आयकरअपीलीयअधिकरण ,'डी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, CHENNAI

श्रीधुव्वुरुआर. एलरेड्डी, न्यायिकसदस्यएवं, श्रीएसजयरामनलेखासदस्यसमक्

BEFORE SHRI DUVVURU RL REDDY, JUDICIAL MEMBER AND SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं/.I.T.A. No. 1040/Chny/2014 **निर्धारण वर्ष/Assessment Year : 2009-10**		
M/s. Siva Ventures Ltd., (Now Merged with M/s.Siva Industries & Holdings Ltd.) First Floor, Block-1, Beliciaa Towers, Door No.71/1, MRC Nagar Main Road,Raja Annamalaipuram Chennai – 600 028. **[PAN: AAACS 4460M]**	Vs.	The Asst. Commissioner of Income Tax, Company Circle- VI(3), Chennai.
आयकर अपील सं/.I.T.A. Nos. 1392, 1393, 1390, 391 & 1973/Chny/2016 **निर्धारणवर्ष/Assessment Years : 2007-08, 2008-09 & 2010-11**		
M/s. Siva Ventures Ltd., (Now Merged with M/s.Siva Industries & Holdings Ltd.) First Floor, Block-1, Beliciaa Towers, Door No.71/1, MRC Nagar Main Road,Raja Annamalaipuram Chennai – 600 028. **[PAN: AAACS 4460M]**	Vs.	The Asst. Commissioner of Income Tax, Company Circle- 6(2), Chennai.
आयकर अपील सं/.I.T.A. No. 1075/Chny/2014 **& CO No. 51/Chny/2014** **निर्धारण वर्ष/Assessment Year : 2009-10**		
The Deputy Commissioner of Income Tax, Company Circle- VI(3), Chennai.	Vs.	M/s. Siva Ventures Ltd., (Now Merged with M/s. Siva Industries & Holdings Ltd.) First Floor, Block-1, Beliciaa

		Towers, Door No.71/1, MRC Nagar Main Road,RajaAnnamalaipuram Chennai– 600 028. **[PAN:AAACS4460M]**
आयकर अपील सं/.I.T.A. No. 663/Chny/2015 **निर्धारण वर्ष/Assessment Year : 2010-11**		
The Deputy Commissioner of Income Tax, Company Circle- 6(3), Chennai.	Vs.	M/s. Siva Ventures Ltd., (Now Merged with M/s. Siva Industries & Holdings Ltd.) First Floor, Block-1, Beliciaa Towers, Door No.71/1, MRC Nagar Main Road,RajaAnnamalaipuram Chennai– 600 028. **[PAN:AAACS4460M]**
आयकर अपील सं/.I.T.A. Nos. 1417 & 1421/Chny/2016 **निर्धारण वर्ष/Assessment Year : 2008-09**		
The Deputy Commissioner of Income Tax, Company Circle- 6(2), Chennai.	Vs.	M/s. Siva Ventures Ltd., (Now Merged with M/s. Siva Industries & Holdings Ltd.) First Floor, Block-1, Beliciaa Towers, Door No.71/1, MRC Nagar Main Road,Raja Annamalaipuram Chennai– 600 028. **[PAN:AAACS4460M]**

(अपीलार्थी/Appellant) **(प्रत्यर्थी/Respondent)**

अपीलार्थीकीओरसे/Appellant by **:** None

प्रत्यर्थीकीओरसे/Respondent by **:** Shri. M. Srinivasa Rao, CIT

सुनवाईकीतारीख/Date of Hearing : 23.10.2019

घोषणाकीतारीख/Date of Pronouncement : 21.01.2020

आदेश/ O R D E R

PER BENCH:

The assessee filed these appeals in ITA Nos. 1973, 1392, 1393, 1390 & 1391/Chny/2016 against the Commissioner of Income Tax (Appeals)-15, Chennai in ITA Nos. 566, 565, 567, 375 & 381/CIT(A)-15/13-14 dated 03.03.2016, 16.02.2016, 16.02.2016, 09.02.2016, 11.02.2016 for the assessment years 2010-11, 2007-08, 2008-09, respectively. The Revenue filed appeal in ITA No. 663/2015 against the order of the DRP in F.No. DRP/CHE/26/14-15 dated 27.11.2014 for assessment year 2010-11 and ITA Nos. 1417 & 1421/Chny/2016 against the order of the Commissioner of Income Tax (Appeals)-15, Chennai in ITA Nos. 375 & 381/CIT(A)-15/13-14, dated 09.02.2016 for assessment year 2008-09, respectively. The assessee and the Revenue filed its Cross appeals in 1040/Chny/2014; ITA No. 1075/Chny/2014 & CO No. 51/Chny/2014 against the order of the DRP, Chennai in F.No. DIT/CHE/DRP/49/2013 dated 20.12.2013, for the assessment year 2009-10.

2. Some of these appeals are pending more than 5 years. The assessee filed an adjournment petition which is rejected and the appeals are taken for the hearing. Since, none was present for the assessee, we required the Ld. DR to present the cases and on the basis of the Ld. DR's submissions and the material available on the record, the above appeals are being disposed as under:

Grounds of appeal in ITA No.1392/2016 A Y 2007-08

1. The order passed by the Commissioner of Income-tax Appeals ["CIT(A)"j under section 250(6) of the Income-tax Act, 1961 (" the Act") confirming the order of the Assessing Officer ("AO") passed is not in accordance with law, contrary to the facts and circumstances of the present case and is in violation of principles of equity and natural justice.

2. Treatment of compensation as interest income

2.1 The learned CIT(A) and AO failed to appreciate that the real intent of the agreement entered by the appellant with Sahara India Commercial Corporation Limited ("SICCL") was to derive value by execution of larger project, which on completion would have reflected on the appellant's ability to complete mega project.

2.2 The learned CIT(A) and AO failed to appreciate the fact that the 400 crores advanced to SICCL has been disclosed as 'Advance for purchase of land' in the audited financial statements and not as loan.

2.3 The learned CIT(A) and AO failed to appreciate the relevant clauses, clause 13.4.2 and clause of the Facility agreement demonstrate the fact that the intent of the appellant was to enter into a development agreement.

2.4 The claim of the learned CIT(A) and AO that the appellant had intentionally entered into such agreements to treat the receipt of compensation as capital is factually incorrect and baseless.

2.5 The learned CIT(A) and AO have failed to appreciate that the appellant is not in the business of strategic investments in realty market and therefore the intention of advancing money to SICCL was with a view t6 acquire the land for development for business purpose and not to earn interest

2.6 The learned C1T(A) and AO have erred in not considering the fact that the nature of the compensation received was towards relinquishment of profit earning apparatus. Therefore, any amount received on extinction of source of income and profit earning apparatus, would partake the character of capital receipt.

2.7 The learned CIT(A) and AO have erred in concluding the nature of the receipt as revenue based on the fact that Tax Deducted under Source ("TDS") under section 194 of the Act, was deducted by SICCL. The learned CIT(A) and AO have failed to appreciate the fact that deduction of tax from payment under the Chapter- XVII of the Act, would not change the character of the receipt in the hands of the appellant.

3. Treatment of Interest earned as income from other sources

3..1 The learned CIT(A) and the AO have erred in treating the interest earned including proportionate compensation under the head income from other sources instead of treating the same as business income as claimed by the appellant.

3.2 The learned CIT(A) and AO have failed to appreciate the fact that the interest of Rs. 1.69 crores was earned from inter-corporate deposits made to Indus Cityscope Constructions Pvt. Ltd., ignoring the decisions of appellate authorities which held that interest should be treated as business income.

3.3 The learned CIT(A) and AO have erred in not considering the matching concept where in order to earn an income, certain amount of expenses need to be spent, thereby, erred in not allowing any expense against the income determined.

The appellant craves leave to add, substitute, amend, delete, or otherwise modify any of the grounds of appeal stated hereinabove before commencement of or at the time of hearing."

3. Since none represented the assesssee, we required the ld DR to present the case . The Ld DR invited our attention to the relevant portion of the order of the ld CIT(A) , and submitted that the assesseee , V S Net limited , subsequently merged with M/s Siva Industries and Holdings Limited ("SIHL" or "the appellant") is engaged in the business of Strategic Investments in the real estate space and having objective to invest in large projects both in commercial and residential space, filed its return of income for the Assessment year ("AY") 2007-08 on October 30, 2007 declaring a total income of Rs. 2,18,71,340 under normal computation and a total tax of Rs. 73,61,893. The assessee claimed a Tax deducted at source ("TDS") credit of Rs. 77,93,486 and accordingly claimed a refund of Rs. 4,31,593. A survey was conducted in the premises of the assessee on July 02, 2010. During the survey, original agreements relating to a financial transaction with ("SICCL") viz, Facility agreement dated December 29, 2006, Re-stated agreement dated February 15, 2007 and two correspondences dated April 06, 2007 and April 09, 2007, all entered in stamp papers were found and impounded. Consequent to the survey, the assessment was reopened by a notice under section 148 , dated August 30, 2010 . During the reassessment , the appellant pleaded that entered into an agreement with M/s. Sahara India Commercial Corporation

Limited ("SICCL") on December 29, 2006 to develop 196.97 acres of agriculture land situated at Chauma Village, Dist. Gurgaon, State of Haryana as residential and commercial projects. As per agreement, SICCL was to obtain approval for conversion of the above mentioned agricultural land into a non- agricultural land from a competent Governmental Authority within January 31, 2007, failing which, the amount advanced was to be treated as advance towards purchase of land and the facility agreement entered would be construed as agreement for the purchase of land. In order to secure the appellant's interest, the agreement was in the nature of facility agreement and the advance of Rs 400 crores was termed as Inter- corporate deposit. The appellant had disclosed the amount of Rs 400 crores as 'Advance for purchase of land' in its audited financial statements. SICCL could not get necessary approvals for conversion of the above lands from Agriculture to non- agricultural land for commercial use within the specified date, as mentioned in the facility agreement. Hence, a re-stated agreement was entered into on February 15, 2007, which was later formalized on a stamp paper dated April 2, 2007, to acquire rights in lands held by SICCL and its associate concerns. Subsequently, SICCL failed to honour the agreement entered into with the appellant and decided to enter into an agreement with a third party to sell the land that was agreed to be sold to the appellant. Post a prolonged discussion, SICCL agreed to compensate the appellant for loss of business opportunity due to failure to execute the project and settled at a compensation of Rs. 35 crores for breach via an agreement dated April 06, 2017. Pursuant to which, SICCL paid the compensation to the

appellant which is nothing but a capital receipt in the assessee's hand and hence it is not taxable . After seeking further details and information and after considering the assessee's reply etc, the A O held , inter alia, that the assessee (lender) had entered into an agreement dated 26.12.2006 with M/s Sahara India Commercial Corporation Ltd. as the borrower and 16 other parties as guarantors. The A O after going through the agreement has held , inter alia, that the assessee has not recognized any revenue on account of the agreement dated 29.12.2006 and treated Rs.35 crores as the capital receipt. Restated agreement dated 15.02.2007 was entered into in a stamp paper purchased on 02.04.2007 (purchased much after the so called re-stated agreement). The stamp vendor, Mr. K.Muniappan , Madurai, in his statement stated that though the impugned three stamps were sold by him but he could not remember to whom the stamp papers were sold. Further, he added that he had never sold stamp papers to 'Sahara India Commercial Corporation Ltd.', 'V.S.Net Ltd.' and the sales number of the stamps papers and the date of sale mentioned on the stamp papers are not written by him or his sons. M/s Sahara India Commercial Corporation Ltd. issued TDS certificate deducting tax u/s 194A treating it as an interest. Therefore, the A O taxed the proportionate interest of Rs.30,10,00,000/- as income of the assessee.

4. Before the ld CIT(A) , the assessee submitted that its intention was to derive value of a large project and M/s Sahara India Commercial Corporation Ltd. decided not to sell land to it and compensated it. It was submitted that the

compensation is not interest and it relied upon various case laws . The ld CIT(A) has called for a remand report from the AO and the AO reported inter alia that

" The facility agreement had been on 29.12.2006. Subsequently , a restated agreement was made on 15 Feb 2007 as an amendment which reflected a different type of arrangement by which M/s. SAHARA India Commercial Corporation Ltd is the seller and the assessee is the purchaser and developer of the land of 196.97 Acres. However, the assessee accepted the receipts of interest for Rs35 Crores as per the agreement made dated 29.12.2006 which was calculated on pro rata basis. But in connection with this interest income, the assessee claimed it as a capital receipt and hence it should not be treated as revenue receipt. On verification from the Restated Agreement dated 15 Feb 2007, it was observed that the stamp paper is issued on 02.04.2007. Hence a question arise as to how come the date of issuance of stamp paper is later than the date of agreement. Therefore it is a clear case of an afterthought of the assessee, by which the assessee sought to rearrange the date of agreement so to avoid tax treatment. The intention of the assessee is clear further from one more agreement made on 06.04.2007 , which is a cancellation to the previous agreement .Hence, the AC had taken a correct stand in considering the interest amount as revenue receipts for the A. Y. 2007-08. The assessee company filed an additional ground which is not accepted, as the restated agreement dated 15 Feb 2007 is found bogus. Therefore, it is a clear case of an afterthought of the assessee to avoid tax."

5. Considering the facts of the case, the assessee's submissions and on perusal of all the agreements and the AO's remand report, the ld CIT(A) held , inter alia, that the receipt of Rs.35 crores is nothing but interest on the money given to M/s Sahara India Commercial Corporation Ltd. Compensation received is not of capital nature especially in view of the fact that Rs.35 crores

was received on 09.04.2007 merely five days after such the so called agreement was entered into. It is pertinent to note that the principle amount of Rs.400 crores was received on 25.05.2007. M/s Sahara India Commercial Corporation Ltd itself had treated Rs.35 crores as interest only. Therefore, the ld CIT(A) confirmed the action of AO in taxing Rs.30,10,00,000/-.

6. With regard to the treatment of interest earned as income from other sources at Rs.1,69,88,132/-, the appellant has submitted before the ld CIT(A) that the learned AO has failed to appreciate the fact that the interest of Rs.1.69 crores was earned from the Inter Corporate Deposits made to Indus City Scapes Construction Pvt. Ltd. and he has erred in treating the interest earned including proportionate compensation under the head income from other sources against the business income as claimed by the appellant. The ld CIT(A) held that the learned AO observed that the appellant's income consists of rental income and interest income only. Therefore, the AO has correctly taxed Rs.1,69,88,132/- under the head 'Income from Other Sources' and thus dismissed the assessee's appeal.

7. Though, the assessee filed this appeal with the above grounds of appeal, the assessee has not assailed the findings recorded by the lower authorities with relevant material and hence the ld DR pleaded to dismiss the assessee's appeal .

8. We heard the submissions of the ld DR and gone through the relevant material. Since the assessee has not assailed the findings recorded by the lower authorities with relevant material, we dismiss the assessee's appeal .

Assessee's appeal in ITA No 1390/2016 of A Y 2008-09 & the Revenue's cross appeal in ITA No.1417/2016 :

9. The assessee had during the FY 2007-08 relevant to the AY 2008-08 , entered into international transactions with its Associated Enterprises ("AE") M/s Daleworld Limited, Cyprus by way of subscribing to the OFCDs issued by Daleworld Limited, Cyprus at the rate of 2 percent interest per annum and with an option to convert into equity shares within a period of 10 years. On a reference to the Transfer Pricing Officer ('TPO") , in an order made under section 92CA(3) in which the learned TPO adopted 6.31% (LIBOR of 4.41 percent plus 1.9 percent) as the arm's length price and directed an adjustment of 4.31% (6.31 percent minus 2 percent) at INR 1,48,48,492. Further, during the year the assessee had issued guarantees to financial institutions on behalf of wholly owned subsidiaries in the capacity as a shareholder. No commission was charged to the AE's on the Guarantee extended on behalf of AEs to the bank. The Learned TPO adopting 3.5% as the Arm's length price directed an adjustment of INR 40,96,82,652 towards guarantee commission to the appellant's income. Subsequently, the Learned

AO passed the assessment order dated January 25, 2012 under section 143(3) read with section 92CA (4) making the following disallowances / additions.

Disallowance of interest expense under section 14A at INR 9,34,74,475
Disallowance of consulting fee paid to bank under section 37at INR 13,70,90,436
Disallowance of escrow fee paid to bank under section 37 at INR 201,663
Transfer Pricing adjustment: INR 42,45,31,144 and thus a total additions of INR 65,52,97,718 was made in the assessee's case.
Aggrieved, the assessee filed an appeal before the CIT(A) . The ld CIT(A) partly allowed the appeal . Against that order, the assessee as well as Revenue filed appeals . Let us first take the assessee's appeal.

9.2 Since there was none present for the assesssee, we required the Ld DR to present the case. The ld DR taken us through the relevant portion of the order of the ld CIT(A) and on the issue of disallowance under section 14A, the ld DR submitted from the assessee's following submissions that

> "The Learned Commissioner of Income Tax (Appeals) ["CIT(A)"] directed the Learned AO to recalculate disallowance under section 14A after excluding the disallowance of an amount which is not directly attributable to any particular income or receipt. However, such an order giving effect to the CIT(A)'s order has not yet been passed.",

it appears that the AO has not given effect to the order of the ld CIT(A) , therefore the AO may be directed to comply with the order of the Ld CIT(A).

9.3 We heard the submissions and find merit in the submissions. The A O should have given effect to the order of the appellate authority as soon as he received the appeal order. However, if he has not done so, then the A O is directed to give effect to the order of the appellate authority immediately.

10. On the issues of the disallowances ; of consulting fee and escrow fee paid to bank , the ld DR invited our attention to the relevant portion of the order of the ld CIT(A), which is extracted as under

> " 5.5 Ground No.6 raised by the appellant is against disallowance of Rs.13,70,90,436 and Rs.2,01,663 paid as consultancy fees and Escrow fees paid to Standard Chartered Bank. The AO has disallowed consultancy fee of Rs.13,70,90,436/- paid to standard chartered bank since this expense pertains to Daleworld Ltd., a wholly owned subsidiary which is a separate legal entity. He disallowed Escrow fee of Rs.2,01,663/- which the appellant incurred on behalf of wholly owned subsidiary. The appellant has submitted that the above mentioned advisory fee was paid to Standard Chartered Bank ("SCB"). The fee was paid being a financial advisor to a transaction in connection 'With the acquisition of overseas subsidiary. The amount was paid to SCB as part of the scope of providing various advisory services to enable SVL to take decisions which are feasible, strategic and supplement to the value of investment made. It has claimed that the expenses were incurred solely for benefit of the appellant and not on behalf of the overseas subsidiary and that intention and motive of making such investment and ultimate benefit of such investment made by appellant is to be linked into.
>
> 5.5.1 I do not agree with the contention of the appellant as no details/proof has been furnished as to how such expenditure incurred on behalf of the overseas subsidiaries are expenditure incurred for its benefit which are not reimbursed by the subsidiaries. The action of AO in disallowing consultancy fee of Rs.13,70,90,436/- and Escrow fee of Rs.2,01,663/- paid to standard chartered bank is confirmed. This ground of appeal is dismissed.

> 5.6 Additional ground No.7 raised by the appellant is against adjustment of interest rate charged on OFCD Issued. This issue is already decided against the appellant in ground no.4. This appeal is dismissed."

and submitted that in the light of the above , the assessee's pleadings, that

> "The Learned CIT(A) disregarded the contention of the appellant as no details were furnished to substantiate as to how such expenditure incurred for the appellant's benefit and ruled against the appellant "

without specifically pointing out how and on which material , the ld CIT(A) findings are wrong etc, these grounds are vague and hence the ld DR submitted they may be dismissed.

11. We heard the submissions and find merit in the submissions. Since the assessee has not specifically pointing out how and on which material , the ld CIT(A) findings are wrong etc, we find that the assessee's corresponding grounds are vague and hence we dismiss them .

12. The assessee also filed an additional ground during the pendency of the proceedings before this tribunal pleading that it has inadvertently omitted to raise an alternate ground in the above appeal viz " on the facts and circumstances of the case and in law , the appellant prays that the AO be directed to allow the consultancy fee paid by the appellant as ' cost of acquisition' under section 48 read with section 55 of the Act". In this regard, it

was submitted that this plea being purely a legal ground which do not require investigation of additional facts , it may be admitted and decided on merits.

13. We have considered the assesseee's plea and admit the same. However, we find that the corresponding main ground itself is being dismissed for want of proof, in the absence of any material filed in support of the additional ground we dismiss the additional ground also.

14. On the Transfer pricing adjustment made in respect of investment in OFCDs issued by AEs, the ld DR invited our attention to the relevant portion of the order of the ld CIT(A), which is extracted as under :

> " 5.4 Ground No.5 raised by the appellant is against the action of the AO in holding that the transaction between the appellant and its associated enterprises were not at an arm's length price u/s 92F(ii) of the act. The AO has made upward adjustment of Rs.1,48,48,492/- as interest short charged by the appellant. The appellant has submitted that the learned AO and the TPO has erred in equating the OFCD with the loan and thereby, determining ALP Interest rate of 6.31 % @ LIBOR rate as applicable to loan granted to foreign subsidiary. The learned AO and the TPO has failed to appreciate the fact that the OFCD subscribed by SVL is in the nature of quasi equity investment into its wholly owned subsidiary and therefore, under no circumstances can be equated with the loan transaction. We humbly submit that the Appellant undertook an independent valuation of the OFCDs at the time of its issue to SVL. The same was provided before the TPO during the course of Transfer Pricing assessment. In the said valuation, the option to convert was valued using Cox Ross Rubinstein Model. The annualized return on the investment determined on the basis of such valuation, it can be established that the effective annualized yield on the investment is higher than the arm's length earning on a lending in foreign exchange. Further, details of various comparable companies coupon rate charged for the issuance of FCCBs were also provide during the course of assessment. These transactions available in the public domain are summarized in the following table:

Issuer	Date	Issued amount	Interest rate
Rolta India Ltd	22.07.2007	USD 150 million	Zero percent
Suzlon Energy Ltd	21.09.2007	USD 200 million	Zero percent
Firstsource Ltd	07.11.2007	USD 275 million	Zero percent
Sharon Bio-medicine Ltd	27.11.2007	USD 15 million	Zero percent

As against the above, SVL has charged an interest of 2 percent on the investment made in OFCD. Thus, it is apparent that the interest earned by SVL on the investment in OFCD issued by its overseas subsidiaries is at arm's length price. Since, investments in equity instruments would not require any earning of interest, a nil rate of interest charged on OFCDs will also be at arm's length. As against this, the assessee charged interest at 2 percent and accordingly, there should not be any further adjustment under section 92 of the Act.

5.4.1 The DRP in the aforesaid order has held that

"In all the international financial transactions, the rate of interest is to be considered at LIBOR rates and not at the rates at which the banks are lending / charging in India. Therefore, the assessee's claim of 6% interest is not adequate / comparable. Further, M/s. Avis Ventures Ltd., one of the AEs of the assessee, had also availed a loan from Standard Chartered Bank at LIBOR + 1.9%. When the AE is paying interest to unrelated party at LIBOR + 1.9%, there is no reason why the assessee cannot charge the same from the said AE. In fact, in the instant case, the LIBOR + 1.9%, being the interest paid by the AE to an outsider, forms an internal 'CUP' for the purpose of determining the ALPs of the interest incomes to be charged from the AEs on the loans advance/OFCOs subscribed. Hence, the TPO's action of determining the ALP of the interest chargeable on the loans given to the AEs and subscription to OFCOs by applying the LIBOR + 1.9%, is justified and needs no interference. The assessee fails in its objection in this regard."

Following the decision of the DRP in appellant's own case for AY 2010-11, the action of AO in reworking interest at LIBOR + 1.9% is confirmed. This ground of appeal is dismissed . "

Supporting the above order , the ld DR submitted that the assessee's plea that the Learned CIT(A) upheld the decision of the Hon'ble Dispute Resolution Panel ("DRP") for AY 2010-11 in the appellant's own case but ruled against the

appellant does not merit and hence prayed for the dismissal of the assessee's corresponding grounds.

15. We heard the above submissions and gone through the relevant material . Since the assessee has not specifically pointing out how and on which material , the ld CIT(A) findings are wrong etc, the assessee's corresponding grounds are dismissed .

Now let us consider the cross appeal filed the Revenue in ITA No.1417/2016 with following grounds:

" 1. The order of the Ld CIT(A), is contrary to the law and facts of the case.

2. Whether on the facts and circumstances of the case and in law, id. CIT(A) was right and justified in deleting the addition made by TPO towards Arms length price of 'Guarantee commission' in respect of guarantee offered by assessee free of cost to its AE?

3. Whether id. CIT(A) erred in deleting the addition holding it as not an international transaction ignoring the amendment to sec. 92B by way of Expl. (c) with retrospective effect?

4. Whether on the facts and circumstances of the case and in law, ld. CIT(A) was correct and justified in deleting the disallowance u/s 14A being expenditure incurred to earn exempt income while computing the profits u/s 115JB?

5. Whether ld. CIT(A) erred in deleting the addition to book profits overlooking Expl. 1(f) to sec. 11 5JB and the decision of ITAT, Bangalore bench in DCIT Vs M/s Sobha Developers 58 taxmann.com 107 (Bang), Dabur India Ltd. Vs ACIT (ITAT, Mum) 145 lTD 175 and CIT Vs Goetze (India) Ltd. (Del) 97 DTR 169?

6. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored on the above issues."

16. The ld DR assailed the order of Learned CIT(A) on the above lines and pleaded to allow the Revenue's appeal. Since none was present for the

assessee , we have gone through the relevant portion of the order of the ld CIT(A), which is extracted as under :

> " 5.3 Ground No.4 raised by the appellant is against addition of uncharged guarantee commission of Rs.42,45,31,144/-. The AO in the assessment order held that the learned JCIT, Transfer Pricing, after due consideration of the all issues raised by the assessee has considered adjustment to the tune of Rs.42,45,31,144/- to the value of international transactions. The amount of Rs.42,45,31,144/- is added to the income of the assessee company as adjustment u/s 92CA of the IT Act.
> 5:3.1 I have considered the findings given by the AO and written submission filed by the AR of the appellant. The AO has made an upward adjustment of Rs.40,96,82,652/- as uncharged guarantee commission fee @ 3.5% p.a. The appellant has submitted that guarantee to its overseas subsidiary is part of responsibility that the holding normally discharges to augment the value and operation of the subsidiary. It further submitted that Even the above fact is recognized by the Reserve Bank of India vide its circular issued on July 1, 2013 on Guarantees and Co-acceptances. The RBI has dwelled upon the necessity and requirement for the banks to seek guarantee to safeguard its interest. The RBI has also considered certain scenarios where the guarantees are helpful to sanction loan and financial assistance to the Company. On the issue of guarantee commission it has been stated that "The system of obtaining guarantees should not be used by the directors and other managerial personnel as a source of income from the company. Banks should obtain an undertaking from the borrowing company as well as the guarantors that no consideration whether by way of commission, brokerage fees or any other form, would be paid by the former or received by the latter, directly or indirectly. This requirement should be incorporated in the bank's terms and conditions for sanctioning of credit limits". Hence, it is indicative that the bank recommends obtaining guarantees from promoters of unlisted companies so as to ensure that there is continuity of management and change of management could only happen with the knowledge of the bank. Thus, issuance of corporate guarantee by SVL is a procedural compliance being the shareholder. Further, the issuance of guarantee by SVL as a holding company cannot be compared with the guarantee given by any third party. In view of the above arguments placed before your good self, we request to delete the guarantee commission @3.5% charged by the AO. Notwithstanding the above arguments that corporate guarantee given is not an international transaction, we hereby submit that the rate adopted by TPO is incorrect; As your good self would agree that the issue of guarantee commission being an international transaction and percentage of commission on such guarantee to be charged, has evolved very recently within last 3 years. It is by way of Finance Act 2012, clarified that guarantee commission is an international transaction within the meaning of Transfer Pricing provisions. Similarly, there is no clarity on the percentage on the commission to be charged since it is very fact specific. However, there are certain decision of Tribunal has emerged where these issues are dealt in detail and the Tribunal has given some indicator to determine the rate to be charged on guarantee commission. The Tribunal in

the following cases held that the TPO cannot adopt blanket rates from bank websites as they are not appropriate comparable's.

M/s Godrej Household Products Ltd. vs. ACIT and Glenmark Pharmaceuticals Ltd. vs. Additional CIT

Further, we would like to submit that the Hon'ble Dispute Resolution Panel in the appellant's own case for the AY 2009-10 has upheld a guarantee commission adjustment of 1%. We humbly request if your good self to take into consideration this significant development in the area of adjustments made to ALP on guarantee fee. The Tribunal judgements as cited hereabove have taken into consideration the complexities of the bank guarantee fee structure and have accordingly been more practical to the application of the ALP.

5.3.2 The appellant has further submitted that DRP, Chennai for AY 2010-11 dated 27.11.2014 in its own case has deleted upward adjustment regarding corporate guarantee. DRP in the aforesaid order has held as under:

"The issue of determining the ALP on corporate guarantee has already been examined by the jurisdictional bench of Chennai ITAT in the case of Redington India Ltd. v. JCIT (ITA No.513/Mds/2014). The Hon'ble ITAT has held that since there is no cost involved in extending the corporate guarantee, it will not constitute "an International transaction". The relevant 'portion of the order of the ITAT of Redington India Ltd. v. JCIT (ITA No.513/Mds/2014 dated 07.07.2014) are as under:

> 94. The ITAT, Delhi Bench, in the case of Bharti Airtel Ltd. us. Addl.CIT, 43 Taxmann.com 150, has held that providing of corporate guarantee does not involve any cost to the assessee and, therefore, it is not "an international transaction", even under the definition of the said term as amended by the Finance Act 2012. This is because, the guarantee provided by an assessee does not have any bearing on profits, income, loss or assets of the assessee.
>
> 95. In view of the nature of corporate and bank guarantees given by the assessee company and in the light of the above order of the ITAT, Delhi Bench, we hold that the TP addition made against corporate and bank guarantees is not sustainable in law. The addition is therefore deleted.

Respectfully following the decision of the jurisdictional ITAT in the case of Redington India Ltd v. JCIT (ITA No.513/Mds/2014 dated 07.07.2014), we are of the opinion that providing of corporate guarantee will not constitute an international transaction for the purpose of determining the ALP. Hence, the TPO's action of determining the ALP at Rs.24,75,78,358/- is not justified, and consequently the proposed upward adjustment of Rs. 24, 75,78,358/- is deleted."

Following the decision of the DRP in appellant's own case for AY 2010-11, the AO is directed to delete upward adjustment of Rs.40,96,82,652/-. This ground of appeal is allowed.

……
……
……
……..

5.7 Additional ground No.8 raised by the appellant is against computation of book profit u/s 115JB of the IT Act. The AO in his remand report has stated as under:

> *"In the view of the assessee, the assessing officer has erred in considering the disallowance made u/s. 14A r.w.r. 8D in MAT computation hence lowering the MAT credit. According to the assessee the disallowance u/s.14A r.w.r.8D is a notional one not debited to P&L Act. However the argument made by the assessee is not justified and hence not acceptable. By considering the line of thought of the assessee income derived by way of MAT Computation u/s. 115JB ought to be considered as also notional one. Hence the assessee also should have been objected the validity of MAT provision also. Further the assessee is fully aware that the amounts as expenditure incurred towards earning exempted income debited in P&L Acct only to be taken for addition during computation of MAT u/s. 115JB. Hence there is no voluntary disclosure of- interest expenditure incurred towards earning exempted income from assessee side. The provision like Sec.14A r.w.r. 8D is formulated to curb this practice and bring a proportionate disallowance to tax. Therefore, the addition of disallowances made u/s, 14A r.w.r. 8D in MAT computation by the Assessing officer is justified."*

5.7.1 The appellant has further submitted that disallowance under section 14A is added for the computation of book profit. Hence statement of Assessing officer that it was not added back for computation of book profit under section 115JB is wrong. Assessing officer contended that it was not added to the book profit and the computation is as per provisions of the Income tax Act. From the statement of the assessing officer it can be concluded that disallowance made under section 14A of the Act not to be added for the computation of book Profit.

5.7.2 The AO is directed to recompute book profit u/s 115JB after excluding disallowance u/s 14A. This ground of appeal is allowed. "

17. We heard the above submissions and gone through the relevant material . Since the issue of the ALP on corporate guarantee has already been examined by the jurisdictional bench of Chennai ITAT in the case of Redington India Ltd. v. JCIT (ITA No.513/Mds/2014) and applied by the DRP in the assessee's case itself , supra, and the ld CIT(A) applied it in the

assessee's case , supra, we do not find any reason to interfere with the order of the ld CIT(A) .

18. However, on the issue of disallowance u/s 14A r w r 8D, it is seen from the assessment order that the AO had added the quantum of disallowance made u/s 14A r w r 8D to the returned income and computed the total income under the normal or regular computation of total income. The A O has not determined the total income under section 115 JB. However, this issue was a subject matter before the Special Bench, ITAT, Delhi in the case of ACIT Vs. Vireet Investments Pvt. Ltd. in ITA No.502/Del/2012 . Para 6.22 of the special bench decision in the above is extracted as under:-

> *"6.22 In view of above discussion, we answer the question referred to us in favour of assessee by holding that the computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8d of the Income-tax Rules, 1962."*

19. From the above, it is clear that the Assessing Officer is not prohibited from making the disallowance U/s.14A. However, the Special Bench, supra, held that the Assessing Officer can make disallowance without resorting to explanation to clause (f) of Explanation 1 to section 115JB(2). Therefore, this issue is remitted back to the Assessing Officer for making appropriate disallowance U/s.14A r w s 115JB, if the total income has to be determined and to be assessed u/s 115JB . Therefore, this issue is remitted to the AO

for a fresh examination on the above lines. The corresponding grounds raised by the Revenue are treated as partly allowed for statistical purposes.

Assessee's appeal in ITA No.1391/2016 for A Y 2008-09 & the Revenue's cross appeal in ITA No. 1421/2016

20. For the Assessment Year ("AY") 2008-09, the assessee filed its return of income on September 29, 2008 declaring a total income of INR 146,63,29,522. On a reference to the Transfer Pricing Officer ('TPO"), the TPO found ,inter alia , that the assessee entered into international transactions with its Associated Enterprises ("AE") M/s Daleworld Limited, Cyprus by way of subscribing to the OFCDs issued by Daleworld Limited, Cyprus at the rate of 2 percent interest per annum and with an option to convert into equity shares within a period of 10 years. The learned TPO adopted 6.31% (LIBOR of 4.41 percent plus 1.9 percent) as the arm's length price and directed an adjustment of 4.31% (6.31 percent minus 2 percent) at INR 1,48,48,492. Further, the assessee had issued guarantees to financial institutions on behalf of wholly owned subsidiaries in the capacity as a shareholder. No commission was charged to the AE's on the Guarantee extended on behalf of AEs to the bank. Therefore, the Learned TPO adopting 3.5% as the Arm's length price directed an adjustment of INR 40,96,82,652 towards guarantee commission to the appellant's income. Subsequently, the Learned A O passed the assessment order dated January 25, 2012 under section 143(3) read with section

92CA(4) in which the following disallowances / additions were made in the assessee's case

> Disallowance of interest expense under section 14A at INR 9,34,74,475
>
> Disallowance of consulting fee paid to bank under section 37 at INR 13,70,90,436
>
> Disallowance of escrow fee paid to bank under section 37 at : INR 201,663 and
>
> Transfer Pricing adjustments of at INR 1,48,48,492 & INR 40,96,82,652 and penalty proceedings under section 271(1)(c) of the Act was initiated.

Subsequently, the A O after considering assessee's explanation and the material etc levied the penalty u/s 271(1)(c) by an order dt 26.6.2012 on all the aspects. Aggrieved, the assessee filed an appeal before the CIT(A) . The ld CIT(A) partly allowed the appeal . Against that order, the assessee as well as Revenue filed appeals . Let us first take the assessee's appeal.

21. It is seen from the appeal record that the assessee has pleaded that the Learned A O made a disallowances of consulting fee and escrow fee paid to Standard Chartered Bank ("SCB") amounting to INR 13,70,90,436 and INR 201,663, respectively under section 37 of the Act. These amounts were paid to SCB for being a financial advisory to a transaction in connection with acquisition of overseas subsidiary and also to the SCB as it has acted as an escrow agent for the acquisition of the shipping business. The escrow fee is paid to the escrow agent, in this case the SCB, to hold the assets until the transaction is finalized and then gives them to the appropriate party. The that

Learned AO disregarded all the submissions made to substantiate the commercial expediency of those expense and disallowed them said expenses and failed to appreciate that the appellant derived business advantage enabling it to take decisions which are feasible, strategic on account of advisory services provided by SCB in respect of the above claim of the appellant and passed an order confirming the levy of penalty under section 274. The Learned CIT(A) has also disregarded the contention of the appellant as no details were furnished to substantiate as to how such expenditure incurred for the appellant's benefit and ruled against the appellant. Therefore, the assessee filed this appeal.

22. Since none was present for the assessee , we required the ld DR to present the case . The ld DR took us through the order of Learned CIT(A) and supported that order, the relevant portion of the order of the ld CIT(A), which is extracted as under :

> " 5.1 All the grounds raised by the appellant are against levy of penalty u/s 271(1)(c) of the IT Act to the tune of Rs.19,64,65,267/-. The AO in the assessment order held that the undersigned satisfied himself in the final assessment order that this action of the assessee would amount to the concealment of particulars of income or furnishing of inaccurate particulars in terms of the provision of Sec.271(1)(c) of IT Act.
>
> 5.1.1 I have considered the submissions given by the AO and written submissions filed by the AR of the appellant. The AO has levied penalty of Rs.19,64,65,267/- on the following issues:
>
> 1. Corporate guarantee given by the assessee on behalf of the associated enterprises Rs. 40,96,82,652/-.
> 2. Interest on the OFCD- Rs.1,48,48,492/-
> 3. Advisory fee paid to Standard Chartered Bank, London on behalf of its subsidiaries Rs.13,70,90,436/-.
> 4. Escrow Fee charge paid to Standard Chartered Bank on behalf of its subsidiaries Rs.2,01,663/-.

5. Disallowance u/s.14A r.w.Rule 8D — Rs.9,30,60,979/-

In the order for appeal No.375, dated 09.02.2016, addition on account of corporate guarantee has been deleted and disallowance u/s 14A r.w.Rule 8D has been reduced. The AO has stated in penalty order as under:

"The Ld .JCIT (Transfer Pricing) found that the commercial substance in involving Date in the funding arrangement appears to be nil and its role redundant. Thus, in funding Avis Ventures, Norway through Date there appears to be a corporate veil masking the actual motive behind the arrangement. The assessee has charged 2% on these OFCDS. The assessee attempted to make a comparison with 3 cases where in FCCBs at zero percent interest rate was issued by third parties. The Ld. JCIT did not accept the comparison between the OFCDs and FCCBs and proposed an upward adjustment of Rs.1,48,48,492/- on the interest on the OFCD. It has to be noted despite many opportunities, the assessee was not able to prove before the Ld JCIT (Transfer Pricing) that this interest rate was its arm's length price. Therefore, explanation-7 of section 271(1)(c) of the Income Tax Act, 1971 is applicable on this adjustment."

Consultancy charges of Rs.13,70,90,436/- and Escrow fee of Rs.2,01,663/- paid to Standard Chartered Bank through its overseas subsidiary, Avis Ventures Ltd. for investment in Daleworld. This wholly owned subsidiary of the assessee, Daleworld Limited is a separate legal entity in its own right and the expenses of the subsidiary cannot be transported to the books of SVL as allowable expenses. Therefore, this expense not being a business expenditure of the assessee was disallowed and added to the income of the assessee. Neither during the assessment proceedings nor during the penalty proceedings, the assessee gave any explanation why these expenses were debited in its books. For this reason, the undersigned has satisfied in the assessment order that this act of assessee comes under the purview of explanation 1(B) to sec 271(1)(c) of the income Tax Act, 1961. Therefore penalty is levied on this addition. On perusal of the Escrow Agreement dated 24.12.2007, it was found that agreement was between J B Ugland Holdings AS (Norway), BB Shipping AS(Norway) and Daleworld Limited (A wholly owned subsidiary of SVL). These three parties have appointed M/S. Standard Chartered Bank, London as the Escrow Agent. (An Escrow Agent is a third party who agrees to hold fund or assets in Escrow. The escrow agent provides this service to two parties in a transaction until certain conditions are filled). The escrow agent holds the assets until the transaction is finalized and then gives them to the appropriate party. However, the second para of the above said agreement showed that the assessee, SVL was the purchaser of the shares of J B Ugland Holdings AS, (Norway) and BB shipping AS(Norway) not directly but through its wholly

owned subsidiary Daleworld Limited with registered office in Cyprus. The escrow agent was charging USD 5000 from all the three parties, namely Daleworld Limited, J B Ugland Holding AS and BB Shipping AS. The fees was not chargeable on the assessee but only on the wholly owned subsidiary Daleworld Limited, with its registered office in Cyprus. On the analysis of the Escrow agreement, it was found that the assessee had no role in paying the escrow fees to the escrow agent but it was incurring on behalf of its wholly owned Subsidiary. Even if the deal has materialized, then these companies, namely L B Ugland Holding AS and BB Shipping AS would have been reflected in the balance sheet of SVL as investments. However, it was found that there was no such investment reflected in the books of SVL. Further, the notice of release enclosed along with the escrow agreement clearly mentioned that the deposit amount and the interest thereon will go to the wholly owned subsidiary and not to the assessee. Therefore, this expense was disallowed and added to the income of the assessee. Neither during the assessment proceedings nor during the penalty procedings, the assessee gave any explanation why this expenses were debited in its books.

5.1.2 The appellant has submitted that the AO had initiated penalty only. on following disallowances:

1. Advisory fee of Rs.13,70,90,436/-
2. Escrow fee of Rs.2,01,663/-

It has submitted that addition/disallowances are made on a subjective interpretation and there was no concealment of facts or furnishing inaccurate particulars of income. It has relied upon the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts P. Ltd. 230 ITR 320. It has relied upon the decision of Hon'ble ITAT Chennai in its own case vide ITA No.120/Mds/2014 dated 21.03.2014 for AY 2007-08 wherein it is held that:

> *"We hold that even the estimated disallowance u/s 14A has been made only on the basis of particulars furnished and not otherwise. In these circumstances, we observe that present is a case of mere estimated addition made in view of the overall circumstances of the case and not based on the particulars of income, which does not warrant imposition of penalty. It is a trite proposition of low that each and every case of disallowance/addition based on the facts and circumstances does not lead to imposition of penalty."*

It has relied upon the decision of Hon'ble ITAT Ahmedabad in the case of M/s Cadilla Health Care Ltd. vide ITA No.2430/Ahd/2012 & Co.No.242/Ahd/2012 dated 11.10.2013 for A.Y 2008-09 wherein it is held that"

> *"Notional Interest can be added only if Optionally Fully Convertible loan was not converted into Equity within the prescribed time as specified in the Agreement. Since the OFCD was converted into Equity within the prescribed time there is no question of taxing notional interest."*

The appellant has submitted that the learned AO has disallowed the above expenses on the basis that it is not direct subsidiary of the company and levied penalty on the same. The very fact that the above amount is expended to SCB for the advisory services to acquire JB Ugland AS, through its wholly owned subsidiary Avis Ventures Limited (Mauritius) which has invested in Daleworld (Cyprus). The Hon'ble High Court of Delhi in the case of CIT v Mahanagar Telephone Nigam Ltd. has held that, a mere erroneous claim made by an assessee, though under a bonafide belief that, it was a claim which was maintenable in law, cannot lead to an imposition of penalty. The claim for deduction was made in a bonafide manner and the information with respect to the claims was provided in the return and documents appended thereto. Accordingly, there is no furnishing of "inaccurate particulars". Making of an incorrect claim for expenditure does not constitute furnishing of inaccurate particulars of income.

5.1.4 It has further relied upon the following judgements:

1. Industrial Development Bank of India Ltd. vs. Dy.CIT (2010) 42 SOT 325(Mum)
2. Union of India vs. Rajasthan Spg & Mills (224 CTR 1)
3. Ushdev International Ltd.(2011) 129 lTD 167 (Mum)

The appellant has never proved the business necessity of paying consultation fee and Escrow fee which would otherwise be paid not by it but by its subsidiary. The AO has given enough opportunity to the appellant to give evidence. The action of AO in levying penalty u/s 271(1)(c) on consultancy charges and Escrow fee is confirmed. The AO is directed to cancel the penalty levied on interest income and disallowance u/s 14A. This ground of appeal is partly allowed."

23. We have considered the above submissions and gone through the relevant material. Since the assessee has neither during the assessment proceedings nor during the penalty proceedings, explained as to why the impugned expenses were debited in its books not has substantiated or proved the business necessity of paying the impugned expenses , which would otherwise be paid by its subsidiary and not by the assessee , it is clear that the assessee's case clearly falls within the scope of Explanation 1 of section 271(1)(c) of the Act and hence we do not find any reason to interfere with the order of the ld CIT(A) and hence the corresponding grounds of the assessee fail.

Now let us consider the cross appeal filed the Revenue's appeal in ITA No. 1421/2016 with following grounds :

" 1. The order of the Ld CIT(A) is contrary to law and facts of the case.

1.1 The Ld CIT(A) has erred in directing the Assessing Officer to delete the penalty levied u/s 271 (1) (c) on interest income and disallowance u/s 14A .

1.2 The Ld CIT(A) has erred in not providing an iota of reasoning as to how the

levy is not attracted in respect of interest income and U/s 14A vide a speaking order.

G1.3 For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT (A) may be set aside and that of the Assessing Officer restored.

24. The ld DR assailed the order of learned CIT(A) on the above lines and pleaded to allow the Revenue's appeal. Since none was present for the assessee, we have gone through the relevant portion of the order of the ld CIT(A) , which is already extracted in para 22, supra , wherein the assessee's appeal was dealt with.

25. From the above , it is clear that the assessee has submitted that addition/disallowances are made on a subjective interpretation and there was no concealment of facts or furnishing inaccurate particulars of income and has relied upon the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts P. Ltd. 230 ITR 320. It has also relied upon the decision of Hon'ble ITAT Chennai in its own case vide ITA No.120/Mds/2014 dated 21.03.2014 for AY 2007-08 wherein it is held that:

"We hold that even the estimated disallowance u/s 14A has been made only on the basis of particulars furnished and not otherwise. In these circumstances, we observe that present is a case of mere estimated addition made in view of the overall circumstances of the case and not based on the particulars of income, which does not warrant imposition of penalty. It is a trite proposition of low that each and every case of disallowance/addition based on the facts and circumstances does not lead to imposition of penalty."

Further, it has relied upon the decision of Hon'ble ITAT Ahmedabad in the case of M/s Cadilla Health Care Ltd. vide ITA No.2430/Ahd/2012 & Co.No.242/Ahd/2012 dated 11.10.2013 for A.Y 2008-09 wherein it is held that"

"Notional Interest can be added only if Optionally Fully Convertible loan was not converted into Equity within the prescribed time as specified in the Agreement. Since the OFCD was converted into Equity within the prescribed time there is no question of taxing notional interest."

And further, the assessee has relied upon the following judgements :

1. Industrial Development Bank of India Ltd. vs. Dy.CIT (2010) 42 SOT 325(Mum)
2. Union of India vs. Rajasthan Spg & Mills (224 CTR 1)
3. Ushdev International Ltd.(2011) 129 lTD 167 (Mum).

After considering all of them, the ld CIT (A) directed the A O to cancel the penalty levied on the interest income and on the disallowance made u/s 14A. Therefore, we do not find merit in the submissions of the Revenue and hence dismiss the Revenue's appeal.

Assessee's appeal in ITA No.1040/Chny/2014 for the Ay 2009-10, Revenue's cross appeal in ITA No.1075/2014 A Y 2009-10 & Assessee's Cross Objections in CO No.51/2014

26. M/s Siva Ventures Limited , the assessee, is incorporated in India under Companies Act, 1956 as a venture capital infrastructure company with the aim of promoting strategic tie ups in emerging sectors such as telecom, shipping, reality, renewable energy, media and others both in India and abroad.

27. The assessee filed its original return of income on September 30, 2009 admitting a total income of Rs 76,53,79,690. Since the assessee had entered into international transactions, the Assessing Officer ("AO") referred the case to the Transfer Pricing Officer (TPO), who passed an order under section 92CA(3) of the Act on January 24, 2013. The AO further proceeded to complete the assessment and passed the impugned Draft Assessment Order on March 28, 2013 incorporating the adjustment suggested by the TPO and forwarded a copy to the assessee . The assessee filed its objections before the Dispute Resolution Panel and on receipt of the directions of the DRP the AO passed the assessment order . Aggrieved, the assessee filed this appeal with following grounds.

1. The assessment order passed by the AO under section 143(3) read with section 144C of the Income-tax Act, 1961 ("Act") is not in accordance with the law, contrary to the facts and circumstances of the present case and is in violation of principle of equity and natural justice.

Validity of the Assessment Proceedings

2. The AO erred in passing the assessment order in the name of a non-existent company and hence, the order passed by the learned AO is bad in law and liable to be quashed.

Disallowance under section 14A

3. The Honourable DRP/AO have erred in law and on facts by disallowing Rs 8,22,89,728 under section 14A of the Act read with Rule 8D of the Rules.

4. The Honourable DRP/AO have erred in law and on facts by applying the provisions of under section 14A of the Act read with Rule 8D of the Rules, without any satisfaction on record to prove that the claim of the appellant is incorrect.

5. The Honorable DRP/AO have erred in law and on facts by not considering the favorable decision of the Honorable Tribunal of Chennai in the appellant's own case for the AY 2006-07 on similar facts.
6. The Honorable DRP/AO have erred in law and on facts in failing to appreciate that the loans were utilised for making strategic investments into wholly owned subsidiary companies outside India, which was with the intention of harnessing long term benefit in the form of increase in business value and with the intention of earning income by way of interest and dividend income which are subject to tax in India, in respect of which section 14A of the Act ought not to apply.
7. The Honorable DRP/AO have erred in not appreciating that section 14A of the Act was not applicable because the expenditure incurred by the appellant does not have any nexus with the exempt income earned by the appellant.
8. The Honourable DRP/AO have erred in not appreciating the fact the appellant has utilized his own funds (i.e. internal accruals) for fresh investments made during the year.
9. The Honourable DRP/AO have erred in not appreciating the fact the appellant has proved that investments from which the dividend has been received during the year, have been made out of own funds (i.e. internal accruals).
10. The Honorable DRP/AO have failed to appreciate that during the relevant financial year the appellant had more interest income than interest expenses and hence, the provisions of section 14A of the Act ought not to apply.
11. The learned AC has erred in making the disallowance merely for the reason that the appellant had interest expenditure in its business without establishing any nexus between the expenditure and exempt income, and without establishing any proximate cause for disallowance under section 14A of the Act and merely on the basis of presumptions.
12. The Honourable DRP/AO have erred in law and on facts by making disallowance under section 14A of the Act without appreciating that the scope of disallowance under the said provision is limited to expenditure incurred 'in relation to' income which does not form part of total income under the Act.
13. The Honourable DRP/AO erred in law and on facts by relying upon Cheminvest Limited vs ITO (121 lTD 318), though they are on a completely different set of facts, clearly distinguishable and not applicable to the appellant's case.
14. The Honourable DRP/AO erred in law and has failed to appreciate that even if section 14A of the Act has to be applied, it cannot exceed the actual expenditure incurred by the appellant.
Transfer Pricing Adjustment
OFCD Interest:
15. The Honorable DRP has erred in law and on facts, in holding that the transactions between the appellant and its AE were not at arm's length and in upholding the adjustment of Rs 11,23,02,003 made to the interest income of the appellant.
16. The Honorable DRP, TPO and the AC erred in law and on facts in not considering the valuation report provided by a professional, which proves that the effective rate of interest annualized yield on the investment in OFCDs is higher than the arm's length rate of interest on a lending in foreign currency.
17. The Honorable DRP, TPO and the AC erred in law and on facts in not appreciating the fact that the investments in OFCDs are quasi-equity investments, since OFCDs have an inherent option to convert into equity shares and further, not appreciating the fact that part of the investments in OFCDs were actually converted into equity in the AY 2010-11.
18. The Honorable DRP, TPO and the AC erred in rejecting zero percent Fully and Compulsorily Convertible Bonds ("FCCBs) issued by third parties as Comparable

Uncontrolled Price ("CUP") transactions which were issued during the same period as the OFCDs and hence, the receipt of interest at the rate of 2 percent was at arm's length.

19. The Honorable DRP, TPO and the AC erred in law and on facts in not appreciating that the overseas subsidiaries have incurred loss and therefore, there is no question of shifting profits.

20. Without prejudice to the other grounds, the Honorable DRP, TPO and the AC erred in not considering the alternate plea of the appellant that at best the rate of interest earned on OFCD can be compared to LIBOR. The L(BCR for the year was 2.85 percent. Therefore, addition at best could have been to the extent of 0.85 percent, amounting to Rs 3,47,11,528.

Guarantee Commission:

21. The Honorable DRP, TPO and the AC have erred in law and on facts in making additions of Rs 14,51,19,700 as commission income on the guarantee extended by the appellant to its associated enterprises ("AEs"), under section 143(3) of the Act read with section with 92CA(3) of the Act.

22. The Honorable DRP, TPC and the AC have erred in law and on facts in holding that the provisions of section 92 of the Act would be applicable to the transaction of extending guarantee by the appellant to its AE.

23. The Honorable DRP, TPO and the AC failed to take cognizance to that fact that the assessee company is a hundred percent shareholder of the subsidiary company and thus the nature of guarantee is an implicit guarantee, required to be given by a shareholder or director as evident from excerpts from the Master Circular on Guarantees and Co-acceptances issued in July, 2009 by the Reserve Bank of India.

24. The Honorable DRP, TPO and the AC have erred in appreciating the fact that the corporate guarantee provided by the appellant has no current or future liability crystallizing and the appellant being a holding company is fully insured against all risk of default by the subsidiary AE.

25. The Honorable DRP, TPC and the AC have erred in not considering the rate of 0.25 percent adopted as guarantee commission rate by a bank in India in respect of guarantee issued in foreign currency to a Non-resident beneficiary as CUP for determining the Arm's length price on the guarantee extended by the appellant for its wholly owned subsidiaries.

26. The learned AO/TPO has erred in charging the guarantee commission on the opening balance of guarantee.

27. The learned AC has erred in not giving the TDS credit of Rs 1,96,79,460 while computing the tax payable.

28. The earned AC has erred in not giving the MAT credit of Rs.26,35,58,884 while computing the tax payable.

29. The Learned AC has erred in wrongly adding an additional tax amount of Rs. 1,51,00,445 without any basis.

Interest under section 234B

30. The learned AC has erred in computing the interest under section 234B.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds, at any time before or at the time of hearing of the appeal Each of the above grounds is independent and without prejudice to the other grounds preferred by the Appellant."

Revenue's Ground of appeal in ITA No.1075/2014 A Y 2009-10

1. The order of the Id. DRP is contrary to law and facts of the case.
2.1 The Ld. DRP erred in directing the Transfer Pricing Officer (TPO) to adopt 1% as guarantee commission rate instead of 3.5% adopted by TPO.
2.2 The Id. DRP erred in directing the Transfer Pricing Officer to verify the domestic transactions in the case of guarantee offered by IDBI bank Ltd charging 1 % guarantee commission to M/s S Tel P. Ltd for the F.Y. 2008-09.
2.3 The Id. DRP ought to have noted that domestic transactions cannot be taken as benchmark for determining ALP for international transactions.
2.4 The Id. DRP failed to consider that the transaction involves additional risk in the form of forex transaction, different credit rating of the guarantor, guarantee etc.
3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the DRP & AO may be set aside and that of the TPO restored.

Assessee's Cross Objections in CO No.51/2014

28. Based on the facts and circumstances of the case, M/s Siva Industries and Holdings Limited (hereinafter referred to as "the Respondent"), respectfully submits that:

" 1. The appeal filed by the learned DCIT is not maintainable and it is against the provisions of section 253(2A) of the Income-tax Act, 1961.
2. The learned TPO has erred in not providing any basis for arriving at 3.5 percentage as arm's length price commission for issuing corporate guarantee for the subject AY 2009-10.
3. The learned TPO erred in not appreciating the fact that the learned TPO himself applied the rate of 2 percent as guarantee commission on the same guarantee transaction in the subsequent AY 2010-11.
The Respondent craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal.

29. Since none was present for the assessee, the Ld DR submitted that the Revenue's appeal is with a delay of 7 days and pleaded to condone the delay. After considering the reasons advanced, we condone the delay. We required the ld DR to present the case. The ld DR submitted on the issue of

disallowance of interest on loan under section 14A r w r 8D that the AO has disallowed the interest on loans, Rs 1,28,93,207 u/s 14A rwr Rule 8D(i), Rs 6,93,96,521 u/s rwr 8D(iii), being 0.5 percent of the average value of investments and thus Rs.8,22,89,728/- has been disallowed by the AO , which were utilized for making advances to subsidiaries and for other business considerations. Total interest expense of the assessee for the year under consideration was Rs 87,08,84,055. Out of the total interest, interest amounting to Rs 1,99,845 was already disallowed by the assessee while computing the total income for the purpose of Income-tax. The assessee has submitted that during the year it had earned dividend income of Rs 2.70 crores from Mutual Funds and the investments in Mutual funds were made out of internal accruals and not out of borrowed funds etc . After examining and considering assessee's submissions and the observations of the AO, the DRP held , inter alia, that the A O however, found that the entire interest of Rs.28 crores relates to loan amount borrowed and squared up during the period under consideration. The assessee , therefore, needed to establish through a cash now statement the utilization of these borrowings during the year. Since this has not been done, the claim of the assessee that interest payments are not for mutual fund investment cannot be accepted. Even if the assessee's claim that the loans were utilised for making strategic investment for wholly owned subsidiary companies outside India is accepted, the fact remains in such a case also, the investment is for earning exempt income by way of dividends

and therefore, section 14A would come into play etc and decided the issue against the assessee . Aggrieved against it , the assessee filed this appeal with the above grounds. The Ld DR supported the order of the DRP.

30. We heard the above submissions and gone through the relevant material . Since the assessee has not specifically pointing out how and on which material , the findings of the DRP are wrong etc , the corresponding grounds of the assessee are dismissed. However, following the decision of the Delhi High Court in the case of Joint Investments Pvt. Ltd. (372 ITR 694) , we direct the Assessing Officer to restrict the disallowance made under section 14A to the extent of dividend income earned by the assessee. In the result, the assessee's appeal is partly allowed in this regard.

31. On the issue of the transfer pricing adjustment in respect of the investment in OFCD , the ld DR submitted that during the year, SVL had invested in the OFCDs issued by its subsidiaries aggregating to Rs 339,64,09,879. The TPO treated the investment as loans and accordingly benchmarked the transactions. TPO has made an adjustment of Rs 11,23,02,003 at the rate of 2.75 percent, which is over and above the interest already charged by SVL at the rate of 2 percent. The TPO has compared the rate of 2 percent with the rate of LIBOR plus spread of 1.9 percent (2.85 + 1.9). The rate of 4.75 percent was used to benchmark loan transactions by the

assessee. The TPO used the same rate to benchmark the OFCD transactions, which is totally different in nature when compared to a loan transaction. Aggrived the assessee filed its objections before the DRP. After duly considering the assessee's submissions , the DRP issued its directions and therefore ld DR invited our attention to the directions of the DRP , which is extracted as under and supported it :

> **" Directions of this Panel**: OFCDs are optionally fully convertible debentures. They as products are different from compulsorily fully convertible debentures (FCCD). Unlike FCCD, the OFCD are not considered equity capital. OFCDs are nothing but debt and therefore, interest must be charged on the same. This Panel finds that even Hon ITAT Chennai has held that no adjustment is required since SIHL had charged a higher rate of interest than the prevailing LIBOR rate. Thus SIHL has charged interest rate higher than LIBOR rate. Therefore if the assessee had charged interest rate higher than LIBOR rate the TPO would have considered it as at ALP. But the assessee has charged rate at 2% where the LIBOR as mentioned by the assessee is 2.8 percent. Further spread that takes care of other expenses, risks and other incidental the investor incurs is also considered necessary by this Panel. Therefore, this Panel finds the interest rate identified by the TPO as proper as per TP provisions in the Act. The objection raised by the assessee therefore is rejected."

31. We heard the above submissions and gone through the relevant material . Since the assessee has not specifically pointing out how and on which material , the findings of the DRP are wrong etc, the assessee's corresponding grounds of the assessee are dismissed .

32. On the issue of transfer pricing adjustment in respect of Corporate Guarantee issued on behalf of AEs, the ld DR submitted that the Transfer

Pricing Officer ("TPO") has made an adjustment of Rs 50,79,18,950 at the rate of 3.5 percent, being guarantee commission on the outstanding guarantees of Rs 12,91,64,90,000 extended by the assessee to its overseas subsidiaries during earlier years. Aggrived the assessee filed its objections before the DRP. After duly considering the assessee's submissions , the DRP issued its directions and therefore the ld DR invited our attention to the directions of the DRP , which is extracted as under :

> **" Directions of this Panel**: This Panel has considered all the facts brought on record by the assessee and the TPO. The assessee has given corporate guarantee in favour of its AE. Due to corporate guarantee which is explicit one the credit rating of the borrowing AE has gone up and AE could borrow from the bank. In third party scenario, the entity which gives corporate guarantee would charge corporate guarantee fee. Therefore, the AE on whose behalf the corporate guarantee has been given by the assessee should share the benefit accruing to it with the assessee. See from this perspective 3 percent appears to be on a higher side. Even if it is considered that the advantage has accrued to the AE, then at best it is expected from the AE that the benefit will be shared with the assessee. Therefore, deciding the arm's length price of the corporate guarantee at 3 percent seems unreasonable. However, in this connection additional evidence furnished by the assessee that IDBI Bank Ltd has charged 1 percent guarantee commission to S Tel Pvt Ltd for the relevant FY 2008-09 appears reasonable. Therefore, the TPO is directed to verify the additional evidence furnished by the assessee. In case, it is found correct the assessee is directed to apply rate of 1 percent as against 3 percent charged by the TPO."

33. However, the Ld DR argued against the above directions on the grounds and the lines in which the Revenue filed its appeal, supra.

34. We have heard the submissions of the ld DR and gone through relevant material. Since the DRP rendered its decision based on a valid external comparable wherein IDBI Bank Ltd has charged 1 percent guarantee commission to S Tel Pvt Ltd for the relevant FY 2008-09, we do not find any reason to interfere with the directions of the DRP and hence dismiss corresponding grounds of ; the assessee , the Revenue and the CO filed by the assessee .

35. On the MAT Credit issue , we find that the DRP has directed the AO to verify the claim of the assessee from the record and decide as to whether the credit is to be given or not. Apart from complying with this direction, we direct the A O to verify the claims of the assessee in this appeal ,supra, from the record and decide as to whether other claims made by the assessee in this appeal are correct or not and if found correct to allow the due credit .

Grounds of appeal in ITA No.1393/2016 A Y 2008-09 143 rw 147

" 1. The order passed by the Commissioner of Income-tax Appeals ["CIT(A)"j under section 250(6) of the Income-tax Act, 1961 (" the Act") confirming the order of the Assessing Officer ("AO") passed is not in accordance with law, contrary to the facts and circumstances of the present case and is in violation of principles of equity and natural justice.

2. Reopening of assessment

2.1 The learned AO has erred in initiating re-assessment proceedings under section 147 of the Act, without appreciating the facts of the case.

2.2 The learned AO has erred in reopening and assessment in the absence of any fresh or tangible material to have "reason to believe" that the income has escaped assessment.

2.3 The AO has erred in reopening the assessment in the absence of any failure on the part of the assesse to furnish return of income or disclose fully and truly all material facts.

3. Treatment of compensation as interest income

3.1 The learned CIT(A) and AO failed to appreciate that the real intent of the agreement entered by the appellant with Sahara India Commercial Corporation Limited ("SICCL") was to derive value by execution of larger project, which on completion would have reflected on the appellant's ability to complete mega projects.

3.2 The learned CIT(A) and AO failed to appreciate the fact that the 400 crores advanced to SICCL has been disclosed as 'Advance for purchase of land' in the audited financial statements and not as loan.

3.3 The learned CIT(A) and AO failed to appreciate the relevant clauses, clause 13.4.2 and clause

3.2 of the Facility agreement demonstrate the fact that the intent of the appellant was to enter into a development agreement.

3.4 The claim of the learned CIT(A) and AO that the appellant had intentionally entered into such agreements to treat the receipt of compensation as capital is factually incorrect and baseless.

3.5 The learned CIT(A) and AO have failed to appreciate that the appellant is not in the business of strategic investments in realty market and therefore the intention of advancing money to SICCL was with a view t6 acquire the land for development for business purpose and not to earn interest

3.6 The learned C1T(A) and AO have erred in not considering the fact that the nature of the compensation received was towards relinquishment of profit earning apparatus. Therefore, any amount received on extinction of source of income and profit earning apparatus, would partake the character of capital receipt.

3.7 The learned CIT(A) and AO have erred in concluding the nature of the receipt as revenue based on the fact that Tax Deducted under Source ("TDS") under section 194 of the Act, was deducted by SICCL. The learned CIT(A) and AO have failed to appreciate the fact that deduction of tax from payment under the Chapter- XVII of the Act, would not change the character of the receipt in the hands of the appellant.

4. Treatment of Interest earned as income from other sources

4.1 Without prejudice to the above grounds, the learned CIT(A) and the AO have erred in treating the interest earned including proportionate compensation under the head income from other sources instead of treating the same as business income.

4.2 The learned CIT(A) and AO have erred in not considering the matching concept where in order to earn an income, certain amount of expenses need to be spent, thereby, erred in not allowing any expense against the income determined.

The appellant craves leave to add, substitute, amend, delete, or otherwise modify any of the grounds of appeal stated hereinabove before commencement of or at the time of hearing.

36. Since none represented the assesssee , we required the ld DR to present the case . The Ld DR invited our attention to the relevant portion of the order of the ld CIT(A) , which is extracted as under :

" 5.2.1 I have considered the findings of the AO. The AO has reopened the assessment u/s 148, which was originally accepted u/s 143(1). The reason for reopening was that the compensation received from SICCL to the extent of Rs.35 crores was in the nature of Interest against the advance made to SICCL and not in the nature of capital. Therefore, the income earned is to be treated as Income from Other Sources. The learned AO further relied on the fact that tax has been deducted at source u/s 194A of the Act which substantiate the fact that the compensation was in the nature of interest. The appellant has objected to the reopening. The AO had reason to believe that income had escaped assessment. He has reopened the assessment by duly recording the reason. The action of AO in reopening the assessment is confirmed. This ground of appeal is dismissed.

5.3 Ground No.3 raised by the appellant is against treatment of proportionate compensation received as interest. The AO in the assessment order held that as the payee (M/s Sahara India Commercial Corporation Ltd.) has already treated the amount paid to the assessee company as interest and deducted tax u/s 194, the entire amount as explained is treated as income only. A survey u/s 133A was conducted on 22.07.2010. The AO reopened the assessment u/s 148 by recording the following reason.

'the compensation received from SICCL to the extent of Rs.35 crores was in the nature of Interest against the advance made to SLCCL and not in the nature of capital. Therefore, the income earned is to be treated as Income from Other Sources. The learned AO further relied on the fact that tax has been deducted at source u/s 194A of the Act which substantiate the fact that the compensation was in the nature of interest.'

The appellant (lender) had entered into an agreement dated 26.12.2006 With M/s Sahara India Commercial Corporation Ltd. as the borrower and 16 other parties as guarantors. The AO has held that:

a. It is a Loan facility agreement for extending the Loan to the borrower by the assessee company (Lender). The expressions given to the parties were clear i.e., M/s. V.S.Net Limited as 'Lender' and M/s. Sahara India Commercial Corporation Limited as 'Borrower.'

b. It was mentioned In the preamble of the agreement that the borrower urgently needed a sum of Rs.400 crores as loan for its business purposes and approached the Lender for an inter-Corporate Deposit (lCD) facility of a principal amount of Rs.400 crores from the Lender. The guarantors have Jointly and severally agreed to provide unconditional and irrecoverable Guarantee for the due payment of all the amounts due by the borrower to the Lender.

c. Definitions of Lender, Borrower, Guarantors, Facility, Disbursement, Drawdown etc were lucid (Clause 1.1).

d. It was reiterated as the borrower is in urgent need of funds for its business purpose.. the amount borrowed shall be utilized by the borrower for its business (Clause 2),

e. It is apparent that the 'conditions precedent and subsequent' (clause 3) relate in general about the securities such as Lands, shares, demand promissory note, post dated cheques etc in favour of the loan facility arrangements.

f. It was clearly spelt about the return on the Loan facility (Clause 5), and agreed for an annual Return of Rs. 135 awes far Rs.400 crores loan or in proportion to the Disbursed loans, pro-ratted return shall be payable by the Borrower to the Lender. Further, it was stated that the return shell be calculated on the basis of number of days elapsed from Drawdown Date.

g. The non-payment of the facility and the appropriate return accrued will result in unrestricted right to the lender to transfer or sell the securities offered that too without the intervention of court (Clause 6.1.2).

h. The details of all securities to be offered in favour of loan facility is inclusive of the Deposit of the Title Deeds of the Immovable Properties (Clause -7).

i. Further, the Borrower covenants with the Lender that, it shall utilize the amounts borrowed under the Facility onlf for the business purpose of the Borrower.
(Clause- 10)

j. The conditions under clause 13.4 further assurances and undertakings do not vitiate the loan facility and in fact it is in the nature of an additional protective clause to protect the loan facility.

He concluded that the appellant has not recognized any revenue on account of the agreement dated 29.12.2006 and treated Rs.35 crores as capital receipt. Restated agreement dated 15.02.2007 was entered into in stamp paper purchased on 02.04.2007 (purchased much after so called re-stated agreement was entered Into). The assessee had not recognized any revenue on account of this facility transaction and it was stated that a sum of Rs. 35 crores received was on account of loss of business opportunity and treated as capital receipt during the F.Y 2007-08. The stamp vendor, Mr. K.Muniappan, Madurai, in his statement stated that though the above three stamps were sold by him only but he could not remember to whom the stamp papers were sold. Further, he added that he had never sold stamp papers to 'Sahara India Commercial Corporation Ltd.', 'V.S.Net Ltd.' and sales number of the stamps papers and the date of sale mentioned on the stamp papers are not written by him or his sons. M/s Sahara India Commercial Corporation Ltd., issued TDS certificate deducting tax u/s 194A of the IT Act treating it as Interest. The AO taxed proportionate Interest of Rs.3,33,00,000/- as Income of the appellant.

5.3.1 The appellant submitted that the Intention was to derive value of a large project and M/S Sahara India Commercial Corporation Ltd. decided not to sell land to it and compensated it. It was submitted that compensation is not Interest and relied upon the following case laws:

1. CIT v. Saurashtra Cement
2. S.Zoraster & Co. v. CIT (322 ITR 59)
3. CIT v. Bombay Burmah Trading Corporation(161 ITR 386)
4. CIT v. T.I & M Sales Ltd. (259 ITR 116)
5. CIT Madras v South India Flour Mills Pvt. Ltd. (75 ITR 147)
6. Parle Soft Drinks Pvt. Ltd. vs KIT (TS 467 ITAT 2013)
7. ACIT vs 3i Infotech Ltd.(TD 417 ITAT 2013)
8. CIT & Others Vs. Sapthagiri Distilleries Ltd. (366 ITR 270)
9. Khanna and Anandham vs. CIT in ITA No.1286/2008, dt. 29.01.2013

5.3.2 Considering the facts of the case, submissions made by the appellant, perusal of all the agreements and remand report, I am of the view that receipt of Rs.35 crones is nothing but interest on money given to M/S Sahara India Commercial Corporation Ltd., The appellant has furnished additional submission vide letter dated 02.01.2016 which is unsigned. Therefore, no cognizance is taken of this letter. Compensation received is of capital nature especially in view of the fact that Rs.35 crores was received on 09.04.2007 merely five days after such and so called agreement was entered into. It is pertinent to note that principle amount of Rs.400 crores was received on 25.05.2007. M/s Sahara India Commercial Corporation Ltd. itself had

treated Rs.35 crores as Interest only. The action of AO in taxing Rs.3,33,00,000/- is confirmed. These grounds of appeal are dismissed.

5.4 Ground No.4 raised by the appellant is against treatment of interest earned as Income from other sources. During the course of appellate proceedings, the AR of the appellant filed written submission. I have considered the findings given by the AO and written submission filed by the AR of the appellant. The AO has added Rs.3,33,00,000/- as income from other sources. The appellant has submitted that the learned AO has erred in treating the interest earned including proportionate compensation under the head income from other sources against the business income a claimed by the appellant. The learned AO has failed to appreciate the fact that the Interest of Rs.1.69 crores was earned from the Inter Corporate Deposits made to Indus City Scapes Construction Pvt. Ltd. The AO observed that the appellant's income consists of rental Income and interest Income only. Therefore, the AO has correctly taxed Rs.3,33,00,000/- under the head 'income from Other Sources' . This ground of appeal is dismissed.

6. In the result, the appeal is DISMISSED.

37. The ld DR supported the above order stating that the assessee has not assailed the findings recorded by the lower authorities with relevant material and hence the ld DR pleaded to dismiss the assessee's appeal .

38. We heard the submissions of the ld DR and gone through the relevant material. Since the assessee has not assailed the findings recorded by the lower authorities with relevant material, we dismiss the assessee's appeal .

ITA No.1973/Chny/2016 A y 2010-11

39. Since none represented the assesssee , we required the ld DR to present the case . The Ld DR submitted that M/s SVL Technologies and

Network Limited (Formerly known and 'VS Net limited) merged with M/s Siva Industries and Holdings Limited ("SIHL" or "the appellant") vide order dated August 22, 2013 of Honourable High Court of Madras with effect from April 1, 2011 is engaged in the business of Strategic Investments in the real estate space and having objective to invest in large projects both in commercial and residential space.

40 It filed its return of income for the Assessment year ("AY") 2010-11 on October 14,2010 declaring a total income of Rs. 28,81,80,060 and determined a tax of Rs. 9,79,51,963 on the income and claimed a refund of Rs. 14,31,51,560 which was scrutinized under section 143(2). Based on the document impounded in the survey and after considering the assessee's reply and material etc, the AO treated the compensation of Rs. 48 crores received by the appellant from UTL for the breach of agreement and claimed by it as a capital receipt as an interest income and charged it to tax under the head income from other sources. Further, the appellant had taken an interest free unsecured loan of Rs. 555 crores from M/s Siva Ventures Limited ("SVL"), holding company of the appellant, which had been given to M/s Vantage Realty Private Limited ("VRPL"), a subsidiary of the appellant. During the relevant year, the appellant had factored to the extent of Rs. 100 crores of receivables and paid to EAFSL, factoring charges amounting to Rs. 7,82,68,493 upfront. The AO disallowed Rs. 7,82,68,493 under section 40(a)(ia) of the Act stating

that the transaction was a colourable device to reduce taxable income and if at all the transaction was in accordance with commercial necessity, the expense was in the nature of interest expense and the assessee was liable to deduct TDS. Aggrieved the filed an appeal before the Commissioner of Income-tax (Appeals) who upheld the order passed by the AO. Aggrieved, the appellant has filed this appeal The Ld DR invited our attention to the relevant portion of the order of the ld CIT(A) , which is extracted as under :

> " 5.2 Ground No.3 raised by the appellant is against addition of Rs.48,00,00,000/- as interest under the head 'Income from Other Sources' . A survey u/s.133A was carried out on 22.7.2010 in the business premises of the appellant, wherein original agreements were found regarding memorandum of understanding (MU) with M/s Unitech Ltd., dt.15.1.2009, supplement agreement dt.31.1.2009 and termination letter dt.18.4.2009 and the appellant had not recognized any revenue account of this transaction. The Assessing Officer has observed that
> i) M/s Unitech Ltd was supported to take care of preparation of plan and development of the project of which the appellant failed to give any details despite giving adequate opportunity especially in view of the fact that investment of Rs.400 crores was involved.
> ii)The appellant was supposed to take care of the sales and marketing activities but no evidence of it was found during survey and no evidence was furnished during scrutiny proceedings.
> iii)Both the parties were supposed to enter into a definitive joint development agreement which was not executed as the original agreement was terminated by M/s Unitech Ltd., which was a paper agreement only in view of the fact that neither party made an effort to start the project.
> iv)No definite land demarcation or identification was done for the project as only general description of 100 acres of land in and around sector 70 of Gurgaon is mentioned. Reliance was made to the said project to disguise loan transaction under the guise of joint development.
> v)Reference to payment of security was made only to facilitate the 'return' of advanced money
> vi)M/s Unitech Ltd had the unilateral power to terminate the said project as opposed to the claim of the appellant that both parties had the right to terminate whereas the appellant's right to termination started from 180 days after the original agreement. The appellant got 4% per month return for advanced sum of Rs.400 crores. M/s Unitech Ltd deducted TDS ufs.194A treating the same as interest so as to claim it as revenue expenditure. Merely change in nomenclature would not change the nature of transaction.

5.2.1 The appellant has submitted that security deposit of Rs.400 crores was shown under the head Loans and advances as on 31.3.2009 and compensation received of Rs.48 crores was shown under the head capital revenue. The appellant has made the submissions before me similar to the submissions made before the Assessing Officer. It relied upon the following case laws:-

1. CIT Vs Saurashtra Cement (SC)
2. S Zoraster & Co., VsCIT (322 ITE 59) (Mad.)
3. CIT V Bombay Burmah Trading Corporation (161 ITR 386) (SC)
4. CIT V T.I & M Sales Limited (250 TR 116) (Mad.)
5. CIT Madras V South India Flour us India P Ltd.(75 ITR 147)(Mad.)
6. Pane Soft Drinks P Ltd Vs JCIT (TS 467 ITAT2O13) (Mum. ITAT)
7. ACIT vs 3i Infotech Ltd (TD 417 THE ITAT 2013) (Mum. ITAT)

It has been further submitted that mere deduction of tax at source by the payer does not alter the character of the receipt in the hands of the payee. It relied upon the decision of Honourable Supreme Court in the case of M/s State Bank of India and Anr. Vs Mula Sahakari Sakhar Karkhana Ltd., dt.6.7.2006.

5.22 The so called agreements entered into by the appellant and M/s Unitech Ltd., were made in fact to disguise the loan transaction in the garb of joint project development. Both the parties had not even started the duties assigned to them. M/s Unitech Ltd neither identified the land nor prepared a project plan. The appellant neither prepared a marketing strategy not tried to make any sale. No expenditure was shown to have been incurred by the appellant in trying to execute his part of the agreement. The project plans were not supplied inspite of giving adequate opportunity to the appellant. It is worthwhile to note both parties to the agreement have neither done an iota of work nor communicated regarding the execution/non execution of the said plan. The very fact that M/s Unitech Ltd., has shown the payment of 'compensation' as interest shows the intention of M/s Unitech Ltd., to treat the amount of Rs.400 crores as loan transaction only. It is not a case of a small sum of money advanced and received that there can be two different treatment by the person who has advanced the money and the person who has received the money. From the very beginning, the intention of both the parties was not to develop the project but to camoflague the transaction of loan as advance only. The appellant has relied upon the judgment of Honorable Supreme Court in the case ch::d supra wherein it is held that

"A document, as it well known, must primarily be construed on the basis of the terms and conditions contained therein. It is also true that while construing a document the court shall not supply any words which the author thereof did not use."

"The document in question is a commercial document. It does not on its face contain any ambiguity. The High Court itself said that ex facie the document appears to be a contract of indemnity. Surrounding circumstances are relevant for construction of a document only if any ambiguity exists therein and nor otherwise."

"It is one thing to say that the nature of a transaction would be judged by the terms, and conditions together with the surrounding and/or attending circumstances in a case where the document suffers from some ambiguities but it is another thing to say that the court will take recourse to such a course, although no such ambiguity exists."

In this context reference is made to Articles III and IV of the original agreement on 15.1.2009 which define te tasks assigned to both the parties. As the parties themselves have not acted upon the terms and conditions as laid out in the said agreement, the appellant cannot now pleaded that other terms and conditions contained in this agreement be construed as not ambiguous. The action of Assessing Officer in adding Rs.48,00,00,000/- as interest income is confirmed. This ground of appeal is dismissed.

5.3 Ground No.4 raised by the appellant is against addition of factoring charges of Rs.7,82,68,493/- u/s 4O(a)(a) of the IT Act holding that the transaction is a colourable device to reduce the taxable income and otherwise also in the nature of interest expense liable to TDS. The appellant has submitted that

a. Factoring is akin to bill discounting, under a new nomenclature. Banks and a financial institutions have specialized division to handle the factoring (bill discounting), For both export and domestic supply/service sectors

b. Factoring/bill discounting are structured transaction wherein the receivables are transferred to the bank/financing institution at a value lower to the realizable value

c. Through factoring, neither a debt is incurred nor is money borrowed. There is only a change in the ownership of the receivable at a price lower to its realizable value

d. This is also not covered by the definition of interest given under section 2(28A) which reads as under:

Reliance was placed on the following decisions:

a) M.K.J Enterprises Ltd., Kolkatta Vs Department of Income tax — ITAT Kolkatta

b) Director of Income tax, International Taxation-I, New Delhi Vs Cargil TSF PTE Ltd 212 Taxmann 16 (Delhi High Court)(2013)

c) Commissioner of Income tax Vs Cargil Global Trading P Ltd., 335 ITR 94 (Delhi High Court)

d) Board Circular No.22/68-IT(B) (F.No.12/23/68-IT(B) (F.No.12/23/68- IT(B)) dt.28-3/13.5.1968

5.3.1 The Assessing Officer has observed that the transactions are between M/s Siva Ventures (Holding Co.,) to the appellant (subsidiary co.,) to M/s. Vantage Reality Pvt Ltd., (Subsidiary co), all group concerns under the same management. Certificate dt.5.11.2009 was furnished to the Assessing Officer stating that the appellant has taken loan advance from M/s Easy Access

Services P Ltd , of Rs 100 crores against the receivable from M/s Vantage Reality Pvt Ltd., and paid factoring charges which are in the nature of interest only. The Assessing Officer rejected the contention of the appellant that interest from inter corporate deposit to Amby valley has been offered to tax against which factoring charges are allowable expenditure stating that transaction with Amby Valley is an independent transaction holding as under

- The loans and advance given to the M/s Ambay Velley, has earned interest and money borrowed by the assessee company was interest free, and repayment of the principal will be subject to the repayment of the principal amount by the M/s Ambay Valley Ltd.,
- In this instant case the asessee company is taking loans from M/s Easy Access Financial Services Ltd., to repay principal amount to ultimate holding company against

the receivable from M/s Vantage Realty Pvt Ltd a subsidiary of assessee company, the transaction referred are entirely an independent transaction.

• Factoring charges paid to M/s Easy Access Financial Services Pvt. Ltd., against the receivable of MJs Vantage Reality Ltd., does not have any relation with the "ansncbon with the Ambay Valley and interest earned towards both transaction are separate transaction.

• To pay principal amount to holding company by way of taking loans against the receivable of ovan subsidiary company, though the assessee company could have received the money from subsidiary without entering such transaction. Moreover loans and advance given to M/s Vantage Realty Pvt Ltd., is interest free, and again M/s Vantage Reality Pvt Ltd., is also not showing any income out of the such loans.

• The transaction was dealt in a manner to reduce the taxable income, by way of netting of the interest income in the shed of factoring charges. The transactions is nothing a colorable device to reduce the taxable income.

5.3.2 The Assessing Officer has held that

"From the above discussions and judicial pronouncements on the issue and principal laid down, it can be concluded that claim of the assessee is not maintainable in the light of the judicial pronouncement, and as well as facts and circumstance of the case. The referred transaction was dealt in a manner to reduced the taxable income, by way of netting off the interest income under the nomenclature factoring charges" and distinguished the case laws and circular no.48 relied upon the appellant.

5.3.3 The appellant has not produced the copies of factoring agreement and bills of exchange in support of its contention. The appellant has relied upon the judgment of ITO Vs MKJ Enterprise Ltd., by Honourable ITAT Kolkatta wherein it is held that

The term 'interest relates to a pe-existing debt, which implies a debtor creditor relationship. Unpaid consideration gives rise to a lien over goods sold and for money lent as held in Bombay Steam Navigation Co. Pvt. Ltd Vs CIT (1963) 561TR 52 (SC) where interest on unpaid purchase price was not treated as interest on loan. It is clear from the definition that before any amount paid is construed as interest. It has been established that the same is payable in respect of any money borrowed of debt incurred. According to us, discounting charges of Bills of Exchange or factoring charges of sale cannot be termed as interest.

It is evident that discounting charges by whatever name called of sale cannot be termed as interest. In the case of he appellant there is no sale which is discounted. As there is no sale which is discounted, the money paid by whatever name called cannot be termed as discounting charges as there was no purchase or delivery of goods. The Hon'ble Supreme Court is the case of Bombay Steam Navigation P Ltd. Vo. C!T (1963) 56 ITR 52 has held not interest on unpaid purchase price can t be treated as interest on loan and it is, therefore, clear that before any amount paid is construed as interest, it has to be established that the sum is payable in respect of any money borrowed or debt incurred. In the case of he appellant, as there was no purchase/bill/delivery of goods/agreement to purchase goods etc. but only a financial transaction with it subsidiary, which was shown as receivable to get loan from M/s Easy Access Finance Services Ltd., the transaction clearly falls under the ambit of money borrowed or debt

incurred. The terms 'invoice discounting' or 'bill discounting' or 'purchase of bills' are all the same which is a source of working capital finance or the seller of goods on credit. Bill discounting is a arrangement whereby the seller recovers the amount of sales bills from the financial intermediaries before it is due and such intermediaries charge a fee known as discounting charges or factoring charges

5.3.4 Invoice discounting can be technically defined as the selling of bill of invoice discounting company before the due date of payment at a value which is less than the invoice amount. The difference between the bill amount and the amount paid is the fee of the invoice discounting company. The fee will depend upon the period left before payment date and the perceived risk. Sec.2(7) of the Interest Act defines the term 'interest' as interest on loans and advances made in India and includes
(a)Commitment charges or unutilized portion of any credit sanctioned for being availed of in India.
(b)Discount on promissory notes end bill of exchange drawn or made in India.
Thus, where the legislature was conscious of the fact that even the discount of bill of exchange e be included within the definition of interest, the same was basically e provided for.
Section 2(28A) of the Income Tax Act defines the term 'interest' as interest payable in any manner in respect of any money borrowed or debt incurred (including a deposit, claim or other similar right of obligation) and includes any service fee or other charge in respect of the moneys borrowed or debit incurred or in respect of any credit facility which has not been utilized. From this definition it is clear that before amount paid is construed as interest, it has to be established that the same in respect of any money borrowed or debt incurred.
5.3.5 There is a difference between discount allowed and interest paid. In the case of the appellant as there was no purchase or delivery of goods or bills raised as held earlier, there cannot be any discount allowed. The amount of Rs. 7,82,68,493/- cannot be termed as discounting charges and is in the nature of interest paid on money borrowed wherein receivable from subsidiary company might have acted as security or a loan of Rs. 100 Cr. As interest is liable for TDS, the action of AO is adding Rs. 7,82,68,493/- u/s. 40(a)(ia) is confirmed. This ground of appeal is dismissed."

41. The Ld. DR supported the order of the Ld. CIT(A), supra, and pleaded that in the absence of specific error being pointed out on the order of the Ld. CIT(A) with relevant material, the assessee's appeal may be dismissed.

42. We heard the submissions of the LD. DR and gone through the above material.. Since, the assessee has not specifically pointed out the error if any

from the orders of the lower authorities and has not substantiated with relevant material, we do not find any reason to interfere with the order of the Ld. CIT(A) and hence the corresponding grounds of the assessee in this regard are dismissed.

Revenue's appeal in ITA No.663/2015 for ay 2010-11

43. The assessee is found to have extended corporate guarantees to its AEs during the year. However, the assessee has not received any service charges / commission from the said AEs. Hence, the TPO considered 2% of the corporate guarantee as service charges / commission and determined the ALP accordingly. The total commission / service charges so determined by the TPO is Rs.24,75,78,358/- and accordingly, he proposed an upward adjustment of Rs.24,75,78,358/-. Aggrieved, the assessee filed its objections before the DRP and the DRP allowed the assessee's objections. Aggrieved , the Revenue filed this appeal with the following grounds

> " 1. The order of the Dispute Resolution Pannel, Chennai is contrary to the law and facts of the case.
>
> 2.1 The DRP erred that the action of the TPO's actio'n of determining the ALP at Rs.24,75,78,358/- is not justified and consequently the proposed upward adjustment of Rs.24,75,78,358/- is deleted as providing of corporate guarantee will not constitute an international transaction for the purpose of determining the ALP
>
> 2.2 The Hon'ble DRP had fail to note the explanation (c) of section 92B wherein it was stated that Capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase of sale of marketable securities or any type of advance, payments or differed payment or receivable or any other debt arising during the course of business.
>
> 2.3 It is submitted that the decision of Hon'ble ITAT relied upon by the learned DRP in the case of M/s Redington India Ltd in ITA No.513/Mds/2014 has not become final

and the department has preferred appeal before the Hon'ble High Court of Madras u/s 260A.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned DRP's may be set aside and that of the Assessing Officer restored.

44. The ld DR presented the case on the above lines and pleaded to allow the appeal. Since none represented the assessee, we have gone through the relevant portion of the order of the DRP, which is extracted as under :

" 3.1.7. The next issue of transfer pricing is the determination of the ALP of the service charges / commission on extending corporate guarantee to the AEs. The assessee is found to have extended corporate guarantees to its AEs during the year. However, the assessee has not received any service charges / commission from the said AEs. Hence, the TPO considered 2% of the corporate guarantee as service charges / commission and determined the ALP accordingly. The total commission / service charges so determined by the TPO is Rs.24,75,78,358/- and accordingly, proposed an upward adjustment of Rs.24,75,78,358/-. The details of the corporate guarantee and the adjustment proposed by the TPO are as under:
The ALP computation of of corporate guarantee:

Sl.no	Name of the AE	Outstanding Amount in Rs.	Guarantee Commission 2%
1	Avis Ventures Limited	4,46,61,00.000	4,61.56,394
2	Daleworid Limited	9.49,39,90,000	16,43,89,087
3	Rudhra Ener Pte Ltd	1,12,25,00,000	33,82,877
4	Winwind OY.	1,68,25,00,000	3,36,50,000
	Total	16,76,50,90,000	24,75,78,358

3.1.8. The issue of determining the ALP on corporate guarantee has already been examined by the jurisdictional bench of Chennai IT AT in the case of Redington India Ltd. v. JCIT (ITA No.513/Mds/2014). The Hon'ble ITAT has held that since there is no cost involved in extending the corporate guarantee, it will not constitute "an international transaction". The relevant portion of the order of the ITAT of Redington India Ltd. v. JCIT (ITA No.513/Mds/2014 dated 07.07.2014) are as under:

> 94. The lTAT, Delhi Bench, in the case of Bharti Airtel Ltd. vs. Add!. Cl'I',
> 43 Taxmann.com 150, has held that providing of corporate guarantee does not involve any cost to the assessee and, therefore, it is not "an international transaction", even under the definition of the said term as
> amended by the Finance Act 2012. This is because, the guarantee provided by an assessee does not have any bearing on profits, income, loss or assets of the assessee.

> 95. In view of the nature of corporate and bank guarantees given by the assessee company and in the light of the above order of the lTAT, Delhi Bench, we hold that the TP addition made against corporate and bank guarantees is not sustainable in law. The addition is therefore deleted.

> 3.1.9. Respectfully following the decision of the jurisdictional ITAT in the case of Redington India Ltd. v. JCIT (ITA No.513/Mds/2014 dated 07.07.2014), we are of the opinion that providing of corporate guarantee will not constitute an international transaction for the purpose of determining the ALP. Hence, the TPO's action of determining the ALP at Rs.24,75,78,358/- is not justified, and consequently the proposed upward adjustment of Rs.24,75,78,358/- is deleted .

45. We heard the above submissions and gone through the relevant material . Since the issue of the ALP on corporate guarantee has already been examined by the jurisdictional bench of Chennai ITAT in the case of Redington India Ltd. v. JCIT (ITA No.513/Mds/2014) , which was applied by the DRP in the assessee's case itself , supra, we do not find any reason to interfere with the order of the DRP and hence the corresponding grounds of the Revenue are dismissed .

46. In the result, the assessee's appeals in ITA No 1392/2016 for the assessment year 2007-08 , ITA No 1391/2016 for the assessment year 2008-09, CO in 51/2014 for the assessment year 2009-10 and ITA No 1393/2016 for the assessment year 2008-09 are dismissed , the assessee's appeals in ITA No 1390/2016 for the assessment year 2007-08 & ITA No 1040/2014 for the assessment year 2009-10 are partly allowed and the Revenue's appeal in 1417 / 2016 for the assessment year 2008-09 is partly allowed and the

Revenue's appeal in ITA No 1421/2016 for the assessment year 2008-09 , in ITA No 1075/2014 for the assessment year 2009-10 & in ITA no 663/2015 for the assessment year 2010-11 are dismissed .

Order pronounced on 21st January, 2020 at Chennai.

Sd/-	**Sd/-**
(धुव्वुरुआर.एलरेड्डी)	**(एसजयरामन)**
(DUVVURU RL REDDY)	**(S. JAYARAMAN)**
न्यायिकसदस्य/JUDICIAL MEMBER	**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated: 21st January, 2020
JPV
आदेशकीप्रतिलिपिअग्रेषित/Copy to:
1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT 5. विभागीयप्रतिनिधि/DR 6. गार्डफाईल/GF