IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "I-1 " : DELHI
[THROUGH VIDEO CONFERENCING]

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA.Nos.3558 & 3559/Del./2016
Assessment Years 2011-2012 & 2012-2013

The DCIT, Central Circle-29, Room No.318, 3rd Floor, ARA Centre, Jhandewalan Extn., New Delhi.	vs.	M/s. Jaypee Capital Services Ltd., FA-45, Shivaji Enclave, New Delhi – 110 027. PAN AAACJ0628A
(Appellant)		(Respondent)

For Revenue :	Shri Bhuvnesh Kulshreshtha, CIT-DR
For Assessee :	Shri Ved Jain, Sr. Advocate And Shri Ashish Goel, C.A.

Date of Hearing :	23.06.2021
Date of Pronouncement :	21.09.2021

ORDER

PER R.K. PANDA, A.M.

The above two appeals filed by the Revenue are directed against the separate Orders Dated 16.03.2016 of the Ld. CIT(A)-30, New Delhi, relating to the A.Ys. 2011-

2012 and 2012-2013 respectively. Since common issues are involved in both these appeals, therefore, these appeals are heard together and are being disposed of by this common order.

ITA.No.3558/Del./2016 - A.Y. 2011-2012 :

2. The facts of the case, in brief, are that the assessee is a company engaged in the business of share trading through recognized stock exchange i.e., NSE and BSE etc. A search and seizure action under section 132 of the I.T. Act, 1961 was initiated in the case of the assessee as part of Jaypee Group on 30.03.2012. The key persons of the group are Shri Gaurav Arora and his son Shri Saurav Arora. This group is engaged in the business of trading of equity, commodity, derivatives of equity and forex market. During the course of search, incriminating documents and evidences have been found and seized. In response to the notice under section 153A of the I.T. Act, 1961 dated 05.08.2013, the assessee company filed its return of income

on 02.09.2013 declaring a total taxable income of Rs. 2,91,41,210/-.

2.1. During the course of assessment proceedings, the A.O. noted that the assessee company is a member of stock exchanges and doing trading for the clients as well as in its own account. It is also a client with M/s Futurz Next Services Ltd. for trading in commodities. These companies are registered with NSE, MCX, and NCDEX. These are also registered with the United Stock Exchange. During the course of search and post search proceedings, the evidences of Client Code Modifications **[**"CCM"**]** done by these companies in their own account as well as in the accounts of client were found. The Special Auditors appointed by the Department was directed to look into the aspect of CCM in the account of assessee company also. After examining the report of the Special Auditor, reply of the Assessee etc., the A.O. observed that CCM are carried-out by the assessee to shift Profit and Loss amongst Group Companies to reduce the tax liability. He noted that CCM were done by the assessee for its clients **[**other than Group concerns**]** vide

which profit is transferred to the clients who have losses and transferred the losses to the clients who have profit to reduce the tax liability of the clients and accordingly, accommodation entries given, on which, Commission Income was determined by the A.O. at 3.5% of the profit/loss shifted. It was further analyzed by the A.O. that the whole process of CCM in the case of the assessee does not seem to be genuine. He held that the copy of File Transfer Protocol **[**"FTP"**]** was not made available during the assessment proceedings and, therefore, there may be entries not as per the guidelines of SEBI. He, therefore, concluded that an amount of Rs.11,97,21,030/- is the net effect of profit/loss shifted from the assessee company to the other client codes and vice versa.

2.2. The A.O. further held that 20% of such CCM transactions to be genuine errors. However, according to him all the CCM have been done in order to provide accommodation entries. Therefore, he held that assessee has earned Commission @ 3.5% on the amount of Rs.26,29,027/- **[**which is 20% less than the sum of profit

and loss shifted out of group**]**, which comes to Rs.92,016/-. This was added by the A.O. to the total income of the assessee.

2.3. The A.O. similarly observed from the financial statements of the assessee that interest expenses amounting to Rs.3,95,09,607/- was paid on the funds borrowed. He further noted that the Special Auditors have observed that on many occasions the Company has granted interest free advances to shareholders, Group Companies and Others, the purpose of which is not made available to them. The A.O, therefore, asked the assessee to submit the details of interest bearing fund received and its out-flow and details of interest paid and provide the nexus of fund borrowed on which interest is paid with the business exigencies.

2.4. The assessee filed detailed submissions wherein it was stated that the amount borrowed on which interest has been paid was exclusively for business purposes. However, the A.O. was not satisfied with the arguments

advanced by the assessee in absence of any details in respect of utilization of working capital and other loans on which interest of Rs.3,95,09,607/- has been paid. From the various details furnished by the assessee, he noted that the account of the assessee company with the group persons namely Directors Shri Gaurav Arora and sister concern namely M/s. Jaypee Commodities Ltd., and M/s. Arora Timber Ltd., reveal that the accounts have debit balance in major part of the year. The peak debit in the case of Shri Gaurav Arora is Rs.8.21 crores, in the case of Future Next Services (P) Ltd., the peak debit amount is Rs.61.96 lakhs and in the case of Arora Timber Pvt. Ltd., the peak debit amount is Rs.70 lakhs. He observed that the assessee has not charged any interest on the loan provided to its Director Shri Gaurav Arora and sister concerns. He, therefore, held that assessee could not establish that interest bearing fund borrowed by it is wholly and exclusively used in the business and there is no commercial expediency in giving interest free loan to sister concerns. Relying on various decisions, the A.O. held that interest amounting to Rs.1.97

crores which is approximately 50% of interest expenses on working capital is used for non-business purposes and, therefore, applying the provisions of Section 36(1)(iii) of the I.T. Act, 1961, the A.O. made addition of Rs.1,97,54,804/- to the total income of the assessee.

2.5. The A.O. also made the addition of Rs.2,30,000/- being 1/5th of total preliminary expenses on account of increase in authorized capital.

2.6. The A.O. further noted that the assessee have substantial amount of investment in the shares of the Companies. From the details furnished by the assessee, the A.O. noted that assessee has tax free exempt income of Rs.60,718/-. He, therefore, confronted the assessee to explain as to why disallowance under section 14A read with Section 8D should not be applied. It was explained by the assessee that it has received gross dividend of Rs.60,718/- and no expenses are incurred as the amount is very small. However, the A.O. was not satisfied with the arguments advanced by the assessee and by applying the provisions of

Section 14A read with Rule 8D, he made addition of Rs.67,98,422/- to the total income of the assessee.

2.7. During the course of assessment proceedings, the A.O. noted that The United Stock Exchange of India Ltd., **[**"USE**"]** was formed on 15.10.2008. USE was given permission to enter into the business of stock exchange in currency derivatives on 26.03.2010 w.e.f. 22.03.2010. The exchange commenced its business in the F.Y. 2010-11 w.e.f. 20.09.2010. M/s. Jaypee Capital Services Ltd and Federal Bank were the initial promoter shareholders of the Exchange since 2008, along with 7 individuals holding shares worth Rs.1000 each, the individuals being Mr. Gaurav Arora, Mr. Saurav Arora, Mr. Jaswant Rai Arora, Ms. Padam Arora, Mr. Sunil Sachdeva, Mr. M. Venugopalan **[**then MD & CEO, Federal Bank Ltd.**]**. and Mr. PH Ravikumar **[**Director, Federal Bank Ltd.**]**. In November 2009, BSE and other institutional share holders subscribed to the shares of the company. The shareholding of Jaypee group including persons acting in concert at that time was 24.99% in the exchange. The launch of a separate stock exchange

was big news. The presence of financial institutions and public sector banks in the equity and management provided an additional advantage which added to aura and hype around USE. The presence of Jaypee Group at about 25% of share holding and presence of two directors namely Shri Gaurav Arora and Shri Saurav Arora gave additional advantage to Jaypee group in the management and decision making process of United Stock Exchange. The hype created around it led to the increase in share price of USE. The shares of USE were not listed and the existing shares were transferred through private placements. While processing the application of USE for permission to do the business of Stock Exchange, SEB1 noticed the dominant position of Jaypee Capital group in USE. Therefore in March 2010, SEB1 asked M/s Jaypee Capital Services Ltd group to reduce their share holding to 5% of issued capital. Consequent to same, the Jaypee Capital Services Ltd sold its share holding to bring the same within 5 % of share holding of the USE.

2.8. He, therefore, asked the assessee-company to submit the details of sale of shares of USE and justification of price on which it was sold. In response to the same, the assessee submitted the following details of sale of shares of USE which is as under :

Name of purchaser	No. of shares sold with the value	Date of sale of shares	Sale consideration received (Rs.)	Sale price per share (Rs.)
Atex Overseas (P) Ltd.	75,00,000 (Rs. 10 value)	31-03-2010	29,25,00,000	39
Span Holding (P) Ltd.	7,50,00,000 (Rs. 1 value)	19-09-2010	7,50,00,000	1
Shahi Sterling Export (P) Ltd.	7,50,00,000 (Rs. 1 value)	19-09-2010	7,50,00,000	1
U.K. Paint (India) (P) Ltd.	7,50,00,000 (Rs. 1 value)	19-09-2010	7,50,00,000	1

2.9. From the above reply, the A.O. noted that 75 lakhs shares were sold to M/s Atex Overseas Pvt Ltd as on 31.03.2010 @ Rs.39/- per shares. It was informed that in next year the share were restructured and in place of one share of Rs.10/-, it was made of Rs.1/- per share. Thus, in next year the assessee sold 7.5 crore shares to three different concerns on face value of Rs.1/-. There was wide difference in the value of each share sold by the assessee in

the year ending on 31.03.2010 and value received in September 2010. In March 2010, the shares were sold at 3.9 times of their face value whereas in September 2010, the same is sold at par of face value. He, therefore, asked the assessee to justify the sale price of the shares in September 2010 vis- a- vis with the same some month ago.

2.10. He further noted that during the course of search loose paper marked as Annexure-A3, A4 and A5 were found from Shri Duni Chand who was trusted employee of Jaypee Group. He was so near to the Management that he was made Director of their flagship Company M/s. Futurtz Next Services Ltd. The papers were confronted to the assessee during the course of search and he had accepted that the papers have been found from him and represent cash entries. The A.O. observed that in Annexure A-3, page No. 18 is a bank deposit slip. The figure mentioned is Rs.53,00.000/- but on Annexure A-4, which is a cash ledger, the figure has been mentioned as Rs.53,000 which shows that two zeros have been left intentionally. He observed that Shri Duni Chand has accepted that in place

of Rs.53,00,000/-, figure of Rs.53,000/- have been shown. Further, in his reply to Question No.46, he has accepted that such entries were done intentionally and two zeros have been removed. The A.O, therefore, again confronted the assessee to explain the same. Rejecting the various explanations given by the assessee, the A.O. made addition of Rs.45 crores by observing as under :

> *"10.10. The reply of assessee is carefully considered. He accepted that the entries mentioned in 4, are camouflaged by reducing the last two zeros of the figures. He explained that the entries in the A.5 are not camouflaged as in certain papers of this Annexure, the actual entries are found mentioned in Annexure A-3 (by removing last zeros). It was observed that A.4 is a small diary but Annexure A.3 and A.5 are loose paper sheets. These sheets are written in different hand writings. The papers are also not chronologically arranged. In the top of certain sheets "Cr" and "Dr" have been*

mentioned indicating that the incoming and outgoing of funds. The assessee has not identified the person in whom hand writings the papers are written. However, the specific mentions of names Ahuja , Dhingra, Gujaral and Gulati are predominantly mentioned in certain pages which are page no 29,28,25,11 of the Annexure A.5. There are other entries in these pages also. For example in page No 25 amount of 2911.50 is mentioned against jobbers. It is quite unlikely that amount in paisa are taken in to accounts in loose sheets. The actual amount thus would be Rs.291150/-. In page No 21 again figures of 5701.28 is mentioned. The assessee has not submitted anything to prove that such amount is recorded in its books of accounts. In page No 17 & 14 the rent is being shown at figures 727.50. The rent of any premises in such a odd figures and small amount is very'

unlikely, therefore, the submission of assessee that all the figures mentioned in Annexure A-5 are actual figure are not believable. It has already been discussed above that Sh. Dhingra of U.K. Paint, Sri Naresh Gujaral, the Director of Span India and Sh. Harish Ahuja of Shahi Sterling (P) Ltd. have submitted that except the shares of USE , they do not have any other dealing with the assessee company. The dates mentioned in the loose papers sheets are also near the date of sale of shares, therefore, it can be conclusively inferred that the amount mentioned against their name in loose paper sheets Annexure A.4 represent the out of books received on account of sale of shares of United Stock Exchange to them. The submission of assessee are therefore not acceptable in view of discussion as under

10.11. The submission of assessee are therefore not acceptable in view of discussion as under :

(i) The first argument of the assessee is that USE state holder includes the representative of public Sector Banks , Financial Institution and BSE and the transfer of shares were required to be approved by them have no bearing on the rate of sale of Shares held by the assessee. The arrangement if any is only for the approval of sale of shares by the stake holders. No documents indicating that the rates of sale are to be approved by the stake holders have been submitted.

(ii) The next argument is that BSE had right of first refusal and they could bring any alternate buyer of their choice at the same price of the proposed transfer is also considered. In this connection, it is stated that first of all , the assessee could not bring any document to support the contention.

Secondly, the BSE is a large Institution which have large participation in number of institutions. Non interference of BSE in the matter of sale of shares of USE by the assessee company is therefore not a conclusive prove of sale of share at par by the assessee company.

(iii) The next submission of the assessee is that 100% of the allotments done by USE were done at par/face value of the shares which was changed from Rs 10 to Rs 1. In this connection, it is submitted that the assessee have not brought any evidence to record that USE made any offer of the shares to large investor community. As per the document submitted by the assessee the negotiation of USE with regard to allotment of its shares was only with big financial institutions and foreign investors. The intention of USE seems to be was to bring big financial instructions to its board. The assessee has not brought any document to prove that the offer of

USE was also available to any small and medium level Indian Companies. Therefore, the sale of shares by the assessee company through local placement and efforts of USE to bring large financial institutions and foreign investors are at different footings, so cannot be compared.

(iv) The assessee could not explain the name and amount mentioned in the loose paper sheets Annexure A-4 as discussed above. The assessee itself sold the shares @ Rs 3.9 per shares in March 2010. The assessee could not produce any convincing argument that despite the Exchange was going to receive the permission to commence the business, why the value of its share fell so drastically.

10.11. Therefore, the sale value of share of M/s USE by the assessee are estimated a *Rs.3.00 per share. The amount is arrived after considering the previous sale made by the assessee and on the basis of amounts mentioned in the seized*

documents, particularly against the name of Gujaral. The assessee sold Rs.22.50.00,000/- shares during the year under consideration. The sale proceed of the same @ Rs 3 per share comes to Rs.67.50 Crore. The amount of Rs.1 per share has been taken into the books of accounts by the assessee, therefore the balance amount of Rs.45 crore is, considered the income of assessee for the year under consideration and added to income on account of undisclosed sale proceeds of shares of United Stock Exchange of India."

2.11. The A.O. similarly made addition of Rs.40,827/- being interest on TDS and interest on FBT claimed by the assessee as expenditure.

2.12. The A.O. also made addition of Rs.113,31,36,001/- on account of allotment of shares of NCDEX by invoking provisions of section 56(2)(viia). While dong so, the A.O. noted that NCDEX was promoted by various Financial Institutions. Over a period of time the

shares have been sold to Individuals and Private Sector shareholders and have become a Private Company. The main area of business operation of NCDEX is to carry-out activity as National Level Commodity Exchange dealing in various Commodities approved by its regulator Forward Market Commission **[**"FMC"**].** He noted that NCDEX entered into an Agreement on 02.12.2010 with M/s. Jaypee Capital Services Ltd. **[**"M/s.JCSL"**]** As per the terms of agreement, equity shares of NCDEX were allotted to M/s. JCSL at the rate of Rs.59 per share. The agreement mentioned that value of each equity share as per the last recorded price was Rs.145 on 02.12.2010. A total of 1,31,76,000 shares amounting to approximately 26% of the paid-up capital of the company was allotted to assessee company. As per Article-3.1 of the Agreement, the assessee company assigned part of its right to subscribe equity shares in favour of M/s Shri Renuka Sugar Ltd **[**"SRSL"**]** and 18,36,000 shares were allotted to SRSL and balance 1,13,40,000 shares were allotted to assessee company. As per the agreement, the stated purpose to allot shares at

about 1 /3rd of market value was that the anchor investor **[**Assessee-Company**]** shall assist NCDEX to improve the overall performance of the NCDEX and raise Average Daily Turnover Value **[**ADTV**] [**as defined in item 1.3 of the agreement**]** from current levels to higher level. NCDEX's ADTV was about Rs.6000 crores per day in the year 2011, it is striving to achieve through JCSL, ADTV of Rs.12,000 crores for any period of 3 consequent calendar months **[**clause 1.23 of the agreement**]** and Rs.18,000/- crores **[**clause 3.3.1**]** for a continuous period of 3 months within 3 years, or else it shall receive damages equivalent to Rs.113.32 crores from JCSL.

2.13. The A.O. noted that a direct benefit of Rs.113,31,36,000/- **[**149-59] X 1,31,76,000**]** was passed on to the JCSL by the NCDEX. This is the direct benefit passed on by NCDEX to JCSL in lieu of achieving its objectives. The A.O. analyzed the provisions of Section 56(2)(viia) and noted that as per the agreement between the company and NCDEX, the equity shares of NCDEX were allotted to JCSL @ Rs.59 per share. The value of each equity

share as on that date was Rs.145 per share. A total of 1,31,76,000 shares were allotted by virtue of the agreement to the assessee company. Thus, a direct benefit of Rs. 113,31,36,000/- (Rs.145 - Rs.59) x 1,31,76,000 was transferred to the assessee company. Therefore, the assessee was requested to submit the complete details of transactions and explain as to why the amount of Rs.113,31,36,000/- i.e. the benefit accrues to it should not be treated as its income as per the provisions of Section 56(2)(viia) of the Income Tax Act, 1961. After considering the reply/explanation of assessee, the A.O. held that the provisions of Section 56(2)(viia) are applicable on the allotment of shares of NCDEX at concessional rates. The assessee got benefit of Rs.113,31,36,000/- by virtue of receipt of shares of NCDEX below the market rate, hence, the income attributable in the hands of assessee shall be added to the total income under section 56(2)(viia) of the Act and accordingly made addition of Rs.113,31,36,000/- to the total income of the assessee.

2.14. From the accounts of assessee, the A.O. noted that it has made investment in Foreign Companies. During the course of search and post search investigation, it was found that the assessee company have made investment in foreign companies namely Jaypee Capital Inc, USA and Jaypee Capital Singapore Pte Ltd. The evidences of transaction being carried out in India by the foreign company were also found. The investment by the assessee company in foreign entity was therefore referred to special auditor for verification. The special auditor provided the date wise remittance of fund to foreign subsidiary companies. The reference through FT&TR division of CBDT was also made to tax authorities in USA and Singapore for providing the financial statements of the foreign companies. In response to reference under DTAA, the USA and Singapore tax authorities provided certain information in respect to companies incorporated in the respective countries. In order to verify the issue of foreign investment, the assessee was requested to furnish the information as below :

(1) It was pointed out by the auditor that funds were invested in the equities of M/s Jaypee International INC and M/s Jaypee Singapore PTE Ltd. respectively.

(2) You are requested to submit the purpose of remittance, the details of shares held in, the above mentioned companies along with the value of each shares and percentage of shares held by you in the companies. The details regarding conversion of application money into share capital is also to be submitted.

(3) The purpose of remittance to your foreign subsidiaries is to be explained with documentary evidences. Along with the same, the RBI approval of investments, bank advice of remittance made, Copy of certificate of Form 15CA/ 15CB at the time of making remittance is also required to be submitted.

(4) If the amount is remitted as loan, the rate of interest charged is required to be submitted.

2.15. Rejecting the various explanation given by the assessee, the A.O. made addition of Rs.2,02,72,428/- as income under section 92D being interest on loan from AE.

While doing so, the A.O. noted that (i) the assessee has in the process of lending money to its subsidiary has not followed the arm's length price. (ii) The assessee did not correctly assess the risk associated with the international transaction of lending the money. The A.O, accordingly, made addition of Rs.2,02,72,428/-. Thus, the A.O. determined the total income of the assessee at Rs.177,91,86,740/- as against the returned income of Rs.2,91,41,210/-.

3. In appeal, the Ld. CIT(A) gave substantial relief to the assessee. So far as the addition of Rs.11,97,21,030/- on account of CCM is concerned, the Ld. CIT(A) deleted the same by observing as under :

> "9.4. I have carefully considered the assessment order, written submissions, case laws relied upon and oral arguments of the Ld. A.R. The objections/arguments of the appellant, are discussed as under :

(i) It has been stated by the A.O. in the assessment order, that the client code modifications (CCM), are carried out by the assessee. to shift profit and loss amongst the group companies to reduce the tax liability. The A.O. further alleged that CCM were done by the assessee, for its clients (other than group concerns), vide which profit is transferred to the clients, who have losses and transferred losses to the clients, who have profit, to reduce tax liability of the clients and accordingly, accommodation entry is given, on which commission income is determined by the A.O. @ 3.5% of profit/loss shifted.

(ii) It has been further analyzed by the A.O., that whole process of CCM, in case of the assessee, does not seem to be genuine. The A.O. has also held that the copy of File Transfer Protocol **(FTP),** was not made available in the assessment proceedings and

therefore, there may be entries not as per the guidelines of the SFBI. In this way, A.O. concluded that an amount of Rs.11,97,21,030/-, is the net effect of profit/loss shifted from the assessee company to the other client codes and vice versa.

(iii) It has been further held by the A.O. that 20% of such CCM transactions, has been considered as genuine errors. However, all the CCM, have been done in order to provide accommodation entries and therefore, it has been held that the assessee has earned commission @ 3.5% of Rs.92,016/-, for providing such accommodation entries of Rs.26,29,027/- (20% less than the sum of profit or loss shifted out of group).

(iv) During appellate proceedings, appellant has submitted that the CCM, is modification change of client codes, after execution of trades. This facility

is provided by the Stock Exchange/ Commodity Exchange, in order to rectify any error or wrong data entry done by the staff of appellant broker company, at the time of punching orders. Further, it is submitted that these CCM, is subjected to certain guidelines provided by the SEBI, with regard to the execution of entries, genuinely punched wrong and not as a routine. The observations of the Special Auditor regarding huge number of CCM transactions, arc grossly incorrect, being misused to shift the profit / loss from one client to another. However, in appellate proceedings, it has been submitted that the, CCM transactions, have been recorded less than 1%, except only on 1 day i.e 21.7.2010, where penalty of Rs.500/-, was imposed, since CCM exceeded 1%, being 2.63%.

In this regard, appellant has submitted that the CCM on 21.7.2010, was carried out for the purpose of testing the software, where total of 51 trades were modified (which includes one share of each company), through which the net profit and loss of Rs.17/-, was shifted to appellant and is duly recorded in the books of accounts. In fact, it is argued by the A.R. that by doing so, appellant has increased its profit.

(v) In appellate proceedings, it has been submitted by the appellant that CCM transactions, have been recorded less than 1%, and no penal action has been taken by the exchange on CCM transactions, except in one case (supra). It has also been submitted, that A.O. has wrongly mentioned in the assessment order that penalties have been imposed by the SEBI on the appellant during the

period from 1.4.2010 to 31.01.2015 on account of CCM, whereas the penalties mentioned are on account of other discrepancies, i.e Margin shortage/ Margin Violation etc. Therefore, it is submitted by the appellant that there is no violation of rules and regulations prescribed in respect of CCM by the Exchange.

(vi) Further, appellant also submitted that these entries have been entered into normal course of business. These entries are duly recorded in the books of accounts and also forming part of the transactions reported to the exchange. No adverse inference has been drawn about these entries by the exchange and SEBI. In fact, even the information about these CCM, was obtained by the A.O. from the exchange. During assessment proceedings, the assessee has given detailed explanation in this regard to the A.O.

In the explanations, it has been clarified that these errors are part of its normal course of business activities and permissible, even as per the Circular issued by National securities Clearing Corporation Ltd. vide circular no. NSCCL/SEC/2004/0464, dated 31.5.2004, where error up-to 1% of the total number of transactions, is permissible, without any fine for the sake of clarity, the circular is, reproduced as under :

"NATIONAL SECURITIES CLEARING CORPORATION LIMITED

Download Ref. No. NSE/CMPT/5128

Circular No. NSCCL/SEC/2004/0464 May 31, 2004.

To

All Members

Sub:- Penalty for client code modification.

In pursuance of the Bye laws and Regulations of NSCCL and in partial modification to circulars

no. NSE/CMPT/4041 dated March 27, 2003 and NSE/CMPT/4991 dtd. April 16, 2004, it is hereby notified that the penalty structure for client code modification in the capital market (Cash Segment) is being revised. The new penalty structure is as follows :-

Percentage(%) of client codes changed to total orders (matched) on a daily basis	Fine
Less than or equal to 1%.	NIL
Greater than 1% but less than or equal to 5%.	Fine of Rs.500/- lump sun per day.
Greater than 5% but less than or equal to 10%.	Fine of Rs.1000/- lump sun per day.
Greater than 10%	Fine of Rs.10,000/- lump sum per day.

The above shall be effective from trade date June 01, 2004.

Yours faithfully
For National Securities Clearing Corporation Ltd.,
Jaya Chatterjee
Manager."

Therefore, it is submitted by the appellant that in their case, these errors are at 0.54% during the whole year, which is less than 1% of the total number of transactions entered into and the entries relating to CCM and have been accepted by both the parties. The A.O. has not brought any evidence to support the allegation, apart from suspicion on the basis of SEBI guidelines. Hence, it is submitted by the appellant that there is no justification for drawing any adverse inference on this account, without bringing any specific anomaly with regard to genuineness of the transactions and no fine has been imposed by concerned authorities, in respect of CCM.

It is further submitted by the appellant that the A.O. himself has made this addition by doing a guess work, whereby he has accepted that

20% of such CCM transactions, are genuine errors and 80%, as non-genuine errors and therefore, the entire addition on this account, is not correct. Therefore, it is submitted by the appellant that, the suspicion, cannot be a basis for making any addition.

(vi) It is further submitted by the appellant that the entries, which are being alleged, where profit/losses arising from the alleged transactions by the A.O, are all being assessed to tax and such profit/losses, are included in total income declared in each of such case, which has been charged at the maximum marginal rate. Therefore, it is submitted that, there cannot be any allegation of intention to avoid taxes by shifting profit to loss by manipulating entries. The same A.O. has assessed all these entities in assessment proceedings u/s

153A and no corresponding adjustments, have been made in the income of such entities.

From the above, following facts emerge:-

- The volume of CCM occurred, are within the permissible limit allowed by the SEB1, and
- The Exchange / SEBI, has not found any violation of rules and regulations relating to CCM, and the CCM transactions are falling within the prescribed limit of less than 1%.
- No incriminating material was found during the course of search, and A.O. has not brought any material or evidence to support the allegation of in-genuine CCM.

In view of the above facts, I agree with the arguments of the appellant that the CCM transactions, are genuine. Accordingly, 1 hold that the A.O. was not justified in making addition on above basis. Therefore, the additions of Rs.11,98,13,046 **(** Rs.11,97,21,030/- + Rs.92,016/- **)** made by the A.O, are hereby deleted

3.1. The Ld. CIT(A) also deleted addition of Rs.1,97,54,804/- on account of interest expenses made by the A.O. by observing as under :

"10.4. I have carefully considered the assessment order, written submissions, case laws relied upon and oral arguments of the Ld. A.R. The objections / arguments of the appellant, are discussed as under :

(i) During the assessment proceedings, the A.O. alleged that on review of financial statement of assessee company, it can be observed that, it has paid interest amounting to Rs.3,95,09,607/- on borrowed funds. Further, on perusal of accounts it is observed that the related person/concerns of assessee company, has debit balances during the year under consideration.

(ii) As per A.O., in the assessment proceedings, it has been stated that the peak debit balance in case of Shri. Gaurav Arora is Rs.8.21 crore, M/s Futurz next Services (P) Ltd. is Rs.61.96 lacs and M/s Arora Timber (P) Ltd. is Rs.70 lacs. The assessee has not charged any interest on such alleged loan provided to them.

(iii) During the appellate proceedings, it has been submitted by the appellant that chart showing the nexus between the borrowed funds used for business purposes and interest paid filed now, was also submitted during the assessment proceedings, vide which it can be clearly observed that borrowed funds are utilized for business only. From the perusal of submission filed during assessment proceedings, it can be observed that there are regular business transactions amongst the group persons / entities and the same are running throughout the year, which are attributed to the business of shares/futures/option of securities etc. In this background, the interest element on these funds cannot be disallowed, being part and parcel of business transactions. Further, the

exercise of calculating peak balance on these accounts and then attributing interest expenses to the same, by the A.O. is incorrect. The assessee has filed detailed explanation before A.O. regarding money borrowed, on which interest has been paid and its utilization for business purposes. The A.O. has not pointed out any inaccuracy in the submission filed by the assessee. The assessee having utilized the borrowed funds for business purposes and therefore, it is submitted that no amount can be disallowed u/s 36(l)(iii) of the Act.

(iv) In alternate, assessee has also submitted that in light of the judgment of Hon'ble Supreme Court in the case of M/s S.A. Builders Ltd. vs. C1T (A) 2007 (158) Taxmann 74 SC and M/s Hero Cycles Pvt.

Ltd. Vs. CIT 2015 (63 Taxmann.com 308 SC), no disallowance can be made u/s 36(l)(iii) of the Act, if the money is advanced to group concerns, is on account of commercial expediency and accordingly, interest paid on borrowed funds to the extent of advanced to group concerns, is allowable expense u/s 36(l)(iii).

From the above, it is a undisputed fact, that, the A.O. has disallowed an amount of Rs.1,97,54,804/-, out of the total interest paid of Rs.3,95,09,607/-, being 50% of the interest paid. The A.O. has made disallowance u/s 36(1)(iii) of the Act and the provision of section 36(1)(iii) of the Act, is to allow interest expenses on the funds borrowed for business purposes. This means that the interest

expenses are allowable only to the extent of funds borrowed for business purposes. The A.O. while estimating the said disallowance, had also made certain estimation of peak debit balances in the account of Shri Gaurav Arora, M/s Futurz Next Services (P) Ltd & M/s Arora Timber Pvt. Ltd. The estimation of interest at 50% by the A.O. is without any basis, while disallowing any interest on borrowed funds not used for business purposes, the A.O. has to pinpoint for specific interest bearing funds, has been diverted for non-business purposes, on which no interest has been charged.

From the above, following facts emerge :

- The appellant is having business transactions with alleged 3 clients, and

- The transaction with these clients are, only business transactions and no loan transactions have taken place.

In view of the above, I hold that, appellant is engaged in the business of share broking/trading activities with the clients and there is no loan transaction with the alleged 3 clients. Accordingly, 1 agree with the main argument of the appellant and therefore, findings of the A.O. for making alleged disallowance of interest, are erroneous. Therefore, the addition of Rs.1,97,54,804/-, is deleted."

3.2. So far as addition of Rs.67,98,422/- made by the A.O. under section 14A of the Act is concerned, the Ld. CIT(A) deleted the same by observing as under :

"12.4. I have carefully considered the assessment order, written submissions, case laws relied upon and oral arguments of the Ld. A.R. The objections / arguments of the appellant, are discussed as under :

(i) As per A.O. during the year under consideration, assessee company has earned dividend income of Rs.60,718/- and for earning the exempt income, assessee has substantial amount of investment in shares of companies. The nature of income, which can be earned out of such investment, is dividend income, which is exempt income.

(ii) The assessee has not claimed any expenses against the exempt income, however, as per A.O., there would be expenses incurred on manpower, office expenses etc. for maintaining and keeping track of funds. Therefore, the A.O. was of the view that provisions of Sec. 14A. are attracted and accordingly, the A.O. determined the

disallowance of Rs.67,98,422/-, as per Rule 8D(ii) and (iii).

(iii) During the appellate proceedings, the appellant has submitted that, it has earned exempted income by way of dividend of Rs.60,718/- only on the shares held as stock in trade and not as investment. Therefore, A.O. has wrongly invoked the provisions of Sec.l4A of the Act, which is invoked for the exempt income, earned as dividend on the investment in shares. The dividend income earned on such shares, are incidental to the main business of the assessee. Therefore, no disallowance u/s 14A can be made and for this view, the appellant has relied upon on the judgment of Karnataka High Court in case of CCI Limited vs. JCIT, (2012,20 Taxmann.com 196) (Supra) and for sake of clarity, the same is reproduced as under :

"When no expenditure is incurred by the assessee in earning the dividend income, no notional expenditure could be deducted from the said income. It is not the case of the assessee retaining any shares so as to have the benefit of dividend. 63 per cent of the shares, which were purchased, are sold and the income derived therefrom is offered to tax as business income. The remaining 37 per cent of the shares are retained. It has remained unsold with the assessee. It is those unsold shares which have yielded dividend, for which the assessee has not incurred any expenditure at all. Though the dividend income is exempted from payment of tax, if any expenditure is incurred in earning the said income, the said expenditure also cannot be deducted. But in this case, when the assessee has not retained shares with the intention of earning

dividend income and the dividend income is incidental to its business of sale of shares, which remained unsold by the assessee, it cannot be said that the expenditure incurred in acquiring the shares has to be apportioned to the extent of dividend income and that should be disallowed from deductions. In that view of the matter, the approach of the authorities is not in conformity with the statutory provisions contained under the Act. Therefore, the impugned orders are not sustainable and require to be set aside. [Para 5]"

(iv) The appellant has made further submission that all the investments standing in the balance sheet, are strategic investments made in its group companies, which are strategically important for it and to maintain a direct nexus with the business, being carried on by the assessee company. Accordingly, such investment have to be

excluded while computing the disallowance u/r 8D.

From the above, following facts emerge :-

- The dividend income of Rs.60,718/- is earned from the shares held as stock in trade and not an investment.
- The investment made in its group concerns, are on account of strategic investments and on which, no dividend income has been earned.

In view of the above, I hold that the dividend income is incidental to the main business of trading in shares and therefore, A.O. has erred in invoking the provision of Sec. 14A for making disallowance for alleged expenses, against exempt income. Accordingly, I agree with the arguments of the appellant that the dividend income is incidental income, which is earned on account of business activities of the appellant and therefore, the

disallowance made by the A.O. cannot be sustained. Therefore, disallowance of Rs.67,98,422/-, is deleted.

3.3. So far as addition of Rs.113,31,36,000/- made by the A.O. by invoking the provisions of Section 56(2)(viia) is concerned, the Ld. CIT(A) deleted the same by observing as under :

"14.4. I have carefully considered the assessment order, written submissions, case laws relied upon and oral arguments of the Ld. A.R. The objections / arguments of the appellant, are discussed as under :

(i) The A.O. during the assessment proceedings observed that the shares of NCDEX were issued to assessee @ Rs. 59/- per share, however the last traded price of share was @ Rs. 145 on 2.12.2010. sold to M/s. Shri Renuka Sugar Ltd. **(SRSL).**

(ii) The provisions of section 56(2)(viia) applies from 01.62010. The allotment of shares by NCDEX to assessee company was carried oul by virtue of agreement dated 2.12.2010. Both NCDEX and assessee company are nol the companies in which public are substantially interested. Therefore, the provisions of section 56(2)(viia) would apply on the transaction of allotment of shares of NCDEX @ of Rs.59/-. As stated above, the last traded price of such shares was Rs.145/-, accordingly assessee received the benefit @ Rs.86 /-(Rs.l45-Rs.59) per share.

Accordingly. A.O. made an addition of Rs.1,13,31,36.000/- (Rs.86* 1,31,76,000 shares) invoking the provisions of section 56 (2) (viia).

(iii) During the assessment proceedings, assessee company submitted that though agreeing that the provision of Section 56 (2) (viia), are applicable and in such circumstances, valuation of shares is to be determined as prescribed Income -tax Rules 11U & 11UA, for calculating fair market value of the shares of NCDLX, which is not a listed company.

(iv) During assessment proceedings, the assessee has submitted the fair market value of the share, determined as per Rule 11U & 11UA, @ Rs.42.12/- per share, as against purchase rate @ Rs.59/- per share. However, this submission of the assessee did not find favour with A.O., since Rule 11U & 11UA, has come into effect from 29.11.2012.

(v) It is submitted by the assessee that the shares issued to SRSL and assessee company, were having different conditions attached with the allotment, as assessee company was an anchor investor and the shares issued had a lock-in period of 5 years and also includes penalty clause, if the conditions of agreement, are not fulfilled, whereas there were no such attributes of the shares issued to SRSL, accordingly, the value of share cannot be compared. The assessee has also submitted that the shares have not been purchased from related party.

(vi) During appellate proceedings also, the arguments taken before the A.O. in assessment proceedings, are more or less reiterated and it has been further submitted that the A.O. has wrongly stated that Rule 11U & 11UA, has come into effect from 29.11.2012. The provision of sec.56(2)(viia) has

come into force from 1.6.2010 and as per relevant explanation, the fair market value of the shares, has to be determined in accordance with the method, prescribed under Rule 11U and 11UA.

(vii) It is further submitted by the appellant that the corresponding existing Rule for the year under consideration, in term of the above provision u/s 56(2)(viia), was prescribed by notification no. 23/10 dated 8.4.2010, came into effect from 1.10.2009, same is as under :

"11UA. For the purposes of section 56 of the Act, the fair market value of a property, other than immovable property, shall be determined in the following manner, namely -

(c) valuation of shares and securities,

(a) the fair market value of quoted shares and

securities shall be determined in the following manner, namely,

(i) if the quoted shares and securities are received by way of transaction carried out through any recognized stock exchange, the fair market value of such shares and securities shall be the transaction value as recorded in such stock exchange;

(ii) if such quoted shares and securities are received by way of transaction carried out other than through any recognized stock exchange, the fair market value of such shares and securities shall be,

(a) the lowest price of such shares and securities quoted on any recognized stock exchange on the valuation dale, and

(b) the lowest price of such shares and securities on any recognized stock exchange on a date immediately preceding the valuation date when such shares and securities were traded on such stock exchange, in cases where on the valuation date there is no trading in such shares and securities on any recognized stock exchange;

8(b) the fair market value of unquoted equity shares shall he the value, on the valuation date, of such unquoted equity shares as determined in the following manner, namely:

The fair-market value of unquoted equity shares =

$$\frac{(A\text{-}L \times (PV)}{(PE)}$$

Where,

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance

tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortized amount of deferred expenditure which does not represent the value of any asset;

L = book value of liabilities shown in the balance-sheet, but not including the following amounts, namely **:—**

(i) the paid-up capital in respect of equity shares.

(ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the dale of transfer at a general body meeting of the company;

(iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;

(iv) any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance lax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;

(v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;

(vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PE = total amount of paid up equity share capital as shown in the balance-sheet.

PV = the paid up value of such equity shares;]

(c) the fair market value of unquoted shares and securities other than equity shares in a company which are not listed in any recognized stock exchange shall be estimated to be price it would fetch if sold in the open market on the valuation date and the assessee may obtain a report from a merchant banker or an accountant in respect of such valuation.]"

However, above rule was renumbered w.e.f 29.11.2012, on account of insertion of new Sec. 56(2)(viib), as 11UA(1) and 11UA(2). Accordingly, appellant submitted that, the A.O. has wrongly taken a view that Rule 11UA(1), came into effect from 29.11.2012.

From the above, following facts emerge :-

- Rule 11U and 11UA of Income-tax Rules, has come into force by Notification no.23/10 dated 8.4.2010, which came into effect from 1.10.2009. Accordingly, the rule shall be applicable for the allotment of shares taken place on 2.12.2010.
- Shares issued to SRSL and shares issued to NCDCX, are on different footings and cannot be compared.
- The purchase of shares by the appellant, is not from related party.

In view of the above, I hold that shares issued to assessee company @ Rs.59/- per share, is higher than the value @ Rs.41.12 per share, determined u/s 56(2)(viia), in pursuance of Rule 11U and 11UA. Accordingly, I agree with the argument of the appellant and therefore, above addition cannot be sustained.

In view of the above, the addition of Rs.113,31,36,000/- made on account of share issued of NCDCX, is deleted."

3.4. So far as disallowance of an amount of Rs.45 Crores on account of sale of shares of United Stock Exchange is concerned, the Ld. CIT(A) deleted the same by observing as under :

"15.4. I have carefully considered the assessment order, written submissions, case laws relied upon and oral arguments of the Ld. A.R. The objections / arguments of the appellant, are discussed as under :

(i) During the assessment proceedings, the A.O. alleged that the assessee company has sold the 75 lacs shares of USE, on 31.3.2010. to M/s Atex Overseas Pvt. Ltd. at sale price @ Rs. 39/- per share. However, thereafter on 19.9.2010, the same share of USE, were sold to 3 different companies @ Rs.1 per share. Subsequent shares were splited to face value of Rs.1 each, as against earlier face value of Rs. 10/-. Therefore, A.O. was of the view that above alleged transactions has a huge difference in the date of shares sold on 19.9.2010.

(ii) During the assessment proceedings, the assessee submitted that, the assessee sold its stake of shares in USE, after taking permission from the BSL. Further, the assessee submitted that regarding the sale consideration, the A.O. has himself enquired from the Buyer and the Buyers has confirmed that it had not paid anything over and above the consideration. Therefore, no doubt can be

raised about the sale consideration received. Unless the confirmation of the buyer is proved to be wrong by bringing other adverse material on record, then only A.O. can take an adverse view with regard to the said transaction

(iii) During appellate proceedings, it is submitted that there were transaction of sale of shares of USE at rates other than @ Rs.3/- or for that matter or so there are instances of allotting the shares @ Rs.1/- also. Shares to M/s. Richa Global exports Pvt. 1 id. and M/s Riddhi Siddhi Buildcon Pvt. Ltd. were allotted @ Rs.1/- per share by USE itself. From the perusal of list of allottees of shares of USE placed in paper book page no.267-268, which was also filed in the assessment proceedings, it is observed that a total number of 110944300 shares were allotted to 24 different person @ Rs. 10/- (par value) each-and therefore, the A.O. should have also taken into consideration these

transactions.

(iv) During appellate proceedings, it is also submitted that the last traded rate to be taken on actual sale consideration, is not a correct method for determining the sale price. It is further submitted that, it is a trite law by that the income is to be taxed, has to be the real income of the assessee, which has actually been earned and not the income which it ought to have been earned. Therefore, it is argued that A.O. while making such addition, has to bring on record some material to prove that the assessee has actually received something over and above the consideration, which have been shown by it in its books of accounts and for this purpose, appellant has relied upon the judgment of the Hon'ble Supreme Court in the case of K.P. Varghese vs., ITO (1981, 131 ITR 597).

(v) During appellate proceedings, it has also submitted that the alleged entries of seized material, represent cash

received on account of sale of silver and the cash has been deposited in the bank. The same has been accounted for, in the case of group company, M/s Genx Services Pvt. Ltd. and no adverse view has been taken by the A.O. in the order passed u/s.153A.

From the above following facts emerge :-

- The sale price of the share on 17.9.2010, sold by USE to appellant and M/s. Richa Global Exports Pvt. Ltd., @ Rs.1/- which is not a related party to the transaction.
- On 13.11.2009, the exchange itself has allotted shares to 24 different persons @ Rs.10/- per share (i.e.. par value), before splitting.
- That the A.O. was no correct in drawing adverse inference and mixing the sale of silver with that of sale of share when sale of silver is duly accounted for in the books of accounts of M/s Genx Services Pvt. Ltd.
- There is no evidence found in the action u/s 132. to show that assessee has received any amount over and above the

sale value declared by it and in the post search enquiry also conducted by the A.O. the buyer has confirmed the sale transaction shown by the appellant.

In view of above, I hold that the shares were allotted to different persons (as stated supra) at par/face value and no adverse material has been brought on record to substantiate the rate of share @ Rs.3/-, taken by the A.O. Accordingly, I agree with the argument of the appellant and therefore, addition made by the A.O. cannot be sustained.

In view of the above, the addition of Rs.45,00,00,000/-, on account of sale of shares of USE, is deleted."

3.5. So far as the addition of Rs.2,02,72,428/- made by the A.O. under section 92 of the I.T. Act, 1961 is concerned, the Ld. CIT(A) deleted the same by observing as under :

***Findings** :The findings are as under:-*

I have carefully considered assessment order, written submission, case laws relied upon and oral arguments of Ld. AR. The objections/arguments of the appellant are discussed as under :-

(i) In the assessment proceedings, A.O. found that assessee has given the unsecured loan to its foreign A.E. M/s Jaypee Singapore Pte. Ltd. Singapore, from which it has not charged any interest. Therefore, as per provisions of Sec.92 of the Act, the interest chargeable on this international transaction with A.E., is to be determined at ALP. Accordingly, the A.O. considered the interest @ 13.5% p.a. at ALP by following CUP method, after taking into account financial risk, credit risk, business risk and structural risk, as discussed in para 14.10 of the assessment order. Accordingly, determined the ALP of the interest amount at Rs.2,02,72,428/-, for A.Y. 2011-12.

(ii) During the appellate proceedings, it has been submitted that the appellant is of the view that the money,

was given to the foreign A.E., as capital infusion in order to extend its business and keep its control over them. Therefore, it is submitted that there is no question of charging interest on such money. The A.O. has given a categorical findings in Para 14.4 and 14.5 of the assessment order that from the details obtained from Singapore tax authorities, it is seen that the remittance is only partly utilized for the purpose of equity and major fund, is of loan in substances and not of equity, as claimed by the appellant. Thus, funds have been admittedly transferred to the subsidiaries, without charging interest.

From the above, it is clear that the appellant has entered into a international loan transaction with A.E. of Singapore, in terms of Sec.92B of the Act, and failed to determine the ALP, in terms of Sec.92 of the Act. Accordingly, I do not find any infirmity in the action of the A.O. for determining the ALP of the interest chargeable on this international transaction and therefore the arguments of the appellant, are not acceptable.

(iii) During the appellate proceedings, it has also been submitted by taking alternative argument that A.O.'s action, while applying CUP method for determination of rate of interest at ALP, by using interest rate towards the amount advanced to an Indian Company, will charge interest @ 12% to 15% p.a., which is not correct. Since, the loan is granted in foreign currency to a foreign entity and not to an Indian company, the best comparable would be US Dollar LIBOR rate, not the interest rate of Indian company, as assumed by the A.O. For this view, the appellant has relied upon, the ITAT Delhi decision in the case of Cotton Natural (I) (P) Ltd. Vs. DCIT, (2013,32 taxmann.com 219) and held as under :-

> *"14. We note that CUP method is the most appropriate method in order to ascertain arms length price of the international transaction as that of the assessee. We agree with the assessee's contention that where the transaction was of lending money in foreign currency to its foreign subsidiaries the comparable transactions, therefore, was of foreign currency lended*

by unrelated parties. The financial position and credit rating of the subsidiaries will be broadly the same as the holding company. In such a situation, domestic prime lending rate would have no applicability and the international rate fixed being LIBOR should be taken as the benchmark rate for international transactions. "

The above order of the ITAT, has also been upheld by the Hon'ble Delhi High Court in it's decision in Commissioner of Income tax - I Vs. Cotton Naturals (I) (P) Ltd., dated 27.3.2015, reported in [2015] 55 taxmann.com 523 (Delhi) and relevant para 28 and 40, are reproduced as under :

"28. We do not agree with the finding recorded in paragraph 5 of the TPO's order that the comparable test to be applied is to ascertain what interest would have been earned by the assessed by advancing a loan to an unrelated party in India with a simitar financial health as the taxpayer's subsidiary. The aforesaid reasoning is unacceptable and illogical as the loan to the subsidiary AE in the instant case is not granted in India and is not

to be repaid in Indian Rupee. It is not a comparable transaction. The finding of the TPO that for this reason the interest rate should be computed at 14% per annum i.e. the average yield on unrated bonds for Financial Years (FY, for short) 2006-07, has to be rejected.

…….

40. The aforesaid methodology recommended by Klaus Vogel appeals to us and appears to be the reasonable and proper parameter to decide upon the question of applicability of interest rate. The loan in question was given in foreign currency i.e. US $ and was also to be repaid in the same currency i.e. US $. Interest rate applicable to loans granted and to be returned in Indian Rupees, would not be the relevant comparable. Even in India, interest rates on FCNR accounts maintained in foreign currency are different and dependent upon the currency in question. They are not dependent upon the PLR rate, which is applicable to loans in Indian Rupee. The PLR rate, therefore, would not be applicable and should not be applied for

determining the interest rate in the extant case. PLR rates are not applicable to loans to be re-paid in foreign currency. The interest rates vary and are thus dependent on the foreign currency in which the repayment is to be made. The same principle should apply."

In view of the above, I agree with the argument of the appellant that ALP of interest on foreign currency loan, is to be determined at US dollar LIBOR, for the year under consideration, since loan given to A.E. is in US dollar, for which appellant will determine the ALP, and file its claim before the A.O.. If A.O. find that the claim as per US dollar LIBOR, in terms of above "decision of the Hon'ble High Court (Supra) is in order, that the addition to that extent will be made and the excess of interest now determined, will be deleted .

Accordingly, ground no. 13 to 17, are hereby partly allowed."

4. Aggrieved with such Order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds :

(a) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in deleting additions made on account of client code modifications(CCM).

(b) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in holding that the CCM done by the company is within permissible limit and ignoring the fact that the CCM done by the sister concern M/s Futurz Next Services Ltd. through which profit of the assessee company was reduced by Rs. 11.97 crore is done through back office.

(c) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in holding that the CCM done by assessee company is within permissible criteria, thus,

ignoring the fact that the CCM was done in the code of certain entities only and the modified client code were not similar to the original client code, the values of client code was significant and other conditions laid down by stock exchanges.

(d) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in directing the AO to delete disallowance u/s 36(i)(iii).

(e) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in directing the AO to delete disallowance made u/s 14A.

(f) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in directing the AO to delete the additions made on account of sale of shares of United Stock Exchange.

(g) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in not appreciating the entries found in Annexure A-3, A-4 and A-5 which substantiate the sale of shares of USE at much higher rate than face value thereof.

(h) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in deleting the additions made u/s 56(2)(viia) for the purchase of shares of NCDEX by ignoring the actual traded value of the shares of NCDEX.

(i) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in holding that LIBOR rate of interest is applicable.

(j) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in accepting the contention of assessee that

the loan to AE w as advanced in LSS without calling for report under Rule 46A from AO as no such details were submitted during the course of assessment proceedings.

(k) That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in law.

(l) That the grounds of appeal are without prejudice to each other.

(m) That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.

5. So far as Ground Numbers. (a), (b) and (c) are concerned, the same relate to the order of the Ld. CIT(A) in deleting the addition made by the A.O. on account of Client Code Modification ["CCM"]. The Learned Counsel for the Assessee submitted that the issue stands covered in favour of the assessee by the decision of the Tribunal in the case of Group Company Jaypee Financial Services Ltd., for the A.Y. 2011-2012 vide ITA.No.4266/Del./2016 order dated 03.12.2019 wherein an identical issue had come up.

Referring to Para-15 of the order of the Tribunal, he submitted that the Tribunal has decided the issue in favour of the assessee. Referring to page-2, para-6 of the assessment order, he submitted that the present case is also exactly the same as in the case of Jaypee Financial Services Ltd.. He accordingly submitted that the Grounds of Appeal Numbers. (a), (b) and (c) being covered in favour of the assessee, the order of the Ld. CIT(A) be upheld and the grounds raised by the Revenue should be dismissed.

6. The Ld. D.R. on the other hand heavily relied on the order of the A.O.

7. We have heard the rival arguments made by both the sides, perused the orders of the A.O. and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both the sides. We find the A.O. in the instant case made an addition of Rs.11,97,21,030/- on account of CCM and also made further addition of Rs.92,016/- being commission earned for providing accommodation entry to the persons out of the

Group. We find the Ld. CIT(A) deleted the addition, the reasons of which have already been reproduced in the preceding paragraph. We find an identical issue had come up before the Tribunal in the case of Group Company namely Jaypee Financial Services Ltd. We find the Tribunal vide ITA.No.4266/Del./2016 order dated 03.12.2019 had decided the identical issue and upheld the order of Ld. CIT(A) in deleting the addition made by the A.O. by observing as under :

> *"10. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO in the instant case made addition of Rs.1,90,71,392/- on account of CCM on the ground that in the case of member (broker) group of companies of the assessee, it is held that the CCM is by and large not for the genuine reasons and for extraneous consideration and that the assessee has suppressed its income to the extent of Rs.1,90,71,392/-.*

We find the Ld. CIT(A) deleted the addition made by the AO on the ground that the assessee is not a member of any exchange and cannot execute CCM. Further the transactions on account of CCM done by group concerns are genuine and the volume of CCM occurred are within permissible limit allowed by SEBI. It is also the observations of the CIT(A) that the exchange or SEBI has not found any violation of rules and regulations relating to CCM and the CCM transactions are falling within the prescribed limit. It is the submission of the Ld. DR that it is not a genuine mistake and the transactions are not genuine. Further the CCM was done by the assessee through its sister concern M/s. Futurz Next Services Limited through which the profit of the assessee company was reduced by Rs.1.90 crores.

According to the Ld. DR the CCM is akin to penny stock. It is the submission of the Ld. Counsel for the assessee that the transactions entered into by the assessee are not found to be false or untrue and although SEBI is the regulator no action has been taken

by SEBI holding that the transactions are not genuine. Further no adverse material has been found by the search party during the course of search and the revenue even have not gone to the broker who has done the CCM. It is also his argument that it is not known as to whom the account has shifted.

11. We find some force in the argument of the Ld. Counsel for the assessee. We find force in the argument of the Ld. Counsel for the assessee that client code modification is the internal matter of the broker and assessee has no control over it. The AO in the instant case has not spelt out as to on which scrips the assessee has shifted the profit. We find the AO nowhere in the assessment order has mentioned of any statement of broker of the assessee regarding the admission of any client code modification. We find in the instant case the addition has been made by the AO despite assertions by the assessee that it was not a registered broker on the stock exchange.

There is also nothing on record to suggest that the CCM was done at the behest of the assessee. Further, there is no addition or adverse view taken in the case of the other person with whose accounts presumption is being made that transaction has been shifted.

Admittedly there is nothing on record that the revenue has gone to the broker to find out as to who is the beneficiary of the CCM.

Further the transactions have not been held to be non genuine. So far as the argument of the Ld. DR that the Client Code Modification is akin to penny stock is concerned, we do not find any merit in the said arguments. In case of the penny stocks shares are purchases at a very low price and were sold immediately after one year at astronomically high price just to claim the benefit of deduction u/s. 10 (38) or as the case may be. However, in case of CCM there is no such purchase at low price and sale at high price and it is on account of some punching error which has been rectified subsequently. We, therefore, do not find any

merit in the argument of the Ld. DR that CCM is akin to penny stock."

7.1. Since the facts of the present case are identical to the facts of the case decided by the Tribunal cited (supra), therefore, respectfully following the decision of the Tribunal in the case of the sister concern, we hold that there is no infirmity in the order of the Ld. CIT(A) in deleting the addition made on account of Client Code Modification and commission earned for such accommodation entry. Grounds of Appeal Numbers. (a), (b) and (c) are accordingly dismissed.

8. Grounds of Appeal Number. (d) relates to the Order of the Ld. CIT(A) in deleting the addition made by the A.O. of Rs.1,97,54,804/- under section 36(1)(iii) of the I.T. Act, 1961. Learned Counsel for the Assessee submitted that the A.O. in the instant case made the addition on the ground that assessee could not establish that the interest bearing funds borrowed by it is wholly and exclusively used for the purpose of business and there is no commercial expediency in giving interest free loan to its sister concerns.

He submitted that the Ld. CIT(A) holding that the assessee is having business transaction with the 03 clients which are for business transactions and no loan transaction has taken place, deleted the addition. He submitted that an identical issue had come up before the Tribunal in assessee's own case for the A.Y. 2013-2014. He submitted that the Tribunal vide ITA.No.1384/Del./2017 Order Dated 17.01.2020 has decided the issue and upheld the order of the Ld. CIT(A) in deleting the addition on the ground that advances are pertaining to the business transaction having been given on account of commercial expediency. He submitted that the facts of the present case being similar to the facts in A.Y. 2013-2014, therefore, the issue being covered in favour of the assessee, the order of the Ld. CIT(A) be upheld and the grounds raised by the Revenue should be dismissed.

9. The Ld. D.R. on the other hand heavily relied on the order of the A.O.

10. We have considered the rival arguments made by both the sides, perused the orders of the A.O. and Ld. CIT(A)

and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the A.O. in the instant case made addition of Rs.1,97,54,804/- under section 36(1)(iii) of the I.T. Act on the ground that interest bearing funds have been diverted for interest free loans to Director Shri Gaurav Arora, sister concern Futurz Next Services Limited and Arora Timber Pvt. Limited. We find the Ld. CIT(A) deleted the addition on the ground that the transactions with the 03 clients are business transactions and not loan transactions. We find an identical issue had come up before the Tribunal in assessee's own case in the A.Y. 2013-2014 vide ITA.No.1384/Del./2017 order dated 17.01.2020 and the Tribunal at Para Nos.11 and 12 of the Order has decided the issue and deleted the addition made by the A.O. and upheld by the Ld. CIT(A), by observing as under :

"11. So far as addition of Rs.24,15,000/- made by the AO and confirmed by the ld. CIT (A) u/s 36(1)(iii) is concerned on account of disallowance of interest is concerned, assessee company has come up with specific

plea that it has not granted any loans to Futurz Next Services Pvt. Ltd. rather all are regular business transactions supported with regular receipt and payment transactions occurring in the account. It is also contended by the ld. AR for the assessee that all the transactions are attributed to the business of shares/ future/option of securities and drew our attention towards its financial ledger for the period 01.04.2012 to 31.03.2013, available at pages 64 to 68 of the paper book wherein business transactions with Futurz Next Services Pvt. Ltd. have been recorded.

12. It is also contended by the ld. AR for the assessee that advances to the group companies have been given out of its own paid up share capital and reserve & surplus of Rs.3,24,81,89,677/- for commercial expediency to the group companies and relied upon the decision of S.A. Builders Ltd. vs. CIT (2007) 158 taxman 74 (SC). So, in view of the financials brought on record by the assessee company discussed in the preceding para, we are of the considered view that since transactions are pertaining of

business of shares/future/option of securities & advances having been given on account of commercial expediency of the group companies, disallowance made by the AO and confirmed by the ld. CIT (A) u/s 36(1)(iii) is not sustainable, hence ordered to be deleted. So, grounds no.5, 6, 7 & 8 are determined in favour of the assessee."

10.1. Since the facts of the instant case are identical to the facts decided by the Tribunal in assessee's own case for A.Y. 2013-2014, therefore, in the absence of any contrary material brought to our notice and respectfully following the decision of the Tribunal in assessee's own case cited (supra), we find no infirmity in the order of the Ld. CIT(A) in deleting the addition made by the A.O. under section 36(1)(iii) of the I.T. Act, 1961. Accordingly, Grounds of Appeal Number. (d) of the Revenue is dismissed.

11. Grounds of Appeal Number (e) relates to disallowance under section 14A of the I.T. Act, 1961 of Rs.67,98,422/- made by the A.O. and deleted by the Ld. CIT(A).

12. Learned Counsel for the Assessee submitted that an identical issue had come up before the Tribunal in assessee's own case for the A.Y. 2013-2014 and the Tribunal vide ITA.No.1384/Del./2017 order dated 17.01.2020 has upheld the order of the Ld. CIT(A) in deleting the entire addition made by the A.O. on the ground that A.O. has not recorded satisfaction and investment is not out of borrowed funds. He accordingly submitted that since the facts of the instant case are identical to the facts of the case decided by the Tribunal in A.Y. 2013-2014, the order of the Ld. CIT(A) be upheld and the grounds raised by the Revenue should be dismissed.

12.1. In his alternative contention, he submitted that the assessee has earned tax free exempt income of Rs.60,718/- and, therefore, in view of Judgment of Hon'ble Delhi High Court in the case of Cheminvest Ltd., reported in [2015] 378 ITR 33 (Del.), the disallowance under section 14A cannot exceed the actual amount of tax free exempt income received.

13. The Ld. D.R. on the other hand heavily relied on the order of the A.O.

14. We have considered the rival arguments made by both the sides, perused the order of the A.O. and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered various decisions cited before us by both the sides. We find the A.O. in the instant case made addition of Rs.67,98,422/- by invoking the provisions of Section 14A read with Rule 8D. We find the Ld. CIT(A) deleted the disallowance made by the A.O, reasons of which have already been reproduced in the preceding paragraph.

15. We find merit in the alternate contention of Learned Counsel for the Assessee that the disallowance under section 14A cannot exceed the actual dividend income received in view of the decision of Hon'ble Delhi High Court in the case of Cheminvest Ltd., (supra). Since the assessee in the instant case has received dividend income of only Rs.60,718/-, therefore, the disallowance under section 14A is restricted to Rs.60,718/-. The order of Ld. CIT(A) is

accordingly modified and the ground raised by the Revenue on this issue is partly allowed.

16. Grounds of Appeal Numbers. (f) and (g) relates to the order of the Ld. CIT(A) in deleting the addition of Rs.45 crores made by the A.O. on account of sale of shares of United Stock Exchange.

17. Learned Counsel for the Assessee submitted that United Stock Exchange ['USE'], is a national level recognized stock exchange and duly notified in the Gazette. USE shareholder includes national level institutions, public and private sector and Bombay Stock exchange being the strategic and single largest shareholder with 15% shareholding. Further it has 21 public sector banks, 6 private sector banks, one foreign bank and corporates like MMTC, Indian Potash are its shareholder. The shareholding of Jaypee group in USE was 24.99%. USE has applied for permission to do the business of stock exchange with SEBI. SEBI while processing the application of USE in March 2010, directed Jaypee Capital services P. Ltd. Group to

reduce their shareholding to 5% of issued share capital, as a condition for obtaining the permission. Therefore assessee sold its stake in USE, to obtain permission. The Learned Counsel for the Assessee filed the following details of shares sold :

Name of Purchaser	**Date of sale**	**No. of shares sold**	**Sale Price**	**Sale consideration**
Atex Overseas P. Ltd	31.03.2010	75,00,000	39	29,25,00,000
Span Holding p. Ltd	19.09.2010	7,50,00,000	1	7,50,00,000
Shahi Sterling Export P. Ltd.	19.09.2010	7,50,00,000	1	7,50,00,000
U.K. Paint (India) P. Ltd.	19.09.2010	7,50,00,000	1	7,50,00,000

- He submitted that these shares were allotted to assessee at par with face value of Rs.10/- each. Thereafter, shares were splitted to face value of Rs.1/-

each. The shares were sold at par value only and not at a reduced price, hence no adverse inference should be drawn that the same are sold at lesser value.

- While supporting the order of Ld. CIT(A) in deleting the addition, he submitted that the Ld. CIT(A) has given the following findings :

a. The sale price of share on 17.9.2010, sold by USE to appellant and M/s Richa Global Exports Pvt. Ltd, @ Rs.1/-, which is not a related party transaction.

b. On 13.11.2009, the USE itself has allotted shares to 24 different persons @Rs. 10/- per share (i.e. par value), before splitting.

c. As per SEBI guidelines, shareholder cannot hold more than 5% of paid-up capital, accordingly shares were sold in a haste. As discussed above also, the sole motive behind selling the shares was to obtain permission from SEBI for online trading and the

shares were sold in a haste, hence the same were sold at par.

d. That USE was to formally commence its operations on 20.09.2020 till 19.09.2010 assessee had no option but to reduce the shareholding to 5%, the operation of USE could not commence under the above circumstances as assessee was holding 22.50 Crore shares in excess of 5% before 19.09.2010. Thus assessee has no option but to sell entire excess shareholding of 22.50 Crore on or before 19.09.2010 at par.

e. BSE has the right of first refusal i.e. if BSE can buy at the same price and further more BSE has the right to bring new buyer of their choice to buy shares at the offered price, then these could not be sold to other parties. Therefore, there cannot be any scope of understatement of selling price as the same was in knowledge of BSE and doubting this transaction would also raise questions on BSE.

f. All the shares allotted/transferred were approved by the board of USE and BSE. That is, the shares are transferred with prior approval of board, hence there is no hidden transaction etc.,

17.1. He, accordingly submitted that the addition is liable to be deleted and the order of the CIT (A) should be upheld.

18. The Ld. D.R. on the other hand heavily relied on the order of the A.O.

19. We have considered the rival arguments made by both the sides, perused the order of the Ld. CIT(A) and paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the A.O. in the instant case made addition of Rs.45 crores to the total income of the assessee by estimating the sale value of 22,50,00,000 shares of M/s.USE @ Rs.3.00 per share as against Rs.1/- by the assessee. While doing so, he considered the previous sale made by the assessee and on

the basis of amounts mentioned in the seized documents, particularly against the name of Gujaral.

18.1. We find the Ld. CIT(A) deleted the addition on the ground that the sale price of share on 17.09.2010 sold by USE to assessee and M/s Richa Global Exports Pvt. Ltd, @ Rs.1/-, which is not a related party transaction. On 13.11.2009, the Exchange itself has allotted shares to 24 different persons @ Rs.10/- per share (i.e. par value), before splitting. In view of the above, Ld. CIT(A) held that the shares were allotted to different persons at par/face value and no adverse material has been brought on record to substantiate the rate of share @ Rs.3/- taken by the A.O. Therefore, we do not find any infirmity in the order of the Ld. CIT(A).

18.2. We find United Stock Exchange ['USE'], is a national level recognized stock exchange and duly notified in the Gazette. USE shareholder includes national level institutions, public and private sector and Bombay Stock exchange being the strategic and single largest shareholder

with 15% shareholding. Further it has 21 public sector banks, 6 private sector banks, one foreign bank and corporates like MMTC, Indian Potash as its shareholder. The shareholding of Jaypee group in USE was 24.99% in USE. USE has applied for permission to do the business of stock exchange with SEBI. SEBI while processing the application of USE in March 2010, directed Jaypee Capital services P. Ltd. Group to reduce their shareholding to 5% of issued share capital, as a condition for obtaining the permission. Therefore assessee sold its stake in USE, to obtain permission. These shares were allotted to assessee at par with face value of Rs.10/- each. Thereafter, shares were splitted to face value of Rs.1/- each. The shares are sold at par value only and not at a reduced price, hence no adverse inference should be drawn that the same are sold at lesser value. We find the Ld. CIT(A) while deleting the addition has found that the sale price of share on 17.9.2010, sold by USE to assessee and M/s Richa Global Exports Pvt. Ltd, @ Rs.1/-, which is not a related party transaction. On 13.11.2009, the USE itself has allotted shares to 24

different persons @Rs. 10/- per share (i.e. par value), before splitting. We find as per SEBI guidelines, the shareholder cannot hold more than 5% of paid-up capital and accordingly the shares were sold. We find merit in the arguments of the Learned Counsel for the Assessee that the sole motive behind selling the shares was to obtain permission from SEBI for online trading and the shares were sold in a haste, hence the same were sold at par. USE was to formally commence its operations on 20.09.2010 and till 19.09.2010 the assessee had no option but to reduce the shareholding to 5% since the operation of USE could not commence under the above circumstances as assessee was holding 22.50 Crore shares in excess of 5% before 19.09.2010. Thus assessee has no option but to sell entire excess shareholding of 22.50 Crore on or before 19.09.2010 at par. BSE has the right of first refusal i.e. if BSE can buy at the same price and further more BSE has the right to bring new buyer of their choice to buy shares at the offered price, then these could not be sold to other parties. Therefore, there cannot be any scope of understatement of

selling price as the same was in knowledge of BSE and doubting this transaction would also raise questions on BSE. We find all the shares allotted/transferred were approved by the board of USE and BSE. That is, the shares are transferred with prior approval of board, hence there is no hidden transaction etc. We, therefore, find no infirmity in the order of the Ld. CIT(A) in deleting the addition made by the A.O. Accordingly, we, confirm the order of the Ld. CIT(A) on this issue. Grounds of Appeal Numbers. (f) and (g) of the Revenue are, therefore, dismissed.

19. Grounds of Appeal Number (h) relates to the order of the Ld. CIT(A) in deleting the addition of Rs.113,31,36,000/- made by the A.O. on account of allotment of shares of NCDEX at concessional rate by invoking the provisions of Section 56(2)(viia) of the I.T. Act, 1961.

20. Learned Counsel for the Assessee submitted that during the year under consideration assessee-company was allotted 1,31,76,000 shares of NCDEX at a value of Rs.59/-

per share for a total consideration of Rs.77,73,84,000/- (59 * 1,31,76,000). He submitted that NCDEX entered into an agreement with assessee-company on 02.12.2010. During the course of assessment proceedings, the A.O. alleged that, the equity shares of NCDEX were allotted @ Rs.59/- per share, whereas the value of shares as on that date was Rs.145 and, therefore, a direct benefit of Rs.11,31,36,000/- [(Rs.145 - 59) X 1,31,76,000] was transferred, which according to him, is the income as per provisions of Sec. 56(2)(viia). It was submitted to the AO that, the shares were issued at a price more than the book value of shares of NCDEX as on 31.03.2010 .i.e. Rs.42.12 and was duly approved by the board of NCDEX by its shareholders in EGM held on 06.09.2010. He submitted that the Ld. CIT(A) deleted the addition on the basis that Rule 11U and 11UA of Income Tax Rules, have come into force by Notification no. 23/10 dated 8.4.2010, which came into effect from 1.10.2009. Accordingly, the rule shall be applicable for the allotment of shares taken place on 02.12.2010. Shares issued to SRSL and shares issued to NCDEX, are on

different footing and cannot be compared. The purchase of shares by the assessee is not from related party. Fair market value of such shares is Rs.42.12 as per valuation Rules 11U and 11UA, prescribed under section 56(2)(viia). Whereas the same were issued at a price of Rs.59, which is higher than fair market value. Further, the comparables selected by the A.O. are wrong. A.O. himself accepts that the shares were issued to the assessee-company at Rs.59/- and there is no doubt expressed in this regard. Shares have been sold and profit has been booked and the corresponding income is also offered to tax. Hence, the addition is liable to be deleted and the order of Ld. CIT(A) should be upheld.

21. The Ld. D.R. on the other hand heavily relied on the order of the A.O. He submitted that the provisions of Section 56(2)(viia) are applicable on the allotment of shares of NCDEX at concessional rates for which the assessee had got benefit of Rs.113,36,31,000/-, but, the assessee received the shares at below the market rate, therefore, the A.O. is fully justified in invoking the provisions of Section 56(2)(viia) of the I.T. Act, 1961.

22. We have considered the rival arguments made by both the sides, perused the orders of the A.O. and Ld. CIT(A) and paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the A.O. in the instant case made addition of Rs.113,36,31,000/- on the ground that provisions of Section 56(2)(viia) are applicable on the allotment of shares of NCDEX at concessional rates. According to him, the assessee got the benefit of Rs.113,31,36,000/- by virtue of receipt of shares of NCDEX at below the market rate and hence the income is attributable in the hands of the assessee. We find the Ld. CIT(A) deleted the addition on the ground that Rule 11U and 11UA of Income Tax Rules, have come into force by Notification no. 23/10 dated 08.04.2010, which came into effect from 01.10.2009. Accordingly, the Rule shall be applicable for the allotment of shares taken place on 02.12.2010. Shares issued to SRSL and shares issued to NCDEX, are on different footing and cannot be compared. The purchase of shares by the assessee is not from related party. The submission of the Learned Counsel

for the Assessee that shares are issued to the assessee-company @ Rs.59/- per share as against Fair Market Value of Rs.42.12 as per Rule 11U and 11UA could not be controverted by Ld. D.R. Since, the Ld. CIT(A) while deleting the addition has passed a detailed order giving reasons which the Ld. D.R. could not controvert, therefore, we find no infirmity in the order of the Ld. CIT(A) in deleting the addition. We, therefore, uphold the order of the Ld. CIT(A). Accordingly, Grounds of appeal Number. (h) raised by the Revenue is dismissed.

23. Grounds of Appeal Number. (i) and (j) relate to the order of the Ld. CIT(A) in deleting the addition of Rs.2,02,72,428/- made by the A.O. being income under section 92 of the I.T. Act, 1961 as interest on loan from A.E.

24. Learned Counsel for the Assessee submitted that the A.O. made the addition on account of ALP of interest receivable on loans outstanding in the name of Jaypee Singapore Pte Limited which was deleted by the Ld. CIT(A). on the ground that ALP of interest of foreign currency loan

is to be determined at LIBOR for the year under consideration since loan given to A.E. is also in US Dollars. He submitted that the issue stand decided in favour of the assessee by the decision of the Tribunal in assessee's own case for the A.Y. 2013-2014 vide ITA.No. 1384/Del./2017. He submitted that the Tribunal at Para Nos. 17 to 25 had decided the issue and deleted the addition made by the A.O. and upheld the order of the Ld. CIT(A). He submitted that since the facts of the instant case are identical to the facts of the case decided by the Tribunal in assessee's own case for the A.Y. 2013-2014, therefore, the same being a covered matter in favour of the assessee, the Grounds raised by the Revenue on this issue should be dismissed.

25. The Ld. D.R. on the other hand heavily relied on the Order of the A.O.

26. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the A.O. in the instant case made addition of Rs.2,02,72,428/- on account of ALP interest receivable on

loans outstanding in the name of Jaypee Singapore Pte Limited by invoking the provisions of Section 92 of the I.T. Act, 1961. We find the Ld. CIT(A) deleted the addition on the ground that ALP of interest on foreign currency loan, is to be determined at US Dollar LIBOR, for the year under consideration since loan given to A.E. is in US Dollar, for which, assessee will determine the ALP, and file its claim before the A.O. If the A.O. finds that the claim as per US Dollar LIBOR, in terms of decision of Hon'ble Delhi High Court in the case of Cotton Naturals (I) Pvt. Ltd., the addition to the extent will be made and the excess of interest now determined, will be deleted. We do not find any infirmity in the order of Ld. CIT(A) on this issue. We find an identical issue had come up before the Tribunal in assessee's own case in A.Y. 2013-2014 vide ITA.No.1384/Del./2017 dated 17.01.2020. We find the Tribunal from Paras-17 to 25 has elaborately discussed the issue and deleted the addition made by the A.O. and sustained by the Ld. CIT(A), by observing as under :

"17. AO noticed investment made by the assessee company in foreign companies, namely, Jaypee Capital Inc., USA and Jaypee Singapore Pte Ltd.. AO made addition of Rs.1,04,24,675/- on account of arm's length price value of the interest receivable on loans outstanding in the name of Jaypee Singapore Pte Ltd. against which the assessee has shown nil interest. It is categoric plea of the assessee company that remittance to foreign subsidiaries has been made vide "capital infusion" in order to extend its business and to keep its control over foreign subsidiaries. However, the AO has treated the "capital infusion" as deemed loan and thereby made addition on account of interest @ 13.5% on deemed loan as its arm's length price value.

18. Assessee company has raised categoric plea that foreign subsidiaries in which capital infusion was made, is part of Jaypee Capital Services Pvt. Ltd. and as such, there is no question of charging interest on the same. It is contended by the ld. AR for the assessee that

transaction of investment into loan cannot be re-characterized by the AO.

19. Undisputedly, for the year under assessment, there is no loan outstanding against the subsidiary. When we examine Notes on Financial Statement ending 31.03.2013, available at page 21 of the paper book, it is proved that investment has been made in equity shares of subsidiary of the assessee, namely, Jaypee Singapore Pte. Ltd. by way of infusion of capital in accordance with the RBI Guidelines under automatic approval route. Moreover, Jaypee Singapore Pte. Ltd. has made final allotment to the assessee company in AY 2014-15.

20. Hon'ble High Court of Delhi in case of CIT vs. EKL Appliances Ltd. 345 ITR 241 held as under :-

> *"17. The significance of the aforesaid guidelines lies in the fact that they recognise that barring exceptional cases, the tax administration should not disregard the actual transaction or*

substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions. The reason for characterisation of such re- structuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured.

18. Two exceptions have been allowed to the aforesaid principle and they are (i) where the economic substance of a transaction differs from its form and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been

adopted by independent enterprises behaving in a commercially rational manner."

21. Similarly, coordinate Bench of the Tribunal in case of Topsgrup Electronic System Ltd. vs. ITO (2016) 48 ITR (trib) 753 also held that re-characterization of capital transaction into loan by the Transfer Pricing Officer is not sustainable in the eyes of law in view of the decision rendered by Hon'ble Bombay High Court in case of Besix Kier Dabhol SA 2012 (10) TMI 817 (Bombay). Operative part of the order is extracted for ready perusal as under:-

"In this case the question before the court was: -

"i) Whether on the facts and circumstances of the case and in law the Tribunal was right in holding that in the absence of any specific thin capitalization rules in India, the Assessing Officer cannot disallow the interest payment on debt capital after having observed the abnormal thin capitalization ratio of 248:1?"

In this regard it was submitted that the Hon'ble Court held as under at paras 4 to 8 of its order: -

"4) The respondent-assessee is a company incorporated under the laws of Belgium. The sole business of the respondent- assessee is to carry out the project of construction of fuel jetty near Dabhol in India. The respondent-assessee had fully paid capital of 25.00 lacs (Belgium Francs) divided into 2500 shares of 1000 Belgium Francs each. This equity capital was divided in the ratio of 60:40 between the two joint venture partners N V Besix SA, Belgium and Kier International (Investment) Limited of U.K. The respondent assessee also borrowed from its shareholders in the same ratio as the equity share holding amount of Rs.57.09 crores from N.A. Basix SA and Rs.37.01 crores from Kier International Investment Limited. In the circumstances, the respondent had equity capital of Rs. 38.00 lacs and debt capital of

Rs.9410 lacs. Thus, debt equity ratio worked out is to 248:1.

5) The respondent assessee paid interest of Rs. 5.73 crores on the aforesaid borrowing of Rs.57.09 crores and Rs.37.01 crores from NV Basix SA and Kier International (Investments) Limited respectively. However, the Assessing Officer disallowed the payment of interest in view of the Reserve Bank of India's approval letter dated 3/11/1998 granting approval to the assessee to do business in India. The approval letter dated 03/11/1998 specifically provided that India Branch Office will not borrow or lend from/to any person in India without specific permission of the Reserve bank of India. The Assessing officer further observed that in view of India Belgium Double Taxation Avoidance Agreement interest on monies paid by the Head Office to the branches was not allowable as a deduction.

6) In appeal, the Commissioner of Income Tax (Appeals) by an order dated 29/3/2007 upheld the order of the Assessing officer and disallowed the deduction on account of interest of Rs.5.73 crores paid to Joint Venture Partners. The Commissioner of Income Tax (Appeals) held that Article 7(3)(b) of the Double Taxation Avoidance Agreement forbids allowance of any interest paid to the head office by permanent establishment in India as a deduction. Further, the payment of interest also directly violates the conditions imposed by RBI in its letter dated 3/11/1998. Therefore, the order of the Assessing Officer was upheld.

7) However, the Tribunal allowed the respondent-assessee's appeal. During the course of the proceedings before the Tribunal the revenue contended that the borrowings on which the interest has been claimed as a deduction are in fact capital of the assessee and brought only

under the nomenclature of loan for tax consideration. It was the case of the appellant-revenue before the Tribunal that debt capital is required to be re-characterized as equity capital. However, the Tribunal held that in India as the law stands there were no rules with regard to thin capitalization so as to consider debt as an equity. It is only in the proposed Direct Tax Code Bill of 2010 that as a part of the General Anti Avoidance Rules it is proposed to introduce a provision by which a arrangement may be declared as an impermissible avoidance arrangement and may be determined by recharactersing any equity into debt or vice versa.

8) We find no fault with the above observations of the Tribunal. There were at the relevant time and even today no thin capitalization rules in force. Consequently, the interest payment on debt capital cannot be disallowed. In view of the above, the

question (i) raises no substantial question of law and is therefore, dismissed."

22. So, there is umpteen number of judgment declaring that transaction involving share application money cannot be recharacterized as international transaction of loan under Transfer Pricing provision.

23. Hon'ble Bombay High Court in case of Pr. CIT vs. Aegis Limited in ITA No.1248 of 2016 dated 28.01.2019 held that in the absence of finding that the transaction was sham, the TPO could not have treated such transaction as a loan and charge interest thereon on notional basis. Coordinate Bench of the Tribunal in case of Voltas Ltd. vs. DCIT, Range 8(3)(2), Mumbai in ITA No.2822/Mum/2017 & Ors. in the identical facts and circumstances of the case held that, "the payment of share application money cannot be treated as partly in the nature of interest free loans to the Associated Enterprises and as such, ALP adjustment based on that

hypothesis is not legally sustainable". Operative part of the judgment is as under ;-

> *"3.5.7 Upon careful consideration of factual matrix as enumerated by us in the preceding paragraphs, the undisputed position that emerges is the fact that the assessee has advanced Share Application Money to one of its AE situated in Saudi Arabia with a view to acquire further stake in that entity. The entity has become wholly owned subsidiary of the assessee company during the month of January, 2009. The financial health of its AE was not good and the money was advanced with a view to infuse further capital in the AE and with a view to acquire controlling stake in its AE. The money has been utilized by its AE to pay-off business debts and to meet working capital requirements. Another undisputed fact is that ultimately the shares have been allotted to the assessee during December, 2015 after getting the desired regulatory approvals from concerned*

authority i.e. SAGIA. It is also undisputed fact that there was delay in the legal process which has been substantiated by the assessee, inter-alia, by furnishing email correspondences etc. The entirety of the facts and circumstances would demonstrate that the investment made by the assessee was for genuine business purpose and the stated transaction was not found to be a sham transaction, in any manner. Another fact is that whatever benefit would accrue to assessee's AE, they would indirectly accrue to the assessee since AE ultimately became wholly owned subsidiary of the assessee company. No doubt, there was inordinate delay in allotment of shares, nevertheless, the assessee was successful in explaining the delay in allotment of share and was able to demonstrate with evidences the circumstances which led to delay in allotment of shares. Therefore, re-characterization of this transaction as advance / loan by revenue

authorities, in our considered opinion, was not correct approach and this transaction could not be equated with loan transactions. The Ld. DR has contended that the transactions have not been re-characterized as loan but the same has been benchmarked since certain benefits have accrued to AE by infusion of fund which must be shared with the assessee. However, we find that ALP of the transaction has been computed in similar manner as it would be computed for a loan transaction. Further as already noted, assessee's AE ultimately became wholly owned subsidiary of the assessee and therefore, whatever benefit would accrue to AE, the same would indirectly accrue to the assessee. Therefore, not convinced with the approach of lower authorities, we hold that no addition would be warranted on this account. .....

50. In view of these discussions, as also bearing in mind entirety of the case, we are of the

considered view that the authorities below were in error in treating the payment of share application money, as partly in the nature of interest free loans to the AEs, and, accordingly, ALP adjustment based on that hypothesis was indeed devoid of legally sustainable merits. We delete the impugned adjustment of Rs.19,15,45,943. The assessee gets the relief accordingly. As we have decided this ground of appeal on the fundamental issue that the payment of share application money could not be partly treated as interest free loan to AE, we see no need to deal with other aspects of the matter."

24. Ld. DR for the Revenue by relying upon the order passed by the AO/CIT (A) contended that health of the AE needs to be looked into and it is not disclosed by the assessee company that if the loan was given and later on converted into equity. This contention of the ld. DR is not tenable for the reason that it is categoric case of the assessee company since very outset that funds

were given to the subsidiary for business purpose and to have control over it. Moreover it was investment in equity.

25. In view of the decisions rendered by Hon'ble High Courts and coordinate Bench of the Tribunal discussed in the preceding paras, we are of the considered view that firstly, AO has no authority to re-characterize the transaction of making investment by the assessee company in equity shares of subsidiaries as a loan; secondly, OECD Guidelines also discourage restricting of legitimate business transaction; thirdly, when the AO has not come up with specific finding that the transaction in question is a sham transaction, he cannot treat the transaction of "capital infusion" by the assessee company as a loan and to charge the interest thereon on notional basis; and fourthly, in the absence of any specific finding by the AO that any income has arisen from international transaction, TP provisions contained in Chapter-X of the Act do not apply. Section 92(1) of the act says that income arisen from

international transaction is a condition precedent for application of Chapter-X of the Act. Consequently, we are of the considered view that addition made by the AO and confirmed by the ld. CIT(A) on account of arm's length price of value of interest receivable on loans outstanding of Rs.1,04,24,675/- in the name of Jaypee Singapore Pte Ltd. is not sustainable, hence ordered to be deleted. So, grounds no.10 to 13 are determined in favour of the assessee."

26.1. Since the facts of the instant case are identical to the facts of the case already decided by the Tribunal in assessee's own case for the A.Y. 2013-2014, therefore, in absence of any contrary material brought to our notice by the Ld. D.R, we do not find any infirmity in the order of the Ld. CIT(A). Accordingly, the same is upheld and Grounds of appeal Numbers. (i) and (j) raised by the Revenue on this issue are dismissed.

27. Grounds of Appeal Numbers. (k), (l) and (m) being general in nature and are dismissed.

28. In the result, ITA.No.3558/Del./2016 of the Revenue is partly allowed.

ITA.No.3559/Del./2016 – A.Y. 2012-2013 :

29. Grounds of Appeal raised by the Revenue are as under :

(a) *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in deleting additions made on account of client code modifications(CCM).*

(b) *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in holding that the CCM done by the assessee company is within permissible criteria, thus, ignoring the fact that the CCM was done in the code of certain entities only and the modified client code were not similar to the original client code, the values of client code was significant and other conditions laid down by stock*

exchanges.

(c) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in directing the A.O. to delete disallowance u/s.36(i)(iii).

(d) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in directing the AO to delete disallowance made u/s 14A.

(e) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in holding that LIBOR rate of interest is applicable.

(f) On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in accepting the contention of assessee that the loan to AE was advanced in US $ without calling for report under Rule 46A from A.O. as no such details were submitted during the course of assessment proceedings.

(g) That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in law.

(h) That the grounds of appeal are without prejudice to each other.

(i) That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.

30. Grounds of Appeal Numbers. (a) and (b) relating to the order of the Ld. CIT(A) in deleting the addition of Rs.11,88,889/- made by the A.O. on account of CCM.

31. After hearing both sides, we find the above grounds are identical to Grounds of Appeal Numbers (a), (b) and (c) in ITA.No.3558/Del/2016. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following similar reasonings, the Grounds of Appeal Numbers (a) and (b) of the Revenue are dismissed.

32. Grounds of Appeal Number (c) by the Revenue relates to the order of the Ld. CIT(A) in deleting addition of

Rs.41,33,260/- made by the A.O. under section 36(1)(iii) of the I.T. Act, 1961.

33. After hearing both the sides, we find the above ground is identical to Grounds of Appeal Number (d) in ITA.No.3558/Del/2016. We have already decided the issue and the ground raised by the Revenue has been dismissed. Following similar reasonings, Ground of Appeal Number (c) of the Revenue is dismissed.

34. Grounds of Appeal Number (d) by the Revenue relates to the order of the Ld. CIT(A) in deleting the addition of Rs.54,12,130/- made by the A.O. under section 14A read with Rule 8D of the I.T. Rules.

35. After hearing both the sides, we find the above ground is identical to Grounds of Appeal Number (d) vide ITA.No.3558/Del/2016. We have already decided the issue and the ground raised by the Revenue have been partly allowed by holding that disallowance u/s. 14A cannot exceed to actual dividend income received. Following similar reasonings, we direct the A.O. to restrict the disallowance to

the actual dividend income received. Ground raised by the Revenue on this issue is accordingly partly allowed.

36. Grounds of Appeal Numbers (e) & (f) relate to the order of the Ld. CIT(A) in deleting the addition of Rs.1,04,24,675/- made by the A.O. under section 92 of the I.T. Act, 1961 being interest on loan from AE.

37. After hearing both the sides, we find the above ground is identical to Grounds of Appeal Numbers (i) & (j) vide ITA.No.3558/Del/2016. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following similar reasonings, Grounds of Appeal Numbers (e) & (f) of the Revenue are dismissed.

38. Grounds of Appeal Numbers (g) (h) and (i) being general in nature are dismissed.

39. In the result, ITA.No.3559/Del./2016 of the Revenue is partly allowed.

40. To sum-up, both the appeals of the Revenue are partly allowed.

Order pronounced in the open Court on 21.09.2021

Sd/-	Sd/-
(SUDHANSHU SRIVASTAVA)	(R.K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Delhi, Dated 21st September, 2021

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'I-1' Bench, Delhi
6.	Guard File.

// By Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.