IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU "C" BENCH, BENGALURU

Before Shri George George K., Judicial Member
and
Ms. Padmavathy S., Accountant Member

ITA No. 2929 /Bang/2018 (Assessment Year: 2014-15)		
M/s. Palmer Investment Group Ltd. C/o United Spirits Ltd. UB Towers, No. 24 Vittal Mallya Road Bangalore 560001 PAN – AAECP2487P	vs	DCIT (IT), Circle - 2(1) 4th Floor, BMTC Building 80 Ft. Road, Kopramangala Bangalore 560095
(Appellant)		(Respondent)

ITA No. 2930 /Bang/2018 (Assessment Year: 2014-15)		
M/s. Palmer Investment Group Ltd. (erstwhile UB Sports Management Overseas Ltd.) C/o United Spirits Ltd. UB Towers, No. 24, Vittal Mallya Rd. Bangalore 560001 PAN – AAECP2487P	vs	DCIT (IT), Circle - 2(1) 4th Floor, BMTC Building 80 Ft. Road, Kopramangala Bangalore 560095
(Appellant)		(Respondent)

Assessee by:	Smt. Manasa Ananthan, Advocate
Revenue by:	Ms. Neera Malthora, CIT-DR

Date of hearing:	09.02.2023
Date of pronouncement:	24.02.2023

O R D E R

Per: George George K., J.M.

These appeals at the instance of the two assessees are directed against the final assessment order dated 27.08.2018 and 28.08.2018 passed under Section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (the Act). The relevant

assessment year is 2014-15. Common issues are raised in these appeals, hence they were heard together and are being disposed off by this consolidated order.

2. Facts pertaining to both the assessees are identical except for variation in figures. Therefore we are setting out the facts pertaining to the assessee, Palmer Investment Group Ltd. The assessee, Palmer Investment Group Ltd. was established in British Virgin Island and is primarily engaged in investment activities. The assessee company is wholly owned subsidiary of M/s. United Spirits Ltd. (USL). For the assessment year 2014-15 return of income was filed on 31.03.2015 declaring total income of Rs.630,25,50,240/- under the normal provisions of the Act. The assessment was selected for scrutiny and notice under Section 143(2) of the Act was issued on 28.08.2015. During the course of assessment proceedings the assessee's case was referred to Transfer Pricing Officer (TPO) under Section 92CA of the Act. The TPO passed order under Section 92CA of the Act on 31.10.2017 proposing an upward transfer pricing adjustment in respect of the shares sold by the assessee. On receipt of the TPO's order the Assessing Officer (AO) passed the draft assessment order dated 26.12.2017 incorporating the TP adjustments proposed by the TPO and also applying the rate of 20% to the capital gains he brought to tax (the assessee adopted the rate of 10%).

3. Aggrieved by the draft assessment order the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide its directions dated 20.07.2018 disposed off the objections of the assessee. Pursuant to the DPR directions the impugned final assessment order was passed on 27.08.2018 wherein the AO had made the following additions: -

Sl.No.	Nature of disallowance	Amount (in Rs.)
1	Re-computation of arm's length price of shares sold by the assessee	2,62,27,80,021
2	Differential tax on account of difference in rate of tax on capital gains (based on the assessed income)	96,52,74,468

4. Consequent to the final assessment order total income of the assessee was computed at Rs.892,53,30,261/- as against the income of Rs.630,25,50,240/- declared in the return of income. Aggrieved by the final assessment order the assessee has preferred appeal before the tribunal [IT(TP)A No. 2929/Bang/2018). The grounds raised read as follows: -

"Transfer Pricing

1. *The learned Assessing Officer ('learned AO'), the learned Transfer Pricing Officer ('learned TPO[1]) and the Honourable Dispute Resolution Panel ('Hon'ble DRP') have grossly erred in determining an adjustment of INR 262,27,80,021/ - to the sale of equity share by the Appellant.*
2. *The learned AO, the learned TPO, and the Hon'ble DRP have erred in rejecting the transfer pricing documentation maintained by the Appellant, by invoking provisions of sub-section (3) of 92CA of the Act.*
3. *The learned AO, the learned TPO, and the Hon'ble DRP have failed to appreciate that the purported international transaction was in essence entered into between two third parties and therefore is at arm's length.*
4. *The learned AO, the learned TPO, and the Hon'ble DRP have failed to appreciate that the transaction of sale of shares by the Appellant to Relay B.V., was reported as an international transaction in the Accountants Report for FY 2013-14 only to be compliant with the definition of associated enterprise under Section 92A(2) of the Act, and such disclosure does not take away the arm's length nature of the arrangement entered into between two third parties.*
5. *The learned AO, the learned TPO, and the Hon'ble DRP have erroneously concluded that the Appellant had entered into an arrangement with Relay B.V to transfer controlling stake in United Spirits Limited and therefore, a valuation of United Sprits Limited as a going concern entity needs to be performed and not merely of its share ignoring that for a publicly listed company generally the value of its shares represent the value of its business operations.*

6. *The learned AO, the learned TPO and the Hon'ble DRP, in concluding that the Appellant had transferred controlling stake in United Spirits Limited to Relay B.V., erroneously made assumptions and commented upon the necessity of certain clauses of the Share Purchase Agreement dated 9 November 2012, without appreciating that such arrangement was in essence agreed between two third parties and thus, is at arm's length.*

7. *The learned AO, the learned TPO, and the Hon'ble DRP have erred in not considering the weighted average market price i.e., INR 1,376 of USL's shares as on the date of entering into the Share Purchase Agreement dated 9 November 2012 for determining the arm's length nature of the price at which USL's shares were transferred by the Appellant to Relay B.V.*

8. *The learned AO and the Hon'ble DRP have erred in disregarding the comparable uncontrolled transaction of sale of shares of United Spirits Limited by unrelated individual shareholders at the same price of INR 1440 per share by erroneously assuming that there existed separate compensation to such unrelated individual shareholders without there being any evidence to support this claim and purely based on surmises and conjectures.*

9. *The learned AO, the learned TPO, and the Hon'ble DRP have erred in assuming that the preferential allotment of shares were not taken under strict market conditions and in the process ignored the fact that the preferential shares were issued by United Spirits Limited after obtaining approval of shareholders through a special resolution which gives credence to the arm's length nature of the arrangement.*

10. *The learned AO, the learned TPO, and the Hon'ble DRP have erred in ignoring the valuation certificate issued by an independent Chartered Accountant to determine the minimum price of INR 1,387.90 at which USL's shares could have been allotted.*

11. *The learned AO, the learned TPO, and the Hon'ble DRP have erred in applying Discounted Cash Flow ('DCF') to determine the value of shares of USL at INR 2,039.25.*

12. *The learned AO, the learned TPO and the Hon'ble DRP while conducting the valuation have erred in considering the free cash flow on a pro-rata basis for 9 November 2012*

instead of adopting the free cash flow as on 9 November 2012.

13. *The learned AO, the learned TPO and the Hon'ble DRP have erred in relying on incorrect, unaudited and unreliable data for determination of value of shares of USL and thereby arriving at the arbitrary price of INR 2,039.25 per share as the arm's length price.*

14. *The learned AO, the learned TPO and the Hon'ble DRP have erred in assuming that the valuation of USL ought to have been done or available with the Appellant regardless of no regulatory requirement to do so and without appreciating the regulatory restriction surrounding the availability of information necessary to conduct any such valuation to the Appellant.*

Corporate Tax

15. ***Levy of tax on long-term capital gains ('LTCG') arising from sale of listed securities on recognized stock exchange at 20 per cent instead of 10 per cent***

15.1 *The learned Assessing Officer ('AO') erred in law in levying tax at the rate of 20 per cent on LTCG arising from sale of listed shares of USL on recognized stock exchange instead of beneficial rate of 10 per cent as per proviso to section 112 of the Act.*

15.2 *The learned AO grossly erred in not complying with the binding Circular No.779 dated 14 September 1999 of Central Board of Direct Taxes (CBDT') which clarified that the beneficial rate of 10 per cent on LTCG from sale of listed securities is available to **'all assessees'.***

15.3 *The learned AO erred in violating the law that Circulars issued by the CBDT are binding on the Revenue as held by the Hon'ble Supreme Court in plethora of decisions including -*

- *K. P Varghese v. ITO(1981) 131 ITR 597*
- *CIT v. Hero Cycles Private Limited (1998) 228 ITR 463*
- *Catholic Syrian Bank Limited v. CIT (2012) 3 SCC 784*
- *UCO Bank v. CIT (1999) 307 ITR 324*

15.4 *The learned AO erred in not following the decision of the Hon'ble High Court of Delhi in **Cairn UK Holdings Ltd. v DIT [2013] 38 taxmann.com 179** and **CIT v. Mitsubishi***

> ***Motors Corporation (in ITA No. 741/2016)*** *upholding levy of tax at beneficial rate of 10 per cent.*
>
> *16. The learned AO has erred in levying interest under section 234B of the Act."*

5. The above grounds relate to two issues, namely re-computation of arm's length price of share sold by the assessee amounting to Rs. 262,27,80,021/- and differential tax on account of difference in rate of tax on capital gains (based on the assessed income) of Rs. 96,52,74,468/-. We shall adjudicate the above two issues as under: -

Re-computation of arm's length price of shares sold by the assessee amounting to Rs. 262,27,80,021/- (Ground Nos. 1 to 14):

6. The brief facts in relation to the above issue are that the assessee along with group companies of USL entered into share purchase agreement (SPA) on 09.11.2012 with Relay BV, a company incorporated in Netherlands. It is stated that Relay BV is an independent company and an investment holding company of the Diageo group. Pursuant to the SPA, the assessee sold 43,76,771 equity shares of USL to Relay BV at Rs.1,440 per share. The share transfer was completed on 04.07.2013 (i.e. during the relevant assessment year 2014-15) after necessary approvals were obtained.

7. The TPO in his order under Section 92CA of the Act dated 31.10.2017 stated that acquisition of shares pursuant to the SPA, Diageo Pic (the ultimate holding company of Rely BV) acquired controlling stake in USL and, hence, the determination of ALP must be determined based on a valuation of USL as an entity. Therefore, the TPO held that the price of USL shares in the stock exchange cannot be considered as a valid comparable for the purpose of determination of ALP of the transaction. The TPO proceeded to conduct an independent valuation of shares of USL by applying Discounted Cash Flow (DCF) method based on the data available in Bloomberg database. Based on

such computation share value of USL was determined to be Rs.2038.79 per share as against 1440 per share agreed in the SPA.

8. Aggrieved by the TPO's determination of share price at Rs.2038.79 the assessee filed objection before the DRP. The DRP upheld the view of the TPO. The DRP, however, directed the TPO to consider the cash flow projections as on 09.11.2012 instead of 09.12.2012 considered by the TPO for the purpose of determining the cash flow. Pursuant to the DRP directions, the price per share was re-determined at Rs.2039.25 per share.

9. Aggrieved by the order of the TPO and the DRP the assessee has raised this issue before the Tribunal. The assessee has filed a paper book (in the case of Palmer Investment Group Ltd.) running into 654 pages enclosing therein the submission made before the TPO and the DRP, the share price agreement, etc. The learned Sr. Counsel appearing for the assessee submitted that the transaction in question is entered into between two independent parties and therefore the transfer pricing provisions are not applicable. The learned Sr. Counsel referring to the provisions of the Act submitted that the assessee is not an associated enterprise of Relay BV as on the date of entering into SPA and even after acquisition of shares from the assessee. It was stated that only on 28.11.2013 Relay BV further acquired 19,67,940 shares from unrelated shareholders on the stock market and consequent to such acquisition the controlling stake in USL by Relay BV exceeded 26%. The learned Sr. Counsel submitted that it is settled position that where literal interpretation of a statutory provisions leads to unjust/absurd result, the court may modify the language used by the Legislature, so as to achieve the intention of the legislature and produce a rational construction. In this context the learned Sr. Counsel relied on the following judicial pronouncements: -

i) CIT vs. J.H. Gotla (1985) 23 taxmann 14j (SC)

ii) ACIT and Anr. Vs. Surat Art Sil Cotton Manufacturers Association (1979) 2 Taxmann 501 (SC)

iii) K.P. Varghese vs. ITO (1981) 7 Taxman 13 (SC)

10. The learned Sr. Counsel further submitted that the agreement entered between unrelated parties cannot be disregarded. In this context the learned Sr. Counsel relied on the order of the Delhi Bench of the Tribunal in the case of Abhisek Auto Industries vs. DCIT reported in (2011) 9 taxmann.com 27 (Del). The learned Sr. Counsel stated that parties to SPA agreed to sell shares on a price and on the basis of such negotiated settlement of the price was the shares of the USL transferred by assessees to Relay BV. It was stated that shares of USL was listed in stock exchange and the weighted average value of these shares as on the date of signing of the SPA, i.e. 09.11.2012 was Rs.1,336/- whereas the price at which the shares were purchased by Relay BV was much higher at Rs.1,440/-. The learned AR further submitted that the market price of shares at time of entering into transaction is an appropriate valuation method. Reference was drawn to statutory instances such as Rule 11UA of the I.T. Rules and the provisions of the Wealth Tax Act, which prescribes that value of quoted shares shall be the value as recorded in the recognised stock exchange on valuation date. Reliance was also placed on the judgement of the Hon'ble Supreme Court in the case of CWT vs. Mahadeo Jalan reported in (1972) 86 ITR 621 (SC) which upheld the aforesaid valuation mechanism for quoted shares. It was contended that the following transaction undertaken by Relay BV can also be considered as comparable for determination of the ALP: -

- In compliance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, an acquirer of shares is required to make a public announcement of an open offer to the public for acquisition of shares. In this regard, Relay B.V. had also made an offer to the public on 09 November 2012, the same day as the agreement to purchase shares at

Rs. 1,440 per share and had subsequently purchased 58,668 shares from the public on 13 May 2013.

- The post offer report was duly published in compliance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Pg. 241 of the paperbook). The market price of the equity shares during the relevant period is mentioned in the document (Pg. 243 of the paperbook).
- The price at which the shares were sold by the Appellant to Relay B.V. was the same (i.e., Rs. 1440 per share) at which shares were allotted by USL to Relay B.V. on a preferential allotment basis.
- A screenshot of the movement of the price of USL's shares is produced at page 249 of the paperbook. This can be adopted as comparable uncontrolled price in terms of Rule 10B of the Income-tax Rules, 1962.
- The CA Certificate (average of weekly high and low of the closing process of the USL's share quoted on NSE during the 26 weeks preceding the relevant date) is produced at page 253 of the paperbook, as per which, the average price is Rs. 917.27.
- Moreover, the price at which the Appellant had sold the shares is the same price at which the other group companies sold their shares to Relay. Since the price charged by the other group companies is accepted, upon application of the 'CUP' method, the price charged by the Appellant also ought to be accepted.

The learned A.R. had also attacked the basis of valuation undertaken by the TPO by stating that the data obtained from Bloombery database does not satisfy Rule 10AB of the Income Tax Rules, 1962.

11. The learned D.R., on the other side, has also filed a written submission running into 16 pages basically elaborating the reasoning of the TPO and the DRP.

12. We have heard the rival contentions and perused the material on record. The primary contention of the learned Sr. Counsel was that the impugned transaction at the time of entering into SPA were between two unrelated parties and thus transfer pricing provisions are inapplicable (refer grounds 3 & 4). It was contended that only on 28.11.2013 Relay BV further acquired 19,67,940 shares from unrelated shareholders on stock market and the said acquisition only resulted in Relay BV having controlling stake in USL, i.e. more than 26%. Therefore the contention of the learned Sr. Counsel is that as on date of SPA and even after acquisition of shares from the assessee, the Relay BV and assessee were not associated enterprises. The above contention of the learned Sr. Counsel, we are of the view is not legally tenable. The impugned transaction was reported by the assessee itself in Form 3CEB as an international transaction. In this regard para 3 of the order of TPO dated 31.10.2017 (in Palmer Investment Group Ltd. ITA No. 2929/Bang/2018) is reproduced below: -

"3. International transactions with is Associated Enterprises (AE):

Particulars	***Consideration charged/received***	***As per TP document***	***Method***	***AE with whom IT entered into***
Sale of equity shares of USL	*6,302,550,250/-*	*6,302,550,250/-*	*Other method*	*Relay B.V. Netherlands*
Total	*6,302,550,250/-*	*6,302,550,250/-*		

13. We are aware of the fact that there is no estoppels of law and such reporting does not give rise to the conclusion that the transaction is indeed an international transaction. However, Section 92A(2) of the Act states that two enterprises shall deemed to be an associated enterprises if, <u>at any time during the previous year</u> one enterprise holds, directly or indirectly, shares carrying not less than 26% of the voting power in the other enterprise. Admittedly, in

the instant case Relay BV holds controlling stake in USL of more than 26% i.e. 26,37% on 28.11.2013 i.e. during the relevant previous year. Therefore in light of the clear provisions of Section 92A(2) of the Act, which uses the expression "*if at any time during the previous year*" we find no merit in the contention of the learned Sr. Counsel. The literal reading of Section does not give rise to any absurdity or unjust result. Hence the contention that the literal interpretation should not adopted is rejected and we hold that the impugned transaction has been rightly put through the test of benchmarking. Therefore the contentions raised in ground Nos. 3 & 4 are rejected.

14. Ground Nos. 5 to 10 deal with the aspect of benchmarking of share transfer in the impugned transaction. The assessee, in its TP documentation used "other method" to determine the ALP of the shares on the basis of market price prevailing at the time of entering into transaction. The market price per share was Rs.1,376/- as on 09.11.2012 being the date entering into the SPA. Considering the same and coupled with the fact that the Relay BV purchased shares of USL from public through open offer at Rs.1,440/- per share, the assessee reported that the transaction undertaken at Rs.1,440/- per share is at arm's length. The dispute primarily hinges on the aspect of whether there has been a transfer of controlling stake under the SPA entered into by the assessee and its associates with Relay BV. If the answer is in the positive, the question is whether the price agreed upon by the parties which is determined on the basis of the prevailing market price, justifies the same. The Hon'ble Supreme Court in Vodafone International Holdings B.V. vs. Union of India (2012) 341 ITR 1 (SC) analysed the interplay between transfer of shares and the resultant host of consequences which inter alia included the concept of controlling interest. The relevant portion from the judgement, as authored by Hon'ble justice K.S. Radhakrishnan J, read as follows:

"Controlling Interest;

72. Shares, we have already indicated, represent congeries of rights and controlling interest is an incident of holding majority shares. Control of a company vests in the voting powers of its-shareholders. Shareholders holding a controlling interest can determine the nature of the business, its management, enter into contract, borrow money, buy, sell or merge the company. Shares in a company may be subject to premiums or discounts depending upon whether they represent controlling or minority interest. Control, of course, confers value but the question as to whether one will pay a premium for controlling interest depends upon whether the potential buyer believes one can enhance the value of the company.

73. The House of Lords in Inland Revenue Commissioners v. Bibby & Sons Ltd. [I946]14 ITR 7 (Supp) at 9-10, after examining the meaning of the expressions "control" and "interest", held that controlling interest did not depend upon the extent to which they had the power of controlling votes. Principle that emerges is that where shares in large numbers are transferred, which result in shifting of "controlling interest", it cannot be considered as two separate transactions namely transfer of shares and transfer of controlling interest. Controlling interest forms an inalienable part of the share itself and the same cannot be traded separately unless otherwise provided by the Statute. Of course, the Indian Company Law does not explicitly throw light on whether control or controlling interest is apart of or inextricably linked with a share of a company or otherwise, so also the Income Tax Act. In the impugned judgment, the High Court has taken the stand that controlling interest and shares are distinct assets.

74. Control, in our view, is an interest arising from holding a particular number of shares and the same cannot be separately acquired or transferred. Each share represents a vote in the management of the company and such a vote can be utilized to control the company. Controlling interest, therefore, is not an identifiable or distinct capital asset independent of holding of shares and the nature of the transaction has to be ascertained from the terms of the contract and the surrounding circumstances. Controlling interest is inherently contractual right and not property right and cannot be considered as transfer of property and hence a capital asset unless the Statute stipulates otherwise. Acquisition of shares may carry the acquisition of controlling interest, which is purely a commercial concept and tax is levied on the transaction, not on its effect."

15. The Hon'ble Supreme Court has thus held that each share represents a vote in the management of the company and such a vote can be utilized to control the company. Further, the Hon'ble Supreme Court has held that controlling interest is not a distinct capital asset independent of holding of shares and the nature of the transaction has to be ascertained from the terms of the contract and the surrounding circumstances. Subsequent to the decision of the Hon'ble Supreme Court, Explanation to section 2(14) was introduced by the Finance Act 2012 w.e.f.01.04.1962 which clarifies that 'property' includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever. Keeping these principles in mind, we proceed to analyse the terms of the SPA and the surrounding circumstances of the impugned transaction, to answer the question posed by us.

16. The DRP has elaborately analysed various clauses of the SPA to reach its conclusion. We deem it appropriate to highlight the following clauses to gather the intention of Relay BV in acquiring shares of USL under the share purchase agreement.

> 2.*3 Subject to clause 2.4, if, immediately following the latest of:*
>
> *(A) Completion:*
>
> *(B) completion, termination, withdrawal or lapse of the Open Offer: and*
>
> *(C) the earlier of(i) completion or termination of the Preferential Allotment Agreement and (ii) the date falling 22 weeks following the date on which payment of the consideration pursuant to the Open Offer is made by the Purchaser,*
>
> *the number of Equity Shares held by the Purchaser's Group at such time represents less than 25.1 per cent, of the Equity Share Capital the UB Group Sellers shall sell and the Purchaser shall purchase the Additional Shares with all rights attached or accruing to them at the Additional Shares Completion Date and the Purchaser shall*

simultaneously purchase such Additional Shares for the Additional Consideration.

4.5 Each Seller shall provide to the Purchaser such general assistance and information as is reasonable required by the Purchaser in connection with conducting the Open Offer, including, without limitation:

(A) acting in compliance with its obligations under the SEBI Takeover Regulations:

(B) .....

(C).....

(D) exercising its powers of influence and control and otherwise using reasonable endeavours to cause the relevant members of the Company's Group to certify information relating to the Company 's Group where reasonably requested and providing reasonable assistance in the implementation of the Open Offer;

(E) ....

(F) .....

(G) exercising its shareholder rights, other powers of influence and control and otherwise using reasonable endeavours to cause the relevant members of the Company 's Group to provide to the Purchaser such general assistance and information as may reasonably be required by the Purchaser in connection with conducting the Open Offer, including:

(i) compliance by each member of the Company's Group with sub-clause 4.5(D): and

(ii) providing the Purchaser with information reasonably available to it and necessary for the preparation of the Open Offer Documents; and

(H)....

4.8 The UB Group Sellers undertake to exercise their shareholder rights, other powers of influence and control (subject to the fiduciary duties of the UB Group Sellers' officers) and otherwise use their respective reasonable endeavours to fulfil or procure the fulfilment of the conditions set out in paragraphs I, 3.1, 5, 6. II, 12, 14 and 17 of Schedule I (Conditions to Completion) of the Preferential Allotment Agreement (the "Preferential Allotment Conditions"). UB shall co-operate with the Company and the purchaser in good faith in order to satisfy the Preferential Allotment Conditions and facilitate the actions contemplated in

> *clauses 3.10, 3.11, 3.12 and 3.14 of the Preferential Allotment Agreement*

17. On perusal of the above, it is evident that Relay BV has set out a minimum target of 25.1% of equity capital of USL to be acquired under the SPA. Further, it is pertinent to note that Relay BV has sought assistance from the UB Group Sellers in successfully completing the 'Open Offer' in compliance with SEBI Takeover Regulations as well as in completing the acquisition through the Preferential Allotment Agreement, to achieve such target of acquiring 25% of equity. Therefore, the intention of Relay BV was to exercise 25% or more of the voting rights in USL. At this juncture, it is pertinent to refer to findings of the learned DRP of its independent analysis of the various clauses of the SPA. The relevant extract from the directions of the DRP are as follows:

> *4.4 If it were a pure equity investor, the only cash flow the investor can expect out of a publicly traded company is the dividend. If that were so, incorporating clauses 4.4, 4.8, 4.13, 6.2, 7.2, 10.3, 12.1, 12.2, 12.3, 12.4, 12.6, 13. 20.2, Schedule 1, Schedule 2 etc in the share purchase agreement would not have been necessary. The obligations determined by the above clauses in the Agreement are elaborated below:*
>
> - *By Clause 2.3, the Purchaser Group is ensuring that they get minimum 25.1 % of Equity Capital of USL. As per SEBI guidelines on substantial Acquisitions and Takeovers, after the Public offer is made, the percentage will rise above 26% giving the Purchaser Group controlling stake in USL.*
> - *By clause 4.4, the Sellers Group are obliged to facilitate the Purchaser Group with meetings etc with Trustees of the Pension Scheme, Trade Union, Works Council, staff association etc.*
> - *By clause 4.8, the Seller Group undertakes to use its influences and control to procure the Preferential Allotment of shares as per Preferential Allotment Agreement in favour of the Purchaser Group.*
> - *By clause 4.13, the Seller Group undertakes to use its influences and control to help constitute a separate*

superannuation fund for the benefit of the employees of USL and get necessary approvals and transfer amounts from the old scheme to the new one etc.

- *By clause 10.3, the Seller Group undertakes to notify the Purchaser Group regarding any redundant UB employee.*
- *By clause 12.1, the Seller Group undertakes to transfer rights or trademarks held by them to the Purchaser Group.*
- *Similarly vide clause 12.2. 12.3 and 12.6 the Seller group covenants to transfer and cause registration of ownership or right to any intellectual property, business information or domain name used in conduct of the business of USL to the Purchaser group.*
- *Vide clause 12. 4, the UB group Sellers undertakes that no member of the Seller 's group shall use the Business Names or Brands or similar names or mark which could compete etc with the business of the company USL.*
- *Schedule 1 and 2 list out several conditions to completion of Share Purchase Agreement and Schedule 2 also talks of delivery of any title deeds and all ancillary documentation by the Sellers to the Purchasers.*

These clauses clearly indicate that the company has been purchased as a Going Concern and if is not a mere equity investment as claimed. What is bought is not mere stocks but the underlying business. In such circumstances, the valuation of the company as a Going Concern has to be made to fix the value to be paid by the purchaser for the shares in the company. This is what has been done by the TPO. The TPO adopted the Discounted Cash Flow method by discounting the cash flows to the company at the cost of capital to arrive at the estimate intrinsic value of the company. DCF forces the valuer to look for the fundamentals that drive value rather that what market perceptions are. We do not find any infirmity in the order of the TPO on this count.

18. We are of the view that on perusal of the above clauses referred to in the DRP directions, it is clear that Relay BV sought to exercise control in the business of USL. As rightly pointed out by the DRP, incorporating the above clause would not have been necessary' if it was a mere acquisition of equity capital in the company. On totality of facts and circumstances, we believe that Relay BV had intended to acquire controlling interest in USL through the

SPA. It is true that the Assessee under the share purchase agreement has transferred only 3.35% of total shares of USL to Relay BV. However, as observed by the Hon'ble Supreme Court in Vodafone's case (supra), each share represents a vote in the management of the company and such a vote can be utilized to control the company. The Assessee has contributed and assisted Relay BV in acquiring controlling interest in USL along with other associates.

19. With the above being clarified, the question that now arises is the appropriateness of the price charged by the Assessee. The Assessee has charged a price marginally above the prevailing market price at the time of entering into the impugned transaction. The TPO however has adopted the DCF method to value the company as an entity to determine the arm's length price. In this connection, we refer to the order of Mumbai Bench of the Tribunal in the case of Lanxess India (P.) Ltd v ACIT (2013) 36 taxmann.com 350 (Mum-Trib) which has held that where an assessee sold controlling interest in a company, addition on account of control premium is justified. In the said decision, the Bench has relied on the report by Phillip Sounders Jr (Phd) which showed that the mean control premium varied from 30% to 50% of quoted price. The relevant observations are as follows:

> *5.6 We have carefully considered the various aspects of the matter. This issue involved is determination of arm's length price of shares sold by the assessee. AO/TPO have impliedly used CUP method. They have referred to the cases of Maruti etc. only to emphasize the point that substantial amounts are required to be paid on account of control over the market price, in case of Maruti, the Government had received Rs. 1000 crore only towards control premium. However for estimating the control premium in case of the assessee with respect to other un-related parties the TPO has referred the Phillip Sounders Jr PHD report who gave a finding that mean average premium varied from 30% to 50% of the public quoted price. AO/TPO have, therefore, estimated the control premium at 25% of share price as the share price received by the assessee has been considered as the price only towards sale*

of shares without taking into account the control premium. Though AO/TPO have not specifically mentioned, they have indirectly compared to price of Rs. 201 per share paid to RA Group who held only 18.83% share which was not a controlling stake, which is clear from the fact that control premium has been computed by them with respect to the negotiated price. The RA Group in our view is a good internal CUP as both the assessee and RA Group have sold the shares of the same company and buyer was also the same. Therefore the transaction is identical except the fact that the assessee had sold the controlling stake. The provisions of Rule I0B(3) make it quite clear that an uncontrolled transaction shall be comparable if reasonably accurate adjustment can be made to eliminate the material affect of differences if any. Further under the provisions of Rule 10B(1)(a)(ii) the price charged to a comparable uncontrolled transaction has to be adjusted on account of differences between the international transaction and the comparable uncontrolled transaction or between enterprises entering into such transactions if these differences materially affect the price in the open market. In the present case the share transaction of the assessee is identical to that of the uncontrolled transaction of RA Group the only difference is that the assessee had sold the controlling stake. The share price will not depend upon personal characteristics of the sellers and, therefore, no adjustment is required on account of differences between the assessee and RA Group which sold the shares. The only difference as pointed out earlier between the international transaction and the transactions with RA Group is that the assessee had sold the controlling stake. Therefore, we have only to consider adjustment on account of controlling stake transferred by the assessee by estimating the price for the controlling stake. The report by Phillip Sounders Jr PHD which is based on research undertaken in respect of several public quoted companies can be used as reliable material. As per the said report the mean premium varied from 30% to 50%. Considering this the adjustment of 25% of the share value made by AO/TPO on account of controlling premium with respect to the share price charged in case of RA Group which was an unrelated person, in our view, is quite justified.

5.7 The argument of the learned AR that the assessee was selling the business and. therefore, could not expect control premium, in our view, has no merit. In fact it is only the seller who can demand control premium in case he or she is selling the control stake. The

assessee in this case was selling the business because of rising competition in the market as was clear from the Lanxess global report referred to in this order earlier. Moreover the control premium does not depend upon the fact whether the assessee was selling the business or that the business was not doing well. The Article by Phillip Sounders Jr PHD has clearly mentioned that payment of control premium largely depends upon the potential buyer believing that he or she could enhance the value of the company. It is the potential for increasing the value that makes the buyers willing to pay the premium for control. The learned CIT(DR) has placed before us the report dated 29.6.2007 taken from INEOS ABS site as per which the Chairman of INEOS had stated that the joint venture with Lanxess provided INEOS strong market position in a new portfolio of product that complemented their Styrenic. Polyethylene, Polypropylene and PV Plastic activities which was a good fit in their existing business. The report also mentioned that Lustron Polymers was currently the world's third largest and Europe's leading supplier of ABS plastics with sales amounting to almost Euro 900 Million. Thus it is the perception and the capacity of the buyer to make the value addition decides the control premium. In this case the material placed before us as mentioned above clearly shows that the buyer saw tremendous potential in purchasing the business of the assessee and, therefore, there is a justification for substantial control premium in this case. The Phillip Sounders Jr. PHD report showed that the mean control premium varied from 30% to 50% of quoted price. Considering the potential of the business transferred, the control premium should be towards the upper end of about 50% of the quoted price. But in this case, since control premium has been estimated with respect to the negotiated price which was higher than the public quoted price, the estimation at the rate of 25% of negotiated price in case of RA Group is considered reasonable. The argument that Phillip Sounders Jr PHD report related to only public quoted companies is also not relevant as the premium is linked to the potential for making the value addition to the company by the buyer and not upon whether the company is public quoted or not. The research had been made in cases of public quoted companies as data in such cases is easily available.

5.8. The learned AR of the assessee has also argued that the general public share holders had also been paid at the rate of Rs201/- per share as per SEBI regulation No. 20(4). It has also been submitted that while judging the comparability of

> *transaction, Government laws and orders in force have also to be taken into account. We have perused the said regulation. The SEBI regulations do not regulate the price to be negotiated between the buyer and seller of shares. It only provides that in case of transfer of stake exceeding 15% of share holding, the general public is also required to be offered to the extent of 20% of share holding which has to be the highest of the four factors i.e. negotiated price; the share price paid by the acquirer for any acquisition during the 26 week period prior to the date of public announcement; the average daily high and low on the stock exchange during the 26 week period preceding the date of public accouchement; and average daily high and low of share price on the stock exchange during the two week period preceding the date of public announcement. This is only a formula to safeguard the interest of general share holders. It does not in any way state that price negotiated by the assessee with the buyer is at arm's length price. Infact the general share holders would have got more price had the negotiated price also included the control premium. Therefore, the argument based on SEBI regulation is devoid of any merit.*
>
> *5.9 In view of the foregoing discussion and for the reasons given earlier, we do not see any infirmity in the order of AO making adjustment on account of control premium. The order of the AO is, therefore, upheld on this point.*

20. The Bench in the above decision has held that the report by Phillip Sounders Jr PHD which is based on research undertaken in respect of several public quoted companies can be used as reliable material. Applying the average premium as identified in the said report of 30% to 50% to reported price of Rs. 1,440, the price range in the present case would vary from rupees 1800 to 2100 per share. Considering the above, the price determined by the TPO by adopting the discounted cash flow method at Rs. 2,039.25 per share, which is within the aforementioned range, appears to be reasonable.

21. Looked at from another angle, the argument of the Assessee that the share prices quoted on the stock exchange would factor in all the conditions and would ultimately represent the true value of the underlying business as a whole, may be considered at the relevant time when the fact of transfer of

control was in public domain. In the present case, as reported in the post offer report filed with the SEBI, the average market price during the 'Tendering Period' for the Open Offer made by Relay BV (which the Assessee seeks to use as a comparable price), was Rs. 2,011.66 per share. Although the public announcement for open offer was made by Relay BV on 09.11.2012, the tendering period for the same was between 10.04.2013 to 26.04.2013. The average market price during this period as mentioned above was Rs. 2,011.66 per share. At this juncture, the acquisition of more than 25% of share capital by Relay BV was in public domain and it could be said that the average market price as per the stock exchange during this period reflects and includes the value of share including the controlling interest. Therefore, going by the argument of the Assessee as well, the price determined by the learned TPO appears reasonable from this viewpoint as well. Further, the number of shares offered for open offer was 3,77,85,214 (refer page No. 11 of assessment order). Though M/s. Relay BV made offer to purchase 3,77,85,214 shares, purchased only 56,668 shares on 13.05.2013 which is only 0.1499% of the offer and the purchase price was Rs.1,440/- per share. This itself show that M/s. Relay BV could not purchase the proposed number of shares at the rate of Rs.1,440/- per share for the reason that the market price was as high as Rs.2,045.25 per share on 26.04.2013 i.e. expiry of tendering period. The same price further went up to Rs.2,335.10 per share on 13.05.2013 i.e. 10 days after the last date of tendering period (refer page No. 15 of the DRP's order). This 56,668 shares comes only to 0.0389% of total number of shares of United Spirits Ltd. Further it is to be noted that number of shares offered through share SPA was 2,17,67,749 shares. If one work out the ratio between this and number of shares purchased through open offer, it works out only to 0.2603%. Under such circumstance, by no stretch of imagination the price paid to the public/ third party through such an open offer can be treated as comparable to the price offered though SPA.

22. The learned Senior counsel has also argued that the general public share holders had also been paid at the rate of Rs.1,440/- per share as per SEBI regulation No. 8(2). It has also been submitted that while judging the comparability of transaction, Government laws and orders in force have also to be taken into account. We have perused the said regulation. The SEBI regulations do not regulate the price to be negotiated between the buyer and seller of shares. It only provides that in case of transfer of stake exceeding 15% of share holding, the general public is also required to be offered to the extent of 20% of share holding which has to be the highest of the four factors i.e. negotiated price; the share price paid by the acquirer for any acquisition during the 26 week period prior to the date of public announcement; the average daily high and low on the stock exchange during the 26 week period preceding the date of public accouchement; and average daily high and low of share price on the stock exchange during the two week period preceding the date of public announcement. This is only a formula to safeguard the interest of general share holders. It does not in any way state that price negotiated by the assessee with the buyer is at arm's length price and the TPO is bound by the same. We find an identical argument was raised in case of Lanxess India (P) Ltd. (supra) and the said contention was rejected by the Mumbai Tribunal in para 5.8 reproduced above.

23. It was argued that the price at which the assessee has sold the shares is the same price at which the other group companies sold their shares to Relay BV. It was submitted that since the price charged by the other group companies is accepted, upon application of the CUP method, the price charged by the assessee also ought to be accepted. This argument though appears to be attractive cannot be accepted for the reason that the share purchase agreement dated 9th November 2012 was entered into between the Trustees of USL Benefit Trust and certain subsidiaries of USL including the assessee with

Relay BV and Diageo Plc to transfer their investment in shares of USL to Relay BV at the rate of INR 1,440 per share. The said rate was applicable for sale of shares by all sellers. It was one agreement under which the sellers agreed to sell the shares to Relay BV. Thus the rate at which other group companies sold their shares to Relay BV cannot be considered to be an independent or uncontrolled transaction. The ITAT Chennai Bench in Ascendas India P Ltd v DCIT [2013] 33 taxmann.com 295 under similar circumstances rejected similar argument and held as under:

> "*16. Even if we accept the stand of Assesses. CUP method could at the best, be adopted, for the sale of shares in LTIAL only and not for that of ALTPL. No doubt in LTIAL, Assessee and LTIL were holding equal shares. Argument of Assessee that LTIAL was not an Associated Enterprise of Assessee is without doubt technically true. Hence, its contention that the price at which LTIL sold the shares to APFI is a perfectly comparable uncontrolled price, does appear at the first look very attractive. However, it is, in fact, not so. Sub Sec. (2) of Sec.92C of the Act mandates application of an appropriate method for determining ALP from those prescribed in sub sec. (1). All these methods are prescribed with the intention of arriving at the possible transaction value, had the parties been unrelated or at Arm's Length. The question here is whether we can consider the sale of shares by LTIL to APFI to be uncontrolled. For answering this, we have to look at the agreement entered between the Assesses, LTIL. LTIAL & APFI placed at P.34 to 91 of the Paper Book. At one end of this agreement is LTIL and Assessee together, and on the other end APFI The sellers are Assessee and LTIL. Sellers joined together and sold the shares held by them in LTIAL to APFI. Had these been independent transactions entered into by two different parties, the sale would not have been ordinarily effected through one agreement. APFI was interested in purchasing the shares of LTIAL. only if both Assessee and LTIL sold their respective holdings at a single price. Every clause in the said agreement applies to both Assessee and LTIL. Even the consideration of Rs. 79 crores mentioned at clause No. 3 of the said agreement is a consolidated one. Thus, the price for which shares of LTIAL were transferred was based on a single agreement and, therefore, to say that one part of that agreement would be an uncontrolled transaction, for comparing it with the*

other part, would, in our opinion, be unacceptable. The agreement has to be taken as a whole and it is clear that the transactions between Assessee and LTIL with regard to the sale of shares of LTIAL, was not an independently entered one. but a joint effort. In such circumstances, Assessee's contention that the sale of shares of LTIAL by LTIL to APFI has to be taken as an comparable uncontrolled transaction, falls flat."

24. The definition of 'arms length price' as per section 92F(ii) means a price which is applied or proposed to be applied in a transaction between persons other than associated in a uncontrolled conditions. As per section 92C(1), the arms length price in relation to an international transaction shall be determined by any of the six methods prescribed therein. As mentioned earlier in the present case, the assessee has applied 'other method' for justifying the ALP of sale of shares. Rule 10AB deals with determination of ALP under 'other method' and the same reads as under:

For the purposes of clause (i) of sub-section (1) of section 92C. the other method for determination of the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.

25. There has to be a same or similar uncontrolled transaction with or between non associated enterprises under similar circumstances considering all the relevant facts. In the present case, the share purchase agreement was entered into for transfer of 25.1% of shares of USL. If non associated enterprises had entered into similar agreement, they would not have agreed for the transfer of shares at the stock exchange price as it involves transfer of control. Transfer of shares in stock exchange cannot be equated with transfer of shares involving transfer of control. Therefore, the price determined by the TPO is upheld for the above reasons and the grounds No. 5 to 10 raised by the Assessee are accordingly dismissed.

26. **Ground** Nos. **11 to 14** deal with aspect of the method and computation mechanism adopted by the learned TPO. As mentioned above, the TPO has valued the shares by adopting Discounted Cash Flow (DCF) method using data available in Bloomberg database. The Assessee has questioned the adoption of such method as well as the consideration of data available in the said database which according to the Assessee, is incorrect, unaudited and unreliable data. The learned AR also highlights the fact that there are significant variations between the projected cash flows considered by the TPO and the actual cash flows of the company. The DR relies on the findings of the DRP in this regard which has held that use of DCF method is appropriate considering the unique facts of the present case.

27. The DCF method is statutorily as well as internationally accepted method for valuation of shares. We therefore are of the opinion that the TPO has not erred in adopting such method. The data considered for computing the value using such method is also questioned particularly on the aspect of substantial variations in projected cash flows vis-a-vis the actual cash flows. In the context of section 56(2)(viib) read with rule 11UA, this Tribunal in Flutura Business Solutions (P) Ltd v ITO (2020) 117 taxmann.com 567 (Bang-Trib) and other similar cases, has held that the valuation under DCF method can be based only on estimated future projections and actual figures available subsequently cannot be replaced. Applying the same, the estimated cash flows considered by the TPO using date available in Bloomberg database for the relevant period, is justified. Accordingly, these grounds raised by the Assessee are dismissed.

CORPORATE TAX ISSUES

(Differential tax on account of rate of tax on capital gains of Rs.96,52,74,468/-)

28. The Assessee has raised Ground No. 15 contending the rate of tax applied by the AO in computing tax on long term capital gains offered. The

brief facts pertaining to this issue are that the shares transferred by the Assessee to Relay BV under the SPA, were held by it for a period exceeding 12 months. Accordingly, the assessee computed long term capital gains on such transfer and offered the same to tax at the rate of 10% along with applicable surcharged and cess, based on the proviso to section 112(1) of the Act. The AO while passing the draft assessment order held that the benefit of lower rate of 10% under the proviso to section 112(1) does not arise in the case of non-residents as the second proviso to section 48 is not applicable to non-residents. Reliance was placed by the AO on the decision of the AAR in Cairn U.K. Holding Ltd., In re [2011] 12 taxmann.com 266 (AAR - New Delhi). The AO thus applied the rate of 20% on such gains.

29. Aggrieved assessee filed objection before the DRP. The DRP held that it can adjudicate matters dealing only with variations to the income or loss proposed in the draft assessment order. Since the dispute is on the applicable rate of tax, the DRP refused to adjudicate the said issue. Thereupon, the Assessee filed a writ petition before the Hon'ble Karnataka High Court challenging the action of the DRP in not adjudicating the objection raised on the applicable rate of tax. The Hon'ble High Court in its order dated 08.04.2022 (WP No. 35768/2018 & WP No. 35769/2018) directed that the ground in relation to the rate of tax applicable on capital gains from listed securities shall be adjudged by this Tribunal.

30. The learned Senior Counsel relied upon the decision of the Hon'ble Delhi High Court in Cairn UK Holdings Ltd. v DIT [2013] 38 taxmann.com 179 (Delhi) which had set aside the ruling of the AAR in Cairn U.K. Holding Ltd., In re (supra) which was relied upon by the AO. The learned AR also relied upon various other decisions in this context to submit that the rate of 10% provided under the proviso to section 112(1) shall be applicable even for transfer of listed shares by a non-resident.

31. The learned DR relied on the decision in BASF Aktiengesellschaft v DDIT [2007] 12 SOT 451 (MUM.) to support the views of the AO.

32. We have heard the rival submissions and perused the material on record. This issue is covered in favour of the Assessee by the judgement of the Hon'ble Delhi High Court in Cairn UK Holdings Ltd case (supra). The relevant portions from the said judgement are as follows:

> *20. Language of proviso to Section 112(1) syntactically and grammatically mandates one interpretation. If one squarely focuses and orates the words used in the proviso and interprets them without extracting or subtracting any phrase or word, a non-resident assessee is entitled to benefit of the said provision. The proviso to Section 112(1) of the Act does not state that an assessee, who avails benefits of the first proviso to Section 48, is not entitled to benefit of lower rate of tax @ 10%. The said benefit cannot be denied because the second proviso to Section 48 is not applicable. The stipulation for taking advantage of the proviso to Section 112(1) is that the aggregate of long-term capital gains to the extent it exceeds 10% of the amount of capital gains, should be before giving effect to the provisions of second proviso to Section 48. Inflation indexation shall be ignored. In case the Legislature wanted to deny the said advantage/benefit where the assessee had taken benefit of the first proviso to Section 48, it was easy and this would have been specifically stipulated, that an assessee, who takes advantage of neutralization of exchange rate fluctuation under the first proviso to Section 48 would not be entitled to pay lower rate of tax @10%. Legislature had ajar easier and simpler way to deny benefit of the proviso to Section 112(1) by using different words and phrases had thus been the intention. The legislature in fact did not intend to deny the said benefit'.*

33. We accordingly direct the AO to apply the rate of 10% as provided under the proviso to section 112(1) of the Act and compute the tax on long term capital gains on sale of listed shares accordingly. Therefore, the grounds raised by the Assessee are allowed.

34. In the result, the appeals filed by the assessees are partly allowed.

Order pronounced in the open court on 24th February, 2023.

Sd/-	Sd/-
(Padmavathy S.)	**(George George K.)**
Accountant Member	**Judicial Member**

Bengaluru, Dated: 24th February, 2023

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -*
4. *The CIT -*
5. *The DR, ITAT, Bengaluru*
6. *Guard File*

By Order

//True Copy//

Assistant Registrar
ITAT, Bengaluru

n.p.