Material	Rs	23.37 lacs – TNMM as MAM
Payment for Agency Commission	Rs	33.74 lacs – TNMM as MAM

CPM stands for Cost Plus Method

TNMM stands for Transactional Net Margin Method

MAM stands for Most Appropriate Method

3.2. The Id TPO observed that the assessee adopted Internal TNMM for these transactions. The Id TPO also observed that the assessee had adopted Internal Cost Plus Method (CPM) for benchmarking its international transactions in respect of Export of Tea and Export of PP Bags / PP Geo Fabrics in the sums of Rs 2913.74 lacs and Rs 454.93 lacs respectively. The Id TPO observed that the data provided by the assessee in justifying the internal CPM was analysed as under:-

TEA				
Area	Particulars	Sales Value	Direct Expenses Allocated	Percentage of direct expenses allocated to Total Sales
At Kol/Guw	Tea Sales to non-related party	45,12,94,184/-	7,28,55,586/-	17.33%
	Tea Sales to related party	17,03,71,469/-	2,40,56,443/-	14.12%
At CBE	Tea sales to non-related party	3,97,55,421/-	70,09,497/-	17.63%
	Tea Sales to	12,09,89,828/-	1,10,83,396/-	9.03%

	related party			
PP Bags				
At MK	PP Sales to non-related party	4,14,41,156/-	1,94,50,259/-	46.93%
	PP sales to related party	4,54,93,615/-	1,77,54,632/-	39.02%

3.3. The Id TPO observed from the aforesaid table that while allocating the direct cost to AEs and Non-AEs, the assessee has significantly allocated lower cost to the related party so as to increase its profitability and consequent to it, held that the Internal TNMM is to be rejected.

3.4. Further , he observed that as the assessee is also engaged in selling of both branded and non-branded categories of teas, the same should be taken into consideration for the purpose of internal comparability. The crux is to compare the margin of selling branded tea to AE with branded tea to Non-AE. However, the assessee has not undertaken the same. It has compared the margin of branded tea sold to AEs with the margin earned from selling of branded and non-branded tea to Non-AEs. In view of the same, the transfer pricing analysis undertaken by the assessee was rejected by the Id TPO. The Id TPO in the show cause notice u/s 92CA(2) of the Act dated 9.1.2015 issued to the assessee stated as under:-

...4. Now when Internal TNMM and Internal CPM is rejected a method has to be adopted to find the ALP of the transaction entered into by the assessee with its Associated Enterprises. Evidently, the CUP cannot be applied as the assessee does not import same or similar products from third parties. External CPM and RPM cannot be applied as the method envisages calculation of Gross profit. As calculation of GP is very subjective and the India Accounting Standards does not provide for the presentation of gross profit. Profit Split method cannot be

applied as the company and related both do not hold any intangible. Thus external TNMM is the most appropriate for determining the Arm's length of the transaction with Operating Profit on Operating Cost as profit level indicator (PLI).

3.5. The Id TPO calculated the Operating Profit of the company from the audited profit and loss account as under after excluding certain incomes and expenditures which in his opinion are non-operating in nature :-

Description		Amount(Rs.)
Net Sales		152,20,84,000/-
Duty Drawback	6,11,000/-	
DEPB Claim	1,26,01,000/-	
Rent	2,33,000/-	
Miscellaneous receipt	49,10,000/-	
	1,83,55,000/-	
Less Exchange gain 6,30,000/-		1,77,25,000/-
Operating Revenues		153,98,09,000/-
Expenditure debited to P& L Account	181,98,66,000/-	
Less Bank Interest and charges	3,58,73,000/-	
Operating Expenditure		178,39,93,000/-
Operating Profit		24,41,84,000/-
Operating Profit/Operating Cost		(-)13.68%
Operating Profit/Operating Revenue		(-)15.85%

3.6. The Id TPO keeping in view of the business process carried out by the assessee, came forward with the following comparables as under :-

Sl No.	Name of the company	Operating Revenue(OR)	Operating Cost(OC)	Operating Profit(OP)	OP/OC	OP/OR
1	Jivraj Tea Limited	12895.32	12311.09	584.22	4.75%	4.53%
2	Marvel Tea Estate (India) Ltd.	14607.82	14026.73	581.09	4.14%	3.98%
3	Mahani Tea Leaves (P) Ltd.	17569.88	16753.07	816.81	4.87%	4.65%
4	Asian Tea & Exports Ltd.	13787.84	13458.86	328.97	2.44%	2.39%
5	Gujarat Tea Processors and Packers Ltd.	52693.32	48747.13	3946.19	8.09%	7.49%
Average					4.86%	4.61%

The Id TPO concluded that the operating profit margin of the comparable selected are significantly greater than that of tested party. In view of the above, he show caused the assessee as to why not the ALP of the transaction be calculated by using the TNMM as the MAM with Operating Profit on Revenue as the PLI.

3.7. The assessee vide letter dated 14.1.2015 responded as under:-

“1. Rejection of the Transfer pricing Study undertaken by MJIL (refer Point No. 1,2,3 and 4 of the subject notice)

During the FY 2010-11, MJIL has exported finished goods to its AEs in the nature of tea, pp bags. In order to benchmark the international transaction of export of finished

goods (i.e. tea and pp bags), MJIL adopted cost Plus Method as the most appropriate method in the transfer pricing study report.

In the subject notice, your goodself has held that the CPM analysis for benchmarking the transaction of export of finished goods is not correct as the direct expenses allocated by MJIL between the sales made to related and non-related party is in appropriate. Your goodself has mentioned that the direct expenses allocated to AEs are significantly lower compared to direct expenses allocated to non-AEs. In this regard, it may be noted that generally the Company sells its produce only to its AE in the jurisdiction where AE has presence. However, it is humbly submitted that your goodself while comparing the direct cost of exports to related and non-related parties have ignored that there could be various factors leading to such difference. For example, the freight charges comprise of one of the main component of direct cost which is different for different countries. Further, regulations or the market requirement of any country could lead to increased costs.

In view of the same, the assessee humbly submits that following are the key reasons for difference in the percentage operating costs:

The exports made to the AEs are generally shipped to the port of Vladivostok, Russia only. However, the exports made to non-AEs are shipped to ports of West Africa, Sweden, Finland, Sweden etc.

The Freight charges in the port of Vladivostok Russia is approximately \$2000 per container. However, similar charges in West Africa and European countries rages between \$3500 - \$4000 and \$2700 - \$2800 respectively. Thus, it may be noted by your goodself that the freight expenses incurred while exporting to AE is almost double the freight expenses incurred while exporting to non-AE.

Further, the assessee also humbly submits that the non-AEs in West Africa are situated in extremely interior and remote locations. Due to the geographical constraint, the delivery to these non-AEs requires a lot of transshipments which leads to further increment of freight charges.

It may also be noted that the number of boxes packed/stacked in containers, shipped to Vladivostok, are higher compared to number of boxes packed in containers to be shipped to European countries which are shipped in pallets for mechanical unloading. This is because if the boxes are heavily stacked in the containers it would require manual labuor for unloading those containers and the manual labour is extremely expensive in European countries compared to Russia. Hence, to avoid the usage of such expensive labours, the material are shipped in pallets and as such the number of boxes stacked in containers shipped to European countries is lower. Hence, due to this, the freight charges per tonne increases which indirectly affect the direct expenses.

Further, the packaging of shipments to non-AE European customers are facier that shipments made to AE. As such the net quantity of tea shipped in one container to Non-AE European customers is lower than those shipped to AE as the fancy packaging consumes the container volume. As such the freight and shipping charges per tone increases which indirectly affect the direct expenses.

Accordingly, your goodself has proposed to reject the Transfer Pricing (TP) report for transaction relating to export of goods and adopt TNMM as the most appropriate method.”

The assessee also submitted in detail by placing reliance on the OECD guidelines that one of the traditional transaction method to be adopted is CPM. The assessee also placed reliance on various tribunal decisions for its justification of adopting CPM as the MAM. The assessee also placed reliance on the provisions of Rule 10B(1) of the Rules with regard to the appropriateness of CPM for a given situation as under:-

(b) cost plus method, by which , -----

(i) the direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined.

3.7.1. The assessee stated that CPM is to be used for cases where the enterprise has been involved in production activities and the direct and indirect costs can be determined. The assessee placed reliance on OECD guidelines and submitted that para 2.41 of OECD guidelines state that :-

“2.41 Following the principles in Chapter I, an uncontrolled transaction is comparable to a controlled transaction (i.e. it is a comparable uncontrolled transaction) for purposes of the cost plus method if one of tow conditions is met: 1. None of the difference (if any) between the transaction being compared or between the enterprises undertaking those transactions could materially affect the cost plus markup in the open market; or 2. Reasonably accurate adjustments can be made to eliminate the material effect of such differences.”

Based on the same, the assessee submitted that materially there are no significant differences between the exports made to AEs and Non-AEs and hence the same would

not affect the cost plus markup. The assessee placed reliance on the decision of the *Hon'ble Bombay High Court in the case of L'oreal India Pvt Ltd reported in TS-58-HC-2013-(BOM)TP* . In the said caes, L'oreal India was engaged in the manufacture and sale of cosmetics and beauty products. It entered into various transactions with its AEs. During transfer pricing proceedings, the TPO applied TNMM rejecting CPM adopted by the assessee. On first appeal, the CIT(A) deleted the addition. The Mumbai Bench of Tribunal upheld the order of the CIT(A). The Tribunal observed that the method adopted by the assessee was based on the functions performed and not on the basis of types of product manufactured. The tribunal further observed that even according to OECD guidelines, methods requiring computation of ALP directly based on gross margin were preferred over other methods which required computation of ALP in an indirect method. Thus tribunal held that the CIT(A) had rightly delted the addition. Further, the revenue was in appeal before the Hon'ble Bombay High Court where the revenue's appeal was dismissed upholding the order of the tribunal.

3.7.2. The assessee further placed reliance on the following decisions:-

Frigoglass India Pvt Ltd reported in TS-1121-ITAT-2014(DEL)TP

Alumeco India Extrusion ltd (formerly known as M/s Pennar Profiles Ltd) reported in TS-143-ITAT-2013(HYD)TP

Diamond Dye Chem Ltd reported in TS-97-ITAT-2010(Mum)

3.7.3. The assessee further submitted that reliable data for computation of gross margin is available as under :-

According to Rule 10C(2) of the Act,

“In selecting the most appropriate method as specified in sub-rule (1), the following factors shall be taken into account, namely:-

- (a)*
- (b)*

- (c) *The availability, coverage and reliability of data necessary for application of the method*
 (d)
 (e)
 (f) ”

With due consideration to the Rule, the assessee humbly submits that for comparing the transactions of exports made to AEs to Non-AEs, the reliable data required for the calculation of gross profit margin was available. Thus, internal comparables were selected as it easily provided data for the calculation of gross profit margins for manufacturing activities.”

3.7.4. The assessee further submitted that in order to benchmark the international transactions of export of finished goods, the assessee adopted CPM as the MAM in the preceding assessment years. Further, the Id TPO has been accepting such method of benchmarking in the preceding assessment years. In this respect, the assessee stated that since there is no distinguishing factor that has been noted by the Id TPO for rejection of such method in the current financial year as against the preceding financial years, consistency should be maintained in this respect and CPM should be adopted for purpose of benchmarking the transaction of export of finished goods.

3.7.5. The assessee gave the following submissions with regard to rejection of transfer pricing study report for FY 2010-11 (i.e year under appeal) by the Id TPO :-

Rejection of Transfer Pricing Study for FY 2010-11

For the purpose of establishing the Arms' length Price (ALP) of the international transactions with Associated Enterprises (AE), the Company had undertaken a transfer pricing study. A detailed analysis was undertaken to determine the functions performed, risks assumed and assets utilized by the company in respect of the transactions undertaken by MIJL with its AE. Further, the economic analysis for the determination of the ALP was undertaken in accordance with the provisions of the Income Tax Act, 1961 ('the Act'), read with the Income Tax Rules, 1962 ('the Rules'). Based on the transfer pricing study, MJIL concluded that the price received/paid by them in respect of its transactions with AE is at arms' length.

The fact that the analysis undertaken by the assessee was in accordance with ALP in accordance with the provisions of the Act read with the Rules is evident from the following:

Price charged in the international transaction has been determined in accordance with Indian Transfer pricing law. Further, information and documents relating to the international transaction have been kept and maintained by the assessee in accordance with the provision contained in sub-section (1) of section 92D of the Act and the Rules made there under.

In accordance with provisions of section 92 of the Act, the assessee was required to and had computed its income arising from its international transaction having regard to the arm's length price. For this purpose, the assessee complied with provisions of section 92C of the Act along with Rule 10B and Rule 10C prescribed in this regard. The procedure undertaken by the assessee for this purpose has been illustrated below:

Rule 10A defines 'uncontrolled transaction' as "transaction between enterprises other than associated enterprises, whether resident or non-resident".

For its analysis, MJIL considered its transaction with the non-AEs, which was similar to the transactions with the AEs, as uncontrolled transaction.

Further, Rule 10B(2) required that "for the purposes of sub-Rule (1), the comparability of an international transaction or a specified domestic transaction with an uncontrolled transaction shall be judged with reference to the following namely-

- a) The specific characteristics of the property transferred or services provided in either transaction;*
- b) The functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;*
- c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the Transactions;*
- d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail. "*

In addition Rule 10B(3) states that, "an uncontrolled transaction shall be comparable to an international transaction if-

- a) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market: or*

b) reasonably accurate adjustments can be made to eliminate the material effects of such differences. "

Accordingly, a detailed review of the functions performed, risks assumed and assets employed and nature of services rendered by MJIL for exports made to AEs and non-AEs was undertaken.

Section 92C(1) of the Act requires the computation of arm's length price by applying the most appropriate method. As per provisions of section 92C(2) of the Act read with Rule 10C(l) of the Rules, the most appropriate method, "shall be the method which is best suited to the facts and circumstances of each particular international transaction, and which provides the most reliable measure of an arm's length price in relation to the international transaction".

Accordingly, based on the facts of the case such as the nature of the international transaction and the availability of reliable comparable data, CPM was chosen as the most appropriate method under the regulations for determining the arm's length price for the assessee's international transaction. [A detailed discussion on the same is provided vide the documentation maintained by the assessee under section 92D(1) of the Act read with Rule 10D of the Rules already submitted with your goodsself].

Thereafter, in accordance with section 92C(2) of the Act, CPM was applied in the manner prescribed under Rule 10B(1)(c) of the Rules. The steps undertaken by the assessee are listed below for your ready reference:

the direct and indirect costs of production "incurred by the enterprise in respect or goods sold to an associated enterprise, was determined [Rule 10B(1)(c)(i)]'

i) the amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the export of goods to non-AEs were calculated [Rule 10B(1)(e)(ii)]. The aforesaid gross profit margin was finally compared to the price earned by the assessee in respect of the subject transaction.

Further, the assessee had maintained a detailed record of the above mentioned procedure and other information and documents relating to the international transaction that were required in accordance with the provisions contained in sub-section (1) of section 92D and the rules made there under. In addition, the assessee complied with the requirement of Section 92E read with Rule 10E which requires furnishing of a report from an accountant by persons entering into international transactions.

The assessee has thus complied with all requirements as per section 92, section 92C, section 92D, section 92E, rule 10B, 10C, 10D, 10E for computing its income having regard re arm's length price, and maintaining necessary information and documentation for determination of arm's length price. This was done as per procedures outlined and in good faith to comply with all the provisions of law and to

provide a true and fair analysis that was undertaken with fair and prudent business intent.

It would be evident from the above that the assessee's analysis was based on sound transfer pricing principles and that the assessee had not undertaken the transaction to avoid taxes.

To conclude, as per Section 92C(3):

Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information of document in his possession, of the opinion that-

(a) the price charged or paid in an international transaction has not been determined in accordance with sub-sections (1) and (2); or

(b) any information and document relating to an international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or

(c) the information or data used in computation of the arm's length price is not reliable or correct: or

(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,

The Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction or specified domestic Transaction in accordance with sub-sections (1) and (2). on the basis of such material or information or document available with him

It may be noted that:

-The assessee had determined the arm's length price in accordance with sub-sections (1) and (2) of Section 92C

-The assessee had maintained proper documentation under Section 92D

-The information or data used in computation of the arm's length price was from reliable internal as well as external sources.

-The assessee had furnished all information and documentation sought by your goodself

Based on the above, clearly the analysis undertaken by the assessee was in accordance with ALP in accordance with the provisions of the Act read with the Rules, the analysis undertaken by the assessee should not be rejected. In this regard, we further wish to submit as under that as per the provisions of section 92C(3) of the Act, it is clear that the assessing officer can determine the price only under the circumstances enumerated

in clauses (a) to (d) of the said section. Further, we would like to draw reference to the Central Board of Direct Taxes ("CBDT") Circular 14 issued in 2001 which read with section 92C(3) of the Act, provides that:

"Under the new provisions the primary onus is on the tax-payer to determine an arm's length price in accordance with the rules, and to substantiate the same with the prescribed documentation. Where such onus is discharged by the assessee and the data used for determining the arm's length price is reliable and correct, there can be no intervention by the Assessing Officer-

This is made clear by sub-section (3) of section 92C which provides that the Assessing Officer may intervene only if he is, on the basis of material or information or document in his possession, of the opinion that the price charged in the international transaction has not been determined in accordance with subsections (1) and (2), or information and documents relating to the international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made there under; or the information or data used in computation of the arm's length price is not reliable or correct; or the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (1) of section 92D. If any one of such circumstances exists, the Assessing Officer may reject the price adopted by the assessee and determine the arm's length price in accordance with the same rules. "

The principle coming out of the CBDT circular above has also been implicitly brought out by the Hon'ble Income Tax Appellate Tribunal ("ITAT"), Delhi bench in Mentor Graphics (Noida) Pvt. Ltd's case (109 ITD 101). The Hon'ble ITAT has observed that:

"46.2In our considered view, it is not necessary for the taxpayer to satisfy all points in the range. Even if one point is satisfied, the assessee can be taken to have established its case and in that situation, the onus is shifted to the department to show why taxpayer's case be not accepted,"

39.4 "The TPO could have carried fresh search only if the comparables drawn by the taxpayer was insufficient or had other deficiency. "

The above mentioned judgment has also been supported by the Bangalore ITAT in the case of Philips Software Centre Private Ltd -vs- ACIT [119 TTJ 721], wherein the ITAT held as follows:

. 'Circular No. 14/2001 issued by the CBDT is binding upon the TPO

.....

