IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI J BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Sandeep S Karhail (Judicial Member)]

ITA No. 1976/Mum/2021
Assessment year: 2013-14

TV 18 Broadcast Limited ……….…………….………… **Appellant**
1st Floor, Empire Complex, 414 Senapati Bapat Marg,
Lower Parel, Mumbai 400 013[PAN: AACCG3666M]

Vs.

Assistant Commissioner of Income Tax …………….…………………**Respondent**
Central 16(1) Mumbai

ITA No. 2501/Mum/2021
Assessment year: 2013-14

Assistant Commissioner of Income Tax …………….……………… **Appellant**
Central 16(1) Mumbai

Vs.

TV 18 Broadcast Limited ……….…………….………… **Respondent**
1st Floor, Empire Complex, 414 Senapati Bapat Marg,
Lower Parel, Mumbai 400 013 [PAN: AACCG3666M]

Appearances by:
Nimesh Vora *along with* **Moksha Mehta** *for the appellant*
Tejinder Pal Singh Anand *for the respondent*

Date of concluding the hearing : 30/05/2022
Date of pronouncing the order : 30/05/2022

O R D E R

Per Pramod Kumar VP

1. These cross appeals are directed against order dated 6th September 2021 passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s 144C of the Income Tax Act 1961, for the assessment year 2013-14.

2. We will take up appeal filed by the assessee first. In ground nos 1 to 5 of the appeal filed by the assessee, the grievances raised by the assessee are as follows:-

> *1. erred in determining the ALP by imputing interest in respect of OCD's at LIBOR plus 150 bps;*
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> *2. erred in disregarding the aforesaid transaction and in re-characterizing of OCDs as a loan simplicitor and consequently holding that interest at LIBOR+150 bps is chargeable;*
>
> *3. failed to appreciate that the investment by the appellant in form of OCDs to its AEs*
>
> *4. emanates out of ownership and is quasi equity in nature; failed to appreciate that the investments by way of OCDs is in the nature of shareholder activity which does not require any compensation*
>
> *5. failed to appreciate that these OCDs have in fact been converted into equity shares*

3. As we take up the above grounds of appeal, we also deem it appropriate to also take up the following grievances, which are interconnected with the above, raised in ground nos i and ii of the appeal filed by the Assessing Officer.

> *i. Whether on the facts and circumstances of the case and in law, the CIT(A) is correct in directing the AO/TPO in restricting the adjustment made on account of interest chargeable on Optionally Convertible Debentures (OCDs) confirmed by CIT(A) as debt to only Rs. 5,29,22,179/- by adopting ad-hoc LIBOR + 150bps as interest rate as against total adjustment of Rs. 8,14,18,736/- made by the TPO by adopting LIBOR + 262 bps as interest rate arrived after scientifically deriving the same by using Bloomberg Database.*
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> *ii. Whether on the facts and circumstances of the case and in law, Ld. CIT(A) is correct in ignoring the basic tenet of the transfer pricing as enshrined in section 92F(ii), as in a third party unrelated uncontrolled circumstances the assessee would have recovered the interest on OCD's confirmed by CIT(A) as debt considering the scientifically determined rate of interest rate on the outstanding amount during the year.*

4. Learned representative fairly agree that whatever we decide in the cross appeals for the assessment year 2012-13, which were heard alongwith these appeals, will follow here as well. Vide our order of even date, we have in our order for the assessment year 2012-13, observed as follow:-

> *4. To adjudicate on these grievances, raised by the parties, only a few material facts need to be taken not of. The assessee before us is a domestic company engaged in the business of television broadcasting, production of related media software, distribution services and allied activities. During the relevant previous year, the assessee subscribed to optionally convertible debentures issued by it's associated enterprises, namely IBN 18 Mauritius, to the tune of US $2,30,000. When this transaction came up for ascertainment of arm's length price before the Transfer Pricing Officer, it was pointed out by the assessee that issuance of interest free optionally convertible debenture is routinely done by many public listed companies, for their independent investors, and, as such, this is an arm's length transaction. It was also submitted that this transaction is in the nature of quasi capital, and as such the transaction being benchmarked as a borrowing transaction will not be appropriate. None of these submissions as also other detailed submissions however, impressed the Transfer Pricing Officer. He was of the view that debenture is a debt and should be benchmarked on that basis. He computed the weighted average cost of capital as an arm's length consideration for the optionally convertible debenture issued by the assessee company, and this rate, according to the TPO, worked out to 3.20% p.a. Granting reduction of .01% notional coupon rate of the assessee, the TPO computing an arm's length price adjustment of Rs. 2,46,40,344. Aggrieved by the resultant adjustment carried out by the Assessing Officer, assessee carried the matter in appeal before the learned CIT(A) but without complete success. Learned CIT(A) upheld the ALP adjustment in principle but rejected the quantum of adjustment. In his brief order, learned CIT(A) observed as follows:-*
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> *I have considered the facts of the case and submissions of the assessee. During the previous year under consideration, the Appellant Assessee has subscribed to OCD of its wholly owned subsidiary company, viz. IBN 18 (Mauritius) Ltd. The Appellant has submitted that the OCDs in question were ultimately converted into equity FY 2015-16.*
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> *In this regard, I am of a considered opinion that since the OCD was not converted during the financial year relevant to the captioned assessment year, the nature of funding remained as a loan only. Hence, the TPO is justified in treating the said OCD as a loan.*
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> *The TPO has benchmarked the interest at the rate of 3.2% by following search process on bloomberg's database. I agree with the contention of the Appellant Assessee that the TPO has not brought anything on record to show that interest is receivable on comparable OCD transaction. In view of the decision of Hon'ble Bombay High Court in the case of CIT v/s Lever India Exports Ltd. (ITA 1306/1307/1349 of 2014) and CIT 6 v/s Merck ltd (ITA No. 272 of 2014), the determination of ALP by TPO is rejected as being ad-hoc and arbitrary.*
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> *In view of fairness and justice, I direct the AO to adopt LIBOR plus 150 bps in view of my own decision in Appellant's sister concern's case, viz. Reliance Industries Limited for AY 2016-17, dated 17.02.2021.*

5. The assessee is not satisfied and is in further appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We find that the issue in appeal is squarely covered, in favour of the assessee, by a coordinate bench decision in the case of Cadila Healtcare Ltd. vs ACIT [(2017) 80 taxamann.com 24 (Ahd)] wherein speaking through one of us, i.e. the Vice President, the co-ordinate bench had observed as follows:-

10. There is no dispute that the transactions in question are not of the transactions of lending money to the associated enterprises. The amounts advanced to the AEs are attached with the obligation of the AEs to issue share capital, in case the assessee exercise option for the same, on certain conditions, which are admittedly more favourable, and at an agreed price, which is admittedly much lower, vis-à-vis the conditions and prices which independent enterprise would normally agree to accept. The lending is thus in the nature of quasi capital in the sense that substantive reward, or true consideration, for such a loan transaction is not interest simplictor on amount advanced but opportunity to own capital on certain favourable terms. Contrast this reward of owning the capital in the borrower entity with interest simplictor, which is typically defined as "the reward of parting with liquidity for a specified period" (Prof Keynes) or as "a payment made by the borrower of capital by virtue of its productivity as a reward for his capitalist's abstinence" (Prof Wicksell). However, in the case of transactions like the one before us, there is something much more valuable which is given as a reward to the lender and that valuable thing is the right to own capital on certain favourable terms. Therefore, the true reward, as we have noted earlier, is the opportunity and privilege to own capital of the borrower on certain favourable terms. It is for this reason that the transactions before us belong to a different genus than the act of simply giving the money to the borrower and fall in the category of 'quasi capital'.

11. As for the connotations of 'quasi capital', in the context of determination of arm's length price under transfer pricing regulations, we may refer to the observations made by a coordinate bench of this Tribunal- speaking through one of us (i.e. the Accountant Member), in the case of Soma Textile & Industries Ltd Vs ACIT [(2015) 154 ITD 745 (Ahd)], as follows:

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

6. Hon'ble Delhi High Court, in the case Chryscapital Investment Advisors India Ltd Vs ACIT [(2015) 56 taxmann.com 417 (Delhi)], has begun by quoting the thought provoking words of Justice Felix Frankfurter to the effect that "A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas". The reference so made to the words of Justice Frankfurter was in the context of the concept of "super profits" but it is equally valid in the context of concept of "quasi capital" also. As in the case of the super profits, to quote the words of Their Lordships,

"many decisions of different benches of the ITAT indicate a rote repetition (in the words of Felix Frankfurter J, quoted in the beginning of this judgment a "lazy repetition") of this reasoning, without an independent analysis of the provisions of the Act and the rules", the same seems to be the position with regard to "quasi capital". There are several decisions of this Tribunal, including in the cases of Perot Systems TSI Vs DCIT [(2010) 130 TTJ 685 (Del)]., Micro Inks Ltd Vs ACIT [(2013) 157 TTJ 289 (Ahd)], Four Soft Pvt Ltd Vs DCIT [(2014)149 ITD 732 (Hyd)], Prithvi Information Solutions Pvt Ltd Vs ACIT [(2014) 34 ITR (Tri) 429 (Hyd)] , which refer to the concept of 'quasi capital' but none of these decisions throws any light on what constitutes 'quasi capital' in the context of transfer pricing and its relevance in ascertainment of the arm's length price of a transaction. Lest we may also end up contributing to, as Hon'ble Delhi High Court put it, "rote repetition of this reasoning without an independent analysis of the provisions of the Act and the Rules", let us take briefly deal with the connotations of 'quasi capital', and its relevance, under the transfer pricing regulations.

7. The relevance of 'quasi capital', so far as ALP determination under the transfer pricing regulation is concerned, is from the point of view of comparability of a borrowing transaction between the associated enterprises.
8. It is only elementary that when it comes to comparing the borrowing transaction between the associated enterprises, under the Comparable Uncontrolled Price (i.e. CUP) method, what is to be compared is a materially similar transaction, and the adjustments are to be made for the significant variations between the actual transaction with the A E and the transaction it is being compared with. Under Rule 10B(1)(a), as a first step, the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified, and then such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the o pen market. Usually loan transactions are benchmarked on the basis of interest rate applicable on the loan transactions simplictor which, under the transfer pricing regulations, cannot be compared with a transaction which is something materially different than a loan simplictor, for example, a non-refundable loan which is to be converted into equity. It is in this context that the loans, which are in the nature of quasi capital, are treated differently than the normal loan transactions.

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

that is what was decisive so far as determination of the arm's length price of such transactions was concerned. The reward for time value of money in these cases was opportunity to subscribe to the capital, unlike in a normal loan transaction where reward is interest, which is measured as a percentage of the money loaned or advanced.

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

8. While the learned Transfer Pricing Officer had discussed, at length, nature of 'debenture' being a debt instrument, what he has missed out is the fact the character of an optionally convertible debenture is materially different vis-à-vis a debenture simplicitor, and that it's the opportunity to subscribe to equity which, in such a case, becomes pre-dominant motive for subscription of the optionally convertible debenture. There is not even a dispute that the OCD's in question have been subsequently been converted into equity capital at par value. The actual value of OCD being in the convertibility of OCD in the equity capital is thus not even in doubt. The very foundation of the impugned adjustment thus initiated in law as elaborately discussed in the above judicial precedent. In view of these discussions, and being in considered agreement with the views of the co-ordinate bench- as reproduced above, we uphold the plea of the assessee and delete the impugned ALP adjustment of Rs. 2,46,40,344. In this view of the matter, grievances raised by the Assessing Officer, which are only on quantification of the ALP, have been rendered infructuous.

9. In the result, ground nos 1 to 5 of the assessee's appeal are allowed and ground nos. vi and vii in the appeal filed by the Assessing Officer are dismissed as infructuous.

5. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench in assessee's own case. Respectfully following the same, we uphold the plea of the assessee. The assessee gets the relief accordingly.

6. In the result, ground nos 1 to 5 of the assessee's appeal are allowed and ground nos. i and ii in the appeal filed by the Assessing Officer are dismissed as infructuous.

7. Ground nos 6, 7 and 8 in the appeal filed by the assessee, in view of our findings above are rendered academic and do not call for any adjudication at this stage.

8. In ground nos. iii, iv & v the Assessing Officer has raised the following grievance:-

> *(iii) Whether on the facts and in the circumstances of the case and as per law, the learned CIT(A) has erred in holding that no disallowance u/s. 14A of the I.T Act read with Rule 8d(2)(ii) of I.T Rules on account of interest disallowance is required, without taking into consideration the fact that the funds of assessee need to be considered as 'mixed one' and accordingly the interest expenditure relatable to activity of investment in shares/mutual need to be disallowed u/s. 14A r.w.r. 8D(2)(ii).*
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> *(iv) Whether on the facts and in the circumstances of the case and as per law, the learned CIT(A) has erred in ignoring the fact that-as per the provisions of Rule 8D(2)(ii), in case the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular income of receipt, the disallowance out of interest expense has to be computed as per the procedure laid down in Rule 8D(2)(ii).*
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> *(v) Whether on the facts, in the circumstances of the case and as per law, the Learned CIT(A) has erred in excluding the value of investments yielding income from AOP M/s. IBN18 Trust for computing 14A disallowance as per Rule 8D(2) (iii) of the I.T. rules, without appreciating the fact that the said investment are too forming part of the assessee's books of account and the income yielded thereon has been claimed as exempt income not forming part of total income of the assessee.*

9. So far as ground nos iii to v are also covered by several decisions in assessee's own case including the order dated 19.06.2019 for assessment year 2008-09 wherein the co-ordinate bench observed as follows:

> *122. We have heard the rival submissions, perused the orders of the Authorities below. In so far as the disallowance under Rule 8D2(ii) of I.T. Rules in respect of interest is concerned, it is the submission of the assessee that assessee has own and interest free funds much more than the investments made, therefore, no disallowance is warranted towards interest. This Bench following the decision of the Hon'ble Jurisdictional High Court in the case of HDFC Bank Limited (supra) and Reliance Utilities and Power Ltd (supra) consistently holding that if the assessee has sufficient own and interest free funds for making investments no disallowance is required under Rule 8D(2)(ii) of I.T. Rules towards interest expenditure. This Bench following the decision of the Special Bench of Delhi in the case of Vireet Investment Pvt. Ltd., (supra) consistently holding that only those investments which yielded dividend income should be considered for disallowance under Rule 8D(2) (ili) of I.T. Rules. In the case of M/s.*

Revashanakar Gems Ltd (supra) on identical situation the Coordinate Bench held as under:

> *"6 We have heard the rival submissions, perused the orders of the authorities below. The contention of the assessee that, the Capital Reserves and interest free funds are much more than the investments have to be examined by the Assessing Officer. It is true that the Hon'ble Jurisdictional High Court in the cases of CIT v. HDFC Bank Lid (supra) and CIT v. Reliance Utilities Power Limited (supra) held that, if assessee had adequate interest free funds available with it, no disallowance needs to be made under Rule 8D2(i). In the circumstances, we remit this issue to the file of the Assessing Officer who shall examine the contentions of the assessee that the interest free funds are much more than the investments. If the submissions of the assessee are found to be correct, no disallowance under Rule 8D2(ii) is required in view of the decisions of the Hon'ble Jurisdictional High Court in the cases of CIT v. HDFC Bank Lid and CIT v. Reliance Utilities Power Limited (supra). Similarly, the Special Bench in the case of ACIT v. Vireet Investments Private Limited held that only those investments which yielded dividend income should be considered for disallowance under Rule 8D2(in). Thus, respectfully following the Special Bench decision, we direct the Assessing Officer to recompute the disallowance under Rule 8D2(ii) following the Special Bench. Accordingly, we set- aside this issue to the file of the Assessing Officer with the above observations. This ground of appeal is allowed for statistical purposes.*

123. Respectfully following the said decision of the Hon'ble Jurisdictional High Court, we hold that when assessee has sufficient own and interest free funds for making the investments no disallowance is warranted under Rule 8D(2) (ii) of I.T. Rules. Subject to verification the claim of the assessee is allowed. Thus, the Assessing Officer is directed to verify the claim of the assessee and recompute the disallowance u/s. 14A of the Act if any and the income for the year accordingly.

10. We see no reasons to take any other view of the matter the co-ordinate bench. Respectfully following the co-ordinate bench, we confirm the action of the learned CIT(A) and decline to interfere in the matter.

11. Ground nos. iii to v are thus dismissed.

12. In ground nos. vi & vii the Assessing Officer has raised the following grievances:-

vi. Whether on the facts, in the circumstances of the case and as per law, the Learned CIT(A) was justified in directing AO to delete 14A disallowance from computation of books profit u/s. 115JB relying on decision of special bench of ITAT in the case of Vireet Investment Pvt. Ltd. 9165 ITD 27 Del SB) which was not accepted and the appeal of the Revenue was dismissed by the High Court due to lower tax effect.

vii. Whether on the facts, in the circumstances of the case and as per law, the learned CIT(A) is justified in holding that no adjustment to book profit u/s. 115JB should be made on account of expenditure related to any income to which section 10 (other section 10(38), Section 11 and section 12) apply without considering the decision of the Hon'ble Apex Court in the case of Apollo Tyres V/s CIT [2002] 255 ITR 273 holding that the AO is empowered to make upward adjustment as mandated in Explanation to section 115J which apply mutatis mutandis to provisions of section 115JB.

13. Learned representatives fairly agree that this issue is covered, in favour of the assessee, by a special bench decision in the case of ACIT vs Vireet Investment Pvt Ltd. [(2017) 82 taxmann.com 415 (Del SB)]. We, therefore, approve the conclusion arrived at by the learned CIT(A) and decline to interfere in the matter.

14. Ground nos. vi & vii are also, therefore, dismissed.

15. In ground no. viii the Assessing Officer has raised the following grievance:-

viii. Whether on the facts, in the circumstances of the case and as per law, the learned CIT(A) has erred in deleting the expenses incurred on account of Employee Stock Option Plan Scheme holding same are revenue expenditure allowable as deduction u/s. 37 of the I.T. Act.

16. Learned representatives fairly agree that this is a legacy issue and is fully covered by decisions of the co-ordinate bench in assessee's own cases for the assessment years 2008-09 to 2011-12. In the co-ordinate bench's order dated 19.06.2019 for the assessment year 2008-09 it has been observed as follows:-

130. Ground No.3 of the grounds of appeal is in relation to deleting the disallowance made by the Assessing Officer in respect of ESOP expenses incurred by the assessee treating such expenses as capital expenditure.

131. This issue has been decided by us while disposing of the appeal of the assessee namely M/s. Television Eighteen India Ltd. in ITA No. 4545/Del/2014 Vide Para Nos. 21 to 35 for the A.Y. 2008-09. The decision rendered therein shall apply mutatis mutandis to the appeal under consideration to this assessee also. Following the above said order, we sustain the order of the Ld.CIT(A) in deleting the ESOP expenses allowing the same as revenue expenditure. Ground raised by the Revenue is dismissed. We order accordingly.

132. In the result, appeal of the Revenue is dismissed.

17. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench in assessee's own case. Respectfully following the same, we uphold the plea of the assessee. The assessee gets the relief accordingly.

18. Ground no (viii) is thus dismissed.

19. In the result, the appeal filed by the Assessing Officer is dismissed in the terms indicated above.

20. To sum up, while appeal of the assessee is partly allowed in the terms indicated above, the appeal filed by the Assessing Officer is dismissed. Pronounced in the open court today on the 30th day of May 2022.

Sd/-	Sd/-
Sandeep S Karhail	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 30th day of May, 2022

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai