IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES **" C "** BENCH: BANGALORE
BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

IT(TP)A No.489/Bang/2017
(Assessment Year: 2012-13)

M/s. United Spirits Limited,
UB Towers,
No.24, Vittal Mallya Road,
Bangalore-560 001 ....Appellant

Vs.

Dy. Commissioner of Income Tax,
Circle 7(1)(1), Bangalore. .....Respondent.

Assessee By:	Shri Perci Pardiwala, Senior Advocate and Shri Ketan Ved, C.A.
Revenue By:	Shri Bipin C.N, JCIT (D.R)

Date of Hearing :	06.03.2020.
Date of Pronouncement :	29.05.2020.

O R D E R

PER SHRI B.R. BASKARAN, A.M. :

The assessee has filed this appeal challenging the assessment order dated 31-01-2017 passed by the assessing officer for assessment year 2012-13 passed u/s 143(3) r.w.s 144C(13) of the Act.

2. The assessee is engaged in the business of manufacture and sale of alcoholic beverage with outstanding collection of brands across spirits and wines categories. It produces and sells a wide range of scotch whisky, IMFL whisky, brandy, rum, vodka, gin and wine. The brands owned by the assessee included Mc Dowell No.1, Royal Challenge, Signature and Antiquity etc. Aggrieved, by the assessment order passed by the AO in pursuance of directions given by Ld Dispute Resolution Panel (DRP), the assessee has preferred this appeal.

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3. The assessee has raised a legal issue in Ground No.1 and the same is addressed first. The ground no.1.1, extracted below, is the legal ground and the ground no.1.2 to 1.5 support the ground number 1.1:-.

> "1.1 The order passed by the learned Assessing officer ("AO") is bad in law and liable to be quashed for the reason that the same is not in conformity with the directions of the Hon'ble Dispute Resolution Panel ("DRP") and has been passed by the learned AO without application of mind."

4. The facts relating to the above said legal ground are discussed in brief. The return of income filed by the assessee for the year under consideration was taken up for scrutiny. The AO referred the matter relating to determination of Arms Length Price (ALP) of international transactions to the Transfer Pricing Officer (TPO), who passed the order u/s 92CA of the Act on 29-01-2016 proposing Transfer pricing adjustment in respect of interest free loan given to group company. Thereafter, the AO passed a draft assessment order on 30-03-2016 (erroneously mentioned as 30-03-2015 in the draft order) u/s 143(3) r.w.s 144C(1) of the Act. The assessee objected to the draft assessment order by filing its objections before Ld DRP, which disposed of the objections of the assessee by its order dated 22.12.2016. Accordingly, the assessing officer passed the final assessment order u/s 143(3) r.w.s 144C(13) of the Act on 31.01.2017.

5. In the final assessment order, referred above, the AO **did not make** following adjustments/additions, which were directed to be made by the Ld DRP:-

(A) Transfer Pricing matters:-

1.Adjustment for interest free loan to AE - Rs. 45,69,73,626/-

(B) Corporate Tax matters:-

2. Disallowance u/s 14A of the Act - Rs. 94,97,00,000/-

3. Disallowance u/s 36(1)(iii) - Rs.348,72,00,000/

4. Disallowance of payments for
Promotion and advertisement exp. - Rs. 32,65,55,926/-
5. Delay in payment of PF/ESI -Rs. 1,51,904 /-

Hence, the assessing officer determined total income of the assessee in the final assessment order at Rs.990.14 crores, which was the same as determined in the draft assessment order. However, the assessing officer suo motu passed a rectification order on 06th February, 2017 u/s 154 of the Act rectifying the final assessment order in respect of items mentioned in Serial no.1 to 4 above. However, he did not comply with the directions of Ld DRP in respect of item mentioned in Serial No.5 above in the rectification order also.

6. The Ld A.R submitted that, as per the provisions of section 144C(10) of the Act, every direction issued by Ld DRP shall be binding upon the AO. Further, as per sec.144C(13), the assessing officer shall complete the assessment in conformity with the directions issued by Ld DRP. He submitted that the assessing officer, in the instant case, did not pass the final assessment order in conformity with the directions issued by Ld DRP and hence the failure to follow the mandate of sec.144C(10) and 144C(13) would vitiate the assessment order and would make it illegal. He submitted that the assessing officer has rectified the final assessment order by passing a rectification order u/s 154 of the Act suo-motu. However, he has partially followed the directions issued by Ld DRP in the rectification order also, i.e., still he did not follow the direction issued in respect of belated payment of PF/ESI. He further submitted that the rectification order has been passed only on 6th February, 2017, which was beyond the prescribed time limit for passing the final assessment order. He submitted that the failure of the AO in not complying with the directions issued by Ld DRP cannot be considered to be an irregularity, which could be cured by passing the rectification order. Even otherwise, the rectification order complying with the directions of Ld DRP partially, has been passed beyond the time limit prescribed for passing the final assessment order and hence the same would not cure the illegality committed by the AO in passing the final assessment order.

Accordingly he contended that the final assessment order passed by the AO should be quashed. In this regard, the ld A.R placed his reliance on the following case law:-

(a) Software Paradigms Infotech P Ltd vs. ACIT (IT(TP)A No.150/Bang.2014)

(b) July Systems & Technologies P Ltd vs. DCIT (IT(TP)A No.479/Bang.2016)

(c) Addl. CIT vs. Oracle India (P) Ltd (2018)(93 taxmann.com 8)(Delhi – Trib.)

7. The Ld D.R, on the contrary, submitted that the AO has complied with the directions issued by Ld DRP by passing a rectification order u/s 154 of the Act in order to correct the inadvertent mistake committed in the final assessment order.

8. We heard the parties on this legal issue and perused the record. Admittedly, the AO has passed the final assessment order by replicating the draft assessment order, i.e., without complying with the directions issued by Ld DRP. However, the AO has passed a rectification order on 6th February, 2017 suo-motu complying with the directions issued by the Ld DRP in respect of transfer pricing adjustment and also complying with the directions in respect of other matters except the matter of addition relating to belated payment of PF/ESI. The question that arises is whether the above said course adopted by the AO is fatal and would render the final assessment order illegal and consequently liable to be quashed?

9. The Ld A.R first relied upon the decision rendered by the co-ordinate bench in the case of Software Paradigms Infotech P Ltd (supra). In this case, the AO passed a draft assessment order after receipt of order of Transfer Pricing Officer (TPO) u/s 92CA of the Act. The assessee objected to the same by filing its objections before Ld DRP. After receipt of directions of Ld DRP, the AO, however, passed the order u/s 143(3) r.w.s. 92CA of the Act. Thus, the AO has passed the final assessment order by considering the

order of the Transfer Pricing officer only and he has totally ignored the directions issued by Ld DRP, which could not have been done by him, in view of the mandatory provisions of sec.144C(13), which requires him to pass the final assessment order in conformity with the directions issued by Ld DRP.

10. The Ld A.R also relied upon the decision rendered by the co-ordinate bench in the case of July Systems & Technologies P Ltd (supra). In this case also, the AO did not comply with the directions issued by Ld DRP and passed the final assessment order, which was verbatim copy of the draft assessment order. Further the final assessment order came to be passed beyond the time limit of one month from the end of the month in which the directions of Ld DRP was received. Hence, on both these grounds, the co-ordinate bench quashed the assessment order. In this regard, the decision rendered in the case of Software Paradigms Infotech P Ltd (supra) was followed.

11. The Ld A.R also placed his reliance on the decision rendered by Delhi bench of Tribunal in the case of Oracle India (P) Ltd (supra). In this case, the AO ordered for a special audit. After conclusion of special audit, the time limit available for completion of assessment was 03-11-2012. The AO passed the final assessment order on 02-11-2012 and also issued notice of demand & penalty notice u/s 274 of the act. On noticing the mistake that he has failed to pass a draft assessment order in terms of sec.144C of the Act, the AO issued a corrigendum stating that the assessment order passed on 02-11-2012 be treated as draft assessment order. The said corrigendum was issued after the time limit prescribed for completion of assessment. Thereafter, the assessee filed objections before Ld DRP and upon receipt of directions, the AO passed the final assessment order on 30th October, 2013, i.e., much beyond the expiry of limitation period of 03-11-2012. Under these set of facts, the Delhi bench of Tribunal held that the procedure prescribed u/s 144C of the Act, having not followed, the assessment order is liable to be quashed.

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12. We notice that the facts prevailing in the above said three cases are different from the facts prevailing in the instant case. The assessing officer, in the instant case, has passed the final assessment order u/s 143(3) r.w.s 144C(13) of the Act after the receipt of directions of Ld DRP. The very fact that the assessing officer has mentioned that the assessment order has been passed u/s 143(3) r.w.s 144C(13) of the Act would show that the AO has intended to comply with the directions issued by Ld DRP. However, the assessing officer has omitted to comply with the directions issued by Ld DRP. Hence the AO, on noticing the mistake, has corrected his mistake by passing a rectification order u/s 154 of the Act suo-moto. It was contended that the rectification order was passed beyond the time limit prescribed for passing the final assessment order. However, the fact would remain that the final assessment order was passed within the prescribed time limit and the rectification order u/s 154 of the Act was also passed within the time limit prescribed for the purpose.

13. Now the question that arises is whether the AO, in the instant case, has failed to comply with the directions issued by Ld DRP, which he is mandatorily required to comply with. For this purpose, in our considered view, one has to examine the action of the AO objectively, i.e., whether there was conscious omission or complete disregard to comply with the provisions of sec.144C of the Act or whether it was only an inadvertent omission. In all the cases relied upon by the assessee, the assessing officers therein had passed the final assessment orders disregarding the provisions of sec.144C of the Act or by the time they complied with, the limitation period had expired, i.e.,

(a) in the case of Software Paradigms Infotech P Ltd (supra), the AO has passed the order u/s 143(3) r.w.s 92CA of the Act, even though the directions of Ld DRP u/s 144C(10) was available at the time the final assessment order was passed.

(b) Similar is the position in the case of July Systems & Technologies P Ltd (supra). In addition, the final assessment order was passed beyond the limitation period.

(c) In the case of Oracle India (P) Ltd also, the final assessment order was passed beyond the limitation period.

In all the above said cases, the action of the AO would show that he has consciously omitted to comply with or completely disregarded the provisions of sec.144C of the Act by either ignoring the directions issued by Ld DRP or they have passed the final assessment order beyond the limitation period. However, in the instant case, we have noticed that the assessing officer has actually passed the order u/s 143(3) r.w.s 144C(13) of the Act, meaning thereby, he has intended to comply with the directions issued by Ld DRP. However, by inadvertence, he has omitted to incorporate the directions in the final assessment order, which was duly rectified by passing a rectification order u/s 154 of the Act. There should not be any dispute that the Act visualizes committing of mistakes apparent from record either by the assessee or by the assessing officer and hence the provisions of sec. 154 of the Act have been incorporated in the Act. The mistakes apparent from record can be either pointed out by the assessee or it can be noticed by the assessing officer himself. Accordingly he may pass the rectification order suo-motu or on the application filed by the assessee in order to rectify the said mistake apparent from record. The Act also prescribes a time limit of four years for rectifying such mistakes. In the instant case, the assessing officer has passed the rectification order within one week from the date of passing of final assessment order. Accordingly, we are of the view that there was inadvertent omission on the part of the AO in not complying with the directions issued by Ld DRP, which has been duly rectified by him by passing the rectification order u/s 154 of the Act. The Ld A.R submitted that the AO has only partially complied with the directions, i.e., he has not followed the direction in respect of addition relating to belated payment of PF/ESI. In our view, this omission should also be treated as mistake apparent from record, which could have been brought to the notice of the

AO by the assessee himself. Hence the said omission, in our view, would not be fatal to the final assessment order.

14. In view of foregoing discussions, we are of the view that there is no merit in the legal ground urged by the assessee and accordingly we reject the same.

15. Ground No.2 urged by the assessee pertains to the addition relating to Transfer Pricing adjustment made in respect of interest free advances given to M/s USL Holdings Limited. The facts relating to this issue are that the assessee had advanced a sum of Rs.315.80 crores as interest free loan to its subsidiary named M/s USL Holdings Limited located in British Virgin Islands. It was stated that the above said loan was given for the purpose of acquiring a company incorporated in UK named M/s Whyte & Mackay Limited. M/s USL Holdings Limited is an Associated Enterprise of the assessee company.

16. The TPO noticed that the transaction of advancement of interest free loan to Associated Enterprises (AEs) is an international transaction, as per Explanation (1)(c) inserted in sec. 92B(1) by Finance Act, 2012 with retrospective effect from 1.4.2002. As per the new Explanation inserted (referred above), "International Transaction" shall include

- Capital financing including any type of long term or short term borrowing, lending or guarantee.
- Purchase of marketable securities; or
- Any type of advance, payments or deferred payment or receivable; or
- Any other debt arising during the course of business.

Accordingly, the TPO took the view that the interest free advance given by the assessee to its subsidiary, being an international transaction, is required to be examined in terms of sec.92 of the Act. Since the lenders do not normally provide loans to unrelated borrowers at free of interest, the TPO issued show cause notice to the assessee asking it as to why interest should not be computed on the interest free loan given by the assessee to

its AE. The TPO has observed that the assessee did not respond to the show cause notice. However, it is the contention of the Ld A.R that the assessee has furnished a reply on 22.01.2016, which was not considered by the TPO. Accordingly, the TPO proceeded to determine the interest on the "interest free loan" given by the assessee to its AE. The TPO adopted the Comparable Uncontrolled Price (CUP) method for benchmarking the loan transactions. For that purpose, the TPO took guidance from the rating given by CRISIL on corporate bonds, since the yield on the bonds would depend upon rating given by CRISIL. He noticed that the bonds are given ratings from "AAA" to "D". The AAA denotes highest safety and "D" lowest rating, i.e. it denotes "default on scheduled payments". Accordingly the interest yield will be lower for AAA rated companies in view of highest safety and the interest yield shall tend to increase on the basis of down grading of rating. The TPO noticed that the yield on BBB rated corporate bond was 12.06% for 5 years period. The TPO took the view that the risk is very high for the tax payer and its AE. Accordingly, he adopted yield rate of 14.47% and applied the same to the impugned loan transaction. Accordingly, he made Transfer pricing adjustment of Rs.45.69 crores on the interest free loan given by the assessee to its AE.

17. The Ld DRP, following the decision rendered by Special bench of ITAT Kolkatta in the case of Instrumentarium Corporation Ltd Vs. ADIT (2016)(71 taxmann.com 193), confirmed the Transfer pricing adjustment in principle. The assessee had submitted before Ld DRP that the TPO had computed interest for whole of the year instead of computing interest on the basis of time period during which the loan was outstanding. Accordingly, the Ld DRP directed the TPO to compute interest on time period basis.

18. The Ld A.R opposed the Transfer Pricing Adjustment made on various grounds. The Ld A.R submitted that the assessee had advanced interest free loan of Rs.315.80 crores to the AE for the purpose of acquisition of Whyte & Mackay Group ("W & M Group"). The loan was given during the year under consideration and also in the earlier years. He submitted that W

& M Group is one of the leading scotch producers in the World and the acquisition of the above said group will enable the assessee to have access to Scotch, an ingredient used for manufacturing IMFL. For this purpose, various Special Purpose Vehicles (SPV) were incorporated, which acquired W & M Group by availing external loans. The interest free loan given by the assessee was used for repayment of above external loans. Since the loans were given for expansion of assessee's business, no interest was charged and further, it was the intention of the assessee to convert the loan into equity at a later point of time. This fact was highlighted in the Annual Report at page 47 (Page 31of paper book). Hence there was no contractual obligation to pay interest to the assessee. Further, the interest free loan was in the nature of quasi-equity also, as it was intended to be converted into equity. He submitted that both the TPO and Ld DRP have disregarded the submissions made by the assessee in respect of quasi-equity. He further submitted that the Ld DRP had directed the AO to compute interest on time basis, but the AO has retained the T.P adjustments as proposed by the TPO by not complying with the directions of Ld DRP.

19. The Ld A.R further submitted that the "Real Income" theory should be applied even to international transactions, because Chapter X of the Act does not impinge on the concept of accrual/receipt of income and the scope of income set forth in section 4 and 5 respectively. It postulates the existence of income that is chargeable to tax and then only the question of determination of the arm's length price thereof in accordance with the provisions of Chapter X would arise. He submitted that Sec.92 provides for determination of arm's length price of the "income" arising from international transactions. He submitted that the assessee has given "interest free" loan to its AE and even if it is considered as an "international transaction", yet "no income" has arisen to the assessee from out of the said loans, since there was no contractual right to receive interest on the said loans. In this regard, he placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of India Finance & Construction Co. (P) Ltd (1993)(200 ITR 710), wherein it was held that, when no income is

received, there is no question of paying any tax on income which the respondents (department) think should have been received, but was in fact not received. Accordingly he submitted that, in the absence of any income from international transaction, no transfer pricing adjustment u/s 92(1) could be made.

20. The Ld A.R placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of Elphinstone Spg. & Wvg. Mills Co. Ltd vs. CIT (1955)(28 ITR 811), wherein it was held that where the language is clear and not capable of any other construction, then however illogical the position, however absurd the result, however much the construction put may defeat the object of the Legislature, the statute must be construed according to the plain language used by the Legislature. It was further held as under:-

> ".....and it is clear that we cannot impose tax upon a subject by implication or because we think that the object of the Legislature was a particular object. In order to carry out the object the Legislature must use appropriate language and if the Legislature fails to use appropriate language then this would be one of the many sad instances where the Legislature, to use the famous language of a Law Lord, has misfired and however much we may regret the misfiring it would be our duty to relieve the subject from taxation if the language of statute does not support the contention of the Income tax department. The advocate general says that we should avoid giving a construction which would lead to absurd results. That canon is applicable where the language of a statute is capable of bearing a construction which would avoid absurd results. But where the language is clear and not capable of any other construction, then however illogical the position, however absurd the result, however much the construction put may defeat the object of the Legislature, the statute must be construed according to the plain language used by the Legislature and the more so if the plain language supports the subject against the taxing Department."

The Hon'ble Supreme court has upheld above decision in 40 ITR 142 by further observing that the Courts cannot be invited to supply the omission made by the Legislature. Accordingly, he submitted that sec. 92(1) should be interpreted strictly and Courts should not supplement the language of section. The Ld A.R submitted that Sec.92(1) states that any "income" arising from an international transaction shall be computed having regard to the arms' length price. Accordingly, he submitted that, in order to attract the provisions of sec.92(1), an income should arise from an international transaction. He submitted that the assessee did not have any contractual right to receive "income" from the interest free advance given to the AE and hence there does not arise any income to the assessee from this transaction. In the absence of any income from the international transaction, the provisions of sec.92(1) shall not apply and hence no T.P adjustment could have been made. He submitted that the provisions of Chapter X have been held to be machinery provisions in the cases of Vodafone India Services (P) Ltd vs. UOI (2014)(368 ITR 1)(50 taxmann.com 300)(Bom) and Maruti Suzuki India Ltd vs. CIT (2015)(64 taxmann.com 150)(Delhi). The Ld A.R invited our attention to the following observations made by Hon'ble Bombay High Court in the case of Vodafone India Services (P) Ltd (supra) at paragraph 45 of its order:-

> "Chapter X of the Act is a machinery provision to arrive at the ALP of a transaction between AEs. The substantive charging provisions are found in Sections 4, 5, 15 (Salaries), 22 (Income from house property), 28 (Profits and gains of business), 45 (Capital Gains) and 56 (Income from other sources). Even income arising from international transactions between AE must satisfy the test of income under the Act and must find its home in one of the above heads i.e., charging provisions."

Accordingly, the Ld A.R submitted that the provisions of Chapter X cannot be given primacy over the charging sections. Under charging sections, the income should accrue to the assessee. He submitted that the concept of real income theory has been accepted by the Mumbai bench of Tribunal in the following cases in the context of sec.92(1) of the Act:-

(a) Shilpa Shetty vs. ACIT (2018)(96 taxmann.com 443)(Mum- Trib.)
(b) M. Suresh Company P Ltd (ITA No.1853/Mum/2016)

21. The Ld A.R further submitted that the assessee had given similar types of interest free loans in the earlier years, but no addition has been made in any of the previous assessment years.

22. The Ld A.R submitted that the Ld DRP has placed its reliance on the decision rendered by Kolkatta Special bench of ITAT in the case of Instrumentarium Corporation Ltd (supra). He submitted that the primary argument urged before the Special Bench was very limited, viz., imputation of interest in the hands of Non-resident Associated Enterprise which had given interest free loan to an Indian company. It was contended by the non-resident company that the TP provisions would have resulted in erosion of tax base in India, since the tax rate applicable to non-resident company was lower than the tax rate applicable to the Indian company. These arguments were rejected by the Special bench of Tribunal. Accordingly, he submitted that the facts prevailing in the case before the Special bench were different. However, he fairly admitted that the observations made by the Special bench in paragraph 39 of its order are against the arguments put forth by him in this case. However, he contended that the said observations were stay observations.

23. The Ld A.R made an alternative submission, viz., the impugned loan was given with the intent of converting the same into equity and hence these loans are in the nature of "quasi-equity". Hence interest was not charged on these loans. Accordingly the Ld A.R submitted that these kinds of loans cannot be compared with the regular loans, where the purpose of giving loan is to earn interest income. Hence no TP adjustment could be made in the case of quasi-equity loans comparing the same with simple loans. In support of these contentions, the Ld A.R placed his reliance on the decision rendered by Ahmedabad bench of Tribunal in the case of Cadila Healthcare Ltd vs. ACIT (2017)(80taxmann.com 24)(Ahmd.). He

submitted that the substance of transaction should be seen over its legal form. The Ld A.R submitted that the assessee has furnished a detailed submission before TPO on 27th January, 2016, but the same was not considered by him. The assessee also submitted it before ld DRP also, but the same was not considered or dealt with by it also.

24. Without prejudice above said legal contentions, the ld A.R submitted that the TPO was not correct in adopting yield rate of Bonds holding CRISIL rating. He submitted that the Hon'ble Rajasthan High Court has held in the case of CIT vs. Vaibhav Gems Ltd (2017)(88 taxmann.com 12) that "LIBOR" rate should be applied. The SLP filed before the Hon'ble Supreme Court against the decision rendered by Hon'ble Rajasthan High Court in the above said case has been dismissed in SLP (Civil) No.30849/2018.

25. The Ld D.R, on the contrary, submitted that the advancement of interest free loans has been included under the definition of "international transactions". He further submitted that the decision rendered by Special bench of ITAT in the case of Instrumentarium Corporation Ltd (supra) negates various contentions of the assessee.

26. We heard the parties on this issue and perused the record. Admitted fact is that the assessee has given interest free loans to its AE located in British Virgin Islands. It is stated that, in the earlier years also, the assessee has given such kinds loans, but no adjustment was made by the TPO. However, the principle of res-judicata shall not apply to the income tax proceedings and hence there cannot be any bar on the AO to examine the applicability of the transfer pricing provisions to the loan transactions in this year. Further, the Finance Act, 2012 has amended the provisions of sec.92B by inserting an Explanation under it, wherein the definition of the expression "International transactions" has been inserted. The same is defined in an inclusive manner and was also given retrospective effect from 1.4.2002. As per the definition of the expression "International Transaction", it shall include capital financing, including any type of long-

term or short-term borrowing, lending or guarantee etc. Hence, TPO has examined the interest free loan given by the assessee to its AE, as the same falls under the definition of "International Transaction" and made Transfer Pricing adjustment in this year.

27. We shall now deal with various arguments advanced by the assessee. The Ld A.R submitted that Chapter X dealing with determination of Arms Length price of international transactions is a machinery provision and the same cannot acquire primacy over the charging provisions like sec.4,5, 15 etc. Accordingly, he submitted that the "income" should have accrued to the assessee and then only the provisions of Chapter X can be applied to international transactions, i.e., it was submitted that the provisions of sec.92(1) could be invoked only when there arises any "income" from the international transaction, since the provisions of sec.92(1) uses the expression "Any income arising from an international transactions shall be computed having regard to the arms length price". Accordingly, it was contended that existence of "income" is sine qua non for invoking the provisions of sec.92(1) of the Act. It was contended that the assessee does not have any contractual right to receive any income from the interest free loan given by the assessee to its AE. Hence, no "income" arises to the assessee from the interest free loan given by it to its AE and hence provisions of sec.92(1)/Chapter X should not be applied. It was also contended, by placing reliance on certain case laws, that the Courts cannot be invited to supply the omission made by the Legislature.

28. There is no doubt that real income principle should be followed under the Income tax Act. However, under the Income tax Act, the tax is levied on "total income". The expression "total income" is defined u/s 2(45) of the Act as under:-

> "total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act."

Though section 5 defines "Scope of total income", yet the total income has to be computed in the manner laid down in the Act. The term "income" is

defined in sec. 2(24) in an inclusive manner. The said income, when computed in the manner laid down in the Act becomes "total income". Hence there is difference between the expression "income" and "total income". The Income tax Act contains certain legal fictions/deeming provisions like sec. 40A(3), 40(a)(ia) etc., The Ld A.R, during the course of arguments also pointed out that sec. 50CA, 50D, 45(4) contain deeming provisions. While computing total income, the real income is adjusted by including therein various legal fictions/deeming provisions incorporated in the Income tax Act. After this process only, the total income is arrived at. Sec.92(1) states that any "income" arising from an international transaction shall be computed having regard to the arms' length price. U/s 92C(4), the AO may compute the total income of the assessee having regard to the arms' length price so determined. Hence, if the income arising from an international transaction is not at arms length, the AO is entitled to compute the total income by substituting the actual income with the arms length income. In effect, under Chapter X also, the Income tax Act has introduced a legal fiction/deeming provision. As stated earlier, while computing "total income", the legal fictions/deeming provisions included under the Act should be given effect to.

29. The Chapter X is titled as "Special Provisions relating to Avoidance of Tax" and same includes sec. 92 to 94A. We have earlier noticed that the expression "international transactions" has been defined to include capital financing, loan transactions etc. Hence there should not be any dispute that the impugned interest free loan given by the assessee to its AE shall fall under the definition of "International transaction". However, it is the case of the assessee that there is no requirement of determining ALP of transactions, when there is no "income" at all from the international transactions. This argument was rejected by the Ld DRP by following the decision rendered by the Special bench of ITAT in the case of Instrumentarium Corporation Ltd (supra) and the Ld DRP has extracted following observations made by the Special bench dealing with the above said contentions of the assessee:-

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"37. In our considered view, the commercial expediency of a loan to subsidiary is wholly irrelevant in ascertaining arm's length interest on such a loan. There is indeed no bar on anyone advancing an interest free loans to anyone but when such transactions are covered by the international transactions between the associated enterprise, Section 92 of the Act mandates that the income from such transactions is to be computed on the basis of arm's length price. The judicial precedents relied by the assessee, such as in the case of *SA Builders Ltd.* (*supra*), in support of the proposition that interest free advance to the subsidiary, in which assessee has deep interest, are justified on the grounds of commercial expediency are in the context of the question whether such a use of borrowed funds can be said to be for the purposes of business, and, accordingly, whether interest on borrowings for funds so used can be allowed as a deduction in computation of business income of the assessee. That is not the issue here, and these judicial precedents on the commercial expediency, therefore, have no relevance in computation of arm's length price of loan given to an associated enterprise. Similarly, learned counsel's contention that a notional income cannot be taxed, and reliance on *Shoorji Vallabhdas & Co.'s* case (*supra*) in this regard, is wholly misplaced because that proposition is in the context of tax laws in general, **whereas, transfer pricing provisions, being anti abuse provisions with the sanction of the statute, come into play in the specific situation of certain transactions with the associated enterprise. The general provisions of the law have to give way to these specific anti abuse provisions. While a notional interest income cannot indeed be brought to tax in general, the arm's length principle requires that income is computed, in certain situations, on the basis of certain assumptions which are inherently notional in nature. When the legal provisions are not in *pari materia*, as the provision of normal computation of income and the provision of computation of income in the case of international transactions between the associated enterprises, what is held to be correct in the context of one set of legal provisions has no application in the context of the other set of legal provisions.**

38. As for the assessee' s claim that the loan being extended free of interest was in the nature of shareholder service, this plea is being taken up for the first time before us and the assessee has not even furnished basic evidences for the factual elements embedded in this proposition. Such facts cannot be inferred or assumed; there has to be some material

on record to demonstrate, or even indicate, the existence of these facts. The references to OECD report and BEPS report is in the context of benefit test, but then the benefit test is not really relevant in the context of Indian transfer pricing legislation. Learned counsel has not explained as to how these inputs are relevant in interpreting the scope of the statutory provision before us, nor do we see any relevance of this material in the present context and given the fact situation above. It is also important to bear in mind the uncontroverted findings of the Assessing Officer that the interest was all along charged by the assessee on its loans to Datex but, for some unexplained reasons, the assessee has stopped charging interest in the assessment year 2003-04. The commercial bonafides of the present transactions are not established. As regards the assessee's claim that the revenue authorities have re-characterized the transaction, and that they do not have the powers to do so, we find that the claim of the assessee is ill conceived inasmuch as there is no re-characterization of the transaction, inasmuch as it continues to be a loan transaction and inasmuch as the substitution of zero interest by arm's length interest does not alter the basic character of transaction. The question of re characterization arises only when the very nature of transaction is altered, such as capital subscription being treated as loan or such a trade advance received being treated as a borrowing. There is no change in the character of transaction in this case. Learned counsel's reliance on *EKL Appliances Ltd.'s* case (*supra*) and *Cotton Naturals India (P.) Ltd.* case (*supra*) is thus irrelevant. In the case of *Abhishek Auto Industries Ltd.* (*supra*), what was done was that of the joint venture agreement, which was duly approved by the Reserve Bank of India and other regulatory bodies, was disregarded by questioning its need, and it was in this context that the Tribunal observed that legally binding joint venture arrangements cannot be disregarded by the revenue authorities. This observations, taken out of the context, cannot be interpreted to mean that an arm's length price of an interest free loan cannot be adopted for ascertaining income from loan transaction.

39. In our considered view, the assessee is not really correct in contending that when the assessee has not reported any income from a particular international transaction, the ALP adjustment cannot compute the same. The computation of income on the basis of arm's length price does not require that the assessee must report some income first, and only then it can be adjusted for the ALP. Section 92(1) is not an adjustment mechanism; it is a computation mechanism. The arm's length price principle requires that an arm's length price is assigned to the transactions between the associated

enterprise, and if the income in computed, if any, on the basis of the arm's length price so assigned. As regards reliance on the *Vodafone India Services (P.) Ltd.'s* case (*supra*), that deals with a situation in which the international transaction was inherently incapable of producing the income chargeable to tax as it was in the capital field. This is evident from the observation of Hon'ble Bombay High Court to the effect that, "In this case, the revenue seems to be confusing the measure to a charge and calling the measure a notional income. We find that there is absence of any charge in the Act to subject issue of shares at a premium to tax". Undoubtedly, learned counsel is right in interpreting this decision to the extent that what is not in the nature of income cannot be turned into income so as to make ALP adjustment therein, and then bring the ALP adjustment to tax, since the computation is of income and it is only the price at which transaction is entered into that is to be taken as an arm's length price in computation of that income. The ALP adjustments cannot be treated as income *per se*. However, the assessee does not derive any support from this decision since consideration for a loan, i.e interest, is inherently in the nature of income. There is no, and there cannot be any, dispute or controversy about this character of income. **The point of dispute is whether zero interest, or no interest, is good enough for computing the income or whether an arm's length interest must substitute this zero interest. The answer is obvious. As long as the transaction is an international transaction between the AEs, the computation of income has to be on the basis of arm's length interest.** Therefore, in our considered view, even when no income is reported in respect of an item in the nature of income, such as interest, but the substitution of transaction price by arm's length price results in an income, it can very well be brought to tax under Section 92. This plea of the assessee is also, therefore, unsustainable in law."

30. The contention of the assessee that there should arise some "income" from the international transaction in order to invoke the provisions of sec. 92 has been duly addressed by the Special bench in Paragraph 39 of the order. The loan transactions have been included in the definition of the term "International transactions". If the loan is given at free of interest, the same should be construed as having been given at "Zero interest". Hence the income relating to loan transactions with the AE is required to be tested under Arms length principles u/s 92(1) of the Act, even if no interest income is contemplated between the parties. It can be noticed that the

Special bench has specifically addressed the case of charging of Zero interest or no interest and held that so long as the transactions fall under the category of "international transactions", the arms length principle has to be applied. We may look at another instance also. The new definition of "International transaction" shall also include

> "the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing"

The purchase transaction is in the nature of expenditure and the same, per se, does not produce any income. Yet the purchase transaction is included under the definition of "International transaction". The purpose of the same is explained hereafter. The product purchased by an assessee from its AE shall produce income, only when it is sold. However, if an assessee purchases certain article or product from its AE, then the said purchase transaction is reported as an International Transaction and the same is also tested under Arms length principle. If it is found that the price paid by the assessee for the said purchase is not at arms length, i.e., if it is more than the arms length price, then the AO is required to substitute actual purchase price with the arms length price. By substituting so, the total income of the assessee under the Income tax Act gets increased by such excess amount. In fact, the purchase transaction, being international transaction, has not produced any income. At this stage, it is relevant to refer to the Explanation below sec.92(1), which reads as under:-

> "Explanation:- For the removal of doubts, it is hereby clarified that the allowance for any expenses or interest arising from an international transaction shall also be determined having regard to the arms' length price."

The argument of the assessee that income should arise out of the international transaction contradicts the above said Explanation, because "allowance for any expenses" per se cannot produce any income. However, if the said claim for any expense falling under international transaction is not at arms' length, then the same shall produce "income" to the extent of

payment made in excess of arms' length price. As observed by the Special bench, if the transaction falls under the definition of "international transaction, then the same is required to be tested under arms length principle even if it did not produce any real income to the assessee. Suppose the income that arose to the assessee from an international transaction is Rs.100/- and the arms length price is Rs.125/- For computing total income, the AO shall adopt Rs.125/- only as income arising from the said international transaction. The real income principle fails here, since Chapter X brings in a legal fiction/deeming provision and the same is required to be complied with in order to arrive at the total income. As explained by Hon'ble Supreme Court in the case of DIT vs. Morgan Stanely & Co. (292 ITR 416), the object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Hence, the interest free loan should be taken as a case of Zero interest and accordingly the impugned loan transactions should also be examined under arms' length principles.

31. We notice that the decisions rendered by the Mumbai bench of Tribunal in the case of Shilpa Shetty (supra) and M Suresh Company P Ltd (supra) did not consider binding decision rendered by the Special bench of ITAT, Kolkatta and hence the above said decisions so rendered by the Mumbai bench are per-incurium and cannot be followed. Various other decisions relied upon by Ld A.R are related to the computation of income under general provisions of the Act, whereas Chapter X is Special provision relating to Avoidance of Tax. As held by the Special bench, the general provisions have to give way to the special provisions. The Special bench has also observed that the decision rendered by Hon'ble Bombay High Court in the case of Vodafone India Services (P) Ltd (supra) has been rendered in a different context. So is the case with the decision rendered by Hon'ble Delhi High Court in the case of Maruti Suzuki Ltd (supra).

32. In view of the above, we hold that the tax authorities are justified in invoking the provisions of Chapter X to the impugned loan transactions.

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33. The Ld A.R also argued that the loan transactions are in the nature of quasi equity, since the impugned loans are intended to be converted into equity capital. The fact remains that, during the year under consideration, the impugned transactions remained as loan transactions only. The loan has been given to a holding company and the proposed acquisition of a foreign company was proposed to be executed through Special Purpose Vehicles. Thus we notice that there appears to be multiple layers in the proposed scheme. There was no contractual obligation or option for converting the loan into equity as existed in the case of Cadila healthcare Ltd (supra). It is a fact that the TPO/DRP did not deal with the contentions of the assessee regarding quasi-equity. However, it is stated that the assessee has intended to convert the loan into equity. When the loan transactions remained as loan transactions in the books, in our view, the contention of any such intention cannot be recognized. Under these set of facts, we are unable to appreciate this alternative contention of the assessee.

34. The Ld A.R submitted that the AO/TPO was not right in adopting yield rate applicable to bonds rated by CRISIL agency. He submitted that the impugned loan has been given to a foreign AE and hence he LIBOR rate should have been applied by the TPO. He also placed his reliance on the decision rendered by Hon'ble Rajasthan High Court in the case of Vaibhav Gems Ltd (supra). He also submitted that the LIBOR has been accepted by the co-ordinate bench of Bangalore ITAT in the case of M/s Sasken Technologies Ltd vs. DCIT (IT(TP)A 550/Bang./2016). In view of these judicial rulings, we restore this issue to the file of AO/TPO with the direction to examine this claim of the assessee by duly considering the decisions referred above and also that may be relied upon by the assessee in the set aside proceedings.

35. Ground No.3 urged by the assessee relates to the disallowance made u/s 14A of the Act. During the year under consideration, the assessee

earned dividend income, which included dividend received from Overseas subsidiary of Rs.3.38 crores, which was taxable. The remaining dividend income was received from domestic companies and mutual funds. The assessee claimed the same as exempt. As per the assessment order, aggregate amount of dividend received during the year was Rs.8.98 crores. However, in the written submissions, the assessee has stated that it has received dividend income of Rs.4.46 crores only. This difference requires to be examined. Be that as it may, the fact remains that the assessee did not disallow any expenditure u/s 14A of the Act, even though it claimed exemption of dividend income received from domestic companies and mutual fund. The AO, hence, computed disallowance by applying provisions of Rule 8D of I.T Rules at Rs.94.97 crores. The Ld DRP directed the AO to exclude the dividend received from foreign subsidiaries, as they are taxable. Otherwise, in principle, it confirmed the disallowance made by the AO u/s 14A of the Act.

36. We heard the parties on this issue and perused the record. The Ld A.R made various contentions and hence this issue requires to be restored to the file of the AO for examining it afresh in the light of various contentions of Ld A.R, which are summarized below:-

(a) It is the contention of Ld A.R that the own funds available with it is in excess of the investments. The jurisdictional Hon'ble Karnataka High Court in the case of CIT vs. Microlabs Limited (2016)(383 ITR 490) has dealt with an identical issue. The High Court extracted following decision rendered by the Tribunal:-

> "40. We have heard the rival submissions. A copy of the availability of funds and investments made was filed before us which is at pages 38 to 42 of the assessee's paperbook and the same is enclosed as ANNEXURE-III to this order. It is clear from the said statement that the availability of profit, share capital and reserves & surplus was much more than investments made by the assessee which could yield tax free income.

41. The Hon'ble Bombay High Court in Reliance Utilities & Power Ltd. 313 ITR 340 (Bom) has held that where the interest free funds far exceed the value of investments, it should be considered that investments have been made out of interest free funds and no disallowance u/s. 14A towards any interest expenditure can be made. This view was again confirmed by the Hon'ble Bombay High Court in *CIT* v. *HDFC Bank Ltd*., ITA No.330 of 2012, judgment dated 23.7.14, wherein it was held that when investments are made out of common pool of funds and non-interest bearing funds were more than the investments in tax free securities, no disallowance of interest expenditure u/s. 14A can be made.

42. In the light of above said decisions, we are of the view that disallowance of interest expenses in the present case of Rs.49,42,473 made under Rule 8D(2)(ii) of the I.T. Rules should be deleted. We order accordingly."

Thereafter, it was held by Hon'ble Karnataka High Court as under:-

"The aforesaid shows that the Tribunal has followed a decision of the Bombay High Court in the case of *CIT* v. *HDFC Bank Ltd*. [2014] 366 ITR 505/226 Taxman 132 (Mag.)/49 taxmann.com 335 . When the issue is already covered by a decision of the High Court of Bombay with which we concur, we do not find any substantial question of law would arise for consideration as canvassed."

Accordingly, we direct the AO to examine the claim of the assessee and if it is found that the own funds available with the assessee is in excess of the value of investments, then no disallowance u/r 8D(2)(ii) out of interest expenditure is called for.

(b) In the alternative, the assessee has also submitted that the loan funds were taken for specific purposes and utilised the same for those purposes. Accordingly, it was contended that, when the assessee would be

able to show the nexus between the interest expenditure and its utilisation for specific purposes, no interest disallowance is called for. In this regard, it is stated that it has paid interest on security deposits, cash credits/overdrafts, working capital demand loan, bill discounting facilities. When the disallowance is worked out under rule 8D(2)(ii), this contention of the assessee would loose its significance.

(c) The Ld A.R submitted that, for the purpose of computing average value of investments, the AO should consider only those investments which have actually yielded exempt dividend income. We notice that this argument of the assessee finds support from the decision rendered by the Special bench in the case of Vireet Investments P Ltd (165 ITD 27)(Delhi-SB). Accordingly, we direct the AO to exclude investments, which did not yield exempt income, while computing average value of investments.

(d) The Ld A.R also contended that the disallowance should not exceed the amount of exempt income. In this regard, he placed his reliance on the decision rendered by jurisdictional High Court in the case of Pragathi Krishna Gramin Bank vs. JCIT (2018)(95 taxmann.com 41). We direct the AO to take into consideration above said binding decision while examining this issue.

Accordingly, we restore this issue to the file of the AO for examining it afresh in the light of discussions made supra.

37. The next issue urged relates to the disallowance of interest expenditure relatable to the interest free advances given by the assessee to the related parties. The AO noticed that the assessee has advanced interest free loans to related parties to the tune of Rs.4655.84 crores. However, the assessee had paid interest on the loan taken by it. Hence, the AO proposed to disallow interest relatable to the advances so given. The assessee submitted before the AO that it has used its accumulated surpluses and interest free advances received from customers for the purpose of given interest free loans to related parties. The AO, however, rejected the same by

observing that the submissions are very general and not supported by any verifiable evidence. The AO further observed that the assessee was not able to demonstrate how such interest free advances given to related parties is in the interest of business carried on by the assessee, i.e., commercial expediency in giving interest free advances was not shown. The AO also placed his reliance on the decision rendered by Hon'ble Punjab and Haryana High Court in the case of CIT vs. Abhishek Industries Ltd (2006)(286 ITR 1) and C.R Auluck and Sons P Ltd (2014)(360 ITR 193) and accordingly held that proportionate interest expenses should be disallowed. Accordingly he computed the interest disallowance by considering PLR (Prime Lending Rate) and the return on Loans/advances, which worked out to Rs.348.72 crores. The Ld DRP noticed that the interest free loans included the loan given to the AE of the assessee named USL Holdings Ltd. The AO has already made Transfer pricing adjustment in respect of interest free advance given to its AE and the said advance has again been included while computing the present interest disallowance. Accordingly, the Ld DRP observed that the disallowance on the loan given to AE is not warranted. Accordingly the Ld DRP held that the disallowance of interest expenditure to the extent of transfer pricing adjustment should only be made on protective basis and confirmed the disallowance of remaining interest expenditure on substantive basis.

38. The Ld A.R submitted that the decision rendered by Hon'ble Punjab & Haryana High Court in the case of Auluck and Sons P Ltd (supra) was rendered by following its earlier decision in the case of Abhishek Industries Ltd (supra). However, the decision rendered by Hon'ble Punjab and Haryana High Court in the case of Abhishek Industries Ltd (supra) has since been revered by the Hon'ble Supreme Court in the case of Munjal Sales Corporation (2008)(168 Taxman 43)(SC).

39. The ld A.R submitted that the assessee had advanced interest free funds to USL Holdings Ltd located in British Virgin Island, an associated

enterprise for the purpose of acquiring W & M Group and hence there was commercial expediency in giving the loan to USL Holdings Ltd. The above said W & M group is major producer of Scotch, which is the ingredient used in production of alcoholic beverages by the assessee. Hence the acquisition of the above said group has actually promoted the business interests of the assessee. Accordingly he submitted that there is commercial expediency in giving interest free advances to its AE. The Hon'ble Supreme Court has held in the case of S.A Builders Ltd (2007)(158 Taxman 74) that no interest disallowance is called for when there exists commercial expediency in giving interest free loans to subsidiary companies. Accordingly he submitted that interest disallowance in respect of the loan given to the AE of the assessee is not called for and hence the Ld DRP was not justified in confirming the disallowance pertaining to this loan on protective basis.

40. The Ld A.R submitted that the own funds available with the assessee is more than the aggregate amount of interest free loans given by the assessee (including that given to the AE). He submitted that the own funds available with the assessee was Rs.51,037.68 crores and Rs.58,784.87 crores as on 31.3.2011 and 31.3.2012 respectively, as against the interest free advances of Rs.37,573 crores and Rs.45,852 crores outstanding as on the same date respectively. Accordingly, by placing reliance on the following case law, the Ld A.R submitted the presumption is that these advances have been given out of own funds only:-

(a) Reliance Industries Ltd vs. CIT (2019)(102 taxmann.com 52)(SC)

(b) Reliance Utilities & Power Ltd (2009)(178 taxmann 135)(Bom).

Accordingly he submitted that no disallowance out of interest expenditure is called for.

41. On facts, the Ld A.R submitted that there is mistake in the rate of interest adopted for “return of loans/advances” and further the AO has computed the interest disallowance for the whole year, instead of computing the same for outstanding period of loan.

42. We heard Ld D.R and perused the record. From the arguments of the ld A.R, we notice that the own funds available with the assessee is in excess of the aggregate amount of interest free advances and hence the decision rendered by Hon'ble Supreme Court in the case of Reliance Industries Ltd (supra) shall apply to the facts of the present case, in which event, no interest disallowance is called for. We notice that this contention of the assessee has not been examined by the AO in the light of decision of Hon'ble Supreme Court referred above. Accordingly, we restore this issue to the file of the AO to examine the factual aspects and for deciding this issue following the decision rendered by Hon'ble Supreme Court, referred above. If the disallowance gets deleted on this ground, then other contentions of the assessee would be rendered academic in nature. However, if any part of disallowance is liable to be made, then the AO should consider other arguments of the assessee also in the set aside proceedings.

43. The next issue relates to the disallowance of promotion and advertisement expenses. The assessee had claimed following payments as Advertisement and sales promotion expenses:-

a. Royal Challengers Sports P Ltd	-	9.00 crores
b. United Racing & Bloodstock breeders	-	7.72 crores
c. United Mohun Bagan Football Team	-	8.55 crores
		25.27 crores
d. Force India F1 Team Ltd.	-	7.39 crores
		32.66 crores

The AO took the view that these expenses have been incurred for promotion of USL brand and hence they give enduring benefit to the assessee. Accordingly he held that these expenses are in the nature of brand promotion and the same give rise to an intangible asset. Hence these expenses are in the nature of capital expenditure. Accordingly he

disallowed the above said claim of the assessee. Ld DRP also confirmed the same.

44. The Ld A.R submitted that the assessee, being manufacturer of alcoholic beverages, is allowed to advertise only its brand name as per Rule 7 of Cable Television Rules, 1994. Accordingly, the assessee has entered into agreements with companies conducting sports events for the purpose of displaying its logo on the jersey/related materials during the course of sporting events. He contended that the assessee has not acquired any capital asset by incurring these expenses. Further, these expenses did not give any enduring benefit as observed by the AO. He submitted that "USL brand" is a well established brand and the impugned expenses have been incurred only for promoting existing brand logo(s) and not for developing logo(s). He submitted that, in the following cases it has been held that advertisement expenses incurred for the purpose of making the product known to the market is to be considered as revenue nature:-

(a) CIT vs. Indo Nissin Foods Ltd (2013)(217 Taxman 95)(Kar)
(b) CIT vs. Salora International (2009)(177 Taxman 456)(Delhi)
(c) CIT vs. Geoffrey Manners & Co. Ltd (2009)(180 Taxman 87)(Bom)
(d) CIT vs. Empire Jute Co Ltd (1980)(3 Taxman 69)(SC)
(e) CIT vs. ITC Hotels (2014)(47 taxmann.com 215)(Kar)

The Ld A.R submitted that, in the following cases, it has been held that brand building expenses incurred with the intention to increase the visibility amongst its customers is based on pure commercial expediency and hence revenue in nature:-

(a) DCIT vs. Godrej Tea Ltd (2010)(4 ITR(T) 649)(Mumbai)
(a) Modi Revelon P Ltd (2012)(26 taxmann.com 133)(Delhi)
(b) Getit Informediary Ltd (2012)(ITA No.450/Del/2012)

The Ld A.R also submitted that, it has been held in the case of Samundra Developers P Ltd (ITA 5974/Mum/2013) that the expenditure incurred on sponsorship for Mumbai Indian franchise of Indian Premier League did not provide any benefit of enduring nature and the said expenditure is in nature of advertisement providing visibility to the assessee group and hence

it is revenue expenditure. Similarly, it has been held in the case of Pepsico India Holdings P Ltd (ITA No.4517/Del/2016 & others) that sponsorship payments made by Pepsi to ICC for the World Cup event was to be allowed as deduction u/s 37(1) of the Act, as those expenses are for promotion of business and sporting events are generally used by companies as a platform to advertise.

45. We have heard Ld D.R on this issue and perused the record. We notice the issue relating to allowability of expenditure incurred on sponsorship of sports event was considered by the Mumbai bench of ITAT in the case of Samudra Developers Pvt Ltd (ITA 5974/Mum/2013 dated 26-04-2017) and it was held that the same is allowable as revenue expenditure. For the sake of convenience, we extract below the operative portion of the order passed by Mumbai bench of Tribunal on an identical issue:-

> "3.Second ground of appeal pertains to deleting the disallowance on account of sponsorship fees and management fees.In the earlier part of our order,we have mentioned the facts about the various disallowances made by the AO including the capitalisation of sponsorship.Treating it as an intangible asset,he allowed depreciation on it @25%.
>
> 3.1.The FAA after considering the elaborate submissions of the assessee,held that it had entered into an agreement with the sports company namely India-Win in the month of March, 2010,that the assessee-group became cosponsor of Mumbai Indian IPL cricket team as an associate partner, that as per the agreement the ground logo of the assessee group was displayed permanently in the cricket stadium is also on the playing gear of the players,that in the terms of the agreement and amount of Rs.4.50 crores was paid towards sponsorship fees during the year under consideration, that the sponsorship fees for different years had been apportioned and allocated to 3 entities of the assessee group which were using the brand logo in the ratio of their respective turnovers during the year, that out of the expenditure of Rs. 2.50 crores and amount of Rs. 21.61 lakhs was allocated to the assessee, that the expenditure incurred on IPL sponsorship did not provide it any benefit of enduring nature,that the expenditure had been incurred year after year by the assessee group with a view to get visibility, that it was in nature of some kind of advertisement expenditure, that same should be allowed as revenue

expenditure. Referring to the case of Delhi Cloth and General Mills Co.Ltd.(115 ITR 659) of the honorable Delhi High Court,the FAA allowed the appeal filed by the assessee.

3.1.a.With regard to management fee,the FAA observed that there was no doubt about the genuineness of expenditure,that the expenditure was incurred for availing infrastructure facilities administrative support,like manpower recruitment, HR services, uses of computer, telephone, photo copiers, infrastructure set up etc. in order to carryout business operations smoothly, that the parent company had allocated a certain amount to the account of the assessee in the ratio of its turnover. He finally held that expenditure had to be allowed as revenue expenditure.

3.2. Before us, the DR supported the order of the AO and the AR relied upon the order of the FAA.

We find that the assessee group had entered into an agreement with India Win, that it was a co- sponsor of Mumbai Indian IPL team, that it had incurred similar expenditure in the subsequent two years, that out of the total expenditure the assessee had claimed a very small proportion under the head sponsorship expenses. Such an expenditure is for advertising the brand name of the Group. Being a recurring expenditure, it had to be allowed as revenue expenditure. We find that in the case of Delhi Cloth and General Mills Co.Ltd.(supra)the Hon'ble Court had held that expenditure incurred for organizing sports events are allowable items of revenue expenditure as such events publicise the names of the sponsor. The AO was not justified in capitalising the expenses. The entire expenditure was rightly allowed by the FAA as revenue expenditure. After going through the details of expenditure incurred by assessee under the head managerial expenses, we are of the opinion that it had not got any enduring benefit from the expenditure incurred nor did the expenditure create any capital asset.Therefore, we do not want to interfere with the order of the FAA.Considering the above,we decide second ground of appeal against the AO."

46. The Delhi bench of Tribunal has also examined an identical claim in the case of M/s Pepsico India Holdings Pvt Ltd (supra) and the same was allowed as revenue expenditure with the following observations:-

"Re: Disallowance of INR 3,85,15,497/- being sponsorship fees paid to ICC

87. In Grounds No. 7 to 7.3 in I.T.A. No. 1044/DEL/2014 for AY 2009-10, the assessee has challenged the disallowance of INR 3,85,15,497/- being sponsorship fees paid by the assessee to ICC. Our attention was drawn to paras 4 to 4.3 of the final assessment order wherein the said issue has been discussed by the AO. It has been submitted that during the relevant previous year the assessee entered into an agreement dated 20.08.2008 with ICC Development (International) Limited (ICC) for obtaining sponsorship rights in respect of various ICC cricketing events around the world. The assessee paid an amount of Rs. 3,85,15,497/- for sponsoring cricketing events held during 2008 to ICC. The said amount was proposed to be disallowed by the AO in the Draft Assessment Order, for the following reasons: -

> (i) Similar expense has been disallowed in the earlier years as part of the Transfer Pricing Adjustment on account of AMP expenses.
>
> (ii) Assessee has been bearing substantial portion of the fees paid to ICC for acquiring sponsorship rights even though benefit of the same is derived by the other entities of the world.

88. Aggrieved by the addition proposed by the AO, the assessee had filed objections before the DRP. The DRP vide directions dated 20.12.2013 upheld the action of the AO, on the ground, that the expenditure was benefitting all the entities across the globe and hence, it could not be said to have been incurred wholly and exclusively for the business of the assessee.

89. The learned counsel for the assessee submitted that the said disallowance was unwarranted since the said expense was incurred in view of the fact that major viewership of cricket is in the Indian subcontinent. He also referred to various newspapers reports which demonstrated the popularity of the sport in India to support the aforesaid contentions. It was also submitted that the assessee company has consistently promoted its range of products using cricket as an advertising platform. It was also to our notice that payment of sponsorship fees to ICC was remitted by the assessee after deduction of tax at source as instructed by the Income Tax Department. Further, the assessee had obtained the approval of the Ministry of Youth Affairs and Sports for sponsoring the events covered under the agreement. Copy of the order under section 195 of the Act and the approval received from the Ministry of Youth Affairs and Sports has been enclosed at pages 247 to 249 and 224 of the paper-book respectively. He further submitted that the expenditure was wholly and exclusively for the business of the assessee

company and had not been disputed by the revenue. Any incidental benefit that may arise to any other person or entity cannot be a bar for allowance of expenditure under section 37 of the Act, as per the settled position of law. Reference in this regard was made to the decisions of the Hon'ble Supreme Court of India in CIT vs. Chandulal Keshavlal & Co. [1960] 38 ITR 601 (SC), Sasson J. David and Co. P. Ltd vs. CIT 118 ITR 261(SC) and SA Builders Ltd. vs. CIT 288 ITR 1(SC. He further submitted that the Revenue cannot step into the shoes of an assessee to determine the commercial expediency of an expenditure incurred by it.

90. On the other hand, the learned DR relied upon the order of the AO and the DRP in support of his contentions.

91. After considering the rival submissions and on perusal of the impugned orders, we find that, here the disallowance of Rs.3,85,15,497/- has been made on account of sponsorship fee by the assessee to the ICC on the ground that similar expenditure was disallowed in the earlier years as part of Transfer Pricing Adjustment on account of AMP expenses; and secondly, assessee has been bearing substantial portion of the fees to the ICC for acquiring the sponsorship rights even though benefit of the same is derived by either entity of the world. The contention raised by the learned counsel that since major viewer of cricket is an Indian sub-continent looking to its mass popularity in India, the assessee company has been consistently promoting its range of products using cricket as an advertisement platform. The said payment has been made after obtaining the approval of Ministry of Health Affairs and Sports and after deducting TDS u/s.195. Once the expenditure has been incurred wholly and exclusively for the purpose of business which fact has not been disputed by the Department, then even if some incidental benefit which may arise to any other entity cannot be a bar for allowance of expenditure u/s. 37. Under the principle of commercial expediency such an expenditure has to be seen from the angle, whether the decision taken by the assessee for paying sponsorship fees was for the purpose of business or not. Here in this case, the commercial expediency has not been doubted but rather it has been held by the AO that in all the years transfer pricing adjustments has been made on this score and benefit is arising to the other AEs also. What is relevant for an expense to be allowable as revenue expense is that, whether it has been incurred during the course of business and is for the purpose of business. Benefit factor to other related parties is relevant under transfer pricing provision and not while allowability of business expense u/s 37(1). It is well known fact that companies use sports event as a platform to advertise their range of products as it has a very high viewership. Any such incurring of expenditure is ostensibly for

promotion of business only and hence, no disallowance is called for. Accordingly, Grounds No.7 to 7.3 in ITA No.1044/Del/2014 pertaining to A.Y. 2009-10 are allowed."

