

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA Nos.1062 to 1068/PUN/2017

निर्धारण वर्ष / Assessment Years : 2007-08 to 2013-14

M/s. Sava Healthcare Ltd.
(earlier known as Anagha Pharma Pvt. Ltd.)
Sava House, 3rd Floor, Lawani Plaza,
B-Wing, Plot No.57/58,
Sakorenagar, Vimannagar
Pune – 411014
PAN: AAECA9456D

.... अपीलार्थी/Appellant

Vs.

The Asst. Commissioner of Income Tax,
Central Circle 2(1), Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Kishore Phadke
Revenue by : Ms Nandita Kanchan

सुनवाई की तारीख / Date of Hearing : 12.06.2019	घोषणा की तारीख / Date of Pronouncement: 27.06.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This bunch of appeals filed by assessee are against respective orders of ACIT, Central Circle 2(1), Pune, all dated 28.02.2017 relating to assessment years 2007-08 to 2013-14 passed under section 143(3) r.w.s. 144C(13) r.w.s. 153A of the Income-tax Act, 1961 (in short 'the Act').

2. This bunch of appeals relating to same assessee on similar issues were heard together and are being disposed of by this consolidated order for the

sake of convenience. However, in order to adjudicate the issues, we refer to the facts in ITA No.1062/PUN/2017, relating to assessment year 2007-08.

3. The assessee in ITA No.1062/PUN/2017, relating to assessment year 2007-08 has raised the following grounds of appeal:-

General ground

1. *The learned ACIT, Central Circle 2(1), Pune (i.e. "AO") and learned DRP-3, Mumbai (i.e. "DRP") and the learned DCIT/ Transfer Pricing 1(1) (i.e. TPO) erred in law and on facts in determining taxable income of the appellant at Rs.9,20,58,860 instead of income of Rs.1,16,95,864 as per return of income, by making addition of Rs.8,03,63,000 to the taxable income of the appellant.*

Powers of DRP & TPO

- 2.1 *The learned DRP erred in law and on facts in benchmarking the international transactions of supply of goods reported in form no. 3CEB despite the fact that, the said transaction of supply of goods was not benchmarked by the learned TPO conspicuously.*
- 2.2 *The learned DRP ought to have appreciated that since, the learned TPO has taxed the global profits of SAVA group in Appellant's hands by lifting the corporate veil and by treating the global entities as sham / bogus and since, the said analogy of the learned TPO was disapproved / overruled by the learned DRP in Para-10.3 to Para-10.3.4 of the DRP order; no further any deliberations and additions are permissible in the DRP proceedings as per provisions of section 144C (8) & considering scheme of 1TA, 1961.*
- 2.3 *The learned DRP erred in law and on facts in benchmarking an altogether new transaction of alleged provision of services by the Appellant to the AE entities despite the fact that no any such transaction was reported by the Appellant in form no.3CEB and no any such transaction was benchmarked by the learned TPO.*
- 2.4 *The learned DRP ought to have appreciated that, section 144C(8) bestows upon the DRP/ powers to confirm / reduce or enhance any variations proposed by the TPO. The learned DRP ought to have appreciated that, no powers of benchmarking an altogether new transaction, than the one benchmarked by the TPO, exists with the learned DRP.*
- 2.5 *The learned DRP erred in law and on facts in not appreciating that, the learned TPO committed a fatal and grave error in taxing the global profits of SAVA group in the hands of the appellant by lifting the corporate veil and by treating the global entities as sham / bogus; when no authority to such effect existed with the learned TPO. The learned DRP erred in not deleting the entire addition proposed by the learned TPO on the above analogy as such and further erred in not proceeding with the matter instead of leaving the matter at that point, considering the scope of powers u/s 144C(8) of ITA, 1961.*

Requirements u/s 92C(3)

- 3.1 *The learned AO and learned DRP erred in law and on facts in not appreciating that no any opinion, as so envisaged in section 92C(3), as regards profit passing, etc. was reached by the then AO, before making a reference to the TPO for benchmarking of the international transactions of the appellant.*
- 3.2 *The learned DRP erred in law and on facts in putting the onus of substantiating absence of opinion, as so envisaged in section 92C(3) of ITA, 1961, on the appellant. The learned DRP ought to have appreciated that appellant can't substantiate a negative and on the contrary, onus lies on the revenue to substantiate the adherence to the procedure enshrined in section 92C(3) of the ITA, 1961.*

Benchmarking of imaginary transaction

- 4.1 *The learned DRP erred in law and on facts in; deciding the Arm's Length price of an alleged assumed transaction that, the appellant has provided various services to AEs, and that too, without charging any consideration for the same. The learned DRP ought to have appreciated that there is no evidence to infer any such events.*
- 4.2 *The learned DRP erred in law and on facts in converting, equating the allegation of learned TPO as to "Control & Management from India" into some presumption/hypothetical services provided by the appellant to AE Parties.*
- 4.3 *The learned DRP erred in law and on facts in recording conflicting observations regarding TPO's allegation as regards "control and management from India" revealing from Para 5.3 to Para 5.3.2 as against Para 10.1.7.3 of the DRP order.*

Search material

- 5.1 *The learned TPO / DRP / AO erred in law and on facts in not appreciating that, in a search based assessment, no any addition to the taxable income is plausible, in absence of any Incriminating Material found / seized during the course of search u/s 132 of ITA, 1961.*
- 5.2 *The learned I-T authorities erred in law and on facts in not appreciating that, the programmatic screenshots seized during search, were not found on, and seized from, computers of the appellant and as such, do not partake character of incriminating material.*
- 5.3 *The learned I-T authorities further erred on facts in not appreciating that the emails of various employees of other group companies in India, collected from third parties in post search enquiries, do not partake character of incriminating material.*
- 5.4 *The learned I-T authorities further erred in drawing conjectures and surmises on the basis of statements of third parties / employees of other group concerns (except Mr. Vinod Jadhav, who is a paid common director of many group companies). The learned authorities ought to have appreciated that such statements do not partake character of incriminating material at all.*

- 5.5 *The learned I-T authorities erred in law and on facts in not appreciating that, the alleged search material, does not indicate the alleged provision of services provided by appellant to the AE entities.*

Most Appropriate Method

- 6.1 *The learned DRP erred in law and on facts in rejecting the TNMM approach and applying the PSM approach for benchmarking of international transaction for supply of goods to AE parties without any cogent reasons and in an arbitrary manner & thereby making adjustment amounting to Rs.29,78,900/-.*
- 6.2 *The learned DRP erred in law and on facts in not appreciating the appellant's submissions as regards MRP rules and regulations prevailing in India, and not appreciating further efforts of the appellant in establishing that the prices for goods charged to the AE parties, are comparable to the prices for very same products charged by Arm's Length Parties. The learned DRP erred in not giving any specific finding on the alternate submissions on CUP approach in this regard.*
- 6.3 *Assuming the PSM is appropriate method for benchmarking the learned DRP erred in law and on facts making hypothetical segregation between routine profits & residual profits under PSM approach.*

Quantification of routine profits

- 7.1 *The learned DRP erred in law and on facts in selecting PLI for deciding routine profits as "Gross Profit /COGS" which is not envisaged by any method prescribed u/s 92C of ITA,1961 read with rules 10B of ITR, 1962.*
- 7.2 *The learned DRP erred in law and on facts in selecting comparable companies for working out Arm's Length PLI, without applying the filter of export sales to total sales. The learned DRP erred in law in not appreciating that functions and risks involved in export activity are materially different than domestic sales activity.*
- 7.3 *The learned DRP erred in law and on facts in not appreciating that, if the OP : OC PLI is taken instead of Gross Profit for the very same selected companies, then the average margin earned by appellant is well within +/- 5% permissible limit as envisaged by ITA, 1961.*
- 7.4 *The learned DRP erred in law and on facts in providing adjustment on account of marketing functions in an incorrect manner.*
- 7.5 *The learned DRP erred in law and on facts in not providing any working capital adjustment to the appellant.*

Residual Approach under PSM method

- 8.1 *The learned DRP erred in law and on facts in working out the residual profits to be attributed to the appellant, considering each AE as a separate entity. The learned DRP erred on facts in testing each AE entity separately on the one hand; and; making FAR analysis of all the AEs on totality basis on the other hand. The learned DRP ought to have considered all the AEs together while working out residual profits.*
- 8.2 *The learned DRP erred in law and on facts in comparing PLI of the domestic comparable companies with PLI of AEs to determine the*

residual profits attributable to appellant. The learned DRP ought to have appreciated that, considering geographical distances, Indian comparable companies ought not to have been used for benchmarking quantum of residual profits of the AE entities.

- 8.3 *The learned DRP erred in law and on facts in allocating arbitrary and ad-hoc weights to the FAR (i.e. functions, assets & risks) while determining the residual profits.*
- 8.4 *The learned DRP erred in law and on facts in making arbitrary ad-hoc and incorrect splitting up of the residual profits between the appellant and its AE entities.*
- 8.5 *Learned DRP erred in law and on facts in drawing incorrect conclusions and making wrong conjectures from the quantum of software expenditure, electricity expenditure, manpower cost, etc. incurred by the appellant vis-a-vis the AE parties.*
- 8.6 *The learned I-T authorities erred in law and on facts in not accepting the detailed PSM working based on the OECD guidelines, though the same was submitted by the Appellant during the course of hearing.*

Prima facie mistakes

- 9.1 *The learned DRP erred in law and facts in incorrectly appropriating 60% of the business development function to the appellant, instead of 40% revealing from the findings thereto. The learned DRP erred in making allocation contrary to their own finding in Para-13.7.22.*
- 9.2 *The learned DRP erred in law and facts in not granting telescoping of higher routine profits while determining residual profits attributable to appellant in Para-13.7.18.3 read with Para-13.7.17.2.*
- 9.3 *The learned DRP erred in law and facts in making addition of value of international transactions amounting to Rs.77,367,713/- to the return of income while determining the assessed income of the appellant in Para-16 of the DRP order.*

4. The assessee has filed modified ground of appeal No.1 which reads as under:-

General ground

1. *The learned ACIT, Central Circle 2(1), Pune (i.e. "AO") and learned DRP-3, Mumbai (i.e. "DRP") and the learned DCIT, Transfer Pricing 1(1) (i.e. TPO) erred in law and on facts in determining taxable income of the appellant at Rs.1,46,16,363 instead of income of Rs.1,16,95,864 as per return of income, by making addition of Rs.29,20,499 to the taxable income of the appellant.*
5. First of all, we proceed to adjudicate the preliminary issue raised in the grounds of appeal i.e. against exercise of jurisdiction by the Transfer Pricing Officer (TPO) and the powers of Dispute Resolution Panel (DRP) as well as of

the requirement under section 92C(3) of the Act. The assessee in this regard, has raised grounds of appeal No.1 to 4.3 on this issue along with modified ground of appeal No.1, which we shall deal with in the first instance.

6. Briefly, in the facts of the case, the assessee for the year under consideration had furnished the return of income on 30.10.2007 declaring total income of ₹ 1,16,95,864/-. Search action under section 132 of the Act was conducted on Sava group of cases on 31.10.2012. The assessee was covered as part of this group. Since warrant of authorization under section 132(1) of the Act was executed in the case of assessee, notice under section 153A of the Act was issued to the assessee and served upon the assessee. In response thereto, the assessee filed letter dated 21.06.2003 stating that the return of income filed under section 139(5) of the Act may be treated as return of income filed in response to notice under section 153A of the Act. The case of assessee was picked up for scrutiny. The Assessing Officer noted that since the assessee involved in international transactions with its foreign entities hence, after getting approval from CIT(C), Pune, case was referred to the TPO under section 92CA(1) of the Act for the purpose of determination of arm's length price of international transactions. The TPO took up the proceedings and noted that Shri Vinod Jadhav, the main person of Anagha group of companies (earlier name) started the trading of pharmaceutical drugs in the year 2002-03. Later on, he started exporting of pharmaceutical drugs (trading) to foreign countries. The TPO also notes that the assessee started business of medical transcription, prescription verification services and contractual work for online pharmacies. In the financial year 2003-04, he started Anagha Inter-trade Services Pvt. Ltd. (now Anagha Pharma Ltd.) (now Sava Healthcare Ltd.). The assessee was engaged in the business of exporting third party medicines to

different countries worldwide. Till April, 2010, the assessee group was engaged in export trading of third party pharmaceutical products / drugs to foreign countries. In April, 2010, the assessee group diversified its activity by acquiring pharmaceutical division of M/s. Biodeal Laboratories Pvt. Ltd., Surendranagar, Gujarat. The assessee group also acquired manufacturing facility of Dhanvantari Botanicals Pvt. Ltd., Malur, Karnataka through its group company M/s. Sava Pvt. Ltd. The said concern was engaged in manufacturing of herbal preparations and herbal medicines.

7. The TPO noted that the business of group had increased manifold, so the profits also increased and to escape from the taxes on income in India, the group went on creating many companies in Mauritius and Dubai (Free Trade Zone), where no direct taxes were levied. He further observed that goods were dispatched to Singapore godown, but the bills were made in the name of AE's in Mauritius and Dubai. Not only the goods purchased from India but also the entire global purchases made were routed through AE's at Mauritius and Dubai. In Singapore, entire activity was outsourced to DHL Global. The TPO in such scenario was of the view that management and control of entire global business of group was situated wholly in India. The business was shown to have been carried out in Mauritius and Dubai (Free Trade Zone), where no taxes were levied on income. The AE's in Mauritius and Dubai had earned huge income on these trading, as compared to the Indian entities. The income shown in the hands of AE's in Mauritius and Dubai was subsequently brought back to India, by way of dividend and salary to Mr. Vinod Jadhav. The TPO in this regard noted that Mr. Vinod Jadhav claimed the income as exempt on the ground that he was Non-resident. In assessment year 2010-11, Mr. Vinod Jadhav had received salary of ₹ 39.20 crores from AE's in Dubai and also claimed it as

exempt. It was further noted by him that subsequently the Settlement Commission rejected the claim of Mr. Vinod Jadhav and declared him as Resident. In such backdrop, Search and Seizure under section 132 of the Act was carried out in the premises of group on 31.10.2012. The Investigation Team observed that affairs of these group companies revealed that the assessee was selling medicines and drugs from India to the customers in various parts of world using the route of Singapore. The proceeds of sale on such products were realized in the bank accounts of the companies registered in Mauritius / UAE. All of such sales to customers and various countries, as per the TPO, were artificially shown to be made by UAE based companies and income was shown to be earned by Mauritius / UAE based companies. He was of the view that this was done in order not to pay taxes, in India, on the huge profits earned in the business. Such profits were repatriated to the promoter of the group Mr. Vinod Jadhav in the guise of salary, commission, etc. and he had claimed salary of ₹ 39.20 crores as exempt. The TPO under para 4 at pages 2 and 3 of order has tabulated the domestic and foreign companies which were engaged in the exporting third party medicines and pharma products and allied activities. The TPO noted that profiles of different concerns as part of group and first of all commented on the profiles of domestic companies and observed as under:-

- i) *Anagha Pharma Pvt. Ltd. (assessee). This was a flagship concern of assessee group, which was engaged in business of trading and export of third party medicines to foreign countries. Based on the orders received in retail and wholesale segment, it procured material of the products from local distributors in Pune and exported it to the customers all over the world. It was commented upon by the TPO that the assessee had procured*

material on its own, shipped the material to warehouses in Singapore and Mauritius and booked the sales as in the name of UAE based companies.

- ii) SAVA Medica Ltd. This was a new company incorporated in financial year 2010-11 and was a holding company for M/s. Biodeal Laboratories Pvt. Ltd., of whose pharma division was taken over by assessee group. The said concern SAVA Medica Ltd. was engaged in manufacturing of pharma products, medicines and also trading and export of third party medicines to foreign countries. It has shown sales only to a single group entity i.e. UAE based companies.*
- iii) SAVA Pvt. Ltd. This company was earlier known as SAVA Infotech Pvt. Ltd. The company was incorporated in financial year 2009-10 for the purpose of processing orders received from customers all over world. The orders were said to be received on behalf of UAE based company. The assessee processed the orders in its Pune office through its employees and orders received were executed through Pune based office. The said concern also acquired assets of the company namely Dhanvantari Botanicals Pvt. Ltd., Malur, Karnataka in financial year 2011-12. The concern Dhanvantari Botanicals Pvt. Ltd. was engaged in manufacturing and production of herbal products and preparations.*

8. The TPO further enlisted UAE based companies. He further observed that the assessee group had incorporated many companies in UAE in March, 2007, which were located in Free Trade Zone, where no taxes on income were payable. The address of these companies were shown either as PO Box 9523, SAIF Zone Sharjah, UAE or PO Box 9562, SAIF Zone, Sharjah, UAE. The TPO noted that the companies were Free Zone Companies (FZC) formed under instructions issued by the Chairman of the General Authority of the Administration of Sharjah Free Zones and FZC company could be converted into Free Zone Establishment (FZE) as per Article 31 of the said Decree and it could be done only when number of shareholders were reduced to one only. The TPO was of the view that assessee had incorporated FZEs only when the said FZEs were incorporated as wholly owned subsidiaries of Anagha Pharma Pvt. Ltd. He was further of the view that group had been changing the corporate structure or the name of AE's in Dubai, almost every year. He then, enlisted the companies floated by assessee. Similar exercise was done in respect of concerns in Mauritius, wherein the first and main concern was SAVA Pharma Ltd., Mauritius. The TPO then in para 6 observed that in the above said background, the matter was referred by the Assessing Officer to his office to determine arm's length price of international transactions entered into by assessee during the year. As per Form 3CEB, during the year, the assessee had entered into international transactions with its AE's i.e. sale of finished goods (Finished Drugs Formulations) amounting to ₹ 7,73,67,713/-. During the course of TP proceedings, the assessee explained that goods were actually exported to two entities i.e. Anam Trading Co., Mauritius and Sava Trading Ltd., both the concerns were engaged in sale of finished goods (finished drugs formulations).

9. The TPO noted from Form 3CEB and the transfer pricing study report of assessee that the assessee had benchmarked international transactions by applying TNMM method as most appropriate method and PLI of assessee was shown at 16.72%, as against average PLI of the comparables at 2.77%. It was thus, concluded by the assessee that international transactions were at arm's length price. The TPO then analyzed the working of PLI of assessee which is reproduced at page 7 of order. In order to understand the methodology and purpose of undertaking activities through intermediary companies in UAE or Mauritius, the TPO asked the assessee to furnish certain information. The TPO on analysis of business pattern of assessee observed as under:-

- i) *In India, there are some regulations existing in respect of this trade and the assessee has been granted the license by the DGFT for wholesale trading of Drugs. (The licence is dated 29/12/2010. The assessee has not given the details of the lincens held earlier),*
- ii) *There is no regulation for sale price of medicine out of India,*
- iii) *This business falls under OGL and no permission from the RBI is necessary,*
- iv) *Assessee procures goods directly in the open market, in India and sales it to its AE,*
- v) *Although the invoices are raised in the name of AEs situated in Mauritlus/Sharjah, the goods are actually shipped to Singapore, as the warehouses are situated in Singapore only.*
- vi) *In Singapore, all the logistics, from receipt of goods from India to delivery to customers is contracted to DHL. Hence, neither the assessee, not its AE's are having their own Investments in Singapore. The warehouse in Singapore is hired by the AE in Sharjah.*
- vii) *The stock position in Singapore, is based on the 6 months inventory and advance orders, hence there is also no risk involved in stock maintenance also,*
- viii) *The orders are received by emails or other online method, in India and these orders are processed in India only,*
- ix) *All sales are made by the assessee on CIF basis. No indirect taxes are levied on the export.*
- x) *The routing of bills through, Mauritius and UAE, is made in order to avoid payment of taxes, in India on the huge profits earned in this business. Such profits are repatriated by the promoter of the group Shri Vinod Jadhav in the guise of salaries, commission etc., and he has*

claimed the same as exempt by claiming himself to be non-resident Indian (NRI) for the F.Y. 2009-10.

10. The TPO on analysis of information, came to a finding that no activity was found to have been carried out either in Mauritius or UAE and hence, the Ld. AR was asked to submit details of employees of AE's in certain format. In reply, the assessee pointed out that it could not submit the said details as the AE companies were bound by confidentiality clause and hence, the details of employees could not be shared. However, on subsequent hearing, the assessee had submitted the names of employees, including the names of employees of contractor i.e. DHL Global.

11. The TPO vide para 10 refers to the finding of investigation team in relation to functions performed by India based company for the business carried out in India and shown to be carried out in Mauritius / UAE. The same is summarized as under:-

“A) Development of business:

- i) *This business artificially shown in UAE based companies has been developed by Shri Vinod Jadhav by using the assets and resources of India based companies.*
- ii) *The UAE based companies do not possess any resources or assets in order to develop the business of this scale having the worldwide customers.*
- iii) *Quality of service and delivery and the products is ensured using the human resources, assets and intangibles developed and based in India. GTF (Global Trading FZC) is artificially shown to be the legal owner of some of such assets like JadePharma but in fact all these functions are done in India without any intervention or instructions from GTF.*

B) Receipt of orders from the customers:

- i) *It is proved that the assessee group did not receive the orders from UAE based company but received the orders directly from the customers*
- ii) *Such orders were received from the customers based abroad through e-mail attachments on the specified e-mail IDs*

- iii) *Such orders were also received through the web-service portals (SOAP) which are provided to the major customers like BBG, DSP, JAN DRUGS, OPL etc.*
- iv) *There is no role of the UAE based companies in receipt of such orders from the customers all over the world.*

C) Maintenance of service to the customers:

- i) *On the perusal of the e-mail conversations between BytzSoft and the personnel in the SAVA group of Pune it is seen that the clients of the assessee group based in different countries are involved.*
- ii) *These customers are corresponding directly with the SAVA group people in India. This is without any involvement from UAE based company.*

D) Merchandising and Shipping of the orders:

- i) *JadePharma was connected to the warehouses in Singapore and Mauritius. The warehouse personnel updated the JadePharma with the data about stock position in these warehouses. Based on this the stock report sheet was prepared and forwarded to the Supply Chain Management personnel in SAVA Pune.*
- ii) *Supply chain management procures the goods/products from open market or wholesalers in Sadashiv Peth, Pune*
- iii) *Such products are shipped by Anagha Pharma Pvt. Ltd. to the warehouses in Singapore and Mauritius. This is generally done once in 15 days. The bills are raised on UAE based company as it is shown as the buyer and legal owner of the stocks in Singapore and Mauritius. However, it is a fact that all of this process is carried out by Pune based employees without any involvement of UAE based companies.*
- iv) *For some of the products, these are procured from Mauritius, Singapore and some other countries. The quantum of such procurements as per their purchase invoices is not much.*
- v) *The processed orders are available on JadePharma for which access was given to the warehouses. Based on the processed orders and the labels prepared and sent to these warehouses from Pune, the warehouse staff packs the goods in export packs and ships the same to the customers through the DHL Global mail. Some of the wholesale orders are shipped directly to the end customers from India by APPL.*
- vi) *The details about shipping are uploaded from the warehouses in JadePharma. Earlier, before they were connected to JadePharma, they used to upload such details in www.savaordersystem.biz. After the access of JadePharma was given to them, they are updating the details of shipping on JadePharma which in turn is connected to www.savaordersystem.biz*

E) Tracking of the shipments:

- i) *Once the order is shipped to the customers, automatic mail is sent by JadePharma to the customers conveying the details of the shipments*

along with the fog-in details of such customers. The customer logs in on www.savaordersystem.biz and could view the status of their orders which are shipped by SAVA.

- ii) In case of any problems in shipping of the shipments, the customers mailed such problems to orders@savaglobal.com which were sorted out by the SAVA group persons In pune.

F) Pricing of the products:

- i) In JadePharma there were different modules for retail and wholesale operations. The pricing of the products was different for different operations and it appears it was different for different customers also. The prices of various products are also advertised on the websites. Such prices are decided by Shri Vinod Jadhav and entered into JadePharma as per his instructions.
- ii) There is nobody responsible enough with UAE based company to decide the pricing of the products.

12. Vide para 11, the TPO summarized the functional analysis of business transactions of various multi-locational enterprises belonging to the assessee and observed as under:-

A) Indian concerns:

- i) Development and growth of business: Vinod Jadhav and supporting staff
- ii) Advertisement of the business
- iii) Receipt of the orders from the different customers in different parts of the world
- iv) Processing of such orders for accuracy and other details
- v) Processing of the orders and sending these orders to the warehouse in-charge in India for shipping
- vi) Sending these orders to the supply chain management for procurement
- vii) Procuring the material from the local distributors in Pune and Mumbai
- viii) Shipping the material to warehouses in Singapore and Mauritius
- ix) Shipping the material to different countries based on the orders in some cases
- x) Preparing the packing slips to be pasted on the shipments
- xi) Tracking the expiry date of the medicines in warehouses in Singapore and Mauritius as well as India and the shipped goods in transit.
- xii) Ensuring the shipping of the goods from all the warehouses

- xiii) *Feeding the data of shipping in JadePharma which is connected to www.savaordersystem.biz.*
- xiv) *Before JadePharma V2 such data was manually uploaded to www.savaordersystem.biz.*
- xv) *Tracking of the shipments.*
- xvi) *Solving the problems of the customers linked to tracking of the shipments and receipt of the orders- customer care,*
- xvii) *Ensuring that the orders are not processed if there is no confirmation of payment from the customer as all the payments are received In advance.*
- xviii) *Generation of various reports of UAE based companies like stock report sheet, sales report, purchase report, daily sales reports etc.*
- xix) *Generation of the sales invoices of UAE based companies*
- xx) *Control of accounting of UAE based companies.*

B) Singapore (Contractor DHL - as per agreement dated 01/02/2008):

- i) *Maintenance of the stock in warehouses*
- ii) *Shipping of the products as per the addresses and particulars received from India*
- iii) *Updating the shipping data in JadePharma or sending such data to India based concerns*
- iv) *Procurement of medicines/products if the stock is depleted as per the directions of Shri Vinod Jadhav and India based concerns*

C) UAE and Mauritius based concerns:

- i) *Maintenance of the bank accounts in which the payments are received in respect of the sales made from India.*
- ii) *Payments for various expenses through RTGS or other instruments as per the directions of Shri Vinod Jadhav.*
- iii) *Signing on various agreements and documents as per the directions of Shri Vinod Jadhav and Pune based employees.*
- iv) *Maintenance of books of account as per the directions of Pune based employees and Shri Vinod Jadhav.*

13. The TPO thus, based on the finding of investigation wing and evidences produced before him, summarized the functional analysis of business transactions of assessee and AE's during assessment years, which are tabulated under para 12. The TPO thus, was of the view that entire business

module of the assessee was dependent on internet; for which the assessee first developed software as JadePharma Ver.1 in 2007 and went on to upgrade it as and when business grew. The TPO then has drawn diagram explaining the processing of orders using JadePharma software under para 13 at pages 15 to 17 of the TPO's order and he observed that from this diagram it could be easily understood that the goods which were procured from India for its trading activity, were dispatched to Singapore; payment of the goods were received in Dubai, which were then remitted to India by merely processing the payments through online banking, which is also being undertaken in India and by employees of assessee. He further observed that transactions pertaining to remittances made by Mauritius and Dubai AE's were inter-related sales by the assessee from Singapore. He thus, observed that ***these transactions are so inter-linked that its profitability cannot be evaluated separately.*** We are referring to diagrams at pages 15 to 17 but the same are not being reproduced for the sake of brevity.

14. The TPO noted that the assessee had treated TNMM method as most appropriate method and PLI of assessee was shown at 16.72% as against average PLI of comparables at 2.77%, on which basis the assessee claimed that its international transactions were at arm's length price. But vide para 14.2 he was of the view that as the management and control of affairs of assessee found to have been situated wholly in India, the correct profitability of transactions entered by the assessee could not be ascertained by using TNMM method. From diagram of JadePharma, he observed that it makes it clear that the AE's in Dubai and Mauritius were not doing any functions other than receiving and sending money; that too, these functions were operated from India, using internet banking facilities. He thus, concluded that TNMM method

was not most appropriate method for benchmarking such complex transactions, which as per him were designed to escape the legitimate taxation in India and which have been made with the sole intent of tax evasion. He thus, proposed that Profit Split Method was the best method to benchmark transactions undertaken by assessee with its AE's and the profits earned by them. **He was of the view that not only the transactions were complex but its correct profitability in India could not be ascertained by using TNMM method as most appropriate method. He thus, proposed to benchmark international transactions of assessee by using Profit Split Method as most appropriate method.** He referred to para 2.108 of Chapter II of OECD Guidelines, which provides the basics of Profit Split Method and also referred to para 2.111 and para 3.9 referred on para 2.108 of OECD guidelines and vide para 15.6 notes that provisions of Profit Split Method (PSM) under Income Tax Rules (in short 'the Rules'). The assessee in this regard was thus issued separate show cause notice for the individual assessment years and was asked to state as to why TNMM method should not be rejected as the most appropriate method and why PSM method should not be treated as most appropriate method for the transactions entered into by the assessee. In the show cause notice, the TPO referred to Rule 10AB of the Rules, on without prejudice basis, and pointed out that the alternate method which was known as safe method was also proposed to be applied to the transactions and under this method, 97% of profits of AEs were proposed to be adjusted in international transactions of assessee.

15. The assessee in response filed reply raising various objections to adopting PSM method as most appropriate method. First objection raised by assessee was that there was no proof of doing online processing activities in

India. In this regard, the assessee sought evidences on the basis of which this conclusion was drawn by Investigation Wing and by the TPO. The TPO in this regard observed that holistic view of entire facts gathered during search proceedings and TP proceedings lead to the conclusion that entire business model was the brainchild of Shri Vinod Jadhav, who was the director of assessee company. In this business model, the orders were processed and fulfilled and executed from India; billing of sales from customers all over world was done in the name of Mauritius / UAE based companies and the amounts were received in the bank accounts of these AE companies. The TPO further observed that there were plenty of evidences in this regard. He referred to statements of Shri Vinod Jadhav and his employees recorded during the course of search and even the statement of software developer was recorded. He also referred to about 400 e-mails obtained during the course of search proceedings. He again then refers to JadePharma Ver.1, which was developed as desktop based system without access through web to multiple locations. The said system was installed onsite by Bytzsoft Technologies Pvt. Ltd. in the earlier office of Sava group in Ramwadi, Viman Nagar, Pune. The TPO observed that screenshots clearly show that various modules and procedure existing in the software and various reports enabled through this software. He then, analyzed procedure wherein sale orders were received by assessee group based in Pune through e-mail attachments from different customers, buyers and affiliates based all over the world. During the course of search proceedings, the assessee had consistently tried to show that orders were received through its AEs but since the assessee could not produce evidences in support, the TPO observed that there was no need for the orders to either originate from UAE or get routed through it. The epicentre of the process, as per him, was situated in software managed and controlled by the employees of

SPL, Pune. He thus, did not accept the contention of assessee regarding receipt of orders from UAE being tenable and infructuous. He further observed that orders from customers received through e-mail attachments were then uploaded to JadePharma Ver.1.0 for processing; after the orders were processed for their accuracy and compliance and prescription attachments, these were sent to Supply Chain Management for fulfilment through shipping of ordered medicines / products. This sheet of processed orders containing various details of customers and suppliers including the quantity of products was exchanged through emails with the warehouses in Singapore and Mauritius, from where these shipments were to be shifted to the end customers. The shipment of consignment was vide arrangement with DHL Global. In this regard, it was also noted by the TPO that some of the shipments in case of wholesale business were directly shipped by the assessee to the end customers. In all the transactions, sale consideration was received in advance from the customers and the order was processed only after the payment was received. He further observed that stock in warehouses of Mauritius and Singapore was replenished with procurement and supply from India based companies and third parties in few instances. Once the order was shipped, the reports of such sales were generated in JadePharma Ver.1.0, which would generate invoices which could be converted to pdf format and printed. The TPO was of the view that invoices of sales shown in UAE based companies were prepared in India, rejected the plea of assessee that invoices were obtained from UAE based companies and were prepared in UAE by them. Similar reference was made to JadePharma Ver.2, which upgraded earlier Ver.1 in financial year 2009-10. The TPO in this regard observed that receipt of orders and processing of them was same as that of Ver.1.0. But the

warehouses were linked through web services to JadePharma and there was no need to send e-mails to the warehouses for shipping of products.

16. The TPO then carried out investigation by way of enquiry under section 131 of the Act from the software developer, who had developed and maintained software package for Sava group and also examined IT operations Head of Sava group and all the statements and evidences were then confronted to Shri Vinod Jadhav and his statement was recorded. On the analysis of various documents seized and investigation carried out, the TPO was of the view that the sole purpose of creating AEs in Dubai and Mauritius was to evade taxes on income in India. He has then tabulated turnover of assessee and all the AEs in Mauritius and Dubai and observed that as the turnover went on increasing, the employees cost of assessee in India also went on increasing steadily. He thus, observed that the same conclusively proved that entire control and management of affairs of assessee group was wholly situated in India. He then, analyzed asset base of the concerns in Dubai and Mauritius and observed that AEs did not have any asset base in Dubai and Mauritius to carry out activities of AEs located in those countries and all the activities were carried out by assessee in India. As per him, it was therefore, conclusively proved that entire control and management of affairs of assessee was wholly situated in India. He then, referred to role of DHL and observed that actual delivery of goods to the customers had never been taken by AE in Dubai. The AE's in Dubai had taken the godown on rent and all activities of actual delivery were being outsourced to DHL vide agreement dated 01.02.2008, entered by Sava Trading FZE, Dubai with DHL. **The TPO in this regard observed that agreement remained in force till 2012 but even after changing the AE or the name of AE's every year, this agreement had remained in force, which**

proved beyond doubt that real entity behind entire business was the assessee only and the AEs in Dubai and Mauritius were nothing but shell companies. Though the assessee explained that subsequent agreements were entered with DHL and the scope of DHL was reduced only to postal distribution services. However, copies of agreements were not filed. The TPO did not accept the said explanation of assessee. **He reiterated by saying that AEs in Mauritius and UAE did not have any role to play except making of payment for the godown rent and hence, it was clearly proved that entire control and management of affairs of assessee group was wholly situated in India.** On repeated pleas raised by assessee that it had not been permitted to sell the goods at retail in India and that it cannot sell them out of India, at a rate more than M.R.P. was also not accepted on the ground that the assessee had failed to give any documentary evidence in support of its claim. The assessee at the beginning of TP proceedings itself had submitted that it had been granted license to sell wholesale drugs out of India and had also been awarded an 'Outstanding Export Award' for the year 2009-10. The TPO in this regard observed that this plea is not acceptable and **'Even otherwise, whether the activity was legal or illegal is not relevant as far as the Income-tax proceedings are concerned.'** It is well settled law. The TPO also asked the assessee to submit documentary proof of any activity carried out in Dubai during financial years 2006-07 to 2012-13. The assessee pointed out that during post search enquiries on 29.01.2013, Investigation Wing took the video of assessee, wherein two of its employees Shri Umesh Pawar and Shri Sunil Kataria were present. The TPO observed that these enquiries were firstly conducted much after search proceedings and it did not prove that the assessee was carrying on activities during the period under consideration. In the absence of documentary proof of employees employed in Dubai and the

details of salary being paid to them, the existence of employees, if any could not be verified and plea of assessee that it was bound by confidentiality clause was rejected. The TPO was of the view that in the present circumstance, there was necessity to lift the corporate veil. He stressed vide para 25.1 that day-to-day activities of AEs in Mauritius and Dubai were operated from India. He further observed that there were no employees in Mauritius and the employee cost, other than the amount paid to Shri Vinod Jadhav was negligible. However, the employee cost in Pune based company was very high. Hence, it was obvious that all the above activities were carried out in India, in Pune on the directions of Shri Vinod Jadhav. He thus, concluded by holding that affairs of parent company i.e. assessee and AEs in Mauritius and Dubai needed to be treated as wholly. All the brain and functions of group was situated in India and minuscule work of receiving and sending money was left with the AEs in UAE and Mauritius.

17. The TPO then rejected TNMM method and thought it appropriate to benchmark the transactions by treating Profit Split Method as most appropriate method. **During the course of TP proceedings, the assessee had submitted the copies of financials of AEs and also the detailed working of PLI of assessee and its AEs were also given.** The TPO again observed that actual control and management of affairs of AEs was situated wholly in India, wherein the AEs had not incurred any further amount either of management or sale and marketing of the goods procured from India. In view of the findings, during the course of proceedings, the profit of assessee and AEs was proposed to be combined and split according to their functions, using Profit Split Method. **The TPO then went on to observe that since the AEs had almost done no functions except receipt of sale proceeds and sending it to the assessee,**

the functions of AEs were treated as functions of banking agent, with no functions to be performed, except to receive the money of sale proceeds. It was thus, proposed to allocate only 3% of profit to the AEs and the balance 97% was proposed to be allocated to the assessee. The assessee in response to show cause notice pointed out that as per OECD Commentary on the related issue, for allocating profits under PSM method, appropriate comparables ought to be provided on record; but the same was missing in show cause notice. As per OECD, in case of total absence of external comparables, appropriate allocation keys could be resorted to for finding out logical profits which could be attributed to a jurisdiction. Such allocation keys could be assets based, expense based, capital employed based, floor area base, headcount base, etc. He then pointed out that it was a fit case to resort to average allocation ratio i.e. average of assets plus expenses allocation keys and pointed out that the steps to be taken in this regard which are reproduced at page 83 of TPO's order. The TPO thus, worked out year-wise excess profits attributable to the assessee under the same, without prejudice to PSM approach, and worked out excess profits of assessee for the years under consideration. The TPO in this regard was of the view that principally the assessee had agreed for treating the Profit Split Method as the most appropriate method but the working of assessee on perusal was rejected in toto. He was of the view that correct basis would be FAR analysis of entire transactions. Again reference was made to guidelines of OECD and again the TPO referred to FAR analysis for division of profits, which we have reproduced in the paras hereinabove and also referred to the functions, which as per him, were performed by entities in different countries and based on the said finding, the FAR analysis of assessee and AE's in Mauritius and Dubai were finalized as under:-

Function	UAE based company	Singapore (through DHL)	Mauritius based company	Anagha Pharma Pvt. Ltd., India	Sava Medica Ltd.
Development of business	No	No	No	Yes	Yes
Receipt of orders from customers	No	No	No	Yes	Yes
Customer care	No	No	No	Yes	Yes
Merchandising and procurement	No	No	No	Yes	Yes
Packing	No	Yes	No	Yes	Yes
Shipping	No	Yes	No	Yes	Yes
Tracking of the shipments	No	No	No	Yes	Yes
Pricing of the products	No	No	No	Yes	Yes
Receipt of sales consideration	Yes	No	Yes	No	No
Generation and preparation of the bills and invoices	No	No	No	Yes	Yes
Maintenance of books of account	Yes	No	Yes	Yes	Yes

18. The TPO further reiterated that since the AE's were not doing functions other than receiving and sending money which was similar to banking sector, for which not more than 2% to 3% would be charged as commission. He thus, proposed to allocate profits of assessee and AE's cumulated profits in the hands of assessee. He then, split up combined profit, wherein out of total profit of ₹ 157.23 crores earned over the years from assessment years 2007-08 to 2013-14, 97% was the profit allocated to assessee totalling ₹ 145 crores, to which profit attributable to assessee which was equal to comparables profit was added. The said table is reproduced hereunder for ready reference:

A.Y.	Combined Profit of Anagha and AE's	% of Profit earned by the Comparables. As per assessee's T.P. Report	Profit Attributable to the Anagha which is equal to the comparable's profit %	AE's Share 3%	Residual Profit allocated to Anagha Pharma Ltd.	Anagha's Total Profit
A	B	C	D (B*C%)	E (B*3%)	F (B-D-E)	G (D+F)
2007-08	2,28,44,905	2.77	6,32,804	6,85,347	2,15,26,754	2,21,59,558
2008-09	17,69,90,270	0.31	5,48,670	53,09,708	17,11,31,892	17,16,80,562
2009-10	32,69,96,892	2.42	79,13,325	98,09,907	30,92,73,660	31,71,86,985
2010-11	8,81,15,771	4.35	38,33,036	26,43,473	8,16,39,262	8,54,72,298
2011-12	48,58,35,923	6.49	3,15,30,751	1,45,75,078	43,97,30,094	47,12,60,845
2012-13	13,32,70,295	5.71	76,09,734	39,98,109	12,16,62,452	12,92,72,186
2013-14	33,82,69,677	5.16	1,74,54,715	1,01,48,090	31,06,66,871	32,81,21,587
TOTAL	1,57,23,23,733		6,95,23,035	4,71,69,712	1,45,56,30,986	1,52,51,54,021

19. He then, computed adjustment in the hands of assessee year-wise, which reads as under:

A.Y.	Anagha's Total Profit	Less O.P. shown by the Assessee	Total adjustment	Less Adjusted in the hands of Sava Medica Ltd. (As mentioned below)	Net Adj. in the hands of Anagha Pharma Ltd.
A	B	C	D	E	F
2007-08	2,21,59,558	1,30,38,449	91,21,109	0	91,21,109
2008-09	17,16,80,562	1,69,42,134	15,47,38,428	0	15,47,38,428
2009-10	31,71,86,985	4,55,81,486	27,16,05,499	0	27,16,05,499
2010-11	8,54,72,298	73,95,355	7,80,76,943	0	7,80,76,943
2011-12	47,12,60,845	1,66,56,860	45,46,03,985	94,92,109	44,51,11,876
2012-13	12,92,72,186	5,99,91,658	6,92,80,528	54,08,126	6,38,72,402
2013-14	32,81,21,587	4,78,94,987	28,02,26,600	4,66,98,148	23,35,28,452
TOTAL	1,52,51,54,021	20,75,00,929	1,31,76,53,092	6,15,98,483	1,25,60,54,609

20. So, for the year under consideration, he proposed an adjustment of ₹ 91,21,109/-.

21. The Assessing Officer on receipt of order of TPO under section 92CA(3) of the Act, completed assessment and issued draft assessment order for the respective assessment years. The assessee filed objections before the Dispute Resolution Panel (DRP) and proceedings started before the DRP against order of Assessing Officer/TPO. After considering the facts of case and submissions made by assessee, the DRP issued reference to the TPO vide office letter dated 23.11.2016 to carry out certain examinations and report. The first point which the TPO was asked to verify and report was the transaction of supply of goods for Sava Medica Ltd., another concern of assessee which came into existence from assessment year 2011-12. Vide para 6 of show cause notice, the Panel observed that arm's length price of supply of goods could not be determined by applying OP/OR of AEs as PLI. Therefore, the TPO was to get the transactions of supply of goods to AE benchmarked applying appropriate method and determine arm's length price of the

transactions. In the case of assessee, the Panel noted the order of TPO, wherein it was mentioned that all functions except banking were done by assessee itself. **In this regard, he was directed to examine assessments year-wise, various evidences available in his possession and identify the functions performed by different entities in each assessment year separately on the basis of such evidences. The next point noted by the Panel was the plea of assessee that it had supplied only about 30% to 35% of total purchases of Mauritius / Dubai based entities and the balance goods were procured by AE's directly from other countries.** The assessee had challenged the action of TPO in assessing entire profits of AE's in its hands as incorrect and without prejudice it was submitted that even if the TPO's view was correct, it had to be restricted to profits attributable to supplies made from India. The Panel directed the TPO first to examine the genuineness of claim of assessee that only 30% to 35% of total purchases of AE's were from Indian entities. It further directed if the claim of assessee was found to be correct, then the TPO was to examine functions of assessee in respect of procurement by AE from countries other than India on the basis of evidence available with him. The TPO was directed to submit a report in this regard.

22. The TPO submitted the report vide letter dated 20.12.2016 before the DRP. He first rejected additional evidence as being inadmissible since sufficient opportunity was given to the assessee to submit all the evidences during the course of TP proceedings in support of its claim. The TPO was of the view that the assessee was neither denied any opportunity nor it was prevented by sufficient cause to submit the said evidences during TP proceedings. Hence, he was of the view that additional evidence submitted by assessee need not be admitted. However, without prejudice to the same, the

TPO filed a report on the directions given by DRP. Then the TPO in the report first refuted the allegation of assessee that reference to TPO was made without presence of any feature given under section 92C(3) of the Act.

23. Coming to next objection, where the assessee has alleged that in considering the international transactions entered by assessee, where the assessee has taken objection in considering global transactions of AE's for the purpose of benchmarking. The assessee also stated that the said transactions were not listed in section 92B of the Act. The TPO rejected this objection of assessee after considering entire facts gathered during the course of investigation and submissions made by assessee before him, detailed show cause notice was issued to the assessee. From the evidences, it was clear that the assessee group's entire global business was being controlled and managed from India, hence as natural corollary in the show cause notice, the entire global business of assessee was proposed to be benchmarked as in none of the communications, there was any indication to benchmark only the transactions, which were reported in Form 3CEB. Further objection of assessee that only transactions in section 92B of the Act could be benchmarked was held to be totally wrong. It was further observed by the TPO in the said report that under section 92B of the Act, even the transactions between non-AE's can be treated as international transactions, if certain situations exist. The TPO further observed that in the instant case, it was proved beyond doubt that foreign AE's do not perform any function/s other than just receiving money and making the payments. It was also held that the assessee only had the capacity to carry out the functions required by online pharmacy. Hence, the entire global profits of assessee and its AE's were allocated according to their functions by treating the Profit Split Method as the

most appropriate method. The objection of assessee that transaction not reported in Form 3CEB could not be benchmarked, was not accepted by the TPO. He further pointed out that neither the figures nor facts were imaginary as the figures were obtained from the financials and TP study report submitted by assessee. He acknowledged that the facts were gathered in a very long process search by the Investigation Wing, seizure of material, recording of statements, impounding of material analysis of statements recorded, appraisal report, etc. Rejecting the other objections of assessee, the TPO stated that the profits were allocated on the basis of FAR analysis, which were supported by the facts and figures. The AE's were allocated only 3% of profit according to its functions; all though AE's were proved to be sham entities. He acknowledged that **Nonetheless, the AO has specifically been requested to bring even these 3% of the income of the AE's for taxation in India.** Another objection of assessee was that the TPO had exceeded his powers in testing un-referred transactions. In this regard, reliance was placed on the ratio laid down in CIT Vs. Cushman & Weikfield India Pvt. Ltd. reported in 367 ITR 730 (Del) and Honda Motorcycle and Scooter Ind. Pvt. Ltd. Vs. DCIT reported in 46 CCH 459 (Del). In this connection, the TPO drew attention of the Panel to the newly inserted provisions of section 92CA(2B) of the Act w.e.f. 01.06.2012, which empowered the TPO to benchmark even those transactions, which were not referred to him. Various other issues were raised by assessee objecting to the transfer pricing and also the report of TPO, which we shall refer at the relevant time.

24. The said report was forwarded by the DRP to assessee to furnish its reply to the remand report. The main objection of assessee was to the control and management of AE parties. It was pointed out that by assessee in its reply

that this was not transaction *per se* and at best it could be a 'status' but not a transaction. In such case, the whole jurisdiction assumed by the TPO was a failure as testing of control and management of AE parties was not prerogative of the TPO. It could be that of Assessing Officer from International Taxation Cell of IT Department, but in such case, the officer would be different, the assessee therein could be different. He further stated that the assessee was not challenging the right of TPO to benchmark such a transaction but control and management of AE entities was not a transaction. The assessee stressed that only technical point raised was such a POEM phenomenon was not an international transaction *per se*. It was further submitted that if this was part of international transaction, then there was no need for amendment to section 6(3) of the Act, since from the same fact of testing for POEM phenomenon could have been reached through TP proceedings. However, the Legislature in its wisdom has amended section 6(3) of the Act with heavy intent and purpose behind it, to rope in any sham entity. It was stressed that TPO's action of testing POEM transaction was clearly contrary to the scheme of IT Act and contrary to the Legislative thinking. The assessee also filed elaborate submissions on each of the points to the remand report of TPO and replies given are reproduced in the order of DRP. The assessee also filed details of AE entities, employee cost which is available at page 87 of order of DRP.

25. The DRP first decided the issue of reference made to the TPO by Assessing Officer, wherein objection raised by assessee was that the said reference was made without forming any opinion about satisfaction of conditions specified in section 92C(3) of the Act. Relying on series of decisions, the DRP held that reference made to TPO was as per law. It was further held that Finance Act, 2012 empowers the TPO to determine ALP of

international transactions noted by him in the course of proceedings even if the said transactions were not referred to him by the Assessing Officer. **Coming to the next plea raised by assessee that the TPO had tested an imaginary transaction of taxable profits of AE's in the hands of assessee on the ground that control and management of AE's exists with the assessee.** It was further submitted by the assessee that taxing profits of AE's was not a transaction mentioned in section 92B of the Act and also process of testing the control and management of AE's was not the same as benchmarking of international transactions, in fact it was not a transaction at all and hence, could not be benchmarked. The assessee also argued that section 6(3) of the Act provides that an entity is resident of India if its place of effective management is situated wholly in India. The Panel also noted the arguments of assessee that the Legislative intent behind amendment of section 6(3) of the Act and introducing the concept of POEM gets defeated. The assessee had alleged that TPO in the garb of TP proceedings had invoked provisions of section 6(3) of the Act, which was also incorrect and unsustainable in law. It was further submitted by assessee that the Assessing Officer had referred to the TPO only various international transactions as contained in Form 3CEB for benchmarking. However, the TPO had proceeded to test altogether different transactions of taxing profits of AE's in the hands of assessee. Where the transaction of control and management of AE's and their profits was never referred to the TPO, process followed by TPO was bad in law. The next submission of assessee noted by the Panel was that of AE's in Singapore, Dubai and Mauritius were valid and genuine legal entities making all legal compliances. The TPO by making false conjectures had treated all the entities as sham and proceeded to lift corporate veil, which act was overreach by TPO. In fact, all the entities had strong commercial substance and were engaged in

trading activities involving the global procurement, logistics, global marketing, etc.

26. The Panel then considered background facts of the case as noted by TPO and vide paras 5.2.1 to 5.3.2 decided the issue of benchmarking all the transactions. The Panel was of the view that the TPO had examined business model of assessee group, development and upgradation of software JadePharma Ver.1.0, JadePharma Ver.2 and concluded that Profit Split Method was the most appropriate method to benchmark international transactions. Based on various evidences in his possession, the TPO had also rebutted objections of assessee raised during proceedings. It was further noted that TPO had also held that no activity was carried out at Dubai and also that AE's in Singapore and Mauritius were not playing any role other than payment of godown rent. **Based on all these, the TPO concluded that entire control and management of affairs of assessee group is situated wholly in India.** Further, based on low employee cost in Dubai, nil employee at Mauritius and high employee cost for Pune based company, the TPO concluded that all the activities of assessee group were carried out in India and therefore the affairs of assessee in Mauritius and Dubai need to be treated together as one since the brain and functions of group are in India and only minuscule work of receiving and sending money was done by AE's at UAE and Singapore. Vide para 5.2.4, the DRP notes that based on this, the TPO has lifted the corporate veil and held the entire group to be operating from India. Accordingly, the TPO applied Profits Split Method as most appropriate method to benchmark the transactions, attributed 3% of global profits to AE's and determined balance 97% of profits as the ALP of transactions undertaken including unreported transactions by Indian companies of group involved. Vide para 5.3, the Panel

holds that from the benchmarking applying PSM done by TPO, **we find that TPO has not benchmarked any transaction of control and management of the entire assessee group including the AE's lying with the assessee. Based on the evidence and submissions made, he has just held that the control and management of the entire group including the AE's is situated wholly in India and therefore it is a fit case to apply PSM to benchmark the transactions as no other method is found appropriate by TPO.** The Panel thus, held that TPO has not determined the ALP of international transaction of control and management of AE's in India as argued. The TPO had benchmarked only the transactions reported and other inter-related and inseparable transactions found based on the evidence in his possession but not reported. Therefore, it was held that TPO had not tested any imaginary transaction or the transaction of control and management of AE's in India with the assessee.

27. The next plea of assessee of application of section 6(3) of the Act was also dealt in with by Panel, wherein the section provides that a company is said to be resident in India in any previous year if during that previous year, control and management of its affairs is situated wholly in India. From 01.04.2017, the concept of 'Place of Effective Control and Management' (POEM) has been introduced. However, this concept had no application to assessment years under consideration. The Panel observed that the aspect which was relevant in assessment years under consideration was whether a company resident of India, if the control and management of the company in such year is situated wholly in India, for which facts have to be looked into and the provisions of Income Tax Act would apply to such company as if, it was an Indian company. It was further held that income of foreign company held to be resident in India

involving provisions of section 6(3) of the Act was assessable only in the hands of such company and it could not be assessed in the hands of another Indian company even if such Indian company was an AE of such foreign company. The Panel thus, held that the TPO had not recorded any such finding and reiterated that if the assessee were assessed to tax as if they are resident companies, the income of AE's from all sources would be assessable in their hands and not in the hands of assessee. Hence, the argument of assessee that order of TPO was in contradiction to the concept of POEM and provisions of section 6(3) of the Act were held to be misconceived and rejected. It was further held that TPO had not assessed the profits of AE's in the hands of assessee by holding them to be sham entities. On the other hand, the TPO had applied PSM method based on FAR analysis and attributed only 3% of global profits of the group to AE's and balance 97% of global profits were held assessable in the hands of Indian companies involved. Thus, the TPO had not only attributed profits to AE's but also admitted that they were performing certain functions. The Panel concluded by holding that the TPO has not held the AE's to be sham and the argument of assessee in this regard was held to be ill-conceived and rejected. Another finding of Panel in para 5.3.1.2 was **From the financials of the assessee and AEs as submitted, we find that both assessee and AEs have incurred significant costs on employees and other administrative costs.** Looking at the details of accounts of salary and other indirect expenses, assets, etc. of assessee in INR and AE's in their respective foreign currencies, which were submitted by assessee in tabulated form, which are reproduced under para 10.2.8 at pages 186 and 187 of order of DRP; the Panel noted the argument of assessee that AE's were incurring substantial expenses on salaries and other indirect expenses and the said expenses as proportionate to sales, in case of AE's were substantially higher.

Further, the AE's were holding substantial assets. The AE's had also entered into several agreements for supply of products as per orders. Therefore, the AE's could not be declared as merely paper entities or sham as done by TPO. Further, the assessee pointed out that AE's had chosen the business model of outsourcing their operations; accordingly, AE's have appointed DHL at Singapore for dispatching the orders and Sava Infotech Ltd. in India for processing the orders, etc. Hence, merely because AE's have outsourced its functions, it could not be held as sham since they require less manpower for functioning. **Vide para 10.3 onwards, the Panel holds that after considering various arguments, annual reports of AE entities, the discussion in TPO order, the role of AE's in the business model of assessee and also various assets held by them, they were of the view that entities could not be held as sham, they have to be held as genuine legal entities engaged in the business.** It was further elaborated that the object of TPO in calling such entities as sham appeared to be on the ground that they could not do necessary functions as required for the business activities claimed and most of the functions on their behalf were held to be carried out in India by Sava group. For this reason, the TPO held that they were doing only banking functions and attributed 3% of global profits of group to AE's. **The Panel thus, held for this reason alone, it can be concluded that the TPO himself is not holding such entities to be sham.** He also held them to genuine legal entities. The TPO on the other hand, had held that control and management of such entities was situated wholly in India. Reference was then made to order of Settlement Commission in the case of Shri Vinod Jadhav, in whose hands the global profits of Sava group including foreign entities was sought to be taxed; then vide order dated 20.03.2014, the Settlement Commission held that **we are of the considered view that on the basis of evidences presented before us, the**

profits of foreign entities belonging to Sava group cannot be brought to tax in the hands of applicant. The DRP thus, vide para 10.3.4 concluded as under:-

“10.3.4 Considering all the above, we hereby hold that AE's based on facts on record as discussed by TPO, cannot be held as sham. They are therefore held as genuine legal entities. The issue of attribution of profits in their hands @ 3% of the global profits of Sava group shall be decided in subsequent paragraphs while deciding the benchmarking of international transactions. These grounds are therefore decided accordingly.”

28. Then, the next issue which was adjudicated by Panel was the most appropriate method to be applied and held that Profit Split Method was applicable for international transactions including transfer of unique intangibles or any multiple international transactions, which were so inter-related that there cannot be evaluated separately for the purpose of determining arm's length price of any one transaction. It further went on to justify application of PSM method and concluded by holding that ALP should be determined by adopting residuary PSM as most appropriate method and by initially allocating a basic return or routine profits, appropriate for the routine international transactions in which each AE was engaged and then allocating residuary profits based on the relative value of each enterprise's contribution. Necessary directions were given in this regard. The Assessing Officer in final assessment order passed under section 143(3) r.w.s. 144C(13) of the Act r.w.s. 153A of the Act noted the directions of DRP, which reduced the transfer pricing adjustment to ₹ 29,78,900/- as against ₹ 91,21,109/- proposed in the draft order. Further, as per directions of DRP, gross value of international transaction as in Form 3CEB of ₹ 7,73,67,713/- were added to the total income of assessee for the year under consideration. Further disallowance was made under section 14A of the Act at ₹ 16,387/-.

29. The assessee is in appeal against the order of Assessing Officer/TPO/DRP.

30. The Ld. AR first referred to brief facts of the case and pointed out that the assessee was engaged in online pharmacy i.e. e-pharmacy business, wherein the stock is created at various places and the same is sold across global. The said business is highly regulated and only Schedule-E and Schedule-H drugs are traded. It was pointed out that these drugs require Indian Medical Doctors Certificate for sale within country or outside country. However, the assessee has type-2 license of wholesaler wherein sales are made within and outside India so as to sell the stock, back to back. On each packs MRP is mentioned and the assessee has to sell the same at either MRP or at any other rate. It was further explained by the Ld. AR that similar drugs or same drugs were manufactured at different places at different rates and sold at arbitrary prices and the role of assessee was of buying company in India, whereas the AE's were in Dubai, but the warehouse was in Singapore. He explained that Singapore was the hub for distribution of medicine and within 48 hours, the said medicine could be dispatched to different parts of world. The Ld. AR mentioned that search on assessee's premises took place in October, 2012. However, prior to search, Summons under section 131 of the Act were served on Shri Vinod Jadhav and his statement was recorded to understand the model of business. He stressed that during the course of search, nothing was found, however, surrender of ₹ 14 crores was made with respect to deal with Biodeal i.e. takeover of Biodeal Laboratories Pvt. Ltd. This declaration was made by Shri Vinod Jadhav, in his individual capacity and not by assessee company. The Settlement Commission has deleted the aforesaid addition. However, the DRP has made partial addition on account of deal with Biodeal.

He then, pointed out that first issue which needs to be addressed is can reference be made to TPO and second issue was whether where the TPO says everything was sham and he lifted the corporate veil, then the question was whether the TPO could go into it. He stressed that if everything was sham, then the TPO has no jurisdiction under section 92CA of the Act. Referring to order of DRP, it was pointed out that DRP in the first instance says that AE's were not sham; but goes on to say that assessee must have given everything to them and / or provided services to AE's. The reasoning for this by the DRP was that Shri Vinod Jadhav was the employee of assessee. It was pointed out that 69% of global profits were added in assessee's hands and 30% of global profits were added in AE's hands. He explained that in any case large part of profits have travelled back to India as dividend and salary to Shri Vinod Jadhav and same were offered to taxes @ 15%. He pointed out that the question was attribution of profits to Sava Healthcare Ltd and Sava Medica Ltd., but the DRP did not allow an application made under section 154 of the Act. Our attention was drawn to the issue raised vide ground of appeal No.3.1, wherein earlier satisfaction dated 23.05.2014 and 18.07.2014 of Revenue was that entire global profits were that of Shri Vinod Jadhav. However, the finding of Settlement Commission vide order dated 27.08.2015 was that it was not to be taxed in the hands of Shri Vinod Jadhav. He then pointed out that second satisfaction by Revenue dated 16.12.2015, where the entities were shell companies and were formed for tax evasion. The Ld. AR stressed that where matter has to be referred to TPO for benchmarking international transactions, there are some operative 'words' in the mechanism, which have some bearing. The learned Authorized Representative for the assessee stressed that even under the provisions of section 92CA(1) of the Act, it was incumbent upon Assessing Officer to give show cause notice to assessee before making

reference to TPO. The Ld. AR then placed reliance on the decision of the Hon'ble Bombay High Court in Vodafone India Services Pvt. Ltd. Vs. Union of India reported in 39 taxmann.com 201 (Bom). He also placed reliance on CBDT Instruction No.3/2016, dated 10.03.2016 placed at pages 1443 to 1450 of Paper Book-4. On the basis of decision of the Hon'ble Bombay High Court and CBDT Instruction, he then pointed out the instances where cases have to be referred by Assessing Officer to the TPO and the objection raised by assessee in this regard was that the Assessing Officer must provide an opportunity of being heard to taxpayer before recording his satisfaction or otherwise, for making reference to TPO. He then referred to provisions of section 92C(3) of the Act and proviso thereunder and also the amended law w.e.f. 01.06.2007 in section 92CA(4) of the Act. He stressed that after amendment, the word used is 'in conformity', whereas in pre-amended provisions, expression used was 'having regard'. The Ld. AR pointed out that appeals in the case of assessee are from assessment year 2007-08 onwards, hence amended provisions are applicable.

31. He then took us through various paras of decision in the case of Vodafone India Services Pvt. Ltd. (supra) and stressed that in the facts of case, where no notice was received from the Assessing Officer under section 92C(3) of the Act, proceedings were not correctly initiated. He stressed that in the absence of any opportunity of hearing allowed under section 92C(3) of the Act before making reference to TPO, then proceedings before the TPO are vitiated. He then referred to various observations of TPO, wherein he has come to a finding that AE's are sham and were artificially created and has also referred to show cause given by TPO for lifting corporate veil. He stressed that role of TPO was to decide whether price charged by assessee for provision of

services, was correct or not. However, the TPO went beyond his powers and came to a finding that 97% of world's profits were to be taxed in India. He then, referred to the ratio laid down by the Hon'ble High Court of Delhi in Indorama Synthetics (India) Ltd. Vs. ACIT (2016) 386 ITR 665 (Del). He stressed that the Hon'ble High court has laid down that in the absence of any audit report in Form 3CEB and where the assessee does not claim the transactions to be international transactions, then sections 92C(3) and 92C(4) of the Act come into play and the Assessing Officer is duty bound to give opportunity. Reference was also made to CBDT clarification of 2016. Thereafter, reliance was placed on the decision of Hon'ble High Court of Calcutta in PCM Strescon Overseas Ventures Ltd. Vs. DCIT (2017) 85 taxmann.com 165 (Cal) and Mumbai Bench of Tribunal in Videocon Oil Ventures Ltd. Vs. DCIT in ITA No.6630/Mum/2016, relating to assessment year 2012-13, order dated 20.09.2017. The Ld. AR explained that the assessee was making purchase of goods from India and the same were exported to Mauritius in the first year and to UAE thereafter. Our attention was drawn to news report of January, 2016, wherein it was reported that in India, there cannot be any sale of drugs online. In December, 2018, the Hon'ble High Court of Madras had banned online sale of drugs in India. Referring to the order of TPO especially in para 27.3 wherein 97% of world profits had been attributed to assessee, he pointed out that the TPO at page 84 had carried out FAR analysis of entire transactions on the ground that entire control of business was in India and the TPO has also held that all the transactions are sham transactions. Further, the AE's have been held to be shell companies as the AE's were only paying godown rent. Another aspect noted by TPO was the employee cost of Dubai and Mauritius companies and the TPO then goes on to lift corporate veil and after perusing, he holds that PSM method was most appropriate method and he has carried out

quantification accordingly. Referring to the order of TPO, he points out that it has been held that control and management of business was in India and for holistic approach, he says all control in India. Referring to amendment to section 6 of the Act w.e.f. assessment year 2015-16, the Ld. AR pointed out that it now defined the effective control and management of company. In the pre-amended section 6(3) of the Act, talk was of complete control and management of affairs in India, whereas now law w.e.f. 01.04.2017 talks of effective place of management and the Explanation thereunder defines POEM. He stressed that amendment is w.e.f. 01.04.2017 and in earlier regime the definition was at variance. According to TPO, all control and management in India and all AE's are shell companies, so he wants to take route of control and management of affairs in India but in such scenario, where whole control and management was in India, where is the need to apply transfer pricing provisions. The Ld. AR stressed that whether wholly and completely the control was in India was the 'status' of assessee, which could be under section 6 of the Act and not by the TPO under the TP provisions. He pointed out that the TPO has time and again referred to the evidences collected by investigation wing and also investigation carried on by them. Then, the Assessing Officer could have acted himself and found out whether control was in India; but by giving mandate to the TPO, the Assessing Officer acted wrongfully and the same is fatal to the whole mechanism of completing assessment in the hands of assessee.

32. The next plea which was raised by the Ld. AR was the opinion of TPO was whether right and just approach. Referring to the orders of Revenue authorities, he pointed out that they had oscillating opinion, wherein in the first instance, they held that the total profits were taxable in the hands of Shri Vinod

Jadhav and then they held the same were taxable in the hands of assessee company. Our attention was drawn to chart placed at page 1431 of Paper Book and it was pointed out that search action was carried out on Sava group on 31.10.2012, notice under section 153A of the Act was issued to the assessee company on 15.05.2013. However, on 23.05.2014 satisfaction of Assessing Officer was that Shri Vinod Jadhav was the main person behind all foreign entities and unless the profits of foreign entities are included in settlement application, the same cannot be true and complete. On 18.07.2014 also, similar satisfaction of Assessing Officer that profits of foreign entities are to be included in settlement application of Shri Vinod Jadhav was part of report passed in the case of Shri Vinod Jadhav before the Settlement Commission. On 28.09.2014, case was referred to TPO after approval of the Commissioner. On 27.08.2015 in the settlement proceedings, the findings of Settlement Commission are that profits of foreign entities could not be taxed in the hands of Shri Vinod Jadhav. However, Income Tax Department was free to take appropriate action as per section 6(3) of the Act, which was amended by Finance Act, 2015 with respect to POEM; copy of said order of Settlement Commission is placed at page 1399 of Paper Book. He then refers to the findings of TPO on 29.01.2016 to the effect that entire business model was the brainchild of Shri Vinod Jadhav. He also referred to another proceeding in the case of Sava Pvt. Ltd., wherein also the TPO was of the view that entire development of software and its maintenance and operations were managed and controlled by Shri Vinod Jadhav and the employees of Sava Pvt. Ltd. However, on 29.01.2016, the Assessing Officer, Incharge of the assessee company holds that entire operations were managed by the assessee and he comes to a finding that entire global operations were carried out by Pune based companies of Sava group. He stressed that the order of TPO in holding AE

entities to be sham is not correct as they were genuine, legal entities. Coming to the order of DRP, it was pointed out by the Ld. AR that it is held by the Panel that control and management of the affairs of business was not an issue decided. He then, drew our attention to submissions made before the DRP by the assessee to prove that AEs were not sham and then referring to the order of DRP, it was pointed out that all the case laws which are relied upon in paras 4.1 and 4.2 at page 95 relate to the period prior to assessment year 2006-07 except case law in the case of Headstrong Services India Pvt. Ltd. (TS-45-ITAT-2016(Del)-TP). He stressed that after amendment to section 92C(3) of the Act, the Assessing Officer had to pass order in conformity with the said provisions. The said case of the Hon'ble Bombay High Court in Vodafone India Services Pvt. Ltd. (supra) was cited before the DRP, but the same was not referred. He then drew our attention to the ratio laid down in Sony India (P.) Ltd. Vs. CBDT & Anr. (2007) 288 ITR 52 (Del), which is a case explaining the situation prior to 2007 and meaning of expression 'having regard' has been explained. He stressed that after the amendment in 2007, law says that the Assessing Officer is bound to accept the TPO's order. So, it is all the more necessary that before making reference to the TPO, the Assessing Officer should issue show cause notice to assessee, so that the assessee can put its case whether any benchmarking of the transactions are required or not. He then, said that DRP concluded by holding that the AEs were not sham, however, Profit Split Method was applied and an upward adjustment was made in the hands of assessee.

33. The Ld. DR first referring to ground of appeal No.3.1 raised, pointed out that provisions of section 92C(3) of the Act are attracted when the Assessing Officer is making TP analysis. However, provisions of section 92CA(3) of the

Act are to be applied when TPO is making TP analysis; so section itself is not applicable to the facts of the case. Referring to the arguments of Ld. AR that no satisfaction was recorded by the Assessing Officer and if satisfaction is recorded, then not correctly recorded, she referred to Audit Report in form No.3CEB for all the years and pointed out that reference was made on the basis of reporting made by the assessee. Our attention was drawn to reference by Assessing Officer to the TPO dated 16.12.2013 for assessment years 2008-09 to 2011-12, wherein the Assessing Officer has recorded satisfaction. She also filed copy of Reference Note of Assessing Officer, under which TPO was asked to benchmark the international transactions. She stressed that reference by Assessing Officer to TPO was with respect to transactions which were reported by assessee in its audit report. Our attention was drawn to audit reports for each of the years in this regard and the transactions which were referred in the reference letter of the Assessing Officer. The CIT-DR further pointed out that the question whether for making reference, the Assessing Officer has reported transactions with profit or income element. Referring to decision of the Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (supra) with special reference to para 32, she pointed out that the said decision was very specific on its facts, where qualifying remarks were given in para 5. In the present case, however, the TPO makes FAR analysis and in the course of FAR analysis, he can look into any aspect of international transaction. It was stressed by her that whether the assessee is doing business legally or illegally, that aspect has no meaning as income is to be assessed in the hands of assessee. It was stressed by her that there is no requirement that the Assessing Officer to record satisfaction or give any opportunity of hearing to the assessee.

34. On the next date of hearing, the Ld. DR furnished written submissions along with Note of TPO and stressed that grounds raised were invalid. The Ld. DR stressed that reference is to be made by the Assessing Officer under section 92CA(1) of the Act and such reference was correctly made by the Assessing Officer. Further, the TPO in FAR analysis finds that control and management of business was in India, so there was no question of so-called reference being made. The next aspect which was raised by her was that Circular which was applicable to the present case was of 2017 as Circular of 2016 was prospective. The Ld. DR referred to the written note and placed reliance on the following decisions regarding recording of satisfaction by the Assessing Officer.

- i) *Price Water House Vs. CIT (2016) 76 taxmann.com 221 (Cal)*
- ii) *PMP Auto Components (P.) Ltd. Vs. DCIT (2014) 50 taxmann.com 272 (Mumbai-Trib.)*
- iii) *Techbooks International (P.) Ltd. Vs. ACIT (2014) 45 taxmann.com 528 (Delhi-Trib.)*
- iv) *Hindalco Industries Ltd. Vs. Addl.CIT (2012) 17 taxmann.com 187 (Bom)*
- v) *Carrier Race Technologies (P.) Ltd. Vs. ITO (2015) 64 taxmann.com 252 (Madras)*

35. The Ld. DR stressed that only prima facie opinion must be formed, which the Assessing Officer did on the basis of form No.3CEB, wherein the assessee had declared its international transactions. Again our attention was drawn to reference made by the Assessing Officer to TPO, copy of which was handed over during the course of hearing and it was stressed that the Assessing Officer gives background of investigation by search team and also with regard to appraisal report, the Assessing Officer asked the TPO to give his finding on the arm's length price of international transactions. The Ld. DR pointed out that it was misleading to say that the TPO had benchmarked the control and

management of affairs of business and findings of TPO in this regard were referred at pages 73 to 76 of TPO order. The Ld. DR placed reliance on the decisions in DIT (IT) Vs. Morgan Stanley & Co. Inc. (2007) 292 ITR 416 (SC), Pepsico India Holdings Pvt. Ltd. & Anr. Vs. Addl.CIT & Anr. (2019) 197 TTJ 393 (Del) and Google India Pvt. Ltd. & Ors. Vs. Jt.DIT (IT) & Ors. (2018) 194 TTJ 385 (Bang). The Ld. DR stressed that TPO had carried out FAR analysis of transaction which was a very important part of TP analysis and it is wrong to say and vide para 15 of written note, it is stressed that, the TPO had not benchmarked any transaction of control and management, but had conducted FAR analysis, which could be carried out by him, as held by Hyderabad Bench of Tribunal in Euroflex Transmissions India Pvt. Ltd. & Anr. Vs. Addl.CIT & Anr. (2016) 48 CCH 190 HydTrib.

36. The Ld. AR in rejoinder referred to para 2.7.8 at page 28 of DRP's order and also remand report of TPO / DRP, wherein the TPO is very clear that it was benchmarking global transactions and not only the reported transactions. It was stressed by the Ld. AR that control and management of assessee was status and admittedly, not international transactions. The question which arises is whether the provisions of section 92C(3) of the Act were breached or not. It was stressed by the Ld. AR that the TPO had exceeded his jurisdiction in assessing transactions which were not reported in the audit report. The Ld. AR stressed that various issues need to be addressed in such proceedings; first was whether where the Assessing Officer while making reference never confronts the assessee about contents of reference, then there is denial of safeguard to the assessee and how can the assessee be safeguarded. In this regard, the learned Authorized Representative for the assessee stressed that the reference note of Assessing Officer was never confronted to assessee.

The Ld. AR raised the issue of non satisfaction of conditions laid down in section 92CA(1) of the Act, for which he stated that already submissions have been made and reference has been made to the decisions in the case of in Vodafone India Services Pvt. Ltd. (supra) and in Indorama Synthetics (India) Ltd. Vs. ACIT (supra). He pleaded that the said ground needs to be decided and arises in addition to grounds raised challenging exercise of jurisdiction by the Assessing Officer under section 92C(3) of the Act. In this regard, he stated that said issue is raised in line with Rule 11 of Income Tax (Appellate Tribunal) Rules, 1963.

37. The next issue which needs to be addressed which is most important, is, if the control and management is in India and the TPO says that all the entities are controlled and managed in India and hence, 97% of profits are attributed to Indian companies, then whereis its case of international transactions. Referring to arguments of Ld. DR vis-a-vis reported decision of Vodafone India Services Pvt. Ltd. (supra) with special reference to paras 32 and 33 of said decision, the Ld. AR said that if that be the case and if assessee had reported all the transactions of purchase of goods and sale of goods by foreign entities, then as per section 92CA(1) of the Act, no show cause has been issued to the assessee. It was stressed by him that the assessee had not so reported. Referring to reference letter of Assessing Officer, it was pointed out that where the Assessing Officer talks of investigation in the hands of assessee and confronts the TPO in this regard, but fails to confront the results of investigation to the assessee, then such a reference suffers from infirmity.

38. Another aspect raised by the Ld. AR was that while benchmarking international transactions, the TPO can operate in a restricted field and cannot

go to decide control and management of business of AEs while benchmarking international transactions of export of traded goods by assessee. In this regard, again reliance was placed on the ratio laid down by the Hon'ble High Court of Delhi in CIT Vs. Cushman and Wakefield (India) (P.) Ltd. (2014) 367 ITR 730 (Del). The Ld. AR then refers to Circular of 2016 and whether it is prospective or not. He points out that the Ld. DR has placed reliance on the ratio laid down by Delhi Bench of Tribunal in Louis Vuitton India Retail (P.) Ltd. Vs. DCIT (2017) 80 taxmann.com 32 (Delhi-Trib.), wherein it has been held that Instruction No.3/2016 was prospective. The Ld. AR in this regard pointed out that Tribunal in the said case was looking at jurisdiction of TPO and whether the same was confined to international transactions referred to him by Assessing Officer for determination of arm's length price or whether such jurisdiction was extendable to other international transactions which come to his notice during the course of proceedings before him. He stressed that the said ratio was contrary to the view in the case of Vodafone India Services Pvt. Ltd. (supra) with special reference to paras 44 and 45, wherein it has been held that it was the obligation of Assessing Officer to follow the principles of natural justice as read into section 92(A)(1) of the Act, because once the Assessing Officer refers the transactions to TPO, he will be bound to act in conformity with the order of TPO as mandated by section 92CA(4) of the Act. The Ld. AR referred to Instruction No.3/2003, dated 20.05.2013, which is under old scheme, copy of which is placed at pages 1432 to 1434 of Paper Book, wherein also the Assessing Officer was obliged to give formal opportunity to the taxpayer on receipt of TPO's order. Then, he referred to Instruction No.15/2015, dated 16.10.2015 placed at pages 1435 to 1441 of Paper Book-4, wherein it is provided that the Assessing Officer has to compute total income of assessee under section 92C(4) r.w.s. 92CA(4) of the Act in conformity with

arm's length price determined by TPO. Then, our attention was drawn to Instruction No.3/2016, dated 10.03.2016, wherein it is clearly provided that the Assessing Officer has to provide an opportunity of being heard to the taxpayer before recording his satisfaction in three situations mentioned in the said Circular i.e. before making reference to the TPO. In this regard, the Ld. AR referred to decision in Indorama Synthetics (India) Ltd. Vs. ACIT (supra), wherein the Hon'ble Delhi High Court says that the said Circular of 2016 is retrospective. However, it was pointed to the Ld. AR that the Delhi Bench of Tribunal in Louis Vuitton India Retail (P.) Ltd. Vs. DCIT (supra) has held the said Circular to be prospective. In this regard, he stressed that dictate of the Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (supra) is exact opposite. Referring to the letter of Assessing Officer, under which reference was made to the TPO, he says that in the said letter itself reference goes beyond the reported transactions and in fact artificial transactions were referred to the TPO. He stressed that the TPO cannot decide this issue and at best it could be referred for international taxation.

39. The next point which was raised by the Ld. AR was that sale of pharma medicine was not free trade from India and it was allowable only for selected medicine and also against transcriptions. However, both in Dubai and UAE, sale of pharma medicine was a free trade and that was the reason the sale was being made by AEs in Dubai and UAE and not in India.

40. On the next date of hearing, the Ld. AR filed written rejoinder, in reply to the written submissions made by the Ld. DR.

41. Coming to grounds of appeal No.2.1 to 2.6 i.e. powers of DRP, it was pointed out that in the TP analysis it had taken AEs as sham and had held that 97% of global profits have to be taxed in the hands of assessee. The DRP in its opinion has treated the AEs as genuine but compared the functions done by assessee and benchmarked the transactions. The DRP holds that there was something more than trading and finally comes to a finding that the assessee besides trading had given some more services, which had to be benchmarked. The Ld. AR in this regard refers to the proceedings before the DRP with special reference to pages 1247 to 1255. He again stressed that if all the AEs were sham, then no TP provision was to be applied and it was at best theory of control and management as per section 6(3) of the Act; so outside the domain of TPO and no TP proceedings could have been carried out; at best in such scenario, the Assessing Officer had to use its powers which he failed to use though while making reference to the TPO, he talks of all the investigation carried out by search party and also the complexity of the issue and made reference to the TPO. Referring to arguments of Ld. DR, wherein she has said that TPO had never said this and even we presume that the TPO had not said this, but the same has been corrected by DRP and the TPO's order was merged with DRP. Referring to order of DRP, the Ld. AR pointed out that DRP in the final analysis applies Profit Split Method and hold that 70% of profits are attributable to Indian companies. He points out that routine profits of assessee company were first determined by DRP and for balance profits, profit split was done between Indian entities and the foreign entities. The DRP had applied five star theory and allocated 69% of residuary profits to the assessee. In this regard, our attention was drawn to the chart. He stressed that if the global profits are attributable to assessee and all foreign AEs are artificial, then foreign AEs become resident of India and jurisdiction to assess such income was with

the Assessing Officer (International Taxation) and not with the Assessing Officer, Central Circle. Referring to rule 10B(d) of Income Tax Rules, 1962 i.e. Profit Split Method, it was pointed out that as per clause (2) / (ii), after FAR and on the basis of reliable external market data, how such contribution could be evaluated and added in the hands of assessee. He then, referred to powers of DRP under section 144C of the Act and sub-sections (5), (6), (7) and (8) and referred to enhancement powers of DRP. In this regard, he drew simile to the powers of CIT(A) under section 251(2) of the Act of enhancement, wherein Explanation clearly provides that enhancement can be made with regard to any matter arising out of proceedings i.e. any matter relating to assessment. In this regard, the Ld. AR stressed that powers of DRP were lesser than that of CIT(A), wherein the CIT(A) can look into any matter but the DRP to look into enhancement or variation of adjustment but not any new issue. For this, he placed reliance on the decision in *Munjal Showa Ltd. Vs. DCIT (2016) 382 ITR 555 (Del)*. The Ld. AR here stressed that powers of enhancement of CIT(A) were wider than powers of DRP; if the CIT(A) cannot do something, then the DRP cannot venture into something new, which the Assessing Officer has not even gone into. Referring to the order of TPO, he pointed out that it was held that global profits were to be benchmarked and for which the TPO did not apply any of the traditional methods. He artificially lifted corporate veil and made the adjustment, so where the TPO has not benchmarked the transaction by any of the prescribed methods, then the DRP cannot go into the aspect of application of any method. In any case, transactional analysis by the DRP is different, so which is beyond its power and cannot be upheld. Rationale of case laws vis-a-vis powers of CIT(A), the Ld. AR referred to written note filed at pages 1420 to 1424 of Paper Book-4 and also placed reliance on the following case laws:-

- a) *Vijay Arjundas Luthra Vs. DCIT in ITA Nos.535/PUN/2013 & 1354/PUN/2016, relating to assessment years 2004-05 & 2005-06 and ITA No.21/PUN/2015, relating to assessment year 2004-05, order dated 16.08.2017*
- b) *CIT Vs. Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC)*
- c) *CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC)*
- d) *DCIT Vs. Sandvik Information Technology AB (2017) 80 taxmann.com 295 (Pune-Trib.)*

42. The Ld. DR in reply to the arguments of assessee vis-a-vis grounds of appeal No.2.1, 2.2 and 2.3 stated that allegations of assessee were that there were two transactions. However, transactions are inter-dependent and whole business operandi was such that multi transactions could not be benchmarked separately; thus, have been benchmarked as a whole as the modus operandi of assessee cannot be ignored. For the sake of argument, she pointed out that even if we take transactions as separate transactions but the DRP has power to benchmark it. With regard to powers of DRP, reference was made to decision in *Vodafone India Services Pvt. Ltd. Vs. Addl. CIT & Ors. (2014) 361 ITR 531 (Bom)* in para 47, wherein it is mentioned that powers of DRP were to correct order of Assessing Officer. The Ld. DR further placed reliance on the following decisions:-

- a) *Lahmeyer Holding GMBH Vs. DCIT (2015) 376 ITR 70 (Del)*
- b) *Granite Services International P. Ltd. Vs. ACIT in ITA No.532/Del/2016, relating to assessment year 2011-12, order dated 12.09.2017*
- c) *M/s. New Delhi Television Ltd. Vs. ACIT in ITA No.1212/Del/2014, relating to assessment year 2009-10, & Ors. vide order dated 14.07.2017*
- d) *DDIT Vs. Sandvik Information Technology AB in ITA No.128/PUN/2014 and CO No.10/PUN/2015, relating to assessment year 2005-06, order dated 28.12.2016*
- e) *Euroflex Transmissions India Pvt. Ltd. & Anr. Vs. Addl.CIT & Anr. (2016) 48 CCH 190 HydTrib.*

43. The Ld. DR pointed out that the case of DRP was that entire control and management of affairs of assessee was wholly situated in India. However, the DRP has overruled the order of TPO and held that AEs were not sham and when these were held to be not sham, then question comes how to benchmark the same. She stressed that where international transaction remained the same, wherein the TPO had attributed less functions to AEs but the DRP had attributed more functions to AEs, then it is not case of enhancement. She also pointed out that the DRP has concluded and held that Profit Split Method was the most appropriate method. She admitted that 'yes', no comparables were picked up to benchmark the transactions.

44. The Ld. AR in rejoinder pointed out that the case of TPO was that global profits relate to the assessee and the same is disputed. The case of DRP was that some services were provided by AEs but the answer of assessee to the same was 'no'. He placed reliance on written rejoinder placed in this regard with special reference to pages 1 to 3 and stressed that the dictate in the case of Vodafone India Services Pvt. Ltd. (supra) and CBDT Circular has to be applied. It was also pointed out that the DRP proceedings were continuation of assessment proceedings and are not appellate proceedings and referred to reliance placed upon by the Ld. DR on different decisions and explained the propositions laid therein. He stressed that the argument of assessee was that these transactions never arose before the TPO nor were looked into, which the DRP was benchmarking. Referring to para 5.3.1 onwards of DRP's order, it was referred by the Ld. AR that the Panel held that if foreign company is held resident in India, then profits are to be assessed in their hands. However, the TPO had not so held, as it had clearly held the said concerns to be sham. Reference was made to remand report of TPO at page 33, wherein it has been

very clearly observed by TPO that control and management of all companies was in India; so the TPO attempted to benchmark the transactions which were otherwise not reported in form No.3CEB. In last few lines of para, the TPO hold that AEs were proven to be sham. The Ld. AR here stressed that, be that as may, the DRP has given a finding that AEs are not sham at page 187 of DRP's order starting from para 10.3.1 with finding in para 10.3.4. On the other hand, he points out that TPO in substance hold that all control and management was in India, so applies provisions of section 6(3) of the Act. He does talk of Profit Split Method but in true sense not applied it as all control and management was in India. Further, the TPO has not gone into transaction of attribution of profits to AEs as he taxed 97% of world profits in the hands of assessee and asked the Assessing Officer to tax balance 3% in the hands of assessee. Now, the DRP in such circumstances, cannot go enlarge findings. The Ld. AR pointed out that by amendment to section 6(3) of the Act, the Statute has intended to bring to tax profits of shell companies, on the basis of control and management theory. He stressed that if under the existing provisions of the Act, such a remedy was already available to the Revenue authorities i.e. by route of TPO, where was the need to introduce amendment to section 6(3) of the Act. He again referred to Circular at page 1588 of Paper Book-4, under which POEM was introduced. He stressed that where the TPO had not applied any TP method, especially when he says management and control in India and hence, profits of entities to be taxed in India, so, where no exercise of application of any method by the TPO, then DRP in such circumstances, cannot assume jurisdiction.

45. The Ld. AR referring to order of DRP pointed out that it starts benchmarking purchase and sale transactions undertaken by assessee and it

was the role of DRP to benchmark export of medicine, but it goes on to decide provision of services. He stressed that DRP could not find enabled source of income i.e. added services of provision of services to export trading of medicine. It was case of Ld. AR that DRP can look into what the Assessing Officer or TPO had done. In this regard, he drew an example that in case Assessing Officer/TPO had looked into A, B and C aspects and **whether in part or not, any of the aspects the DRP had power to look into them; but not anything under them i.e. provision of added services.** Referring to decision in the case of Vodafone India Services Pvt. Ltd. (supra), it has been pointed out that the Hon'ble High Court had equated powers of DRP with CIT(A) and when CIT(A) was precluded to look into new items of income / expenditure, then no power in this regard can be exercised by the DRP. Reliance in this regard was placed on the decision in the case of ITO Vs. Smt. Nirmala Vijay Sanklecha in ITA Nos.1937/PUN/2016, ITO Vs. Smt. Nirmala Prakash Shah in ITA No.1938/PUN/2016 and CO Nos.35 & 36/PUN/2016, relating to assessment year 2008-09, order dated 23.02.2018. He concluded by saying that when traditional transactions were not included into by the TPO, then the DRP could not go into the same.

46. The next aspect which was raised by the Ld. AR was the DRP could go into this aspect of provision of services i.e. where proceedings before the DRP were continuation of proceedings before the TPO; then where the assessee had filed objections to the proposal of DRP, which were not dealt in by speaking order and final order was passed, then such final order cannot stand in the eyes of law. In this regard, he drew strength from provisions of section 148 of the Act, wherein the Courts have clearly laid down that a speaking order needs to be passed dealing with objections raised by assessee. He then,

referred to Circular No.3/2016, dated 10.03.2016 which postulates a speaking order in such circumstances. The Ld. AR stressed that if there was violation of principles of natural justice, then it was an error which cannot be cured. Relying on the decision in the case of Videocon Oil Ventures Ltd. Vs. DCIT in ITA No.6630/Mum/2016, relating to assessment year 2012-13, order dated 20.09.2017, he pointed out that assessment order in such circumstances was to be struck down. At the close of hearing, it was pointed out that the TPO had applied simultaneous approach to the transactions of both the assessee and also Sava Medica Ltd. and at the end attributed some parts of profits to Sava Medica Ltd. We have heard the parties up to ground of appeal No.4 being the jurisdictional issue.

47. We have heard the rival contentions and also gone through written submissions filed by assessee, reply of the Revenue and rejoinder filed by assessee and also various case laws relied upon by both the learned Authorized Representatives and proceed to decide the jurisdictional issue raised in the present appeal. In the facts of present case, assessee company belongs to Sava group. Search under section 132 of the Act on Sava group was conducted on 31.10.2012. Consequent to search proceedings, notice under section 153A, dated 15.05.2013 was issued to the assessee for assessment years 2007-08 to 2013-14. In response thereto, the assessee vide letter dated 21.06.2013 submitted that returns of income originally filed under section 139(5) of the Act may be treated as filed under section 153A of the Act. Thereafter, notice under section 143(2) of the Act was issued to assessee. The Assessing Officer noted that the assessee was involved in international transactions with its foreign entities. Hence, after getting prior approval of CIT(C), Pune vide letter dated 17.09.2014, case was referred to TPO vide his

letter dated 28.09.2014. The said reference was made under section 92CA(1) of the Act for the purpose of determination of arm's length price of international transactions. Thereafter, another notice under section 142(1) of the Act, dated 28.07.2015 was issued due to change in incumbent along with detailed questionnaire and other notices on various dates, which were attended by assessee and necessary details and documents were filed. The TPO in the proceedings under section 92CA of the Act received jurisdiction order passed by JCIT (TP) Range-1, Pune, dated 14.07.2015. Notice under section 92CA(2) of the Act was issued to assessee on 17.07.2015, in response to which the assessee attended and TP proceedings were carried on. Before going into the details of TP proceedings and findings of TPO and the order passed under section 92CA(3)(1) of the Act, we deem it necessary to refer to certain events which have taken place from the date of search till the start of TP proceedings in the case of assessee i.e. between 31.10.2012 to 17.09.2014 when the approval was received from the Commissioner and the TPO issued notice under section 92CA(1) of the Act, dated 28.09.2014.

48. We need to look at the sequence of events of the present case i.e. pre-search, search period and post-search. The assessee has filed events chart in Paper Book-2 along with relevant documents. Shri Vinod Jadhav was the promoter of assessee company and he was the shareholder and director of assessee company which was incorporated on 25.10.2004. The assessee company was engaged in exporting third party branded pharmaceutical products. Another company M/s. Sava Medica Ltd. was incorporated on 10.02.2010, which is engaged in contract, manufacturing and trading in own branded pharma products. The third concern was incorporated on 17.09.2009 by the name and style of Sava Pvt. Ltd., which was engaged in data entry

services, web development services and IT support services. Thereafter, the assessee acquires in financial year 2010-11 an independent concern M/s. Biodeal Laboratories Pvt. Ltd., which was a manufacturing and trading concern. One concern Sava Pharma Ltd. was incorporated on 02.11.2011 which was also engaged in manufacturing, buying and selling, importing of pharma products.

49. First Summons which were issued by Investigation Wing were as early as 03.08.2012 to Shri Vinod Jadhav along with questionnaire and thereafter, various Summons were issued to him, consequent to which search proceedings were initiated on 31.10.2012 on Sava group; post-search, certain enquiries were made from different concerns. The sequence of events were as under:-

Pre-search

Sr.No.	Date	Events
36	03-08-12	Summons u/s 131(1A) to Mr. Vinod Jadhav promoter of assessee along with detailed questionnaire by DDIT(Inv), Pune
37	21-08-12	1 st Reply to Summon submitting - Brief note on business activity & associated companies - Other personal details
38	12-10-12	Summons u/s 131(1A) to Mr. Jadhav promoter of assessee along with detailed questionnaire by DDIT(Inv), Pune
39	17-10-12	2 nd Reply to Summon
40	18-10-12	3 rd Reply to Summon
41	22-10-12	Statement recorded u/s 131(1)(b) by DDIT(Inv) of Mr. Jadhav
42	23-10-12	4 th Reply to Summon explaining - Boideal Acquisition Transaction - Details of Foreign companies
43	25-10-12	5 th Reply to Summon explaining business model of SAVA group
44	29-10-12	6 th Reply to summon - Summary of submissions till date - Submission of Audited Financials of foreign co - Brief about trading operating at foreign companies
45	30-10-12	7 th Reply to summon

Search

Sr.No.	Date	Events
46	31-10-12	Statement recorded u/s 132(4) of Mr. Jadhav
47	01-11-12	Statement recorded u/s 132(4) of Mr. Jadhav
48	06-11-12 & 07-11-12	Statement recorded u/s 131 by DDIT(Inv) of Mr. Jadhav
49	27-12-12	Retraction of declaration made u/s 131 to DDIT(Inv)
50	27-12-12	Submission to DDIT(Inv) retracting declaration

Post – Search

Sr.No.	Date	Events
51	05-03-13	Enquiry u/s 131 in case of Bytzsoft Technologies Pvt. Ltd. (BTPL) Impounded Material replied upon a) Screenshot of Software (Annexure A of TP order) b) Sample Copies of email communication out of set of 375 emails impounded (Annexure F of TP order) c) Statements of employees of BTPL - Yousuf Saifee owner of BTPL - Yousuf Saifee owner of BTPL d) Loose bundles impounded
52	28-03-13	Survey action at Balasai Net Pvt. Ltd. by DDIT(Inv) Loose papers Email communications (Annexure B of TP order) Email communications (Annexure E of TP order)
53	28-03-13	Survey action at Tata Communication Pvt. Ltd.
54	03-04-13 19-04-13	Statement of employee of Sava Private Ltd. (Group Concern) a) Vikram Taware along with emails b) Ravindra Dasarwar c) Sample Email communications (Annexure D of TP order)
55	22-04-13	Statement Recorded u/s 131 by DDIT(Inv), Pune of Mr. Vinod Jadhav Invoices raised by AE on Third party (Annexure C of TP Order)

50. It may also be pointed out herein itself that assessee company was filing returns of income along with audited statements for the assessment years

under dispute and in response to notice issued under section 153A of the Act, the same income has been disclosed.

51. On 16.12.2013, the Assessing Officer, Central Circle, Pune makes reference to the TPO for determination of arm's length price in the case of assessee company, pursuant to letter of CIT(C), Pune, dated 14.11.2013. The said letter reads as under:-

"No.Pn/DCIT 2(1)/2013-14/TPO/1213

Date: 16/12/2013

*To
The Director of Income Tax
(Transfer Pricing & I.T)
Pune*

Sir,

SUB: - Reference to Transfer Pricing Officer for determining the Arm Length Price in the case of Anagha Pharma Pvt. Ltd.

Ref: - The CIT(C) Pune's letter No.Pn/CIT(C)/Transfer Pricing/2013-14/4259 dated 14.11.2013

Kindly refer to the above.

02. A search and seizure action in various premises of the SAVA group of cases was conducted by Dy. Director of Income Tax (Inv), Unit 1(2), Pune on 31/10/2012. The above mentioned assessee is a part of that group.

03. Perusal of the appraisal report suggests that the transactions investigated are cross border transactions amongst various Associated Enterprises of this assessee group. Major business of this group is supplying drugs and medicines to the on-line pharmacies and customers of on-line pharmacies in different countries and particularly those in North America. For this purpose, the assessee group had floated a company which goes by various names like Sava Trading FZC, Sava Trading FZE, Goldwings Trading FZE, Westside Trading FZE etc., in Sharjah Airport International Free Zone (SAIF), Sharjah, UAE.

04. Investigation into the affairs of these companies have revealed that the assessee group is selling the medicines and drugs from India to the customers in various parts of the world using the route of Singapore and Mauritius for the purpose of packing the products. The proceeds of sale of such products are received in the bank account of companies registered in Sharjah, UAE. All of such sales to customers in various countries are artificially shown to be made by UAE based companies and income is shown to be earned by UAE based companies. This is done in order to not to pay taxes on the huge profits earned in this business which are received in UAE. Such huge profits are repatriated by the Promoter of the group Shri Vinod Jadhav in the guise of salaries,

commissions etc., and he has claimed the same as exempt by claiming himself to be a non-resident India (NRI) for F.Y. 2009-10.

05. The modus operandi of the group adopted for this purpose is unearthed through various evidences and statements of various persons. This is detailed in Chapter-6 of the Appraisal Report from page 66 to 127. The Addl. DIT(Inv), Unit-1, Pune in his letter enclosed with the Appraisal Report, has suggested in para 10 that cases of this group may be referred to the Transfer Pricing Officer. Analysis of the findings of the transaction of this group companies with their Associated Enterprises in UAE, Singapore and Mauritius also make it imperative that these cases should be referred to the Transfer Pricing Officer. The detailed justification for the same also forms the part of the Appraisal Report, a copy of the Appraisal Report is enclosed for your kind reference.

06. The transaction of domestic company namely, M/s. Anagha Pharma Pvt. Ltd. with the associated enterprises are shown in the Audit Report in form 3CEB which are as follows for various years:

Assessment Year	Amount of transaction (Amt. in crores)
2008-09	12.85
2009-10	17.84
2010-11	18.38
2011-12	22.68

Copies of form No.3CEB are attached for your reference

07. The CIT(C), Pune vide his letter dated 14.11.2013 has accorded the necessary approval to refer the above case to T.P.O. Pune. (Copy enclosed)

08. In view of the above, the undersigned is forwarding the cases for determination of the Arm Length Price in this case.

Yours faithfully,

Sd/-
(SUDHA GUPTA)
Dy. Commissioner of Income Tax
Central Circle 2(1), Pune

Copy to: 1. The CIT Central, Pune
2. The Jt. CIT, CR-1, Pune

Dy. Commissioner of Income Tax
Central Circle 2(1), Pune

52. The Ld. AR before us has pointed out that the said letter dated 16.12.2013 (in the case of Anagha Pharma Pvt. Ltd. i.e. assessee before us) is relating to assessment years 2008-09 to 2011-12. The perusal of said letter would reflect that the Assessing Officer having taken note of investigation made

into affairs of assessee group and suggestion of Addl.DIT(Inv) Unit-I, Pune vide para 10 of his letter to make reference to TPO, was of the view that case needs to be referred to TPO for the analysis of findings of transactions of the group companies with their AEs in UAE, Singapore and Mauritius. The said reference was based on the appraisal report of investigation wing, copy of which was also forwarded to the TPO. Vide paras 3 to 5, the Assessing Officer talks about investigation in the case, modus operandi and justification for reference to the TPO. In para 6, the Assessing Officer refers to the transaction of assessee with its AEs as shown in audit report in form No.3CEB. Undisputedly, the amount of transaction is what was reported in form No.3CEB filed by assessee and copy of the same has been forwarded to the TPO.

53. Further, on 28.09.2014 another reference was made to TPO for determination of arm's length price in the case of Sava group of cases. The contents of said letter are similar. However, in para 6, reference is made to international transactions of assessee company reported in audit report in form No.3CEB for assessment years 2012-13 and 2013-14 and assessment year 2007-08 and for Sava Medica Ltd. for assessment years 2012-13 and 2013-14. The said reference was made consequent to approval of CIT(C), Pune letter dated 17.09.2014. In all the investigations, the issue was taxability of global profits of Sava group.

54. Simultaneously, proceedings were also carried out in the hands of Shri Vinod Jadhav on the ground that he was the main person behind all foreign entities. Shri Vinod Jadhav has moved settlement application before the Settlement Commission, which was opposed by authorities below on the ground that unless profits of foreign entities were included in the settlement

application, the same cannot be said to be true and complete. In this regard, reference is made to para 4.1 of the order passed under section 245D(2)(c) of the Act passed in the case of Shri Vinod Jadhav, copy of which is placed at page 1333 of Paper Book and under rule 9 of Income-tax Settlement Commission (Procedure Rules), report of the Commissioner of Income-tax (Central). Vide para 3, it was alleged that application of applicant may be treated as invalid application as it did not contain a full and true disclosure of his income. The said report is placed at pages 1346 onwards of Paper Book with special reference to page 1348. Further, while passing order under section 245D(4), dated 27.08.2015 in the case of Shri Vinod Jadhav, the Settlement Commission vide para 8 refers to the arguments of CIT-DR on the issue of control, management and functioning of foreign entities and bringing to tax global profits of Sava group to be taxed in the hands of appellant (Vinod Jadhav). The contention of assessee was that all foreign entities were independent, corporate entities in complete legal compliance of concerned jurisdiction, as regards preparing accounts, filing reports, paying taxes as per applicable laws. It was further stressed that global pharma activities (e-pharmacy business) could not be done in India due to restrictions as explained in the settlement application. The Settlement Commission held that after considering the facts of case as well as arguments advanced on both sides, they were of considered view that on the basis of evidences presented before us, the profits of foreign entities belonging to Sava group cannot be brought to tax in the hands of applicant.

55. The Revenue authorities thus, had on one hand perused the taxability of global profits of Sava group in the hands of Shri Vinod Jadhav and had opposed the settlement petition filed by him on the ground that till he includes

the profits of foreign entities in the Settlement Application, the same was not true and complete. The said issue was decided by Settlement Commission vide its order dated 27.08.2015; but simultaneously the Revenue authorities also initiated proceedings in the case of assessee on the ground that the affairs of foreign companies have also to be looked in by the TPO, for which reference was made by the Assessing Officer, Incharge of assessee company vide two separate letters dated 16.12.2013 and 28.09.2014. It may be pointed out that the TPO has vide paras 18 and 18.7.7 stated that the entire business model was brainchild of Shri Vinod Jadhav. Further, in para 18.12 of TPO's order, it has been mentioned that entire operations were managed by assessee company; and also entire development of software and its maintenance and operations were managed and controlled by Shri Vinod Jadhav and employees of Sava Pvt. Ltd. This is the premise on which the TP proceedings were initiated, carried out and finalized in the case of assessee. The TPO in the final analysis has held that control and management of business is with the assessee company in Pune and hence, 97% of profits are to be taxed in its hands and he has also directed the Assessing Officer to tax balance 3% in the hands of assessee. The TPO has passed order under section 92CA(3) of the Act proposing an upward adjustment of ₹ 91,21,101/- in assessment year 2007-08 and in entirety, he has proposed the additions as under over the period of 153A proceedings:-

A.Y.	Date of filing of return u/s 139	Returned income as per draft order (in INR)	Gross Value of International transactions as in Form 3CEB (in INR)	TP adjustments made (in INR)	Other addition u/s 14A (in INR)	Total income assessed (in INR)
2007-08	30-10-2007	1,16,95,864/-	7,73,67,713/-	91,21,109/-	16,387/-	2,08,33,360/-
2008-09	30-09-2008	1,59,69,100/-	11,82,68,790/-	15,47,38,428/-	26,128/-	17,07,33,660/-
2009-10	15-10-2009	4,03,29,350/-	17,84,50,128/-	27,16,05,499/-	35,125/-	31,19,69,974/-
2010-11	15-10-2010	5,84,95,250/-	18,38,34,713/-	7,80,76,943/-	Nil	13,65,72,193/-
2011-12	29-11-2011	2,57,97,043/-	22,68,79,029/-	44,51,11,876/-	1,79,290/-	47,10,88,210/-
2012-13	26-08-2013	6,40,91,200/-	33,84,09,581/-	6,38,72,402/-	2,53,060/-	12,82,16,662/-
2013-14	30-11-2013	4,34,03,670/-	35,16,85,750/-	23,35,28,452/-	2,07,007/-	27,71,39,029/-

56. The order of TPO is dated 29.01.2016 i.e. after the findings of Settlement Commission vide order dated 27.08.2015. The TPO has held that entire business model is brainchild of Shri Vinod Jadhav, despite the findings of Settlement Commission that profits of foreign entities could not be taxed in the hands of Shri Vinod Jadhav. The TPO further goes on to hold that entire operations are managed by assessee company after holding that the business model is of brainchild of an individual Shri Vinod Jadhav. It may be mentioned herein itself that the DRP has not upheld the findings of TPO in this regard. The AE entities which were held to be sham / shell companies by the TPO has been reversed by DRP in para 10.3.4 vide order dated 31.12.2016, wherein it has been held that AE entities cannot be held as sham and they were genuine, legal entities. The DRP in line with this, attributes certain part of global profits to AE parties. Both the TPO and DRP have applied the Profit Split Method to benchmark the international transactions of global profits of assessee and the alleged group concerns. As mentioned earlier, the TPO had held that 97% of entire global profits were to be assessed in the hands of assessee, but the modalities adopted for application of Profit Split Method by DRP is modified, wherein the Panel says in the first step, calculate the global profits, then derive the routine profits of assessee company and exclude the same. Further, derive the routine profits of AE parties and spread them in particular manner. The residuary profits are derived and thus, residuary profits are then allocated to the assessee company with 69% of world profits to the assessee and 31% to AEs in the residuary profits. Consequently, 70% of world profits have been added in the hands of assessee. The Ld. AR has challenged the modality adopted by DRP while applying PSM method i.e. it has failed to consider any external comparables while adopting aforesaid modality in the hands of assessee. We shall deal with that aspect at the relevant time.

57. Before moving further, we may also refer to another proceeding initiated by Revenue authorities against one of the entities of group companies i.e. initiating of proceedings by International Taxation Assessing Officer. In the case of Anam Trading Pte Ltd., for assessment year 2011-12, reasons have been recorded for reopening the assessment under section 147 of the Act by the DCIT (International Taxation), Circle 2, Pune. The DCIT refers to search proceedings and the business carried on by several companies based in various countries and the income shown in the hands of Mauritius / UAE based companies, where the goods were dispatched to Singapore godown and also the findings of Revenue authorities that management and control of entire global business of group is situated wholly in India. Then reference was made to the proceedings before the TPO for various assessment years in the case of Anagha Pharma Pvt. Ltd. i.e. assessee and Sava Medica Ltd. The FAR analysis carried out by the TPO and the Profit Split Method applied by TPO and after splitting of combined profit, the adjustments made in the hands of assessee totalling ₹ 131.76 crores for assessment years 2007-08 to 2013-14 and also the computation of adjustment in the hands of Sava Medica Ltd. and further proceedings before the DRP, who had finally worked out the adjustment in the hands of Anagha Pharma Pvt. Ltd. for the combined years at ₹ 49.81 crores. The DCIT takes notes of observations of DRP with regard to AEs having no infrastructure and then holding that sales of Singapore entity were in effect the sale of Dubai entity only and services for all these sales were from India. Therefore, for benchmarking purpose, the transactions of Singapore entity were considered as transactions of Dubai entities. The DCIT in para 4 notes that the assessee which was the foreign company was carrying on its activities through Sava Healthcare Ltd. and the employees of group companies who were resident in India were using assets, intangibles and employees of

Sava Healthcare Ltd.; thus, it constitutes PE of assessee in India. Therefore, the profit attributable to PE is taxable income of foreign company in the hands of PE through Sava Healthcare Ltd. and its various employees. Referring to income as per Profit and Loss Account and assets held, both fixed and current, by AEs in Singapore, Dubai and Mauritius by different concerns in assessment years 2007-08 to 2013-14, the DCIT records reason to believe that income of Anam Trading Pte Ltd. attributable to its PE through Sava Healthcare Ltd. and employees of various group companies in India for assessment year 2011-12 was beyond the prescribed amount and had escaped assessment and notice under section 148 of the Act has been issued.

58. In such scenario and after hearing both the learned Authorized Representatives, we find that following issues need to be adjudicated in the case of assessee, which emanates from the issues raised:

<i>Sr. No.</i>	<i>Issues</i>
<i>i)</i>	<i>What is role of Assessing Officer before / while making reference to TPO. Is any hearing to be allowed to assessee under section 92CA(1) / 92C(3) of the Act?</i>
<i>ii)</i>	<i>Whether while benchmarking a reported transaction (in Form No.3CEB) can the TPO enlarge his scope and look at other connected international transactions, not referred to him?</i>
<i>iii)</i>	<i>Whether in above scenario, can TPO also decide the issue of control and management of other AEs in the hands of assessee and extent of world profits to be attributed to assessee?</i>
<i>iv)</i>	<i>Whether jurisdiction of TPO was to determine ALP of international transactions and not compute the income arising out of such international transactions and related income of world profits i.e. out of group concerns?</i>
<i>v)</i>	<i>Whether the said transaction of control and management was international transaction as envisaged under section 92B of the Act?</i>
<i>vi)</i>	<i>Whether the exercise carried on by TPO was beyond his jurisdiction of determination of ALP of international transaction in view of provisions of section 6(3) of the Act?</i>

59. In order to adjudicate the aforesaid issues raised, we need to look at the provisions of various sections under Chapter X. Chapter X deals with special provisions relating to avoidance of tax. Under section 92 of the Act, it is provided that any income arising from an international transaction shall be computed having regard to the arm's length price. Explanation thereunder provides that allowance for any expenses or interest arising from an international transaction shall also be determined having regard to arm's length price, so, section talks of income arising from an international transaction and its computation having regard to arm's length price of said transaction.

60. Under section 92A of the Act, associate enterprise is defined and there is no issue raised on this aspect in the present case and hence, we need not go into the details of various conditions laid down therein.

61. Section 92B of the Act defines international transaction to be a transaction between two or more associated enterprises, either or both of whom are non-resident. So, it is incumbent that one of the parties has to be non-resident for invoking provisions of section 92B of the Act. Then, it talks of various transactions which would be covered as international transactions.

62. Section 92BA of the Act talks of specified domestic transactions with which we are not concerned at present.

63. Coming to section 92C of the Act which provides steps to be taken for computation of arm's length price in relation to an international transaction. Sub-section (1) talks of various methods out of which any one method has to be applied as most appropriate method having regard to nature of transaction

or class of transactions, etc. Sub-section (2) lays down that most appropriate method shall be applied for determination of arm's length price in the manner as may be prescribed. Sub-section (3) lays down that where during the course of any proceedings for assessment of income, the Assessing Officer on the basis of material or information or documents in his possession, was of the opinion that either of conditions laid down in clauses (a) to (d) are not specified, then the Assessing Officer may proceed to determine arm's length price in relation to said international transaction in accordance with sub-sections (1) and (2) on the basis of material, information or documents available with him. The proviso thereunder lays down that an opportunity shall be given by the Assessing Officer by serving notice and called upon the assessee to show cause why arm's length price should not be so determined on the basis of material / information / documents in his possession. Under sub-section (4), where arm's length price is so determined by Assessing Officer, then he is to compute total income of assessee having regard to the same. This is the proceeding which has to be carried on by the Assessing Officer while determining arm's length price of international transaction. The said exercise of powers by Assessing Officer to determine arm's length price of international transaction takes place in cases having a certain value of international transaction, which is prescribed as per instructions of Revenue. Under section 92C(3) of the Act and proviso thereunder, the Assessing Officer who exercised the power of computing ALP of international transaction of an assessee has to give show cause notice to the assessee before determining ALP in his hands to the effect that why ALP should not be determined in his hands. So, the first step is for the Assessing Officer to give show cause notice to the assessee as to why transfer pricing proceedings should not be initiated in his case and thereafter, the Assessing Officer is to proceed to determine ALP of international

transaction and pass consequent order thereto. In other words, a safeguard is provided under the Act itself where the Assessing Officer exercises the power to determine ALP of international transactions in the given circumstances. The Revenue has time and again announced value of international transactions, wherein if the value of international transactions is less than threshold limits, then such power is exercised by Assessing Officer and in case it is above the threshold limit then power vests with the TPO to determine ALP of international transactions undertaken by assessee.

64. Such a provision is provided under section 92CA(1) of the Act. The said sub-section reads as under:-

"92CA. Reference to Transfer Pricing Officer. — (1) Where any person, being the assessee, has entered into an international transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction under section 92C to the Transfer Pricing Officer.

65. In other words, where the assessee had entered into an international transaction, in any previous year and if the Assessing Officer considers it necessary or expedient to do so, he may with the previous approval of Commissioner refer the computation of arm's length price in relation to international transaction under section 92CA of the Act, to the TPO. As referred in the paras above, under section 92 of the Act, what has to be determined is 'the income arising from an international transaction', which needs to be computed in the hands of assessee, having regard to arm's length price of international transaction undertaken by assessee. In other words, the Assessing Officer before making reference to TPO has to come to a finding that it is either necessary or expedient to make reference to the TPO for computation of ALP of international transactions undertaken by him. So, the

first step in this regard is that the Assessing Officer should come to a finding that some income arises from the international transaction undertaken by assessee, which needs to be benchmarked and its ALP needs to be determined.

66. The question which arises is how the Assessing Officer comes to know that there is an international transaction undertaken by assessee. The first and foremost is the audit report submitted by assessee in Form No.3CEB, which is self declaration made by assessee that it has entered into international transactions with its AE/s. Once such declaration is made, then the Assessing Officer has to come to a finding that the income arising from such an international transaction needs to be computed to find out whether it is at ALP by applying any one of the prescribed methods under section 92C(1) of the Act. This is the preliminary satisfaction of Assessing Officer.

67. The Courts have held that this satisfaction needs to be recorded by the Assessing Officer before making reference to TPO, who shall carry out detailed analysis of international transactions undertaken by assessee applying the most appropriate method and determine ALP of international transactions. It may be pointed out that role played by Assessing Officer while making reference to TPO is at variance to the role of TPO, who has to finally determine ALP of international transactions undertaken by assessee.

68. The case of Revenue before us is that there is no such requirement of satisfaction of Assessing Officer at the time of making reference to the TPO, since the TPO will show cause the assessee and carry out the procedure and apply the provisions of the Act in order to determine ALP of international

transactions. The Ld. DR in this regard has strongly relied on the ratio laid down by the Hon'ble Delhi High Court in Sony India (P.) Ltd. Vs. CBDT & Anr. (supra).

69. The first argument of assessee before us by way of grounds of appeal No.3.1 and 3.2 is that where the Assessing Officer has not fulfilled the conditions laid down in section 92C(3) of the Act i.e. it has not given any opportunity calling upon the assessee to show cause as to why ALP of transfer of profit passing should not be determined, then order passed by the TPO under section 92CA(3) of the Act cannot stand. The next plea raised by assessee by way of oral submission before us in relying on the ratio laid down by jurisdictional High Court in the case of Vodafone India Services Pvt. Ltd. (supra) is that such an opportunity of hearing to the assessee before making reference to TPO to benchmark ALP of international transactions, is also to be read into section 92CA(1) of the Act.

70. First, we will take up the plea of assessee with regard to non satisfaction of conditions laid down in section 92C(3) of the Act. We find no merit in the plea of Ld. AR in this regard as the said provisions of section 92C(3) and 92C(4) of the Act when read together have to be exercised, where the Assessing Officer is computing total income of assessee having regard to ALP of international transactions. As pointed out in the paras above, the Revenue authorities have fixed the threshold limits for cases to be monitored by the Assessing Officer and by TPO vis-à-vis determination of ALP and in case jurisdiction lies with the Assessing Officer to benchmark the same, then in such cases, as per proviso to section 92C(3) of the Act, it is incumbent upon the Assessing Officer to provide an opportunity by serving notice on the assessee

to show cause as to why ALP should not be so determined and thereafter, the Assessing Officer has to compute income of assessee having regard to ALP so determined. In the case of Vodafone India Services Pvt. Ltd. (supra), vide para 33 it has been held that when the Assessing Officer himself determines ALP in terms of section 92C(3) of the Act, then it is open to him to consider the issue of income arising and / or being effected or not before commencing proceedings under Chapter X or at the stage of passing of assessment order. In the present case, where the transfer pricing provisions have been carried out by TPO on reference made by Assessing Officer, we hold that provisions of section 92C(3) of the Act and proviso thereunder do not come into play.

71. Now, coming to alternate plea raised by assessee, we find that the said issue has been elaborately considered by the jurisdictional High Court in the case of Vodafone India Services Pvt. Ltd. (supra) and vide para 34, it has been held that where transactions are referred to TPO, it would be for the Assessing Officer to first determine the issue of any income arising and / or being effected or potentially arising on determination of ALP before referring the transactions to TPO when specifically contended by the petitioner / assessee. It was further elaborated *This is also indicated in Section 92CA(1) which requires an Assessing Officer to refer an International Transaction for determination to the TPO only if he considers it "necessary or expedient" to refer the matter to the TPO.* The exercise of finding out whether any income arises and / or is effected or potentially arises and / or effected by international transaction would certainly be a factor to determine whether or not it is necessary or expedient to refer the matter to the TPO. The Hon'ble High Court further held that in case no objection is raised by assessee to the applicability of Chapter X, then the prima facie view of Assessing Officer would be sufficient to make reference to

TPO. However, wherein objection is raised about the applicability of Chapter X by the assessee, then the requirement for taking a decision after taking on board the objection becomes necessary. The Hon'ble High Court further held that if this issue is considered at the very threshold by the Assessing Officer, it could save an elaborate exercise of determining the ALP, which may turn out to be entirely academic. The Hon'ble High Court thus, held that *it is for the above reason that grant of personal hearing before referring the matter to TPO has to be read into section 92CA(1) in cases where the very jurisdiction to tax under Chapter X is challenged by the assessee.*

72. The Ld. DR has placed reliance on the ratio laid down in Sony India (P.) Ltd. Vs. CBDT & Anr. (supra) and the Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (supra). The panel had placed reliance on the ratio laid down by the Hon'ble Gujarat High Court in Veer Gems Vs. ACIT & Anr. (2013) 351 ITR 35 (Guj). The Hon'ble Bombay High Court vide paras 35 and 36 have held that the decisions which were rendered in the context of section 92CA(4) of the Act as existing prior to 2007 cannot be applied, post-amendment of 2007, wherein section 92CA(4) of the Act was amended. Further, the Hon'ble High Court did not find favour with the decision in Veer Gems Vs. ACIT & Anr. (supra). The relevant findings read as under:-

"35. The revenue has relied upon various decisions to contend that no personal hearing is necessary before referring the matter to the TPO. The relevant cases are as under:

- (a) Sony India (P) Ltd. vs. CBDT 2007(288) ITR 512;*
- (b) Aztee Software & Technology Services Ltd. vs. ACIT 2007 (294)(AT) 32; and*
- (c) Veer Gems vs. ACIT 2013(351) ITR 35.*

*36. So far as the decisions at (a) and (b) are concerned they were rendered in the context of Section 92CA(4) as existing prior to 2007. The preamended Section 92CA(4) provided that the Assessing officer will determine the income **having regard to** the ALP arrived at by the TPO. The earlier (unamended) Section 92CA(4) reads as under:*

92CA (4) On receipt of the order under subsection (3), the Assessing Officer shall proceed to compute the total income of the assessee under subsection (4) of section 92C having regard to the arm's length price determined under subsection (3) by the Transfer Pricing Officer. (emphasis supplied)

This was similar to the power which the Assessing officer still enjoys when he determines the ALP himself in terms of Section 92C(4) as pointed out above. Thus at that time the Assessing officer was not bound to complete the assessment in compliance with the ALP determination of the TPO and it was open to the Assessing officer to consider the question of jurisdiction at the time of passing the draft assessment order. However with effect from 2007, Section 92CA(4) has undergone a change and the Assessing officer is bound to pass an order in conformity with the ALP determined by the TPO. Amended Section 92CA(4) reads as under:

92CA(4) On receipt of the order under subsection (3), the Assessing Officer shall proceed to compute the total income of the assessee under subsection (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer.
(emphasis supplied)

Therefore in the context of the preamendment law as then existing hearing on jurisdictional issues could take place after the order of the TPO which is not possible post amendment of 2007. In any case, the fact situation existing in this case of viz. a question of jurisdiction was not in issue in the above cases and therefore these two cases can have no application to the present case.”

73. The Hon'ble High Court in the case of Vodafone India Services Pvt. Ltd. (supra) concluded by holding as under:-

“40. In our view, once the AO gives hearing to the assessee before making a reference to TPO, the TPO would be bound by formation of opinion of AO that there was international transaction in the relevant year and that income arises or is affected by the international transaction and the TPO is bound to determine the ALP of the international transaction under consideration, since ultimately it is the duty and responsibility of AO to assess chargeable income of the assessee on the basis of the provisions . Hence, there would be sufficient compliance with the principles of natural justice, if AO gives an opportunity of hearing to the assessee. Normally when the assessee files his return along with a copy of the Accountant's report under Section 92E the applicability of Chapter X may be an admitted position. However we may add a caveat and that is: where the assessee objects to the jurisdiction under Chapter X being exercised then hearing is required to be given by the Assessing officer to the assessee to consider whether it is necessary and expedient to refer the matter to the TPO as otherwise this objection would never be considered, as pointed out above and as in fact has happened in this case. In such cases where the applicability of Chapter X to the facts of the assessee's case is objected to, a hearing should be given to consider the assessee's objection but not otherwise.”

74. The Hon'ble High Court did not find favour with the submissions of Revenue that reference of international transaction by the Assessing Officer to

TPO was a mere administrative act and the Assessing Officer has no discretion in the matter and the Assessing Officer hearing the assessee before making reference to the TPO would be an empty formality and a futile exercise. The Hon'ble High Court held that CBDT Circular regarding distribution of files depending on value of transaction could detract from the obligation of Assessing Officer to follow the principles of natural justice, which we have read into section 92CA(1) of the Act, because once the Assessing Officer refers transaction to TPO, the Assessing Officer will be bound to act in conformity with the order of TPO, as mandated by section 92CA(4) of the Act in all respects including jurisdictional issue as held by this Court in Vodafone India Service (P.) Ltd. Vs. Union of India (supra). The Hon'ble High court concluded by holding that there is no merit in the contention of Revenue that no hearing is required to be given to the assessee in respect of jurisdictional issue as there has to be consideration of petitioner's objection to the applicability of Chapter X. The Lordship was of the view that the same should atleast find place in the impugned draft assessment order. The failure on the part of Assessing Officer in not having examined the issue of income arising or not from an international transaction was an illegality. The Hon'ble High Court quoted from Mr. Nani Palkhiwala who in the concluding paragraph of his Preface to the eighth edition of his monumental work had observed as under:-

"The Law and Practice of Income Tax" observed:

"Every Government has a right to levy taxes. But no Government has the right, in the process of extracting tax, to cause misery and harassment to the taxpayer and the gnawing feeling that he is made the victim of palpable injustice"

75. The Hon'ble High Court took note of the fact that where both the Assessing Officer and TPO did not deal with preliminary objection raised by assessee, then it was natural for the assessee to feel harassed. The TPO does

not deal with petitioner's objection about applicability of Chapter X on the ground that it would be dealt in by the Assessing Officer. Thereafter, when the petitioner raises the same issue before the Assessing Officer, he does not deal with the same on the ground that he is bound to complete assessment in terms of ALP determined by TPO. In the facts of the case before the Hon'ble High Court, the assessee in Form No.3CEB audit report had reported a transaction of share investment and had pointed out that it was not an international transaction. This preliminary objection of petitioner was not dealt in by any of the authorities and an upward adjustment was made on account of ALP of international transaction. The matter in the case of Vodafone India Services Pvt. Ltd. (supra) was set aside to the file of DRP to decide preliminary issue as the proceedings were pending before the DRP.

76. The Hon'ble High Court of Delhi in Indorama Synthetics (India) Ltd. Vs. ACIT (supra) had also applied the ratio laid down by the Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (supra). In the facts of the case before the Hon'ble High Court, petitioner had entered into transaction of import of raw materials from Indorama Petrochem Ltd. The return of income was filed at nil after setting off brought forward losses. The case was picked up for scrutiny and during the course of assessment proceedings, voluminous information / details were submitted to the Assessing Officer. The said scrutiny proceedings had to be completed by Assessing Officer by 31.03.2013 but in case reference was made to the TPO, then time limit for completion of assessment was upto October, 2014. In the month of February, 2013, the Assessing Officer required the petitioner to explain as to why transfer pricing provisions should not be made applicable in respect of transaction of import of raw materials amounting to ₹ 196.48 crores from Indorama Petrochem Ltd.

The assessee in reply, pointed out that Indorama Petrochem Ltd. was not its AE as defined in section 92A of the Act and also confirmed that both the companies were separate companies and were managed by independent Board of Directors and do not have either direct or indirect control over each other's business. The petitioner states that thereafter nothing was heard from Assessing Officer but by a letter dated 31.03.2013, the Assessing Officer informed the petitioner that his case was referred to TPO for determination of ALP in relation to international transaction undertaken during the year. The case of petitioner before the Hon'ble High Court was that the above reference was illegal since in the year under question, it had not entered into any international transaction with its AEs and no reference of such transactions could have been made by Assessing Officer to TPO under section 92CA of the Act. The Hon'ble High Court decides the issue after referring to relevant provisions of Chapter X with special reference to section 92CA of the Act and vide paras 14 and 15 has held as under:-

"14. Section 92CA reveals that there are certain jurisdictional prerequisites for the making of a reference by the AO to the TPO. In the first place, the AO has to be satisfied that the Assessee has entered into an international transaction or a specified domestic transaction. Where, as in the present case, the Assessee raises a threshold objection that it has not entered into any international transaction within the meaning of Section 92B of the Act, it is imperative for the AO to deal with such an objection. If the AO decides to nevertheless make a reference, he has to record the reasons, even prima facie, why he considers it necessary and expedient to make such a reference to the TPO.

15. What is referred to the TPO is the determination of the ALP of the said international transaction or specified domestic transaction. Therefore, the satisfaction to be arrived at by the AO regarding the existence of the international transaction or specified domestic transaction, even prima facie, is a sine qua non for making the reference to the TPO. Where such an Accountant's report is submitted by the Assessee in Form 3CEB, then there should be no difficulty for the AO to form an opinion, even a prima facie one, that it is necessary and expedient to make a reference to the TPO on the question of the determination of the ALP of such international transaction involving the Assessee."

77. Vide para 16, the Hon'ble High Court referred to CBDT Instruction No.3/2003, which categorically states that in order to make reference to TPO,

the Assessing Officer has to satisfy himself that the assessee has entered into international transactions with its AEs, one of the sources from which the factual information can be gathered was Form No.3CEB filed with the return of income. It was further held that *where no such report in Form No.3CEB is filed by assessee what will be the basis for Assessing Officer to record that it is necessary and expedient to refer the question of determination of the ALP of such transaction to the TPO?* The Hon'ble High Court in this regard held that *Where the AO is of the view that a transaction reflected in the filed return partakes of the character of an international transaction, he will put the Assessee on notice of his proposal to make a reference to the TPO under Section 92CA(1) of the Act.* It was further noted by the Hon'ble High Court that *Before making a reference to the TPO, the AO has to seek approval of the Commissioner/Director as contemplated under the Act. Therefore, all transactions have to be explicitly mentioned in the letter of reference.* The Hon'ble High Court thus, concluded by holding that *The very nature of this exercise is such that the AO will first put the Assessee on notice of his proposing to make a reference to the TPO and seek information and clarification from the Assessee. If at this stage, the Assessee raises an objection as to the very jurisdiction of the AO to make the reference, then it will be incumbent on the AO to deal with such objection on merits.* The Hon'ble High Court concluded by holding as under:-

"17. While Section 92CA(1) does not itself talk about a hearing having to be given to the Assessee upon the latter raising an objection as to the jurisdiction of the AO to make a reference, such requirement appears to be implicit in the very nature of the procedure that is expected to be followed by the AO. As already noticed, the AO has to record that he considers it necessary and expedient to make a reference. The AO has to deal with the objections raised by the Assessee. It is only thereafter that the AO can come to the conclusion, even prime facie, that it is necessary and expedient to make the reference. This has to be done prior to making a reference."

78. The Hon'ble High Court in Indorama Synthetics (India) Ltd. Vs. ACIT (supra), judgment dated 25.07.2016 then referred to the ratio laid down in the case of Vodafone India Services Pvt. Ltd. (supra) and held that it concurred with the said issue. It further observed that it appears that CBDT had specifically accepted the legal position as explained by the Hon'ble High Court in the case of Vodafone India Services Pvt. Ltd. (supra) and has not gone by the decision of Hon'ble Gujarat High Court in Veer Gems Vs. ACIT & Anr. (supra). It was further observed that Instruction No.15/2015, dated 16.10.2015 issued by CBDT, which sets out, *inter-alia*, the procedure to be followed by Assessing Officer, has since been replaced by Instruction No.3/2016, dated 10.03.2016. The relevant para 3.4 of said Circular dated 10.03.2016 was reproduced, in which three situations are enlisted and it has been directed by CBDT that in the said three situations, the Assessing Officer must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. The Circular further lays down that in case no objection is raised, then the Assessing Officer should make reference to TPO; however, if an objection is raised as to the applicability of Chapter X, then the Assessing Officer must consider objection and pass speaking order so as to comply with the principles of natural justice and thereafter, make reference, if any, to the TPO.

79. Vide para 21, the Hon'ble High Court clearly holds that in the facts of present case, where the assessee had not filed accountants report under section 92E of the Act, and yet the Assessing Officer proceeded to determine ALP under section 92C(3) of the Act or refer the matter to TPO to determine ALP under section 92CA(1) of the Act. Referring to para 3.4 of CBDT Circular, it was held that the Assessing Officer must provide an opportunity of being

heard to the taxpayer before recording his satisfaction or otherwise. It was further held that the said Instruction No.3/2016, dated 10.03.2016 which replaces earlier Instruction No.15/2015, clarifies the correct legal position and cannot be construed as not applying to the facts on hand. The Hon'ble High Court thus, held that since it was a procedural aspect and was intended to benefit the assessee, it requires to be applied even in the present case, where a reference was earlier made by the Assessing Officer to TPO on 31.03.2013 and thereafter. Since the Assessing Officer had made reference to TPO without affording an opportunity of being heard to the petitioner, the said references were set aside and the Assessing Officer was directed to provide fresh opportunity of hearing to the assessee.

80. The Hon'ble High Court of Calcutta in latest decision in the case of PCM Strescon Overseas Ventures Ltd. Vs. DCIT (2017) 399 ITR 302 (Cal), judgment dated 11.08.2017 has decided similar jurisdictional issue as to whether the Assessing Officer should afford reasonable opportunity of hearing to the assessee concerned and thereafter, pass a speaking order. The assessee had two branch units at two countries apart from India and there was no business transaction between unit in India and second branch unit, therefore TP provisions in respect of so-called international transaction were not attracted. Show cause notice was issued to assessee by Assessing Officer that there was international transaction within meaning of section 92B of the Act between branch units and the unit in India. The assessee did file an objection to the same but no opportunity of hearing was afforded to petitioner. The Assessing Officer did not decide the jurisdictional fact as to whether the transaction requires the attention of TPO. The TPO started proceedings of transfer pricing and the assessee did participate. The proceedings before the DRP were

restrained by the Court referring to Circular dated 10.03.2016, which admittedly, came into force subsequent to the decision of Assessing Officer to refer the matter to TPO. It was held that transaction noted in clause 3.3 thereof, if involved, would give rise to jurisdictional requirement and it was incumbent upon the Assessing Officer to provide an opportunity of hearing to the assessee before recording his satisfaction or otherwise, he should pass a speaking order to comply with principles of natural justice. The Hon'ble High Court vide para 8 held that though the Circular was not invoked at the relevant point of time, the applicability of principles of natural justice and the requirement of Assessing Officer deciding on a jurisdictional fact cannot be denied. Section as it stood requires the Assessing Officer to take a decision on jurisdictional fact. Where the Assessing Officer did not afford any opportunity of hearing to the petitioner on the jurisdictional issue raised, then it ought not to have transferred the matter to TPO. It was held that Assessing Officer had acted in breach of principles of natural justice. The matter was set aside to the Assessing Officer to decide on the basis of show cause notice issued by him and reply given by assessee and in consonance with Circular of Department dated 10.03.2016.

81. The Mumbai Bench of Tribunal in Videocon Oil Ventures Ltd. Vs. DCIT (supra) while applying the principle laid down in the case of Vodafone India Services Pvt. Ltd. (supra) have held that where no opportunity of hearing has been given by Assessing Officer before making reference to TPO, then it is violation of jurisdictional issue, which could not be cured even with the consent of affected parties. It was further held that the case of violation of principles of natural justice constituted an irregularity and case of violation of jurisdictional issue makes the proceedings void. Support was taken from the judgment of

the Hon'ble Supreme Court in Deepak Agro Vs. State of Rajasthan & Ors. (2008) 7 SCC 748.

82. Now, let us come to the objections of Revenue to the pleading made by assessee. First point which is raised is against recording of satisfaction by Assessing Officer as envisaged under section 92C(3) of the Act before referring international transaction to TPO. It is pointed out by the Ld. DR in the written submission that such a opinion should be reached by Assessing Officer only when he is determining ALP himself and not when he is making reference to TPO. We agree with the contention of the Ld. DR in this regard. In the next para, the Ld. DR refers to the contentions raised by Ld. AR on without prejudice to the above that the Assessing Officer did not record satisfaction regarding profit shifting before referring the matter to TPO and in support, Counsel of assessee had relied on the decision in the case of Vodafone India Services Pvt. Ltd. (supra) along with other decisions. The case of Revenue here is that the Hon'ble High Court has laid down the ratio that before referring matter to the TPO, the Assessing Officer must give an opportunity of hearing to assessee, in case if an objection challenging jurisdiction is raised by assessee before the Assessing Officer. It is pointed out that, whereas in the present case, the issue raised is whether Assessing Officer is required to record satisfaction that too, a detailed one, demonstrating that there is shifting of profits, before referring the matter to TPO. It is argued by the Ld. DR in this regard that the said issue cannot be said to be covered by the ratio laid down in the case of Vodafone India Services Pvt. Ltd. (supra). Referring to provisions of section 92(1) of the Act and for the purpose of applying Chapter X, the Ld. DR argues that only requirement is there must be income arising from international transactions reported in Form No.3CEB and the Assessing Officer must be satisfied about

the same. Then, she raised the question for consideration, in given facts, is that in such situation, how would Assessing Officer know / be satisfied that there is an element of income arising from the reported international transactions. Referring to observations of Hon'ble High Court in different paras, it was reiterated by the Ld. DR that once a report in Form No.3CEB was filed by accountant reporting international transactions, there was no dispute that there was income arising from such an international transaction and therefore, applicability of Chapter X becomes an admitted position. It is mentioned that it is only by way of Caveat, the Hon'ble High Court gave decision as in para 10 that the requirement of giving hearing to the assessee by Assessing Officer to consider it whether it is necessary or expedient to refer the matter to TPO. It was stressed by her that in order to demand a hearing, an objection must be raised before the Assessing Officer during the course of assessment proceedings that international transaction reported in Form No.3CEB do not have element of income in them and as no such objection was raised and since it is not case of assessee that international transactions so reported were not with AEs, then it was not incumbent upon the Assessing Officer to provide an opportunity of hearing or to record detailed satisfaction. She stressed that where the income arose from international transactions reported by assessee in Form No.3CEB filed before the Assessing Officer, it would be enough to apply Chapter X and would certainly constitute prima facie reason, for the Assessing Officer to consider it necessary and expedient to refer the matter to TPO as held by the Hon'ble High Court in the case of Vodafone India Services Pvt. Ltd. (supra) in para 34 of its order (discussed above). It is further argued that once the assessee had itself accepted that there was income arising from international transactions reported by it, the Assessing Officer was under no

obligation to record a detailed satisfaction that there was profit shifting, etc. before referring the international transactions to TPO.

83. Before proceeding further, we may again refer to the letter of Assessing Officer dated 16.12.2013, under which reference was made to TPO. The said reference has been made pursuant to approval of CIT(C), Pune. The contents of said letter which have been reproduced by us in the paras hereinabove revealed two things. As per para 6, reference was made to transactions reported in audit report in Form No.3CEB. The Ld. DR has filed copies of Form No.3CEB filed by assessee year-wise. The perusal of said Form No.3CEB would reflect the transaction of sale of finished goods i.e. finished drugs formulation and method applied by assessee, TNMM method.

84. Now, coming to paras 3 to 5 of reference letter issued by Assessing Officer, wherein it is pointed out that transactions envisaged by Investigation Team were cross border transactions amongst various AEs of assessee group. The major business of group was supplying medicine to online pharmacies and customers of online pharmacies in different countries and particularly those in North America. It was explained that the assessee group was selling medicines and drugs from India to customers in various parts of world using the route of Singapore and Mauritius for the purpose of packing the products. All the sales to customers in various countries were shown to be made by UAE based companies and income was shown to be earned by them. The modus operandi was adopted not to pay taxes on the huge profits earned in its business. Further, such huge profits were repatriated by the promoter of assessee group Shri Vinod Jadhav in the guise of salaries, commission, etc. and he has claimed the same as exempt by claiming himself to be a non-

resident Indian. The perusal of said reference letter clearly reflects that the Assessing Officer who have come to a conclusion vis-à-vis reference to TPO on two aspects i.e. sale of medicines and drugs by the assessee group, which not only included the assessee but various other companies and the second transaction which was reported was the one declared by assessee in its audit report i.e. export trading of medicines on wholesale basis. In such scenario, where the reference is made not only on account of transactions reported in Form No.3CEB but another transaction which as per the Revenue Department needs to be benchmarked first, in the hands of Shri Vinod Jadhav and then in the hands of assessee was a distinct and separate set of transactions. The TPO has also analyzed the said transactions and held that control and management of business carried on by several companies was in India and hence, 97% of world profits were to be taxed in the hands of assessee. In such scenario, there is no merit in arguments of Ld. DR that the Assessing Officer has only made reference in respect of transactions which are already reported in Form No.3CEB. The facts clearly show that what the Assessing Officer has referred is not only the transactions declared in Form No.3CEB but the transactions which as per the Revenue authorities starting from Investigation Team and other Officers needs to be benchmarked in the hands of assessee i.e. on account of sale of medicines by Sava group and other AEs, which are independent entities duly registered in the respective countries as per the laws of said countries.

85. In such facts and circumstances, where the Assessing Officer came to a finding that second transaction needs to be benchmarked by the TPO, then before making reference to TPO, it was incumbent upon the Assessing Officer to show cause the assessee, whether it was necessary and expedient to refer

the matter to TPO, which the Assessing Officer has failed to do so. Though the Assessing Officer records reasons and even gets those reasons approved by CIT and clearly mentions the reasons for reference in the referral letter but fails to show cause the same to assessee. The said act of Assessing Officer is in contradiction to the provisions of section 92CA(1) of the Act. The copy of said reference letter was never given to the assessee either during the course of assessment proceedings / TP proceedings or DRP proceedings. The assessee has time and again objected to the exercise of powers by TPO alleging that no international transaction arises on the premise of benchmarking transaction of control and management of AE parties from India and that too, through assessee's hands, but the said objection has not been dealt with by TPO or DRP and an order under section 92CA(3) of the Act passed by TPO, which has been partially modified by DRP. After such an order has been passed, the Assessing Officer, as per amended provisions of section 92CA(4) of the Act is bound to act in conformity with the said adjustment made. This is the mandate of section 92CA(4) of the Act. Hence, the jurisdictional issue raised by assessee i.e. whether it is an international transaction or not has not been answered by any of the authorities and the TP proceedings have been completed against assessee in violation of mandate of section 92CA(1) of the Act.

86. Now, we will refer to strong reliance placed upon by the Ld. DR on series of decisions in support of its contention that mandate of section 92CA(1) of the Act is to make reference to TPO and there is no necessity to give any opportunity of hearing to the assessee before making such reference. We have in the paras hereinabove referred to the ratio laid down by jurisdictional High Court in the case of Vodafone India Services Pvt. Ltd. (supra), which is a

decision in Writ Petition filed by assessee and vide order dated 29.11.2013, the issue has been decided. It may be pointed out herein itself that while deciding the aforesaid issue, the Hon'ble Bombay High Court had met with objections of Respondent Revenue that in placing reliance upon the decision of Hon'ble Bombay High Court in Vodafone India Services Pvt. Ltd. Vs. Union of India (2013) 37 taxmann.com 250 (Bom), (Vodafone-2) order dated 06.09.2013. In the said decision, it was held that DRP and ITAT were entitled to set right any defect in the order of TPO as reflected in the draft assessment order including the question of lack of jurisdiction of TPO. Vide para 19, the submissions of Respondent-Revenue were noted and vide para 20, it was held that it was not possible to accept the contention of Revenue that situation in Vodafone India Services Pvt. Ltd. (supra), dated 29.11.2013 (Vodafone 2) case was similar to the present case. In the facts of Vodafone India Services Pvt. Ltd. (supra), dated 29.11.2013 (Vodafone 2), the TPO had *suo motu* exercised the jurisdiction to determine ALP in respect of two unreported international transactions and it was held that the TPO has jurisdiction to determine ALP of two unreported and un-referred transactions.

87. The Hon'ble High Court in the later decision in the case of Vodafone India Services Pvt. Ltd. (supra) observed that this Court though had relegated the petitioner to alternate remedy but with covenant that existence of alternate remedy by itself would not bar the Court from exercising its extraordinary jurisdiction, if the facts of case so warrant. Moreover, in Vodafone India Services Pvt. Ltd. (supra) (Vodafone 2), on facts it was found that petitioner had not challenged / objected to the jurisdiction of TPO at any time prior to filing the petition and on the contrary, it had participated in the proceedings before TPO without raising any objections. The Hon'ble High Court then takes note of

factual aspects of the case before them and notes that the petitioner had from the very outset objected to the jurisdiction of authorities to apply Chapter X on issue of shares at a premium by it to its holding company, which was evident from Form No.3CEB, where the accountant has specifically stated that the said transaction was not covered by Chapter X, as this issue of shares does not give rise or effect income. Further, even during TP proceedings while replying to the show cause notice, the assessee had in its reply protested to jurisdiction of TPO to apply Chapter X. Further, the Hon'ble High Court also referred to decision in Hindalco Industries Ltd. Vs. Addl.CIT (2012) 211 Taxman 315 (Bom) of the said Court itself to refuse to entertain Writ Petition on that ground that the petitioner had willingly participated in the proceedings before the TPO and hence, the Court refused to entertain the petition. In view of the same, the Hon'ble High Court held that none of the said decisions were applicable.

88. It has already been pointed out in the paras above that the Hon'ble High Court vide paras 34 and 35 of the judgment held that the decision in Sony India (P.) Ltd. Vs. CBDT & Anr. (supra) and Aztee Software & Technology Services Ltd. Vs. ACIT 2007 (294) (AT) 32 were under the pre-amended provisions of the Act and were not applicable to the cases which are covered by amended section 92CA(4) of the Act. The Hon'ble Gujarat High Court in Veer Gems Vs. ACIT & Anr. (supra) case had held that the Assessing Officer was bound to apply order of TPO only to the extent of determination of ALP and on all other issues arising under Chapter X, the Assessing Officer could independently decide all other questions while framing assessment. The said decision relied upon by Ld. DR shall not apply as the Division Bench of Court in Vodafone India Services Pvt. Ltd. (supra) (Vodafone 2) had disagreed with the above view of Hon'ble Gujarat High Court in Veer Gems Vs. ACIT & Anr. (supra). It

may be reiterated that in Vodafone India Services Pvt. Ltd. (supra) (Vodafone 2), the Court held that Assessing Officer could not deviate from the order of TPO on any issue including the jurisdictional issue that the transaction is or is not an international transaction. Taking note of the fact that in case the draft assessment order was objected to before the DRP, then in that event, in terms of section 144C(13) of the Act, the Assessing Officer was obliged to complete assessment without granting hearing to the assessee in accordance with directions of DRP. In para 37 of the judgment, the Hon'ble High Court concluded by holding that *Thus to our mind the hearing has to be given by the Assessing officer before making a reference to the TPO.*

89. Now, the Ld. DR has relied on the decision of Hindalco Industries Ltd. Vs. Addl.CIT (supra), but the same has been distinguished by later decision of the Hon'ble Bombay High Court in Vodafone India Services Pvt. Ltd. (supra).

90. The next reliance of the Ld. DR was on the decision of Hon'ble High Court of Calcutta in Price Water House Vs. CIT (2016) 76 taxmann.com 221 (Cal), where the basis of decision was reliance on Sony India (P.) Ltd. Vs. CBDT & Anr. (supra) and Veer Gems Vs. ACIT & Anr. (supra) and no cognizance of amended provisions of section 92CA(4) of the Act had been taken. We have already referred to later Division Bench decision of Hon'ble High Court of Calcutta in PCM Strescon Overseas Ventures Ltd. Vs. DCIT (supra), where judgment is dated 11.08.2017 and hence, the ratio in Price Water House Vs. CIT (supra) does not apply.

91. Further, in PMP Auto Components (P.) Ltd. Vs. DCIT (supra), reliance placed upon by the Ld. DR, where the assessee had reported international

transactions, the Tribunal held that there was no scope of allowing any opportunity to show cause. We agree with the said proposition but as pointed out in the paras hereinabove, the reported transaction in the hands of assessee in Form No.3CEB was the export trading of medicines and not world profits of various entities, of which the control and management was in India, as per finding of TPO.

92. The next reliance placed upon by the Ld. DR was on Techbooks International (P.) Ltd. Vs. ACIT (2014) 45 taxmann.com 528 (Delhi-Trib.), which vide its order dated 28.04.2014 had applied the decision of the Hon'ble Delhi High Court in Sony India (P.) Ltd. Vs. CBDT & Anr. (supra) and had held that at the time of making reference to TPO, the Assessing Officer was not required to record detailed satisfaction. However, we find that jurisdictional High Court in the case of Vodafone India Services Pvt. Ltd. (supra) had taken a contrary view, which was not referred or quoted before the Delhi Bench of Tribunal. Further, in the said decision, reliance was placed on the ratio laid down in Coca Cola Inc. Vs. ACIT (2009) 309 ITR 194 (P&H), which has been reversed by the Hon'ble Supreme Court in the said case itself and the same is taken note in the case of Vodafone India Services Pvt. Ltd. (supra).

93. Similar is the proposition laid down in the case of Louis Vuitton India Retail (P.) Ltd. Vs. DCIT (supra). The Tribunal in the said case had decided two issues ie. Reference to TPO and jurisdiction of TPO and whether Instruction No.3/2016, dated 10.03.2016 has prospective effect and the answer to the same was 'yes'. It was further decided that original jurisdiction of TPO is not confined to international transactions referred to him by Assessing Officer for determination of ALP and such jurisdiction was extendable to other

international transactions which come to his notice during the course of proceedings before him. We may here reiterate that the issue of giving show cause notice to the assessee by Assessing Officer before referring to TPO the matter for determination of ALP of international transactions stands covered by the dictate of jurisdictional High Court in the case of Vodafone India Services Pvt. Ltd. (supra). The decision in the case of Vodafone India Services Pvt. Ltd. (supra) is undoubtedly, in a Writ Petition, but vide the said decision, the Hon'ble High Court has laid down the principles to be applied during exercise of jurisdiction by Assessing Officer under section 92CA(1) of the Act. The principles are after taking into cognizance the pre-amended and post-amended provisions of section 92CA(4) of the Act. The Hon'ble High Court has taken note of earlier decisions of the said Court itself in Vodafone India Services Pvt. Ltd. (supra) (Vodafone 2) and of the Hon'ble High Court of Delhi on similar exercise of jurisdiction in Sony India (P.) Ltd. Vs. CBDT & Anr. (supra), which related to pre-amended era of section 92CA(1) of the Act. The Hon'ble High Court also has taken cognizance of submissions of Solicitor General that action of Assessing Officer in referring international transactions to TPO was mere administrative act, because as per CBDT Instruction No.3/2003, dated 20.05.2003, the Assessing Officer was to exercise powers under section 92C of the Act where the value of transaction was upto ₹ 5 crores (now revised to ₹ 15 crores) and the Assessing Officer is required to refer the transactions to TPO, where even the value of international transactions exceeds ₹ 5 crores (now exceeds to ₹ 15 crores). It was further argued that in view of above Circular, the Assessing Officer has no discretion in the matter and therefore, the Assessing Officer hearing the assessee before making reference to TPO would be an empty formality and futile exercise. The Hon'ble High Court vide para 44 noted this and vide para 45 holds as under:-

“45. We are unable to accept the above submission of the revenue. CBDT Circular regarding distribution of files depending on value of transaction cannot detract from the obligation of AO to follow the principles of natural justice, which we have read into Section 92(A)(1), because once AO refers the transaction to TPO, AO will be bound to act in conformity with the order of TPO, as mandated by Sec.92 CA(4), in all respects including jurisdictional issue as held by this Court in Vodafone II case.”

94. Vide para 46, it holds that there is no merit in the contention of Revenue that no hearing is required to be given to assessee in respect of jurisdictional issue. There has to be consideration of petitioner's objection to the applicability of Chapter X, the same should atleast have found place in the impugned draft assessment order. The failure on the part of Assessing Officer in not having examined the issue of income arising or not from an international transaction is an illegality.

95. In such background, we need to look at the facts of present case. The assessee becomes aware of TP proceedings on receiving show cause notice from the TPO. In the audit report in Form No.3CEB, the assessee had only reported one transaction of sale of finished goods to its AEs and had applied TNMM method to benchmark its transactions. The TPO admits that the assessee has made said declaration vide para 6 of his order and however, we do not find any separate benchmarking being done on this international transaction reported by assessee. The TPO was guided by the background of case i.e. various activities carried on by Shri Vinod Jadhav and the business of group being carried on through many companies in Mauritius, Dubai FTZ, where no direct taxes were levied. Vide para 3.4, it has observed that in fact the management and control of entire global business of group is situated wholly in India and that was the reason, search and seizure action under section 132 of the Act was carried out on the premises of assessee on 31.10.2012. Vide para 3.5 of TPO's order, then considering activities of

assessee and various other concerns, the TPO refers to the findings of Investigation Team in relation to functions performed by India based companies for the business carried out in India and shown to be carried in Mauritius / UAE and summarized the same under para 10 under different heads. Based on the said findings of Investigation Team, the summary of functional analysis of business transactions of various multi-locational enterprises belonging to assessee group was summarized which is available at pages 13 and 14 of TPO's order. Then, TPO refers to the transactions reported in Form No.3CEB and in para 14.2, it holds that **as the management and control of affairs of assessee group, found to have been situated wholly in India, correct profitability of transactions entered into by assessee could not be ascertained by using TNMM method.** Vide para 14.3, it was observed that it is therefore concluded that **TNMM method is not most appropriate method for benchmarking such complex transactions, which have been designed to escape legitimate taxation in India, which have been made with the sole intent of tax evasion.** In such scenario, the TPO vide para 15.1 was of the view that there was no better method than Profit Split Method to benchmark the transactions undertaken by the assessee and its AEs and profits earned by them, not only the transactions are complex, but its correct profitability in India cannot be ascertained by using TNMM method as the most appropriate method. He further holds that **It is therefore conclusively proved that the entire control and management of the affairs of the assessee group is wholly situated in India.** Then, he applies FAR analysis and lifts corporate veil and vide para 25.1, he holds that he has no doubt in his mind that day to day activities of the AE's in Mauritius and Dubai are operated from India and concludes by holding in para 25.2 that **the affairs of parent company i.e. Anagha Pharma Ltd. i.e. assessee and AE's in Mauritius and**

Dubai were therefore, need to be treated as wholly. All the brain and functions of the group is situated in India and only minuscule work of receiving and sending money is left with the AE's in UAE and Mauritius. He benchmarks by applying PSM method.

96. Before the DRP, the assessee challenged that the adjustment was made on account of imaginary transactions, which do not exist. In other words, both before the TPO and Assessing Officer, the assessee had challenged jurisdiction to compute adjustment on account of alleged international transactions which has not been addressed separately. However, adjustment has been made in the hands of assessee by TPO which has been modified by DRP, against which the assessee is in appeal.

97. The Ld. DR stressed that the ratio in the case of Vodafone India Services Pvt. Ltd. (supra) is not applicable as no such objection was raised by assessee during the course of TP proceedings or DRP proceedings or before the Assessing Officer. There is no merit in the stand of Revenue authorities in this regard, especially where the assessee has not declared any such international transactions in its audit report in Form No.3CEB. In the case of Indorama Synthetics (India) Ltd. Vs. ACIT (supra), no international transaction was reported in Form No.3CEB and where the Assessing Officer was of the view that transactions reflected in the filed return partakes the character of international transaction, the Hon'ble High Court held that the assessee be put to notice of his proposal to make reference to TPO. In this regard, reliance was placed on the decision of Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (supra), which has been referred in paras 19.1 to 19.7. Then, in para 20, the Hon'ble High Court held that this Court concurs with the view expressed by Hon'ble Bombay High Court in the case of Vodafone India

Services Pvt. Ltd. (supra) and it further goes on to refer to CBDT circular, which was issued on 10.03.2016 i.e. Instruction No.3/2016. The Hon'ble High Court dismissed the contention of Revenue that the said CBDT Instructions were prospective and held that since it was a procedural aspect and intended to benefit the assessee, hence would apply where the reference was made by the Assessing Officer to TPO on 31.03.2013 and thereafter. The decision was thus, given relying on the decision of Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (supra) and re-affirmed by CBDT Instruction No.3/2016. This was the dictate of Hon'ble High Court, undoubtedly, though in a Writ Petition.

98. Now, coming to the reliance of Ld. DR on ratio laid down by Delhi Bench of Tribunal in Louis Vuitton India Retail (P.) Ltd. Vs. DCIT (supra), wherein a contrary view has been taken and reliance was placed on the decision of Hon'ble High Court of Punjab & Haryana in Shri Vishnu Eatables (India) Ltd. Vs. DCIT (2016) 389 ITR 385 (P&H), wherein it was held that failure to supply satisfaction notice to assessee before making reference of international transaction to TPO was at the highest mere irregularity, which does not make reference made *void ab-initio*. It may also be pointed out that the decision in Hon'ble High Court of Punjab & Haryana was in a Writ Petition. The said proposition of Hon'ble High Court of Punjab & Haryana is contrary to the view expressed by the Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (supra), Hon'ble High Court of Delhi in Indorama Synthetics (India) Ltd. Vs. ACIT and by a latest decision dated 11.08.2017 by Hon'ble High Court of Calcutta in PCM Strescon Overseas Ventures Ltd. Vs. DCIT (supra).

99. Admittedly, the assessee before us has raised the issue vide grounds of appeal No.3.1 and 3.2 against jurisdiction taken by Assessing Officer and applied under section 92C(3) of the Act. The Ld. AR in rejoinder and also during oral hearing before us has stressed that it was not in his knowledge that the Assessing Officer had while making reference under section 92CA(1) of the Act, referred this issue of profit earned by assessee and other AE's for benchmarking to the TPO. He stressed that only during the course of hearing, the Ld. DR has filed reference letters dated 16.12.2013 and 28.09.2014 and it came to his knowledge that such a reference was made by Assessing Officer and it was not TPO, who on its own motion had taken up the case and hence, the issue raised by way of oral submissions against non satisfaction of conditions laid down under section 92CA(1) of the Act, in line with Rule 11 of Income Tax (Appellate Tribunal) Rules. Allowing the said plea of assessee, we hold that where the Assessing Officer while making reference of an independent to / and non existing international transactions (as alleged by Ld. AR) had to come to a finding that income arising from the said international transactions needs to be benchmarked, in order to determine its arm's length price and before such reference to the TPO, show cause notice should have been given to the assessee. In the absence of any such show cause notice being given to assessee, the same is irregularity (as held by the Hon'ble Bombay High Court) and the said irregularity cannot be made good by restoring back the same to the file of Assessing Officer as none of the authorities i.e. Assessing Officer or DRP thought it fit to address the issue raised by assessee and disregarded the same in limine. It is the case of violation of principles of natural justice and such an order passed in the hands of assessee cannot stand and the same is invalid and bad in law.

100. The assessee has also raised another issue that the exercise of powers by TPO suffers from infirmity as the alleged transaction which has been benchmarked by the TPO is not an international transaction but it is a transaction of status of assessee, which in any case, had to be exercised by Assessing Officer and not by TPO. The next aspect of the issue is whether the TPO had power to come to a finding that entire control and management of affairs of assessee group is wholly situated in India. Such a finding is recorded by the TPO at various places starting from show cause notice to final conclusion against assessee. The plea of Ld. AR is that the issue of deciding the control and management of affairs of assessee is a 'status of residence' to be decided in the hands of assessee and such decision of 'status of residence' is not in the realm of determining ALP of international transactions. This is the exercise to be carried out under section 6(3) of the Act, which is the domain of Assessing Officer to interpret and decide and it is beyond domain of TPO to venture into such a finding.

101. Section 6(3) of the Act at the relevant time read as under:-

- "6. For the purposes of this Act, -*
(1).....
(2).....
(3) A company is said to be resident in India in any previous year, if –
- (i) it is an Indian company; or*
 - (ii) during that year, the control and management of its affairs is situated wholly in India.*

102. There is an amendment to section 6(3) of the Act by Finance Act, 2015 w.e.f. 01.04.2016 and amended section 6(3) of the Act reads as under:-

- "6. For the purposes of this Act, -*
(1).....
(2).....
(3) A company is said to be resident in India in any previous year, if –

- (i) it is an Indian company; or
- (ii) its place of effective management, in that year, is in India

Explanation.— For the purposes of this clause "place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

103. In the pre-amended era i.e. the years which are under appeal before us, section 6(3) of the Act provided that a company is said to be resident in India in any previous year, if (a) it is an Indian company or (b) during that year, the control and management of its affairs is situated wholly in India. The terms used in the section are clear and unambiguous. A company can be said to be resident in India in any previous year where it is an Indian company; or where the control and management of affairs is wholly situated in India during the period. In order to establish whether control and management of affairs situated wholly in India, no powers under the Act have been bestowed on the TPO to decide the same, who operates within the realm of section 92CA of the Act. It is the Assessing Officer who has to come to a finding in this regard. It is settled proposition that powers entrusted on any authority by the Statute cannot be further delegated except as otherwise provided in the Statute. In other words, where under the provisions of the Act it is prescribed that a particular Officer is to exercise a power, then it has to be so exercised by him and no other person, unless the Statute so prescribes. In the present set of facts, the said exercise has not been carried out by the Assessing Officer, but if we go through the order of TPO, then such a finding has been given by TPO in various paras of TPO's order. The Assessing Officer was aware of whole background, which is clear from reference made by him to TPO and in such circumstances, he should have exercised his jurisdiction. He has failed to do so and on this ground also, the non exercise of jurisdiction by Assessing Officer makes the assessment order bad in law.

104. Now, coming to next aspect of provisions of section 6(3) of the Act, which have been amended by Finance Act, 2015 w.e.f. 01.04.2016. The said amendment changes the taxability on the basis of status of residence of an entity and cannot be said not to bring in new tax burden and hence, the same cannot be applied retrospectively. As per amended provisions, a company which is an Indian company or whose place of effective management in that year is India is said to be resident in India, in any previous year. In other words, for being subjected to charge of income tax in India, the definition of resident company has undergone change and such change is to be applied prospectively. We find no merit in the stand of Ld. DR that the contention of assessee that TPO had benchmarked the transaction of control and management is highly misleading, as the TPO had not benchmarked any transaction of control and management. In the written note, it is being reiterated that the TPO had only benchmarked the transactions referred by Assessing Officer under section 92CA(1) of the Act and what the TPO had done was in accordance with procedure laid down in the Act and had conducted FAR analysis, in which he had found control and management of affairs of assessee company was in India. The next issue raised is against contention of assessee that Chapter X becomes inapplicable to it as the TPO had no power to benchmark transactions of control and management was argued to be misplaced, as the TPO had not benchmarked any such transaction of control and management. The Ld. DR has placed reliance on the report of TPO/Assessing Officer in this regard, which is filed along with her written submissions.

105. The perusal of order of TPO clearly shows that after analysis of various documents gathered during the course of search and TP proceedings,

mentioned in para 18 and plenty of evidence gathered and analysing the replies in various statements recorded by Investigation Team, the TPO then calls for employee-wise details and observed that online pharmacy or the business model of assessee is highly dependent on the employees. Then, he looks at the employees cost of assessee and at bottom of page 73 holds that **It is therefore proved that entire control and management of affairs of assessee group is wholly situated in India.** Then, under para 20, he draws a comparative analysis of assets held by assessee and its AE's in Dubai and Mauritius in tabulated charts and compares non-current assets held by AE's with base of non-current assets of assessee in India and holds that the AE's do not have any asset base in Dubai and Mauritius to carry out activities of AE's located in these countries and all the activities were carried out by assessee in India. It is therefore, conclusively proved that entire control and management of affairs of assessee group was wholly situated in India. In para 21, he looks at role of DHL i.e. entity in Singapore and again comes to the same finding that the entire control and management of assessee group was wholly situated in India. Vide para 22, he acknowledged that the assessee have been stating that there is no proof that control and management of affairs of assessee were wholly in India. He concludes that **But, in view of the detailed discussion made above, it is held that the entire control and management of the affairs of the assessee group is wholly situated in India.** Then, he talks of lifting of corporate veil and vide para 25.1 that he has no doubt in his mind that day to day activities of the AE's in Mauritius and Dubai were operated from India and he concludes by holding that affairs of parent company and AE's in Mauritius and Dubai, therefore, needs to be treated as wholly. After that, vide para 26 onwards, he applies Profit Split Method.

106. Looking at the exercise carried out by the TPO from page to page, para to para, it is clear that he has come to a finding on the basis of different aspects that entire control and management of affairs of assessee group was wholly situated in India. Once he had to come to such a finding, then he holds that Profit Split Method was to be applied. So, we find no merit in the stand of Revenue and also written submissions filed by Ld. DR and the report of Assessing Officer in this regard that the TPO had not carried out any such exercise. The TPO in the present set of facts had carried out exercise of determining control and management of affairs of assessee group and had come to a finding that it was wholly situated in India. Such an exercise is outside the domain of TPO. Again, we may refer to provisions of section 92CA(1) of the Act, which mandates the TPO to determine ALP of international transactions undertaken by assessee and by applying one of the methods as the most appropriate method to determine whether any adjustment is warranted or not. The TPO in the present facts has first, carried out exercise to conclusively prove that entire control and management of the affairs of assessee group, was wholly situated in India and then in the end, he applies Profit Split Method, which also had not been applied as per rules, as no comparables had been picked up to benchmark the said international transactions. The exercise carried out by TPO in fact is the exercise which had to be undertaken by Assessing Officer in the first instance and after he had come to a finding of control and management of business being wholly situated in India during the previous years in question, then he had to proceed further. The Assessing Officer having failed to do so, action of TPO being beyond jurisdiction cast under section 92CA(1) of the Act cannot stand and hence, the entire exercise carried out by TPO in this regard is both invalid and bad in law.

107. In the present set of facts, where search action had been carried out against Shri Vinod Jadhav and appraisal report was prepared, which was also perused by the Assessing Officer and after its perusal, reference was made by Assessing Officer to TPO, then it cannot be said that Assessing Officer was not aware of transactions in question. It was his duty first, to come to a finding whether such transactions undertaken by assessee and other concerns were inter-linked and first, he should have determined whether the conditions of section 6(3) of the Act were fulfilled or not and then make reference, if needed. Hence, there is no merit in the whole exercise carried out by TPO and also in non exercise of jurisdiction by Assessing Officer, which affects the jurisdiction of Assessing Officer to make assessment. Even the DRP did not address this issue. In the present case, since the Assessing Officer has failed to apply the law correctly, we find no merit in the consequent orders passed against assessee and the same do not stand and are held to be bad in law. Thus, first issue raised by assessee is allowed.

108. Though, we have already quashed the proceedings in the case, but we may also address the second issue of powers of DRP and TPO raised vide grounds of appeal No.2.1 to 2.5. We have already in the paras hereinabove decided the issue of powers of TPO, which is raised by way of ground of appeal No.2.5. Now, we restrict our decision to the powers of DRP, which can be exercised while benchmarking ALP.

109. In order to understand this issue, we need to make reference to sub-sections (5) to (8) of section 144C of the Act. In order to adjudicate the issue raised in the present appeal, what we need to see is the specific provisions of section 144C(8) of the Act. It is provided thereunder that the Panel may confirm, reduce or enhance the variation proposed in draft order and it has no

power to set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of assessment order. In other words, the Panel while exercising its jurisdiction may confirm, reduce or enhance the variation. The question which arises is that while doing so, can the Panel, in this regard (a) benchmark new transaction than the one benchmarked by TPO and / or (b) benchmark altogether new transactions of alleged provision of services by assessee to AE entities, where no such transactions were reported in Form No.3CEB and no such transactions were benchmarked by TPO.

110. The Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (supra) has vide para 47 observed that proceeding before the DRP is continuation of assessment proceedings and only thereafter would a final appealable assessment order be passed. **The proceedings before DRP are not appellate proceedings but correcting mechanism in the nature of second look at the proposed assessment order by high functionaries of Revenue keeping in mind the interest of assessee.** In other words, the powers which have to be exercised by DRP are not as wide as the powers which can be exercised by CIT(A).

111. The Pune Bench of Tribunal in Vijay Arjundas Luthra Vs. DCIT (supra) while deciding exercise of enhancement carried out by CIT(A) had held as under:-

"15. We have heard the rival contentions and perused the record. The preliminary issue raised in the present appeal has been heard by us, wherein the assessee has challenged the exercise of enhancement carried out by the CIT(A). The assessee is aggrieved by the addition made by the CIT(A) under section 251 of the Act at Rs.1.05 crores. Before going into merits of enhancement made by the CIT(A) under section 251 of the Act, we may first look at the powers of the CIT(A) in this regard. The powers of CIT(A) are stipulated in section 251 of the Act and he has to function within those limitations while deciding any appeal; he cannot exceed his powers in making an addition on account of new source of income.

16. The Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC) has held that AAC is not competent to enhance assessment in appeal by discovering new source of income not mentioned in return or considered by the Assessing Officer in assessment. The Hon'ble Apex Court in the aforesaid case held as under:-

“8.....The only question is whether in enhancing the assessment for any year he can travel outside the record, that is to say, the return made by the assessee and the assessment order passed by the Income tax Officer with a view to finding out new sources of income, not disclosed in either. It is contended by the Commissioner of Income tax that the word " assessment " here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words " enhance the assessment " are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be overlooked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal.

9. The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years. In view of the provisions of sections 34 and 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended section 31 and specified the other intention in express words. The Income tax Act was amended several times in the last 37 years, but no amendment of section 31(3) was undertaken to nullify the rulings, to which we have referred. In view of this, we do not think that we should interpret section 31 differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible.”

17. The Hon'ble Apex Court thereafter in the case of Commissioner of Income Tax Vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC) has reaffirmed its view taken in the case of Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry (supra) and it was held as under:-

“As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income tax Officer with a view to find out new sources of income and the power of enhancement under section 31(3) of the Act is restricted to the sources of income which have been the subject matter of consideration by the Income tax Officer from the point of view of taxability. In this context " consideration " does not mean " incidental " or " collateral " examination of any matter by the Income tax Officer in the process of assessment. There must be something in the assessment order to show that the Income tax Officer applied his mind to the particular subject matter or the particular source

of income with a view to its taxability or to its non taxability and not to any incidental connection”.

18. *The law laid down by the Hon’ble Apex Court has been reiterated by the full Bench of the Hon’ble Delhi High Court in the case of Commissioner of Income Tax Vs. Sardari Lal & Co. (2001) 251 ITR 864 (Del)(SB). The Hon’ble Delhi High Court held:-*

“Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority”.

19. *The Pune Bench of Tribunal in M/s. Jaihind Engineers Vs. ITO in ITA No.791/PN/2016 relating to assessment year 2008-09 and in Shri Lalita G. Kale (Prop.) Vs. ITO in ITA No.792/PN/2016, relating to assessment year 2009-10, vide order dated 15.07.2016 held as under:-*

“13. The Tribunal in M/s. Vijay Builders Vs. The Income Tax Officer (supra) while deciding similar issue of the power of enhancement of the Commissioner of Income Tax (Appeals) had relied on the ratio laid down in the following decisions :

- i. CIT Vs. Shapoorji Pallonji Mistry 44 ITR 891 (SC).*
- ii. CIT Vs. Rai Bahadur Hardtroy Motilal Chamaria 66 ITR 443 (SC).*
- iii. CIT Vs. Sardarilal and Company 120 taxmann 295 (Delhi).*
- iv. CIT Vs. Union tyres 107 taxmann 447 (Delhi).*

14. *The Tribunal after considering the factual aspects of the case held as under :*

“14. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find during the course of assessment proceedings, on being questioned by the AO, the assessee vide letter dated 10-12-2010 had clarified that all the advances received and paid have already been properly recorded in the regularly maintained books of accounts. It was also brought to the notice of the AO that during the survey operation the partner Shri Prakash Sanklecha was upset and could not give proper answers due to tension. Relying on various decisions the assessee had argued before the AO that no addition is called for. The assessee had also produced the books of accounts before the AO to substantiate that all those figures are already recorded in the books of account. On the basis of the above the AO has not made any addition. From the copy of the audited accounts filed in the paper book we find the assessee has shown works expenses at Rs.75,42,955/- as per Schedule-M. The Schedule-M annexed to the audited accounts shows labour charges at Rs.14,38,060/-. Similarly, the assessee has also shown purchases to the tune of Rs.68,11,278/-. We therefore find merit in the submission of the Ld. Counsel for the assessee that the figures in the impounded document area already entered in the regular books of account and therefore no addition is called for. Accordingly, we hold that the order of the Ld.CIT(A) enhancing the income by Rs.25 lakhs is not proper.

14.1 Even otherwise also we are of the considered opinion that the Ld.CIT(A) was not justified in enhancing the income of the assessee by Rs.25 lakhs. The Hon'ble Supreme Court in the case of CIT Vs. Shapoorji Pallonji Mistry (Supra) has held that it would not be open to the AAC to introduce into assessment new sources, as his power of enhancement is restricted only to income which was subject matter of consideration for purposes of assessment. The Hon'ble Supreme Court in the case of Rai Bahadur Hardutroy Motilal Chamaria (Supra) has held that the power of enhancement of AAC is restricted to subject matter of assessment or sources of income which have been considered expressly or by clear implication by ITO from point of view of taxability of assessee. Therefore, AAC had no jurisdiction to assessee a source of income which had not been processed by ITO and which was not disclosed either in return filed by the assessee or in assessment order. We find that following the above decisions the Hon'ble Delhi High Court in the case of Sardarilal and Company (Supra) has held that whenever question of taxability of income from a new source of income is concerned which has not been considered by the AO, jurisdiction to deal with same in appropriate cases may be dealt with u/s.147/148 and section 263 if requisite conditions are satisfied. It is inconceivable that in presence of such specific provisions a similar power is available to the first appellate authority. The Hon'ble Delhi High Court in the case of Union Tyres (Supra) has also held similar view and held that it is not open to the appellate commissioner to introduce in assessment a new source of income and assessment has to be confined to those items of income which was subject matter of original assessment. The relevant observations of Hon'ble Delhi High Court at para Nos. 11 to 13 of the order reads as under :

"11. A question regarding powers of the first appellate authority came up for consideration before the Supreme Court recently in CIT v. Nirbheram Daluram [1977] 224 ITR 610/ 91 Taxman 181. Following their earlier decisions in Kanpur Coal Syndicate's case (supra) and Jute Corpn. of India Ltd.'s case (supra) though their Lordships reiterated that the appellate powers conferred on the Commissioner under section 251 could not be confined to the matter which had been considered by the ITO, as the Commissioner is vested with all the plenary powers which the ITO may have while making the assessment, but did not comment on the issue whether these wide powers also include the power to discover a new source of income. Therefore, the principle of law laid down in Shapoorji Pallonji Mistry's case (supra) and Rai Bahadur Hardutroy Motilal Chamaria's case (supra) still holds the field.

12. Thus, the principle emerging from the aforementioned pronouncements of the Supreme Court is, that the first appellate authority is invested with very wide powers under section 251(1)(a) and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessee make a grievance and ranges over the whole assessment to correct the Assessing Officer not only with regard to a matter raised by the assessee in appeal but also with regard to any other matter which has been considered by the Assessing Officer and determined in the course of assessment. However, there is a solitary but significant limitation to the power of revision, viz., that it is not open to the Commissioner to introduce in the assessment a new source of income and the assessment

has to be confined to those items of income which were the subject matter of original assessment.

13. Applying the above well-settled principles of law to the facts of the instant case, we are of the view that the Tribunal was justified in holding that in calling for a remand report on the aforementioned four points, the Commissioner had exceeded his jurisdiction. While computing the total business income of the assessee, the Assessing Officer had estimated the sales at an enhanced figure and had applied a higher rate of gross profit. Thus, the only matter dealt with by the Assessing Officer in the assessment order was the estimation of profits and gain of the business of the assessee. None of the aforementioned four points had any bearing on the question of estimation of either the sales or the gross profit rate. From the observations, extracted above, it is evident that the Commissioner had his doubts about the capacity of the assessee to raise finances for the purchase of goods and show a huge turnover in the very first year of his business. In other words, the enquiry ordered by the Commissioner was to satisfy himself about the source of investment by the assessee. It is axiomatic that failure to prove the sources of investment will result in addition in the hands of the assessee under a different provision of law and will not have much relevance in the estimation of sales and gross profit rate adopted by the Assessing Officer. In our opinion, any addition on account of unexplained investment would constitute a new source of income which was not the subject-matter of assessment before the Assessing Officer and, therefore, it was not open to the first appellate authority to direct the Assessing Officer to conduct enquiry on the said four points.

14. For the foregoing reasons, we answer the question in the affirmative, i.e., in favour of the assessee and against the revenue. No order as to costs.”

14.2 In view of the above decisions we hold that the Ld.CIT(A) has no power to enhance the income of the assessee by introducing a new source of income which had not been considered by the AO. Addition, if any, on that account can be made by taking recourse into provisions of section 147/148 and section 263. We accordingly hold that both factually as well as legally the Ld.CIT(A) is not justified in enhancing the income of the assessee by Rs.25 lakhs. We accordingly set aside the order of the CIT(A) on this issue and direct the AO to delete the addition.”

15. The issue before the Hon'ble Delhi High Court in CIT Vs. Union Tyres (supra) was also with regard to suppressed addition on account of source of investment and the Hon'ble High Court held that the said addition would be under a different provisions of law and would not have any reliance to estimating the sales and gross profit rate adopted by the Assessing Officer and was beyond the scope of the First Appellate Authority.....”

112. The Tribunal after looking at the facts of case has held that the CIT(A) cannot introduce new source of income and assessment had to be confined to those items of income which were subject matter of original assessment. The relevant findings of Tribunal read as under:-

“24. The CIT(A) has found new source of income i.e. total receipts found in the Dummy HO Cash Book at Rs.1.05 crores and has made the addition on that account. The CIT(A) in the present case has travelled beyond the sources of income which was the subject matter of consideration by the Assessing Officer, wherein the Assessing Officer after accepting the contract receipts had doubted the expenses claimed by the assessee and accordingly, applied the net profit rate to determine the income in the hands of assessee. The CIT(A) had first started enquiries in respect of payments made by the assessee which was the issue considered by the Assessing Officer while completing assessment under section 143(3) of the Act. Later, the CIT(A) has issued the show cause notice, wherein reference was made to receipts, which were accepted by the Assessing Officer and not disturbed. In the absence of any enquiry by the Assessing Officer regarding receipts recorded in the Dummy HO Cash Book, the same was outside the purview of enhancement scope of the CIT(A). In case any new source of income is to be added in the hands of assessee which was not considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases, is to be dealt with under section 147/148 of the Act and / or under section 263 of the Act, where requisite conditions are fulfilled. Such is the proposition laid down by the Hon'ble High Court of Delhi in CIT Vs. Sardari Lal & Co. (supra). Applying the said propositions and the dictate of the Hon'ble Supreme Court on the issue, we hold that it is not open to the CIT(A) to introduce in the assessment a new source of income and the assessment had to be confined to those items of income which were the subject matter of original assessment. Accordingly, we reverse the order of CIT(A) in this regard and delete the addition of Rs.1.05 crores. The grounds of appeal raised by the assessee are thus, allowed.”

113. The Ld. AR has placed reliance on the above said decision and has pointed out that where the TPO had erred in view that his benchmarking was for a different alleged transaction of control and management from India, then the DRP having powers parallel to that of TPO could not proceed to benchmark the alleged transactions of provision of services by assessee and also the second international transaction of supply of goods reported in Form No.3CEB, despite the fact that the same was not benchmarked by the TPO. He pointed out that DRP has no power to annul assessment and it has limited powers when compared with powers of CIT(A). So, where the CIT(A) could decide only those domains / issues in which the Assessing Officer has travelled, then the DRP in the present case has exceeded his jurisdiction.

114. Though, we have referred to the facts time and again, but what is material is the finding of TPO. In this case, wherein he has come to a finding

that control and management of the affairs of assessee group was wholly in India and then, he applies the Profit Split Method on world profits and hold that 97% of said profits are to be assessed in the hands of assessee. The assessee files objections before the DRP. It first challenges the order of TPO on the ground that no such international transaction exists and cannot be benchmarked. The DRP does not deal with the same. The next challenge was to the finding of TPO vis-à-vis control and management from India. The DRP while deciding the issue first, decides the issue of international transaction of supply of goods, which is reported in Form No.3CEB. It may again be pointed out that the TPO does not give any finding on this issue though the said transaction is reported in Form No.3CEB. But where the TPO has not exercised his jurisdiction, the DRP in exercise of his powers cannot benchmark new transaction though reported by assessee, in the hands of assessee. Further, the DRP benchmarks the second transaction in the hands of assessee and overturns the order of TPO and holds that AE's are not sham, but are legal entities and attributes part of global profits, first to the assessee and then another part to AE's and the residuary profits are divided amongst the assessee and AE's. In the result, 70% of world profits are added in the hands of assessee under guise of Profit Split Method. The rules in this regard are completely overlooked and no comparables are selected and on its own, allocation of profits is made by the DRP. The said exercise carried out by DRP is beyond its scope and is new line of adjustment, which is outside its jurisdiction. The DRP has also failed to consider the aspect that no such transaction was reported in Form No.3CEB by the assessee and has failed to address the issue raised by assessee. In this regard, we find no merit in the exercise of jurisdiction by the DRP. The Ld. DR has placed reliance on several case laws in this regard, explaining the powers of DRP, but those are

distinguishable on facts. Accordingly, we quash the findings of DRP and consequent order passed under section 143(3) of the Act. Both the jurisdictional issues are thus, decided in favour of assessee and assessment order passed in the case is held to be invalid and bad in law.

115. The facts and issues in ITA Nos.1063/PUN/2017 to 1068/PUN/2017 are similar to the facts and issues in ITA No.1062/PUN/2017 and our decision in ITA No.1062/PUN/2017 shall apply *mutatis mutandis* to ITA Nos.1063/PUN/2017 to 1068/PUN/2017.

116. In the result, all the appeals of assessee are allowed.

Order pronounced on this 27th day of June, 2019.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 27th June, 2019.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP-3 (WZ), Mumbai;
4. The CIT(TP&IT), Pune;
5. The DR 'B', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलिय अधिकरण ,पुणे / ITAT, Pune