आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, Hon'ble JUDICIAL MEMBER
AND Dr.SHRI ARJUN LAL SAINI, Hon'ble ACCOUNTANT MEMBER

(Virtual Hearing)

आ.अ.सं./I.T.A's No.181 & 182/SRT/2017

निर्धारण वर्ष/Assessment Years: 2009-10 & 2010-11

Bilakhia Holding P Ltd., Bilakhia House, Muktanand Marg, Chala, Surat – 394 520. **[PAN: AADCS 4420 J]**	Vs .	The Assistant Commissioner of Income Tax, Vapi Circle, Vapi.
अपीलार्थी / Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओर से /Assessee by	Shri Gopalakrishnan Aiyer – AR
राजस्वकीओर से /Revenue by	Smt. Usha Shrote – Sr.DR

सुनवाई की तारीख/ Date of hearing:	13.04.2021
उद्घोषणा की तारीख/Pronouncement on:	19.05.2021

आदेश /O R D E R

PER Dr.ARJUN LAL SAINI, ACCOUNTANT MEMEBER:

1. Captioned two appeals filed by assessee pertaining to Assessment Year 2009-10 and 2010-11, are directed against the separate orders passed by the ld.CIT(A), which in turn arise out of separate orders passed by the Assessing Officer under section 271(1)(C) of the Income Tax Act, 1961 (here in after referred to as the 'Act').

2. Since these appeals pertain to the same assessee for different assessment years, and common issues are involved, therefore these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience

and brevity. The facts as well as grounds of appeal narrated in ITA No.181/SRT/2010 for A.Y. 2009-10 have been taken into account to decide these two appeals *en masse*.

3. Grounds of appeal raised by the assessee in its lead case in ITA No.181/SRT/2017 are as follows:

> "*01. The order imposing penalty U/s. 271(1)(c) of the Act is contrary to the facts of the case and prejudicial to the law. The appellant company has neither concealed its income nor submitted any inaccurate particulars of income and the action of the Learned Commissioner of Income Tax (Appeals) is contrary to the facts of the case and law and deserves to be deleted.*
>
> *02. On appreciation of the facts and circumstances of the case, the Learned Commissioner of Income tax (Appeals) has erred in confirming the action of the Learned Assessing Officer imposing penalty U/s.271(1)(c) to the tune of Rs.41,81,930/-.*
>
> *08. The appellant craves leave to add, amend, modify or alter the above grounds of appeal at any stage of appellate proceedings.*
>
> *09. The appellant humbly prays that the appeal be allowed in toto."*

4. Brief facts qua the issue are that assessee filed its return of income for F.Y.2008-09 relevant to A.Y.2009-10 on 29.09.2009, declaring an income of Rs. 19,73,23,971/-. Subsequently the case was selected for scrutiny as per the instructions of the Central Action Plan for the F.Y.2009-10. The assessee has entered into international transaction more than Rs. 15 crore with its foreign associate concern during the year under consideration. Accordingly the matter was

referred to the Transfer Pricing Officer for determination of the Arm's length as per the provisions of section 92CA of the I.T.Act, 1961. Accordingly the order u/s 92CA(3) passed by the TPO dated 24.01.2013 has been received on 28.01.2013. In view of the same final assessment order u/s 143(3) r.w.s 144C of the Act was passed on 11.03.2013. The addition was made to the total income, for upward adjustment as per TPO's order at Rs.1,94,15,214/-.

5. The Penalty proceedings U/s.271(l)(c) of the Act was initiated in the above addition for concealment of income and for furnishing inaccurate particulars of income. Show cause notice U/s.274 r. w. section 271(1)(c) of the Act was issued on 11.03.2013 by the Addl.CIT, Vapi Range, Vapi under whose jurisdiction the case was pertaining to, calling for the explanation of assessee by 12.04.2013 on receipt of the notice. In response to this, the assessee company gave reply on 11.04.2013 wherein it was stated that the assessee company is in the process of filing an appeal against the said order before the ld.CIT(A), Valsad. Hence the matter of penalty was kept in abeyance until the decision of CIT(A).

6. The CIT(A) has delivered the decision in the assessee's case, vide order No. CIT(A)/VLS/28/13-14 dated 27.03.2015 and partially allowed the appeal of the assessee . The assessee has

got relief to the extent of Rs.71,11,800/- . The balance of Rs.1,23,03,414/- is sustained. Accordingly a fresh notice for the levy of penalty proceedings u/s 271(1)(c) of the Act was issued by the AO on 26.02.016 requesting the assessee to attend the office of AO for an opportunity of being heard on or before 07.03.2016 on receipt of the letter.

7. The assessee submitted its reply against the show cause notice dated 23.03.2016. However, the Assessing Officer rejected the contention of the assessee and levied the penalty under section 271(1)(c) of the Act TO THE TUNE OF Rs.41,81,930/-.

8. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the ld.CIT(A) who has confirmed the penalty imposed by the AO observing as follows:

> *"considering the above factual and legal positions, it is apparent that the appellant has not been able to prove its good faith and due diligence in not benchmarking its international transactions as required by provision of sec. 92C of the Act. As noted in the two decisions of ITAT Mumbai referred herein above, the penalty was upheld when the appellant did not benchmark its international transactions as per most appropriate method u/s. 92C of the Act, the appellant's case is even worse as benchmarking was not done at all as sec. 92C of the Act. Therefore, I have no reason to differ with the finding of the AO on levy of penalty u/s.271(1)(c) of the Act and the same is hereby confirmed. Gronds of appeal no. 1 & 2 are dismissed."*

9. Aggrieved by the order of the ld.CIT(A), the assessee is in appeal before this Tribunal.

10. At the outset, the Ld.Counsel for the assessee submits that the Tribunal in assessee's appeal for A.Y. 2009-10 and 2010-11 vide ITA No.1415/Ahd/2015 for A.Y. 2009-10 and ITA No.1416/Ahd/2015 for A.Y. 2010-11 have deleted the quantum relating to these penalties. Since the quantum have been deleted by the Tribunal in A.Y. 2009-10 and 2010-11, therefore, penalty should not be imposed and therefore the penalty imposed by the Assessing Officer for Assessment Year 2009-10 and 2010-11 should be deleted.

11. On the other hand, the Ld.Departmental Representative for the Revenue relied on the order of Assessing Officer.

12. We have heard both the parties and perused the material available on record, we note that the Co-ordinate Bench of ITAT Surat in the assessee's own case in ITA No.1415/Ahd/2016 for A.Y. 2009-10 and ITA No.1416/Ahd/2015 for A.Y. 2010-11 have deleted the transfer pricing adjustment/arms length price adjustment of International Transaction relation to quasi-capital observing as follows:

> *"12. **Ground No.4: States that on appreciation of the facts and circumstances of the case and law, the learned Commissioner of Income-tax (Appeals) has erred in confirming the action of the Learned Assessing Officer/Transfer Pricing Officer in making upward adjustment of Rs.1,80,56,250/- out of interest on loan to the AE to the income of the appellant company on account of determining the Arm's Length Price of International Transactions.***

The action of the learned Commissioner of Income tax (Appeals) is contrary to the facts and law and deserve to the deleted.

13. Briefly stated facts of the case are that the assessee has been created an investment company promoted by Bilakhia Group. The assessee credited a Special Purpose Vehicle (SPV) known as M-3 Holdings (Singapore) Pte Ltd [M3]". The assessee company was holding 46.2% shares in a Printing Ink Manufacturing company known as Sterling + Hostag. M3 is the subsidiary company which wholly owned by the credit and its transactions with the assessee company are under audit. As per 3CEB Audit Report, the assessee had international transactions with the assessee enterprises of which details are given as under ….

Sr.No	*Name of the AE*	*Nature of transaction*	*Amount in Rs.million*
1	*M3 Holdings (Singapore) Pte Ltd.*	*Redemption of preferential shares of M3 Holdings (Singapore) Pte Ltd*	*1749.06*
2	*Meeba Holdings Pte Ltd*	*Transfer of equity shares of M3 Holdings (Singapore) Pte Ltd*	*47.37*
3	*M3 Holdings (Singapore) Pte Ltd.*	*Provided corporate guarantee on behalf of M3 Holdings (Singapore) Pte Ltd*	*2218.65*
4	*M3 Holdings (Singapore) Pte Ltd.*	*Interest free unsecured loan*	*281.25*

14. The assessee has shown outstanding loan of Dollar 7 million (Rs.28.125 crore) which were given to M3 for its day to day functioning as it is an SPV not having any cash flow. Similarly, the assessee company provided corporate guarantee for a sum of Rs.2218.65 million on behalf of M3 for availing loan facilities from the Standard Chartered Bank, Mauritius. The assessee company had considered the aforesaid transactions to be in the shareholder's domain and did not charge any interest or charge from the SPV M3. The transfer pricing officer (TPO) did not accept the contentions of the assessee company that the loan transactions be considered as quasi equity or otherwise falling within the domain of shareholders activity. The TPO relied upon the decision of ITAT Delhi Bench in the case of Perot Systems TSI v. DCIT [2010] 37 SOT 358 (Delhi-Trib), wherein, interest free loans given to 100% foreign subsidiaries were not accepted as quasi capital and arms length price of the loans was determined and added to the total income. It was submitted that the assessee had invested US $ 2 Million in equity shares and US $ 38 Million in redeemable preferential shares as part of equity in Singapore Pte Ltd which has been sold by the company to another related company Meeba Holding Pvt. Ltd., a Finance Company at Singapore. The preferential shares have been redeemed during the year. Most of the transactions related to the redeeming of the preferential shares. However, the TPO was of the view that the nature and use will not alter the fact of the assessee having advanced the loan to an associated enterprise. Once funds have been made available to the AE in the form of loan, then the provisions of transfer pricing mandate that such loan be bench marked in terms of arm's length price of the loan. A loan per se cannot be termed as quasi equity and the assessee may claim zero bench marking under this plea. Therefore, a

show cause notice was issued to the assessee as to why the interest free loans to the AE should not be bench marked with reference to loans given to third party at 7.33%. The assessee furnished its reply vide letter dated 03.10.2011 which has been reproduced by the TPO at page 4 to 11 of the order of TPO. However, the TPO observed that the main contention of the assessee company is that the loan has been advanced to the AE in its capacity of only shareholder advancement of interest free loan is to ensure continuity of business and hence this substance of the transaction should be examined not its form. Once funds have been made available to the AE in the form of loan, the character of such funds remained loan unless the agreement for circumstances covering loan prove otherwise. Accordingly, the contention of the assessee company was not accepted on this issue. The TPO further observed that the action of advancing of Rs.28 crore cannot be said to be a shareholder's activity or an act to ensure continuance of the activities of the company, especially when the company is an SPV without many employees and has no substantive routine expenses. The assessee has failed to explain the reason for advancing such a huge loan. It is also not been able to justify that the loan was essential to ensure running of the AE. Since the AE is an SPV and is engaged in only financial activities, it is clear that the loan would be used for financial activities of the AE's. Hence, assessee needs to advance such a sum at normal arm's length financial level. Hence, with regard to contention of the assessee regarding use of SIBOR for bench marking of the interest rate as against LIBOR proposed in show-cause notice. The TPO noted that data given by the assessee for SIBOR pertains to one month of SIBOR which is not applicable to the long term loan given by the assessee. The TPO adopted 12 month average SIBOR for the purpose of bench marking of the interest rate. He thereafter, determined arm's length, risk spread by assuming that the factors of the bank margin/fees and cost of risk being carried by the bank by lending the amount to corporate entity. The TPO thereafter also considered the elements of financial risk credit risk, business risk, and structural risk. The TPO further observed that the study of different type of bonds issued by the Indian Industries and interest paid on such papers gives an indication of interest that could be earned if the amount is lent to the companies. Government Bonds are subject to interest risk. However, corporate bonds are subject to credit risk, in addition to interest rate risk. Accordingly, the TPO for benchmarking the loan transaction, 12 month SIBOR + 0.5% margin + 3.5% risk rate of 3.5% was adopted as the arm's length interest rate which should have been changed from AE over and above the SIBOR plus 0.5% margin plus 3.5% rate adopted as the arm`s length interest which should have been charged from AE. The annual average of 12 months SIBOR was proposed to be reasonable yard stick with reference to nature of loans given by the assessee to its AE is 2.42%. With a spread of 4%, accordingly the total interest required to be charged from the AE would be 6.42%.For the total borrowing of Rs.28.125 crores, the total interest required to be charged was worked out to Rs.1,80,56,250/-. Accordingly, an upward adjustment of Rs.1,80,56,250/- was made on this account.

15. Being aggrieved, the assessee filed an appeal before the ld. CIT(A). Wherein, it was submitted that the assessee has considered the transaction to be in the shareholders domain and did not charge any

interest or charges from the SPV M3. According to him, the TPO did not accept its contention that the loan transaction be considered as quasi equity or otherwise falling in the domain of shareholder's activity. The assessee has reiterated the submissions as made before the TPO. It was contended that the AE was formed as an SPV only with the object of investing in an operating Printing Ink Company and not for any financing activity/operations. The loan of USD 7 million has been given for meeting the working capital requirement of M3 and not for further lending. Therefore, the interest free loan has been given to ensure continuity of investment and easy repatriation of the money from Singapore to India as and when the AE earns any profit. In view of the same, even though the transaction has been shown as an interest free loan, the same amounts to quasi-equity. Therefore, the amount is subject to the same risk that may arise to the equity share holder for a similar type of activity. Reliance was also placed on the extract from the OECD commentary for making such reasonable inference in the circumstances of the case. It was further submitted that even in the event of the transaction being construed as a loan transaction by rejecting the contention of the appellant company, the rate of interest adopted for calculating the ALP shall be the bank lending rates based on Singapore Inter Bank Offer Rate (SIBOR). This was based on the premise that if a third party obtains loan from another third party it will be able to obtain such loans in Singapore at the SIBOR rate. Further, as per Rule 10B to Section 92C of the Act the ALP shall be adopted after benchmarking the same with comparable transactions. It was further submitted the TPO has arrived at a risk rate/margin by comparing interest rate of "AAA" Credit rated corporate bonds in India with "BBB" Credit rated corporate bonds in India. However, it was submitted that the AE being SPV, the same credit rating enjoyed by the parent company should be assigned to the SPV, whereas the TPO has assumed credit rating of "AAA" for the assessee being lender and "BBB" for AE being borrower. Since, the credit rating of parent company has assumed at AAA, the same can be notched down by one notch to arrive at credit rating for AE i.e. "AA +" or "AA" for two notches. Conservatively assuming "AA" rating for AE risk rate would be 0.39% (i.e. 9.71%-9.32%) instead of 3.5%. Further, the risk margin spread of each country is different because rate of interest in each country is different which in turn is based on economic and financial condition of such country. Without prejudice to above, it was also submitted that the rate of interest at which AE has actually taken loan from bank can be considered as benchmark rate. Therefore, rate of interest at which AE has taken loan from independent bank should be considered as comparable rating i.e. LIBOR + 0.75%. It was also contended that to adopt the 12 months average SIBOR as the ALP of the transaction under the CUP method prescribed under Rule 10B. If the actual alternative consideration the internal CUP method and considered the ALP an actual rate of interest for a loan from independent bank from AE i.e. LIBOR + 0.75% which is represented the actual cost taken by Standard Chartered Bank, Mauritius for its requirements. However, the CIT(A) observed that the transaction is a loan to the AE in Singapore to meet its day to day needs if an entity in Singapore raises loan from a third party or bank, the Cyber rate would have been a bench mark at interest rate pay such loans. Apart from, this Cyber rate of interest from mark-up payable for risk margin as well as standard chartered account of transactions. The TPO has considered that the SPV's credit rating will be down by 9 notches as comparable to the rate enjoyed by

the parent company. Accordingly, he has determined 4% as the risk premium apart from the SIBOR rate as per ALP for the transaction as per the transfer pricing provisions. As regards, alternative rating that if at all the ALP has to be computed as provided in Rule 10B which is the machinery provision in this regard. Apparently, the TPO has considered and compared the rate of interest, risk margin and other factors applicable to corporate bonds and similar rated instruments in India. Thereafter he has arrived at the risk premium of 4% over and above the SIBOR rate of interest. The TPO has also considered the credit rating of the SPV to be significantly down than the parent company. Admittedly, the SPV is fully owned by the appellant company and has been formed as SPV to hold investments. It does not carry on any other activity and the entire risk and reward of the AE shall be borne and enjoyed by the appellant company. Accordingly, CIT(A) observed that he has agreed with the TPO's observations that the risk premium of 4% over and above the SIBOR rate of interest is justified. Accordingly, the findings of the TPO were upheld.

16. Being aggrieved, the assessee filed an appeal before this Tribunal. The ld. counsel submitted that the Bhilakhia Holdings Pvt. Ltd [in short "BHPL"] i.e. an appellant-company is an investment company and was holding 46.2% shares in a Printing Ink Company known as Sterling + Hostag and for that purpose created a wholly owned subsidiary in Singapore as a Special Purpose Vehicle (SPV) known as M3 Holdings (Singapore) Pvt. Ltd (M3). BHPL has invested in equity, preference shares and loan in the subsidiary AE which in turn invested in Sterling + Hostage a printing ink manufacturing company in Europe. Once investments are sold, it has to wind up and bring back entire proceeds to India and pay all applicable taxes as if any other resident company is required to do if it has directly invested from India. As per the terms of the investment applicable to the SPV under FEMA as well in the year 2012-13 (07/09/2012) the said Singapore AE has been wound up and all the capital remitted from India and investment/gains on disposal of investments has been completely brought back to India. Tax at the rate of 15% has been paid in India as per law on the dividend received. During the year, BHPL has redeemed preference shares and brought back of Rs.174.90 Crores in order to redeem the aforementioned preference shares in the AE and considering the fact that the AE do not have any income or extra funds in its hand, the redemption has been achieved in the following manner i.e. BHPL and the AE arranged a loan from Standard Chartered Bank Mauritius to the tune of 35 Million Euro. Standard Chartered Bank, Ahmedabad gave guarantee to Standard Chartered Bank Mauritius. BHPL has given Corporate Guarantee to Standard Chartered Bank Ahmedabad. BHPL has paid Guarantee charges of Rs.1,78,86,359/-. BHPL also extended a loan of Rs.28.125 Cr to the AE during the year towards day to day expenses and for achieving the above redemption. From the aforesaid foreign loan and quasi-equity contribution from BHPL, the AE redeemed the preference shares held by BHPL and also recovered a sum of Rs.3,22,19,944/- which is much more than the guarantee charges paid to the bank. Therefore, the ld. counsel for the assessee contended that the AE is only a SPV to hold shares in company sterling + Hostage Europe and hence not authorized to carry any other activity. Once the above shares are sold when decided by BHPL, it has to wind up itself, and bring back the proceeds to India and BHPL has to pay taxes. It was submitted that as per OECD guidelines the substances over form has

not been considered by the TPO/CIT(A). The entire transactions carried out with AE is a single inter linked transaction during the year which has not been considered as such as an integrated transaction by the lower authorities. BHPL had filed TP Study report justifying the transactions as shareholder's activity and after detailed analysis justified the ALP for interest at Nil. The TPO/CIT(A) has rejected the aforesaid T P Study report and arbitrarily adopted the CUP method. The finding in the case of Perot Systems TSI v. DCIT [2010] 37 SOT 358 (Delhi-Trib) that profits are shifted out of India to Bermuda, a Tax Heaven. However, in the instant case, the AE subsidiary has been formed with the intention and the structure of the transaction is to bring back the capital and profits to India after payment of due taxes. Therefore, the decision in the case of Perot System TSI (India) Limited vs. DCIT (2010) 37 SOT 358 (Delhi) relied by the TPO/ CIT(A) is distinguishable on fact as in that case the result of the transaction was that the income of the assessee in India would be reduced, while in the case of the assessee the income would be increased. It is seen that the assessee has brought back an amount of Rs.1,31,30,08,025/- as dividend during the assessment year 2012-13 and in assessment year 2013-14 as could be seen from financial accounts chart filed by the assessee. Further the assessee has given loan of Rs.30,84,56,150/- and has brought back Rs.32,56,53,750/- as repayments. Similarly investment in preferential shares of Rs.1,71,68,40,000/- has been brought back by way of redemption of preferential shares for an amount of Rs.1,74,90,59,944/- during the year under consideration. That case was otherwise a classic case of violation of transfer pricing norms, where profits were shifted to tax heavens or low tax regimes to bring down the aggregate tax incidence of a multi-national group. Whereas, in the case of the assessee, the transaction has resulted into increase in cash inflow into India and possibility of increase of tax base in India. Further, there is no finding of fact that the transactions have been undertaken for shifting of profits to a low tax jurisdiction as against the finding given in Perot System (supra).

17. The transaction in the case of assessee is a quasi-equity in substance based on the transactions considered which has been characterized by the TPO as pure loan simplicitor as given by a financial institution. The quasi-equity as explained in the decision of Cadila Healthcare Limited [2017] 80 taxmann.com 24 (Ahmedabad-Trib.), wherein it was held that where assessee-company advanced loan to its AE with option to convert same into equity at par, since real consideration for granting loan was not interest simplicitor on amount advanced but opportunity to own capital on favourable terms, it was to be regarded as quasi capital transaction which could not be compared with simple loan transaction for purpose of determining ALP. The ld. counsel further has also drawn out attention, Para 10 to 14 of the said decisions in support of his contentions.

18. In the case of the assessee company, the loan has been given for ensuring continues working of the AE at Singapore. It is undisputed facts that the AE is an SPV only to hold investment and not permitted to engage in other activity and liable for bringing all the capital and profit back to India on winding up. Thus, the loan is not mere loan simplicitor as the amounts advanced are authorized with obligation to be paid up along with profits and accrued profits. The lending is thus, in the nature of quasi capital in the sense that substantive reward or

true consideration for such a loan transaction is not interest simplicitor on amount advanced but opportunity to own profits and capital on certain favourable terms. It was submitted that the consideration for extending the loan simplicitor is materially distinct and different from extending a loan which is given in consideration for or mainly in consideration for, option to convert the same into capital on certain terms which are favourable vis-à-vis the terms available or to put it more realistically, hypothetically available, to an independent enterprise. It was further submitted that the TPO has not considered Rule 10A(d) which includes number of closely linked transactions. The nature of transaction carried out by BHPL as per its objective effected a redemption of preference shares held by it to bring back its money to India which will increase its asset base and income into India. In order to redeem the preference shares, the AE do not have any funds and the BHPL has extended the loan of Rs.22.125 crores and carried out all necessary activities to a facilitated redemption of preference shares. This is a closely linked integrated transaction under Rule 10A(d) i.e. functioning his shareholder's function and as well as the loan extended for form shall be considered also a quasi-equity capital for the purpose of determining ALP. The ld. counsel further submitted that in the case of Bartronics India Ltd v. DCIT (2017) 86 taxmann.com 254 (Hyderabad-Trib.). The Tribunal has explained the concept of quasi-equity in Para 20. Therefore, considering the same, as the assessee has also given loan to obtain the benefits of full profits earned by the subsidiary and to ensure full control over the operations of the subsidiary. Therefore, this is not comparable to a bank financing a customer based on their individual financing needs. Further, in the case of BHPL could have very well given the money as a preference capital or as an equity capital but the interest free loan was given to enable the BHPL bring back such money back to India easily so as to increase the asset and tax base in India. In all countries share capital can be brought back only after complying with certain procedure and more so in the case of equity capital. Hence the contention of the assessee that it is a quasi-equity capital has not been right fully considered by the TPO as well as CIT(A). Therefore, both the lower authorities have not considered substance over form by having a holistic view of entire facts. Therefore, on an analysis of transaction as a whole and considering the observations and analysis by Hon'ble Tribunal Ahmedabad in the case of Cadila Healthcare Ltd. v. ACIT-Circle-1, Ahmedabad [2017] 80 taxmann.com 24 (Ahmedabad-Trib) and Bartronics India Ltd v. DCIT (2017) 86 taxmann.com 254 (Hyderabad-Trib.) relied upon by the assessee. Therefore, the transaction have to be considered as quasi-equity in nature. It was further contended that the TPO has not carried out any FAR analysis as in the case of assessee, the AE is just an extension of BHPL to hold investments and have not carried out any functions. The entire risks are borne by BHPL only and the entire investments in Sterling + Hostag has been funded as equity capital, preference capital and loan only by BHPL as part of its shareholder function. The AE itself has not employed any assets. As per the contractual terms and law, the moment this investment is sold the entire proceeds of capital and profits are to be repatriated to India compulsorily and subject the same to taxation in India. Therefore, in this manner the entire risks are to be borne by and rewards accrue to BHPL only as a result of the investments made. As per Rule 10B, adjustment for contractual terms are to be considered while applying CUP method. In this case the AE is not authorised by law to undertake any functions or pursue any

business. Once BHPL decides to sell investments held, the AE has to wind up and BHPL has to bring back the entire proceeds to India. Thus, the aforesaid FAR analysis as required under Rule 10B has not been carried out by the TPO/CIT(A) while rejecting the contention of BHPL that even though in form the transaction is structured as a loan, in substance this is a quasi-equity capital. Thus, the aforesaid material differences and considerations for extending the loan to AE as compared to a loan simplicitor has not been considered by the TPO/CIT(A) as required by Rule 10B, which is more particularly analyzed by the Hon'ble Ahmedabad Tribunal in the case of Cadila Healthcare Ltd. v. ACIT-Circle-1, Ahmedabad [2017] 80 taxmann.com 24 (Ahmedabad-Trib) in Para 11 & 12 of the judgement. The ld. counsel further, without prejudice, as an alternative argument stated that in the event if the transaction is not considered as quasi-equity in nature, then there is no loss of Revenue to the Government of India, hence Chapter-X being anti-avoidance provisions are not applicable to the facts of the case. Had interest been paid on the amount brought back to India, profits would have been lesser to that extent and taxes would have been paid to Government of India proportionately lesser to that extent. Hence, there is no loss of Revenue to the Government of India. Further, alternatively if transaction as quasi-equity is not accepted it shall be considered that there is no risk for BHPL in extending the interest free loan as observed by the CIT(A) in Para 9.3 at Page 19 of the Appellate Order. The CIT(A) observed that the transaction is as a loan simplicitor to an un-related party. Since, the loan is consumed in a foreign country, interest rate prevalent in that country shall be considered as ALP. In this case, as per Rule-10B, entire functions are carried out by BHPL and the risks and rewards are also to be borne and enjoyed by BHPL, hence there should not be any risk premium chargeable to the loan as an adjustment. In support of this contentions, the ld. counsel has placed reliance on the following decision of Vibhav Gems Limited (2017) 88 taxmann.com 12 (Raj.)- SLP dismissed (2018) 99 taxmann.com 2 (SC). It was further contended that the TPO have applied SIBOR rate of 1.13% for the period from 01.04.2007 to 31.03.2008. The third alternative arguments taken by the BHPL are that the AE of the assessee has taken loan from Standard Chartered Bank, Mauritius at an interest of 0.75%. Therefore, considering the AE as a tested party, this becomes an internal CUP for the loan taken by the AE from BHPL. Since, there is a perfect internal CUP available, the ALP of the loan transaction should have been determined at LIBOR rate +0.75% per annum.

19. Per contra, the ld. CIT (DR) submitted that for benchmark interest rate. The AO relying on the lower authorities submitted that the benchmark rate has been correctly applied. Further, the TPO has correctly relied on the decision in the case of Perot Systems TSI v. DCIT [2010] 37 SOT 358 (Delhi-Trib). The Ld. CIT (DR) submitted that the decision of Bartronics India Ltd v. DCIT (2017) 86 taxmann.com 254 (Hyderabad-Trib.) and Cadila Healthcare Ltd. v. ACIT-Circle-1, Ahmedabad [2017] 80 taxmann.com 24 (Ahmedabad-Trib) are not applicable to the facts and circumstances of the case, in arriving at the conclusion, hence these decisions have no application in the case of assessee.

20. We have heard the rival submissions and perused the relevant material available on record. We find that the assessee is an

investment company and was holding 46.2% shares in a Printing Ink Company known as Sterling + Hostag and for that purpose created a wholly owned subsidiary in Singapore as a Special Purpose Vehicle (SPV) known as M3 Holdings (Singapore) Pvt. Ltd (M3). The BHPL has invested in equity, preference shares and loan in the subsidiary AE, which in turn invested in Sterling + Hostage a printing ink manufacturing company in Europe. Once the investments are sold, it has to wind up and bring back entire proceeds to India and pay all applicable taxes as if any other resident company is required to do, if it has directly invested from India. As per the terms of the investment as applicable to the SPV under FEMA as well in the year 2012-13 (07.09.2012) the said Singapore AE has been winded up and all the capital remitted from India and investment/gains on disposal of investments has been completely brought back to India during year 2012-13 and 2013-14 and paid tax at the rate of 15% in India as per laws on the dividend received. During the year, the BHPL has redeemed preference shares and brought back of Rs.174.90 Cr. In order to redeem the aforementioned preference shares in the AE, and considering the fact that the AE do not have any income or extra funds in its hand, the redemption has been achieved by the assessee company i.e. BHPL and the AE by arranging a loan from Standard Chartered Bank Mauritius to the tune of 35 Million Euro through Standard Chartered Bank Mauritius. This is discernible from the letter dated 30.10.2007 of Standard Chartered Bank Mauritius addressed to M3 Holdings (Singapore) Pte Ltd. that the purpose of financing is that the company will redeem preference capital subscribed by Bilakhia Holding Pvt. Ltd., India. The Standard Chartered Bank, Ahmedabad gave guarantee to Standard Chartered Bank, Mauritius. BHPL has given Corporate Guarantee to Standard Chartered Bank Ahmedabad. BHPL has paid Guarantee charges of Rs.1,78,86,359/-. BHPL also extended a loan of Rs.28.125 Cr to the AE during the year towards day to day expenses and for achieving the above redemption. From the aforesaid foreign loan and quasi-equity contribution from BHPL, the AE redeemed the preference shares held by BHPL and also recovered a sum of Rs.3,22,19,944/- which is much more than the guarantee charges paid to the bank. In view of these facts, we are of the view that the AE has been created as SPV only to hold shares in company sterling + Hostage Europe and not authorized to carry any other activity. This view is further supported by the letter dated 02.11.2006 placed at Paper Book Page No.18, wherein the proposal submitted by the assessee vide letter dated 07.07.2006 (Placed at Paper Book Page No. 15 to 17] was approved wherein in it is clearly mentioned that M3 Holdings (Singapore) Pte Ltd. is a SPV formed to hold investment and do not propose to engage in any other activity being SPV. Once the above shares are sold as and when decided by BHPL, it has to wind up itself, and bring back the proceeds to India and BHPL has to pay taxes. The perusal of annual accounts for A.Y. 2012-13 [placed at Paper Book Page No. 54 to 82 and particularly Paper Book Page No. 78 note 35 appended therein would show that the assessee company has resolved to wind up of M3 Holdings (Singapore) Pte Ltd. as per applicable laws of Singapore and accordingly, received dividend of Rs.1,27,25,34,505 during A.Y.2012-13 and Rs.4,01,73,520/- in A.Y.2013-14 which has been duly reflected in annual accounts placed at Paper Book Page No. 55 (and Chart filed with written submissions filed by the counsel). Therefore, we are in agreement with the assessee that as per OECD guidelines, the substances over form has to be considered. The transaction in the case of assessee is therefore, be

considered as a quasi-equity in substance, as against the transactions considered and characterized by the TPO as pure loan simplicitor as given by a financial institution. The finding recorded by the AO, that the AE of the assessee company was engaged in the financial services activities in Singapore is not found to be correct as it is clearly borne out from the letter of disbursement of loan and purpose as setout the terms of loan as discussed herein above. The term of quasi-equity was explained by the Co-ordinate Bench of Ahmedabad in the decision of Cadila Healthcare Limited [2017] 80 taxmann.com 24 (Ahmedabad-Trib.), wherein, it was held that where assessee-company advanced loan to its AE within option to convert same into equity at par, since real consideration for granting loan was not interest simplicitor on amount advanced but opportunity to own capital on favourable terms, it was to be regarded as quasi capital transaction which could not be compared with simple loan transaction for purpose of determining ALP. The Co-ordinate Bench of Tribunal in Para 10 to 14 of the said decision observed as under:

> *"10. There is no dispute that the transactions in question are not of the transactions of lending money to the associated enterprises. The amount/advanced to the AEs are attached with the obligation of the AEs to sue share capital, in case the assessee exercise option for the same, on certain conditions, which are admittedly more favourable, and at an agreed price, which is admittedly much lower, vis-a-vis the conditions and prices which independent enterprise would normally agree to accept. The lending is thus in the nature of quasi capital in the sense that substantive reward, or true consideration, for such a loan transaction is not interest simplicitor on amount advanced but opportunity to own capital on certain favourable terms. Contrast this reward of owning the capital in the borrower entity with interest simplicitor, which is typically defined as "the reward of parting with liquidity for a specified period" (Prof Keynes) or as "a payment made by the borrower of capital by virtue of its productivity as a reward for his capitalist's abstinences" (Prof Wicksell). However, in the case of transactions like the one before us, there is something much more valuable which is given as a reward to the lender and that valuable thing is the right to own capital on certain favourable terms. Therefore, the true reward as we have noted earlier, is the opportunity and privilege to own capital of the borrower on certain favourable terms. It is for this reason, that the transactions before us belong to a different genus than the act of simply giving the money to the ^borrower and fall in the category of 'quasi capital'.*
>
> *11. As for. the connotations of 'quasi capital', in the context of determination of arm''s -length price under transfer pricing regulations, we may refer to the observations made by a coordinate bench of this Tribunal- speaking through one of us (i.e. the" Accountant Member), in the case of **Soma Textile & Industries Ltd**. v. **Asst.CIT** [2015] 154 **ITD** 745/59 **taxmann.com** 152 **(Ahd.)**, as follows:*

'5 The question, however, arises as to what are the connotations of expression 'quasi capital in the context of the transfer pricing legislation.

6. Hon'ble Delhi High Court, in the case Chryscapital Investment Advisors India Ltd. v. ACIT [(2015) 56 taxmann.com 417 (Delhi)], has begun by quoting the thought provoking words of Justice Felix Frankfurter to the effect that "A phrase begins life as a literarily expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas". The reference so made to the words of Justice Frankfurter was in the context of the concept of "super profits" but it is equally valid in the context of concept of "quasi capitals" also. As in the case of the super profits, to quote the words of Their Lordships, "many decisions of different benches of the ITAT indicate a rote repetition (in the words of Felix Frankfurter J, quoted in the beginning of this judgment a "lazy repetition") of this reasoning, without an independent analysis of the provisions of the Act and the rules" the same seems to be the position with regard to "quasi capitals" There are several decisions of this Tribunal, including in the cases of Perot Systems TSI v. DCIT [(2010) 130 TTJ 685 (Del)]., Micro Inks Ltd. v. ACIT [(2013) 157 TTJ 289 (Ahd)], Four Soft Pvt. Ltd. v. DCIT [(2014)149 ITD 732 (Hyd.)], Prithvi Information Solutions Pvt. Ltd. v. ACIT [(2014) 34 ITR (Tri) 429 Hyd.] , which refer to the concept of 'quasi capital' but none of these decisions throws any light on what constitutes 'quasi capital' in the context of transfer pricing and its relevance in ascertainment of the arm's length price of a transaction. Lest we may also end up contributing to, as Hon'ble Delhi High Court put it, "rote repetition of this reasoning without an independent analysis of the provisions of the Act and the Rules" let us take deal with the connotations of 'quasi capital', and its relevance, under the transfer pricing regulations.

7. The relevance of 'quasi capital', so far as ALP determination under the transfer pricing regulation is concerned, is from the point of view of comparability of a borrowing transaction between the associated enterprises.

8. It is only elementary that when it comes to comparing the borrowing transaction between the associated enterprises, under the Comparable Uncontrolled Price (i.e. CUP) method, what is to be compared is a materially similar transaction, and the adjustments are to be made for the significant variations between the actual transaction with the A E and the transaction it is being compared with. Under Rule 10B(l)(a), as a first step, the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified, and then such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the o pen market. Usually loan transactions are benchmarked on the

basis of interest rate applicable on the loan transactions simplictor which, under the transfer pricing regulations, cannot be compared with a transaction which is something materially different than a loan simplictor, for example, a non-refundable loan which is to be converted into equity. It is in this context that the loans, which are in the nature of quasi capital, are treated differently than the normal loan transactions.

9. The expression 'quasi capital', in our humble understanding, is relevant from the point of view of highlighting that a quasi capital loan or advance is not a routine loan transaction simplilcitor. The substantive reward for such a loan transaction is not interest but opportunity to own capital. "As a corollary to this position, in the cases of quasi capital loans or advances, the comparison of the quasi capital loans is not with the commercial borrowings but with the loans or advances which are given in the same or similar situations. In all the decisions of the coordinate benches, wherein references have been made to the advances being in the nature of'quasi capital', these cases referred to the situations in which (a) advances were made as capital could not subscribed to due to regulatory issues and the advancing of loans was only for the period till the same could be converted into equity, and (b) advances were made for subscribing to the capital but the issuance of shares was delayed, even if not inordinately. Clearly, the advances in such circumstances were materially different than the loan transactions simplicitor and that is what was decisive so far as determination of the arm's length price of such transactions was concerned. The reward for time value of money in" these cases was opportunity to subscribe to the capital, unlike in a normal loan transaction where reward is interest, which is measured as a percentage of the money loaned or advanced.'

***12**. It is thus quite clear that the considerations for extending a loan simplictor are materially distinct and different from extending a loan which is given in consideration for, or mainly in consideration for, option to convert the same into capital on certain terms which are favourable vis-a-vis the terms available, or, to put it more realistically, hypothetically available, to an independent enterprise. On a conceptual note, the entire purpose of the exercise of determination of arm's length price is to neutralize the impact of intra AE relationship in a transaction, the right comparable for such a transaction of quasi capital is a similar transaction of lending money on the same term i.e. with an option to convert the loan into capital on materially similar terms. However, what the authorities below have held, and wrongly held for that reason, is that a quasi capital transaction like one before us can be compared with a simple loan transaction where sole motivation and consideration for the lender is the interest on such loans. In the case before us, the consideration for having given the loan is, as we have noted earlier, opportunity and privilege of owning capital of the borrower on certain favourable terms. If at all the comparison of this transaction was to be done with other loan transaction, the comparison should have been done with other loans giving rise to similar privilege and opportunity to*

the lender. The very foundation of impugned ALP adjustment is thus devoid of legally sustainable basis.

13. Let us, at this stage, take note of the US Tax Court decision, relied upon by the TPO, in the case of Pepsi Cola Bottling Co of Puerto Rico Inc (Docket Nos. 13676-09,13677-09; order dated 20th September 2012). It has been referred to by the TPO as decision of the US Supreme Court but in fact it is a decision of the US Tax Court, broadly at the same level of judicial hierarchy as this Tribunal. This decision deals with the limited question whether a particular transaction is required to be treated as debt or as equity. The precise question, which came up for consideration of the US Tax Court, were (1) whether advance agreements issued by Pepsi Co's Netherlands subsidiaries to certain Pepsi Co domestic subsidiaries and PPR are more appropriately characterized as debt than as equity; and, (2) if the advance agreements are characterized as debt, whether, and to what extent payments on the advance agreements constitute original issue discount, relating to contingent payment debt instruments under section 1.1275-4(c), Income Tax Regulations. This provision is a deduction provision and not a provision relating to determination of arm's length price. Nothing, therefore, turns on this decision. In any event, it is nobody's case that the transaction before us is of the debt. The case of the assessee is that since in consideration of this transaction, the assessee is entitled to own the capital at certain admittedly favourable terms, the true reward of this debt is the availability of such an option, and, therefore, it cannot be compared with a debt simplictor for the purpose of determining arm's length price. Nothing, therefore, turns on this decision, and whatever be its persuasive value, or lack thereof, the authorities below were in error even in relying upon this decision.

14. We have noted that, as noted by the TPO, it is wholly immaterial as to whether or not the assessee, by the virtue of this transaction, is entitled to subscribe to capital of the AE on certain concessional terms, because, in any case, the AE is a wholly owned subsidiary of the assessee and none else can subscribe to the AE's capital. What has been overlooked, however, in this process of reasoning is that the very concept of arm's length price is based on the assumption of hypothetical independence between AEs. Essentially, what is, therefore, required is visualization of a hypothetical situation in which AEs are independent of each other, and, as such, impact of intra AE association on pricing of transaction is neutralized. Once we do so, as is the compulsion of hypothesis involved in arm's length price, the fact that normally a parent company has a right to subscribe to the capital of the subsidiary at such price as suits the assessee is required to be ignored. An arm's length price is hypothetical price at which independent enterprises would have entered the transaction, and, as such the impact of intra AE association cannot have any role to play in determination of arm's length price. The stand so taken by the TPO, which has met the approval of the DRP as well, does not, therefore, meet our approval.

15. As regards the stand of the authorities below that Irish subsidiary has shown huge profits and high operational profits @ 93%, and this fact shows that the assessee should have charged interest on commercial rates, we are unable to even understand, much less approve, this line of reasoning. It is incomprehensible as to what role profits earned from the funds raised can have in determining arm's length consideration of raising the funds, unless profit sharing is implicit in the consideration for raising the funds itself- which is neither the normal commercial practice nor the case before us. The cost of raising funds is determined much before the returns from funds so raised is even known. To hold that cost of funds raised should have been higher because the returns from funds employed by the enterprise is higher is putting cart before the horse. In the commercial world, interest does not represent any participation of profits, and it does not vary because of the profits made by the borrower from monies so raised. In any event, while determining arm's length price of a transaction, it is immaterial as to what 'benefit an AE subsequently derives from such a transaction. What is to be determined is the consideration of a transaction in a hypothetical situation, in which AEs are independent of each other, and not the benefit that AEs derive from such transactions. It is not even the case of the authorities below that in the event of hypothetically dealing with an independent enterprise, no independent enterprise would not have given him an interest free loans even if there was an option, coupled with such a deal, to subscribe to the capital of the AE on the terms as offered by the AE to the assessee. Unless that happens, there is not even a prima facie case made out for an ALP adjustment."*

16. We have also noted that, in any event, whenever the assessee's right to exercise the option of converting the loan into equity comes to an end, the assessee is entitled to interest on the commercial rates. It is not even the case of the authorities below that the interest so charged by the assessee, in a situation in which the right to exercise the option has come to an end, is not an arm's length price. Keeping in mind all these factors, as also entirety of the case, we deem it fit and proper to delete the arms length price adjustment of Rs. 5,00,35,270 in respect of interest which, according to the revenue authorities, should have charged on the optionally convertible loan granted to the AE's.

21. Thus, applying the ratio of above decision, it would emerge that the consideration for extending the loan simplicitor is materially distinct and different from extending a loan which is given in consideration for or mainly in consideration for, option to convert the same into capital on certain terms which are favourable vis-à-vis the terms available or to put it more realistically, hypothetically available, to an independent enterprise. Therefore, quasi capital loan or advance are not routine transaction of loan simplicitor. The substantive reward for such a loan transaction is not loan but opportunity to own capital. In the case of the assessee, the loan transaction is therefore, quasi-capital and substantive reward as interest thereon is opportunity to

redeem its preferential shares capital and bring back the same into India. We also note that the TPO has not considered Rule 10A(d) according to transaction which includes number of closely linked transactions. Hence, the nature of transaction as carried out by BHPL as per its objective effected a redemption of preference shares held by it to bring back its money to India which will increase its asset base and income into India. In order to redeem the preference shares, the AE do not have any funds and the BHPL has extended the loan of Rs.22.125 Crores and carried out all necessary activities to a facilitated redemption of preference shares. This is a closely linked integrated transaction under Rule 10A(d) i.e. functioning his shareholder's function and as well as the loan extended for form shall be considered also a quasi-equity capital for the purpose of determining ALP.

22. The ld. counsel relied in the case of Bartronics India Ltd v. DCIT (2017) 86 taxmann.com 254 (Hyderabad - Trib.).

> *"15. As regards ground No. 3 regarding addition of Rs. 1,22,27,058/- in respect of corporate guarantee provided to AE, ld. AR submitted that the corporate guarantee given to AE does not fall within the scope of international transaction u/s 92B. He submitted that the corporate guarantee is provided to AE for commercial and business expediency and the assessee has not incurred any cost for providing such guarantee.*
>
> *15.1 Without prejudice to the above, ld. AR submitted that the Corporate Guarantee was brought under section 92B under Finance Act, 2012 w.e.f. AY 2013-14. It is not applicable to the current AY. For this proposition, he relied on the following cases: 17 ITA No. 259 /Hyd/2017 Bartronics India Ltd., Hyd.. 1. Dr. Reddy's Laboratories, ITA No. 294/Hyd/2014 & ITA No. 458/Hyd/2015. 2. Siro Clinpharm Pvt. Ltd. Vs. DCIT, ITA No. 2876/Mum/2014 3. Bharati Airtel Ltd. Vs. ACIT, ITA No. 5816/Del/2012 4. Asian Paints Ltd. Vs. ACIT, ITA No. 7801/Mum/2010 5. Lanco Infratech Ltd. Vs. DCIT, ITA No. 450/hyd/2016*
>
> *16. Ld. DR, on the other hand, submitted that even though the amended section is introduced in Finance Act, 2012, but, it is introduced with retrospective effect from 01/04/2002. Accordingly, he supported the findings of revenue authorities.*
>
> *17. Considered the rival submissions and perused the material facts on record as well as various case laws submitted by the assessee. Assessee has provided corporate guarantee to its AE in the current AY without charging any fees for the same. The term 'guarantee' was inserted in the definition of international transaction by inserting an explanation in the Finance Act, 2012 with retrospective effect from 01/04/2002. There is no dispute that the corporate guarantee is an international transaction and different assessees are adopting different methods of treatment. Some assessees charges nominal rate to the AEs, whereas other assessees are treating this as shareholder service. Here, the assessee has objected to include this transaction as international transaction for the reason that the Finance Act, 2012, which has inserted an explanation, which will be*

applicable prospectively from AY 2013-14 and the corporate guarantee transaction will not be applicable to the current AY. The same view was upheld by the coordinate bench in the case of Dr. Reddy Laboratories and other benches of Tribunal. The findings given by the coordinate bench in the case of Dr. Reddy Laboratories (supra) are extracted below: 29. We have carefully considered the rival submissions and perused the record. The ITAT, Delhi Bench in the case of 18 ITA No. 259 /Hyd/2017 Bartronics India Ltd., Hyd.. Bharati Airtel Ltd. (supra) has considered an identical issue which was re-affirmed in the case of Siro Clinpharma Pvt. Ltd., Vs. DCIT (order dated 31 st March, 2016). The bench observed that transfer pricing is a legislation seeking the tax-payers to organise their affairs in a manner compliant with the norms setout. In short, it is an anti abuse legislation which tells you as to what is the acceptable behaviour but it does not trigger levy of tax in a retrospective manner because no party can be asked to do an impossibility.. Analysing further the Bench observed that though Explanation to Section 92B is stated to be c1arificatory, it has to be necessarily treated as effective from the A.Y. 2013- 2014 and in this regard, relied upon the observations of the Hon'ble Delhi High Court in the case of Skies Satellite. We have also analysed the case law relied upon by the Ld. D.R. and also the provisions of the Act. In our considered opinion, the view taken by the Delhi Bench of ITAT in the case of Bharati Airtel Ltd., (supra) is one of the possible views on the matter and so long as there is no binding decision of any other Higher Forum taking a contrary view, the one which is favourable to the assessee has to be adopted even though other Benches have taken a different view. We, therefore, hold that the Explanation to Section 92B cannot be applied retrospectively and for the years under consideration the assessee having not incurred any costs in providing corporate guarantee it would not constitute "International Transaction" within the meaning of Section 92B of the Act and consequently, ALP adjustment is not warranted on this aspect." Respectfully following the above decision, we reject the treatment of corporate guarantee as international transaction and consequently, ALP adjustment is not warranted on this aspect. Accordingly, the ground raised by assessee is allowed.

18. As regards addition of Rs. 48,10,26,558/- towards interest on advances given to AE, ld. AR submitted that the TPO erred in recharacterizing the nature of transactions from investment to loan which is not permissible u/s 145 of the Act. He submitted that if the amount is advanced as the share capital, the same would also be shown as share application money in the hands of subsidiary. He submitted that transaction of investment is not international transaction u/s 92B of the Act and hence no interest can be charged on such investment. He relied on the following cases: 19 ITA No. 259 /Hyd/2017 Bartronics India Ltd., Hyd.. 1. CIT Vs. EKL Appliances Ltd., ITA No. 1068/2011 2. M/s Vijay Electricals Ltd., Vs. Additional CIT, ITA No. 842/Hyd/2012, order dated 31/05/2013. 3. GSS Infotech Ltd. Vs. ACIT, Hyd. ITA No. 497/Hyd/2015 4. KAR Therapeutics & Estates Pvt. Ltd., Vs. DCIT, ITA No. 86/Hyd/2016. 5. Topsgrup Electronics Systems

Ltd. Vs. ITO, 67 Taxmann.com 310 (Mum.) 6. Mylan Laboratories Ltd. Vs. ACIT, [2015] 63 Taxmann.com 179 (Hyd.)

19. Ld. DR, on the other hand, relied on the orders of revenue authorities and submitted that this transaction is recorded in the books of account as loan and not as investment. He referred to page 203 of paper book to submit that it is classified as loans & advances. He further submitted that the claim of the assessee is only an after thought.

Considered the rival submissions and perused the material facts on record. Assessee has transferred funds to its AE as investment and the same was classified in the balance sheet as' loans and advances. However, it is only a classification of accounting entry in the books, but, what is relevant and important is whether such transfer of funds were duly treated as investment and accordingly shares were allotted in the subsequent AY. Assessee has submitted share allotment certificate as evidence. Since the transfer of funds were duly accounted by the AE and there is no restriction on the part of the AE to allot shares in the same AY of receipt of funds, as long as the shares allotted, it gives true nature of the transaction. In the given case, even there is no outstanding balance in the books of assessee as loans and advances, the same transaction was duly justified by receiving allotted shares in the subsequent AY. In our considered view, there is no element of profit in the above transaction. Moreover charging of interest is depending upon the contractual obligations between the parties. In the given case, 20 ITA No. 259 /Hyd/2017 Bartronics India Ltd., Hyd.. assessee has transferred funds with an intention to make investment, it cannot be treated as international transaction as held by various courts, particularly, in the case of KAR Therapeutics & Estates Pvt. Ltd. (supra) wherein the coordinate bench has held as under: " 9. Considered the submissions of both the parties and perused the material facts on record as well as the orders of revenue authorities. There is no dispute that the assessee had remitted $ 3387182 towards investment in share capital. The shares were allotted to the extent of $ 2654797 in the same AY. The subsidiary company has treated the balance remittance as interest free unsecured loan and repayable on demand in their financial statement. In the next AY, the subsidiary company has allotted the shares on 15/03/2012. Now, can these transactions be treated as international transaction, which qualifies for ALP adjustment. In our considered view, the amount $ 732.385 is towards investment in share capital of the subsidiary outside India and the transactions are not in the nature of international transaction referred to section 92-B of the IT Act and transfer pricing provisions are not applicable as there is no income as well as there is no mutual agreement between the companies for such payment of interest. Moreover, the subsidiary company also disclosed as 'interest free. Moreover, in the similar situation with uncontrolled transaction, the allottee company in normal course of transaction will not be expected to receive any interest leave away the international transaction. Without any certainty or any agreement on receiving any interest but merely

relying on the accounting method and disclosure of the subsidiary in their financial statement cannot lead to this transaction as international transaction which require ALP adjustment. Assessee had relied on the case of Prithvi Information Solutions Ltd. (supra) wherein on the similar set of facts and circumstances, the coordinate bench of this Tribunal has held as below: "10. We have considered the rival submissions, perused the record and have gone through the orders of the authorities below as well as decisions cited. In our opinion, the amount representing 2118.84 is towards investment in share capital of the subsidiaries outside India as the transactions are not in the nature of transactions referred to section 92-B of the IT Act and the transfer pricing provisions are not applicable as there is no income. Accordingly, we set aside the order passed by the CIT u/s 263 and that of the AO is restored and the grounds raised by the assessee in this regard are allowed." 21 ITA No. 259 /Hyd/2017 Bartronics India Ltd., Hyd.. As held in the above, we are inclined to treat the above transaction as not an international transaction and accordingly ground No. 1 of the assessee is allowed. Since we have adjudicated ground No. 1 as allowed, the ground Nos. 2 & 3 are only academic in nature and accordingly, dismissed." Respectfully following the decision of the coordinate bench in the said case, we are inclined to treat the above transaction as not an international transaction and accordingly the ground raised on this issue is allowed."

23. In the light of ratio of above decision, we find that the Tribunal has held that the advancing interest free loans must not necessarily be deemed to be interest earning activity and activity to capitalize opportunity cost for investing in new territories-The funds were raised for the purpose of investment in subsidiaries and on the fact that these funds were interest free and ultimately, shares were allotted, it shows that there is no adjustment need to be made, on the CUP method adopted by the AO/TPO, even if the transaction is considered as one that of international transaction. (AY. 2008-09 to 2011-12). We also note that it is only a classification of accounting entry in the books, but, what is relevant and important is whether such transfer of funds were duly treated as investment and accordingly shares were allotted in the subsequent AY. Assessee has submitted brought back the preferential shares Since the transfer of funds were duly accounted by the AE and there is no restriction on the part of the AE to allot shares in the same AY of receipt of funds, as long as the shares allotted, it gives true nature of the transaction. therefore, in our considered view, there is no element of profit in the above transaction. Moreover charging of interest is depending upon the contractual obligations between the parties. Further, we find the amount representing loan was towards investment in share capital of the subsidiaries outside India as the transactions are not in the nature of transactions referred to section 92-B of the IT Act and the transfer pricing provisions are not applicable as there is no income. Therefore, considering the same, as the assessee has also given loan to obtain the benefits of full profits earned by the subsidiary and to ensure full control over the operations of the subsidiary. Therefore, this is not comparable to a bank financing a customer based on their individual financing needs. Further, in the case of BHPL could have very well given the money as a preference

capital or as an equity capital but the interest free loan was given to enable the BHPL bring back such money back to India easily so as to increase the asset and tax base in India. In all countries share capital can be brought back only after complying with certain procedure and more so in the case of equity capital. Hence the contention of the assessee that it is a quasi-equity capital has not been right fully considered by the TPO as well as CIT(A).

24. The findings given in the case of Perot Systems TSI v. DCIT [2010] 37 SOT 358 (Delhi-Trib) are distinguishable as in that case profits were shifted out of India to Bermuda, a Tax Heaven. Where in the instant case, the AE subsidiary is formed with the intention and the structure of the transaction is to bring back the capital and profits to India after payment of due taxes. Further, in that case the result of the transaction was that the income of the assessee in India would reduce while that of the AE would increase. That was also a classic case of violation of transfer pricing norms where profits are shifted to tax heavens or low tax regimes to bring down the aggregate tax incidence of a multi-national group, whereas in the present case, the transaction have resulted into increase in cash inflow into India and possibility of increase of tax base in India. Further, there is no finding of fact that the transactions have been undertaken for shifting of profits to a low tax jurisdiction as against the finding given in Perot System (supra). Therefore, on an analysis of transaction as a whole and considering the observations and analysis by Hon'ble Tribunal Ahmedabad and Hyderabad in the decisions relied upon by the assessee, the transaction has to be considered as quasi-equity in nature. It was further contended that the TPO has not carried out any FAR analysis as in the case of assessee, the AE is just an extension of BHPL to hold investments and have not carried out any functions. The entire risks are borne by the assessee company only and the entire investments in Sterling + Hostag has been funded as equity capital, preference capital and loan only by BHPL as part of its shareholder function. The AE itself has not employed any assets. As per the contractual terms and law, the moment this investment is sold the entire proceeds of capital and profits are to be repatriated to India compulsorily and subject the same to taxation in India. Therefore, in this manner the entire risks are to be borne by and rewards accrue to BHPL only as a result of the investments made. As per Rule10B adjustment for contractual terms are to be considered while applying CUP method. In this case the AE is not authorised by law to undertake any functions or pursue any business. Once BHPL decides to sell investments held, the AE has to wind up and BHPL has to bring back the entire proceeds to India. Thus, the aforesaid FAR analysis as required under Rule 10B has not been carried out by the TPO/CIT(A) while rejecting the contention of BHPL that even though in form the transaction is structured as a loan, in substance this is a quasi-equity capital. Thus, the aforesaid material differences and considerations for extending the loan to AE as compared to a loan simplicitor has not been considered by the TPO/CIT(A) as required by Rule 10B, which is more particularly analyzed by the Hon'ble Ahmedabad Tribunal in the case of Cadila Healthcare Limited in Para 11 & 12 of the judgement as reproduced above. The ld. counsel further without prejudice as an alternative argument that for the event in the transaction is not considered as quasi-equity in nature then there is no loss of Revenue to the Government of India hence Chapter X being anti-avoidance provisions

are not applicable to the facts of the case. Had interest been paid on the amount brought back to India profits would have been lesser to that extent and taxes would have been paid to Government of India proportionately lesser to that extent. Hence, there is no loss of Revenue to the Government of India. Further, alternatively if transaction as quasi-equity is not accepted it shall be considered that there is no risk for BHPL in extending the interest free loan as observed by the CIT(A) in Para 9.3 at Page 19 of the Appeal Order. The CIT (A) observed that the transaction is as a loan simplicitor to an un-related party. Since the loan is consumed in a foreign country interest rate prevalent in that country shall be considered as ALP. In this case as per Rule 10B entire functions are carried out by BHPL and the risks and rewards are also to be borne and enjoyed by BHPL, hence there should not be any risk premium chargeable to the loan as an adjustment. Therefore, reliance placed by the Learned Counsel ld. counsel has placed reliance on the following decision of Vibhav Gems Limited (2017) 88 taxmann.com 12 (Raj.)- SLP dismissed (2018) 99 taxmann.com 2 (SC) also supports his case. We have noted that, as noted by the TPO, it is wholly immaterial as to whether or not the assessee, by the virtue of this transaction, is entitled to subscribe to capital of the AE on certain concessional terms, because, in any case, the AE is a wholly owned subsidiary of the assessee and none else can subscribe to the AE's capital. What has been overlooked, however, in this process of reasoning is that the very concept of arm's length price is based on the assumption of hypothetical independence between AEs. Essentially, what is, therefore, required is visualization of a hypothetical situation in which AEs are independent of each other, and, as such, impact of intra AE association on pricing of transaction is neutralized. Once we do so, as is the compulsion of hypothesis involved in arm's length price, the fact that normally a parent company has a right to subscribe to the capital of the subsidiary at such price as suits the assessee is required to be ignored. An arm's length price is hypothetical price at which independent enterprises would have entered the transaction, and, as such the impact of intra AE association cannot have any role to play in determination of arm's length price. The stand so taken by the TPO, which has met the approval of the DRP as well, does not, therefore, meet our approval. We have also noted that the assessee has given loan of Rs.30,84,40,000/- and brought back Rs.32,56,53,750/- as repayments. Similarly, investment in preferential shares were at Rs.1,71,68,40,000/- as against which the assessee has brought back by way of redemption of preference shares for an amount of Rs.1,74,90,59,944/-. Therefore, the transactions under consideration is in the nature of quasi capital. Hence, there was no requirement charge an arm's length price. Keeping in mind all these factors, as also entirety of the case, we deem it fit and proper to delete the arms length price adjustment of Rs.1,80,56,250 in respect of interest on loan to AE, which, according to the revenue authorities, should have charged on the loan granted to the AE's to bring back preferential shares capital in India. ***Thus, Ground No. 4 of the appeal of the assessee is allowed."***

13. The Tribunal for A.Y. 2009-10 and 2010-11 relying on the findings for the A.Y.2008-09 in para no.12 to 24, as noted

above, has deleted the quantum additions. Since the quantum additions have been deleted for A.Y. 2008-09 on the identical issue, therefore, the Tribunal has held that the decision for the A.Y. 2008-09 would be applicable for the A.Y. 2009-10 and 2010-11 *mutatis,-mutandis* and therefore deleted the quantum addition for the A.Y. 2009-10 and 2010-11 observing as follows:

> ***"37. Ground No. 1 & 2 are general in nature; hence, does not require our separate adjudication.***
>
> ***38. Ground No. 3 & 4 are against the confirmation of upward adjustment of Rs.1,23,03,414/- out of total upward adjustment of Rs.1,94,15,214/- made by AO/TPO on account of interest on loan to AE's while determining arm's length price of international transactions.***
>
> *39. We have heard the rival submissions and perused the relevant material on record. We find that both parties have agreed that the fact for this assessment year are identical as in assessment year 2008-09 in assessee`s own case. Therefore, our findings as given in assessment year 2008-09 in Ground No. 4 above, would mutatis mutandis apply to this ground also. Accordingly, following the same these grounds of appeal of the assessee is allowed.*
>
> *40. In the result, the appeal of the assessee is allowed for assessment year 2009-10.*
>
> ***I.T.A.No.1416/AHD/2015/A.Y. 2010-11/ by the assessee:***
>
> ***41. Ground No. 1 & 2 are general in nature; hence, does not require our separate adjudication.***
>
> ***42. Ground No. 3 & 4 are against the confirmation of upward adjustment of Rs.94,09,829/- out of total upward adjustment of Rs.1,55,78,150/- made by AO/TPO on account of interest on loan to AE's while determining arm's length price of international transactions.***
>
> *43. We have heard the rival submissions and perused the relevant material on record. We find that both parties have agreed that the fact for this assessment year are identical as in assessment year 2008-09 in assessee`s own case. Therefore, our*

findings as given in assessment year 2008-09 in Ground No. 4 above, would mutatis mutandis apply to this ground also. Accordingly, following the same these grounds of appeal of the assessee is allowed.

44. In the result, the appeal of the assessee is allowed for assessment year 2010-11."

14. Since the quantum additions have been deleted, by Tribunal for A.Y. 2009-10 and 2010-11 therefore, penalty would not survive, hence we delete the penalty for A.Y. 2009-10 and 2010-11.

15. In the result, appeal filed by the assessee in ITA No.181/SRT/2017 for A.Y. 2009-10 is allowed.

16. Since the assessee has raised identical grounds of appeal in ITA No.182/SRT/2017 for A.Y. 2010-11, therefore, following the principle of consistency, the appeal for A.Y.2010-11 is also allowed with similar observation.

17. In the result, both the appeals of the assessee in ITA's No.181/SRT/2017 for A.Y. 2009-10 and 182/SRT/2017 for A.Y. 2010-11 are allowed.

Order pronounced on 19th May, 2021 as per Rule 34 of Income Tax Appellate Tribunal, Rule 1963.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr.ARJUN LAL SAINI)**
(न्यायिक सदस्य/JUDICIAL MEMBER)	**(लेखा सदस्य/ACCOUNTANT MEMBER)**

सुरत/ **Surat,** दिनांक **Dated:** 19th May, 2021/*#SGR*
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / **TRUE COPY** / /

Assistant Registrar, Surat