IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 2308/MUM/2016
(Assessment Year: 2011-12)

The Indian Hotels Company Limited,
Mandlik House, 3rd Floor,
Mandlik Road, Colaba, Mumbai - 400001
[PAN:AAACT3957G] ..... Appellant

The Deputy Commissioner of Income Tax, Vs
Circle 2(2)(1), Aaykar Bhavan,
M.K. Road, Mumbai - 400020 ..... Respondent

ITA No. 3022/MUM/2016
(Assessment Year: 2011-12)

The Deputy Commissioner of Income Tax,
Circle 2(2)(1),
Room No. 545, Aayakar Bhavan,
M.K. Road, Mumbai - 400020 ..... Appellant

M/s The Indian Hotels Company Limited, Vs
Mandlik House, 3rd Floor,
Mandlik Road, Colaba, Mumbai - 400001 ..... Respondent
[PAN:AAACT3957G]

Appearances
For the Appellant/Assessee : Sh. Kanchan Kaushal, Sh. Pratik Shah & Amol Mahajan
For the Respondent/Department : Dr. Yogesh Kamat

Date of conclusion of hearing : 17.11.2022
Date of pronouncement of order : 29.11.2022

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. These cross appeals are directed against the final Assessment Order dated, 26.02.2016 passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter

referred to as 'the Act'] for the Assessment Year 2011-12, as per directions issued by Dispute Resolution Panel-II, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act on 28.12.2015.

2. The Assessee is a domestic company engaged in the business of running hotels and resorts. The Assessee filed return of income for the Assessment Year 2011-12 on 30.11.2011 declaring loss of INR 2,79,87,412/- and paid tax under Section 115JB of the Act at the book profits of INR 1,05,29,82,190/-. The case of the Assessee was selected for scrutiny. During the assessment proceeding, the Assessing Officer noted that the Assessee had entered into International Transactions with its Associated Enterprises (AEs) and therefore, a reference under Section 92CA(3) of the Act was made to the Transfer Pricing Officer (TPO) for determination of Arms Length Price (ALP) of the International Transactions. The TPO, vide order dated 30.01.2015, passed under Section 92CA(3) of the Act proposed aggregate transfer pricing adjustments of INR 179,61,83,140/- which was incorporated by the Assessing Officer in the Draft Assessment Order, dated 31.03.2015 passed under Section 143(3) read with Section 144C of the Act. The Assessing Officer also proposed (a) disallowance of INR 8,55,98,057/- under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as 'the Rules') in addition to suo-moto disallowance of INR 4,22,01,943/- offered by the Assessee, (b) a disallowance of INR 32,73,14,212/- under Section 36(1)(iii) of the Act, (c) a disallowance of credit card commission expenses of INR 4,22,19,634/- claimed by the Assessee for failure to deduct tax invoking provisions of Section 40(a)(ia) of the Act, and (d) disallowance of advertisement

expenditure of INR 3,46,25,000/-. During the assessment proceedings, vide letter dated 03.03.2015, the Assessee had claimed notional exchange loss on revaluation of shareholders deposits which was also denied by the Assessing Officer.

3. The Assessee filed objections before Dispute Resolution Panel-II, Mumbai (hereinafter referred to as 'the DRP') against the aforesaid Draft Assessment Order which were disposed off vide order, dated 28.12.2015 passed under Section 144C(5) of the Act. In conformity with the directions issued by the DRP, the Assessing Officer passed the Final Assessment Order on 26.02.2016 under Section 143(3) read with Section 144C of the Act after making transfer pricing adjustment of INR 68,68,27,745/- as against transfer pricing adjustment of INR 179,61,83,140/- proposed in Draft Assessment Order. The Assessing Officer also made disallowance/addition of INR 8,55,98,057/- under Section 14A of the Act read with Rule 8D of the Rules as proposed in the Draft Assessment Order. The DRP, however, deleted the disallowance of INR 32,73,14,212/- under Section 36(1)(iii) of the Act and the disallowance of credit card commission expenses of INR 4,22,19,634/- proposed by the Assessing Officer in the Draft Assessment Order. Being aggrieved the Revenue has challenged the deletion of the aforesaid disallowance of INR 32,73,14,212/- under Section 36(1)(iii) of the Act, disallowance of INR 4,22,19,634/- under Section 40(a)(ia) of the Act as well as deletion/reduction of the transfer pricing adjustment in appeal before the Tribunal. Since the Appellant was not satisfied by the relief granted by the DRP, the Assessee has also preferred appeal before the Tribunal challenging the Final Assessment Order, dated 26.02.2016,

passed under Section 143(3) read with Section 144C(13) of the Act.

4. When the matter was taken up for hearing the Learned Authorised Representative for Appellant submitted that the Tribunal has disposed off the cross-appeals for the Assessment Year 2010-11 [ITA No. 2348/Mum/2015 pronounced on 26.09.2022]. Most of the issues raised in the present appeal are identical and therefore, covered by the aforesaid decision of the Tribunal. Learned Departmental Representative also fairly agreed that there is no change in facts and circumstances, and the most of the issues stood covered by the decisions of the aforesaid decision of the Tribunal. However, he submitted that he would like to make additional submission in relation to some of the issues raised in the present appeal.

ITA No. 2308/Mum/2016 (Appeal by Assessee)

5. The Assessee has raised 12 grounds of appeal. Ground No. 1 is general in nature. Ground No. 2 to 7 are directed against the transfer pricing adjustments whereas Ground No. 8 to 10 are directed against the corporate tax additions/disallowances. Ground No. 11 pertains to short grant of credit of tax deducted at source and tax collected at source amounting to INR 2,06,85,052/-. Ground No. 12 pertains to short grant interest under Section 244A of the Act. In addition to the above, vide letter, dated 06.06.2022, the Assessee has also raised the following additional grounds of appeal:

"Additional Ground No. 1:

On the facts and in the circumstances of the case and in law, the order dated 30 January 2015 passed by the Learned Transfer Pricing Officer (Ld. TPO) under section 92CA of the Act

is beyond the time limit prescribed under section 92CA(3A) r.ws 153 of the Income-tax Act, 1961 (Act) thus making the transfer pricing order illegal, bad in law, null and void and liable to be quashed.

Additional Ground No. 2

On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA(3A) r.w.s 153 of the Act, the action of the Assessing Officer in passing the draft assessment order dated 31 March 2015 by invoking section 144C of the Act is without jurisdiction and thus all proceedings consequent to the draft assessment order are also illegal and bad in law and liable to be quashed.

Additional Ground No. 3

On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA(3A) r.ws 153 of the Act, consequently, the final assessment order dated 26 February 2016 is also barred by limitation as prescribed under section 153 of the Act, thus making the final assessment order illegal, bad in law, null and void and liable to be quashed. It is humble prayer of the Appellant that the transfer pricing order, draft assessment order and the final assessment order are bad in law, null and void and liable to be quashed.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

6. We have heard both sides on admitting the additional grounds and are of the view that the additional grounds raised by the Assessee are legal/jurisdictional grounds which do not require examination of any facts not already on record. Accordingly, in view of the judgment of the Hon'ble Supreme Court in the case

of National Thermal Power Co. Ltd. vs. CIT: 229 ITR 383, the additional grounds raised by the Assessee are admitted.

7. Advancing arguments on behalf of the Assessee the Ld. Authorised Representative pressed into service the Additional Ground No.1 raised by the Assessee and submitted that the order passed by the Transfer Pricing Officer (TPO) on 30.01.2015 is barred by limitation in view of the judgment of the Hon'ble Madras High Court in the case of M/s Pfizer Healthcare India Pvt. Ltd. & Ors. Vs. DCIT, passed on 07.09.2020 in Writ Petition No. 32699 of 2019 confirmed by the Division Bench of the Hon'ble Madras High Court in WA No. 1120 of 2021 & ors. (dated 31.03.2022). He submitted that the limitation for passing order by the TPO under Section 92CA(3A) of the Act expired on 29.01.2015 whereas the order has been passed by the TPO on 30.01.2015. He further submitted that the judgment of the Hon'ble Madras High Court has been followed by the Tribunal in the case of (a) ECL Finance Ltd. vs. ACIT: ITA No. 899/M/2018, dated 22.09.2021, and (b) M/s Emerson Electric (Company) India Pvt. Ltd. vs. DCIT: ITA No. 933/M/2021, dated 18.05.2022. The Ld. Authorised Representative for the Assessee submitted that as per the aforesaid judicial precedents 31.03.2015 is to be excluded and therefore, the period of 60 days is to be computed by taking 30 days of March, 28 days of February and 2 days of January (i.e. 30th and 31st day of January) since TPO was under obligation to pass order under Section 92CA(3) of the Act at any time before 60 days prior to the date on which the period of limitation referred to in Section 153/153B for making the order of assessment/reassessment expires. Accordingly, the period of limitation prescribed under Section 92CA(3A) of the Act expired on 29.01.2015. Therefore, the order passed by the TPO is barred

by limitation. He further submitted that identical issue stands decided in favour of the Appellant in the appeal filed by the Appellant for the Assessment Year 2010-11 [ITA No. 2348/Mum/2015, pronounced on 26.09.2022]

8. Per contra, the Ld. Departmental Representative vehemently contended that the order passed by the TPO is within limitation. He submitted that the order has been passed by the TPO on 30.01.2015 which is within the limitation prescribed under Section 92CA(3) of the Act, i.e. 60 days prior to the limitation expiry date of 31.03.2015. According to him, the period of 60 days is to be computed by taking 31 days of March, 28 days of February and 1 day of January.

9. We note that this issue stands decided in favour of the Assessee in ITA No. 2348/Mum/2015 preferred by the Assessee for the Assessment Year 2011-12. The relevant extract of the judgment read as under:

> *"7. We have heard the rival contention and perused the material on record including the judicial precedents cited during the course of hearing. We note that in the case of M/s Emerson Electric (Company) India Pvt. Ltd. vs. DCIT: ITA No. 933/M/2021, dated 18.05.2022, in the identical facts, the Tribunal has, following the above decision of the Hon'ble Madras High Court, decided the issue in favour of the assessee holding as under:*
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> > *"11. In order to determine if the order dated 01.11.2019 passed by the Ld. TPO is barred by limitation as contended by the Ld. AR for the assessee, we would advert to the provisions contained under section 92CA(3) read with section 153 of the Act.*
> >
> > *12. Undisputedly, sub-section (3A) to section 92CA has been inserted w.e.f. 01.06.2007 providing time limit for the Transfer Pricing Officer to pass the order i.e. within a period of 60 days prior to the date of completion of assessment as per section 153. So, under section 92CA (3A) read with section 153, Ld. TPO was required to pass the order within the period of 60*

days prior to the date on which the period of limitation referred to in section 153 expires i.e. 21 months.

13. Undisputedly the assessment order was passed on 01.11.2019 whereas the Ld. TPO was required to pass the order within 60 days prior to the date of which period of limitation referred to in section 153 of the Act expires.

14. Now the question arises as to how the period of 60 days prior to the date of transfer pricing order i.e. 01.11.2019 is to be computed. Hon'ble Madras High Court in case of M/s. Pfizer Healthcare India Pvt. Ltd. (supra) while dealing with the issue held that for computing the period of 60 days, the last date as per section 153 should be excluded. Operative part of the judgment is extracted for ready perusal as under :

> *"30. Now, coming to the question of how the 60 day period is to be computed, the critical question would be whether the period of 60 days would be computed including the 31st of December or excluding it. Section 153 states that no order of assessment shall be made at any time after time expiry of 21 months from the end of the assessment year in which the income was first assessable. The submission of the revenue is to the effect that limitation expires only on 12 am of 01.01.2020. However, this would mean that an order of assessment can be passed at 12 am on 01.01.2020, whereas, in my view, such an order would be held to be barred by limitation as proceedings for assessment should be completed before 11.59.59 of 31.12.2019. The period of 21 months therefore, expires on 31.12.2019 that must stand excluded since Section 92CA(3A) states 'before 60 days prior to the date on which the period of limitation referred to Section 153 expires'. Excluding 31.12.2019, the period of 60 days would expire on 01.11.2019 and the transfer pricing orders thus ought to have been passed on 31.10.2019 or any date prior thereto. Incidentally, the Board, in the Central Action Plan also indicates the date by which the Transfer Pricing orders are to be passed as 31.10.2019. The impugned orders are thus, held to be barred by limitation."*

15. Identical issue has been decided by the co-ordinate Bench of the Tribunal in case of ECL Finance Ltd. vs. ACIT in ITA No.899/M/2018 order dated 22.09.2021 and in case of Louis Dreyfus Commodities India Pvt. Ltd. vs. DCIT in ITA No.2381/Del/2014 order dated 11.03.2021 in favour of the assessee by following M/s. Pfizer Healthcare India Pvt. Ltd. (supra) case rendered by Hon'ble Madras High Court.

16. In view of what has been discussed above and following the order passed by the Hon'ble Madras High Court in case of M/s. Pfizer Healthcare India Pvt. Ltd. (supra) and order passed by the co-ordinate Bench of the Tribunal in case of ECL Finance Ltd. (supra) and Louis Dreyfus Commodities India Pvt. Ltd. (supra) on the identical issue, we are of the considered view that as per limitation prescribed under section 153 of the Act that assessment order was required to be passed within a period of 21 months from the end of assessment year i.e. A.Y. 2016-17 and a further period of 12 months is to be added in case reference is made under section 92CA of the Act to the Ld. TPO, meaning thereby the period of 60 days expires to pass the transfer pricing order on 31.10.2019 whereas the transfer pricing order has been passed in this case on 01.11.2019 i.e. beyond the period of 60 days, hence barred by limitation.

17. Since the order passed by the Ld. TPO is held to be barred by limitation the same is illegal, null and void ab-initio, hence quashed. Consequently, the assessment order passed by the AO, qua transfer pricing adjustment only, is also without jurisdiction and as such is not order in the eyes of law hence quashed. Keeping in view the findings returned by the Bench on legal issue we deem it not necessary to go into grounds raised by the assessee on merit. Consequently, appeal filed by the assessee is allowed. Ground No. 2 is allowed." (Emphasis Supplied)

8. Respectfully following the above decision of the Co-ordinate Bench of the Tribunal, we hold that the order passed by the Transfer Pricing Officer on 30.01.2014 is barred by limitation and therefore, the transfer pricing adjustments made in the Final Assessment Order, dated 26.02.2015 are deleted. Additional Ground No. 1 raised by the Assessee is allowed and Ground No 2 to 7 pertaining to the transfer pricing issues raised in the appeal are disposed of as being infructuous." (Emphasis Supplied)

10. Both the sides agreed that there is no change in the facts and circumstances of the case. Therefore, respectfully following the above decision of the Tribunal [ITA No. 2348/Mum/2015, dated 26.09.2022] preferred by the assessee for the Assessment Year 2011-12, in the case of the Appellant, Additional Ground No. 1 raised by the Assessee in the present appeal is allowed. Ground

No 2 to 7 pertaining to the transfer pricing issues are disposed of as being infructuous.

Ground No. 8

11. *"8. On the facts and in the circumstances of the case and in law, the learned AO, under the directions issued by the Hon'ble DRP, erred in making disallowance of Rs. 12,78,00,000 under Section 14A of the Income-tax Act, 1961 ('the Act').*

It is prayed that the learned AO be directed to compute the disallowance under Section 14A of the Act as per law."

12. The Ground No. 8 raised by the Assessee is directed against disallowance of INR. 8,55,98,057/- made under Section 14A of the Act read with Rule 8D of the Rules in addition to suo-moto disallowance of INR 4,22,19,634/- offered by the Assessee.

13. The Ld. Authorised Representative for the Assessee submitted that the suo moto disallowance of INR 4,22,19,634/- was offered by the Assessee and therefore, no further disallowance was warranted. Without prejudice to the aforesaid, he submitted that while computing the average value of investment for the purpose of computing disallowance as per Rule 8D(2)(iii) of the Rules the investments which did not yield any exempt income should be excluded as per the decision of the Special Bench of the Tribunal in the case of ACIT Vs Vireet investments Private Limited: 58 ITR(T) 313 (Delhi - Trib.) (SB). He further submitted that identical issue stands decided in favour of the Appellant in the appeal filed by the Appellant for the Assessment Year 2010-11 [ITA No. 2348/Mum/2015, pronounced on 26.09.2022]

14. Per contra, the Learned Departmental Representative relied upon the Final Assessment Order as well as the directions

issued by the DRP. The Learned Departmental Representative, in addition, submitted in view of the amendments introduced by the Finance Act 2022, the law stands amended retrospectively. While putting emphasis on the expression “shall be deemed to have always applied” used in the Explanation to Section 14A of the Act inserted by the Finance Act 2022, the Learned Departmental Representative submitted that the use of the aforesaid expression clearly brings out the intention of the legislature to give retrospective effect to the amendment. He submitted that the provisions contained in Section 14A of the Act are now to be interpreted taking into account the Explanation inserted by the Finance Act 2022. In response the Learned Authorised Representative for Appellant relied upon the decision of the Hon’ble Delhi High Court and submitted that in the case of Principal Commissioner of Income-Tax (Central) -2 Vs. M/s Era Infrastructure India Ltd: [ITA No. 204 of 2022, decided on 20.07.2022] the contention of the Revenue that amendments to Section 14A of the Act introduced by the Finance Act, 2022 shall have retrospective effect has been rejected.

15. We have considered the rival submissions and in view of the judgment of the Hon’ble Delhi High Court we are not inclined to accept the contention raised by the Revenue. We note that the Mumbai Bench of the Tribunal has, in the case of Assistant Commissioner of Income Tax- Circle 3(1)(1) Vs Bajaj Capital Ventures (P.) Ltd.: [2022] 140 taxmann.com 1 (Mumbai - Trib.)[29-06-2022] held that the amendments to Section 14A introduced by the Finance Act 2022 shall apply from Assessment Year 2022-23.

16. We note that this issue stands decided in favour of the Assessee in ITA No. 2348/Mum/2015 preferred by the Assessee for the Assessment Year 2011-11. The relevant extract of the judgment read as under:

> *"12. Having considered the rival submission, we find merit in the submission advanced on behalf of the Assessee that the benefit of decision of the Special Bench of the Tribunal in the case of Vireet investments Private Limited (supra) should be granted to the Assessee. Accordingly, we direct the Assessing Officer to verify the investment which yielded exempt income during the year and re-compute disallowance under Section 14A read with Rule 8D(2)(iii) of the Rules by taking into consideration only the investments which yielded exempt income during the previous year for the purpose of calculating Average Value of Investment. Ground No. 7 raised by the Assessee is, therefore, partly allowed."*

17. Respectfully following the above decision of the Tribunal in the case of the Appellant, Ground No. 8 raised by the Assessee in the present appeal is partly allowed. The Assessing Officer is directed to verify the investment which yielded exempt income during the year and re-compute disallowance under Section 14A read with Rule 8D(2)(iii) of the Rules by taking into consideration only the investments which yielded exempt income during the previous year for the purpose of calculating Average Value of Investment.

Ground No. 9

18. *"9. On the facts and in the circumstances of the case and in law, the learned AO, under the directions issued by the Hon'ble DRP, erred in not allowing deduction for foreign exchange loss amounting to Rs.10,40,00,000 on revaluation of shareholders deposits.*

It is prayed that the learned AO be directed to allow deduction for the foreign exchange loss of Rs.10,40,00,000 on revaluation of shareholders deposit.

19. During the previous year relevant to the Assessment Year 2011-12, the Assessee revalued Shareholders Deposit as on March 31, 2010 and debited the exchange loss on revaluation to Reserve Account in Balance Sheet instead of the Profit and Loss Account. In the return income for the Assessment Year 2011-12 the Assessee did not claim deduction of the said exchange loss as such exchange loss on revaluation was treated as capital in nature.

20. The Learned Authorised Representative for Assessee submitted that the assessing officer has been taxing the exchange gain on revaluation of Shareholders Deposit from AY 1998-99 to 2002-03 by treating the same to be revenue in nature. Therefore, during the assessment proceedings for the Assessment Year 2011-12, the Assessee had set up alternate plea that the exchange loss on revaluation of Shareholders' Deposits should be allowed as revenue deduction to the Assessee while assessing income for the Assessment Year 2011-12.

21. Learned Authorised Representative for Assessee, however, submitted that the CIT(A) in appeal by the Assessee for the Assessment Years 1998-99 to 2002-03 had overturned the decision of the assessing officer by holding that exchange gains on revaluation of Shareholders Deposits were capital in nature and therefore, not taxable. The decision of the CIT(A) was confirmed by the Tribunal vide order, dated 23.11.2012. Learned Authorised Representative for Assessee further submitted that the Appeal filed by the Revenue against the aforesaid order of the Tribunal was not admitted by the Hon'ble Bombay High Court and therefore, the issue is settled.

22. In view of the above submission advanced by the Learned Authorised Representative for Assessee, Ground No. 10 raised by the Assessee is dismissed since, admittedly, the very basis on which the Assessee had set up this alternative/without prejudice claim does not survive. Further, in our view the two pleas set up by the Assessee are not alternative but mutually destructive. While preparing return of income the Assessee has treated the exchange loss on revaluation of Shareholders' Deposits as capital in nature, during the assessment proceedings the Assessee has claimed the same to be Revenue in nature while retaining the stand that the exchange gain on revaluation of Shareholders' Deposits in earlier years is capital in nature. While there is no bar on taking any inconsistent or alternative pleas, mutually repugnant and contradictory pleas which are destructive of each other cannot be permitted to be urged simultaneously.

Ground No. 10

23. *"11. On the facts and in the circumstances of the case and in law, the learned AO erred in computing the amount of MAT credit to be carried forward without including surcharge and cess.*

It is prayed that the learned AO be directed to compute the amount of MAT credit to be carried forward including surcharge and cess."

Ground No. 10 pertains to computation of MAT Credit. We have considered the rival submissions. Assessing Officer is directed to re-computed the amount of MAT Credit to be carried forward, after including surcharge and cess as per law.

Ground No. 11

24. *"11. On the facts and in the circumstances of the case and in law, the learned AO erred in not granting credit for Tax Deducted at Source*

(TDS) and Tax Collected at Source (TCS) amounting to Rs. 2,06,85,052.

It is prayed that the learned AO be directed to grant credit for TDS and TCS amounting to Rs.2,06,85,502."

25. In Ground No. 11 the Assessee seeking directions for grant of credit of Tax Deducted at Source (TDS) and Tax Collected at Source (TCS) amounting to INR 2,06,85,502/-. The issue is remanded to the file of Assessing Officer. The Assessing Officer is directed to verify the amount of TDS/TCS credit available and grant credit for the same to the Assessee as per law.

Ground No. 12

26. *"12. On the facts and in the circumstances of the case and in law, the learned AO erred in short granting of interest under Section 244A of the Act.*

It is prayed that the learned AO be directed to compute interest under Section 244A of the Act upto the date of issue of refund and after considering credit for TDS and TCS as prayed in Ground No. 11 above."

27. Ground No 12 pertains to levying of excess interest under Section 244A of the Act. The Assessing Officer is directed to re-compute interest under Section 244A of the Act as per law after giving credit for the correct amount of TDS and TCS in terms of directions issued in paragraph 25 above.

Additional Ground No. 2&3

28. Additional Ground No. 2&3 are disposed off as not pressed as no arguments were advanced on the same during the course of hearing.

ITA No.3022/Mum/2015 (Department's Appeal)

29. The Revenue has raised 7 grounds of appeal which are taken up in seriatim hereinafter.

Ground No. 1 to 5

30. *"1. The order of the DRP is opposed to law and facts of the case.*

2. On the facts and circumstances of the case and in law, the Hon. DRP has erred in directing the AO to adopt a rate of 1.5% to arrive at Arm's Length Price on account of guarantee fees to be charged by the assessee to the Associated Enterprises for letter of comfort issued, without appreciating that in the A.Y. 2007-08 & 2008-09, adjustment at the rate of 3% had been upheld by the Hon. DRP.

3. On the facts and circumstances of the case and in law, the Hon. DRP in directing the AO to adopt a rate of 1.5% to arrive at Arm's Length Price on account of guarantee fees in respect of the guarantee issued by the assessee for the borrowing made by its Associated Enterprises without appreciating that in the AYrs 2007-08 and 2008-09, adjustment at the rate of 3% has been upheld by the Hon'ble DRP.

4. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in relying upon the decision of Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd., vide writ petition No. 871 of 2014 not appreciating the facts of this case are different in as much as that the investment in the instant case is out-bound as compared to the inbound investment in the cited case as such would have an impact on the cost of acquisition of the shares.

5. On facts and circumstances of the case and in law the Hon'ble DRP erred in relying upon the decision of Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd., vide writ petition No. 871 of 2014 not appreciating the facts that the investment made is more than ALP and is to be treated as

deemed loan and as such the decision in the cited case is not applicable to the facts of the present case."

31. Ground No. 1 to 5 raised by the Revenue in its appeal pertain to the transfer pricing adjustments. In view of our findings in paragraph 8-9 above, the same are disposed off as being infructuous since the order passed by the TPO has been held to be barred by limitation.

Ground No. 6

32. *"6 On facts and circumstances of the case and in law the Hon'ble DRP erred in directing the A.O. to delete the proposed disallowance of interest of Rs. 32.38 Crs u/s 36(1)(iii) of the Act without appreciating that on a similar issue the Department is in appeal before the Hon'ble Bombay High Court in assessee's own case for A.Y. 1998-99 to 2002-03, 2009-10 & 2010-11"*

33. During the assessment proceedings, vide order dated entry dated 20.02.2015 the Assessee was asked to explain why disallowance of interest should not be made under Section 36(1)(iii) of the Act since the Assessee was holding investment in overseas entities amounting to INR 1794.49 Crores in response thereto the Assessee filed reply dated 03.03.2015, however, not being satisfied with the explanation/submission of the Assessee, the Assessing Officer proposed a disallowance of proportionate interest of INR 32,73,14,212/- under Section 36(1)(iii) of the Act in the Draft Assessment Order. However, DRP allowed the objections filed by the Assessee against the aforesaid proposed disallowance of interest and therefore, no such addition was made in the Final Assessment Order. Being aggrieved, the Revenue is now in appeal before us. We note that identical ground raised by the Revenue in appeal for the Assessment Year 2010-11 was dismissed by the Tribunal vide

order, dated 26.09.2022 passed in ITA 2408/Mum/2015. The relevant extract of the aforesaid decision read as under:

37. *During the relevant previous year, the Assessee had claimed deduction for interest on borrowed funds amounting to INR 152.90 Crores. The Assessing Officer noticed that the Assessee had made investments in overseas entities of INR 1790.49 Crores consisting of investment of INR 1600.26 Crores International Hotels Management Services Inc. (IHMS) and investment of INR 190.23 Crores in Taj International Hotels HK Ltd. (TIHK). According to the Assessing Officer, the Assessee had utilized interest bearing funds to make aforesaid investments and therefore, the Assessing Officer proposed disallowance of proportionate interest amounting to INR 42.38 Crores in the Draft Assessment Order invoking provision of Section 36(1)(iii) of the Act. The Assessee filed objections before DRP against the proposed disallowance of interest under Section 36(1)(iii) of the Act. After considering the details submissions filed by the Assessee the DRP granted relief to the Assessee by directing deletion of the proposed disallowance under Section 36(1)(iii) of the Act and concluded as under:*

> *"10.5 Direction of DRP:- The submissions has been considered. The assessee being in the business of owning and operating hotels such investments are made for various commercial reasons during the course of business and for the business. The assessee earns management fees and dividend from investments. Similar claim have been allowed in earlier years by DRP. The disallowance is hence deleted."*

38. *Being aggrieved, the Revenue is in appeal before us.*

39. *The Ld. Departmental Representative submitted that the Revenue is in appeal before the Hon'ble Bombay High Court in assessee's own case for the Assessment Year 1998-1999 to 2002-03 wherein identical disallowance of interest under Section 36(1)(iii) of the Act was deleted. Referring to paragraph 10.1 of the order passed by the DRP on 29.12.2014 giving directions under Section 144C(5) of the Act, the Ld. Departmental Representative submitted that the Assessing Officer had disallowed interest of INR 42.38 Crores under Section 36(1)(iii) of the Act as interest bearing funds were used by the Assessee for making the investments instead of using the same for the purposes of business of the Assessee. Instead of making*

investments in Joint Ventures or subsidiaries, the Assessee could have made direct investment. The Assessee could have established branches outside India and in that case, profit of branches would have been taxable in India and deduction for the entire interest cost would have been allowed to the Assessee.

40. *Responding to the above contentions, the Ld. Authorised Representative for the Assessee reiterated the submissions made before the DRP. He submitted that the investments made by the Assessee were on account of commercial expediency and for the purpose of business as per the main objects contained in the Memorandum of Association of the Assessee Company. The investments were made with the object of owing/operating hotels and to help the Assessee expands its presence in international markets. Therefore, the disallowance of interest amounting to INR 42.38 Crores which was proposed by the Assessing Officer under Section 36(1)(iii) of the Act was correctly deleted by the DRP. In this regard, the Ld. Authorised Representative placed reliance on the following judgments/decisions:*

- *S.A. Builders Ltd. vs. CIT(Appeals) : [2007] 288 ITR 1*
- *CIT vs. Tulip Star Hotels Ltd. [2011] 338 ITR 482 (Delhi)*
- *CIT Mumbai-2 vs. The Indian Hotels Co. Ltd : order dated 27.03.2015 passed in ITA No. 1325/1334/1335/1656/1657/1658 of 2013*
- *DCIT vs. The Indian Hotels Co. Ltd: 92 ITD 97 (Mum)(TM)*
- *DCIT, Circle 2(2) vs. The Indian Hotels Co. Ltd: common order of the Mumbai Bench of the Tribunal dated 23.11.2012 passed in appeals for Assessment Year 1994-95, 1998-99 to 2002-03.*

41. *Further, placing reliance upon the judgment of the Hon'ble Bombay High Court in the case of CIT-7 Vs. Reliance Communication Infrastructure Ltd.: [2013] 260 CTR 159 (Bombay), the Ld. Authorised Representative for the Assessee submitted that the fact that borrowed funds were utilzised for making the investments would not disentitled the Assessee from claiming deduction for interest so long as the investment has been made on account of business expediency.*

42. *We have heard the rival contention and perused the material on record including the judicial precedents cited during the course of hearing. The Assessee has been able to demonstrate before the DRP as well as in the present appellate proceedings that the investments made by the Assessee in IHMS and TIHK were made on account of commercial expediency. The investments have been made for the purpose of business as per its main objects contained in the Memorandum of Association of the Assessee-Company. The said investments were made towards its objective of owning and operating hotels. Both the companies were primarily engaged in the business of owning equity interests in entities that own, operate and/or manage hotels and hospitality business and therefore, helped in furthering the business objectives of the Assessee.*

43. *We note that the Mumbai Bench of the Tribunal [Third Member Decision] in Appellant's own case for the Assessment Year 1989-90 [reported in (2005) 92 ITD 97 (Mum)(TM)] has held as under:*

> *"18. In the present case, the assessee has elaborately explained that on account of restrictions on investment in its hands to buy shares of other public limited companies from whom the assessee was receiving operation fees, the subsidiary company was used to buy above shares and for that purpose loan was advanced to the subsidiary. It was a measure of business prudency. The loan advanced helped the assessee to earn substantial amount of operating fees. In fact, it was more than 60% of total receipts. This was besides dividend to be received from the subsidiary. Having regard to all the circumstances and benefits to the parties, it was agreed that interest on advance be charged 6% per annum. This advance was made wholly and exclusively for the purpose of business and to earn income. I find lot of force in the above submissions. In fact the revenue authorities did not challenge above facts/background which clearly showed that advance was made for purpose of business. It was a measure of business prudency.*

44. *19. The other argument accepted by the learned Accountant Member and advanced before me was that the revenue authorities are not justified in prescribing how and in what manner the assessee should carry his business. Every assessee is master of his own affairs and is entitled, under the low, to take decision which would suit his interests. In the case of CIT v. Dalmia Cement (Bharat) Ltd. [2002] 254 ITR 377. Their Lordships noted the facts of the case as under:*

"So far as the disallowance of part of inerest is concerned it was submitted that when funds were available, the assessee without any reason permitted it to be continued with the CDL and paid interest to the financial institutions without charging anything from the CDL. The Tribunal did not accept the stand and held that the conclusions of the Commissioner of Income-tax (Appeals) were in order. On being moved for reference, the questions as set out above have been referred for the opinion of this court."

Their Lordships observed as under:

"An expenditure to which one cannot apply an empirical or subjective standard is to be judged from the point of view of a businessman and it is relevant to consider how the businessman himself treats a particular item of expenditure. The term "commercial expediency" is not a term of art. It means everything that serves to promote commerce and includes every means suitable to that end. In applying the test of commercial expediency, for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business the reasonableness of the expenditure has to be judged from the point of view of the businessman and not the Revenue [See CIT v. Walchand and Co. (P) Ltd. [1967] 65 ITR 381 (SC); J.K. Woollen Manufacturers u. CIT [1969] 72 ITR 622 (SC); Aluminimum Corporation of India Ltd. v. CIT [1972] 86 TTR 11 (SC) and CIT v. Panipat Woollen and General Mills Co. Ltd. [1976] 103 ITR 66 (SC)]."

45. *Above principles are fully applicable to the facts of the present case. Further there is nothing to show that agreement to advance loan was not bona fide entered into or was intended to divert income belonged to the assessee. The Assessing Officer while disallowing and making the addition in dispute, did not keep above legal principles in mind and applied subjective standards. The disallowance made is unjustified. I agree with the learned Accountant Member and uphold the deletion of the disallowance."*

46. *Following the above decision, in Assessee's own case for Assessment Year 1994-95 & 1998-99 to 2002-03, the Tribunal had deleted the disallowance of proportionate interest attributable to the advances given by the Assessee to its subsidiary/group companies at concessional interest rate or interest free and held as under:*

"We have heard the arguments of both the sides on this issue and also perused the relevant material on record. It is observed that the similar disallowance on account of interest attributable to the advances given by the assessee to its subsidiary company was made in the case of the assessee for the earlier years. In assessment year 1989-90, this issue was referred to a Third Member and vide the Third Member decision reported as DCIT vs. Indian Hotel Co. Ltd. in 92 ITD 97 (Mum) (TM), the same was decided in favour of the assessee by a majority view holding that the relevant advances having been made by the assessee to its subsidiary company wholly and exclusively for the purpose of its business, the disallowance of interest attributable to the said advance was not justified. Following the said Third Member decision for assessment year 1989-90, the Tribunal has consistently decided the similar issue in favour of the assessee in the subsequent years upto assessment year 1997-98. As the issue involved in the year under consideration as well as all the material facts relevant thereto are similar to that of the earlier years, we respectfully follow the decision rendered by the Tribunal in assessee's own case for the earlier years and uphold the impugned order of the learned CIT(Appeals) deleting the disallowance made by the AO on this issue. The relevant grounds of the Revenue's appeal for all the six years under consideration are accordingly dismissed."

47. *While the Ld. Departmental Representative submitted that the Revenue is in appeal before the Hon'ble Bombay High Court against the above decision of the Tribunal for the Assessment Years 1994-95, 1998-99 to 2002-03, the Assessee has placed on record order, dated 27.05.2012, passed by the Hon'ble Bombay High Court the case of the Assessee in appeal filed by the Revenue before the Hon'ble Bombay High Court for Years 1998-99 to 2002-03 [ITA No. 1325,1334,1335,1656,1657 & 1658 of 2013] wherein the Hon'ble High Court has declined to admit the appeals filed by the Assessee on the issue of disallowance of proportionate interest under Section 36(1)(iii) of the Act holding as under:*

"3. With the assistance of Mr. Suresh Kumar, we have perused the questions of law in Income Tax Appeal No.1325 of 2013 at pages 3 & 4 of the paper-book. In the case of same assessee, on similar question Nos.1 & 2, the Tribunal found that loans and advances given by the assessee company to its subsidiary company was raised for the assessment year 1989 90 and it was decided in favour of

the assessee. In the present case, we are concerned with the assessment years 1998-99 to 2002-03. The Tribunal has consistently applied the ratio of its decision rendered for assessment years 1989-90 and assessment year 1997-98. We do not find that there is any change in the factual position. The revenue may have preferred an appeal in this Court against the Tribunal's order for those assessment years, but no record of any appeal having been admitted on the questions of law proposed in the present appeal has been produced before us."

48. *In view of the above, we do not find any infirmity in the directions issued by the DRP under Section 144C(5) of the Act on 29.12.2014 and the Final Assessment Order, dated 26.02.2015, on this issue. Respectfully following the above decisions of the Tribunal in the case of the Assessee, we dismiss Ground No. 3 raised by the Revenue." (Emphasis Supplied)*

34. Both the sides agreed that there is no change in the facts and circumstances of the case. Therefore, respectfully following the above decision of the Tribunal in the case of the Appellant, Ground No. 6 raised by the Revenue is dismissed.

Ground No. 7

49. *"7. On facts and circumstances of the case and in law the Hon'ble DRP erred in holding that the second proviso to Section 40(a)(ia) is retrospective ignoring the fact that the second proviso to Section 40(a)(ia) has been inserted by the Finance Act 2012 w.e.f. 01.04.2013 and as such is operative only from Assessment Year 2013-14."*

35. In the Draft Assessment Order, the Assessing Officer had proposed disallowance of INR 16.80 Crores being credit card commission paid without deducting tax at source and therefore not allowable as deduction under Section 40(a)(ia) of the Act following the decision of DRP for the Assessment Year 2009-10. However, DRP allowed the objections filed by the Assessee against the aforesaid proposed disallowance of credit card

commission and therefore, no such addition was made in the Final Assessment Order. Being aggrieved, the Revenue is now in appeal before us. We note that identical ground raised by the Revenue in appeal for the Assessment Year 2010-11 was dismissed by the Tribunal vide order, dated 26.09.2022 passed in ITA 2408/Mum/2015 the relevant extract of which read as under:

48. *We note that the issue raised by the Revenue stands decided favour of the Assessee by the decision of the Tribunal in ITO (TDS) (OSD)-3(4) vs. The Indian Hotels Company Ltd.: ITA No. 5419 and 5420/Mum/2014 pertaining to Assessment Year 2011-12 placed on record by the Ld. Authorised Representative for the Assessee. In Assessee's own case while examining the liability of the Assessee to withhold tax under Section 194H of the Act from payment of credit card collection charges to the banks, the Tribunal has held as under:*

> *"5. We have heard both the parties and perused the orders of the Revenue Authorities as well as the cited decision of the Tribunal and also the relevant material placed before us. On perusal of the said decision of the Tribunal (supra) dated 1.5.2015, we find, on identical issue, the Tribunal dismissed the Revenue's appeal and upheld the decision of the CIT (A) vide para 2.1 of its order. Considering the significance of the said para 2.1 of the Tribunal's order (supra) for the sake of completeness of this order, the same is extracted as under:*
>
> > *"2.1. We have considered the submissions of Ld DR and perused the material available on record. The facts, in brief are that the assessee is in the business of retails in electronic goods, kitchen appliances, computers, laptops and related accessories through dedicated outlets called "Croma". The assessee declared loss of Rs. 85,33,61,594/- in its return filed on 29.9.2009. The Ld AO during the assessment proceedings asked the assessee to show cause as to why the payments of charges to banks in respect of sales effected through card mechanism should not be subjected to TDS u/s 194H of the Act. The assessee vide communication dated 15.12.2011 explained that the provisions of section 194H of the Act will be attracted only when one person acts on behalf of another, thereby, creating a principle and agent*

relationship and further in the instant case, the sale is conducted by the assessee on its own and not through the bank and further the transaction may termed as credit card MSF charges but in charges, cheque book request charges, etc. The Ld AO completed the assessment disallowing the expenditure of Rs. 5,02,36,000/- incurred on account of payment of processing charges to HDFC bank on total amount swiped through customer credit card and expenditure of Rs. 49,02,000/- on account of various other bank charges (Cash Management Services) u/s 40(a)(ia) of the Act. According to the Ld AO, tax should have been deducted at source u/s 194 of the Act. On appeal, Ld CIT (A) examined the facts and following the decision in the case of Ahmedabad Stamp Vendors Association vs. UOI (257 ITR 202) and Tata Tele Services Ltd vs. DCIT (TDS) a decision from Bangalore Bench (ITA Nos.308 to 310 and 393 to 396) order dated 27/11/2012, wherein, it was held that there is no requirement of making TDS on the commission retained by Card Companies, opined that the provisions of section 40(a)(ia) r.w.s 194H of the Act are not applicable, deleted the addition. We find no infirmity in the conclusion of the Ld CIT (A) under the facts available on record. His stand is affirmed. Finally, the appeal of the Revenue is dismissed."

6. We have also perused the cited judgment of the Hon"ble Delhi High Court in the case of JDS Apparels (P) Ltd (supra) and find the same is relevant for the proposition that "Commission to bank on payments received from customers who had made purchases through credit cards is not liable to TDS under section 194H of the Act". Considering the above settled nature of the issue and respectfully following the judgment of the Hon"ble Delhi High Court (supra) and the decision of the Tribunal (supra) for the AY 2009-2011, we are of the opinion, the decision taken by the CIT (A) is fair and reasonable and it does not call for any interference. Accordingly, grounds raised by the Revenue are dismissed.

7. Since, the issues raised in other appeal ITA No.5420/M/2014 (AY 2011-2012) are identical, therefore, our decision given in appeal ITA No.5419/M/2014, in the above paragraphs of this order, squarely applies to the present appeal too. Considering the same, we upheld the decision of the CIT (A) and the grounds raised by the Revenue are dismissed." (Emphasis Supplied)

49. *Further, Notification No. 56 of 2012, dated 31.12.2012, issued by the Central Board of Direct Taxes clearly provides that no deduction of tax shall be made on the payments made to a bank (excluding foreign banks) which are in the nature of credit card or debit card commission for transaction between the merchant establishment and acquirer bank.*

50. *As regards legal contention raised by the Revenue that the DRP and the Assessing Officer have erred in holding that the Second proviso to Section 40(a)(ia) is retrospective in nature, we note that the Tribunal had, in the case of Rajiv Kumar Agarwal v. ACIT [IT Apeeal No. 337 (Agra) of 2013], had held that the Second Proviso to Section 40(a)(ia)of the Act was declaratory and curative in nature and therefore, applied retrospective with effect from 01.4.2005. The aforesaid decision of the Tribunal was approved by the Hon'ble Delhi High Court in the case of CIT-1 vs. Ansal Land Mark Township (P.) Ltd.: [2015] 377 ITR 635 (Delhi). In the case of PCIT vs. Perfect Circle India Pvt. Ltd. [ITA No. 707 of 2016, decided on 07.01.2019], the Hon'ble Bombay High Court, has also held that the second proviso to Section 40(a)(ia) of the Act being beneficial to the assessee and declaratory/curative in nature, must be given retrospective effect.*

51. *In view of the above, we do not find any infirmity in the order passed by the DRP/Assessing Officer on this issue. Accordingly, Ground No. 7 raised by the Revenue is dismissed." (Emphasis Supplied)*

52. Both the sides agreed that there is no change in the facts and circumstances of the case. Therefore, respectfully following the above decision of the Tribunal in the case of the Appellant, Ground No. 7 raised by the Revenue is dismissed.

53. In the result, appeal of the Assessee is partly allowed whereas the appeal of the Revenue is dismissed.

Order pronounced on 29.11.2022.

Sd/-	*Sd/-*
(B.R. Baskaran)	(Rahul Chaudhary)
Accountant Member	Judicial Member

मुंबई Mumbai; दिनांक Dated : 29.11.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai