

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESEIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER**

IT(TP)A No.2569/Bang/2017
Assessment years : 2013-14

United Breweries Ltd., UB Tower, UB City, 24, Vittal Mallya Road, Bangalore – 560 001. PAN: AAACU 6053C	Vs.	The Deputy Commissioner of Income Tax, Circle 7(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, Advocate
Respondent by	:	Shri Sumer Singh Meena, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	24.05.2022
Date of Pronouncement	:	01.06.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal by the assessee is against the final order of assessment dated 9.10.2017 passed by the DCIT, Circle 7(1)(1), Bangalore u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act].

1. Ground Nos. 2.1 to 2.9 raised by the assessee reads as follows:-

“Transfer Pricing Adjustment on account of Management Service Fee:

2.1. The learned AO/Transfer Pricing Officer ('TPO') erred in law and on facts in concluding that the Arm's Length Price (ALP) of Management Fee paid by the Appellant to its AE as NIL and thus erred in making an adjustment of INR 6,00,00,000.

2.2 The learned AO/TPO erred in law and on facts in concluding that no specific tangible services have been rendered by the AE to the Appellant;

2.3 The learned AO/TPO further erred in law and on facts in concluding that the payment made towards Management Service Fee by the Appellant to the AE is not connected to any specific services rendered by the AE to the Appellant;

2.4 The learned AO/TPO has erred in law and on facts in making the TP adjustment on account of Management Service Fee ignoring the commercial and economic rationale and business expediency of the Appellant for receiving the Management Services from its AE;

2.5 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee without appreciating the fact that the Management Services have been rendered by the AE to the Appellant based on an agreement between AE and the Appellant;

2.6 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee ignoring the fact that the services rendered by the AE to the Appellant resulted in various tangible benefits and further erred in ignoring the submissions and evidence placed by the Appellant before learned TPO/DRP;

2.7 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee ignoring the judicial precedents prevailing on the matter and relied upon by the Appellant before the learned TPO/DRP;

2.8 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee adjustment inasmuch as the learned TPO/DRP has not undertaken

any independent analysis of its own to determine the ALP and thus arbitrarily concluded that the ALP is NIL; and

2.9 The learned AO/TPO erred in law and on facts in making the above adjustment ignoring the fact that the ALP of Management Fee in the previous years has been accepted by the department which was paid under similar facts and circumstances.”

2. The assessee is a company engaged in the manufacture and sale of beer. During the previous year, the assessee had paid a sum of Rs.6 crores to Heineken BV [**HIBV**] as consideration for HIBV providing know how through its personnel to the Assessee. There is no dispute that HIBV and assessee are Associated Enterprises (AEs) and therefore the payment made by the assessee to HIBV has to pass the test of arm's length price [ALP] as laid down u/s. 92 of the Act. In terms of Sec.92B(1) of the Act, the transaction of providing services by HIBV to Assessee was “international transaction” i.e., a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. The Assessee also paid a sum of Rs.35,78,473 to Heineken Brouwerijen BV [**HBBV**] for use of technology and trademark viz., Royalty towards technology and trademark.

3. The services rendered by HIBV, are akin to providing intra group services provided by one group entity to the other group entities across the world. On the international level, intragroup services are quite challenging for tax authorities, as companies use these transactions (of course, also other transaction types as loans etc.) to optimize with taxes. Services are commonly used for shifting untaxed profit to a country, where lower income tax rate applies. Therefore, the intragroup transactions have caught the interest of the tax authorities and are being constantly monitored.

4. To justify the payment to HIBV as at arm's length, the assessee filed a Transfer Price [TP] study along with the report in Form 3CEB. It was submitted in its TP study by the Assessee, that there was an agreement between HIBV and the assessee dated 27.6.2012 whereby HIBV agreed to provide the following services to the assessee:-

“Provision of Services and know how

HIBV agrees to provide Services and know how to the Company through its Personnel. Such services and know how would be rendered by HIBV to the Company from the Netherlands.

Heineken has accumulated substantive information, experience and unique knowledge either by developing such know-how itself or by adapting external know-how for specific use within the Heineken Group. It relates to all aspects of the industry of production, marketing and selling beverages and more in particular beers, not limited to the Heineken brand but also applicable to local brands.

The know how with respect to the beverage industry can be used by the Company to determine and refine the local strategy and to optimise all aspects of their operations.

The know-how is in the area of among others management, supply chain, marketing, finance and administration, legal, tax and human resources. Related best practices are shared.

Examples:

- Operational excellence, operational key performance indicators related to quality, cost, safety, etc
- Optimum operational performance against lowest possible cost in supply chain
- Marketing & strategy support, such as portfolio approach, key issues
- Brand building such as development of premium segment, research
- Distribution approach and review
- Trade marketing review and best practices
- Corporate relations (business conduct)
- Legal agreements
- International tax matters
- Audit committee, executive board,-”

5. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determination of ALP of the international transaction u/s.92CA of the Act. On such a reference to the AO on the question of determination of ALP u/s. 92C of the Act, the TPO called upon the assessee to produce evidence regarding rendering of services by HIBV and also to furnish a detailed write-up on the technical consultation rendered by HIBV and the benefit that accrued to the assessee by virtue of such services.

6. In a submission dated 5.8.2016, the assessee gave a note describing in detail, the technical process improvement services rendered by Heineken. The broad headings under which these services were rendered was stated by the Assessee to be:

- a. Reduction in Water consumption — process improvement at 24 units, across all the own and contract breweries in the country.
- b. Brewery Comparison System —this helped in identifying the weakness in brewery operations and made us focus attention on brewery units which were lagging behind in the production.
- c. Total Production Management: This is wholesome project, encompassing all the units, so that a high quality product is manufactured. This also involves looking at sudden production bottle necks being addressed instantaneously and also analysing the Causes which resulted in production loss. This concept also ensures that. no such problem are repeated in future.
- d. Quality Analysis —A new perspective based on international model.”

7. The assessee also furnished copy of emails and correspondence in connection with the services rendered. These documents are available at pages 198 to 424 of the assessee’s PB.

8. The TPO, firstly, observed that there should be a commercial rationale for the arrangement and the agreement between assessee and HIBV lacked commercial rationality in the sense that a sum of Rs.6 crores was paid by the assessee as a lump sum consideration without reference to any nexus with the nature of services to be rendered. He observed that as per clause (7) of the agreement dated 23.7.2012, HIBV was not liable in any way, except for direct damage sustained as a result of gross negligence or willful misconduct in the performance of the services. According to the TPO, such clauses would not be present in the agreement between unrelated parties. Another peculiar

feature noted by the TPO was clause (9) of the agreement which laid down a condition that agreement would get terminated, the moment HIBV group's shareholding in the assessee gets reduced to less than 25% of total equity shareholding. According to the TPO, this aspect of the agreement showed that it was a payment made for the reason that HIBV was a shareholder and rendering of services was not a guiding factor for entering into this agreement. The TPO also referred to the OECD guiding principles on benchmarking intragroup services, which reads as follows:-

“OECD GUIDING PRINCIPLES ON BENCHMARKING INTRAGROUP SERVICES:

The following is culled out of the OECD literature on benchmarking intragroup transactions:

a) The application of the arm's length principle would be to see whether the charges paid by the taxpayer for intra group services reflect the same charges for the services that would have been, or would reasonably be expected to be, levied between independent parties dealing at arm's length for comparable services under comparable circumstances.

It has already been proved that the agreement is very lopsided in favour of Heineken Group and no two independent parties would accept to have such an agreement. When two independent parties would not even have entered into such a lopsided agreement, the question of paying charges for such services does not arise at all.

b) How much a comparable independent service recipient, under comparable circumstances, would be willing to pay for that service? An arm's length entity would be willing to pay for an activity only to the extent that the activity confers on it a benefit of economic or commercial value.

The Taxpayer was repeatedly questioned on the benefit accrued to him out of the supposedly services rendered by Heineken group. The Taxpayer was not able to clarify this issue at all. Infact in the first agreement entered into between the two on 23rd July, 2010, the scope of the services was defined in just two lines. Only in the subsequent agreement entered into between them on 23rd July, 2012, that the scope of the services was extended. Again the scope of services was more generic in nature and mimicked more of shareholder services rather than any specific technical services for which payment would be warranted.”

9. In the light of the aforesaid OECD guiding principles, the TPO examined the case of the assessee and came to the conclusion that the provision of services were generic in nature and no benefit was derived by the assessee and there was no material to prove rendering of any technical services. The TPO observed that because of the services, the assessee claims water consumption while manufacturing beer was reduced. However, the assessee could not file any evidence to prove the reduction of water consumption, according to him. On the aspect of brewery consumption system, the TPO observed that the assessee has filed only illustrative set of emails and this was purely a reporting system between the teams of groups which proved that this was stewardship services provided to shareholders of the group and there is no necessity to pay for shareholder activity. The TPO also observed that the assessee failed to establish the economic or commercial value that it derived by virtue of services rendered by HIBV. In conclusion, the TPO made the following observations and held that ALP should be treated as NIL and the entire payment of Rs.6 crores was to be added to the total income of the assessee on account of determination of ALP:-

“The arguments of the TPO are summarized as under:

1. The taxpayer did not produce any evidence with regard to the actual rendering of services by the AE and how they were quantified.
2. The taxpayer did not produce any primary evidence to show that the services are actually rendered by the AE except describing the nature of services and copies of invoices raised by the AE.
3. The agreement is lopsided and no two independent entities would have entered into such kind of agreement.
4. The taxpayer could not produce the details and quantum of expenditure spent by the AE in rendering services in connection with management support fees even though it was asked specifically.
5. Just describing the services would not suffice to justify the price charged in intra group services. The taxpayer is only describing various services stated to be rendered by the taxpayer, but did not give the actual amount spent in respect of these expenses, as such dealing between two independent parties would invariably boils down to the actual expenditure incurred in connection with such services and mark-up thereon.
6. Firstly, the taxpayer has to prove that the services are rendered. The taxpayer did not prove it **substantially**. The second aspect of intra group services is the quantification of such services in terms of actual expenditure incurred and commensurate benefits derived therefrom. This aspect is also not proved by the taxpayer. Moreover, when an expenditure is incurred for the benefit of the group as a whole, no charging of such expenditure is required as such expenditure is not incurred in connection with any individual member of the group and the benefit of such expenditure would be available to all the members of the group.
7. The taxpayer has not produced any primary evidence to show that services were actually rendered. At arm's length, the

parties dealing in similar circumstances would have such evidence in possession.

8. The taxpayer has not shown how such services would be valued by an independent entity dealing in similar circumstances.

9. The taxpayer did not show what is the tangible and substantial commercial benefit derived by paying such payment of Rs. 6 crores.

8.1 Conclusion:

The following points are noteworthy:

- The payment terms for the management fee are independent of the nature and quantum of services, if any, rendered.
- The payment is apportioned by different cost centres of the affiliate on an agreed percentage basis and not linked to the extent or type of services, if any, actually rendered by the individual unit.
- Despite the high sounding words used, no specific tangible service is identified or its arms length price determined.
- The payment made by United Breweries Limited apparently looks like a tribute payable by a subsidiary to its holding company. It is not relatable to any specific tangible service rendered by the holding company to the subsidiary.

In view of the above it is concluded that the ALP is nil since an independent entity in a comparable situation would not pay any amount for the service. The entire payment of management fee Rs. 6 Crores is treated as an adjustment proposed U/ s 92CA. Showcause why the same should not be done.”

10. The TPO's suggestion was incorporated in the draft assessment order. The assessee filed objections before the DRP, which upheld the order of the TPO with the following observations:-

“Panel: The assessee has further made extensive submissions regarding management service fee (Page 49-106 of the assessee's paper book) . The main points raised by the assessee are:

- (a) HIBV, the service provider AE has considerable expertise and international exposure in the relevant field
- (b) Service agreement was approved by the company board which included independent directors
- (c) AE has brought in several qualitative changes in the manufacturing process of the assessee resulting in
 - Reduction in water consumption;
 - Better monitoring of resources;
 - Increased efficiency in resource usage;
 - Premium beer segment penetration and marketing; and
 - Better safety standards at manufacturing plant
- d) Financial position and market share of the assessee has improved as a result of the management services received.

6.2 The TPO has examined the transactions between the assessee and its AE with reference to the question "whether, the actual transaction possesses the commercial rationality of arrangements that would be agreed between unrelated parties under comparable economic circumstances". TPO has observed the agreement between the assessee and AE is unlike normal commercial agreements. For example, in the case of Management Fee paid to its AE Heineken International B.V the TPO has flagged several peculiarities of the agreement which include but not limited to the following:

- a) Scope of work is not specified
- b) Services mentioned are very general in nature
- c) Payment schedule is not linked to various milestones achieved in delivery of services
- d) Absence of any retention money
- e) Absence of any penalty clause

- f) Vast scope indemnity and limitation of liability granted to the service provider AE at the expense of the assessee.
- g) Automatic termination of agreement in the eventuality of AE's reduction of stake in the
- h) assessee company.

TPO has benchmarked the said agreement against the OECD guidelines on benchmarking intra group transactions and concluded that the agreement failed OECD benchmarking. After elaborately discussing the terms of the agreement, the TPO has also drawn attention to the employee cost of assessee to conclude that assessee had enough personnel on its rolls to take care of the very general functions mentioned in the agreement. TPO has concluded that the assessee has neither proved the substantiality of the transaction, nor quantified the intra group services in terms of expenditure incurred and benefits derived. TPO has held that as no tangible service has been identified or specified by the assessee, the payment was more in nature of a tribute from the subsidiary to its holding company and determined the ALP as Nil as no independent party would make such payment.

6.3 We have gone through the Service Agreements and other evidence adduced by the assessee, TPO's order and the elaborate submissions made by the assessee. We agree with the TPO that the service agreement is unlike those exist between unrelated parties in the sense that:

- It does not specify or quantify services to be rendered
- It does not link payment schedule to milestones achieved in service delivery
- It does not contain normal penal clauses to safeguard the interest of the payer
- It is lopsided on account of the vast scope of indemnity and limitation of liability granted to service provider at the expenses of the recipient.

6.4 The submissions made by the assessee regarding the actual services rendered and commercial benefit accrued to the assessee on account of the said services are too general. There is little evidence connecting process improvements or commercial successes claimed by the assessee to any actual interventions of

AE. Both the alleged interventions and commercial successes appear vague and they can hardly be classified as cause and effect.

We feel that the case is identical to Gemplus India (P.) Ltd.(TPO) has observed that the terms prescribed in the agreement in respect of the payments to be made by the assessee company are independent of the nature and volume of services, if any_ rendered by the Singapore Associate. This is a vital observation made by the TPO which goes to the root of the issue. The function of the TPO is to compare the payments made by the assessee company for services received if any and to see whether those payments are comparable. In a given scenario, the TPO has to examine whether the payments were ALP conducive. Therefore it is very imperative on the part of the assessee to establish before the TPO that the payments were made commensurate to the volume and quality of services and such costs are comparable. The payment terms as pointed out by the TPO are independent of the nature or volume of services. **The assessee has defeated in this primary examination itself.** The TPO is also justified in making a pertinent observation that the expenses are apportioned by Singapore affiliate among different country centres on the basis of their own agreements and not on the basis of the actual services rendered to the individual units. It is in addition to the above fundamental flaw, that the TPO has made a clear findings that there are no details available on record in respect of the nature of services rendered by Singapore affiliate to the assessee company. Therefore, we are of the considered view that the TPO is justified in holding that the assessee has not proved any commensurate benefits against the payments of service charges to the Singapore affiliate. Therefore, the TPO is justified in making the adjustment of ALP under sec. 92CA of the Income-tax Act 1961. (Emphasis added)

- There is little evidence of actual delivery of services or commercial benefits accruing commensurate with payments

6.5 In view of this, we find no reason to interfere with the finding of the TPO. We uphold the order of the TPO computing ALP of Management Service Fee at NIL and dismiss the

objections of the assessee as without merit. We direct the Assessing officer accordingly.”

11. Aggrieved by the final order of assessment incorporating the directions of the DRP, the assessee has raised ground Nos.2.1 to 2.9 before the Tribunal.

12. We have heard the rival submissions. The Id. counsel for the assessee drew our attention to the list of services that the assessee received from HIBV and also the evidence filed regarding rendering of services. We have already referred to these documents while dealing with the manner in which the TPO determined the ALP. The Id. counsel for the assessee submitted that the evidence filed by the assessee regarding services rendered has been completely brushed aside by the TPO as well as the DRP. In this regard, he drew our attention to the order of the TPO for AYs 2017-18 and 2018-19 which are placed at pages 31 to 42 of assessee's PB and submitted that for those assessment years for the very same services, the TPO has accepted that payment to AE is at arm's length. His further submission was that the law with regard to determining the ALP in a case where services are rendered by an AE is that the TPO has to invoke benchmarking analysis on the basis of services that are stated to have been rendered by the AE. The question should be as to, whether, for the services alleged to have been received, a payment equal to sum paid by the AE by the assessee, would have been paid, had such services been rendered by a unrelated party. Though the assessee is

required to show the benefit that it received from the rendering of services, such benefit can be on a broad basis it need not be specific.

13. The submission of the Id. counsel for the assessee was that the revenue authorities fell into an error in disregarding the evidence filed by the assessee and laying emphasis more on the evidence for rendering services and demonstrating the benefit that the assessee received from the services rendered by the AE to the assessee. He therefore submitted the issue has to be remitted to AO/TPO to consider the question of determination of ALP afresh in the light of law as laid down in several judicial pronouncements. We will make a reference to these cases in our conclusions.

14. The Id. DR, on the other hand, submitted that the evidence filed by the assessee with regard to proof of services rendered (pages 198 to 442 of assessee's PB) are all routine emails and cannot be the basis to show that services were rendered by the assessee and the assessee derived benefit out of those services. According to him, the question of benchmarking the international transaction will be necessary, only when the evidence of rendering of services are provided by the assessee. The Id. DR placed reliance on the decision of the Bangalore Bench of the Tribunal in the case of *Volvo India Pvt. Ltd. [2018] 89 taxmann.com 79 [Bang. Trib.]*. He drew our attention to para 12 of the aforesaid order wherein the Tribunal after analysing several judicial pronouncements came to the conclusion that the onus lies on the assessee to prove that services are actually rendered by the AE.

15. We have given a careful consideration to the rival submissions. The law with regard to determination of ALP in a case of services rendered by an AE and the benchmarking process to be adopted in such cases has been laid down in several decisions. In the case of *Dresser Rand India Pvt.Ltd. Vs. ACIT ITA No.8753/Mum/2010 AY 2006-07 order dated 7.9.2011*, the Mumbai Tribunal had an occasion to examine as to what is the approach that has to be adopted for determining ALP in the case of cost contribution agreement which is akin to the arrangement in the present case between the Assessee and its parent company. The assessee in case of Dresser Rand (supra) entered into a 'cost contribution agreement' with its parent company pursuant to which it paid a sum of Rs. 10.55 crores as its share of the costs. The TPO, AO & DRP disallowed the expenditure on the ground that the ALP was 'Nil' as no real services had been availed by the assessee and the arrangement was not genuine. On further appeal by the Assessee, the Tribunal held as follows:-

"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an assessee and what is not. An assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question assessee's wisdom in doing so. The Transfer Pricing

*Officer was not only going much beyond his powers in questioning commercial wisdom of assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. **When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same.***

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10. In case the Assessing Officer comes to the conclusion that the assessee has indeed received the services from the AE the next question which we have to decide is as to what is the arm's length price of these services received under cost contribution agreement. It hardly needs to be emphasized that even cost contribution arrangement should be consistent with arm's length principle, which, in plain words, requires that assessee's share of overall contribution to the costs is consistent with benefits expected to be received, as an independent enterprise would have assigned to the contribution in hypothetically similar situation. .."

16. The Hon'ble High Court of Delhi in the case of EKL Appliances Limited [(2012) 209 Taxman 200 as well as *Cushman & Wakefield India Private Limited in ITA No.475/2012 dated 23.5.2014, 367 ITR 730 (Del)*], rendered similar ruling as was rendered in the case of Dresser Rand (supra). In the case of Cushman & Wakefield (supra), the Hon'ble Delhi High Court observed that whether a third party in an uncontrolled transaction with the Taxpayer would have charged

amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. In the context of cost sharing arrangement, the Hon'ble High Court opined that concept of base erosion is not a logical inference from the fact that the AEs have only asked for reimbursement of cost. This being a transaction between related parties, whether that cost itself is inflated or not only is a matter to be tested under a comprehensive transfer pricing analysis. The basis for the costs incurred, the activities for which they were incurred, and the benefit accruing to the Taxpayer from those activities must all be proved to determine first, whether, and how much, of such expenditure was for the purpose of benefit of the Taxpayer, and secondly, whether that amount meets ALP criterion. In the present case however, the arrangement between the AE and the Assessee is not a cost sharing arrangement but a payment for specific services rendered. To this extent the above observations of the Hon'ble High Court may not be relevant to the present case.

17. The following aspects would require consideration in order to identify intra group services requiring arm's length remuneration:-

- * Whether services were received from related party.
- * Nature of services including quantum of services received by the related party.
- * Services were provided in order to meet specific need of recipient of the services.
- * The economic and commercial benefits derived by the recipient of intra group services.
- * In comparable circumstances an independent enterprise would be willing to pay the price for such services?

- * An independent third party would be willing and able to provide such services?
- * Whether payment made to AE meets ALP criterion will be determined, keeping in mind all the above factors, as well.

18. Keeping in mind the principles emanating from the aforesaid decisions, we shall now proceed to examine the material on record to see the nature of services received by the Assessee and as to whether the same were at Arm's Length.

19. In the present case, the plea of the assessee has been that documentary evidence furnished by it has not been examined by the TPO, who has merely come to the conclusion that the assessee failed to prove the nature of services rendered by the AE for which the assessee made payment. There is force in the arguments of the Id. counsel for the assessee, in as much as the TPO as well as the DRP ignored the documentary evidence filed by the assessee and have proceeded on the assumption that these details were general in nature and did not prove the rendering of services by the AE. It is also equally true that the bulk of evidence filed by the assessee at pages 198 to 424 of PB have to be correlated with type of services rendered and it is necessary for the assessee to explain as to how these emails show that services were rendered by the AE. It is only on such analysis being provided by the assessee, can the TPO proceed to examine the rendering of services as well as benefit that the assessee might derive. In the matter of coming to the conclusion on the benefit that the assessee received, clear evidence cannot be insisted upon and the overall business scenario and type of services rendered have to be looked into. We also notice that

similar payment made to the very same AE for similar services under the very same agreement, has been accepted to be at Arm's Length in AY 2017-18 & 2018-19. We are, therefore, of the view that it would be just and appropriate to set aside the issue with regard to determination of ALP to the AO/TPO for fresh consideration in the light of law as explained above and the other observations in this order. The AO/TPO will afford opportunity of being heard to the assessee in the set aside proceedings, before deciding the issue.

20. The next dispute is with regard to determination of ALP in respect of international transactions whereby assessee paid a sum of Rs.18,98,50,836 to Force India Formula One Team Ltd. [FIFOTL]. The grounds raised by the assessee with regard to this issue are projected in ground Nos.2.10 to 2.17 which read as follows:-

“Transfer Pricing Adjustment on account of Brand Promotion Expenses:

2.10 The learned AO/TPO erred in law and on facts in determining the ALP at NIL in respect of the payment made towards Brand Promotion expenses amounting to INR 18,98,50,836 to Force India Formula One Team Limited;

2.11 The learned AO/TPO erred in law and on facts in treating payment towards Brand Promotion expenses to Force India Formula One Team Limited as international transaction under the provisions of the Act without appreciating the fact that Force India Formula One Team Limited is not an Associated Enterprise under section 92A of the Act and therefore TP provisions are not applicable to the alleged transaction;

2.12 The learned AO/TPO erred in law and on facts in making the TP adjustment in respect of payment towards Brand

Promotion expenses ignoring the commercial and economic rationale of the business of the Appellant;

2.13 The learned AO/TPO has failed to appreciate that in order to invoke the provisions of section 92C the transaction should not only be an international transaction but also has to be with an Associated Enterprise and thus erred in invoking the provisions of section 92C of the Act in respect of Brand Promotion expenses paid to Force India Formula One Team Limited;

2.14 The learned AO/TPO has made the TP adjustment in respect of Brand Promotion expenses paid to Force India Formula One Team Limited by erroneously stating that Force India and UBL are controlled by UB Group Chairman, based on mere surmises and conjectures without appreciating the fact that there was no control inter se and thus Force India and UBL have never come in the sweep of definition of Associated Enterprise as contemplated under section 92A of the Act;

2.15 The learned AO/TPO has no jurisdiction to question the commercial expediency for the incurrence of the expenditure and thus Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the Appellant to have incurred such expenditure;

2.16 The learned AO/TPO has made the TP adjustment in respect of Brand Promotion expenses paid to Force India Formula One Team Limited ignoring the submissions and various judicial precedents relied upon by the Appellant during the course of Transfer Pricing Proceedings and during the course of proceedings before DRP: and

2.17 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee adjustment inasmuch as the learned TPO/DRP has not undertaken any independent analysis of its own to determine the ALP and thus arbitrarily concluded that the ALP is NIL.”

21. The first and foremost argument of the Id. counsel for the assessee on this issue is that FIFOTL is not an Associated Enterprise

[AE] at all. In this regard, the submissions made by the assessee and the conclusions of the TPO are as follows:-

“4.2 It is submitted that Force India Formula One Team Ltd is not an associated enterprise of United Breweries Ltd. By mistake it has been declared as an associated enterprise. In 3CEB and Transfer Pricing Study report the relationship has been described as "enterprise over which the shareholders have significant influence". It is submitted that this kind of relationship is relevant for the related party disclosures required under the relevant Accounting Standards. This relationship is not one of those relationships mentioned in S.92A (2) of the Act. There is no dispute that neither United Breweries Ltd nor Force India Formula One Team Ltd holds directly or indirectly 26% of the shares having the voting powers in the other entity. It is also clear that the shareholders of Force India are the following persons.

- Dr. Vijaya Mallya 42.5%
- Sahara India Pariwar 42.5%
- Moll Family 15% (Netherlands)

It is clear from the Annexure-2 details furnished along with the report that none of the above persons holds more than 26% shares in UBL. So the relationship mentioned in S.92A(2)(b) where the same person or enterprise holds directly or indirectly, shares carrying not less than 26% of the voting power in each of such enterprise is also not present. None of the shareholders of Force India hold directly or indirectly more than 26% of the shares in UBL. **By mistake, the transactions with Force India were classified as international transactions and included in the report. Since we have now demonstrated that Force India is not an AE, we request you to hold that the transactions are not international transactions and drop the further proceedings on this issue.** Without prejudice to the above contention, objections to proposed adjustments are given in paragraph 4.3 to 4.8.

TPO's Comments: This contention of the taxpayer is not acceptable as the taxpayer itself has declared this to be an International transaction. Moreover, Sri Vijay Mallya, Chairman of the UB Board hold 45% of shares in FI Force India Pvt. Ltd.

UBL and the Chairman hold close to 20% shares in UBL. So it is very clear that shareholders can and will exert significant influence on the transactions with FI Force India Private limited. Moreover, in the Income Tax Act, Sec 92A clearly defines 'associated enterprise' in relation to another enterprise, means an enterprise-

- a. which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
- b. in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

UB group and the Chairman of the UB group Mr. Vijay Mallya held close to 20% of shares in UBL and Mr. Vijay Mallya held close to 42% of shares in FI Force India Private Limited. This clearly demonstrates the control of one over the another. This arrangement clearly falls under the domain of Sec. 92A (2)(j). The word 'control' meant in the said section can be interpreted to mean that the individual along with his companies and persons associated with him has the power to make crucial decisions regarding the management and running of two enterprises. This is very apparent in the case of the taxpayer. So FI Force India Private ,Limited clearly is an "associated enterprise" as defined under section 92A”

22. Our attention was drawn to the fact that in AY 2016-17 the AO himself accepted that FIFOTL is not an AE. Further attention was drawn to the order of the TPO dated 30.10.2019 for AY 2016-17 wherein the TPO accepted the explanation of the assessee in its letter dated 27.9.2019 that FIFOTL is not an AE.

23. The Id. DR, on the other hand, pointed out that in Form 3CEB the assessee himself has accepted that FIFOTL is a related party and therefore it is not open for the assessee to now take a contrary stand.

24. We have given careful consideration to the rival submissions. We find that in the AY 2016-17 the assessee had addressed a letter dated 27.9.2019 to the TPO submitting that FIFOTL is not an AE, in response to TPO's query dated 25.9.2019. Following was the submission made by the assessee in this regard:-

“FORCE INDIA - IS NOT A ASSOCIATED ENTERPRISE

In this regard, we would like to submit that Force India Formula One Team Ltd. is not an Associated Enterprise of United Breweries Ltd. The transfer pricing provisions would be applicable only if the relationship of two enterprises qualifies as associated enterprises within the meaning of section 92A of the Income Tax Act.

The relationship between United Breweries Limited (UBL) and Force India is not one of those relationships mentioned in 5.92A (2) of the Act. There is no dispute that neither United Breweries Ltd. nor Force India Formula One Team Ltd hold directly or indirectly 26% of the shares having the voting powers in the other entity. Shareholding details of UBL and Force India are appended in Annexure1.

It is clear from Annexure-1 details furnished along with this note, that, none of the common directors of UBL and Force India hold more than 26% shares in UBL. So the relationship mentioned in S.92A(2)(b) where the same person or enterprise holds directly or indirectly, shares carrying not less than 26% of the voting power in each of such enterprise, is also not present.

Further, it is necessary to appreciate the scheme of section 92A. A plain reading of this statutory provision makes the legal position quite clear. The, basic rule for treating the enterprises as

an associated enterprises is set out in section 92A(1). The illustrations in which basic rule finds application are set out in section 92A(2). Section 92A(1) lays down the basic rule that in order to be treated as an "associated enterprise in one enterprise, in relation to another enterprise, means an enterprise which participate, directly or indirectly, or through one or more intermediaries, 'in the management or control or capital of the other enterprise' or when 'one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise'".

Accordingly, we would like to submit that, UBL is a listed entity and is managed by its board of directors. It is the board's decision (comprising of 3 Directors from UBL, 3 Directors from Heineken and 6. Independent Directors) that over sees on all aspects of the management/operations of the company. Hence, no single person can take a decision with respect to put the capital at risk (or) take any other strategic decisions. Accordingly, no single promoter group has "control/influence" over decisions of the board.

Based on the above facts, our tax auditors have also not considered Force India as an associated enterprise of UBL. Consequently, we request your good self not to consider Force India as an Associated Enterprise of United breweries Limited and to drop the proposal of making any adjustment under section 92CA of the Income Tax Act.”

25. The above plea has been accepted by the AO/TPO and no separate bench marking was undertaken for identical transaction in AY 2016-17. We find that the TPO in the impugned assessment year i.e., AY 2013-14, on identical facts has taken a contrary view, which is to the effect that there is an element of indirect control. The DRP has not rendered any finding on this issue. We are of the view that, in the light of order of the TPO for AY 2016-17, the issue requires fresh

examination by the TPO. We, therefore, set aside the order of the TPO and direct re-examination of the issue, whether FIFOTL can be considered as an AE? The other issues with regard to determination of ALP are left open, without any adjudication, as the preliminary issue, if decided will render the entire exercise of determination of ALP, academic.

26. The next issue to be decided is with regard to determination of ALP in respect of specified domestic transaction in respect of sales promotion expenses for payment made to United East Bengal Football Pvt. Ltd. of Rs.10,50,77,932. The grievance of the assessee in this regard is projected in ground Nos. 2.18 to 2.23 as follows:-

“Transfer Pricing adjustment of Specified Domestic Transaction in respect of Sales Promotion Expenses for payment made to United East Bengal Football Pvt Ltd — Rs 10,50,77,932

2.18 The learned AO/TPO erred in law and on facts in determining the ALP at NIL in respect of the payment made towards Sales Promotion expenses amounting to INR 10,50,77,932 to United East Bengal Football Pvt Ltd;

2.19 The learned AO/TPO erred in law and on facts in making the TP adjustment in respect of payment towards Sales Promotion expenses ignoring the commercial and economic rationale of the business of the Appellant;

2.20 The learned AO/TPO erred in law and on facts in determining the ALP at NIL ignoring the external comparable submitted by the Appellant;

2.21 The learned AO/TPO erred in law and on facts in concluding that the Appellant has not derived any benefit from incurring the expenses on account of sales promotion/sponsorship ignoring the evidences submitted by the Appellant;

2.22 The learned AO/TPO has no jurisdiction to question the commercial expediency in incurring the expenditure and thus Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the Appellant to have incurred such expenditure; and

2.23 The learned AO/TPO has made TP adjustment in respect of Sales Promotion expenses paid to East Bengal Football Team ignoring the submissions and various judicial precedents relied upon by the Appellant during the course of Transfer Pricing Proceedings and during the course of proceedings before DRP;”

27. The Finance Act, 2012 extended its scope to cover certain domestic transactions with related parties within India, defined as ‘Specified Domestic Transaction’ (SDT) with effect from AY 2013-14. The Finance Act, 2012 introduced Section 92BA giving the meaning of SDT and it provided as follows:-

“SECTION 92BA: MEANING OF SPECIFIED DOMESTIC TRANSACTION.

For the purposes of this section and sections 92, 92C, 92D and 92E, “specified domestic transaction” in case of an assessee means any of the following transactions, not being an international transaction, namely:—

- (i) any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A.
- (ii) any transaction referred to in section 80A;
- (iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;
- (iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;

(v) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or

(vi) any other transaction as may be prescribed,

and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of twenty crore rupees.”

28. Section 92(2), as amended provided that where in an international transaction or specified domestic transaction, two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be. Section 92(2A) provided that any allowance for an expenditure or interest or allocation of any cost or expense or any income in relation to the specified domestic transaction shall be computed having regard to the arm's length price.

29. In terms of the above statutory provisions of Sec.92BA(i) the transaction of payment of sales promotion expenses to United East Bengal Football Pvt.Ltd. [UEBF], (which was admitted a related party in terms of Sec.40A(2)(a) of the Act) of Rs.10.50 Crores was regarded as a Specified Domestic Transaction [SDT]. There is no dispute that the aforesaid transaction is covered by the provisions of Sec.92BA(i)

i.e., any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A.

30. Before the Tribunal, the learned counsel for the Assessee submitted that the transaction with UEBF cannot be regarded as SDT, because by Finance Act, 2017 w.e.f. 01.04.2017, clause (i) of section 92BA was omitted from the statute and by virtue of omission of clause (i) from the statute, the proceedings already initiated or action taken under clause (i) becomes redundant or otiose. In this regard, the Assessee placed reliance on decision of ITAT Bangalore Bench in the case of *Textport Overseas Pvt.Ltd. Vs. DCIT IT(TP)A No. 1772/Bang/2017 order dated 22.4.2021* wherein it was held that in the light of provisions of section 6 of the General Clauses Act, in such a case, the court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a *pari materia* provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provisions in the statute or in the rule, the pending proceeding will lapse under rule under which the notice was issued or proceeding being omitted or deleted.

31. We have carefully considered the rival submissions. The issue with regard to whether the transaction of payment of sale promotion expenses to UBEF can be said to be an SDT, we find that the decision of the ITAT in the case of *Textport Overseas Pvt.Ltd. (supra)* has been confirmed by the Hon'ble Karnataka High Court in the very same case of *Textport Overseas Pvt. Ltd.* in ITA No.392/2018 order dated 12.12.2019, with the following observations:-

"5. Having heard learned Advocates appearing for parties and on perusal of records in general and order passed by tribunal in particular it is clearly noticeable that Clause (i) of Section 92BA of the Act came to be omitted w.e.f. 01.04,2019 by Finance Act, 2014. As to whether omission would save the acts is an issue which is no more res-integra in the light of authoritative pronouncement of Hon'ble Apex Court in the matter of *KOBLAPUR CANESUGAR WORKS LTD. v. UNION OF INDIA* reported in AIR 2000 SC 811 whereunder Apex Court has examined the effect of repeal of a statute visa-vis deletion/addition of a provision in an enactment and its effect thereof. The import of Section 6 of General Clauses Act has also been examined and it came to be held:

"37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1), If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the ITA No.2936/Bang/20180 M/s. Sobha City, Bangalore omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular

provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision."

6. In fact coordinate bench under similar circumstances had examined the effect of omission of sub-section (9) to Section 10B of the Act w.e.f. 01.04.2004 by Finance Act, 2003 and held that there was no saving clause or provision introduced by way of amendment by omitting sub-section (9) of Section 10B. In the matter of GENERAL FINANCE CO. vs. ACIT, which judgment has also been taken note of by the tribunal while repelling the contention raised by revenue with regard to retrospectivity of Section 92BA(i) of the Act. Thus, when clause (i) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.07.2017 from the Statute the resultant effect is that it had never been passed and to be considered as a law never been existed. Hence, decision taken by the Assessing Officer under the effect of Section 92BI and reference made to the order of Transfer Pricing Officer-TOP under Section 92CA could be invalid and bad in law.

7. It is for this precise reason, Tribunal has rightly held that order passed by the TPO and. DRP is unsustainable in the eyes of law. The said finding is based on the authoritative principles enunciated by the Hon'ble Supreme Court in Kolhapur Canesugar Works Ltd referred to herein supra which has been followed by Co-ordinate Bench of this Court in the matter of M/s.GE Thermometrias India Private Ltd., stated supra. As such we are of the considered view that first substantial question of law raised in the appeal by the revenue in respective appeal memorandum could not ITA No.2936/Bang/20180 M/s. Sobha City, Bangalore arise for consideration particularly when the said issue being no more res Integra."

32. Since the decision rendered by the Hon'ble High Court of Karnataka is binding on this bench of Tribunal sitting in Bengaluru, we follow the same. Accordingly, we hold that the reference to the TPO in

respect of specified domestic transactions mentioned in clause (i) of sec.92BA is not valid, as the said provision has been omitted. Accordingly, we direct the AO to delete the addition relating to specified domestic transactions made u/s 92CA of the Act.

33. We notice that the co-ordinate bench in the case of *Textport Overseas (supra)* has restored the matter to the file of the A.O. with the direction to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act. Following the same, we restore this issue to the file of the AO with the direction to examine the claim of expenditure mentioned above in terms of the provisions of section 40A(2) of the Act. Accordingly, following the binding decision rendered by Hon'ble High Court of Karnataka in the case of *Textport Overseas P Ltd (supra)*, we hold that the reference to the TPO in respect of specified domestic transactions mentioned in clause (i) of sec.92BA is not valid, as the said provision has been omitted. Accordingly, we direct the AO to delete the addition relating to specified domestic transactions made u/s 92CA of the Act. However, as pointed out by Ld D.R, the co-ordinate bench in the case of *Textport overseas P Ltd. (supra)*, has restored the matter to the file of the A.O. with a direction to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act. Following the same, we restore this issue to the file of the AO with the direction to examine the claim of expenditure mentioned above in terms of the provisions of section 40A(2) of the Act.

Corporate tax issues

34. The next ground for consideration is regarding depreciation on goodwill on the following grounds raised by the assessee:-

“Grounds relating to Depreciation on Goodwill:

3.1 The learned AO has erred in law and on facts in disallowing Depreciation of INR 2,80,41,441 on Goodwill arising on acquisition of Karnataka Breweries and Distilleries Limited and other subsidiaries;

3.2 The learned AO has erred in law and on facts in disallowing Depreciation by blindly relying on the earlier year order, without appreciating the appreciating the complete facts of the case.

3.3 The learned AO has erred in law and on facts in disallowing Depreciation ignoring the ruling of Hon'ble Supreme Court and other judicial precedents; and

3.4 The learned AO has erred in law and on facts by not appreciating the fact that Goodwill is an intangible asset thus entitled for depreciation under the provisions of the Act;

35. The assessee in the return of income has claimed a sum of Rs.2,30,41,441 as depreciation on goodwill @ 25% as per the provisions of the Act on the opening WDV of Rs.14,95,54,349. Before the AO, the assessee has submitted that it has acquired the brewery from Karnataka Breweries & Distilleries Ltd. through a process of de-merger and acquisition and the difference between the cost of acquisition and the fair value of the assets is recognized as goodwill in the books of the assessee and claimed depreciation on the goodwill. The assessee relied on the decision of the Hon'ble Supreme Court in the case of *Smiffs Securities, 348 ITR 307 (SC)*. The AO disallowed

the depreciation stating that the claim was not allowed in the earlier assessment year also.

36. We have heard both the parties. The coordinate Bench of this Tribunal in the assessee's own case for AY 2007-08 has held that depreciation on goodwill is not allowable based on the facts of the case of assessee. Respectfully following that decision, we hold that depreciation on goodwill is not allowable. Accordingly, these grounds are dismissed.

37. The next issue for adjudication is disallowance of expenses u/s. 14A of the Act on the following grounds:-

Grounds relating to disallowance of expenses under section 14A:

4.1 The learned AO has erred in law and on facts in disallowing expenses of INR 70,66,372 in relation to exempt dividend income amounting to INR 8,57,655;

4.2 The learned AO has erred in law and on facts in invoking Rule 8D of Income Tax Rules, 1962 to compute the expenditure in connection with exempt dividend income ignoring the submissions of the Appellant;

4.3 The learned AO has erred in law and on facts by invoking Rule 8D by summarily dismissing the plea of the Appellant that the Appellant was never required to incur any expenditure to earn the exempt dividend income and thus made the disallowance on mere conjectures and surmises;

4.4 The learned AO has erred in law and on facts by disallowing the expenses of INR 70,66,372 as against the exempt dividend income of INR 8,57,655 which is substantially higher than the exempt income ignoring the various judicial precedents relied upon by the Appellant;

4.5 The learned AO has erred in law and on facts by adding strategic investments made for business while computing expenditure for disallowance;

4.6 The learned AO has erred in law and on facts by considering both investments, generating taxable and non-taxable income, while computing disallowance under section 14A of the Act; and

4.7 The learned AO has erred in law and on facts in concluding that INR 70,66,372 should be added back to the book profits for the purpose of 115JB of the Act.

38. The brief facts on this issue are that during the year under consideration, the assessee disclosed a dividend income of Rs.8,57,655 and claimed the same as exempt u/s. 10(34) of the Act. The AO noticed that the assessee had made huge investments shares, mutual funds, bonds, etc. to the tune of Rs.2,547 Lakhs. Before the AO, the assessee submitted that the assessee has not incurred any expenditure towards earning tax-exempt income. However, the AO considering the huge quantum of investment and the fact that the assessee has debited a sum of Rs.7,725 lakhs towards interest charges, proceeded to invoke the provisions of section 14A of the Act r.w. Rule 8 of the Income-tax Rules [Rules] and disallowed the interest u/s. 14A as under:-

“6.2.1 The assessee has disclosed dividend income of Rs. 8,57,655/-, as per Note 25 of the Financial Statements from various mutual funds / companies. Further, the assessee has claimed exemption u/s 10(34) in respect of the dividend income. On the other hand, the assessee had made huge amount of investment in shares and mutual funds with an intention to earn exempt income. As on 31.3.2013 relevant to AY 2013-14, the value of the total investment made by the assessee in shares, mutual funds, bonds etc. is Rs. 2547 lakhs. It is also noticed that most of the investments have been made in various group

Companies in the form of loans, advances, investment in shares etc. but without receiving commensurate income.

6.2.2 During the course of assessment proceedings, the AR was asked to furnish the details of expenditure incurred in earning the tax-exempt income. In response thereto, the AR stated that the assessee has not incurred any expenses towards earning the tax-exempt income. However, going by the huge quantum of investment made by the assessee and the nature of income earned thereon, I am not satisfied that the assessee has not incurred any expense in earning the tax-exempt income.

6.2.3 Further, the assessee could not produce any credible evidence in the form of books of account along with fund flow / cash flow statement indicating that there is no expenditure incurred by the assessee for the purpose of investments made resulting in tax exempt income. It is also pertinent to note that the assessee has debited a sum of Rs. 7725 lakhs towards interest charges on the loans borrowed from Banks and financial institutions. In view of this, I am satisfied that this is a fit case to invoke Rule 8D of the Income-tax Rules 1962 to compute the expenditure relating to earning of the tax exempt income. The relevant portion of section 14A is reproduced below:

Expenditure incurred in relation to income not includible in total income" Section 14A

- (1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.
- (2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the A.O having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.

- (3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act:

Provided that nothing contained in this section shall empower the A.O. either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154 for any assessment year beginning on or before the 1st day of April, 2001.

6.2.4 Accordingly, it was proposed to the assessee that the disallowance u/s 14A will be made by invoking Rule 8D. In this connection, it may be noted that the assessee has been taking a similar stand for several previous assessment years and the department had not accepted the same and computed expenditure relatable to taxable income by invoking provisions of section 14A r.w.r 8D. The additions/disallowances made in earlier assessment years are before various appellate authorities for final decision on the issue. In view of this, I am constrained to invoke provisions of section 14A r.w.r. 8D to determine the disallowance u/s 14A. A detailed working in respect of disallowance of expenditure as envisaged under Rule 8D is given as under:-

As per clause (i): Nil as there is no direct expenditure incurred towards earning tax exempt income.

As per clause (ii)

(A) Amount of interest expenditure Rs. 79,89,00,000/ -

(B) Average value of investment (Rs. 25,47,00,000 + 25,47,00,000) / 2 = 25,47,00,000

Average value of total assets (Rs. 32865200000+37386606000)/2 =35125900000

(C) Proportionate interest expenditure = (A) x (B) / (C) = 57,92,872/ -

As per clause (ii)

$\frac{1}{2}$ % of average value of investment = 12,73,500/-

Total expenditure to be disallowed u/s 14A = (i) + (ii) + (iii) = 70,66,372/-.”

39. With regard to disallowance being more than the exempt income, the AO placed reliance on the decision of ITAT, Delhi in the case of *Cheminvest Ltd. v. ITO [12 ITD 318]*. The DRP upheld the disallowance made by the AO on the ground that the assessee has not maintained separate accounts for investments and that some establishment expenses / administrative expenses ought to have been incurred warranting disallowance. With regard to the claim of the assessee that the investments are made for commercial expediency, the DRP held that the purpose of investment does not matter for applicability of section 14A by relying on the decision of the Kerala High Court in the case of *South India Bank Ltd. v. CIT, 363 ITR 11 (Ker)*. Aggrieved, the assessee is in appeal before the Tribunal.

40. The Id. AR submitted as follows :-

- (i) It is settled principle that while computing the disallowance, the investments made for strategic business purposes should be excluded.
- (ii) It is also settled that only those investments that generate taxable income should be considered.
- (iii) Without prejudice to the above, disallowance u/s. 14A cannot be more than the exempt income earned and in this regard

reliance is placed on the decision of this Tribunal in the case of *GMR Enterprises in ITA No.2310/Bang/2019*.

- (iv) The amendment brought about in the Finance Act, 2022 is prospective in nature and not applicable to the assessee's case for the year under consideration.

41. The ld. DR relied on the orders of the lower authorities.

42. We have heard the rival submissions and perused the material on record. It is settled law that disallowance u/s. 14A cannot exceed the amount of exempt income earned by the assessee. The co-ordinate Bench of this Tribunal in the case of *GMR Enterprises (supra)* has held as under:-

“3.4 We have heard rival submissions and perused the material on record. It is settled position of law that disallowance cannot exceed the amount of dividend income earned during the relevant assessment year. In this context, the following judicial pronouncements support the stand of the assessee:-

(i) Joint Investments Pvt. Ltd. v. CIT (59 Taxmann.com 295) – it was held that disallowance u/s 14A of the Act is to be restricted to the tax exempt income.

(ii) Daga Global Chemicals Pvt. Ltd. v. ACIT [2015-ITRV-ITAT-MUM-123) – has held that disallowance u/s 14A r.w. Rule 8D cannot exceed the exempt income.

(iii) M/s.Pinnacle Brocom Pvt. Ltd. v. ACIT (ITA No.6247/M/2012) – has held that disallowance u/s 14A cannot exceed the exempt income.

(iv) DCM Ltd. v. DCIT (ITA No.4567/Del/2012) – held that the disallowance u/s 14A of the Act cannot exceed the exempt income.

3.5 In view of the above settled position, the amount of disallowance u/s 14A of the I.T.Act needs to be restricted to the extent of exempted income earned during the relevant assessment year. As would be evident that in the facts and circumstances of the present case the amount of exempted income of Rs.27,37,47,187 was earned on investment and consequently the amount of disallowance, if at all, to be made is to be restricted to Rs.27,37,47,187.

3.6 However, in this case, the assessee had made disallowance of Rs.145,02,09,668 voluntarily while filing the return of income. In this context, it is important to refer to the judgment of the Hon'ble Madras High Court in the case of M/s.Marg Limited v. CIT in Tax Case Appeal Nos.41 to 43 & 220 of 2017 (judgment dated 30.09.2020). The Hon'ble Madras High Court followed the judgment of the Hon'ble Karnataka High Court in the case of Pargathi Krishna Gramin Bank v. JCIT[(2018) 95 taxman.com 41 (Kar.)]. In the case considered by the Hon'ble Madras High Court, the assessee therein had made voluntarily disallowance u/s 14A of the I.T.Act more than the dividend income earned and the Tribunal confirmed the disallowance made u/s 14A of the I.T.Act. However, the Hon'ble Madras High Court held that the disallowance u/s 14A of the I.T.Act cannot exceed the exempt income earned during the relevant assessment year. The relevant finding of the Hon'ble Madras High Court reads as follow:-

“20. Before parting, we may also note with reference to the Table of disallowance voluntarily made by the Assessee, which is part of the Paper Book before us for the four assessment years in question. In the Table quoted in the beginning of the order, shows that the Assessee himself computed and offered the disallowance beyond the exempted income in the particular year, namely AY 2009-10, as against the dividend income of Rs.41,042/- and the Assessee himself computed disallowance under Rule 8D of the Rules to the extent of Rs.2,38,575/-, which was increased to Rs.98,16,104/- by the Assessing Authority. Similarly, for AY 2012-13, against Nil dividend income, the Assessee himself computed disallowance at Rs.8,50,000/-, which was increased to Rs.2,61,96,790/-.

21. We cannot approve even the larger disallowance proposed by the Assessee himself in the computation of

disallowance under Rule 8D made by him. These facts are akin to the case of **Pragati Krishna Gramin Bank**(2018) 95 Taxman.com 41 (Kar.) decided by Karnataka High Court. The legal position, as interpreted above by various judgments and again reiterated by us in this judgment, remains that the disallowance of expenditure incurred to earn exempted income cannot exceed exempted income itself and neither the Assessee nor the Revenue are entitled to take a deviated view of the matter. Because as already noted by us, the negative figure of disallowance cannot amount to hypothetical taxable income in the hands of the Assessee. The disallowance of expenditure incurred to earn exempted income has to be a smaller part of such income and should have a reasonable proportion to the exempted income earned by the Assessee in that year, which can be computed as per Rule 8D only after recording the satisfaction by the Assessing Authority that the apportionment of such disallowable expenditure under Section 14A made by the Assessee or his claim that no expenditure was incurred is validly rejected by the Assessing Authority by recording reasonable and cogent reasons conveyed to Assessee and after giving opportunity of hearing to the Assessee in this regard.

22. We, therefore, dispose of the present appeal by answering question of law in favour of the Assessee and against the Revenue and by holding that the disallowance under Rule 8D of the IT Rules read with Section 14A of the Act can never exceed the exempted income earned by the Assessee during the particular assessment year and further, without recording the satisfaction by the Assessing Authority that the apportionment of such disallowable expenditure made by the Assessee with respect to the exempted income is not acceptable for reasons to be assigned the Assessing Authority, he cannot resort to the computation method under Rule 8D of the Income Tax Rules, 1962.”

(underlining supplied)

3.7 In view of the above judgment of the Hon'ble Madras High Court in the case of M/s.Marg Limited v. CIT (supra), it is clear that the disallowance u/s 14A of the I.T.Act cannot exceed the exempt income earned during the relevant assessment year

irrespective whether larger amount was disallowed by the assessee u/s 14A of the I.T.Act while filing the return of income. Therefore, the AO is directed to restrict the disallowance u/s 14A of the I.T.Act to Rs.27,37,47,187.

3.8 In the result, ground No.II raised by the assessee is allowed.”

43. The assessee in this case has earned a dividend income of Rs.8,57,655 and respectfully following the decision of the coordinate Bench of the Tribunal,(supra), we hold that the disallowance should be restricted to the amount of exempt income earned by the assessee. We direct accordingly.

44. Grounds relating to disallowance of year end provisions u/s. 40(a)(ia) are as follows:-

5.1 That the learned AO has erred in law and on facts in making disallowance under section 40(a)(i)/40(a)(ia) amounting to INR 11,00,00,002 observing that TDS was not made on the year end provisions;

5.2 That the learned AO has erred in law and on facts in making disallowance under section 40(a)(i)/40(a)(ia) without appreciating the fact that there was no requirement of making TDS on year end provisions when no credit was given to the identified party;

5.3 That the learned AO has erred in law and on facts in making disallowance of INR 50,08,252 (out of INR 11,00,00,002) pertaining to Salary which is not subject to disallowance under section 40(a)(ia) of the Act.

5.4 That the learned AO has erred in law and on facts in making disallowance under section 40(a)(i)/40(a)(ia) by observing that the TDS is required to be deducted on year end provision without appreciating the rationale of the provisions of the Act and without appreciating that TDS is required only when the income is credited to identified party;

5.5 That the learned AO has erred in law and on facts in making the disallowance u/s 40(a)(i)/40(a)(ia) without appreciating the fact that the year end provisions made by the Appellant is reversed in the subsequent year and the TDS is deposited based on the actual credit given to the party;

5.6 That the learned AO has erred in law and on facts in not appreciating that TDS provision is not applicable on Del-credre Commission as it does not fall within the category of the commission as contemplated under section 194H of the Act;

5.7 That the learned AO has erred in law and on facts in not allowing INR 7,34,77,951 during the year under consideration i.e. AY 2013-14 which pertains to the AY 2012-13 which was disallowed during AY 2012-13, for which TDS was deducted and paid during AY 2013-14 in accordance with provisions of section 40(a)(i) and Ist proviso to section 40(a)(ia); and

5.8 That the learned AO has erred in law and on facts in making disallowance of Non-Resident payments u/s 40(a)(i) without appreciating that TDS on such payments have been deducted and deposited within the due date of filing of return of income for AY 2013-14.

45. The assessee following mercantile system of creating monthly provisions for expenses in the books of accounts and reverse these provisions in the subsequent month. In the same manner, the assessee created provision for various expenses as of 31st March, 2013. The auditors in the tax audit report against clause 27(b)(i) have recorded the fact that the assessee has not deducted tax at source in respect of provisions created for the expenses as on 31st March, 2013. The AO, during the course of assessment, took note of the same and called upon the assessee to show cause as to why disallowance u/s. 40(a)(ia) of the Act should not be made towards such provisions created.

46. The assessee submitted that the provisions are adjusted against the bills/invoices received during the month of April/May and that tax deducted on such bills/invoices are deposited before the due date for filing the return of income. The assessee therefore submitted that no disallowance is warranted u/s. 40(a)(ia) as amended w.e.f. 2010. The assessee also submitted the break-up of expenses on which tax is deducted and remitted before the due date for filing the return of income which amounted to Rs.11,00,00,002.

47. The AO disallowed the said amount stating that tax ought to have been deducted as of 31.3.2012 and only for remittance the assessee has time till the date of filing of the return which the assessee failed to comply. The assessee raised objections before the DRP, which confirmed the disallowance without going into the merits observing that TDS is required to be done on payment or credit, whichever is earlier, even if the credit is done to the suspense account. Aggrieved, the assessee is in appeal before the Tribunal.

48. Before us the ld. AR contended that :-

- (i) The only reason for the addition by the AO is based on clause 27(b)(i) of the audit report which clearly states that the provision is not created against the supplier account, but created against the provision for expenses account.
- (ii) The provisions are adjusted against the actual receipt of invoices in April/May and TDS is deducted and paid on these

bills before the due date for filing the return of income u/s. 139(1) of the Act.

- (iii) In the earlier years i.e., AYs 2008-09, 2009-10 & 2010-11, the AO accepted the contention of the assessee that tax has been subsequently deducted and paid on receipt of bills/invoices including the year under consideration and no TDS proceedings were initiated.
- (iv) If the assessee is not 'in default' as per proviso to section 40(a)(ia) of the Act, no disallowance could be made.

49. The Id. DR supported the orders of the lower authorities. We have heard the rival submissions and perused the material on record. Similar issue was considered by this Tribunal in the case of *Biocon Ltd. v. DCIT in ITA No.1248/Bang/2014* where the Tribunal by order dated 21.3.2022 has held as under:-

“6. We heard the parties and perused the record. Before addressing the issues contested before us, we feel it necessary to discuss about the accounting practice relating to making yearend provisions, its impact on profits and the legal effects. The accounts of a business concern can follow either “cash system of accounting” or “mercantile system of accounting”. Under mercantile system of accounting, “revenue cost matching principle” is followed, i.e., all the expenses incurred to earn the corresponding revenue should be accounted for. The accounting principle of “Prudence” also requires for accounting for all known expenses and losses at the time of finalising accounts at the yearend. Accordingly, the assessee’s, who are following mercantile system of accounting are required to account for all known expenses and losses, even if the bills/invoices have not been received. This is done by making provision for various

expenses at the year end. It will ensure that the financial statements reflect true profits of the fiscal period. Accounting Standard – 29 issued by the Institute of Chartered Accountants of India (ICAI) titled as “Provisions, Contingent Liabilities and Contingent Assets” deals with this aspect. As per AS-29, “A Provision is a liability which can be measured only by using a substantial degree of estimation”. It further states as under:-

“A Provision should be recognised when:-

(a) an enterprise has a present obligation as a result of past event.

(b) it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation; and

(c) a reliable estimate can be made of the amount of the obligation.”

Hence, while finalising the accounts as at the year end, it is a usual accounting practice to ascertain the obligations that have arisen as a result of past events, which may involve probable cash outflow. All those obligations are recognised as expenses and provided for. Making a provision will be an easy task, if the assessee is aware of the quantum of liability. For example, audit fee might have been fixed in the AGM and hence it is easy to provide for the same as at the year end. On the contrary, if the assessee has received services of an advocate and he has not sent his bill by the year end, then the assessee shall be constrained to make an estimate of the amount that may be charged by an advocate and provide for it in the books of account as at the year end.

6.1 The accounting practice followed in this regard is that the Concerned expenses account shall be debited and “Provision for expenses” account shall be credited. The “book rule” of accounting practice is to debit ‘Provision for Expenses’ account with the payment made in the succeeding year. Since the expenses are provided for on estimated basis, four possible situations shall arise in the succeeding year, when payment is made. We explain the same by way of illustrations:-

Let us assume that provision for expenses is made for Rs.1000/- towards a particular expense as on 31.3.2012 and the above said amount was determined on estimated basis.

(a) Situation I:- In the subsequent year, the assessee receives bill for Rs.1000/-. Accordingly, when the payment is made "Provision for expenses" account shall be debited with Rs.1000/-. In this situation, the Provision for expenses a/c will show NIL balance after the payment. There will not be any impact on the Profit and Loss account of the succeeding year.

(b) Situation II:- In the subsequent year, the assessee receives bill for Rs.1,200/-, meaning thereby, the provision created was short by Rs.200/-. When the payment is made, the Provision for expenses account shall be debited with Rs.1000/- and the concerned expenses account shall be debited with remaining amount of Rs.200/-. In this situation also, the Provision for expenses a/c will show NIL balance after the payment. There will be impact on the Profit and Loss account of the succeeding year by way of increase in expenses by Rs.200/-.

(c) Situation III:- In the subsequent year, the assessee receives bill for Rs.750/- only, meaning thereby, the provision created was in excess by Rs.250/-. When the payment is made, the Provision for expenses account shall be debited with Rs.750/-, which will leave a credit balance of Rs.250/- in the Provision for Expenses account. This remaining credit balance will be transferred to the Profit and Loss account. Accordingly, the Provision for expenses account will show NIL balance and there will be an impact on the Profit and Loss account of the succeeding year by way of income of Rs.250/-.

(d) Situation IV:- The assessee finds that it is not liable to pay the provision amount. Accordingly, the entire amount of Rs.1000/- outstanding to the credit of Provision for expenses account shall be transferred to the Profit and Loss account. Accordingly, the Provision for expenses a/c will show NIL balance and there will be an impact on the Profit and Loss account of the succeeding year by way of income of Rs.1000/-.

Thus, the effect of making provision in a year is that the “Profit and Loss account” of the year in which the said provision is made will absorb the relevant expenses to the extent so provided for, i.e., those expenses will not get shifted to the next year when the payment is actually made. The profit and loss account of succeeding year will not be affected by the amount of provision made, if the actual payment made is equal to or in excess of the provision amount. However, if there is no requirement of making any payment or if the payment made is less than the amount provided for, then the Profit and Loss account of the succeeding year shall be affected to the extent of the amount transferred from “Provision for expenses a/c” to the credit of Profit and loss account.

6.2 However, in the present days, the above said “book rule” practice is not followed. The modern days accounting practice is to reverse the provision for expenses so created as at the yearend immediately on the first day of succeeding year. For example, yearend provisions created as on 31.3.2012 shall be reversed on 01-04-2012. Thereafter the expenses shall be booked as and when the invoice is accounted/payment is made in the succeeding year. This modern days practice is followed only for convenient sake only. It can be noticed that the impact on the ‘profit and loss’ of the year in which provision for expenses was created and also on the ‘profit and loss’ of the succeeding year would be the same as discussed in the preceding paragraph, if the actual payment is made before the closure of the succeeding year. There will be a difficulty/risk in this modern days practice if the actual payment is not made before the closure of accounting year of the succeeding year against an acknowledged liability. In that kind of situation, the assessee should provide for the same again as at the year end of the succeeding year, which may sometimes lead to tax complications.

6.3 An argument was advanced that there will be no liability to deduct tax at source on the yearend provisions made as on 31.3.2012, since the same is reversed on 01.04.2012. From the discussions made in the preceding paragraphs with regard to the impact of the accounting entries relating to Provision for expenses, it would be clear that this argument is fallacious and devoid of merits. We also noticed that, it is only for the sake of

convenience, the modern days practice of reversing the yearend “Provision for expenses” as at the beginning of succeeding year is followed. We have also seen that the effect/impact on the Net profit/loss of the preceding year in which provision was initially created or the effect/impact on net profit/loss of succeeding year would remain the same under “book rule” method of accounting practice and modern days accounting practice. The net result of making provision for expenses is that the expenses pertaining to a particular year shall be claimed in that year only even in the absence of bills/invoices received from the vendors/service providers.

7. We shall now advert to the Income tax Act. Chapter VII of the Act deals with provisions relating to tax deduction at source. The contention of the assessee is that the “yearend provisions” are made on estimated basis and further it is credited to “Provision for expenses” account and not to the credit of vendors/service providers’ account. Accordingly, it was contended that the TDS provisions will not apply to yearend provisions.

7.1 We noticed earlier that the Ld CIT(A) has referred to the provisions of Sub-sec. (2) of sec. 194C, Explanation (ii) to sec. 194I, Explanation (c) to Sec. 194J, Explanation (iv) to Sec. 194H and Explanation 1 to sec. 195, which states that even if the sums referred to under these provisions are credited to any account, whether called ‘Suspense Account’ or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such account to the account of the payee and the provisions of TDS shall apply accordingly. For the sake of convenience, we extract below provisions of sec.194C(2):-

“Where any sum referred to in sub-section (1) is credited to any account whether called “Suspense account” or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.”

Similar clause is available in all other provisions requiring deduction of tax at source.

7.2 The question as to whether the above said clause available in various TDS provisions shall apply even to “Provision for expenses” created at the yearend was examined by the co-ordinate bench in the case of IBM India Private Ltd vs. The ITO (TDS) (ITA Nos. 749 to 752/Bang/2012 dated 14.05.2015) and the said question was decided as under:-

“29. Sec. 194C applies when payment is made to contractor. The point of time at which tax had to be deducted at source is at the time of credit to the Account of contractor or payment in cash or cheque, whichever is earlier. Sub-section (2) of Sec. 194-C lays down that where any sum referred to in sub-section (1) is credited to any account, whether called “Suspense account” or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly. Similar provision such as Sec. 194(2) exists in Sec. 194H Explanation (ii) of the Act which applies when the payment made is in the nature of commission or brokerage, in sec. 194J Explanation(c) when payment made is Fees for Technical Service and Sec. 195 Expln.-1 when payment is made to non-resident. The reason for introduction of provisions such as Sec. 194(2) of the Act has been explained in CBDT circular No.550 dated 1.1.1990 as follows:-

“26.3 Under the existing provisions of section 193 of the Income-tax Act, tax has to be deducted at source by the person responsible for making any payment in the nature of interest on securities at the time of payment. The liability to deduct tax at source was being postponed by making a provision for such payment. In order to prevent the postponement of liability to deduct tax and payment to the credit of the Central Government, the Finance Act has provided that tax will be deducted at source either at the time of credit to the account of the payee or at the time of payment thereof, whichever is earlier. For this purpose, credit to any suspense account or any other account, by whatever name called, shall be

deemed to be a credit of such income to the account of the payee.”

30. It is thus clear from the statutory provisions that the liability to tax at source exists when the amount in question is credited to a ‘suspense Account’ or any other account by whatever name called, which will also include “Provision” created in the books of accounts. Therefore it is not possible for the Assessee to argue that there was no accrual of expenditure in accordance with the mercantile system of account and therefore the TDS obligations do not get triggered.”

7.3 We notice that the Delhi bench of Tribunal has also considered the question of applicability of TDS provisions on yearend provisions in the case of Interglobe Aviation Ltd vs. ACIT (ITA No.5347/Del/2012 dated 07-01-2020), wherein it was held as under:-

“19. We have carefully considered the rival contentions and perused the orders of the lower authorities. Assessee has made provision for Airport expenses of Rs 32314535!-, Airport Handling expenses Rs. 14115000!-, Crew Accommodation expense Rs 694000!-, IT Communication charges Rs 7021580!- and provision for other expenses Rs 74335080!-. Admittedly assessee has not deducted tax and source on the above sum stating that it is yearend provision and the payees are not identified. It is not the case of the assessee that these are we are not ascertained liabilities. According to the provisions of the income tax act the tax is required to be deducted as and when assessee becomes responsible for payment of above sum to other parties. The claim of the assessee is that it is maintaining its books of account on accrual basis of accounting and therefore the amount is required to be provided for. When the expenditure incurred by the assessee, the corresponding liability definitely arises for payment of such expenditure. The amount of expenditure incurred can be determined only if, there is a recipient identified of the sum, there is a methodology available for working out the amount payable by the assessee to the recipient, there is a corresponding liability arising out of the existing contract or customs by the assessee with the recipient. If generally these ingredients are not satisfied assessee cannot be said to have incurred the expenditure.

In absence of one of one of these criteria, if provision is made, it is not an ascertained liability but an unascertained liability, which does not satisfied the concept of accrual of expenditure. There may be reasons for receiving the bills by the service providers after certain time lag but that does not absolve the assessee from the liability of deduction of tax at source. In the present case the provision is made under the specified head, provision is also made to on certain basis thereby ascertaining the amount. It is not the case of the assessee that it has made an ad hoc provision. Thus it cannot be said that the payee is not identified. Therefore, according to us, the tax is required to be deducted on the year-end provisions made by the assessee which are ascertained liabilities. No doubt, the learned CIT(A) has given the benefit of the assessee if tax is deducted by the assessee subsequently. Therefore we do not find any infirmity in the order of the learned CIT(A) in holding that assessee has failed to deducted tax at source on year-end provisions. Thus the order of the learned CIT(A) is upheld to that extent.”

7.4 Following the above said decisions of the co-ordinate benches, we hold that the TDS provisions are triggered for the amount credited to “Provision for expenses account” also, in view of specific provisions (extracted above) available in all TDS sections. Accordingly, the assessee is liable to deduct tax at source from the yearend provision for expenses.

8. One more contention raised by Ld A.R is that the assessee has voluntarily disallowed the amount of yearend provision u/s 40(a)(i)/40(a)(ia) of the Act and hence there is no requirement to raise any demand u/s 201(1)/201(1A) of the Act, i.e., disallowance made u/s 40(a)(i)/40(a)(ia) would exonerate the assessee from the liability u/s 201 of the Act. In this regard, he placed his reliance on the decision rendered by co-ordinate bench in the case of Robert Bosch Engineering and Business Solutions P Ltd (ITA Nos.1689 & 1690/Bang/2017 dated 31.1.2022).

8.1 We notice that the very same contention was urged before Cochin bench of Tribunal in the case of Agreenco Fibre Foam (P) Ltd vs. The ITO (TDS)(ITA No.165/Coch/2012 dated 16th August 2013) and it was rejected with the following observations:-

“5.2 The liability to deduct tax at source on the interest payments is prescribed u/s 194A of the Act. Sub-section (1) of sec. 194A reads as under:-

194A. (1) Any person, not being an individual or a Hindu Undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, shall, at the time of credit of such income to the account of payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force.”

Explanation:- For the purposes of this section, where any income by way of interest as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of payee and the provisions of this section shall apply accordingly.”

A plain reading of above provision clearly shows that the person responsible to pay the interest is liable to deduct tax at source at the time of credit or payment, whichever is earlier. It is pertinent to note that the section uses the term "any income by way of interest". The interest payment may constitute expenditure in the hands of the person making the payment, while it may constitute income in the hands of the payee/recipient. Since the section uses the term "any income by way of interest", in our view, it should be viewed from the angle of the recipient/payee and not from the angle of the person making the payment. Accordingly, the accounting/tax treatment given by the payer in respect of interest paid by him may not be relevant at all for the purposes of sec. 194A of the Act. So long as the interest amount constitutes "income" in the hands of recipient, the payer shall be liable to deduct tax at source on the interest amount so paid. Accordingly, even if the payer has disallowed the expenditure u/s 40(a)(ia) of the Act or did not claim the same as expenditure at all, he shall still be liable to deduct tax at source u/s 194A of the Act on the interest amount so paid, if the said payment is liable for tax deduction at source. We notice that the Mumbai bench of Tribunal, in

the case of Pfizer Ltd (supra) did not consider the express provisions contained in sec. 194A of the Act. Further we notice that the provisions of sec. 40(a)(ia) does not override the provisions of sec. 201 of the Act. We notice that provisions of sec. 40(a)(ia) do not provide for absolute disallowance as in the case of say, sec. 40A(3) of the Act. The amount disallowed u/s 40(a)(ia) in one year can be claimed as deduction in the year in which the TDS provisions are complied with. Thus, in our view, the provisions of sec. 40(a)(ia) provide only for deferment of the allowance and it does not provide for absolute disallowance. The objective of sec. 40(a)(ia) appears to be to compel the assessee to deduct tax at source in order to claim the relevant expenditure as deduction.”

8.2 The co-ordinate Bangalore bench of Tribunal has also examined similar argument raised before it in the case of IBM India Private Ltd (ITA Nos.749 to 752/Bang/2012 dated 14.05.2015) and it was rejected with the following observations:-

“27. We have carefully considered rival submissions. Provisions of Sec.40 of the Act start with a non-obstante clause and provides that, “Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession.” Sec.40(a)(i) and 40(a)(ia) of the Act lists of certain items of expenditure and categories payees as “Residents” “Non Residents”. In respect of the items of such expenditure there if there is an obligation to deduct tax at source under Chapter XVII-B and such tax has not been deducted or after deduction, has not been paid during the previous year, then the expenditure cannot be claimed as a deduction. Sec. 200(1) appears in Chapter XVII-B of the Act and it provides that any person deducting any sum in accordance with the foregoing provisions of this Chapter i.e., Chapter-XVII-B shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs. Sec.201(1) of the Act is triggered when if any such person referred to in section 200 does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall, without

prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax. The contention of the learned DR that the assessee having admitted its default u/s 40(a)(i) & 40(a)(ia) of the Act, cannot in proceedings u/s 201(1) of the Act, be heard to say that there was no default under Chapter XVII-B of the Act is therefore correct. The disability u/s 40(a)(i) & 40(a)(ia) of the Act and the liability u/s 201(1) of the Act cannot be different and they arise out of the same default. Once there is disallowance u/s 40(a)(i) & 40(a)(ia) of the Act, it is not possible to argue that there was no liability under Chapter XVII-B of the Act and therefore the provisions of Sec.201(1) of the Act will not be attracted.”

8.3 It can be noticed that the co-ordinate benches have, in the case of Agreenco Fibre Foam (P) Ltd (supra) and also in the case of IBM India P Ltd (supra), expressed the view that the disallowance u/s 40(a)(i) and 40(a)(ia) and the demand raised u/s 201 are two different consequences. In this connection, we may advert to various provisions of the Act. We may notice that the Income tax Act provides for different types of consequences for the failure to deduct tax at source or failure to remit the tax so deducted either in full or in part. The consequences provided under the Act are

- (a) disallowance of expenses should be made u/s 40(a)(i)/40(a)(ia);
- (b) assessee shall be deemed to be an assessee in default and hence the demand u/s 201(1)/201(1A) could be raised upon the assessee.
- (b) penalty can be levied u/s 271C/271CA and
- (c) prosecution can be launched /s 276B of the Act.

It is pertinent to note that **each of the consequences mentioned above are independent of each other**. However, in case of disallowance of expenses to be made u/s 40(a)(ia) (w.e.f AY 2013-14) and u/s 40(a)(i) (w.e.f 2020-21), the proviso inserted in those sections gives a relief, i.e., if the assessee is “not deemed to be an assessee in default u/s 201”, then there is no requirement of

making any disallowance u/s 40(a)(ia)/40(a)(i). The corollary is that if the assessee is deemed to be an assessee in default, the above said relief given under the proviso to sec.40(a)(i)/40(a)(ia) shall apply. Thus the proviso given under sec.40(a)(i)/40(a)(ia) itself makes it very clear that liability u/s 201 is independent of the above said disallowances.

8.4 Our view that each of the consequences is independent of each other is also supported by the Explanation given under Sec. 191, which reads as under:-

Explanation.—For the removal of doubts, it is hereby declared that if any person including the principal officer of a company,—

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer,

does not deduct, or after so deducting fails to pay, or does not pay, the whole or any part of the tax, as required by or under this Act, and where the assessee has also failed to pay such tax directly, then, such person shall, **without prejudice to any other consequences which he may incur**, be deemed to be an assessee in default within the meaning of sub-section (1) of section 201, in respect of such tax.

In view of the above said explanation given under sec.191 of the Act, the provisions of sec.201 are triggered when the assessee is “deemed to be an assessee in default”. Further this explanation makes it very clear that this liability is “without prejudice to any other consequences which he may incur”. The assessee can escape from the disallowance to be made u/s 40(a)(i)/40(a)(ia), if he is not treated as an “assessee in default”. In our considered view, the converse is not true, i.e., if the assessee makes disallowance u/s 40(a)(i)/40(a)(ia), he will not be exonerated from the liability u/s 201 of the Act.

8.5 Another pertinent point to be noted is that the disallowance required to be made u/s 40(a)(i)/40(a)(ia); penalty to be levied u/s 271C/271CA are the direct liabilities, i.e.,

liabilities which are directly imposed upon the assessee due to his failure. On the contrary, the demand raised u/s 201(1)/201(1A) is vicarious liability imposed upon an assessee. The tax is deducted at source from the amount payable to the payee, i.e., it is not paid in discharge of assessee's own liability. The role of an assessee is that of "Pipe line" role, i.e., TDS is deducted from the amount payable to a vendor and remitted to the credit of the Government on behalf of the vendor. For example, if an assessee is liable to pay interest amount of Rs.10,000/- to a person named Mr. A and the said payment is liable for tax deduction at source @ 10%, then the assessee shall pay Rs.9000/- to Mr.A and deposit Rs.1000/- to the credit of Government as TDS on behalf of Mr.A. Thus the TDS amount is actually a form of recovery of tax from the payee Mr.A and it belongs to him only. Hence Mr.A is entitled to claim set off of the TDS amount of Rs.1000/- against the tax payable by him. If there is failure on the part of an assessee to deduct tax at source, the provisions of sec.191 introduces a "deeming fiction" as per which the said assessee is deemed to be an assessee in default. Accordingly, the TDS amount could be recovered from the assessee, even if he has not yet paid the amount or fully paid the amount to the payee, i.e., the assessee is made liable for the tax belonging to the payee. In the above said example, the assessee would be liable to pay Rs.1000/- as per the provisions of sec.201(1) over and above the amount of Rs.10000/-payable/paid to Mr.A. Hence it is called vicarious liability. The concept of vicarious liability has been well explained by Mumbai bench of Tribunal in the case of Industrial Development Bank of India vs. ITO (2007)(107 ITD 45), which are going to discuss infra.

8.6 In view of the foregoing discussions on legal provisions, following the decisions rendered by the co-ordinate benches of Tribunal in the case of IBM India Pvt Ltd (supra) and Agreenco Fibre foam P Ltd (supra), we hold that the disallowance made u/s 40(a)(i)/40(a)(ia) will not absolve the assessee from the liability u/s 201 of the Act, when an assessee is deemed to be an assessee in default.

9 The Ld A.R submitted that the assessee has deducted tax at source when the payments are actually made in the succeeding year. The co-ordinate bench in the case of IBM India P Ltd

(supra) has held that the demand raised u/s 201(1) is liable to be cancelled, if the assessee has deducted tax at source at the time of accounting the invoices/bills or at the time of making payment in the succeeding year. It was further held that the assessee would be liable to pay interest u/s 201(1A) of the Act, in view of the delay in deduction/remittance of TDS amount. Following the above said decision, we also hold so.

9.1 The Ld A.R expressed the view that there are certain practical difficulties involved in complying with the provisions of TDS. He prayed that the Tribunal may clarify the law on the practical difficulties. We shall address them one by one. The first difficulty pointed out by him is that the payees are not identifiable in respect of certain expenses, even though the same has been included in the yearend provisions. We have noticed earlier that the provision for expenses have been created by the assessee for the liability towards

- (a) Contract expenses covered by sec. 194C
- (b) Professional fees covered by sec. 194J
- (c) Rent expenses covered by sec. 194I
- (d) Commission expenses covered by sec.194H
- (e) Payments to non-residents covered by sec. 195

The Ld CIT(A) rejected this submission of the assessee with the following observations:-

“4.2 With regard to the appellant’s claim that the identity of the recipients was not known and, hence, it could not have deducted tax on the provisioned amounts, I find that the facts and probability largely belie this claim. It is commonsensical to expect that the appellant’s creation of the provision for the services received by the year end to obtain a correct view of its profit at year end was not based on any arbitrary or whimsical estimate. It is clear from the provisioned expenses that the estimate has followed from pre-existing contracts with known parties for identified services and, hence, the accounting of amounts liable to be paid to these parties for services availed as per known terms of transaction is a specific

exercise which carries with it the statutory responsibility for deducting tax at source also. The appellant cannot wriggle out of this responsibility by holding that the provisions were made without any basis towards unidentified parties for unascertained liabilities.”

From the nature of expenses listed above, the view expressed by Ld CIT(A) appears to be quite reasonable. In our view, it is the responsibility of the assessee to satisfy the assessing officer by preparing a list of expenses, for which payees could not be identified at the time of making provision and the reasons for the same.

9.2 We notice that there are certain judicial rulings holding that there will not be TDS liability, if the payee is not identifiable. We shall discuss about the same. In the case of Dishnet Wireless Ltd vs. DCIT (2015)(154 ITD 827)(Chennai Trib), the Chennai bench of Tribunal held that when the tax deductor cannot ascertain the payee who is the beneficiary of credit of tax deduction at source, the mechanism of Chapter XVII-B cannot be put into service. It was further held that if the payee is identifiable and the amount payable to him is ascertainable, then the assessee would be required to deduct tax at source in respect of such provision. We shall discuss some more decisions:-

(a) The first decision is that of Honourable Delhi High Court in case of UCO Bank (369 ITR 335). The facts prevailing in this case are that the Court had directed one of the parties to the suit to deposit certain sums in the High Court. The amount was invested in Fixed deposit by the Registrar General of the High Court with UCO Bank. The High Court dealt with the question as to whether the bank is liable to deduct TDS on the interest income credited to the above said Fixed deposit. The bank's case was that the Registrar General was merely a custodian of the funds on behalf of the High Court and the Registrar General per se was neither an assessee nor he was beneficiary entitled to receive any interest on the fixed deposits. Under these facts, the Hon'ble Delhi High Court held that if TDS is deducted that would amount to recovery of tax without corresponding income being assessed in the hands of any assessee. In the absence of ascertainable assessee, the machinery of recovering tax by

deduction of tax at source breaks down because it does not aid the charge of tax u/s 4 of the Act, but takes a form of a separate levy, independent of other provisions of the Act, which is not permissible. Therefore, it can be seen that the decision of the Hon'ble Delhi High Court has been rendered in the peculiar facts prevailing in that case.

(b) The next decision is of Hon'ble Karnataka High Court in the case of Karnataka Power Transmission Corporation Ltd (383 ITR 59). In this case, the assessee before Hon'ble High Court of Karnataka made provision towards interest payable on delayed payments. However, subsequently assessee noticed that interest is not payable in view of understanding reached between the parties. Accordingly it reversed the provision entries in books of account. Under these set of facts, the Hon'ble Karnataka High Court held that the interest which partakes the character of income alone is liable for deduction of tax at source u/s 194A of the Act.

(c) The Mumbai bench of Tribunal, in the case of Industrial Development Bank of India vs. ITO (2007)(107 ITD 45) has examined the aspect of liability to deduct tax at source, when the payees could not be identified. The question before Mumbai bench of Tribunal was whether or not Section. 193 of the Act requires tax deducted at source in respect of the provision for interest accrued but not due made by an assessee where the ultimate recipient of such interest accrued but not due cannot be ascertained at the point of time when the provision is made. In this case, the assessee issued 'Regular Return Bond-Series II', which carried interest rate of 16 per cent p.a. payable annually. The interest was payable on 9th of June every year. However, the assessee closed its accounting year on 31st March. Accordingly, it made provision of interest accrued upto 31st March, which however has not become due. This issue was adjudicated in a detailed manner. The discussions made by the Tribunal in lucid manner are extracted below:-

9. The above terms and conditions, so far as material for the purposes of our adjudication, can be summarized as follows:

- (a) The assessee is liable to pay interest @ 16 per cent annually in respect of regular return bondholders.
- (b) The interest is payable on 9th June of each calendar year, except in the year of maturity, when interest is payable on maturity.
- (c) The interest, except at the time of maturity, is paid to the person whose name is registered in the records of the assessee-company as on 15th May of each calendar year.
- (d) The bonds are transferable by endorsement and delivery, and the assessee does not, in any way, control such transfer of ownership.

Let us now appreciate the impact of the above terms and condition so far the issue in appeal before us is concerned. As on 31st March of the year, the assessee's liability for 'interest accrued but not due' because interest is payable only once annually on a date other than the date of closure of accounts but the assessee will have no means to find out as to who could be the recipients of 'interest due but not payable' in respect of 'regular return bonds' because while assessee's liability to pay interest @ 16 per cent is certain and is to be made as on 31st March, i.e., on the end of the relevant accounting year, the bonds in question being freely transferable, it cannot ascertain as to who will be the registered bondholder as on 15th May of that year. The assessee cannot be expected to have clairvoyance of knowing, as on 31st March, as to who will own the bonds on 15th May of that year. Therefore, in such a situation while the assessee certainly has the liability to pay the interest for the period till the end of the relevant accounting year, the assessee certainly does not know for sure as to who will be entitled to receive this interest

In our humble understanding, conceptually, liability of TDS is in the nature of a vicarious or substitutionary liability which presupposes

existence of a principal or primary liability. Chapter XVII-B is titled 'Collection and recovery of tax-- Deduction of tax at source" and this title also indicates that the nature of TDS obligations are obligations for collection and recovery of tax. Under the IT Act, tax is on the income and it is in the hands of the person who receives such income, except in the case of dividend distribution tax which is levied under Section. 115-0--a Section outside the chapter providing for collection and recovery mechanism and set out under a separate chapter 'Determination of tax in certain special cases--Special provision relating to tax on distributed profits of domestic companies'. A plain reading of Section. 190 and Section. 191, which are first two sections under the Chapter XVII, and of Sections 199, 202 and 203(1) would show this underlying feature of the TDS mechanism

Section 190 makes it clear that the scheme of TDS is one of the methods of recovering the tax due from a person and it is notwithstanding the fact that the tax liability may only arise in a later assessment year. The tax liability is obviously in the hands of the person who earns the income and TDS mechanism provides for method to recover tax under such liability. Therefore, this TDS liability is, as we begun by taking note of, a sort of substitutionary liability. Section 191 further makes this position clear when it lays down that in a situation TDS mechanism is not provided for a particular type of income or when the taxes have not been deducted at source in accordance with the provisions of Chapter XVII, income-tax shall be payable by the assessee directly. This provision thus shows that TDS liability is a vicarious liability and the principal liability is of the person who is taxable in respect of such income. Section 199 makes it even more clear by laying down that the credit for taxes deducted at source can only be given to the person from whose income the taxes are so deducted. Therefore, when tax deductor cannot ascertain beneficiaries of a credit, the tax deduction mechanism cannot be put into service.

Section 202 lays down that TDS provisions are without any prejudice to any other mode of recovery from the assessee, which again points out to the tax deduction liability being vicarious liability in nature. Section 203(1) then lays down that for all tax deductions at source the tax deductor has to "furnish to the person to whose account such credit is given or to whom such payment is made or the cheque or warrant is issued" which presupposes that at the stage of tax deduction the tax deductor knows the name of person to whom the credit is to be given though whether by way of credit to the account of such person or by way of credit to some other account. This again shows that TDS liability is a vicarious liability to pay tax on behalf of the person who is to be beneficiary of the payment or credit, with a corresponding right to recover such tax payable from the person to whom credit is afforded or payment is made. **It would be thus seen that the whole scheme of TDS proceeds on the assumption that the person whose liability is to pay an income knows the identity of the beneficiary or the recipient of the income. It is a sine qua non for a vicarious tax deduction liability that there has to be a principal tax liability in respect of the relevant income first, and a principal tax liability can come into existence when it can be ascertained as to who will receive or earn that income because the tax on the income and in the hands of the person who earns that income. In this view of the matter, TDS mechanism cannot be put into practice until identity of the person in whose hands, it is includible as income can be ascertained.**

18. It is indeed correct that Explanation to Section. 193 lays down that even when an income is credited to any account in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this Section shall apply accordingly, but the fact that the credit to any account is to be deemed to be credit to the payee's

account also presupposes that payee can be ascertained. Therefore, this deeming fiction can only be activated when the identity of the payee can be ascertained. To illustrate, in the example that we had taken in para 4 above as long as assessee knows the identity of lenders, whether the assessee credits the interest accrued but not due in the account of the assessee or in some other account, tax would continue to be deductible under Section 193 by the virtue of deeming fiction set out in the Explanation to Section. 193. The liability to pay in such a case would crystallise later, i.e., on due date of 31st December, and the corresponding credit to the lender's account will also be given on 31st December, but the assessee will still have tax deduction liability in respect of interest accrued but not due as on 31st March. However, on the facts of the present case, this Explanation cannot be put into practice because the payee is not known at the stage of provision for 'interest accrued but not due' being made. It is not difficult to visualize that Explanation to Section. 193, which was introduced w.e.f. 1st June, 1989, was apparently to take care of a situation in which instead of crediting the account of the payee, some other proxy account was credited, to avoid the TDS liability being invoked. For example, if at the end of the accounting year, the assessee is to make a provision for interest of Rs. 10,000 payable to Mr. X, but he creates the provision by way of credit to 'interest payable account'. In such a situation 'interest payable account' is de facto a proxy account for Mr. X, either fully or to the extent of the amount payable to Mr. X. However, it could have been argued, in the absence of the Explanation to Section. 193, that since the credit is not to the account of Mr. X, the tax deduction liability cannot be invoked. The Explanation itself makes it clear that even when such a practice is adopted the credit will be deemed to be credit to the payee's account. In our considered view, fiction embodied in the Explanation is only applicable in situations in which tax deduction liability is sought to be escaped by crediting interest

to some other account other than that of recipient of interest. In our considered view, Explanation to Section. 193 cannot be invoked in a case where the person who is to receive the interest cannot be identified at the stage at which the provision for interest accrued but not due is made. This position is also accepted by the CBDT, as evident from its letter dt. 5th July, 1996 addressed to the Tata Iron and Steel Co. Ltd. (Letter No. 275/126/96 IT (B)), which, inter alia, states as follows:

I am directed to refer to your letter ref. 3A 13-21/1460 dt. 23rd May, 1996, on the above subject, and to say that difference between the issue price of Rs. 5,000 and face value of Rs. 25,500 is in the nature of interest subject to provisions of Sections 193/193A. Although the company would be making provisions for interest on year to year basis in their books of account, there will be no deduction of tax at source in each such year as the payee is not known.

(Emphasis, italicised in print, supplied by us now) We agree with the merits of the stand so taken by the CBDT. The deduction of tax at source can only be effected when payee is known. As far as the situation before us is concerned, the regular return bonds being transferable on simple endorsement and delivery and the relevant registration date being a date subsequent to the closure of books of account, the assessee could not have ascertained the payees at the point of time when the provision for interest accrued but not due was made. Accordingly, no tax was required to be deducted at source in respect of the provision for interest payable made by the assessee which reflected provision for 'interest accrued but not due' in a situation where the ultimate recipient of such 'interest accrued but not due' could not have been ascertained at the point of time when the provision is made. In the present case, interest to such bondholders is to be paid as are registered with the assessee-company as on 15th May, 1994 but there could not have been any

method of ascertaining, as at the time of making the provision for 'interest accrued but not due', i.e., on 31st March, 1994, as to who will be registered bondholders as on 15th May, 1994. It is also important to bear in mind that taxes were duly deducted at source at the time of payment, i.e., on 9th June, 1994 and that there is no loss of revenue as such. In the light of these discussions, we hold that the assessee did not have any liability to deduct tax at source, in respect of provision for 'interest accrued but not due', in respect of regular return bonds made on 31st March, 1994. When there was no obligation of deduct tax at source, there cannot be any question of levy of penalty or interest. The appellant, therefore, must succeed."

It can be noticed that the decision, in all these cases has been rendered on the peculiar facts of the case.

9.3 We also notice that in all these decisions, the assessee therein has established the fact that the payees are not identifiable. Hence there should not be any dispute to the proposition that the TDS mechanism will fail, if the payees are not identifiable. However, **it is the responsibility of the assessee to prove** that payees are not identifiable with credible reasons. Accordingly, if the assessee, in the present case, is able to prove that the payees could not be identified in respect of particular expenses, then the mechanism provided under Chapter XVII-B would fail and hence the AO is not entitled to demand tax u/s 201(1) and interest u/s 201(1A) in respect of those expenses.

10. The second practical difficulty expressed by Ld A.R is that the yearend provisions are made on estimated basis and hence there might be difference between the estimate so made and the actual payments finally made. Under these circumstances, the question that arises is how the provisions of sec.201 could be applied. In our view, the Ld A.R has raised a valid point. Since the yearend provisions are made on estimated basis, following five scenarios may emerge at the time of making actual payments in the succeeding year:-

- (a) The actual payment made in the succeeding year is more than the provision amount.
- (b) The actual payment made in the succeeding year is less than the provision amount
- (c) No payment is required to be made, since it was ascertained that there is no liability to pay the Amount. Accordingly, entire amount of provision is reversed in the succeeding year.
- (d) Payment has not yet been made in the succeeding year, even though the liability is acknowledged. However, the TDS was deducted/paid in the succeeding year.
- (e) Payment has not yet been made in the succeeding year, even though the liability was acknowledged. However TDS was not deducted in the succeeding year.

Under Scenario (a) and (b) above, if the assessee has deducted tax at source at the time of making payment, then the provisions of sec.201(1) will not be attracted as held by us in the preceding paragraphs. However, since there was delay in deduction and payment of TDS amount, the assessee would be liable to pay interest u/s 201(1A) of the Act. We shall discuss the same in the ensuing paragraphs.

10.1 The first scenario is that the actual payment made is more than the amount of provision made. The TDS was deducted at the time of credit or at the time of making actual payment. Since yearend provision was made on 31.3.2012 in this case, the date on which TDS was deductible shall be 31.3.2012. The assessee shall be liable to pay interest from that date to the date of actual deduction/payment as per the provisions of sec.201(1A) of the Act on the amount of "Provision" created as on 31.3.2012. For example, the provision made as on 31.3.2012 was Rs.1000/- and the actual payment made was Rs.1200/-. The interest shall be payable on the provision amount of Rs.1000/-, since the provision amount alone was claimed as deduction during the year ending 31.3.2012.

10.2 The second scenario is that the actual payment made is less than the amount of provision made. The TDS was deducted at the time of credit or at the time of making actual payment. Since yearend provision was made on 31.3.2012 in this case, the date on which TDS was deductible shall be 31.3.2012. The assessee shall be liable to pay interest from that date to the date of actual deduction/payment as per the provisions of sec.201(1A) of the Act on the amount of "actual payment" made. For example, the provision made as on 31.3.2012 was Rs.1000/- and the actual payment made was Rs.800/-. The assessee would be reversing the excess provision of Rs.200/- in the succeeding year. Hence the liability to deduct TDS shall arise on the amount of actual payment only. We derive support in this regard from the decision rendered by Mumbai bench of Tribunal in the case of Industrial Development Bank of India (supra), wherein it was held that **"It is a sine qua non for a vicarious tax deduction liability that there has to be a principal tax liability in respect of the relevant income first."** In this scenario, the principal tax liability upon the recipient will be on the amount of Rs.800/- only. Accordingly, the TDS liability will also on the above said amount actually paid and consequently, the interest u/s 201(1A) shall be leviable on Rs.800/-.

10.3 The third scenario is that no payment was required to be made in the succeeding year, since it was ascertained that there was no liability to pay the Amount. Accordingly, entire amount of provision was reversed in the succeeding year. In this scenario, there will no liability to deduct tax at source from the amount of provision created as on 31.3.2012, as it was found that the said amount is not payable at all to anyone. Hence this provision amount cannot be linked to any payee, in which case, there will not be any liability to deduct tax at source from the provision amount. Hence, in our view, the provisions of sec.201 will not be applicable in this scenario.

10.4 The fourth scenario is that the payment was not yet made in the succeeding year, even though the liability to pay was acknowledged. However, Tax was deducted at source and paid in the succeeding year. In this scenario, the interest u/s 201(1A) shall be payable as discussed in Scenario 1 above.

10.5 The fifth scenario is that the payment was not yet made in the succeeding year, even though the liability was acknowledged. TDS was also not deducted in the succeeding year. In this scenario, the assessee would be liable to pay demand u/s 201(1) of the Act equivalent to the TDS amount deductible on the entire amount of provision. The assessee shall also be liable to pay interest u/s 201(1A) of the Act till the date of deduction/payment, which may cross the succeeding year.

10.6 We noticed earlier that the assessee has claimed to have deducted tax at source at the time of accounting of invoices/payments. Accordingly, the yearend provisions may fall under anyone of the categories discussed above. Accordingly, we restore this issue to the file of AO in order to enable him to re-compute the liability, if any, u/s 201(1) and interest u/s 201(1A) of the Act.

10.7 We noticed earlier that the yearend provisions made by the assessee included "Commission payable to non-residents", which is liable for deduction of tax at source u/s 195 of the Act. The provisions of sec.195 are triggered only if that payment is chargeable under the provisions of Income tax Act. We notice that the assessee has not furnished any detail to the AO/CIT(A) with regard to the applicability or otherwise of provisions of sec.195 to the above said payment. Hence we restore this issue also to the file of the AO for examining it afresh in accordance with law and in the light of discussions made supra.

11. In view of the foregoing discussions, the order passed by Ld CIT(A) would stand modified."

50. In the present case, we notice that the assessee has furnished the details of subsequent deduction of tax from the year end provisions and the details of payment made before the due date for filing the return of income at pages 528 to 537 of the assessee's PB. In view of the above discussion and respectfully following the decision of the coordinate Bench of this Tribunal *supra*, we remand this issue back to the AO to verify the details of payments and tax deducted and allow the

expenditure where the TDS is remitted to the Government account on or before the due date for filing the return of income. The assessee may be given a reasonable opportunity of being heard.

51. Grounds relating to disallowance under section 43B by the assessee are as follows:-

6.1. That the learned AO has erred in law and on facts in disallowing (i) provision of service tax on sponsorship services - INR 1,90,88,602 and (ii) penalty on service tax — INR 1,06,33,176 — amounting to INR 2,97,21,778 which has already been disallowed by the Appellant in the computation of income;

6.2. That the learned AO has erred in law and on facts in considering the disallowance of INR 3,51,30,965 instead of INR 3,15,30,965;

52. During the course of assessment, the AO noticed from the tax audit report that the auditor has mentioned that the assessee has not remitted certain statutory dues before the due date for filing the return of income to the tune of Rs.17,86,33,977. The AO observed that the assessee has disallowed only a sum of Rs.14,71,03,012 and hence proceeded to disallow the balance amount u/s. 43B. The DRP confirmed the disallowance.

53. The Id. AR submitted before us that there is an arithmetical error in the amount mentioned by the AO disallowed u/s. 43B. He submitted the AO/DRP did not take into account the amount disallowed as provision for service tax on sponsorship and penalty on service tax by the assessee in the computation of income, which has

resulted in double disallowance to that extent. The ld. DR did not have any counter argument to this submission of the assessee.

54. We have heard both the parties. We notice that the AO while arriving at the difference between the amount mentioned in the tax audit report (as not paid before the due date for filing the return of income) and the amount already disallowed by the assessee i.e., the difference between Rs.17,86,33,977 and Rs.14,71,03,012 had arrived at an amount of Rs.3,50,30,965 which is wrong, whereas the correct amount is Rs.3,15,30,965. Further the assessee has already disallowed Rs.1,90,33,176 as penalty on service tax (pg. 243 of PB) which fact has not been considered by the AO resulting in double disallowance to that extent. We, therefore, direct the AO to recompute the disallowance taking into consideration the above two disallowances already considered by the assessee in the computation and also correct the transposition error while arriving at the disallowance. It is ordered accordingly.

55. The next issue that arises for consideration is relating to taxing capital receipt. The grounds raised in this regard are as follows:-

7.1 That the learned AO has erred in law and on facts by taxing the alleged notional profit of INR 4,82,21,348 which arose out of amalgamation with Scottish & Newcastle India Pvt Ltd;

7.2 That the learned AO has erred in law and on facts by taxing the alleged notional profit of INR 4,82,21,348 without appreciating the fact that income can be taxed only under a specific provision of the Act;

7.3 That the learned AO has erred in law and on facts in bringing to tax the alleged notional profit of INR 4,82,21,348 without appreciating the fact that the same is in the nature of capital receipt and thus it is not taxable under the provisions of the Act; and

7.4 That the learned AO has erred in law and on facts in taxing the alleged profit without appreciating the provisions of section 56(2)(viib) is not applicable in the instant case.

56. The brief facts are that under a scheme of amalgamation, the assessee company amalgamated Scottish & Newcastle India Pvt Ltd [SINIPL] into the company with effect from 01.04.2012. SINIPL was incorporated to provide technical consultancy for the manufacture, marketing and distribution of beer and allied products. The amalgamation was approved by Hon'ble High Court of Karnataka and Hon'ble High Court of Maharashtra vide their orders on 17.01.2013 and 02.11.2012. Under the scheme of amalgamation, 84,89,270 fully paid up equity share of Rs.1 each of the company was issued and allotted to the shareholders of SINIPL as against 3,22,23,912 equity shares of Rs. 10 each held by them in SINIPL.

57. As on date of amalgamation, the per share price of assessee company as per Bombay Stock Exchange (ESE) was Rs. 545/-. The networth of SINIPL and the share allocation was reworked as under:

Reserves & Surplus	198,48,78,326/-
Equity shares	32,22,39,110/-
Bonus shares	2,27,90,000/-
Less: Capital reduction	1,33,56,088/-
	231,65,51,348/-
Less: Investments	226,83,30,000/-
	4,82,21,348/-

Add: Investments in UBL @ Rs.545/-	462,66,52,150/-
	A 467,48,73,498/-

Share price of SNIPL is Rs.145/- per share.

84,89,270 x 545 B	462,66,52,150/-
A – B	4,82,21,348/-

58. The AO noted that on amalgamation with SNIPL, the assessee has earned a profit of 4,82,21,348/- which is not offered to tax and hence the same was added.

59. Against the objections raised by the assessee, the DRP confirmed the addition.

60. Before us, the Id. AR submitted that the AO has brought to tax a notional profit without even mentioning under what provisions of the Act and under what head the amount is taxed. Even if this notional amount is taxable in the first place, then the amount is in the nature of capital receipt and not taxable. At any rate, the provisions of section 56(2)(viib) is not applicable.

61. The Id. DR supported the orders of lower authorities.

62. We have heard the rival submissions and perused the material on record. The AO has taken the market price of the shares of the assessee company which were allotted as a gain in the hands of the

assessee. He has not mentioned any specific provision under the addition is made. On a similar issue, the Ahmedabad Tribunal in the case of *DCIT v. Ozone Ltd. in ITA No.103/Ahd/2018* by order dated 13.4.2021 has held as follows:-

“10. We have dispassionately considered the rival submissions and perused the assessment order as well as first appellate order. The documents referred and relied upon has been taken cognizance in terms of Rule 18(6) of the Income Tax(Appellate Tribunal) Rules, 1963.

10.1 In the case in hand, the short question that arises in essence is whether the shares received by the amalgamating company in consideration of vesting of its assets, liabilities and undertaking in the amalgamated company pursuant to scheme of amalgamation is hit by the deeming provisions of Section 56(2)(viib) of the Act in the facts of the present case?

10.2 The AO has made impugned additions towards excess consideration solely under S. 56(2)(viib) in terms of approval granted by the Addl. CIT on reference made under S. 144A of the Act. Hence, no other point such as cursory allegation of violation of AS-14 of ICAI etc. needs our indulgence in isolation for adjudication of controversy. To address the issue, it may be pertinent to reproduce the provision of section 56(2)(viib) for an easy reference:

"(viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received—

(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf,

Explanation.—For the purposes of this clause,—

(a) the fair market value of the shares shall be the value—

(i) as may be determined in accordance with such method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher;

(b) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of [Explanation] to clause (23FB) of section 10;]"

10.3 In the instant case, pursuant to amalgamation, all assets, liabilities, undertaking of the amalgamating company (KEPL) are agreed to be vested in the amalgamated company(the Assessee) as a going concern. The amalgamated company has issued 300 equity shares of its company at face value for each shares of amalgamating company in consideration of such vesting of assets, liabilities etc. as per the scheme of amalgamation duly approved by the Jurisdictional High Court. As a result, shares worth Rs. 15 crore of the amalgamated co. (assessee co.) were issued against the vesting of assets etc. The assessing officer observed that the value of net assets (assets less liabilities) vested in the amalgamated company under the scheme stands at Rs. 54,21,16,156 against which shares worth Rs. 15 crore were issued by it for such acquisition. The difference between the value of assets and corresponding shares issued amounting to Rs. 39,21,16,156/- credited by the assessee co.(amalgamated co.) to its capital reserve without any payment of taxes triggered the cause of action for the AO. In the course of assessment, the AO further found on a incisive verification that the intrinsic value of share of amalgamated co. issued at face value of Rs. 10 stands at

Rs. 6.81 per shares only. The AO accordingly noted that the share of amalgamated co. so issued carries worth Rs. 10.22 crores only (1,50,00,000 *6.81= 10,21,50,000) as against the net assets acquired Rs. 54.21 crore. The AO after making reference to Addl. CIT under S. 144A has brought the difference of Rs. 43.99 crore within the ambit of taxable income with the aid of deeming provision of S. 56(2)(viib) of the Act and increased the assessed income to that extent.

10.4 In the backdrop of facts capsuled above, it is the contention of the assessee that impugned transaction of vesting of assets of amalgamated co. in exchange of issue of shares of assessee co. at face value neither matches the essential ingredients of S. 56(viib) of the Act nor is the transaction carried out pursuant to approved scheme, in conformity of the objects and purposes of insertion of section 56(viib) of the Act. It is further contended that applicability of deeming clause is unfounded on giving schematic interpretation to the language employed. The revenue on the other hand seeks to support the action of AO and essentially contends that newly inserted S. 56(2)(viib) was introduced with an object to inter alia plug the present situation where consideration received in kind (by way of vesting of assets of amalgamated co.) is far higher than the face value of corresponding shares issued in lieu of such excess value of assets vested.

10.5 The interpretation of S. 56(viib) qua the facts of the present case is in controversy. S. 56(2) deems certain income chargeable to income tax under the head 'income from other sources'. Finance Act 2012 has, understandably, inserted clause (viib) with effect from 1-4-2013 (assessment year 2013-14) to include consideration received in excess of face value of shares issued i.e. 'share premium' received by an issuing company as it exceeds the fair market value of shares as its income chargeable under the head 'income from other sources'. On a plain reading, two things immediately emerges from the newly inserted provision (i) consideration which is taxable is the one which exceeds face value of shares issued (ii) in the event of shares issued at consideration above face value, the same need to be compared with fair market value to be determined as per sub-clause (a) appended thereto. The Assessee in the present case, is not found

to have issued shares at value more than face value at the first instance as repeatedly exhorted on behalf of the assessee.

10.6 To decipher the true purport of iteration of law in the context and object for insertion of the provision, it may be useful to refer to the explanations given at the time of enactment of the provision.

Explanatory Memorandum to Finance Bill, 2012

Share premium in excess of the fair market value to be treated as income

Section 56(2) provides for the specific category of incomes that shall be chargeable to Income Tax under the head "Income from other sources".

It is proposed to insert a new clause in section 56(2).

The new clause will apply where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares. In such a case if the consideration received for issue of shares exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax under the head "Income from other sources".

However, this provision shall not apply where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund. Further, it is also proposed to provide the company an opportunity to substantiate its claim regarding the fair market value. Accordingly, it is proposed that the fair market value of the shares shall be the higher of the value—

(i) as may be determined in accordance with the method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value of its assets, including intangible assets, being goodwill, know-how, patents, copyrights, trademarks, licences,

franchises or any other business or commercial rights of similar nature.

10.7 The budget speech of the Hon'ble Finance Minister Mr. Pranab Mukherjee on 16/03/2012 in para 155 concerning section 56(2)(viib) may also be quoted to understand the object behind the insertion.

I propose a series of measures to deter the generation and use of unaccounted money. To this end, I propose

◆ -----

- ◆ Increasing the onus of proof on closely held companies for funds received from shareholders as well as taxing share premium in excess of fair market value

10.8 The Circular of the Department being a contemporaneous exposition may also serve as useful guide to understand the true intent of S. 56(2)(viib) of the Act. The relevant text of CBDT circular no, 3/2012 dated 12-6-2012 in this regard is reproduced hereunder:

Share premium in excess of fair market value to be treated as income

In the Finance Bill, 2012, it had been proposed [section 56(2), as sub-clause [(viib)] that in case of a company, not being a company in which the public are substantially interested, which receives, in any previous year, from any person being a resident, any consideration for issue of shares and the consideration received for issue of such shares exceeds the face value of such shares, then the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax. An exemption was provided in a case where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.

- (i) It has now been further provided that such excess share premium is included in the definition of "income" under sub-clause (xvi) of clause (24) of section 2.

(ii) Considering that the proposed amendment may cause avoidable difficulty to investors who invest in start-ups where the fair market value may not be determined accurately, it is proposed to provide an exemption to any other class of investors as may be notified by the Central Government.

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.

10.9 When the clause in section 56(2)(viib) of the Act is read in tandem with elucidations provided in CBDT Circular; Finance Ministers' speech in Parliament disclosing his intentions behind such insertion and also Memorandum explaining Finance Bill, it appears that whole thrust for such insertion is to bring measures to tax hefty or excessive share premium received unjustifiably by private companies on issue of shares without carrying underlying value to support such uncalled for premium and thereby enriching itself without paying taxes legitimately due to them. It also seems that subscription to the shares issued by a company at a substantial premium (not necessarily backed by a valuation justifying the premium) was supposedly resorted to convert unaccounted money. The extant framework of law were not found sufficient by the legislature to curb such practices. Earlier attempts to tax such excessive receipts in the garb of share premium by private cos. did not arguably fructify. The provision was inserted to change the landscape for charging premium to tax of capital nature.

10.10 Section 56(2)(viib) creates a deeming fiction to imagine and fictionally convert a capital receipt into revenue income. It is well entrenched by the body of case laws that while giving effect to such legal fictions, all facts and circumstances thereto and inevitable corollaries thereof have to be assumed. In CIT v. Mother India Refrigeration (P.) Ltd. [1985] 23 Taxman 8/155 ITR 711, the Hon'ble Supreme Court has held that the legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond the legitimate field. Thus, a deeming fiction cannot be stretched beyond its purpose and import another fiction in it.

10.11 In the light of understanding developed on object and purpose of the deeming clause, as discussed above, the provisions of section 56(viib), would not come to motion where the Assessee company as admittedly not charged any premium at all and the shares were issued at face value.

11. However, We have examined the issue from yet another perspective discussed below.

11.1 It may be possibly argued that section 56(2)(viib) does not oust its applicability in the event of shares issued pursuant to amalgamation. The amalgamation is a compromise or arrangement between the parties, which inter alia includes the amalgamated company issuing the shares and the shareholders of the amalgamating company, which is supervised by the Court, in terms of the Companies Act. In other words, there is an agreement or arrangement between the amalgamated company issuing the shares and the shareholders of the amalgamating company. The clause contemplates the issue of shares and the receipt of consideration from a resident person and it is fulfilled on amalgamation. This perspective seeks to cover the issue of shares arising from amalgamation with equal measure.

11.2 In contrast, the applicability of the clause in the case of amalgamation may be equally looked from a little different perspective as well. In amalgamation, the issue of shares is made by inviting subscription from the persons to whom offer is made. The issue of shares is to give effect to the amalgamation, as per mutual agreement and the Court order. In other words, it may be argued that the issue of shares does not trigger any consideration and in converse, the obligation to give consideration, triggers issue of shares. Secondly, the clause contemplates 'receipt' of the consideration for the shares from a resident person. In other words, it contemplates a transaction between a resident person and the company issuing shares. In the case of an amalgamation, the consideration, which would be undertaking along with all its assets and liabilities is in the form of vesting by the amalgamating company, whereas the shares are issued to its shareholders. Thus, it is, in effect, a tripartite arrangement between (i) amalgamated co. (ii) amalgamating co. (iii) the shareholders of amalgamating co.. Such tripartite arrangements in

amalgamation cases are not contemplated in the deeming clause in question.

11.3 There is yet another perspective to dwell upon. As per the proviso to the clause, it does not apply 'to the consideration for issue of shares by a venture capital undertaking(VCU) from a venture capital company(VCC) or a venture capital fund(VCF)'. The proviso implies that there should issue of shares directly by the company to the subscriber, obviously, for a consideration. In other words, it contemplates a bilateral transaction. Further, it also contemplates a transaction in the nature of issue of shares at the instance of the company on its own and it does not contemplate a transaction in the nature of issue of shares for discharging the consideration or issue of shares obligated pursuant amalgamation etc. If a view is adopted that the transaction can also apply to amalgamation etc. then, in that case, if there is amalgamation by and between venture capital undertakings, the provision would possibly apply inconsistent with the intent of the legislature to exclude VCUs etc. If the shareholders are regarded as the persons providing consideration in the context, they could include VCC or VCF or even notified persons or non-residents along with other resident persons. Such a situation contradicts in the intent of the legislature expressed in the clause. Hence, in terms of proviso, the clause cannot apply in the case of amalgamation etc.

11.4 We may also look at the scheme of the Act in totality for contextual understanding of the issue. The Legislature has contemplated that there arises 'transfer' of shares by the shareholders of amalgamating company in consideration of the allotment of shares by the amalgamated company and consequently with a view to neutralize tax effect, the Act provides for suitable exclusion/exemption, from the ambit of expression 'transfer', under section 47(vii) which is also of deeming nature. In other words, as per the provisions of the Act, the consideration for issue of shares by the amalgamated company, in so far as the shareholder is concerned, is the shares held in the amalgamated company by way of transfer (except for the saving clause in s.47(vii) of the Act). A bare issue of shares contemplated in S. 56(viib) thus cannot be equated with a situation of transfer gathered from an intent implicit in S. 47(vii).

Thus, the consideration and the issue of shares envisaged by section 56(2)(viib) is not found compatible with scheme enacted, when seen from the perspective of revenue.

12. To summarise, in our view, the issue of shares at 'face value' by the amalgamated company (assessee) to the shareholders of amalgamating company in pursuance of scheme of amalgamation legally recognized in the Court of Law neither falls with scope & ambit of clause (viib) to S. 56(2), when tested on the touchstone of objects and purpose of such insertion i.e. to deem unjustified premiums charged on issue of shares as taxable income; nor does it fall in its sweep when such deeming clause is subjected to interpretative process having regard to the scheme of the Act.

13. In the wake of above delineation, we see no error in the conclusion drawn by the CIT(A) in this regard. The CIT(A) in our view, has rightly found inapplicability of S. 56(viib) in the facts of the present case. We thus decline to interfere with the conclusion so drawn by the CIT(A) whose order is under challenge by the revenue. Similarly, the cross objection filed by the Assessee which merely seeks to support the action of CIT(A) also does not call for separate adjudication and is infructuous.”

63. A similar view is held by the Kolkata Tribunal in the case of *ITO v. Kyal Developers* in ITA No.627/Kol/2012 dated 19.12.2013.

64. Respectfully following the above decisions of the Tribunal, we hold that there is no income arising in the hands of the assessee for the notional profit computed by the AO. Hence the addition is deleted.

65. The grounds of the assessee regard MAT credit and TDS credit are as follows:-

8.1. That the learned AO has erred in law and on facts in not allowing MAT credit as per provisions of section 115JAA of the Act.

8.2. That the learned AO has erred in law and on facts in granting TDS credit of INR 12,67,57,080 instead of INR 12,71,75,047.

66. We direct the AO to verify and allow the credits for MAT and TDS while recomputing the income of the assessee in accordance with the directions given in this order.

67. Ground No.8.3 with regard to interest u/s. 234B of the Act is consequential in nature.

68. Ground No.8.4 reads as follows:-

8.4. The learned AO / TPO and the learned DRP have erred in computing the ALP without considering the +/- 5 percent variation from the arm's length price as permitted under Section 92C(2) of the Act.

69. We direct the AO/TPO to recompute the ALP in accordance with the directions given in this order.

70. Ground No. 8.5 is not pressed and dismissed as such.

71. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 1st day of June, 2022.

Sd/-

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

(PADMAVATHY S)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 1st June, 2022.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.