47. We notice that the co-ordinate benches are consistently holding the view that the expenditure incurred on sponsoring of sports events are intended to promote business only and hence the same is allowable as expenditure. The allowability of brand promotion expenses was examined by Hon'ble Delhi High Court in the case of Modi Revelon P Ltd (supra) and the relevant discussions made by the High Court are extracted below:-

"22. As far as the second aspect, i.e. expenditure for promotion of the brand is concerned, there is no doubt that the dealer's functions extend to advertising the products of the assessee, manufactured by the sister concern. On this aspect, Section 37 of the Income-tax Act would be relevant. The said provision reads as follows:

"SECTION 37 GENERAL:

(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

Explanation : For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

(2B) Notwithstanding anything contained in sub-section (1), no allowance shall be made in respect of expenditure incurred by an assessee on advertisement in any souvenir, brochure, tract, pamphlet or the like published by a political party.

The applicable test as to what constitutes expenses "laid out or expended wholly and exclusively for the purposes of the business or profession" was explained in Gordon *Woodroffe Leather Manufacturing Co.* v. *CIT* [1962] Supp. (2) SCR 211. The correct approach, said the Court, which has to be taken in all such cases is to see whether:

"was the sum of money expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business"

Again, in *Sassoon J. David & Co. (P.) Ltd.* v. *CIT* [1979] 118 ITR 261/ 1 Taxman 485 (SC) the Supreme Court outlined the correct test of commercial expediency as the guiding principle to decide whether the expenditure was to facilitate profits, as follows:
(*iii*) that the sum of money was expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business of the assessee"

In *Smith Kline & French (India) Ltd.* v. *CIT* [1992] 193 ITR 582/[1991] 59 Taxman 357 (Kar.), it was held that in normal commercial sense and in common parlance sales promotion and publicity are activities aimed at gaining goodwill in the market. They need not be confined to media propaganda but can involve indirect approaches. The judgment of a Division Bench of this Court in *CIT* v. *Adidas India Marketing (P.) Ltd.* [2010] 195 Taxman 256 (Delhi) has recognized that brand promotion exercises undertaken through media campaigns, schemes, programmes etc are essential for propagation of the brand. The necessity (or lack of it) is not something which income tax authorities can go into; as long as it is voluntarily undertaken by the business enterprise for profit earning, it would be entitled to claim relief under section 37(1).

23. In the present case, the AO was conscious of the fact that brand promotion expenses are a necessary ingredient in marketing strategies. Therefore, he allowed about 50 per cent of those expenses. However, the reasoning for disallowance of the rest, i.e. that the assessee could claim only a proportion of such expenses, since advertising expenses were to be borne by the sister concern dealer, and that the proportion was in respect of its territory, was not upheld. This Court does not see any fallacy in the Tribunal's approach or reasoning, on this aspect. One is not unmindful of the concerns of a business which engages in sale of consumer items, and faces continuous competition. Brand promotion enhances the visibility of given products or services, and are often perceived as conferring a competitive advantage on those who adopt those strategies or schemes. Expenditure towards that end is based on pure commercial expediency, which the revenue in this case, ought to have recognised, and allowed. The revenue's arguments on this point too are insubstantial."

48. The observations made by the Hon'ble jurisdictional Karnataka High Court in the case of CIT vs. ITC Hotels (2014)(47 taxmann.com 215) on the

concept of “enduring benefit” is relevant here and the same is extracted below:-

> **“6.** The first substantial question of law relates to a sum of Rs.10 lakhs, which were paid by the assessee as a license fee for the use of central court yard, having marble, (for short "Court Yard") in Lallgarh Palace (for short 'Palace'). It appears that there was a Memorandum of Understanding (for short 'MOU') between the Assessee and Maharaja Ganga Sinhji Charitable Trust (for short the "trust"). The assessee, as per the MOU, had acquired a right to use the court yard for their business of hotel, being run in the palace, more efficiently and profitably. The question is whether the expenditure of Rs.10 lakh resulted in any addition to the fixed capital of the assessee. According to the Revenue, the assessee had acquired right to use the court yard apart from the palace, and thus, had acquired an advantage of enduring benefit of a trade. In other words, the expenditure incurred by the assessee for the use of court yard is in the capital field and it cannot be said to have been incurred to facilitate trading operation of the assessee.
>
> **7.** Learned Counsel appearing for both the sides placed reliance upon the judgment of the Supreme Court in the case of *Empire Jute Co. Ltd.* v. *CIT* [1980] 124 ITR 1/3 Taxman 69, in support of their contentions. Mr. Aravind, learned counsel for the Revenue tried to distinguish the ratio laid down by the Supreme Court in this case on the basis of factual matrix involved therein. As against this, learned counsel appearing for the respondent/assessee placed reliance upon the principle laid down by the Supreme Court in the said judgment.
>
> **8.** We have perused the judgment. We find ourselves in agreement with the learned counsel appearing for the respondent/assessee. It would be relevant to reproduce the relevant observation made by the Supreme Court, in the said judgment, which, in our opinion, support the case of the respondent/assessee to contend that the expenditure of Rs. 10 lakhs would be on revenue account. The relevant observation in the case of *Empire Jute Co. Ltd.* (*supra*) reads thus:
>
> > 'The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the Courts may be referred to as they might help to

arrive at a correct decision of the controversy between the parties. One celebrated test is that laid down by Lord Cave L.C. in Atherton Vs. British Insulated & Helsby Cables Ltd. (1925) 10 Tax Cases 155 (HL), where the learned Law Lord stated :

"...when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite condition) for treating such an expenditure as properly attributable not to revenue but to capital".

This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in *CIT* v. *Nchanga Consolidated Copper Mines Ltd.* [1965] 58 ITR 241 (PC) : TC16R.991, it would be misleading to suppose that in all cases, securing a benefit for the business would be, *prima facie*, capital expenditure "so long as the benefit is not so transitory as to have no endurance at all. There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case'.

9. It is clear that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. In the present case, except the right to use the court yard, no other rights were created in

favour of assessee. In other words, the amount paid to the Trust was for the use of the court yard under the MOU for an indefinite future, and therefore, it would be on revenue account. In other words merely because the advantage may endure for an indefinite future would not mean that the expenditure would be on capital account and not revenue. The advance of Rs. 10,00,000/-, in the present case, consists merely in facilitating the assessee's business operations, enabling the management to conduct their Hotel business more efficiently and profitably. We are, therefore, satisfied that the view taken by the Tribunal in answering this question in favour of Assessee and against the Revenue is correct and deserve no interference by this Court."

49. Respectfully following the above cited decisions, we set aside the order passed by AO on this issue and direct him to allow the impugned sponsorship expenses as revenue expenditure.

50. The last issue relates to the disallowance of PF/ESI payments for belated remittance of the same. The AO disallowed a sum of Rs.1,51,904/- relating to employees contribution of PF/ESI relating to USL, Hospet. The Ld DRP directed the AO to delete the disallowance by following the decision rendered by jurisdictional Karnataka High Court in the case of Sabari Enterprises and Essea Teraoka Company Ltd. It is the say of the assessee that the AO did not follow the direction given by Ld DRP on this issue in the final assessment order as well as in the rectification order passed by the AO thereafter.

51. We heard the parties on this issue. Since it is a matter of rectification, we direct the AO to rectify the mistake pointed out by the assessee on this issue by deleting the disallowance as per the direction issued by Ld DRP.

52. The remaining grounds relate to excess levy of interest u/s 234A and 234B and also Short credit of TDS/TCS. These issues also are matters of rectification at the end of AO and charging of interest is also consequential. Accordingly we restore these issues also to the file of the AO.

53. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	**(B.R. BASKARAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 29.05.2020.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore