IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1' : NEW DELHI)

BEFORE HON'BLE VICE PRESIDENT, SHRI N.K. SAINI
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.6937/Del./2017
(ASSESSMENT YEAR : 2013--14)

M/s. Vedanta Limited, (successor to Cairn India Ltd.), DLF Atria Building, Jacaranda Marg, N Block, DLF City Phase – II, Gurgaon - 122 002 (Haryana).	vs.	ACIT, Circle 26 (1), New Delhi.
(PAN : AACCC8799D)		
(APPELLANT)		**(RESPONDENT)**

ASSESSEE BY : Shri Ajay Vohra, Senior Advocate
Shri Piyush Chawla, CA
Ms. Poonam Ahuja, CA
REVENUE BY : Shri Sandeep Mishra, Senior DR

Date of Hearing : 31.01.2019
Date of Order : 12.02.2019

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, M/s. Vedanta Ltd. (successor to Cairn India Ltd.) (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 31.10.2017 passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the

Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2013-14 on the grounds inter alia that :-

> ***"1. That on the facts and circumstances of the case & in law, the Ld. Assessing Officer (AO) erred in assessing the total income and adjusted book profit of the Appellant at Rs.906,05,93,504 and Rs.6850,01,87,820 as against Rs.893,36,58,194 and Rs.6667,49,45,379/- respectively declared by the appellant in the return of income.***
>
> ***2. That on the facts and circumstances of the case & in law, the Ld. AO/DRP grossly erred in making disallowance of Rs.212,15,413 under section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 ('the Rules').***
>
> ***2.1 That on the facts and circumstances of the case & in law, the Ld. AO/DRP without assigning any cogent reason disregarded actual computation of expenditure related to exempt income as well as third party independent quotation for managing the exempt income yielding investments of the assessee.***
>
> ***2.2 That on the facts and circumstances of the case & in law, the Ld. AO/DRP grossly erred in making the aforesaid disallowance without recording the necessary satisfaction as mandated in section 14A(2) of the Act.***
>
> ***3. That on the facts and circumstances of the case & in law, the Ld. AO/DRP erred in adding back disallowance of Rs.212,15,413 under section l4A read with Rule 8D of the Rules in computing book profit under section 115J8 of the Act.***
>
> ***4. That on the facts and circumstances of the case & in law, the Ld. AO/DRP erred in allowing claim of additional depreciation amounting to Rs.17,12,04,096 under section 32(1)(iia) of the Act despite the fact that appellant had not claimed at all while filing its original return of income.***
>
> ***4.1 That on the facts and circumstances of the case & in law, the Ld. AO/DRP erred in observing that the claim of additional depreciation was to be mandatorily allowed in terms of Explanation 5 to section 32(1) of the Act, without appreciating that additional depreciation being optional in nature, is not covered within the purview of the said Explanation.***
>
> ***5. That on the facts and circumstances of the case & in law, the Ld. AO/DRP erred in holding that the profit and loss account prepared by the Appellant was not in accordance with Part II of***

Schedule VI to the Companies Act, 1956 and, therefore, the AO had jurisdiction to recast the same.

5.1 That on the facts and circumstances of the case & in law, the Ld. AO/DRP erred in adding back the amount of depletion of producing properties debited in the profit and loss account using 'Unit of Production Method'; instead in allowing depreciation on producing facilities @ 5.28% on straight line method, thereby making adjustment of Rs.180,40,27,029 to the book profit under section 115JB of the Act.

6. That on the facts and circumstances of the case & in law, the Ld. AO/TPO/DRP erred in not appreciating that the transactions of reimbursement of Rs.2,00,40,842, Manpower, general and administrative ('MGA') cost ofRs.237,09,69,90 1 and Parent Company Overheads ('PCO') cost of Rs.3,54,53,085 are not in the nature of international transaction under section 928(1) of the Act and hence outside purview of transfer pricing provisions.

6.1 That on facts and circumstances of the case and in law, the Ld. AO/TPO/DRP erred in not appreciating that as prescribed in Production Sharing Contract/Petroleum Resource Agreement / Joint Operating Agreement, partners of Unincorporated Joint Venture (UJV) are permissible to pay only for actual cost incurred by the appellant without any mark-up.

6.2 That on facts and in the circumstances of the case and in law, the Ld. AO/TPO/DRP erred in not appreciating that the transaction of reimbursement of expenses amounting to Rs.2,00,40,842 entered into by the appellant with its Associated Enterprises (' AEs') is in the nature of pass through costs and hence notional mark up of 5% on the same is unwarranted.

6.3 That on facts and in the circumstances of the case & in law, the Ld. AO/TPO erred in not applying Comparable Uncontrolled Price ('CUP') method as directed by Ld. DRP with respect to determination of Arm's Length price of MGA costs of Rs.211,41,48,589 reimbursed by CEHL when same transaction was entered into between Unincorporated Joint Venture ('UJV') of RJ ON-901l oil block (allegedly the appellant) and third party Oil & Natural Gas Corporation of India Ltd ('ONGC').

6.4 That without prejudice to the above Grounds, the Ld. AO/TPO/DRP erred in imputing notional mark up of 5% on reimbursement of expenses, MGA costs and PCO costs in gross disregard of Rule 108(2) of the Income Tax Rules, 1962 ('the Rules') and OECD guidelines.

6.5 That on facts and in the circumstances of the case & in law, Ld. TPO grossly erred in holding that:

- ***the appellant has not furnished any documentary evidence to demonstrate the benefits received from the services provided by the AE, ignoring the submissions and documents submitted by the assessee during the assessment proceedings***
- ***the appellant has not furnished any cost benefit analysis with respect to cost of services and benefits received from AE vis-a-vis independent parties.***
- ***there is no clause defining the Scope of Work for which the payment was to be made.***
- ***there is absence of written binding contract between the payer and payee companies.***
- ***the appellant has not provided full details of nature and extent of services provided by AE.***
- ***the appellant has not provided basis for determining the reimbursement to be charged."***

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Cairn India limited (CIL), the taxpayer was a resident company incorporated under the Companies Act, 1956 primarily engaged in the business of exploration and production of mineral, oils, petroleum, gas and related by products. The taxpayer has entered into Product Sharing Contracts (PSCs) qua certain blocks/oil and gas fields. Subsequently, on January 25, 2017, CIL merged with Vedanta limited by virtue of the scheme of arrangement under sections 391(2) and 394 read with sections 100 to 103 of the Companies Act, 1956 and section 52 of the Companies Act, 1956 with the appointed date of 1st April, 2016 (effective date 11.04.2017) vide approval dated March 23, 2017 accorded by National Company Law Tribunal (NCLT).

3. The taxpayer is engaged in the business of surveying, prospecting, drilling, exploring, acquiring, developing, producing, maintaining, refining, storing, trading, supplying, transporting, marketing, distributing, importing, exporting and generally dealing in mineral oils, petroleum, gas and related by-products and other activities incidental to the above. The taxpayer as part of its business activities also held interests in its subsidiary companies which have been granted rights to explore and develop oil exploration blocks. The taxpayer is a participant in the various oil and gas blocks/fields which are in the nature of jointly controlled assets granted by the Government of India through production sharing contracts entered into between the company and Government of India and other venture partners.

4. During the year under assessment, the taxpayer entered into international transaction and specified domestic transactions reported in Form 3CEB as under :-

"**International Transactions**

S.No.	***Nature of Transaction***	***Amount in (Rs.)***	***Method Applied***
1	***Bank Guarantee***	***16,01,369***	***CUP***
2	***Subscription of Equity Shares***	***1,37,37,49,700***	***Other Method***
3	***Recovery of expenses***	***2,00,40,842***	
4	***Reimbursement of expenses***	***1,80,55,556***	
5	***Recovery of Expenses from UJVs***	***2,42,79,41,802***	
6	***Reimbursement of expenses to UJVs***	***15,93,54,699***	

Specified Domestic Transactions

S.No.	*Nature of Transaction*	*Amount in (Rs.)*	*Method Applied*
1	*Director's remuneration*	*17,44,90,925*	*Other Method*
2	*Director sitting fee*	*13,40,000*	
3	*Transfer of Inventory and Consumables from an eligible unit to non-eligible unit*	*1,70,79,100*	
4	*Head Office Allocation*	*33,78,17,143*	
5	*Share of manpower, general and administrative cost*	*211,41,48,575*	

5. During the year under assessment, the taxpayer has incurred expenses which were later on reimbursed to it by its Associated Enterprises (AEs) on cost to cost basis, which are detailed as under:-

(i)	*Recovery of consultancy expenses*	*Rs.98,39,539/-*
(ii)	*Recovery of travel and accommodation expenses*	*Rs.86,99,335/-*
(iii)	*Recovery of travel and accommodation expenses*	*Rs.12,58,195/-*
(iv)	*Recovery of stationery and misc. expenses*	*Rs.2,43,773/-*
(v)	*Parent company overheads*	*Rs.3,54,53,085/-*
(vi)	*Share of MGA cost recharged to UJV*	*Rs.24,51,68,589/-*
(vii)	*Share of MGA cost recharged to UJV*	*Rs.211,41,48,575/-*
(viii)	*Share of MGA cost through UJV*	*Rs.1,16,52,723/-*
	Total	*Rs.2,42,64,63,814/-*

6. The Ld. TPO sought to add markup to the services rendered by the taxpayer for which it was reimbursed on cost to cost basis on the ground that as to why finance cost and other overheads components was not charged. Declining the contentions raised by

the taxpayer, the ld. TPO proceeded to add markup of 5% and thereby proposed to determine the arm's length price of aforesaid transactions entered into by the taxpayer to the tune of Rs.12,13,23,191/-.

7. AO noticed from perusal of profit & loss account and balance sheet that the taxpayer had invested in shares and mutual funds in tax free bonds and thereby earned dividend income and interest income of Rs.94,74,34,528/- and Rs.4,03,26,027/- respectively which was claimed as exempt income under section 10 of the Act and has added back the amount of Rs.26,96,640/- on account of expenses proportionate to earn this income under section 14A and 115 JB of the Income-tax Act, 1961 (for short 'the Act'). Consequently, AO made disallowance of Rs.2,39,10,053/- minus Rs.26,96,640/- already offered for tax by the taxpayer under section 14A read with Rule 8D in computing the profit under section 115 JB of the Act. AO/DRP have also allowed claim of additional depreciation amounting to Rs.17,12,04,096/- under section 32(1)(iia) of the Act which has not been claimed by the taxpayer while filing its original return of income.

8. AO/DRP have also reduced the depreciation to Rs.164,14,71,567/- by recasting the audited financial statement and thereby made disallowance of Rs.180,40,27,029/- to the peak profit

under section 115 JB of the Act by using "Unit Of Production Method" instead of allowing depreciation on producing facility at 5.28% on straight line method.

9. The taxpayer carried the matter by way of filing objections before the ld. DRP who has disposed of the same by confirming the proposal made by the ld. TPO.

10. In compliance to the order passed by the TPO/DRP, AO proceeded to compute the income of the taxpayer for the year under assessment as under :-

CAIRN INDIA LTD. AY 2013-14		
UNDER NORMAL PROVISIONS		***Amount (in Rs.)***
Gross Total Income as per Return of Income		***6793,84,85,088/-***
Add : Transfer Pricing Adjustments	***12,13,23,191/-***	
Add: Disallowance u/s 14A read with Rule 8D	***2,39,12,053/-***	
Less : Already offered for Tax by the assessee u/s 14A	***(26,96,640/-)***	***14,25,38,604/-***
Gross Total Income		***6808,10,23,691/-***
Less : Deduction u/s 80IB (9) as per Original Return		***(5900,48,26,894/-)***
Less : Impact of additional depreciation		***(1,56,03,293)***
Total Income		***906,05,93,504/-***
Tax Payable		
Basic @ 30%	***271,81,78,051/-***	
Add : Surcharge @ 5%	***13,59,08,903/-***	
Add : Education Cess 3%	***8,56,22,609/-***	
Total Tax	***293,97,09,563/-***	
Under MAT Provisions u/s 115JB of the I.T. Act, 1961		
Book Profit shown in return	***6667,49,45,379/-***	

Add : Expenses related to Exempt Income (Rs.239,12,053 – Rs.26,96,604)	***212,15,413/-***	
Add : Excess Depreciation disallowed under UOP method	***180,40,27,029/-***	***6850,01,87,820/-***
Taxable Book Profit u/s 115JB		***6850,01,87,820/-***
Tax Payable		
Basic @ 18.5%		***1267,25,34,747/-***
Add : Surcharge @ 5%		***63,36,26,737/-***
Add : Education Cess 3%		***39,91,84,845/-***
Total Tax Payable under MAT		***1370,53,46,329/-***

11. So, the AO assessed the total tax payable under section 115JB at Rs.13,70,53,46,329/-. The taxpayer ordered to be charged on peak profits under section 115 JB of the Act.

12. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

13. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case. Our ground-wise findings are as under.

GROUND NO.1

14. Ground No.1 needs no findings being general in nature.

GROUND NOS.2, 2.1 & 2.2

15. AO after noticing the investment made by the taxpayer in shares, mutual funds and tax free bonds from which it has earned

dividend income and interest income to the tune of Rs.94,74,34,528/- and Rs.4,03,26,027/- respectively claimed as exempt income under section 10 of the Act proceeded to make disallowance of Rs.2,12,15,413/- by invoking the provisions contained under section 14A read with Rule 8D of the Income-tax Rules, 1962 (for short 'the Rules). Ld. AR for the taxpayer challenging the impugned finding contended that AO without dis-recording dissatisfaction as to the actual computation of expenditure incurred by the taxpayer to earn the exempt income proceeded to arbitrarily made the disallowance which is not sustainable.

16. However, at the same time, ld. AR for the taxpayer fairly conceded that this issue has been decided against the taxpayer in assessment years 2011-12 and 2012-13 but appeal on this issue on question of law is lying admitted in the Hon'ble Delhi High Court.

17. Undisputedly, AO/DRP have decided this issue against the taxpayer by following their own decision rendered in assessment years 2011-12 and 2012-13. AO based its decision on the fact that the taxpayer has failed to consider indirect expenses in the shape of establishment in addition to direct expenses and there are lot of cost factors involved in investment in shares and mutual funds.

18. In the identical set of facts in taxpayer's own case for AY 2011-12, AO/DRP's decision of making disallowance under section 14A under the normal provisions of the Act has been upheld which has been followed by AO/DRP while passing the impugned order.

19. Co-ordinate bench of the Tribunal in the ***taxpayer's own case for AY 2011-12 decided by order dated 09.10.2017 in ITA No.1459/Del/2016***, available at pages 82 of the case law paper book, thrashed the issue at length and decided against the Taxpayer by returning following findings :-

> ***"5. On going through the above extraction from the assessment order, it is abundantly clear that the Assessing Officer did not find satisfactory the reply of the assessee as regards the disallowance of Rs.18.00 lac on the basis of the quotation from JM Financial Services. Having regard to the language of section 14A(2), providing for examining the claim `having regard to the accounts of the assessee', it was once again required to furnish the working of disallowance under section 14A. The assessee furnished working of expenses u/s 14A having regard to its accounts computing the amount of disallowance at Rs. 13,35,108. The same was again considered carefully but not found to be correct as the assessee : `did not consider various aspects of indirect expenses in the shape of establishment in addition to direct expenses'. He further found that : `There are lot of cost factors involved in investment in shares/mutual funds', which were not considered by the assessee. In the next para, the Assessing Officer dealt with the claim of the assessee about the not making any investment in shares out of borrowed funds. He placed reliance on the judgment of Hon'ble jurisdictional High Court in the case of CIT Vs. Abhishek Industries [2006] 156 Taxman 257 (P&H) to negative the assessee's claim on this issue as well. That is how, he did not find correct the assessee's working of disallowance. Thereafter, the provisions of section 14A read with rule 8D were applied to determine the amount of expenditure in relation to income not includible in total income.***

6. It is thus discernible from page 6 of the assessment order that the Assessing Officer recorded proper satisfaction with regard to the assessee's computation of disallowance and only thereafter moved to compute disallowance u/s 14A of the Act in terms of rule 8D of the Income-tax Rules, 1962. In our considered opinion, the Assessing Officer did record proper satisfaction in terms of section 14(2) of the Act before resorting to rule 8D. This contention of the assessee, therefore, fails.

7. First part of the disallowance by the AO is Rs.9.63 crore and odd which has been made under Rule 8D(2)(ii). This provision stipulates that in a case where the assessee has incurred expenditure by way of interest during the year which is not directly attributable to any particular income, the disallowance shall be made for an amount computed in accordance with the formula given therein. Sum and substance of disallowance under Rule 8D(2)(ii) is that the interest relatable to investments/securities yielding exempt income is to be disallowed.

8. At this juncture, it is relevant to note that section 36(1)(iii) provides for deduction of interest of the amount of interest paid in respect of capital borrowed for the purpose of business or profession. The essence of this provision is that the interest should be allowed so long as the capital borrowed, on which such interest is paid, is used for the purpose of business or profession. If, however, an assessee is having its own interest free surplus funds and such funds are utilised as interest free advances even for a non-business purpose, there cannot be any disallowance of interest paid on interest bearing loans. The Hon'ble Bombay High Court in CIT vs. Reliance Utilities and Power Ltd. (2009) 313 ITR 340 (Bom), has held that where an assessee possessed sufficient interest free funds of its own which were generated in the course of relevant financial year, apart from substantial shareholders' funds, presumption stands established that the investments in sister concerns were made by the assessee out of interest free funds and, therefore, no part of interest on borrowings can be disallowed on the basis that the investments were made out of interest bearing funds. In that case, the AO recorded a finding that a sum of Rs.213 crore was invested by the assessee out of its own funds and Rs.1.74 crore out of borrowed funds. Accordingly, disallowance of interest was made to the tune of Rs.2.40 crore. The assessee argued that no part of interest bearing funds had gone into investment in those two companies in respect of which the AO made disallowance of interest. It was also argued that income from operations of the company was Rs.418.04 crore and the assessee had also raised capital of

Rs.7.90 crore, apart from receiving interest free deposit of Rs.10.03 crore. The assessee submitted before the first appellate authority that the balance-sheet of the assessee adequately depicted that there were enough interest free funds at its disposal for making investment. The ld. CIT(A) got convinced with the assessee's submissions and deleted the addition. Before the Tribunal, it was contended on behalf of the Revenue that the shareholders' funds were utilized for the purchase of its assets and hence the assessee was left with no reserve or own funds for making investment in the sister concern. Thus, it was argued that the borrowed funds had been utilized for the purpose of making investment in the sister concern and the disallowance of interest was rightly called for. The Tribunal, on appreciation of facts, recorded a finding that the assessee had sufficient funds of its own for making investment without using the interest bearing funds. Accordingly, the order of CIT(A) was upheld. When the matter came up before the Hon'ble High Court, it was contended by the Department that the shareholders' funds stood utilized in the purchase of fixed assets and hence could not be construed as available for investment in sister concern. Repelling this contention, the Hon'ble High Court observed that : "In our opinion, the very basis on which the Revenue had sought to contend or argue their case that the shareholders' fund to the tune of over Rs.172 crore was utilized for the purpose of fixed assets in terms of the balance-sheet as on March 31, 1999, is fallacious." In upholding the order of the Tribunal, the Hon'ble High Court held that: "If there be interest free funds available to an assessee sufficient to meet its investment and at the same time the assessee had raised a loan, it can be presumed that the investments were from the interest free funds available". Thereafter, the judgment of the Hon'ble Supreme Court in the case of East India Pharmaceutical Works Ltd. Vs. CIT (1997) 224 ITR 627 (SC) and also the judgment of the Hon'ble Calcutta High Court in Woolcombers of India Ltd. Vs. CIT (1981) 134 ITR 219 (Cal) were considered. It was finally concluded that: "The principle, therefore, would be that if there are funds available both interest free and overdraft and/or loans taken, then a presumption would arise that the investments would be out of interest free funds generated or available with the company, if the interest free funds were sufficient to meet the investment". Consequently the interest was held to be deductible in full. From the above judgment, it is manifest that there can be no presumption that the shareholders' fund of a company was utilized for the purchase of fixed assets. If an assessee has interest free funds as well as interest bearing funds at its disposal, then the presumption would be that investments were made from interest free funds at the disposal of the assessee. Similar view has been taken by the Hon'ble Delhi High Court in CIT vs. Tin Box Company (2003) 260 ITR 637 (Del), holding that when the capital and interest free unsecured loan with the

assessee far exceeded the interest free loan advanced to the sister concern, disallowance of part of interest out of total interest paid by the assessee to the bank was not justified.

9. Applying the above proposition in the context of section 14A, the Hon'ble Karnataka High Court in CIT & Anr vs. Microlabs (2016) 383 ITR 490 (Kar) has held that when investments are made from common pool and non-interest bearing funds are more than the investment in tax free securities, no disallowance of interest expenditure u/s 14A can be made. This view has been taken by following the judgment of the Hon'ble Bombay High Court in CIT vs. HDFC Bank Ltd. (2014) 366 ITR 515 (Bom). It is further observed that this issue is no more res integra in view of the recent judgment delivered by the Hon'ble Supreme Court in Godrej & Boyce Manufacturing Company Ltd. vs. DCIT (2017) 394 ITR 449 (SC), in which it has been held that when interest free funds in the form of share capital and reserves are more than investment, then no disallowance of interest can be made u/s 14A.

10. Adverting to the facts of the instant case, we find that the Assessing Officer has taken value of investments yielding exempt income at Rs.1,179.96 crore. As against this, the assessee's share capital with the reserve and surplus at the close of the year stands at Rs.25,351.75 crore. This shows that the assessee's Shareholders' fund is far in excess of the amount of investments in securities yielding exempt income.

11. The ld. Departmental Representative vehemently argued that the contention of the assessee for having utilized idle IPO proceeds in making investments is not correct and hence disallowance towards interest under Rule 8D(2)(ii) should be sustained. This was sought to be established w.r.t. the Annual reports of the assessee company for the preceding years. There is no doubt that such Annual reports do reflect the utilization of IPO funds at places other than the securities earning exempt income. However, it is also pertinent to note from the same Annual reports, as has been pointed out by the ld. AR, that it has been mentioned that part of the investments were also financed from IPO. Be that as it may, we are not so much concerned with the question as to whether or not proceeds from IPO were utilized for the purposes of making investments in securities yielding exempt income. Since the investments in securities fetching exempt income is far less than the amount of Shareholders' funds not only at the end of the Financial year 2010-11 under consideration but even in the earlier years, whose Annual reports have been placed on record, as the sequitur, such securities are held to have been purchased from the interest-free Shareholders' fund. Ergo, we are satisfied that the disallowance

under rule 8D(2)(ii) at Rs.9.63 crore is not sustainable. The same is directed to be deleted.

12. Now, we turn to the last part of the disallowance made under rule 8D(2)(iii). This part of the Rule provides that an amount equal to 1/2 % of the average of the value of investment, income from which does not or shall not form part of the total income, shall be disallowed. The Assessing Officer has computed this amount of disallowance at Rs.5,89,98,005/-. We have noticed above that the assessee furnished quotation from JM Financial Services stating fee of Rs.18 lakh as a basis of its disallowance. However, when the Assessing Officer required the assessee to compute the disallowance as per its books of accounts, the assessee determined such amount at 13,35,108/- as under:-

`Working of expenses directly or indirectly related to earning dividend income.

Particulars		***March, 2011 Amount (in Rs.)***
Staff Cost		***1,07,56,90,703***
Administrative expenses		***1,96,86,30,968***
Less: Company share in following expenses not related to earning dividend income		
-Legal & Professional services	***62,99,47,521***	
-Contract Employee Charges	***66,50,568***	***63,65,98,089***
Total		***2,40,77,23,582***
Less: Directors' Salary (Refer Tax Audit Report)		***23,59,48,525***
Balance		***2,17,17,75,057***
No of Employees (support staff)		***244***
Cost per employee		***89,00,717***
Considering the number of transactions 15% cost of employee is considered Also Refer to Note 1		***13,35,108***

Note 1: Conservatively amount is very high as it includes salary of employee at very senior level and who are not directly or indirectly involved in investment portfolio management'

13. It can be seen from the above computation that the assessee took Staff cost at Rs.107.56 crore and Administrative expenses at Rs.196.86 crore. Thereafter, it reduced a sum or Rs.63.65 crore towards Legal and professional services and Contract employees. From the remaining amount of Rs.240.77 crore, the assessee further reduced Directors' salary amounting to Rs.23.59 crore for computing the remaining amount of Rs.217.17 crore. This amount has been divided with 244, being,

number of employees for working out the Cost per employee at Rs.89.00 lakh. Thereafter, 15% of the Cost of one employee has been attributed to disallowance under section 14A at Rs.13,35,108/-. We find that there are several inconsistencies in the above calculation made by the assessee. The Assessing Officer has also held such calculation as incorrect: `as it has not considered various aspects of indirect expenses in the shape of establishment in addition to direct expenses. There are a lot of cost factors involved in investments in shares/mutual funds'. Turning to the above computation, it is seen that the assessee has reduced Directors' salary from the base figure, implying, that the directors were nowhere involved in taking any decisions or handling the investments. This is an absurd proposition. The assessee is a limited company and all the relevant decisions of the company are taken by the Board of Directors. Here is a case in which the assessee is holding investments to the tune of Rs.1179.96 crore and has earned exempt income of Rs.64.76 crore and there is a contention that Board of Directors was not involved in any of the decisions qua such Investments. This contention is obviously not acceptable. Further, the assessee determined cost per employee at Rs.89.00 lakh and the amount disallowable under Section 14A at Rs.13.35 lakh, being, 15% of the cost of one employee. This means that the claim of the assessee is that out of its 244 employees, only one person was involved in the investments and dividend income and that too, only 15% of the time of that single person was utilized in such activity. In other words, out of 244 employees, 243 employees in full and 85% of the remaining employee were looking after the regular operations of the business and only 0.15% of one employee was attending to such huge investments in terms of value and volume. In our considered opinion, this computation of disallowance made by the assessee at Rs.13.35 lakh is absolutely devoid of any merit and totally unacceptable.

14. As regards quotation of JM Financial Services Pvt. Ltd., whose copy placed on record, we find that the same is merely a quotation and does not satisfy prescription of section 14A(2) being actual expenditure incurred by the assessee for earning exempt income, and the satisfaction of the Assessing Officer 'having regard to the accounts of the assessee'. Moreover, this quotation is only for handling the surplus funds `in line with your investment policy guidelines'. It transpires that even as per this quotation, investment policy guidelines have to be drawn by the assessee only, which again entails costs. We, therefore, hold that the assessee's calculation of disallowance under section 14A of the Act read with Rule 8D(2)(iii) has been rightly rejected by the Assessing Officer.

15. At this juncture, it is relevant to note the ratio decidendi of the judgment of the Hon'ble jurisdictional High Court in

Punjab Tractors Ltd. Vs. Commissioner of Income Tax, (2017) 78 taxmann.com 65 (P&H). In this case, the disallowance was made by the Assessing Officer under section 14A read with rule 8D. The assessee challenged the same before the Hon'ble High Court. Their Lordships observed in para 38 that "Assessing Officer cannot be faulted for not being satisfied with the claim of the assessee". Thereafter, the Lordships observed in para 40 that "The Assessing Officer on not being satisfied with the correctness of the claim by the assessee in respect of the expenditure incurred to earn exempt income ought to have applied Rule 8D which he did not.....Where an Assessing Officer is not satisfied with the correctness of the claim of the assessee, in this regard, he is bound by the provisions of sub section (2) of section 14A to follow the prescribed method which at the relevant time was Rule 8D". It is clear from the judgment of the Hon'ble jurisdictional High Court that where the Assessing Officer has rejected the assessee's claim of disallowance under section 14A of the Act, then such disallowance has necessarily to be computed in terms of rule 8D to the relevant extent.

16. Adverting to the facts of the instant case, we find that the Assessing Officer, on being dissatisfied with the assessee's computation of disallowance, embarked on his own computation under rule 8D(2)(iii) at Rs. 5,89,98,005/-. The assessee has not disputed any part of the calculation of such disallowance. This computation of disallowance, having been made in terms of rule 8D(2)(iii), is held to have rightly made. The assessment order making disallowance of Rs.5.89 crore u/s 14A under the normal provisions of the Act is upheld pro tanto."

20. So, following the order passed by the co-ordinate bench of the Tribunal for AY 2011-12 (supra), we are of the considered view that AO has rightly made disallowance of Rs.2,12,15,413/- after taking into consideration suo Moto disallowance of Rs.26,96,640/- made by the assessee under the "normal positions of the Act".

21. However, these findings of fact are subject to the decision to be rendered by Hon'ble High Court where appeal of the taxpayer

for AY 2011-12 on question of law is lying admitted. Consequently, Grounds No.2, 2.1 & 2.2 are determined against the taxpayer.

GROUN NO. 3

22. AO/DRP have proceeded to add back disallowance of Rs.2,12,15,413/- made under section 14A read with Rule 8D of the Rules in computing the profit under section 115JB of the Act by following its own decisions in AY 2011-12 & 2012-13. AO in order to make disallowance under section 14A read with Rule 8D and section 115JB read with Explanation 1(f) computed the expenses in relation to dividend income as under :-

Rule	***Amount in Rs.***
8D (i)	***Nil***
8D(ii)	***Nil***
8D(iii)	***0.5% of 478,24,10,500/- = 2,39,12,053/-***
Total	***Rs.2,39,12,053/-***

23. However, at the very outset, the ld. AR for the taxpayer brought to our notice that this issue has been decided in favour of the taxpayer by the co-ordinate Bench of the Tribunal in AY 2011-12 (supra) by following the decision rendered by the ***Special Bench of Delhi Terminal in ACIT vs. Vireet Investments (P) Ltd. dated 16.06.2017***. Operative part of the findings returned by the

co-ordinate Bench of the Tribunal in the taxpayer's own case for AY 2011-12 are extracted for ready perusal as under :-

> ***"17. As regards the adding back of the amount of disallowance under section 14A in the calculation of `book profit' under section 115JB of the Act, we find that the issue is no more res integra in view of the decision of the Special Bench of the Delhi tribunal in ACIT Vs. Vireet Investments (P) Ltd. dated 16.6.2017 holding that the computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income tax Rules 1962. Respectfully following the Special Bench decision, we hold that no separate disallowance should be made under section 14A in the computation of book profits under section 115JB of the Act. The impugned order is set aside to this extent."***

24. Following the decision rendered by the co-ordinate Bench of the Tribunal in AY 2011-12 (supra), we are of the considered view that when disallowance of Rs.2,12,15,413/- has been made by the AO under section 14A under the normal provisions of the Act, the same cannot be simultaneously assessed under section 14A in the computation of peak profits under section 115JB of the Act. Consequently, Ground No. 3 is determined in favour of the taxpayer.

GROUNDS NO.4 & 4.1

25. AO made addition of Rs.17,12,04,096/- as additional depreciation by invoking the provisions contained under section 32 (1)(iia) read with section 32(1)(i) & 32(1)(ii) and Explanation 5

holding the same as mandatory on the ground that the taxpayer has intentionally not claimed additional depreciation in order to enhance its claim of deduction under section 32 of the Act in the subsequent years.

26. However, ld. AR for the taxpayer fairly conceded that this issue has already been decided against the taxpayer in AY 2011-12 (supra).

27. Identical issue has been decided by the co-ordinate Bench of the Tribunal in taxpayer's own case for AY 2011-12 (supra) by returning the following findings :-

> ***"19. Facts apropos this issue are that the assessee claimed depreciation amounting to Rs.503.24 crore apart from additional depreciation amounting to Rs.538.66 crore in the revised return. However, as per letter dated 07.01.2005 filed during the course of assessment proceedings, the assessee withdrew the claim of additional depreciation amounting to Rs.538.66 crore. As a result of withdrawal of the claim of additional depreciation, the original deduction claim under section 80IB from Rs. 2042.81 crore shot up to Rs.2579.07 crore. The Assessing Officer allowed the claim of additional depreciation by relying on Explanation 5 to section 32(1)(ii) and also holding that the judgment of the Hon'ble Supreme Court in the case of Goetze India Ltd. Vs. Commissioner of Income Tax (2006) 284 ITR 323 (SC) does not permit him to take cognizance of a claim made during the course of assessment proceedings after the completion of the time for filing revised return. The assessee is aggrieved against the decision of the Assessing Officer in this regard.***
>
> ***20. Having heard both the sides and perused the relevant material on record, we find that the judgment of the Hon'ble Supreme Court in the case of Goetze India Ltd. (supra) though restricts the power of the Assessing Officer in entertaining a new claim made before him otherwise then by way of a revised return, but such decision does not affect the powers of the appellate authorities in entertaining such a claim if it is legally sustainable. However, we find that the on the facts and in the***

circumstances of the case, the assessee does not deserve any relief on this score.

21. The Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Mahendra Mills (2000) 243 ITR 56 (SC), has held that "if an assessee does not claim the depreciation and does not furnish particulars for claiming depreciation, as prescribed, depreciation cannot thrust upon him." To remedy the situation flowing from such judgment, the Legislature brought in Explanation 5 to section 32(1)(ii) through the Finance Act, 2001 w.e.f. 01.04.2002. The Explanation provides that the "… provisions of this sub-section shall apply whether or not the assessee has claimed deduction in respect of depreciation in computing his total income". The effect of this Explanation is that deduction on account of depreciation has to be mandatorily allowed under section 32(1)(ii) of the Act notwithstanding the fact that assessee claims or does not claim it in the computation of its total income.

22. The ld. Authorized Representative contended that the Explanation does not cover the assessee's case inasmuch as the amount of additional depreciation originally claimed but subsequently withdrawn by the assessee is an incentive and not depreciation, and the same is admissible under section 32(1)(iia). It was submitted that Explanation 5 operates only for the purposes of section 32(1)(ii) and not section 32(1)(iia) of the Act.

23. In order to appreciate the contention, it will be significant to note the prescription of the relevant parts of section 32 as under : -

"Depreciation.

32. (1) In respect of depreciation of—

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—

(i) ….

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:

Provided that …..

Explanation 5.—For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income;

(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :

……"

24. In our considered opinion, the contention that additional depreciation is an incentive and not depreciation has no legal legs to stand. It can be noticed that section 32 with caption "Depreciation" opens through sub-section (1) with the expression "In respect of depreciation of" and then sets out tangible and intangible assets owned and used by the assessee for the purposes of business or profession and then provides that `the following deductions shall be allowed'. Then there are clauses (i), (ii), (iia) and (iii). This shows that the deduction on account of depreciation is relevant to all the clauses including clauses (ii) and (iia). Thus, it is not correct to contend that relief provided u/s 32(1)(iia) is a separate incentive de hors depreciation.

25. A cursory look at clause (iia) divulges that the assessee is entitled to deduction equal to 20% of the actual cost of such machinery or plant, which shall be allowed as a deduction under clause (ii). Contention of the ld. Authorized Representative that the mandate of Explanation 5 does not apply to relief under clause (iia) as the same has been placed under clause (ii), in our view, is far-fetched. It is no doubt clear that Explanation 5 granting mandatory depreciation is placed in clause (ii) of Section 32(1) of the Act, but when we consider the language of clause (iia) providing further deduction for depreciation @ 20%, it becomes vivid that such further claim "shall be allowed as deduction under clause (ii)". It ergo becomes overt that the claim for additional depreciation as provided under clause (iia) has to be allowed as deduction under clause (ii). So, for all practical purposes, the claim for additional depreciation has to be considered and allowed as deduction only under clause (ii) and there is no separate provision for allowing additional depreciation under clause (iia) so as to make the prescription of Explanation 5 inoperative.

> ***26. We agree with the ld. Authorized Representative that the word "shall" is not always conclusive of the mandatory nature and can be read as the word "may" in certain circumstances. However, when we consider the text and the context of the word "shall" as employed in clause (iia), there remains no doubt whatsoever that the grant of additional claim at the rate of 20% has necessarily to be allowed as deduction under clause (ii). Once the claim of additional depreciation under clause (iia) is to be allowed as deduction under clause (ii), a fortiori, the command of Explanation 5 which applies to clause (ii) automatically becomes applicable to such a claim of additional depreciation. Once we hold that the claim for additional depreciation is allowable as deduction under Section 32(1)(ii), the writ of Explanation 5 providing for allowing depreciation mandatorily, gets magnetized. Explanation 5, even if placed under clause (ii), applies to sub-section (1) of section 32, which also covers clause (iia). We, therefore, hold that the Assessing Officer was fully justified in granting additional depreciation amounting to Rs. 538.66 crore under clause (iia) read with clause (ii) of section 32(1). This ground is not allowed."***

28. Following the decision rendered by the co-ordinate Bench of the Tribunal, we are of the considered view that AO has rightly granted the additional depreciation of Rs.17,12,04,096/- under clause (iia) read with clause (ii) of section 32(1) of the Act. Consequently, Grounds No. 4 and 4.1 are determined against the taxpayer.

GROUNDS NO. 5 and 5.1

29. The taxpayer has challenged the adjustment of Rs.180,40,27,029/- made by the AO to the peak profit under section 115 JB of the Act by adding back the amount of depletion of producing properties debited in the profit and loss account using "Unit of Production Method" instead of allowing the depreciation

on producing facilities at 5.28 % on "straight line method". Ld. DRP also upheld the findings returned by the AO by following its own decision rendered in AY 2011-12 and 2012-13. However, at the very outset, it is brought to our notice that this issue has already been decided in favour of assessee in AY 2011-12. Operative part of the findings returned by the co-ordinate Bench of the Tribunal is as under :-

> ***"65. Reverting to the facts of the extant case, we find that the assessee determined the amount of net profit as per its Profit and Loss account - both for the purposes of section 115JB and also for placing in the annual general meeting - after claiming Depletion (depreciation) at a higher rate than the one prescribed in Schedule XIV of the Companies Act, which is not forbidden in Parts II and III to Schedule VI of the Companies Act. It is further found that the audit report issued by the auditors of the assessee company is unqualified. The Annual accounts as prepared by the auditors are stated to have been approved by the company in its AGM and then registered by the Registrar of companies without any objection. Such a contention put forth on behalf of the assessee has not been disputed by the Revenue. When position is so, we fail to comprehend as to how the action of the AO in adding the alleged excess depreciation can be sustained. The impugned order is set aside pro tanto and the enhancement to the amount of net profit to the tune of Rs.2,53,87,76,183/- made for the purposes of section 115JB of the Act is hereby deleted."***

30. So, following the decision rendered by the coordinate Bench of the Tribunal in AY 2011-12 (supra), when undisputedly annual accounts of the taxpayer audited by the auditors have been ratified by the taxpayer in its annual general meeting and then taxpayer is registered by the Registrar of Companies without any objection, AO is not empowered to make adjustment of Rs.1,80,40,27,092/-

to the peak profits under section 115JB of the Act on account of depletion of producing properties by using "unit of production method". So, addition made by the AO to the peak profits under section 115JB of the Act is ordered to be deleted. Consequently, Grounds No. 5 and 5.1 are determined in favour of the assessee.

TRANSFER PRICING GROUNDS

GROUNDS NO.6 TO 6.5

31. Undisputedly, the taxpayer has received reimbursement from its AEs as under :-

	Description of transaction	*Total cost reimbursed in INR*
A Reimbursement of Manpower, general and administrative ('MGA') cost recharged to UJV (Receipts)		
Cairn Energy Hydrocarbon Ltd. ('CEHL')	***Share of MGA cost (recharged to UJVs)***	***211,41,48,589***
Cairn Lanka	***Share of MGA cost (recharged to UJVs)***	***24,51,68,589***
Cairn Africa	***Share of MGA cost (recharged to UJVs)***	***1,16,52,723***
Sub Total (B)		***237,09,69,901***
B. Reimbursement of Expenditure (Receipts)		
Cairn Lanka Pvt. Ltd. ('Cairn Lanka)	***Recovery of Consultancy expenses***	***98,39,539***
	Recovery of travel and accommodation expenses	***86,99,335***
	Recovery of stationery and other miscellaneous expenses	***2,43,773***
Cairn South Africa Proprietary Ltd. ('Cairn Africa)	***Recovery of travel and accommodation expenses***	***12,58,195***
Sub Total (B)		***2,00,40,842***
C. Parent Company Overhead ('PCO') (Receipts)		
Cairn Lanka	***PCO through UJVs***	***3,54,53,085***
Sub Total (C)		***3,54,53,085***
Total (A+B+C)		***242,64,63,828***

32. It is categoric case of the taxpayer that the issue of reimbursement of expenses by the AEs to the taxpayer, reimbursement of manpower, general and administrative (MGA) cost recharged to UJVs as well as receipt of Parent Company Overhead (PCO) has already been accepted at arm's length without any adverse inference by the ld. TPO in the preceding AYs 2010-11 and 2012-13 and has also placed reliance on Hon'ble Supreme Court in the case of ***Radhasoami Satsang vs. CIT – (1992) 193 ITR 321 (SC) and decision of ITAT, Pune Bench in the case of Brintons Carpets Asia P. Ltd. [ITA No.1296/PN/10]***.

33. It is also not in dispute that MGA cost is explained as under:-

> ***"A. Manpower costs comprise of:***
> - ***Salary, employer's taxes and pension contributions and other employee benefits and allowances***
> - ***Cost of consultants and their related travel costs***
>
> ***B. General and Administrative (G&A) Costs* comprise of:***
> - ***Premises Costs***
> - ***Amortization of equipment, software and furniture costs***
> - ***Communication costs***
> - ***Consultants and professional fees***
> - ***Recruitment, relocation and training costs etc.***
> - ***Others***
>
> ****Sole administration costs of the Operator and exchange fluctuation are excluded for the purposes of determining the recharge to the UJVs"***

34. So far as cost recharged to Cairn Energy Hydrocarbon Ltd. (CEHL), it is the case of the assessee that it has incurred MGA

expenses on behalf of Rajasthan Unincorporated Joint Venture (RJ UJV) in terms of the Production Sharing Contracts (PSC) dated May 15, 1995 as effective between the Government of India, Oil & Natural Gas Ltd. (ONGC), CEHL and the taxpayer during the year under assessment. It is also the case of the taxpayer that CEHL and ONGC which are joint venture partner in RJ UJV accounted these expenses and reimbursed these costs to the extent of its participating interest held in RJ UJV.

35. It is also the case of the taxpayer that TPO should have applied Comparable Uncontrolled Price (CUP) method for determination of Arm's Length Price (ALP) of MGA cost of Rs.211,41,48,589/- reimbursed by CEHL. The taxpayer also contended that the RJ UJV incurred total MGA cost of Rs.486,15,85,986/- and the MGA cost was reimbursed by ONGC, CEHL and borne by the taxpayer in ratio of their participating interest.

36. It is further case of the taxpayer that as per clause 3.1.4 (ii) of Accounting Procedure to the PSC, RJ UJV is permitted to pay only for actual cost incurred by the taxpayer without any mark up and the operator shall procure a certificate from the statutory auditor to that effect. The taxpayer further contended that similar provisions existed in Petroleum Resources Agreement (PRA)

between July 07, 2008 with the Government of Sri Lanka and Joint Operating Agreement (JOA) dated February 07, 2013 in case of South Africa for which certificate received from the statutory auditors dated April 8, 2013 certifying the actual costs recharged to RJ UJV has been furnished.

37. The ld. AR for the taxpayer contended that the ld. TPO ought to have been applied CUP method for ALP of MGA cost of Rs.211,41,48,589/- reimbursed by CEHL. Undisputedly, ld. DRP by accepting this contention raised by the taxpayer directed TPO to verify if CUP can be applied in taxpayer's case. The taxpayer also relied upon the decision rendered by the coordinate Bench of the Tribunal in case cited as ***Toll Global Forwarding India (P.) Ltd. (2014) 51 taxmann.com 342 (Delhi-Trib.)***. The ld. TPO has also not applied CUP in the remand proceedings.

38. When we examine Article 6.4, 1.4.4, 3.1.4 (ii) of PSC for RJ-ON-90/1, available at pages 335, 356 & 359 respectively of the paper book, it becomes apparently clear that "operating function" required of the contractor under this contract shall be performed by the operator on behalf of all constituents of the contractor, subject to, and in accordance with, the terms and provisions of the contract and generally accepted by the international petroleum industry practice; that the operator shall maintain books of account and

other records including audit in accordance with the terms of the PSC on behalf of each of the parties constituting the contract; and that as per clause 3.1.4 (ii) of accounting procedure to PSC, RJ UJV is permitted to pay only for actual cost incurred by the taxpayer without any mark-up. The taxpayer in order to support its argument relied upon the decisions rendered by coordinate Bench of the Tribunal in case cited as ***Toll Global Forwarding India (P.) Ltd. (supra),*** judgment of the ***Hon'ble Supreme Court in CIT vs. Enron Oil & Gas Ltd. (2008) 305 ITR 75 (SC)*** and judgment of ***Hon'ble Uttarakhand High Court in CIT vs. Enron Expat Services Inc. – (2010) 327 ITR 626***.

39. So far as contention of the taxpayer that the ld. TPO ought to have applied CUP method for determination of MGA cost is concerned, it is held by the coordinate Bench of the Tribunal that as per Rule 10B((1)(a) of the Rules, CUP method can be applied when the amount charged for similar uncontrolled transaction is the same as international transaction between the AEs and even if the taxpayer had not even made effort to demonstrate that the actual amount charged for comparable services rendered to, or received from, AEs were the same as in the case of independent enterprises, but profit sharing ratio of transaction between the taxpayer and AEs are not different from that with a third party, viz. 50 : 50 and

price determination of all business associates, CUP method can be applied. So, when undisputedly the taxpayer is operator of PSC and each member of PSC would be charged cost to ratio of profit, the TPO/AO is directed to verify the ratio and then to apply the CUP method for benchmarking the transaction. Moreover, TPO/AO was directed by the ld. DRP to apply the CUP.

40. So far as contention of the taxpayer that RJ UJV is permitted to pay only for actual cost incurred by the taxpayer without any mark-up is concerned, clause 3.1.4 (ii) of accounting procedure to PSC, available at page 359 of the paper book, is very categoric in this regard that RJ UJV is required to pay only for actual cost incurred by the taxpayer without any mark-up. For facility of reference, clause 3.1.4 (ii) is extracted as under :-

> ***"(ii) Affiliates of Operator a) Charges for services***
>
> ***"Costs of specific professional, technical or other services, provided by any Affiliate at the request of the Operator for the direct benefit of Petroleum Operations. If such work is not covered by an approved budget and Work Programme, Contractor shall submit a revised budget and Work Programme to the Management Committee as soon as possible. Such charges shall not include any element of profit and shall be calculated in accordance with the Affiliate's customary accounting practice for recovering the actual cost of providing such services. At the request of any Party, Operator shall procure that a certificate from the statutory auditors of the Affiliate is obtained to the effect that any sum charged."***

41. This issue has already been decided by the Hon'ble Supreme Court in case cited as ***CIT vs. Enron Oil & Gas Ltd.*** (supra)

wherein it is held that, *"section 42 becomes operative only when it is read with Production Sharing Contract (PSC) and the expenses deductible under this section has to be determined as per PSC".*

42. Hon'ble High Court of Uttarakhand in the case of ***CIT vs. Enron Expat Services Inc.*** (supra), in the identical set of facts, held that, *"affiliated companies of EOGIL are prohibited under clause 3.1.4(b)(1) of Production Sharing Contract from charging the members of the consortium anything more than actual cost of services."*

43. Identical clause in case of the taxpayer in clause 3.1.4(1) is also there which reads as cost of services represented *"fair allocation of actual costs and does not include any element of profit"*. Moreover, it is the case of reimbursement made by the AE to the taxpayer and has received money for the services rendered. In these circumstances, the taxpayer was not required to demonstrate the benefits received by it by carrying out a cost analysis benefit.

44. Likewise, in case of Cairn Lanka undertakes exploration of petroleum resources, development and production activities under Petroleum Research Agreement (PRA) as per Appendix C, Section 3, para 3.1.4 (ii)(a) of PRA, available at page 578 of the paper book, where UJV with Cairn Lanka as operator avails

"Professional and Administrative Services" of Cairn Lanka affiliates, it is permitted to pay only actual cost incurred by the taxpayer without any element of profit. Relevant provisions are extracted for ready perusal as under :-

> ***"Charges for Services***
>
> ***(ii) Affiliates of Contractor***
>
> ***(a) Professional and Administrative Services and Expenses***
>
> ***Cost of professional and administrative services provided by any Affiliate for the direct benefit of Petroleum Operations including services provided by the production, exploration, legal, financial insurance, accounting and computer services divisions other than those covered by Section 3.1.4 (ii)(b) which the Contractor may use in lieu of having its own employees. Charges shall be equal to the actual cost of providing their services, shall not include any element of profit and shall not be any higher than the most favourable prices charged by the Affiliate to third parties for comparable services under similar terms and conditions elsewhere and will be fair and reasonable in the light of prevailing modern oilfield/gas field and petroleum industry practices."***

45. Similarly, in case of Cairn South Africa which is an operator of UJV as per Participating Interest Holders in 60% and it undertakes exploration of petroleum resources and development and production activities under JOA as per section 2 of JOA. Section 2 of JOA, available at page 437 of the paper book, which sets out the procedure to be followed for the cost accumulation and allocation of such costs to the UJV based on time writing system. So, the taxpayer is to be reimbursed actual cost incurred by it without any element of profit.

46. Ld. DR for the Revenue by placing reliance on decision rendered by Hon'ble High Court in case of ***Cushman and Wakefield (India) Pvt. Ltd. – (2014) 367 ITR 730*** contended that the taxpayer has failed to substantiate if efforts were made by it for making arrangement to provide such services and that the reimbursement of expenditure was made on the same day when the expenditure were incurred by the taxpayer. Ld. DR further contended that whatever services have been rendered by the taxpayer mark-up on the cost incurred should be there.

47. So far as question of applicability of decision rendered by Hon'ble High Court in case of ***Cushman and Wakefield (India) Pvt. Ltd.*** (supra) to the facts and circumstances of the case is concerned, we are of the considered view that the services have been admittedly rendered in this case by the taxpayer designated as operator of PSC, and the contract is to be carried out as per conditions laid down by the Government of India and in view of the fact and market condition, the services required to be availed of at cost without any mark-up. So, the contract as to rendering services by the taxpayer to its AEs on cost to cost basis is on different footing then in the case of ***Cushman and Wakefield (India) Pvt. Ltd.*** (supra). So, the case of ***Cushman and Wakefield***

(India) Pvt. Ltd. (supra) is not applicable to the facts and circumstances of the present case.

48. So far as question of reimbursement of expenditure is concerned, it is the case of the taxpayer that these expenses were incurred on behalf of AEs and recovery from them on cost to cost basis for which a copy of related invoice on sample basis was furnished by the taxpayer vide letter dated 26.10.2016 for verification. Since the reimbursement cost is mere recoupment of expenses and do not include provisions of any services by the taxpayer, this cost is to be treated as a "pass-through cost" and not to be included in the profit of the taxpayer. Moreover, it is neither the case of the taxpayer nor the TPO that the taxpayer has added any value to the services rendered or the taxpayer has assumed any risk with respect to the third party services. So, no mark-up is required to be added in this case. Identical issue has been decided by the coordinate Bench of the Tribunal in case cited as ***DCIT vs. Ericsson India (P.) Ltd. (2016) 74 taxmann.com 173 (Delhi-Trib.)*** by returning following findings :-

> "***It is observed that the Commissioner (Appeals) has dealt with the issue at length and has examined the scope and nature of services rendered by the assessee to its AEs in each segment. The Commissioner (Appeals) observed that a FAR analysis forms the bedrock of any transfer pricing analysis. In the instant case the assessee by way of any FAR analysis has clearly***

demonstrated that it did not undertake any significant functions, employed significant assets and bore significant risks. Further, the assessee has also submitted sample copies of third party invoices for the said international transactions which also mentions the name of the customer to which it is supplied. The agreement between the assessee and its AE was also examined from where it was observed that for supply of equipment the contract is between Bharti and the AE, and the assessee purchases and supplies the equipment at the instruction of AE. Based on the facts present and the material placed on record, the assessee's contention that the cost reimbursement transaction was undertaken by the assessee only for administrative convenience and the assessee had not undertaken any significant activity in this regard was acceptable."

49. So far as question of receiving Parent Company Overheads (PCO) charges from Cairn Lanka is concerned, it is the case of the taxpayer that this amount is received under PRA entered by Cairn Lanka with Government of Sri Lanka and annual overhead charge at the pre-specified basis as per respective Petroleum Resources Agreement (PRA) is required to be paid to affiliates/parent company of the operator in lieu of financial, legal, accounting services and assistance provided by the affiliates/parent company to the UJVs and relied upon clause 2.6.2, Appendix 'C' of PRA relating to annual PCO pertaining to Block No.SL 2007-01-001. So, the taxpayer being the parent company of Cairn Lanka has received PCO charges during the year under assessment from Cairn Lanka. When rendering of services by the taxpayer has not been

disputed commercial expediency of the transaction cannot be questioned by the Revenue. Moreover legal and contractual agreement between the parties cannot be questioned by the Revenue without assigning any cogent reasons.

50. So far as contention of the ld. DR that segmental value of cost sharing to ONGC is not available is concerned, ld. AR for the taxpayer drew our attention towards detail of allocation/recharge of MGA cost/shared venture cost in US $, available at page 426 of the paper book, which is extracted for ready perusal as under :-

"B. ALLOCATION / RECHARGE OF MGA COST/SHARED VENTURE COST IN USD

Particulars	*USD*	*INR*	*CIL*	*CEHYL*	*ONGC*
Exploration	*15,99,313*	*8,85,65,064*	*4,42,82,532*	*4,42,82,532*	
Development & Production	*1,74,96,458*	*96,42,02,382*	*33,74,70,834*	*33,74,70,834*	*28,92,60,715*
Total	*1,90,95,771*	*1,05,27,67,446*	*38,17,53,366*	*38,17,53,366*	*28,92,60,715*

51. Ld. AR for the taxpayer also drew our attention towards statement of allocation / recharge of manpower, general and administrative cost to RJ-ON-90-1-Unincorporated Joint Venture for the year ending March 31, 2013 which is also extracted for ready perusal as under :-

Sl.No.	*Particulars*	*Amount in US Dollars (US $)*	*Amount in Indian Rupees (INR)*
1	*Allocation / recharge of manpower, general and administrative costs in INR*	*-*	*4,859,678,933*
2	*Allocation / recharge of manpower, general and administrative costs in US$*	*19,095,771*	*-*
3	*Allocation of Shared venture costs in INR*	*-*	*1,907,053*
4	*Allocation of Shared venture costs in US $*	*-*	*-*
	Total	*19,095,771*	*4,861,585,986*

52. Statement of allocation / recharge of MGA cost / shared venture cost in US $ is duly certified by the auditor as per certificate available at page 419 of the paper book. Moreover, statement of allocation available at page 427 of the paper book is duly tallied with allocation / recharge of MGA cost / shared venture cost in US $ available at page 426 of the paper book.

53. Furthermore, the ld. TPO has made disallowance on the basis of cost analysis on the ground that the taxpayer has not been able to show as to when and how various services were requisitioned from the AEs, whether the services actually needed by it, whether the same were actually received by it, what benchmarking analysis was done, what cost analysis was done particularly when huge payment has been made by it to the AEs.

54. However, we are of the considered view that when the taxpayer is a designated operator of PSC who has always kept money in advance as a cash call for and on behalf of its members. Hon'ble Supreme Court in case cited as ***in CIT vs. Enron Oil & Gas Ltd.*** (supra) has held as to how the PSC works, the operative part of the judgment is extracted for ready perusal as under :-

> ***"15. If the price of oil increased, the extent of profit oil would also increase and thereby the share of the Government would automatically increase. It is for this***

reason that PSCs were considered to be a better arrangement for ensuring the Sovereign Governments (owners of the natural resources) the maximum possible "take". At the same time, such contracts ensure that the projects remained attractive enough for foreign investors. However, due to this kind of structure of the PSC, inherently there has to be frequent conversion from one currency to the other. Cash calls were made in USD; some of the cash calls were required to be converted to INR for local expenses; some of the expenses stood incurred in USD whereas some to be incurred in INR; the sale price of oil was in USD whereas the accounts were drawn up in USD. When some of the expenses were incurred in USD and some incurred in INR, conversion had to be made at the prevalent rates of exchange to bring them all to the contract currency, i.e., USD. Similarly, as stated above, the sale price of oil was in USD. At the time of sale, the INR – USD rate would change from that on the date of the cash calls. Similarly, as stated above, the accounts were required to be drawn up in USD. For that purpose also one had to reconvert the costs from barrels to monetary terms. For the said reasons, clauses 1.6.1 and 1.6.2 of appendix 'C' to the PSC envisaged booking of all currency gains and losses irrespective of whether such gains/losses stood realized or remained unrealized. In case of gains, a part of the credit would go to the Government, and taxes would be payable on the income to the extent of such gains credited. Therefore, in our view, currency gains and losses constituted an inextricable part of the accounting mechanism for expenses incurred on the development and production of oil."

55. Ld. DR for the Revenue also contended that the balance sheet of the taxpayer does not disclose date of payment on daily basis, so the question of having advance money with the taxpayer as a cash call for and on behalf of its members does not arise.

However, we are of the considered view that in case of PSC, when rates of the oil blocks fluctuate on daily basis, this information cannot be given in the balance sheet. However, in the interest of justice, we are of the considered view that the matter is remanded to TPO/AO to verify whether cash call was received in advance by the taxpayer as operator for and on behalf of its members.

56. In view of what has been discussed above, we are of the considered view that when undisputedly the taxpayer is designated as operator of PSC and was having money in advance as a cash call for and on behalf of its members, it is to act on and on behalf of UJVs and does not enter into the transactions in its own capacity. Moreover, operator has duly maintained its books of account and other records which are audited in terms of PAC on behalf of each of the parties constituting contractor, and the taxpayer has incurred expenses on behalf of joint venture partner of CEHL, it is not an international transaction between AEs in terms of section 92B (1) of the Act and joint venture partners are only permitted to pay the actual cost without any mark-up. However, to work out the cash call, the TPO may verify the ledgers duly maintained by the taxpayer to see if taxpayer has always kept money in advance as a cash call to be spent for and on behalf of its members.

57. So, when undisputedly the taxpayer is operator of PSC and each member of PSC would be charged cost to ratio of profit, the TPO/AO is directed to verify the ratio and then to apply the CUP method for benchmarking the transaction. Moreover, TPO/AO was directed by the ld. DRP to apply the CUP. Consequently, grounds no.6 to 6.5 are determined in favour of the taxpayer for statistical purposes.

58. Resultantly, the appeal filed by the taxpayer is allowed for statistical purposes.

Order pronounced in open court on this 12th day of February, 2019.

Sd/-	**sd/-**
(N.K. SAINI)	**(KULDIP SINGH)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated the 12th day of February, 2019
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT (A).
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.