The TP study cannot be ignored by the TPO in absence of any deficiency or insufficiency"

In addition, transfer pricing in India being in a nascent stage, the Company submits that it is highly probable that there are varied interpretation as to what is the ALP. This is also implicitly recognized in CBDT Circular 12 of 2001, which states that:

"where an international transaction has been put to a scrutiny, the AO can hope recourse to sub-section (3) of section 92C only under the circumstances enumerated ill clauses (a) to (d) o] that sub-section and in the event of material information or document in his possession on the basis of which an opinion call be fanned that any such circumstance exists. In all other cases, the value of the international transaction should be accepted without further scrutiny". (Emphasis supplied)

Circular 12 of 2001, further states that:

"In the initial years of implementation (i.e. of the transfer pricing legislation), there may be room for different interpretation leading to uncertainties with regard to determination of arm's length price of an international transaction. While if would be necessary to protect our tax base, there is a need to ensure that the taxpayers are not put to avoidable hardship in the implementation (If these Regulations. " (Emphasis supplied)

The assessee would also like to point out that in Sony India's case (2007) 288 ITR 52 (Del), it was held that:

"Sub-section (3) of section 92C envisages the AO having to form an opinion on the existence of the factors enumerated in clauses (a) to (d) as a pre-condition to proceeding to himself determine the Arms' Length Price. In other words, acceptance of the Arms' Length Price declared by the assessee is the rule and its rejection is the exception posited 011 the presence of the factors enumerated in clauses (a) to (d)....." , (Emphasis supplied)

i) Further, the Hon'ble Supreme Court in Rajesh Kumar vs. DCIT (2006) 287 ITR 91 (SC) clearly held and observed that:

"If an assessee files a return the same is not presumed to be incorrect". (Emphasis supplied)

Hence, it is clear that where an international transaction has been put to a scrutiny, the assessing officer can have recourse to sub-section (3) of section 92C only under the circumstances enumerated in clause (a) to (d) of that sub-section and in the event of material information or document in possession on the basis of which an opinion can be formed that any such circumstance exist. In all other cases, the value of the international transaction should be accepted without further scrutiny.

Accordingly, in the absence of any information to the contrary, based on the provisions of the Act read with the Rules, CBDT circulars and recent court decisions, it is not

justified to reject the transfer pricing analysis undertaken by the Company on account of the fact that the assessee had followed the guidelines laid down in the Rules.

In light of the above discussion, we respectfully submit that the assessee had duly complied with the transfer pricing regulations as envisaged in the Act. Further, we respectfully submit that there exist no circumstances as enumerated in clauses (a) to (d) of section (3) of section 92C, which would warrant your goodself to disregard the analysis undertaken by the assessee and undertake a fresh analysis.)

3.7.6. The assessee pointed out the error in computation of PLI by the ld TPO as under

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2. Error in computation of PLI of the assessee (Refer Point No. 5 of the notice)

Reference point no. 5 of the subject notice, wherein your goodself has considered that the PLI of MJIL as - 13 .68%, the assessee humbly submits that your goodself has eliminated the following items from the head of Operating Income, in spite of these income being operating in nature:

*DEPB claim of Rs 1,26,01,000 and Duty Drawback of Rs 6,11,000
Miscellaneous receipt of Rs 49,10,000
Exchange Gain of Rs 6,30,000*

It may be noted by your goods elf the above mentioned incomes are operating in nature and pertains to regular business operations. The contentions for the same are as follows:

DEPB Claim and Duty Drawback

The assessee humbly submits that DEPB (Duty Entitlement Pass Book) is all export incentive scheme of Indian Government provided to Exporters in India. Under the post-export DEPB, which is issued after exports, the exporter is given a duty entitlement Pass Book Scheme at a pre-determined credit on the FOB value. Credit given under DEPB Schemes is utilized for payment of Indian customs duty on import of goods. Further, Duty Drawback is another form of rebate of import duty provide by the Government of India, Under the duty drawback scheme the taxpayer would be refunded the import duty paid by him at the time of import, if it re-exports the said goods, with or without processing or using, according to the specified provision of the Customs Act, 1962 and relevant rules and regulations.

In view of the above, the assessee humbly states that it has exported its finished goods to various countries outside India including Russia, Singapore, European countries etc. In the said process of the exports, the Company has earned various DEPB entitlement and duty drawback entitlements.

Accordingly, as the said entitlements are incidental to the operational activities undertaken by the Company during the year, the Company has treated the same as revenue/ operating income. The assessee wishes to apprise your goodself that the assessee has duly offered the said income to tax in the computation of income for the subject assessment year.

Miscellaneous Income

In respect of Miscellaneous Income, the assessee humbly submits that the same is operating in nature, Considering, the items included, please note that all the items are in respect of the regular business of MJIL and holds no nexus apart from its business activities. The break-up of miscellaneous income:

Particulars	Amount (INR)
Electricity charges received	42,61,938
Brokereeage and commission Charges	1,451
Discount Received on Purchase	1,14,206
Misc.Receipt-Waste Bags Sales and unused drum and barrels	46,332
Employee's Rent Recoveries	11,001
Sundry adjustment (including provisions written back during the year, telephone refund etc.)	4,74,760
Total	49,09,689

Accordingly, as all the items mentioned above have complete nexus to the regular business activities of MJIL, hence they are considered as operating in nature by the assessee and included in its operating income in computation of the PLI

Foreign Exchange Gain are Operating Income

In view of the above, the assessee humbly submits that the exchange gain is operating in nature. The exchange gain/loss in general could arise on account of a number of factors. Some of such factors are as follows:

- *Export proceeds at a rate higher/lower than the rate at which they were booked;*
- *Import payables at a rate lower/higher than the rate at which they were booked;*
- *Adjustment of customer advances (received in foreign currency) against export invoices,*

The assessee submits that the OECD vide its para 2.82 states as follows:

"2.82 Whether foreign exchange gains and losses should be included or excluded from the determination of the net profit indicator raises a number of difficult comparability issues. First, it needs to be considered whether the foreign exchange gains and losses are of a trading nature (e.g. exchange gain or /loss on a trade receivable or payable)

and whether or not the tested party is responsible for them. Second, any hedging of the foreign currency exposure on the underlying trade receivable or payable also needs to be considered and treated in the same way in determining the net profit. In effect, if a transactional net margin is applied to a transaction in where the foreign exchange risk is borne by the tested party, foreign exchange gains or losses should be consistently accounted for (either in the calculation of the net profit indicator or separately)."

Unrealised foreign exchange gains/loss on account of restatement (in the financial statements) of the following as on the last day of the year.

- *Export receivables/Import payables;*
- *Advances received from customers in foreign currency.*

The assessee submits that that exchange gain/loss arises in the normal course of business and therefore should be considered as operating in nature. The aforesaid view of the assessee is supported by the various judgments given by a number of Courts in India. Some of which are reproduced below:

Realised Foreign Exchange

• ***Four Soft Ltd V. Deputy Commissioner of Income-Tax (62 DTR 308)***

"With regard to the exclusion of gain Oil account of foreign exchange fluctuation while computing the net margin, as claimed by the assessee, we find that the exchange fluctuation gains arise out of several factors, for instance, realisation of export proceeds at higher rate, import dues payable at lower rate. Since the gain or loss on account of exchange rate fluctuation arises in the normal course of business transaction. the same should be considered 'while computing the net margin for the international transaction with the AEs of the assessee. Our view in this behalf is fortified by the decisions of the Bangalore Bench of the Tribunal in the case of SAP Labs India Ltd. (supra) and Bombay Bench of the Tribunal in the case of Deutsche Bank A.G. vs. Dy. CIT (2003) 86 ITD 431 (Mumbai)."

• ***M/s Trilogy E- Business Software India Private Limited V Deputy Commissioner of Income-tax (47 SOT 45)***

"As far as foreign exchange gain/loss being considered as not forming part of the operating cost, the reasoning of the revenue is that such loss or gain cannot be said to be one realized from international transaction though they may form part of the gain/loss of the enterprise and therefore they should be excluded while determining operating cost. On the above issue we find that the Bangalore Bench of ITAT in the case of Sap Labs India (P) Ltd. Vs. ACIT (2011) 44 SOT 156 (Bang) has taken the view that Foreign Exchange Fluctuation gains are required to be added to operating revenue. Following the same, the AO is directed to accept the claim of the Assessee in this regard"

- *In the case of Sujata Grover 74 TT J 347 (Del) which was in the context of deduction under section 80HHC of the Act, the Court held as follows:*

"Basically exchange rate fluctuation difference is nothing but part of sales. When the goods are exported to a country outside India, the invoice has to be raised in terms of the foreign currency prevalent in that country and at the time of making exports. The exporter converts that currency into Indian rupees at the exchange rate prevalent at that time and accordingly takes cognizance of that amount as its export figure in its books of accounts. However, when the invoice is actually realized from foreign country and the amount is remitted to India, the exchange rate prevalent on that date may be equal to or more or less than the one recorded in the 900ks of accounts at the time of making the sales. If the exchange rate is more it results into income from the exchange rate fluctuation and in the reverse case if becomes loss on that account. Under all circumstances the basic character of the receipt of foreign currency remains the same i.e., it remains attributable to the export effected by the assessee. Whether there is a profit or a loss, it ultimately goes to increase or reduce the figure of export turnover recorded initially by the assessee in its books of accounts. It, therefore, shows that the income from the foreign currency fluctuation is nothing but part of export turnover and is a sort of additional sales price." (Emphasis supplied)

- *Renaissance Jewellery (P) Ltd. vs. Income-tax Officer (2006) 101 ITD 830 (Mum ITAT), it was held that:*

"The profit on account of foreign exchange gain is directly referable to the articles and things exported by the assessee. Such profits are, therefore, in the same nature as the sale proceeds and there is no reason while deduction under section 10A should not be allowed in respect of exchange gain."

- *Rusabh Diamonds vs. ACIT [I.T.A. No. 7217/Mum/2012] (Mum ITAT), it was held that:*

"10.1 If it is clear that in case of hedging of foreign currency exposure on the underlining trade receivable or payable the profit or loss will be treated in the same way in determining the net profit.

10.2 In view of the facts that the assessee has entered into forward contracts for the purpose of hedging of foreign currency exposure on the export and import of diamond, the gain or loss arising of the said will be treated as part and parcel of the operating profit"

- Further, in S Narendra vs. ACTT [ITA No. 6839/Mum/2012) (Mum ITAT), it was held that:*

"The proposition that gain on foreign exchange if it relates to the business of the assessee is part and parcel of operating income is well established by the aforementioned decisions of the coordinate benches. In the present case, nothing has been

brought on record to suggest that the gain made by the assessee on fluctuation of foreign exchange was not on account of business transactions of the assessee. In absence of any such material, following the aforementioned decisions of the Tribunal, it has to be held that the foreign exchange gain of the assessee is to be considered as part and parcel of the profit of the assessee and therefore should be included for the purpose of computing the profit margin of the assessee”.

Unrealised Foreign Exchange

- *In the case of **Deutsche Bank A. G. vs Deputy CIT 86 ITD 431** it was held that both unrealised loss and profit have to be taken into account for determining the correct profits of the business.*

- *In the case of **Bestobell (India) Ltd. v. CIT 117 ITR 789 (Cal)**, it was held that the liability of the assessee would increase on devaluation of the Indian currency where the assessee has maintained its accounts on mercantile basis. The liability would accrue during the relevant period and cannot be said to be a contingent liability or an anticipated future loss. [Reference can also be made to the decisions in the case of **Khandelwal Brothers Pvt. Ltd. vs. CIT 117 ITR 452 (Cal)**; **CIT vs. Oil India Ltd. 143 ITR 848 (Cal)**; and **CIT vs. Martin and Harris P. Ltd. 154 ITR 460 (Cal)**]*

- *The Delhi ITA T in the case of **Oil and Natural Gas Corporation Ltd vs. DCIT [2003] 261 ITR 1 (Delhi ITAT - SB)** held as follows:*

" ... the assessee's claim for loss arising as a result of fluctuation in foreign exchange rates on the closing day of the year has been disallowed by the Assessing Officer inter alia, on the ground that this liability was a contingent liability and the loss was a notional one. The main ingredient of a contingent liability is that it depends upon happening of a certain event. We are of the considered opinion that in the case of the assessee, the "event" i.e., the change in the value of foreign currency in relation to Indian currency has already taken place in the current year. Therefore, the loss incurred by the assessee is a fait accompli and not a notional one. "

*It may be noted that the above decision of the Delhi ITAT has also been affirmed by the Delhi High Court in the case of **CIT v Woodward Governor India (P) Ltd [2007]162 Taxman 60**.*

Based on the aforesaid principles, we wish to submit that exchange gains/losses in connection with the income/expenses earned/incurred in foreign currency retains the same character of the income/expense in connection with which it has been earned/incurred. The relevant items of income and expenditure, on which there has been a foreign exchange gain or loss, are operating in nature and have complete nexus with the regular business activities of MJIL. Hence, since the relevant items are considered as operating items, even the foreign exchange gain/loss in respect of the should be considered as operating in nature.

Having regard to all of the above, we respectfully wish to submit that foreign exchange fluctuation should be considered as operating income while computing the arm's length margin of the comparable companies.

3.7.7. With regard to the comparables chosen by the Id TPO for application of TNMM, the assessee submitted as under:-

3. Comparables chosen by your goodself for application of TNMM (Refer point no. 6 of the notice)

Reference point no. 5 of the subject notice, your goodself has rejected the transfer pricing study i.e. the internal comparables chosen by the assessee at the time of conducting the Transfer Pricing Study and has chosen a new set of comparables (kindly refer page no. 4 of the notice). However, the comparables chosen by your goodself does not satisfy the basic criterias including functional similarity and should be eliminated. In view of the same the assessee humbly submits as follows:

Functionally different

In respect of the above mentioned argument, the assessee humbly submits that if a company is functionally different the same cannot be held as a comparable for the tested party.

For a company to be functionally similar, the following two conditions are to be satisfied:

- *The product that is to be compared should be similar to the tested party's product even if not exactly same.*
- *The company whose product is being compared, should perform the same kind of functions in earning the revenue from that product.*

If the above mentioned both the conditions are satisfied, then the company may be considered as a comparable post considering the other factors as well.

The assessee humbly submits that the assessee's finished goods includes vast varieties of teas, blended with different mix of teas & flavors having different prices. According the assessee submits that degree of comparability between comparables without comparing the varieties of Tea produced would be unjust and would led to absurd conclusions.

It may also be noted that comparables chosen by your goodself are not functionally similar as they are involved in trading whereas MJIL is involved in blending/ manufacturing of tea,

Quantum of Exports

In view of the same, the assessee humbly submits that subject, it has exports amounting to 58% of total turnover. Hence, it is neither a complete export oriented unit nor it only earns revenue from domestic sale. It may be noted that the comparables selected for the benchmarking analysis shall be selected on the basis of functions performed; assets used and risk profile of the assessee. The economic circumstance in which the assessee is operating and the circumstances in which the comparable companies are operating are very important. It may be further pointed out that the export filter should be applied because of variations in:

- *Conditions prevailing in the market in which the Companies operate*
- *Geographical Locations*
- *Size of the Companies to which the company caters to*
- *Direct Costs such as material labour as well as cost of capital*
- *Incentives*
- *Level of competition etc.*

Further, considering the quantum of exports of MJIL, an export filter of 50% -75% can be considered as appropriate.

In this regard, reliance may be placed on the decision of Crm Services India P Ltd., New... Vs. Assessee [I.T.A. No. 4068/Del/2009] where the Delhi ITAT has held that:

"We have considered the facts and the submissions made in this behalf. We are of the view that territory of the business is a material factor in deciding comparability of the cases. The assessee renders services in USA while Shreejal Info Hubs Ltd. renders services in India. This fact alone is sufficient to exclude this comparable. Thus, it is held that the AO/TPO rightly rejected this case as a comparable case.

-Ranbaxy Laboratories Ltd. v ACIT [299 ITR 175] where the Delhi TTAT held that the economic conditions prevailing in the market such as geographical locations, size of market etc. are to be considered.

Secret Comparables

In this regard it is pertinent to note the OECD Comparability: Public invitation to comment on a series of draft issue notes also states that though tax administrations have access to confidential information that is unavailable to the taxpayer, the resource to confidential information by tax administration follows from the asymmetry situation which exists between taxpayers and tax administrations. Such information qualifies as "secret comparables" as such information is confidential in nature. It also indicates that usage of such informal and confidential information from third party sources which is not available to the Assessee is not appropriate.

Further, usage of such "secret comparables/ information" raises a number of concerns especially with respect to the fairness and transparency of the process. The OECD does represent a view of the majority of the OECD Member Countries and the practices they adopt in their respective countries while examining transfer pricing practices. Hence, the views should have a persuasive value. Even though India is not a Member of the OECD, as observed by the ITAT, the OECD has been supporting efforts of tax administration in India to properly and effectively administer and implement Transfer Pricing Policy. A useful reference can always be made to OECD Guidelines/ Reports/ Documents, for the purposes of resolving dispute of transfer pricing in India.

Given the above, we wish to submit that it would not be appropriate to use such limited information for the purpose of undertaking the comparability if the comparable does not feature in both the databases i.e. Prowess and Capitaline, the same cannot be accepted as comparable company.

Exceptional year of operations

The assessee humbly submits that a particular company cannot be considered as a comparable if the year under analysis is an exceptional year of operation. By the term 'Exceptional year of Operation', the assessee means that company under consideration has had substantial change/ reorganization (like merger, acquisition, amalgamation, etc) in the subject FY which has a significant impact on the business during the year.

Reliance in this regard is placed on the judgment pronounced by the Hyderabad ITAT in the case of Capital IQ Information Systems (India) Pvt. Ltd vs DCIT [ITA No. 1961/ Hyd/ 2011) wherein the ITAT held as follows:

"we also agree with the aforesaid view of the DRP that extra-ordinary event like merger and demerger will have an effect on the profitability of the company in the financial year in which such event takes place .. "

"If it is found upon such verification that the amalgamation in fact has taken place, then the aforesaid comparable has to be excluded"

In view of the above arguments, the assessee humbly submits that due to the following reasons, the companies selected by your goodself, as comparables, cannot be regarded as the same for application of TNMM:

<i>Name of Company</i>	<i>Reasons for rejection</i>
Jivraj Tea Limited	<p>In respect of the mentioned company, the assessee humbly submits that the company is not involved in blending/ manufacturing of tea. The company is involved in trading of tea. The relevant pages of the financial statements have been enclosed as Annexure 1A.</p> <p>Further, it may also be noted that the said company cannot be considered as a comparable also because its major sales are done domestically and only 1% of its sales are exports. However, MJIL</p>

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Name of Company	Reasons for rejection
	<p>exports 58% of its total sales, whereas Jivraj tea serves only customers in India. The relevant extract of the financial statement elucidating the quantum of exports has been enclosed as Annexure 1B.</p> <p>Also, the assessee submits that the company is mainly engaged in trading of the tea and no value addition is made in the product. The company does not deal in flavoured tea. However, the assessee blends various varieties of teas and makes additions of flavors and aromas in the said blend.</p> <p><u>Hence, the same cannot be considered as functionally comparable as it is involved in trading and its 99% of revenue is earned solely from domestic sales.</u></p>
<p>Marvel Tea Estate (India) Limited</p>	<p>In respect of the mentioned company, the assessee humbly submits that the company is not involved in blending/ manufacturing of tea. The business description of the company as per the financial statements states that the Company is not a manufacturing company but a trading company of tea. The relevant pages of the financial statements have been enclosed as Annexure 2A.</p> <p>Further, it may also be noted that the said company cannot be considered as a comparable also because all its sales are done domestically and no exports. However, MJIL exports 58% of its total sales. The relevant extract of the financial statement elucidating the same has been enclosed as Annexure 2B.</p> <p><u>Hence, the same cannot be considered as functionally comparable as it is involved in trading and its revenue is earned solely from domestic sales.</u></p>
<p>Mohani Tea Leaves</p>	<p>As also mentioned above, that the said company cannot be considered as a comparable as the Company does not feature in both the databases i.e. Prowess and Capitaline.</p> <p>In this regard it is pertinent to note the OECD Comparability: Public invitation to comment on a series of draft issue notes also states that though tax administrations have access to confidential information that is unavailable to the taxpayer, the resource to confidential information by tax administration follows from the asymmetry situation which exists between taxpayers and tax administrations. Such information qualifies as "secret comparables" as such information is confidential in nature. <u>It also indicates that usage of such informal and confidential information from third party sources which is not available to the Assessee is not appropriate.</u> Further, the assessee wishes to apprise your good self that the annual report provided to us by your good self contains only the Balance Sheet and no details of the Profit and</p>

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<i>Name of Company</i>	<i>Reasons for rejection</i>
	<p>Loss of the company is provided.</p> <p>Given the above, we wish to submit that it would not be appropriate to use such limited information for the purpose of undertaking the comparability if the comparable does not feature in both the databases i.e. Prowess and Capitaline, the same cannot be accepted as comparable company.</p>
<p>Asian Tea and Exports Limited</p>	<p>The assessee humbly submits that the said company is also engaged in trading. It is involved in sale of made tea. The relevant extract of financials have been enclosed as Annexure 3A.</p> <p>Further, it may also be noted that the Company earns its maximum revenue from exports. The company exports 98% and has only 2% domestic sales. Hence, it only serves to customers outside India. The relevant extract elucidating the quantum of exports have been enclosed as Annexure 3B.</p> <p>Hence, the same cannot be considered as functionally comparable as it is involved in trading and its revenue is earned solely from exports.</p>
<p>Gujarat Tea Processors and Packers Limited</p>	<p>In respect of the mentioned company, the assessee humbly submits that the company is not involved in blending and manufacturing of tea. However, the sale from blended tea is only 0.0024%. The company is majorly involved in sale of packed tea and not blended tea. The relevant pages of the financial statements have been enclosed as Annexure 4A. The said company is not involved in blending in the subject AY is also substantiated by the fact as mentioned in the Directors' Reports which states that Company is in process of setting up a blending factory. Hence, this substantiates that the company is not involved in blending in the current AY and solely involved in sale of packed tea. The relevant extract of the financials have been enclosed as Annexure 4B.</p> <p>Further, it may also be noted that the said company cannot be considered as a comparable also because its major sales are done domestically and only 1% of its sales are exports. However, MJIL exports 58% of its total sales, whereas this Company serves only customers in India. The relevant extract of the financial statement elucidating the quantum of exports has been enclosed as Annexure 4C.</p> <p>Further, it may also be noted that the said company cannot be considered as a comparable as it is an Exceptional year of Operation. It may be noted that there has been an amalgamation of the said Company with Evergreen Beverages Ltd. The said fact is also available in the financial statements of CERTIFIED TRUE. Hence, the said company cannot be considered as a comparable.</p>

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<i>Name of Company</i>	<i>Reasons for rejection</i>
	<p>Reliance in this regard is also placed on the judgement pronounced by the Hyderabad ITAT in the case of <i>Capital IQ Information Systems (India) Pvt. Ltd vs DCIT [ITA No. 1961/Hyd/ 2011]</i>.</p> <p><u>Hence, the same cannot be considered as functionally comparable as it is not involved in blending and its 99% of revenue is earned solely from domestic sales.</u></p>

3.7.8. With regard to the PLI chosen for computation of ALP , the assessee submitted as under:-

"4. PLI chosen for Computation of ALP(Refer point no. 7 of the subject notice)

In view of the above, the assessee humbly submits that your goodself have taken the operating profit to operating revenue as the Profit Level Indicator CPU') for benchmarking the various transactions undertaken by the Company with its AEs. In this regard, the assessee humbly submits that the PLT should be selected after taking account respective strengths and weaknesses of the various possible PLI. Accordingly, the assessee after considering the fact that the operating revenue of the Company contains controlled transactions, has consider the appropriate PU as operating profit to operating cost.

In this regard, the assessee places its reliance on OECD guidelines

"Para 2.76 of OECD Guideline updated in July 2010

It should take account of the respective strengths and weaknesses of the various possible indicators; the appropriateness of the indicator considered in view of the nature of the controlled transaction, determined in particular through a functional analysis; the availability of reliable information (in particular on uncontrolled comparables) needed to apply the transactional net margin method based all that indicator; and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate differences between them, when applying the transactional net margin method based on that indicator

Para 2.87 of OECD Guideline updated ill July 2010

Typically, and subject to a review of the facts and circumstances of the case, sales or distribution operating expenses may be an appropriate base for distribution activities, full costs or operating expenses may be an appropriate base for a service or

manufacturing activity, and operating assets may be an appropriate base for capital-intensive activities such as certain manufacturing activities or utilities.

Para 2.88 of OECD Guideline updated in July 2010

The denominator should be reasonably independent from controlled transactions. Otherwise there would be no objective starting point.

Para 2.92 of OECD Guideline updated in July 2010

Cost-based indicators should only be used in those cases where costs are a relevant indicator of the value of the functions performed, assets used and risks assumed by the tested party

Further, assessee also places reliance on the recent judicial pronouncements in the case of M/s. St. Jude Medical India Private Limited [ITA No. 914/HYD/13] dated 19 September 2014, Hyderabad ITAT held that:

“As noted by the learned CIT(A), the purpose of identifying the PLI is to ensure that the comparability of the controlled transactions is objective and reference in this regard was made by him to the OECD Transfer Pricing Guidelines 2010, wherein it was explained that the denominator should be reasonably independent from controlled transactions, as otherwise there would be no objective starting point. We are of the view that the CIT(A) was fully justified in accepting the Operating Profit to operating Revenue as the PLI, as claimed by the assessee for Transfer Pricing Analysis, and not Operating Profit to Operating Cost as taken by the Assessing Officer/TPO, relying on the relevant OECD Transfer Pricing Guidelines, 2010”.

Based on the above judicial pronouncements and OECD guidelines the assessee humbly states that your goodself should apply the PLI as operating profit to operating costs.

Based the above submissions, we humbly submit that the arm's length price computed by the assessee should be accepted and no adjustment is warranted in their case.

3.7.9. The assessee also enclosed the relevant pages of the schedules to profit and loss account together with the notes on accounts containing the quantitative particulars of goods, segmental reporting etc of the comparables in support of its arguments advanced hereinabove.

4. The Id TPO observed in his order with regard to the submissions of the assessee as under:-

“10.2 Undersigned observation - The views of the undersigned are as under for the above contentions:

1) Russia is located farther than Europe and African countries. Thus, contention of the assessee, that the freight charges' are lower for Russia cannot be accepted in absence of documentary evidence.

2) Further, in international business of sales and purchase the selling terms are either FOB/CIF/ CFR. In any case, the responsibility of seller ends when the goods are reached at the destination port of the buyer's country. From the point of the Port, it is the buyers responsibility for transshipment of goods. Thus, it does not really matter as to where the buyer is locally placed in its country. Whether it is near to the port or far away from the port, the charges for shipment of goods from port to its place is not borne by the international seller. Thus, in the absence of any documentary evidence and basis to justify, the contention of higher shipment cost of the assessee to Non-AEs could not be considered.

3) The other reasons with regard to fancier packaging etc.. proves the point of the undersigned that the assessee is comparing the profitability of branded teas with Non-branded teas. Fancier packing is required for branded teas whereas non-branded teas are sold in bulk. This results in premium sale price for branded teas and thus higher profits and therefore a comparison cannot be made for profits of branded teas with non-branded teas.

4) Incurrence of excess labour costs etc. are all regarded as baseless contentions in the absence of any documentary evidence. Further, in determining sale price of product a businessman is expected to factor all the costs in its sale price to earn an acceptable level of profits for earning profits. Thus, if labor costs are higher, than the same would have been factored.

10.3 In view of the above, the contentions of the assessee stands rejected.

10.4 With regard to application of CPM - Rejection of CPM as most appropriate method has already been dealt with by the undersigned in show cause notice already reproduced above.

10.5 With regard to computation of PLI

The assessee submitted as under:

Reference point no. 5 of the subject notice, wherein your goods elf has considered 1 hat the PLI of MJIL as -13.68%, the assessee humbly submits that your goodselj has eliminated the following items from the head of Operating Income, inspire of these income being operating in nature:

DEPB claim of Rs 1,26,01,000 and Duty Drawback of Rs 6.11,000

*Miscellaneous receipt of Rs 49,10,000
Exchange Gain of Rs 6,30,000*

It may be noted by your goodself the above mentioned incomes are operating in nature and pertains to regular business operations.

10.6 Undersigned observation

With regard to the above, undersigns accepts the contention of the assessee for DEPB claim and duty drawback income. With regard to miscellaneous income and Exchange gain, these items of income are held to be non-operating for the below reasons:

Exchange gain - *The said element of income is earned on the basis of external factors which are out of assessee's control. As rightly said by the assessee, such income is result of fluctuation in ex rate of currency in international markets which are factor of various elements including prevailing interest rates, demand supply of particular currency, GDP performance etc. There could be adverse effects on exchange fluctuation and might result in substantial losses for the company. Further, assessee is not ill the business of trading exchange currencies and do not have a primary motive to earn profits from exchange fluctuation. Thus, the said item cannot be considered as operating in nature.*

Miscellaneous income - *At the foremost, the assessee should have provided details of such income for consideration of it in the operating category. In general sense, miscellaneous means "others". Thus, not a mainstream source of income for the assessee. These income might have resulted which do not have any connection with the international transactions and operation of the assessee.*

10.7 Considering the above, the PLI of the assessee is recomputed as under:

Description		Amount(Rs.)
Net Sales		1,542,084,000/-
Less Exchange gain		-6,30,000/-
Duty Drawback		6,11,000/-
DEPB Claim		1,26,01,000/-
Operating Revenues		155,46,66,000/-
Expenditure debited to P & L Account	181,98,66,000/-	
Less Bank Interest and charges	3,58,73,000/-	
Operating Expenditure		178,39,93,000/-
Operating Loss		22,93,27,000/-
Operating Loss/Operating cost		(-)12.85%
Operating Loss/Operating Revenue		(-)14.75%

10.8 With regard to comparable companies chosen

The submission of the assessee along with undersign response is provided below:

Name of Company	Assessee's observation	Undersign response
<p><i>Jivraj Tea Limited</i></p>	<p><i>In respect of the mentioned company, the assessee humbly submits that the company is not involved in blending/ manufacturing of tea. The company is involved in trading of tea. The relevant pages of the financial statements have been enclosed as Annexure 1A.</i></p> <p><i>Further, it may also be noted that the said company cannot be considered as a comparable also because its major sales are done domestically and only 1% of its sales are exports. However, MJIL exports 58% of its total sales, whereas Jivraj tea serves only customers in India. The relevant extract of the financial statement</i></p>	<p><i>On perusal of the audited financials, it is nowhere mentioned that the assessee is engaged in trading activity. In fact it is mentioned on page 45 for disclosure related to quantitative details as "....pertaining to Finished Product Tea"</i></p> <p><i>It needs to be considered that only a manufacturing/blending company would classify its products as raw material, WIP, and finished product. As the company has reported quantitative details for its</i></p>

Name of Company	Assessee's observation	Undersign response
	<p>elucidating the quantum of exports has been enclosed as Annexure 1B. Also, the assessee submits that the company is mainly engaged in trading of the tea and no value addition is made in the product. The company does not deal in flavoured tea. However, the assessee blends various varieties of teas and makes additions of flavors and aromas in the said blend.</p> <p><u>Hence, the same cannot be considered as functionally comparable as it is involved in trading and its 99% of revenue is earned solely from domestic sales.</u></p>	<p>finished product tea, it implies it is engaged in manufacturing/blending activity.</p> <p>In case the company is engaged only in domestic market it does not classify the company to be functionally incomparable. The company is engaged in blending of tea activity and does not own plantations – same as assessee and hence comparable. Further, it should also be noted that export markets are considered as profitable markets compared to domestic market. Thus, assessee should not be prejudiced even if a 100% domestic oriented company is also compared.</p>
<p>Marvel Tea Estate (India) Limited</p>	<p>In respect of the mentioned company, the assessee humbly submits that the company is not involved in blending/manufacturing of tea. The business description of the company as per the financial statements states that the Company is not a manufacturing company but a trading company of tea. The relevant pages of the financial statements have been enclosed as Annexure 2A.</p> <p>Further, it may also be noted that the said company cannot be considered as a comparable also because all its sales are done domestically and no exports. However, MJIL exports 58% of its total sales. The relevant extract of the financial statement elucidating the same has been enclosed as Annexure 2B.</p> <p><u>Hence, the same cannot be considered as functionally comparable as it is</u></p>	<p>The annual report of the company is pursued. It is observed that the company is engaged in trading activity and hence rejected</p>

Name of Company	Assessee's observation	Undersign response
	<i>involved in trading and its revenue is earned solely from domestic sales.</i>	
<p><i>Mohani Tea Leaves</i></p>	<p><i>As also mentioned above, that the said company cannot be considered as a comparable as the Company does not feature in both the databases i.e. Prowess and Capitaline.</i></p> <p><i>In this regard it is pertinent to note the OECD Comparability: Public invitation to comment on a series of draft issue notes also states that though tax administrations have access to confidential information that is unavailable to the taxpayer, the resource to confidential information by tax administration follows from the asymmetry situation which exists between taxpayers and tax administrations. Such information qualifies as "secret comparables" as such information is confidential in nature. <u>It also indicates that usage of such informal and confidential information from third party sources which is not available to the Assessee is not appropriate.</u> Further, the assessee wishes to apprise your goodself that the annual report provided to us by your goodself contains only the Balance Sheet and no details of the Profit and Loss of the company is provided.</i></p> <p><i>Given the above, we wish to submit that it would not be appropriate to use such limited information for the purpose of undertaking the comparability if the comparable does not feature in both the databases i.e. Prowess and Capitaline, the same cannot be accepted as comparable company.</i></p>	<p><i>The annual report of the company is available from which functional comparability could be undertaken. On its perusal the company is functionally comparable.</i></p> <p><i>With regard to financial data, the undersigned acknowledges P/L page is not available in the AR. However, a financial summary is provided in Director's report and net margins could be computed considering PBT and sales.</i></p> <p><i>Further, as the AR is available in the public domain than there does not arise any question of secret comparable. Databases are only one of the many sources of identifying comparable companies.</i></p> <p><i>Hence this company is accepted.</i></p>

Name of Company	Assessee's observation	Undersign response
Asian Tea and Exports Limited	<p>The assessee humbly submits that the said company is also engaged in trading. It is involved in sale of made tea. The relevant extract of financials have been enclosed as Annexure 3A.</p> <p>Further, it may also be noted that the Company earns its maximum revenue from exports. The company exports 98% and has only 2% domestic sales. Hence, it only serves to customers outside India. The relevant extract elucidating the quantum of exports have been enclosed as Annexure 3B.</p> <p><u>Hence, the same cannot be considered as functionally comparable as it is involved in trading and its revenue is earned solely from exports.</u></p>	<p>The relevant extracts of the financials are pursued. It is mentioned under segment reporting note 12 (a) that the company is engaged in the business of sale of made tea (including blending)...The assessee is also engaged in blending activity and hence the company is considered as a comparable company.</p>
Gujarat Tea Processors and Packers Limited	<p>In respect of the mentioned company, the assessee humbly submits that the company is not involved in blending and manufacturing of tea. However, the sale from blended tea is only 0.0024%. The company is majorly involved in sale of packed tea and not blended tea. The relevant pages of the financial statements have been enclosed as Annexure 4A. The said company is not involved in blending in the subject AY is also substantiated by the fact as mentioned in the Directors' Reports which states that the Company is in process of setting up a blending factory. Hence, this substantiates that the company is not involved in blending in the current AY and solely involved in sale of packed tea. The relevant extract of the financials have been enclosed as Annexure 4B.</p> <p>Further, it may also be noted that the said company cannot be considered as a comparable also because its major sales are done domestically and only 1% of its sales are exports.</p>	<p>The company is engaged in selling of packet tea. In the tea industry, the branded tea sellers normally purchase bulk raw teas from the auction market and repack them after blending and flavouring activities and sell the product as packed tea under various brands. It is observed for this company as well that it is also engaged in such activities. This could be observed from the following facts:</p> <ol style="list-style-type: none"> 1) The company is engaged in selling various branded products 2) The company has launched various new products as well. A distributor can never launch a product. Distributors only resell the products already launched by manufacturers 3) The company has a tea testing center for testing various blends of tea.

Name of Company	Assessee's observation	Undersign response
	<p>However, MJIL exports 58% of its total sales, whereas this Company serves only customers in India. The relevant extract of the financial statement elucidating the quantum of exports has been enclosed as Annexure 4C.</p> <p>Further, it may also be noted that the said company cannot be considered as a comparable as it is an Exceptional year of Operation. It may be noted that there has been an amalgamation of the said Company with Evergreen Beverages Ltd. The said fact is also available in the financial statements of the subject FY. Hence, the said company cannot be considered as a comparable.</p> <p>Reliance in this regard is also placed on the judgement pronounced by the Hyderabad ITAT in the case of Capital IQ Information Systems (India) Pvt. Ltd vs DCIT [ITA No. 1961/ Hyd/ 2011].</p> <p><u>Hence, the same cannot be considered as functionally comparable as it is not involved in blending and its 99% of revenue is earned solely from domestic sales.</u></p>	<p>Hence the company is engaged in blending activity of tea and considered as comparable company.</p>

11. Hence, on the basis of above, the following companies are considered as comparable companies:

Sl No.	Name of the Company	Operating Revenue(OR)	Operating Cost (OC)	Operating profit(OP)	OP/OC
1	Jivraj Tea Limited	12895.32	12311.09	584.22	4.75%
2	Mohani Tea Leaves (P) Ltd.	17569.88	16753.07	816.81	4.87%
3	Asian Tea & Exports Ltd.	13787.84	13458.86	328.97	2.44%
4	Gujarat Tea Processors and Packers Ltd.	52693.32	48747.13	3946.19	8.09%
	Average				5.04%

Amount of Adjustments:

Particulars	Amount (Rs.)
Operating revenue (a)	1,554,666,000

<i>Operating cost (b)</i>	1,783,993,000
<i>Arm's Length margin (c)</i>	5.04%
<i>Arm's Length profit (d=b*c)</i>	89,868,647
<i>Actual margin (e)</i>	-12.85%
<i>Actual Profit (f=b*e)</i>	-229,327,000
<i>Differential Profit (g=d-f)</i>	319,261,000
<i>Value of international transaction (h)</i>	367,261,000
<i>Proportion of international transaction (i=h/a)</i>	23.62%
<i>Amount of Adjustment (j=g*i)</i>	75,404,050

48. Based on the above, the total upward adjustment of the total income of the assessee is computed at Rs. 75,404,050/-.

5. The assessee filed its objections before the Id DRP and the Id DRP observed as under with regard to each of the objections filed by the assessee:-

a) With regard to the rule of consistency in applying CPM as the MAM, the Id DRP upheld the action of the Id TPO by simply stating that the principle of res judicata is not applicable to the income tax proceedings.

b) With regard to the objection raised by the assessee that CPM has been rejected by the assessee without assigning proper reasons and with regard to the allegations raised on the low cost allocation and thereby increased profitability in related party segment and on the aspect that only branded products are exported to AEs and non-branded products to AEs thereby resulting in profitability not being comparable and in adopting the TNMM method by the Id TPO, the Id RP observed as under:-

DRP Directions:

"The TPO has analyzed the TP Report and arrived at reasoned conclusions upon analysis of the pricing of branded and un-branded goods as also the trans-shipment charges. Thought it was seen from the remand report that the sales of branded and

unbranded goods were both to the AEs and the non-AEs, but the expenses allocations and price base of the two categories are distinguishable. The TPO has concluded this by comparing average price realization in absence of more robust information. The conclusions drawn per the remand report reinforce the TPO action of invoking TNMM wherein the rough edges of comparability are smoothed and hence use of TNMM is useful in these circumstances to compute ALP in a realistic and practical manner. This objection is accordingly dismissed”.

c) With regard to the usage of comparables by the ld TPO by applying external TNMM for determining the ALP of the international transactions and not applying the export turnover filters , mergers etc, and not giving credit for working capital adjustments , the ld DRP observed as under:-

	TPO	Assessee	DRP
Jivraj Tea Limited	It is a comparable basis the methodology of stock maintenance. It is functionally a comparable entity.	This company is not involved in blending/manufacturing of tea. Only in trading of tea. Further, it may also be noted its major sales are done domestically and only 1% of its sales are exports. Assessee exports 58% of its total sales.	The comparable is not suitable in view of functional differences. Hence, should be excluded.
Marvel Tea Estate (India) Limited	Functionally Comparable.	This company is not involved in blending/manufacturing of tea. The company is not a manufacturing	The comparable is not suitable in view of functional differences. Hence, should be

		company but a trading company of tea. All its sales are done domestically.	excluded.
Mohani Tea Leaves	Functionally Comparable.	This does not feature in both the databases i.e. Prowess and Capitaline. The annual report provided to us by your goodself contains only the Balance Sheet and no details of the Profit and Loss of the company is provided.	It is comparable basis functional comparability as in TP order and profile of the comparable. It is validly chosen.
Asian Tea and Exports Limited	Functionally Comparable.	This company is also engaged in trading. It is involved in sale of made tea. Further, it may also be noted that the company earns it maximum revenue from exports. The company exports 98% and has only 2% domestic sales. Hence, it only serves to customers outside India.	It is comparable basis functional comparability as in TP Order and profile of the comparable. It is validly chosen.

Gujarat Tea Processors and Packers Limited	Functionally Comparable.	This company is not involved in blending and manufacturing of tea. However, the sale from blended tea is only 0.0024%. The company is majorly involved in sale of packed tea and not blended tea. Its major sales are done domestically and only 1% of its sales are exports.	The comparable is not suitable in view of functional differences. Hence, should be excluded.
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d) With regard to the objection that the Id TPO erred in computation of PLI of the assessee by considering foreign exchange gain and miscellaneous income as non-operating income , the Id DRP observed as under:-

DRP Directions:

The foreign exchange fluctuations that bear direct nexus with the operations should be treated as operating in nature. This position has also been held so in Westfalia Separator India Pvt. Ltd. vs. ACIT [TS-220-ITAT-2014(Del)-TP].

The Miscellaneous income of the assessee has been seen. The break up is as per table below:

<i>Particular</i>	<i>Amount (INR)</i>
<i>Electricity charges received</i>	<i>42,61,938</i>
<i>Brokerage and Commission Charges</i>	<i>1,451</i>
<i>Discount Received on Purchase</i>	<i>1,14,206</i>
<i>Misc. Receipt</i>	<i>46,332</i>
<i>Employee's Rent Recoveries</i>	<i>11,001</i>

<i>Sundry adjustment (including provisions written back during the year, telephone refund etc.)</i>	4,74,760
<i>Total</i>	49,09,689

The above cannot be treated as operating in nature as crucial nexus with operations is absent. The same cannot be treated as operating receipts. Only the Discounts received on purchases shall be allowed as operating subject to verification by the TPO that such purchases pertain to the stock or operational equipment. This objection is thus disposed of”.

6. The Id AO pursuant to the directions of the Id DRP passed the final order u/s 143(3) read with section 92CA(4)/144C(13) of the Act dated 27.11.2015 wherein he worked out the revised PLI (OP/ TC) of the assessee and determined the upward adjustment of Rs 6,93,27,744/- in the final assessment.

7. Aggrieved, the assessee is in appeal before us on the following grounds :-

2. Adjustment in relation to the international transaction entered into by the Appellant.

2.a) On the facts and circumstances of the case and in law, the impugned order erred in not following the ‘rule of consistency’ and rejecting the Transfer Pricing methodology as adopted by the Appellant

2.b) The impugned order has further erred in rejecting the Transfer Pricing methodology i.e. the Cost Plus Method (‘CPM’) adopted by the Appellant without assigning any specific reason.

2.c) Thus, the impugned order has erred in rejecting more reliable Traditional Method (i.e. CPM method) and in adopting Transactional Profit Method [i.e. Transactional Net Margin Method (‘TNMM’)] for the determination of Arms’ Length Price (‘ALP’).

2.d) The impugned order has further erred in not considering the fact that the expense allocation and price difference between the sale of branded and non-branded products to Associate Enterprises (‘AE’) and non-AE is due to location constraints and the other inevitable reasons.

2.e) On the facts and circumstances of the case, the impugned order has erred in applying external TNMM by choosing comparable companies which are functionally not similar as compared to the functions of the Appellant.

2.f) The impugned order has erred in not providing the detailed search process for selecting his own set of comparables during the transfer pricing assessment and in conducting fresh search and economic analysis.

2.g) Without prejudice to the above, the impugned order has further erred in not sharing the complete data i.e. the complete financial statements, which was required for computing the Profit Level Indicator ('PLI') and the functionally, of the comparables and hence erred in choosing a secret comparable.

2.h) On the facts and circumstances of the case and in the law, the impugned order has erred in choosing such comparables that have an exceptional year of operation like amalgamation, merger etc in the subject AY and/or are solely involved in business of exports.

2.i) Without prejudice to the above and on the facts and circumstances of the case and in law, the impugner order has erred in considering a set of only two comparables for determining the ALP.

2.j) Without prejudice to the above and on the facts and circumstances of the case and in law, the impugner order has erred in not considering the Closing Stock and the Miscellaneous Income, as operating items, in the computation of the PLI of the Appellant.

2.k) On the facts and circumstances of the case, the impugned order has erred in not giving effect to the rectified directions of the Hon'ble DRP, issued under Rule 13 of the DRP Rules, dated 10th December, 2015 wherein the DRP has directed to consider the amount of closing stock in computing the PLI of the Appellant.

8. We have heard the rival submissions and perused the materials available on record. We find that the assessee had applied the Cost Plus Method (CPM) as the Most Appropriate Method (MAM) for benchmarking its international transactions. The facts of the case had not changed during the year under appeal and hence the method adopted

by the assessee at CPM has been the same for this year under appeal also for benchmarking its international transactions.

8.1. We find that the Id TPO while passing an order u/s 92CA(1) of the Act for the Asst Year 2007-08 had observed as under:-

2. The perusal of Form 3CEB showed that the assessee had entered into transactions with its AEs. The assessee had used CPM method for determination of the transaction.

3. After due deliberation, it is seen that no transfer pricing adjustment is required to be made u/s 92CA(3) of the IT Act. The transaction entered into by the assessee is accepted to be at the Arm's length price.

8.1.1. We find that the Id TPO while passing an order u/s 92CA(1) of the Act for the Asst Year 2010-11 had observed as under:-

2. The assessee is engaged in the business of blending of tea and production of tea bags. The assessee had used CPM method for determination of the transaction.

3. After due deliberation, it is seen that no transfer pricing adjustment is required to be made u/s 92CA(3) of the IT Act. The transaction entered into by the assessee is accepted to be at the Arm's length price.

8.1.2. Similarly no transfer pricing adjustments were made by the Id TPO for the Asst Years 2008-09 and 2009-10 vide his order u/s 92CA(3) of the Act dated 28.10.2011 and 29.1.2013 respectively.

8.2. We find that the Id TPO erred in taking a different stand in the year under appeal in spite of the similar facts prevailing in this year when compared to the earlier years. The principles of rule of consistency has been given a go by the Id TPO. We find that the nature of international transactions, functions performed and risks assumed by the parties and method adopted at CPM are similar to those adopted in the earlier years by the assessee and hence there is no reason for the Id TPO to take a different stand in the

year under consideration. We do not find any distinguishing feature pointed out by the Id TPO / Id DRP or by the Id DR during this year so as to deviate from the stand already taken by the Id TPO in earlier years. We find that the reliance placed on the decision of the *Hon'ble Telengana and Andhrapradesh High Court in the case of CIT vs M/s Alumeco India Extrusion Limited in ITA Nos. 532 and 563 of 2014 dated 6.11.2014* is very well founded and is directly applicable to the facts of the instant case. The question raised before the Hon'ble Court is as under:-

“In the facts and circumstances of the case, whether the Hon'ble Tribunal (ITAT) is correct in law in directing the Assessing Officer/Transfer Pricing Officer to compute the value of international transaction by using Internal Cost Plus Method under Section 92CA of the Act instead of External Transaction Net Margin Method?”

The Hon'ble Court held as follows:-

“We have heard Mr. B. Narasimha Sharma, Learned Counsel for the appellant, and perused the judgment and order under appeal. It appears that the learned Tribunal has recorded the fact that when the assessee has chosen a Most Appropriate Method and substantiated the choice in its Transfer Pricing Study it is upto the Transfer Pricing Officer to record and substantiate the reasons as to why the assessee's Most Appropriate Method was incorrect and why some other Transfer Pricing Method need to be the Most Appropriate Method. The Tribunal did not find any substance in any of the Transfer Pricing Officer's multiple arguments for rejection of assessee's internal Cost Plus Method and adoption of external Transaction Net Margin Method. In other Words, it was found by the Tribunal that the decision of the Transfer Pricing Officer was absolutely arbitrary and irrational and hence it set aside the order of the Transfer Pricing Officer. We do not find any element of law for consideration in these appeals. The appeals are therefore dismissed. There will be no order as to costs.”

8.2.1. Respectfully following the aforesaid decision and the ratio laid down by the *Hon'ble Apex Court in the case of Radhasaomi Satsang reported in 193 ITR 321 (SC)* , we hereby direct the Id AO to adopt the CPM as the MAM for determining the ALP of the international transactions of the assessee.

8.3. We also find that the assessee had segregated financials into Exports to AE and Exports to Non-AE by adopting Internal TNMM method for the same. We find that the

ld TPO had not accepted the internal CPM , he had not accepted the internal TNMM also. We find that the ld TPO had observed in para 7 of his order as under :-

“7. Further, as the assessee is also engaged in selling of both branded and non-branded categories of teas, the same should be taken into consideration for the purpose of internal comparability. The crux is to compare the margin of selling branded tea to AE with branded margin of branded tea sold to AEs with the margin earned from selling of branded and non-branded tea to non-AEs.”

But the ld DRP had observed that from the remand report of the ld TPO, the sales of branded and unbranded goods were both to the AEs and Non AEs. Hence the observation made by the ld TPO in his order had been nullified by his own observation later in the remand report which has been taken cognizance by the ld DRP. However, we find that the ld DRP had observed that the expenses allocation and price base of the two categories (Branded and unbranded goods to AEs and Non AEs) are distinguishable and based on this it had upheld the action of the ld TPO. We hold that the ld TPO should adopt the Internal CPM and Internal TNMM for benchmarking the different international transactions carried out by the assessee with its AEs, and accordingly this aspect of the issue also deserves to be remanded back to the file of the ld AO.

8.4. With regard to the list of comparables chosen by the ld TPO and later modified by the ld DRP, we find that the ld TPO had issued a show cause notice dated 9.1.2015 seeking the presence of the assessee on 14.1.2015. The assessee had given the financials of comparables chosen by the ld TPO on 10.1.2015. It was argued by the ld AR that the assessee sought time for a day to make its detailed submissions before the ld TPO with regard to the objections to be filed for the comparables and disputing the MAM adopted by the assessee and that this request was rejected by the ld TPO. In any case, the entire exercise of determination of ALP had to be redone by the ld TPO as per the directions contained hereinabove based on the Internal CPM and Internal

TNMM to be adopted as MAM for benchmarking different transactions. Hence in these circumstances, we deem it fit and appropriate, in the interest of justice and fairplay, to remand this issue of list of comparables also to the file of the Id TPO for denovo adjudication. The assessee is also given liberty to file fresh list of comparables, if it so desires, and also file fresh objections and evidences in support of its contentions.

8.5. Accordingly the Ground Nos. 2(a) to 2(k) raised by the assessee in respect of transfer pricing adjustments are allowed for statistical purposes.

9. The next issue to be decided in this appeal is as to whether the Id AO was justified in making disallowance of Rs 1,07,065/- u/s 14A of the Act read with third limb of Rule 8D(2)(iii) of the Rules, in the facts and circumstances of the case.

9.1 The brief facts of this issue is that the assessee was in receipt of dividend income of Rs 4,14,000/- and claimed the same as exempt. The Id AO observed that the investments were made out of own funds and hence no disallowance under second limb of Rule 8D(2) of the Rules towards Interest is to be made in this case. However, the Id AO resorted to make disallowance under third limb of Rule 8D(2) of the Rules and arrived at the disallowance of Rs 1,07,065/- in the assessment which was upheld by the Id DRP. Aggrieved, the assessee is in appeal before us on the following grounds:-

3.Disallowance under section 14A of the Act

3.a) On the facts and circumstances of the case and in law, the impugned order erred in making disallowance of Rs. 1,07,065/- under Section 14A of Act read with Rule 8D of the Rules.

3.b) On the facts and circumstances of the case and in law, the impugned order has erred in denying the Appellant's contention that no expenses have been incurred for earning exempt income and has grossly applied Rule 8D without appreciating the facts of the Appellant's case.

3.c) The impugned order has further erred in not considering that the entire investments have been made from the Appellant's own funds and no expenses have been incurred for earning a nominal exempt income and has applied Rule 8D without appreciating the facts of the Appellant's case.

3.d) On the facts and circumstances of the case, the impugned order has erred in not acknowledging that the provisions of section 14A mandate that the onus is on the AO to justify the basis for not being satisfied with the correctness of the claim of the Appellant in respect of such expenditure in relation to income which does not form part of the total income under Act.

3.e) The impugned order has further erred in not abiding by the decision of the Jurisdictional High Court wherein it was affirmed and held that the disallowance should be quashed if no cogent reasons for the same has been given.

3.f) Without prejudice to the above, the impugned order has further erred in also considering those investments, for computation of disallowance, on which exempt income has not been earned during the subject A.Y.

9.2. We have heard the rival submissions. We find that the disallowance u/s 14A of the Act had been made only under the third limb of Rule 8D(2) of the Rules viz 0.5% of average of value of investments. The ld AR before us filed the list of investments which did not fetch any dividend income and prayed for exclusion of those investments while calculating disallowance under Rule 8D(2)(iii) of the Rules in the light of the decision of this tribunal in the case of REI Agro Ltd reported in 144 ITD 141. The ld DR fairly agreed for the same. Hence we direct the ld AO to rework the disallowance under Rule 8D(2)(iii) of the Rules only by taking into account those investments which had fetched dividend income in light of decision of this tribunal in REI Agro Ltd supra. Accordingly the Ground Nos. 3(a) to 3(f) raised by the assessee are allowed for statistical purposes.

10. The Ground No.1(a) raised by the assessee is general in nature and does not require any specific adjudication.

11. The Ground Nos 4 & 5 raised by the assessee with regard to chargeability of interest u/s 234B / 234C of the Act and levy of penalty u/s 271(1)(c) of the Act which are only consequential in nature and does not require any specific adjudication. Moreover, the ground raised towards penalty was not with regard to levy of the same but only for initiation of the same. Hence we refrain to give our opinion on the validity of levy of penalty u/s 271(1)(c) of the Act in this order.

12. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Court on 01.12.2017

Sd/-
[A.T. Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 01.12.2017

SB, Sr. PS

Copy of the order forwarded to:

1. Madhu Jayanti International Ltd., 46, B.B. Ganguly Street, Kolkata-700012
2. DCIT, Central Circle4(1),Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
3. C.I.T(A)- , Kolkata
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches