IN THE INCOME TAX APPELLATE TRIBUNAL, 'J' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.9057/Mum/2010
(**Assessment Year :2006-07**)
ITA No.6900/Mum/2012
(**Assessment Year :2007-08**)
&
ITA No.8710/Mum/2011
(**Assessment Year :2007-08**)

M/s. Tata Chemicals Limited 24, Homi Mody Street Bombay House, Fort, Mumbai – 400 001	Vs.	Deputy Commissioner of Income Tax-2(3) Aaykar Bhavan M.K.Road, Mumbai- 400 020
PAN/GIR No.AAACT4059M		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Nitesh Joshi
Revenue by	Shri Manoj Kumar
Date of Hearing	**15/03/2023**
Date of Pronouncement	**31/03/2023**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.9057/Mum/2010, ITA No.8710/Mum/2011 & ITA No.6900/Mum/2012 respectively for A.Y.2006-07 & 2007-08 respectively preferred by the order against the final assessment order passed by the Assessing Officer dated 31/12/2009, 31/12/2010 & 19/10/2011 u/s.143(3) r.w.s. 144C(13) of the Income Tax Act, hereinafter

referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel-II (DRP in short) u/s.144C(5) of the Act dated 27/09/2010 & 30/09/2011 for the A.Y.2006-07 & 2007-08.

2. The ground No.1 raised by the assessee is with regard to the transfer pricing adjustment on account of low rate of interest charged on advance to M/s. Home Field International P. Ltd (Associated Enterprises-AE).

2.1.We have heard rival submissions and perused the materials available on record. Home Field International Pvt. Ltd. (HIPL) in Mauritius is a 100% subsidiary of the assessee formed with a view to make investments globally. The assessee was bidding for acquisition of Egyptian Fertiliser Company through HIPL With a view to fulfil the pre-bid condition of 'Proof of funds letter' from an international banker, the assessee had lent USD 110 million to HIPL to show availability of funds with them. The lending of funds was from 16.05.2005 to 26.06.2005 i.e. for a period of 41 days. Since, the bid was unsuccessful the funds were returned back. The said funds were placed by HIPL as short term fixed deposits with Barclays Bank. Interest earned by it on such deposits of USD 3,76,247 has been paid as interest to the assessee after reducing bank charges of USD 105. Accordingly, the assessee company earned interest income of USD 376247 from its AE on this special purpose lending to its AE. Apart from this, the assessee had also advanced regular loans to its AE which were benchmarked by the assessee by applying LIBOR + 200 basis points as the ALP rate. This was accepted by the ld. TPO to be at arm's length. The mistake which the assessee committed was including this special purpose loan given to AE during the year in the sum of USD 110 million also in the list of total loans given to the AE and had erroneously stated in form 3CEB

that all the loans to AE have been benchmarked by applying interest rate of LIBOR + 200 basis points. Though this is a disclosure error in Form No.3CEB, the fact on record clearly proves that assessee has not received interest @LIBOR + 200 basis points on the special purpose lending of USD 110 million from its AE. The fact is assessee has actually received interest at an average interest rate of 3% from its AE. We also find from page 193 of the paper book that assessee had maintained an account with State Bank of India in Bahamas where it had held foreign currency to the tune of USD 110127098.13. These funds were raised by the assessee through issue of Foreign Currency Convertible Bonds (FCCB). In other words, the monies raised by the assessee through issue of FCCB were lying in the bank account of State Bank of India in the name of the assessee at Bahamas. This FCCB funds lying in State Bank of India was fetching interest to the assessee @3% per annum. Those funds were lent to its AE as a special purpose loan to the tune of USD 110 million during the year on 16/05/2005. As stated supra, since the bid participation was unsuccessful, the funds were returned back by AE to the assessee on 26/06/2005 and the monies received in USD were again credited in the same bank account maintained by the assessee with State Bank of India Bahamas on 28/06/2005 in the sum of USD 110376142.02. The evidence in this regard is enclosed in pages 193-196 of the paper book. Out of the total sum credited in the bank account maintained with State Bank of India in the sum of USD 110376142.02, a sum of USD 110 million represent receipt of principal portion of the loan and interest of USD 3,76,247 after reducing bank charges of USD 105.

2.2. The monies received from the assessee by the AE was parked by the AE with Barclays bank in the form of short term deposits at Mauritius. The monies were lying with bank account at Mauritius in the name of AE

for a period of 41 days and it had fetched interest of USD 376247.02. Since the bid was unsuccessful on 28/06/2005, the AE withdrew the amount in the sum of 110376247.02 on 28/06/2005 and returned the money to the assessee on the very same day. This goes to prove that the AE had actually received interest @3% on the funds parked by it with Barclays bank. The very same interest amount of USD 376247.02 had been returned to the assessee company by the AE without retaining any margin thereon. This peculiar fact itself goes to prove that the fund that was given to AE was not at the disposal of the AE to be utilised for any other purpose, rather it was used for special purpose funding to participate in the bid, for which purpose the funds were placed in the form of short term deposits with Barclays bank. Hence, this peculiar fact distinguishes this special purpose loan transaction given to AE in the sum of USD 110 million with regular loans given by the assessee to its AE. Accordingly, the assessee had bifurcated this special purpose loan which had fetched interest @3% with the regular loan transactions which had fetched interest @LIBOR +200 basis points.

2.3. The ld. TPO observed that since the assessee had included this USD 110 million in Form 3CEB along with all other loans by stating that it had benchmarked at LIBOR + 200 basis points, the ld. TPO concluded that the interest rate at LIBOR + 200 basis points becomes a CUP available with the assessee and accordingly determined the ALP of the international transaction of lending of USD 110 million also by applying LIBOR + 200 basis points and made the transfer pricing adjustment.

2.4. As stated earlier, the lending of USD 110 million is to be considered separate and distinct from the regular loan given to the AE. In our considered opinion, considering the purpose for which this USD 110

million was given to its AE by the assessee and also considering the fact that the AE could not utilise the monies received from the assessee for any other purpose other than for the purpose of participation in the bid, we have no hesitation to hold that this lending of USD 110 million should be construed as a special purpose lending and accordingly to be treated as separate and distinct from loan simplicitor. We find that similar issue had come up for adjudication of this Tribunal in the case of Bennett Coleman And Co. Ltd vs. DCIT reported in 129 taxmann.com 398 (Mumbai Trib). The issue in dispute and the facts in the aforesaid case are as under:-

> ***2.*** *The core issue requiring our adjudication, in this case, is whether an interest-free debt funding of an overseas company in the nature of a special purpose vehicle (SPV), with a corresponding obligation to use it for the purpose of acquisition of a target company abroad, can be compared with a loan simpliciter, and be, subjected to an arm's length price adjustment, on the basis of Comparable Uncontrolled Price (CUP) method accordingly,. The issue in dispute is an ALP adjustment of Rs. 44.26 crores on account of notional interest on a loan stated to be of this nature by the assessee company to its fully owned foreign subsidiary, which is used as an SPV for overseas acquisitions.*
>
> ***3.*** *To adjudicate on this issue, a few material facts, as discernible from material on record, need to be stated. The assessee before us is a company now merged in Bennett Coleman & Co. Ltd., the flagship company of a well-known Indian media group- commonly known as 'Times Group'. At the relevant point of time, the assessee company, then known as Times Infotainment Media Ltd (TIML-India, in short), was a fully owned subsidiary of Bennett Coleman & Co Ltd and was engaged, inter alia, in the radio broadcasting business. When the Times Group decided to expand its wings in the radio broadcasting business and acquire overseas companies engaged in this line of business, as is stated, it was considered commercially expedient to make these investments through the assessee company. A public listed company in the United Kingdom, by the name of Scottish Media Group plc (SMG-UK, in short), wanted to disinvest in its radio broadcasting business, and that is the reason it put to auction its entire shareholding in Virgin Radio Holdings Limited, UK, (Virgin Radio, in short) which was held through SMG's wholly-owned subsidiary Ginger Media Group Ltd, UK. (Ginger-UK, in short). TIML-India was one of the successful bidders in this auction. The assessee was then invited to participate in the 'final proposal' phase of this disinvestment deal. A final proposal dated 19th March 2008 was submitted by the TIML-India. This offer, at point no. 5, specifically stated, under title 'Identity of the shareholders (with immediate and ultimate ownership)' that the purchasing company will be "an SPV formed specifically for the purpose of*

acquiring Virgin Radio", which is "100% owned by TIML" and that "the immediate and ultimate shareholder of TIML is Bennett Coleman & Co Ltd". In point no. 6, it was further stated that "the transaction will be 100% equity-financed from internal resources of TIML/BCCL" and that "no further financing is required given the size of this transaction relative to the TIML/BCCL group". What followed is an exclusivity agreement dated 3rd April 2008 with respect to possible sale by Ginger Media Group Ltd, one of SMG plc's wholly-owned subsidiaries to TIML-India "the entire share capital of Virgin Radio Holdings Ltd", which ultimately culminated in, on 30th May 2008, a sale agreement was entered into between Ginger UK, SMG-UK, TIML-India and a company by the name of TML Golden Square Ltd, UK (TIML Golden, in short). The TIML Golden was thus evidently the SPV (special purpose vehicle company) for the purpose of acquiring Virgin Radio. TIML was initially incorporated by a third party, Huntsmoor Nominees Limited, with a paid-up capital of £ 1, on 22nd May 2008, and it was subsequently acquired by TIML, on 30th May 2008, by purchasing the £ 1 share. Subsequently, one more UK based SPV came into the picture as the assessee acquired another TIML Global Limited (TIML Global, in short), a company incorporated with a £ 1 paid-up capital by Huntsmoor Nominees Limited, on 13th June 2008. This company was acquired by TIML-India, by purchased the £ 1 share on 16th June 2008. On acquisition of TIML Global, and with a view to make TIML Golden a step down subsidiary, the only £ 1 share of TIML Golden, which was held by TIML-India, was transferred to TIML Global. TIML Golden and TIML Global, at this point of time, were typical £ 1 companies without substance- which were to be used special purpose vehicles for the acquisition of Virgin Radios. This transaction also took place on 16th June 2008 itself. As a result of these transactions, TIML Golden became a wholly-owned subsidiary of TIML Global, TIML Global became a wholly-owned subsidiary of TIML, and, TIML anyway was already a wholly-owned subsidiary of BCCL. With this structure in place and the deal having been finalized, the flow of funds started to complete the transaction. TIML received Rs. 388.85 crores as interest-free deposits from its holding company, i.e. BCCL, and Rs. 100 crores as a subscription for 1% non-cumulative preference shares. TIML-India then remitted UK £ 56,824,316 (UK £ 1.2 million for equity, and balance UK £ 55.824 million as an interest-free loan to TIML-Global on 27th June 2008. Once this amount of UK £ 56.82 million was received by TIML-Global, it paid UK £ 53.51 million, on that day itself, on behalf of TIML-Golden, for the acquisition of Virgin Radio shares, and the balance amount of TIML-Golden for other acquisition-related costs. The acquisition of shares in Virgin Radios by TIML-Golden was completed on 30th June 2008. A further payment of UK £ 3,75,000, as an interest-free loan, was made by TIML India to TIML Global for the working capital costs. It was in this backdrop that form 3CEB filed by the assessee company disclosed the following transaction with its AE: "Amount remitted Rs. 477,10,41,750".

2.4.1. The findings of the Tribunal are as under:-

6. *We have heard the rival contentions at considerable length, perused the material on record and duly considered facts of the case in the light of the*

applicable legal position. The basic plea of the assessee, on which we are deciding this appeal, is the limited scope of application of the CUP method, and whether any commercial interest can be attributed, as an ALP adjustment, to such interest-free debt funding on the peculiar facts of this case. There have been considerable arguments on judicial precedents on the broad proposition that there can not be any arm's length price adjustments, under the transfer pricing legislation, on the interest-free debt funding to the SPVs, but, for the reasons we will set out in a short while, it is not really required to deal with that aspect of the matter. Learned counsel for the assessee has highlighted the peculiar nature of this transaction, emphasized that no interest can be attributed to such funding, particularly when the funds advanced are to be used only in the manner specified and in furtherance of the commercial interests of the assessee rather than the SPV, and submitted that, in any case, it could not be compared with loans simpliciter - as has been done by the authorities below. He has painstakingly taken us through the orders of the authorities below, including the Transfer Pricing Officer and the Dispute Resolution Panel, and made an effort to demonstrate glaring fallacies in the application of CUP method. He has also taken us through a large number of judicial precedents, but then, as we are deciding the matter on the first principles, and none of the judicial precedents come in the way of that exercise, we see no need to deal with all these judicial precedents at this stage. Learned Departmental Representative's basic argument has been that since such funding of SPV is required to be treated as an international transaction, it is required to be benchmarked anyway. On the question of application of CUP on the facts of this case, his plea has been that since the funding is admittedly in the nature of, and described in the books of accounts, as a loan, the interest imputation is inevitable. When learned Departmental Representative was confronted with, what appeared to us, infirmities in the application of CUP method, it was his submission that even if there are some shortcomings in the determination of the arm's length price, though he maintains that there are no such infirmities in substance, the matter may be remitted at the assessment stage for fresh adjudication on the determination of arm's length price. He fairly submits that if Indian PLR is not good enough as a benchmark for this loan, in all fairness, at least LIBOR is a good enough benchmarking tool for GBP denominated loan. Learned counsel reiterates his submissions, submits that this transaction is shown as a loan in the books of accounts as that is the only way in which it can shown, under the legal requirements, but then nothing really turns on how the transaction is treated for accounting purposes. Learned counsel for the assessee has vehemently opposed this suggestion and submitted that what is before this Tribunal is an adjudication on the arm's length price adjustment made and confirmed by the authorities below; if this arm's length price adjustment is incorrect, the Tribunal has to delete the same. As for what other remedies are available to the authorities below to correct their mistakes, it is not for the Tribunal to do anything parallel or to override the same. He thus reminds us, in his inimitable subtle way, of our role as a neutral forum and our limitation of not being able to supplement or improve the case of the Assessing Officer and the Transfer Pricing Officer. In addition to these arguments, many other facets of the matter have been argued before us, but then, in our considered view, it is not really necessary to deal with those facets.

7. *On a conceptual note, the determination of arm's length price is essentially an effort to neutralize the impact of intra- AE relationship in a transaction between two associated enterprises as also the impact of controlled conditions in such a transaction. In other words, the entire ALP ascertainment exercise is to determine if a hypothetical or real but same or materially similar transaction was to take place between two independent enterprises in uncontrolled conditions, whether such a hypothetical transaction would have been any different vis-à-vis the subject transaction entered into two associated enterprises, and, if so, to quantify the impact of such variations.*

8. *While section 92(1) that any income arising from an international transaction, which essentially refers to the transactions with associated enterprises- under section 92B, shall be computed "having regard to the arm's length price", section 92 F (ii) provides that "arm's length price means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions". It could thus be a historical price, which is applied in a transaction in the uncontrolled transaction, or a hypothetical price "proposed" to be applied in a transaction which is yet to take place or a transaction which is purely hypothetical, or even an entirely imaginary, formula-based, price- as is inherent in the scheme of the computation of ALP by methods permitted under section 92C- which includes indirect methods as well. We will come back to this aspect a little later.*

9. *…….*

10. *…….*

11. *…….*

12. *It is important to understand the true nature of this transaction because everything hinges on what is the true nature of the transaction in question. The transaction is a remittance of Rs. 477.10 crores to a wholly-owned subsidiary for making further payment of the cost of acquisition of a target company in the name of a step-down subsidiary which is fully owned by this fully owned subsidiary of the assessee company. Let us not forget the fact that the assessee company was one of the successful bidders in the purchase of the entire equity capital of Virgin Radios, which was held by Ginger Group plc UK- a wholly-owned subsidiary of the Scottish Media Group plc. Upon carrying the due diligence, and completion of other prerequisite steps, the assessee makes a final proposal, on 10th March 2008, with respect to the acquisition of Virgin Radios from Ginger Group plc UK, when TIML Global UK was not even in existence. TIML Global, the AE to which the remittance in question is made, was incorporated on 13th June 2008 in the UK and acquired by the assessee on 18th June 2008. Yet this final offer states that an SPV is formed especially for the purpose of acquiring Virgin Radios, and this SPV will be entirely funded from internal resources of the assessee company and its Indian parent company. Clearly, therefore, the agreement to acquire the Virgin Radios was reached much before the AE in question, i.e. TIML-Global, even came into existence, and the AE in question, i.e. TIML-Global, was used as a medium to acquire Virgin Radios. It is not thus a loan simpliciter to TIML-Global, but it is in the nature of an advance to TIML-Global with a corresponding obligation to use the funds advanced in the manner specified. The entire funds so remitted to the TIML-Global UK were spent by TIML-Global UK*

on the acquisition of Virgin Radios UK for TIML-Golden UK, a step-down subsidiary, and this end-use of funds remitted was essentially an integral part of the entire transaction. The role of the assessee company, though technically described as 'purchaser's guarantor in the agreement dated 30th May 2008, is so foundational and critical that the said agreement, in paragraph 22.1, states that "In consideration of the seller entering into this agreement, ...(the TIML-India), as primary obligor and not merely as surety, unconditionally and irrevocably guarantees to the seller the proper and punctual performance of the purchaser's obligations under this agreement and the transaction documents, including, without limitation, due and punctual payment of any sum which the purchaser is liable to pay". The assessee company is into the radio broadcasting business, and, much before even the AE came into existence, the assessee company had bid for, and successfully bid for, the target company, which was eventually acquired by its wholly-owned step-down subsidiary. The acquisition of the target company was thus at the instance of, in furtherance of business interests of the assessee company, and structured by the assessee company. The remittance of funds to TIML-Global was for this limited and controlled purpose, and sequence events and the material on record unambiguously confirm this factual situation- and that is not even called into question by the revenue authorities. The transaction of remittance to TIML-Global cannot, therefore, be considered on a standalone basis and can only be viewed in conjunction with the restricted use of these funds, for the strictly limited purposes, by the TIML-Global.

13. *If at all, therefore, this transaction can be compared with any other transaction, such other transaction can only be for the purpose of making remittance to an independent enterprise with the corresponding obligation to use the funds so remitted for acquiring a target company already selected by, and on the terms already finalized by, the entity remitting the funds. The essence of the transaction is a targeted acquisition and providing enabling funds for that purpose. Such a transaction, in our humble understanding, cannot be equated with providing funds to another enterprise as a loan simpliciter, on a commercial basis, which essentially implies that such a borrower can use the funds so received in such manner, even if subject to broad guidelines for purpose test, in furtherance of borrower's business interests. Ironically, however, that is precisely what the Transfer Pricing Officer has done and has been approved by the Dispute Resolution Panel as well.*

14. *It is also an admitted position that TIML-Global is a special purpose vehicle. A special purpose vehicle, or SPV as it is commonly called, is an entity that is set up for a special purpose or a special project. SPVs are often used by the promoters of a project or business to isolate the financial or legal risk associated with the project or activity for which the SPV was set up or because sometimes the activity or project in question requires an entity registered in a specific jurisdiction or specific jurisdictions. The business structuring through SPVs, particularly SPVs structured abroad, could be warranted on account of a variety of commercial and legal considerations, ranging from the comfort level of the outside parties dealing with entities incorporated in certain jurisdictions to the legal framework within which such entities operate, as also to cushion owners of these structures from financial, commercial or legal risk exposures emanating from the transactions that are undertaken through these SPVs. These SPVs are typical, to use transfer pricing terminology, "capital-rich low function entity".*

15. *…….*

16. …….

17. …….

18. *There are three fundamental questions that arise in this context- first, whether there can be such a funding transaction between the parties which are not associated enterprises, or, to put it differently, whether there can be valid comparables, under the CUP method, for such a transaction of SPV funding; second, whether if such a transaction is hypothetically possible, what could be the rate of interest in such financing is done in an uncontrolled situation; and, third- if interest is not the arm's length consideration for such funding, what could constitute an arm's length price of such financing.*

19. *As for the first question, the answer is obvious. Once we have held that transactions between the owner of SPV and the SPV belong to a genus different from the transactions between lenders and borrowers, such transactions between an SPV and the entity creating such an SPV, as long as it is for a specific transaction structured by the owner entity- as in this case, is inherently incapable of taking place between independent enterprise. The moment this kind of funding is done, the relationship between the entity funding the SPV and the SPV will be rendered as of 'associated enterprise' within the meanings of Section 92A(1) as also 92A(2). It is also elementary that the transactions between associated enterprises, even if held to be arm's length in character, cease to be valid comparable under the CUP method. Such a controlled end use of the monies is possible when the lender has functional control over the borrower, and that very control vitiates the arm's length situation. Section 92F(ii), as we have noted earlier, defines arm's length price as a real or hypothetical price in the same or materially similar transaction "between persons other than associated enterprises, in uncontrolled conditions". In the first place, an enterprise and its SPV are inherently associated enterprises. The definition of 'associated enterprises' under section 92A(1) covers "an enterprise which participates, directly or through one or more intermediaries, in the management or control or capital of the other enterprise". An SPV is entirely managed, entirely controlled and entirely owned by the enterprise which sets up the SPV. So far as section 92A(2) is concerned, SPVs are covered by more than one clause as the entire voting power (clause a) and entire share capital (clause b) of the SPV is held by the owner of that SPV, but loan advanced, if the remittance is to be treated as a loan to the SPV, by the owner of the SPV is clearly more than 50% of the book value of the assets owned by the SPV (clause c) at each stage. That is one thing. The other aspect of the matter is that not only the transaction has to be between independent enterprises but also in uncontrolled conditions. When a strict condition about end-use, and that too end-use being decided by the owner of the SPV so much in advance that the SPV was not even in existence when the end-use decision was taken, is an inherent part of the transaction of funds being remitted, this is anything but an uncontrolled condition. Viewed thus, there could indeed be a valid school of thought that the requirement of arm's length standards can, therefore, never be met, under the CUP method, so far as the nature of the present transaction is concerned.*

20. *As for the second question, even if one proceeds on the basis that one can assume or hypothesize a transaction similar to SPV funding in a non-AE relationship situation and fiduciary in nature- and such a hypothesis may also have some merits, it is important to bear in mind the fact that interest is compensation for the time value of money in the sense that when lender puts the money at the disposal of the borrower for a certain period, the interest that the borrower pays the lender is compensation for placing the money at the disposal of the borrower for borrower's use during this period. In a situation in which a borrower has sufficient opportunities to gainfully use the funds so placed at his disposal, and the gains from such use are high, interest rates are also high, and when there are no gains from such funds placed at the borrower's disposal, or when the gains from such funds are low or minimal, the interest rate also correspondingly travel south. In a situation, therefore, when the borrower has no discretion of using the funds gainfully, the commercial interest rates do not come into play at all.*

21. *That brings us to the third question, academic as it may sound at this stage, as to what, hypothetically speaking, could be a reasonable compensation under the CUP method, in an arm's length situation or, to borrow the terminology used in rule 10B(1)(a), 'comparable uncontrolled transaction', for making remittance to another corporate entity, even a special purpose vehicle, when the remitter decides the end-use of these funds in the strictest possible manner. Let us assume, for this analysis, that there is no intra-AE relationship between the two entities (i.e. Indian entity and the overseas entity set up for a particular purpose or project), and these entities are independent of each other. In our humble understanding, when the overseas entity is, from a commercial perspective, a de facto non-entity and it has come into legal existence only for the furtherance of the interests of the company providing the wherewithal, all the gains that such an overseas entity belongs to the Indian company. The SPV in such a situation is no more than a conduit entity. In an arm's length situation, when an SPV is created for some specific project or purpose, therefore, the net gains of that project or purpose must go to the person(s) sponsoring the SPV. The next logical question then would be as to how does this principle translate into actionable reality. We find inputs from transfer pricing legislation in a developing economy in the African continent. Rule 8(1) of the Nigerian Income-tax (Transfer Pricing) Regulations 2018, which we have referred to and reproduced earlier in this order, throws important light on this aspect. What this rule holds, in plain words, is that an SPV, which does not control the financial risks associated with its funding activities, shall not be allocated the profits associated with those risks, and the profits or losses associated with such risks would be allocated to the owner(s) of the SPV. This approach addresses the dichotomy in the SPV structure business model in the sense that while risks of an SPV investment are assumed by the owner(s) of the SPV, all the rewards, in whatever form, go to the SPV itself, by removing the gap, or ectopia in tax law, between the assumption of risks and the taxation of rewards thereof. It proceeds on the hypothesis that in an arm's length situation, the risks and rewards for the risks go hand in hand, and when someone assumes particular risks, the rewards for that risk cannot be assigned to someone else. The hypothesis underlying such an approach appeals to us, and, in our humble understanding, perhaps it truly reflects the arm's length compensation for the role played by the owner of the SPV in providing all the requisite*

wherewithal to the SPV to achieve its objectives. Therefore, when the CUP method is to be adopted for ascertaining arm's length price of providing wherewithal to the SPV, for achieving its objectives and purpose, the arm's length consideration thereof could at best be the corresponding gain to the SPV concerned- whether directly or indirectly.

22. *To sum up, there cannot be a transaction, between the independent enterprises, of interest-free debt funding of an overseas SPV by its sponsorer; if such a transaction between independent enterprises is at all hypothetically possible, the arm's length interest on such funding will be 'nil'; and, if there has to be an arm's length consideration under the CUP method, other than interest, for such funding, it has to be net effective gains- direct and indirect, attributable to the risks assumed by the sponsorer of the SPV, to the SPV in question.*

23. *So far as the arm's length consideration for SPV funding, for consideration other than interest is concerned, it is academic in the present case because the entire case of the revenue proceeds on the basis that interest was leviable on this funding, and benchmarking the same on CUP basis. In any event, that aspect of the matter would be wholly academic because, in the present case, the consolidated financial statements of the TIML-Global, which takes into account the financial affairs of its step-down subsidiary TIML-Golden as well, reflect a loss figure. In other words, there is no economic gain to the SPV in the relevant financial period, and, therefore, even going by this theory, the arm's length price of providing funds to the SPV, under the CUP method, would be 'nil'. Except for this arm's length price imputation- if all it can be so imputed under the CUP method, no amount of commercial interest, as in a borrowing simpliciter- whether LIBOR based or PLR based, can be attributed to the funding to the SPVs. The action of the authorities below on this point, thus, is unsustainable in law. Ground Nos 2 to 9 are thus allowed in the terms indicated above.*

2.5. The only distinguishing feature of the assessee's case with that of the facts prevailing in Bennett Coleman And Co. Ltd supra is that, in that case, special purpose lending was given for the purpose of participation in the bid and the bid was successful, whereas in the instant case, the bid was not successful. Barring this, all the facts are identical. Hence, ratio laid down by the Co-ordinate Bench of this Tribunal supra would be squarely applicable to the facts of the instant case before us.

2.6. In view of the aforesaid observations and respectfully following the judicial precedent relied upon hereinabove, we have no hesitation in directing the ld. TPO / AO to delete the transfer pricing adjustment made

in respect of special purpose loan of USD 110 million. Accordingly, the ground No.1 raised by the assessee is allowed.

3. At this juncture, it would be relevant to address the additional ground raised by the assessee on 16/05/2011 which is as under:-

> *1. The appellant company prays that it be allowed credit for Rs. 3,08,26,361 equivalent to MUR 2,09,29,003 paid by the company on 31st December 2010, pertaining to the tax on interest from Homefield International Pte. Ltd., which related to the previous year pertaining to AY 2006-07, as income from interest has already borne the tax in India and tax has now been paid in Mauritius also.*
>
> *2. The appellant craves the leave to add, amend, alter and or delete any of the above grounds of appeal at or before the time of hearing of the appeal.*

3.1. We find that this additional ground raised by the assessee goes to the root of the matter and does not require verification of fresh facts. Hence, they are admitted and taken up for adjudication. We find that the interest income received by the assessee from Home Field International Ltd. (AE) was duly offered to tax by the assessee company in Mauritius. The assessee paid the due taxes thereon at Mauritius. The assessee is only seeking foreign tax credit for the taxes already paid at Mauritius since the very same interest income received from AE is also subjected to tax in India in the hands of the assessee. We find that this is a legitimate claim of the assessee and hence, we direct the ld. AO to grant foreign tax credit tax while determining the tax liability on the assessee pursuant to this Tribunal order. Accordingly, the additional ground raised by the assessee is allowed.

4. The Ground No. 2 raised by the assessee was stated to be not pressed by the ld. AR due to smallness of the amount. We accordingly dismiss

the said ground as not pressed with an observation that the same shall not be construed as a precedence for other years.

5. The Ground No. 3 raised by the assessee is challenging the disallowance of payments made to various instituitions by invoking the provisions of section 40A(9) of the Act.

5.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee had made payment of Rs 81,26,900/- to as entrance fee subscription and contribution towards service and facility use to the following persons:-

Corporate Office	
Tata Sports Club	- Rs 3,30,000
Mithapur	
Mithapur Nutan Balshikshan Sangh	- Rs 19,00,000
Kindergarten Primary School	- Rs 10,75,000
Flag Day Celebration	- Rs 2,150
Babrala	
Tatachem D A V Public School	- Rs 44,44,813
Tatachem Sports and Cultural Club	- Rs 3,71,337
Total	**Rs 81,26,900**

5.2. The said payments were sought to be disallowed by the ld. AO by applying the provisions of section 40A(9) of the Act pursuant to the directions of the ld. DRP. Both the parties mutually agreed that this issue has already been settled in favour of the assessee by the co-ordinate bench decisions of this tribunal in assessee's own case as under:-

Contribution to Tata Sports Club

Covered in ITA No. 3082/Mum/2002 dated 26.07.2006 in A.Y. 1995-96

Covered in ITA No. 6496/Mum/2004 dated 17.08.2007 in A.Y. 1996-97

Covered in ITA No. 3383/Mum/2015 dated 22.04.2019 in A.Y. 2002-03

Mithapur Nutan Balshikshan Sangh

Covered in ITA No. 4442/Mum/1996 dated 04.02.2000 in A.Y. 1992-93

Covered in ITA No. 3383/Mum/2015 dated 22.04.2019 in A.Y. 2002-03

Kindergarten Primary School

Covered in ITA No. 4442/Mum/1996 dated 04.02.2000 in A.Y. 1992-93

Covered in ITA No. 3383/Mum/2015 dated 22.04.2019 in A.Y. 2002-03

Flag Day Celebration

Covered in ITA No. 3383/Mum/2015 dated 22.04.2019 in A.Y. 2002-03

Tatachem D A V Public School

Covered in ITA No. 7035/Mum/2004 in A.Y. 1997-98

Covered in ITA No. 3383/Mum/2015 dated 22.04.2019 in A.Y. 2002-03

Tatachem Sports and Cultural Club

Covered in ITA No. 3383/Mum/2015 dated 22.04.2019 in A.Y. 2002-03

5.3. Respectfully following the aforesaid decisions, we direct the ld. AO to delete the disallowance made in this regard. Accordingly, the Ground No. 3 raised by the assessee is allowed.

6. The Ground No. 4 raised by the assessee is with regard to the treatment of subscription paid to Tata Sons Ltd under the Brand Equity and Business Promotion Agreement.

6.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee had entered into Brand Equity and Business Promotion (BEBP) Agreement dated 18.12.1998 with Tata Sons Ltd for use of Tata Logo by the assessee, pursuant to which payment has been made by the assessee. This payment was sought to be disallowed by the ld. AO on the ground that the assessee was a Tata

Group Company since 1939 and has its own reputation and logo. Hence there is no need to use separate Tata Logo. Accordingly, the ld. AO disallowed the said payment as not meant for business purposes of the assessee.

6.2. We find that this issue is no longer res integra in view of the decisions of this tribunal in assessee's own case in the following cases :-
ITA No. 6366/Mum/2014 dated 15.09.2017 for A.Y. 2001-02
ITA No. 3383/Mum/2015 dated 22.04.2019 for A.Y. 2002-03
ITA No. 2439/Mum/2011 dated 19.02.2021 for A.Y. 2003-04
ITA No. 2440/Mum/2011 dated 06.07.2022 for A.Y. 2004-05

6.3. The ld. AR also stated that the similar issue has been decided by this tribunal in the case of assessee's own subsidiary Rallis India Ltd case in ITA No. 5701/Mum/2008 for A.Y. 2004-05 ; in the case of BPL Refrigeration Ltd vs ACIT reported in 91 ITD 203 and in the case of Tata Autocomp Ltd in IT(TP)A No. 7596/Mum/2012 dated 12.06.2013.

6.4. Respectfully following the aforesaid judicial precedents, the Ground No. 4 raised by the assessee is allowed.

7. The Ground No. 5 raised by the assessee is with regard to disallowance of computer upgradation expenses, which was stated to be not pressed by the ld. AR as depreciation has been granted to the assessee in the later years. Hence Ground No. 5 raised by the assessee is dismissed as not pressed.

8. The Ground No. 6 raised by the assessee is challenging the denial of deduction u/s 80IA of the Act in respect of profits derived by the Mithapur Power Plant.

8.1. We have heard the rival submissions and perused the materials available on record. The assessee has claimed deduction u/s 80IA of the Act in respect of its Power Plant comprising of High-Pressure Boiler (HPB3) and Turbine (TT9) set, located at Mithapur Plant, Mithapur, Plha Mandal, Gujarat-361315. It is not in dispute that the power generated by this Power Plant is captively consumed by the other units of the assessee company. It is not in dispute that the said power plant was set up on 11.05.1995 and the initial year of claim of deduction u/s 80IA of the Act was A.Y. 2001-02. It is not in dispute that separate books of accounts are maintained at Mithapur Plant for determining the profits derived from Mithapur Power Plant. The status of allowability of the said claim of deduction for various years commencing from A.Y. 2001-02 onwards are as under:-

a) For A.Y. 2001-02, the assessee's claim of deduction was allowed by the ld. AO in the assessment framed u/s 143(3) of the Act. This assessment was not subjected to reopening u/s 147 of the Act or revision u/s 263 of the Act.

b) For A.Ys. 2002-03 to 2004-05, the assessee's claim was initially allowed u/s 143(3) of the Act, but later withdrawn in the re-assessment proceedings. On further appeal, the reopening was held to be invalid by this tribunal. No decision was rendered by this tribunal on merits. The appeal preferred by the revenue against this tribunal order is pending before the Hon'ble High Court.

c) For A.Y. 2005-06, the assessee's claim was initially allowed u/s 143(3) of the Act. This assessment was sought to be revised u/s 263 of the Act by the ld. CIT. On further appeal against the section 263 order to this tribunal, this tribunal had held the revision order passed u/s 263 of the Act by the ld. CIT to be invalid. The appeal preferred by the revenue against this tribunal order is pending before the Hon'ble High Court.

8.1.1. Hence as on date, the deduction u/s 80IA of the Act in respect of Mithapur Power Plant was allowed in A.Y. 2001-02 on merits , being the first year. For A.Ys. 2002-03 to 2005-06, it has been allowed by the ld. AO u/s 143(3) of the Act, which had become final as subsequent reopening and revision proceedings, as the case may be, were quashed by this tribunal. Effectively, the claim of deduction is allowed to the assessee upto A.Y. 2005-06. Accordingly, the ld. AR argued that there is no reason for the ld. AO to take a divergent stand during the year under consideration to deny the claim of deduction u/s 80IA of the Act, when the facts are identical and there is absolutely no subsequent adverse developments on facts. The method of working of the profit of the eligible undertaking adopted for the year is the same as it was for A.Y. 2001-02. This method has been consistently followed by the assessee in all the subsequent years also.

8.2. The audit report in Form 10CCB for the year under consideration is enclosed in page 125 of the paper book. The profit and loss account of the eligible power unit is enclosed in page 133 of the paper book. The workings for deduction u/s. 80IA of the Act are enclosed in page 131 of the paper book.

8.3. For the year under consideration, the sales figure for electricity is derived by multiplying units of electricity produced by the power plant with the fair market transfer price of Rs.4.74 per unit. The rate of Rs.4.74 per unit is derived as a equivalent cost of power per unit if the power would have been purchased from local state electricity board- i.e. Gujarat State Electricity Board. This is done as per the provisions of section 80(IA)(8) of the Act which provides for adoption of Fair Market Value (FMV) for goods transferred to another business of the assessee.

8.3.1. The sale of steam generated by the power project has been recorded at cost of producing the same. The sale of steam could not be recorded at fair market value as there is no ready market for steam i.e. steam is not a Marketable product.

8.3.2. As far as electricity is concerned, the cost of production of power is arrived at scientifically as per the cost records and the same has been matched against the figure of Sales which is the amount which would be required to be expended if the electricity had to be purchased from Gujarat Electricity Board, as per the provisions of Section 80(IA)(8) of the Act. The saving of cost has been determined as the profit from the industrial unit by the company.

8.3.3. The assessee further drew the attention of the ld. AO to the letter of the CBDT addressed to the IMC dt. 3.10.2001 (submitted vide letter dated 26-10-2010) wherein the issue of allowance of deduction u/s 80(IA) of the Act with respect to captive consumption of power units has been discussed at length.

8.3.4. The cost of the steam generated by the power project is the actual cost of production as per Cost Accounts. The sale of steam generated by the power project has been recorded at cost of producing the same. The sale of steam could not be recorded at fair market value as there is no ready market for steam i.e. steam is not a Marketable product. Hence, there is no profit no loss on steam. In support of the claim, the working sheet of rate of power of Gujarat State Electricity Board was also enclosed.

8.4. We find that the case of the ld. AO is that--

(i) since the said power plant is a captive power plant, deduction u/s.80IA of the Act is not eligible to the assessee;
(ii) the assessee had adopted the rate of Rs.4.74 per unit to book income from sale of power. This is nothing but the rate charged by the Gujarat Electricity Board had it supplied power to the assessee. Hence, the assessee has inflated the profit on sale of power by showing the cost of production at a rate much lower than the one as per the tariff of Gujarat Electricity Board; and
(iii) the assessee has claimed deduction u/s.80IA of the Act on the sale of steam also. This is merely a notional book entry passed by the assessee and accordingly, not eligible for deduction u/s.80IA of the Act.

8.5. We would like to adjudicate each of the aforesaid propositions separately. First, whether deduction u/s. 80IA of the Act would be eligible in respect of captive power plant i.e. power generated in the power plant when captively conceived by other non- eligible units, deduction u/s.80IA of the Act would be eligible for the said power plant. This issue is no longer res integra in view of the decision of the Hon'ble Madras High

Court in the case of Tamilnadu Petro Products Ltd. vs. ACIT reported in (2011) 51 DTR (Mad) 67. Similarly, the Hon'ble Delhi High Court in the case of CIT vs. Orient Abrassive Ltd in ITA Nos. 991/2010, 1078/2010, 1077/2010, 1079/2010 and 535/2011 dated 31/07/2014 had also held that assessee would be eligible for deduction u/s.80IA of the Act in respect of captive consumption of power generated from the eligible unit. Respectfully following the aforesaid decisions, we hold that assessee was duly justified in claiming deduction u/s.80IA of the Act for captive consumption of power. In any case, the very same deduction was granted under the same facts and circumstances by the ld. AO himself in A.Y.2001-02. Once, the deduction u/s.80IA of the Act has been granted in the first year of its claim, then in subsequent year, the same cannot be withdrawn unless there are adverse factual developments. In the instant case, there is absolutely no adverse factual development that had been placed on record by the Revenue to justify its withdrawal of deduction u/s.80IA of the Act in the 6th year of its claim of the assessee. Reliance in this regard has been rightly placed by the assessee on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Paul Brothers reported in 216 ITR 548 (Bom).

8.6. It is a fact that the steam generated from the power plant is transferred for usage in manufacturing soda ash and salt. For this transfer of usage of steam from power plant to the chemical plant, the assessee had reflected sale of steam in the profit and loss account of power plant and claimed deduction u/s.80IA of the Act. The steam generated effectively is a by-product of the power plant. Even though this income is booked by the assessee by way of book entry i.e. by booking income in the eligible unit and claiming expenditure in the non-eligible unit, in our considered opinion, the said profit represents profit derived from the

power plant which is an eligible undertaking. We find that the assessee for the purpose of determining the value of steam transferred to the non-eligible unit, had adopted the cost of production of steam as the sale price. The cost of production of steam has been considered by the assessee by using the cost accounting records which is prescribed and which is as per the mandate of cost accounting rules which has been consistently followed by the assessee. In this regard, the eligibility of an assessee to claim deduction u/s.80IA of the Act for the sale of steam from power unit to non-eligible unit has been subject matter of consideration by the Co-ordinate Bench decision of this Tribunal in the case of DCW Ltd vs. The Additional Commissioner of Income Tax reported in 37 SOT 322(Mum). The relevant observation of this Tribunal on the impugned aspect of the issue is reproduced hereunder:-

> ***"18.8*** *The next item of miscellaneous income is the income from sale of steam produced by the assessee. Briefly the facts and nature of steam are that the captive power undertaking also has waste heat recovery boiler, which is part of the power undertaking. The power generated by the running of diesel generating set is used in the manufacture of caustic soda. Running of Diesel Generating Sets produce heat, which is recovered from the waste heat recover boiler in the form of steam. During the year ended March, 2003, the total quantity of steam generated is 1,02,295 MT. The said steam is used as power for the manufacture of PVC and Ilmenite and 6,240 MT was used towards internal consumption. During the year 66,990 MT of steam was consumed in the manufacture of PVC and 29,065 MT was consumed in the manufacture of Ilmenite.*
>
> ***18.9*** *The submission of the learned AR of the assessee is that since power in the form of steam was generated by the captive power plant and consumed in the manufacture of PVC and Ilmenite, therefore, the assessee is entitled for deduction under section 80-IA. Further, the learned AR submitted that on identical set of facts, the department filed Special Leave Petition before Hon'ble Supreme Court against the judgment of Hon'ble Madras High Court in T.C. No. 1773 of 2008 and vide judgment dated 6th November, 2008, the Apex Court dismissed the department's appeal. In the said judgment Madras High Court dismissed the Department's appeal against the decision of Tribunal holding that the assessee was entitled to claim deduction under section 80-IA of the Act on the value of steam used for captive consumption by the assessee. CIT v. Tanfac Industries Ltd. [S.L.P.(C) No. 18537 of 2009] (319 ITR 8 & 9). In the light of above discussion, we find that the steam produced by the assessee is eligible unit is a bye-product and income from sale of steam is the income derived from industrial*

> *undertaking, therefore, deduction under section 80-IA is allow-able. We, accordingly, set aside the order of CIT(A) on this issue and the claim, of the assessee is allowed."*

8.7. In view of the above, we hold that assessee is entitled for deduction u/s.80IA of the Act in respect of sale of steam from its power plant to non-eligible units.

8.8. Now coming to the rate per unit of power adopted by the assessee for recognizing income on account of sale of power, we find that assessee had adopted the rate of Rs.4.74 per unit which is the same rate charged by Gujarat Electricity Board on the assessee had the power been drawn by the assessee from the Gujarat Electricity Board Grid. We find that the main grievance of the Revenue is that the cost of production of power for the assessee is less than Rs.4.74 per unit and hence, the assessee is not eligible to claim deduction u/s.80IA of the Act by considering the sale price of Rs.4.74 per unit which is nothing but the price charged on the power supply by Gujarat Electricity Board on the assessee. We find that this issue is no longer res integra by the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Reliance Industries Ltd reported in 421 ITR 686 (Bom). The relevant question raised before the Hon'ble Jurisdictional High Court is reproduced as under:-

> *(c) Whether, on the facts and in the circumstances of the case and in law, the ld. Tribunal was right in upholding the decision of the ld.CIT(A) who had deleted the addition made by the then AO by restricting the deduction u/s. 80IA at Rs. 48,76,82,681/-as against Rs. 131,43,30,575/- claimed by the assessee?"*

8.8.1. The Hon'ble Jurisdictional High Court disposed of the above question by observing as under:-

4. *Question (c) pertains to the dispute between the department and the assessee regarding the rate at which the electricity generated by one unit of the assessee-company and provided to the another be valued. The assessee contended that such valuation should be at the rate at which the electricity distribution companies are allowed to supply electricity to the consumers. The revenue on the other hand argues that the appropriate rate should be the rate at which the electricity is purchased by the distribution companies from the electricity generating companies.*

5. *This controversy arose in the background of the fact that the assessee had set up a captive power generating unit and claimed deduction under Section 80IA of the Income Tax Act, 1961 ("the Act" for short) in respect of the profits arising out of such activity. Obviously, therefore the attempt on the part of the assessee was to claim larger profit under the unit which was eligible for such deduction as against this, attempt of the revenue would be see that the ineligible unit shows greater profit.*

6. *The Tribunal in the impugned judgment extracted extensively from the order of CIT (Appeals) and independent reasons for confirming the same. In such order CIT (Appeals) had placed reliance on an earlier judgment of the Tribunal in case of Reliance Infrastructure Ltd. v. Addl. CIT [2011] 9 taxmann.com 186 (Mum. - Trib.). Learned counsel for the assessee had placed on record a copy of the judgment of the Tribunal in case of Reliance Infrastructure limited. In such judgment an identical issue came up for consideration. The Tribunal by detailed judgment had held and observed as under:—*

> *"44. In the given facts and circumstances of the case, we are of the view that the profits of the business of generation of power worked out by the Assessee on the basis of the price that it paid to TPC for purchase of power continues to be the best basis even after the order of MERC and therefore the same has to be accepted as was done in the past and as approved by the ITAT in Assesssee's case. We therefore dismiss ground No.4 of the revenue."*

7. *Counsel for the assessee pointed out that the judgment of the Tribunal in case of Reliance Infrastructure Ltd. (supra) was carried in appeal by the revenue before the High Court in Income Tax Appeal No.2180 of 2011, such appeal was dismissed making following observations:—*

> *"6. As far as question (d), namely, the claim relating to purchase price from Tata Power Company is concerned and that was for the deduction under Section 80IA, the ITAT in paragraph 21 onwards has noted the factual findings and also referred to the order of the Maharashtra Electricity Regulatory Authority (for short "MERC"). Paragraph 36 set outs as to how the claim arose. The claim has been considered in the light of Section 80IA and particularly proviso and explanation thereto. The Tribunal eventually held that till the Assessment Year 2005-2006, the Revenue considered the rate at which the power was purchased by the Assessee from Tata Power Company as market value. There is nothing brought on record as to how the rate determined by the MERC is the true market value. The Assessee gave explanation that the rates determined by the MERC do not reflect the correct market rate. The finding is that the mode of computation and deduction under Section 80IA requires no deviation from the past. The findings of fact and to be found in paragraphs 42 to 50 also reflect that the very issue came up for*

> *consideration for the Assessment Year 2003-2004. For the reasons assigned by the ITAT and finding that the attempt is to seek reappreciation and reappraisal of the factual data that we come to a conclusion that even question (d) as framed is not a substantial question of law."*

8.9. In view of the above, we hold that assessee was justified in recognizing the sale income of power at the rate of 4.74 power unit.

8.10. In view of the independent observations, we find that basis on which the deduction u/s.80IA of the Act has been denied by the ld. AO for the year under consideration has no legs to stand in the eyes of law. Hence, we direct the ld. AO to grant deduction u/s.80IA of the Act in respect of its captive power plant, in accordance with law. Accordingly, the ground No.6 raised by the assessee is allowed.

9. The ground No.7 raised by the assessee is challenging the denial of deduction u/s.80IB of the Act in respect of fertilizer subsidy received by the Haldia unit in West Bengal.

9.1. We have heard rival submissions and perused the materials available on record. We find that assessee had received a price concession from the Government which has been coined as fertilizer subsidy. The assessee submitted that the maximum retail price for sale of fertilizers to farmers had been fixed at a concessional rate by the Government, i.e. in other words, the assessee is mandated to sell the fertilizers to the farmer only at the maximum retail price fixed by the Government which is below the actual market price. The difference between actual market price and MRP is being paid by the Government to the assessee in the form of fertilizer subsidy. This is done in order to protect the farmers and it is more of welfare measures adopted by the Government in consonance with the Government Policies. It is only

subsidy to the farmers and not to the assessee. Hence, as far as the assessee is concerned, it is effectively the receipt of sale price. It is not in dispute that assessee's Haldia unit in West Bengal is eligible for claiming deduction u/s.80IB of the Act. The only dispute in the instant ground is whether the fertilizer subsidy received by the assessee as stated supra from the Government would be eligible for deduction u/s.80IB of the Act or not. As stated earlier, what assessee has recovered is only part of sale price in the form of subsidy. Hence, in our considered opinion, the same would be eligible for deduction u/s.80IB of the Act. In fact, in A.Y.2003-04 this Tribunal in assessee's own case vide its order dated 16/06/2022 had accepted the stand of the assessee and held that fertilizer subsidy represent part of the consideration received for sale of fertilizers and hence, the same would be eligible for deduction u/s.80IB of the Act. This order was subsequently followed by this Tribunal in assessee's own case for A.Y.2004-05 and 2005-06 also. Respectfully following the same, we direct the ld. AO to grant deduction u/s.80IA of the Act in respect of fertilizer subsidy received by the assessee. Accordingly, the ground No.7a raised by the assessee is allowed.

10. The ground No.7b raised by the assessee was stated to be not pressed by the ld. AR due to smallness of the amount. We accordingly, dismiss the said ground No.7b as not pressed with an observation that the same shall not be construed as a precedent for other years.

11. The ground No.8 raised by the assessee is challenging the disallowance of commission paid to Managing Director and Executive Director by applying the provisions of Section 36(1)(ii) of the Act.

11.1. We have heard rival submissions and perused the materials available on record. We find that assessee was directed to produce the details of the commission paid to the Directors and employees by the ld. AO during the course of assessment proceedings. The assessee filed the details vide letter dated 22/12/2009. The assessee stated that commission has been paid to the Managing Director and Executive Director as per the provisions of Companies Act 1956. It was specifically clarified that no commission was paid to any employee. The assessee stated that it had paid commission to Shri P R Menon, Managing Director in the sum of Rs.80 lakhs and Shri Homi R Khushrokhan, Executive Director in the sum of Rs.50 lakhs. Both these Directors i.e MD & ED were drawing salary from the assessee company. The assessee pleaded that the said payments were made to these two Directors as permitted in the provisions of the Companies Act 1956. The assessee also submitted that the said commission has been taken into account as part or remuneration paid to the said Directors and due deduction of tax at source were complied with. The ld. AO however, did not heed to the contentions of the assessee and invoked the provisions of Section 36(1)(ii) of the Act and disallowed the same on the ground that the said commission has been paid to the shareholders by way of distribution of profits as dividend. In other words, the case of the Revenue is that in lieu of the dividend, this commission has been paid by the assessee to the Directors. The ld. AR before us vehemently argued that both the Managing Director and Executive Director are not even shareholders of the assessee company. Hence, the provisions of Section 36(1)(ii) of the Act per se cannot be applied in the instant case. The ld. AR also submitted that the reliance placed by the ld. AO on the decision of the Hon'ble Bombay High Court in the case of Loyal Motor Services Co. Ltd. vs. CIT reported in 14 ITR 647 would indeed support the case of the assessee. In the said case,

it has been categorically stated that the provisions of section 36(1)(ii) of the Act has been inserted in the statute to prevent the escapement from taxation by describing the payment as bonus, when in fact ordinarily, it should have reached the shareholder as profit or dividend. For the sake of convenience, we deem it fit to reproduce the provisions of Section 36(1)(ii) of the Act hereunder:-

> ***Other deductions.***
>
> ***36.*** *(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—*
>
> *(ii) any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission;*

11.2. From the bare reading of the aforesaid provision, it is very clear that in order to apply this provision in the first instance, the Managing Director and Executive Director should be shareholders and they should have been paid commission in lieu of distribution of profit or as dividend. Since the ld. AR placed on record the list of shareholders for the first time before us to drive home the point that both the MD and ED were not shareholders of the assessee company at the relevant point in time, we deem it fit and appropriate to restore this issue to the file of the ld. AO for the limited purpose of verification of facts as to whether Mr. P R Menon and Shri Homi R Khushrokhan were shareholders of the assessee company at the relevant point in time. If they are not found to be shareholders, then the disallowance made u/s.36(1)(ii) of the Act should be deleted. We make it clear that we are not even contemplating here that if the payment is made to shareholders in the form of Commission or Bonus, the provisions of section 36(1)(ii) of the Act would become applicable automatically. With these directions, the ground No. 8 raised by the assessee is allowed for statistical purposes.

12. The ground No.9 raised by the assessee was stated to be not pressed by the ld. AR. The same is reckoned as a statement made from the Bar and accordingly, dismissed as not pressed.

13. The ground No.10 raised by the assessee with regard to disallowance of machinery hire charges was decided against the assessee by this Tribunal in A.Y.2002-03 and hence, the ld. AR did not press this ground. Accordingly, the ground No.10 is dismissed as not pressed.

14. The ground No.11 raised by the assessee with regard to refusal to withdraw deduction of loss on foreign exchange fluctuation was stated to be not pressed by the ld. AR at the time of hearing. This issue is left open to be adjudicated in subsequent years, if the need arises. Accordingly, the ground No.11 is dismissed as not pressed.

15. The ground No.12 raised by the assessee is challenging the disallowance of deduction for early settlement scheme / voluntary retirement scheme expenses. The same was stated to be not pressed by the ld. AR as proportionate deduction was allowed to the assessee over a period of 5 years. Hence, the ground No.12 is hereby dismissed as not pressed.

16. The ground No.13 raised by the assessee is with regard to unilateral addition of Rs.7,93,739/- made by the ld. AO. This ground was stated to be not pressed by the ld. AR due to smallness of the amount. Accordingly, dismissed as not pressed.

17. The ground No.14 raised by the assessee is challenging the adjustment to book profits u/s.115JB of the Act in respect of provision for wealth tax and provision for advances. This ground was stated to be not pressed by the ld. AR, in view of the fact that adjudication of this issue would be academic in nature as income was not assessed u/s.115JB of the Act. In view of this, this issue is left open by us and ground No.14 is hereby dismissed as not pressed.

18. In the result, appeal of the assessee in ITA no.9037/Mum/2010 for A.Y.2006-07 is partly allowed.

ITA No.8710/Mum/2011 (A.Y.2017-18) (Assessee Appeal)

19. The ground No. 1 raised by the assessee is challenging the transfer pricing adjustment in the sum of Rs.1,29,04,514/- on account of low rate of interest charged on advance to its AE M/s. Home Field International Pvt. Ltd.

19.1. We have heard rival submissions and perused the materials available on record. At the outset, we find that the lending to AE has been made in earlier years and the same has been continuing during the year. No fresh lending was made during this year. The loans given to AE are continuing transactions during the year on which interest is recovered by the assessee company on LIBOR + 200 basis points. The same was considered to be at arm's length price while doing the benchmarking in the TP study report. The total loan outstanding to Home Field International Pvt. Ltd (HLP) Mauritius was USD 140.58 million which has been funded partly through FCCB issue proceeds to the extent of USD 112.22 million and remaining USD 28.36 million has been funded by way

of remittance from India. The lending at the interest rate of LIBOR +200 basis points to the AE was accepted to be at arm's length price by the ld. TPO in A.Y.2006-07 i.e. the immediately preceding year which has been adjudicated hereinabove. The assessee had actually earned interest income of 36.37 lakhs, Rs.11.85 lakhs and Rs.14.09 lakhs. This interest was considered erroneously by the ld. TPO at 36.37%, 11.85% and 14.09%. Based on this, the ld. TPO by applying CUP method adopted 16% interest rate to be the arm's length price which is the domestic SBI Prime Lending Rate. (PLR). The assessee argued before the ld. DRP that when the loan is given in foreign currency, how the interest rate applicable at SBI PLR rates could be charged on the said loans. The assessee always argued that the currency in which the loan amount is getting consumed and the country in which the loan is getting utilized is to be considered and since the loan is in USD and the repayment from AE is also going to be in USD, then interest rate @LIBOR + 200 basis points would be at arm's length. The assessee in support of its submission also submitted a quotation received from HSBC for similar type of transaction which quoted interest rate of LIBOR + 0.5%. As against this, the assessee has charged interest @ LIBOR + 2% from its AE and accordingly, it was submitted that assessee's interest rate is at arm's length. The ld. DRP however, took a different view. The ld. DRP observed that out of USD 140.58 million, the assessee already had funds lying by way of FCCB issue proceeds to the extent of USD 112.22 million in its dollar account. Hence, for that amount, interest to be adopted would be LIBOR + 2%. Accordingly, no TP adjustment would be required for the same. The ld. DRP however, held that with regard to remaining USD 28.36 million, since the same were sourced out of Indian funds, Indian banking lending rate should be considered which was determined by the ld. DRP at 11%. The ld. DRP directed the ld. TPO to determine the ALP

@11% interest rate in respect of USD 28.36 million, which was duly implemented by the ld. AO in the final assessment order. Aggrieved, the assessee is in appeal before us.

19.2. We find that the issue as to whether LIBOR interest rate should be adopted in respect of loans given in foreign currency in which the said loan is to be recovered was subject matter of consideration by the Hon'ble Delhi High Court in the case of CIT vs. Cotton Naturals (I)(P) Ltd. reported in 276 CTR 445 (Del). The relevant operative portion in this regard is reproduced hereunder:-

> ***"39.*** *The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, in our considered opinion, must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable. The currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. Klaus Vogel on Double Taxation Conventions (Third Edition) under Article 11 in paragraph 115 states as under:—*
>
> > *"The existing differences in the levels of interest rates do not depend on any place but rather on the currency concerned. The rate of interest on a US $ loan is the same in New York as in Frankfurt-at least within the framework of free capital markets (subject to the arbitrage). In regard to the question as to whether the level of interest rates in the lender's State or that in the borrower's is decisive, therefore, primarily depends on the currency agreed upon (BFH BSt.B1. II 725 (1994), re. 1 § AStG). A differentiation between debt-claims or debts in national currency and those in foreign currency is normally no use, because, for instance, a US $ loan advanced by a US lender is to him a debt-claim in national currency whereas to a German borrower it is a foreign currency debt (the situation being different, however, when an agreement in a third currency is involved). Moreover, a*

difference in interest levels frequently reflects no more than different expectations in regard to rates of exchange, rates of inflation and other aspects. Hence, the choice of one particular currency can be just as reasonable as that of another, despite different levels of interest rates. An economic criterion for one party may be that it wants, if possible, to avoid exchange risks (for example, by matching the currency of the loan with that of the funds anticipated to be available for debt service), such as taking out a US $ loan if the proceeds in US $ are expected to become available (say from exports). If an exchange risk were to prove incapable of being avoided (say, by forward rate fixing), the appropriate course would be to attribute it to the economically more powerful party. But, exactly where there is no 'special relationship', this will frequently not be possible in dealings with such party. Consequently, it will normally not be possible to review and adjust the interest rate to the extent that such rate depends on the currency involved. Moreover, it is questionable whether such an adjustment could be based on Art. 11 (6). For Art. 11(6), at least its wording, allows the authorities to 'eliminate hypothetically' the special relationships only in regard to the level of interest rates and not in regard to other circumstances, such as the choice of currency. If such other circumstances were to be included in the review, there would be doubts as to where the line should be drawn, i.e., whether an examination should be allowed of the question of whether in the absence of a special relationship (i.e., financial power, strong position in the market, etc., of the foreign corporate group member) the borrowing company might not have completely refrained from making investment for which it borrowed the money."

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

41. *Counsel for the Revenue had made reference to Chapter 10 of the U.N. Transfer Pricing Manual, relevant portion of which reads:—*

"10.4.10. Financial Transactions

10.4.10.1. Intercompany loans and guarantees are becoming common international transactions between related parties due to the management of cross-border funding within group entities of an MNE group. Transfer pricing of inter-company loans and guarantees are increasingly being

considered some of the most complex transfer pricing issues in India. The Indian transfer pricing administration has followed a quite sophisticated methodology for pricing inter-company loans which revolves around:

- *Examination of the loan agreement;*
- *A comparison of terms and conditions of loan agreements;*
- *The determination of credit ratings of lender and borrower;*
- *The identification of comparable third party loan agreements: and*
- *Suitable adjustments to enhance comparability.*

10.4.10.2. The Indian transfer pricing administration has come across cases of outbound loan transactions where the Indian parent has advanced to its associated entities (AE) in a foreign jurisdiction either interest free loans or loans at LIBOR (London Interbank Offered Rate) or EURIBOR (Euro Interbank Offered Rate). The main issue before the transfer pricing administration is benchmarking of these loan transactions to arrive at the ALP of the rates of interest applicable on these loans. The Indian transfer pricing administration has determined that since the loans are advanced from India and Indian currency has been subsequently converted into the currency of the geographic location of the AE, the Prime Lending Rate (PLR) of the Indian banks should be applied as the external CUP and not the LIBOR or EURIBOR rate.

10.4.10.3. A further issue in financial transactions is credit guarantee fees. With the increase in outbound investments, the Indian transfer pricing administration has come across cases of corporate guarantees extended by Indian parents to its associated entities abroad, where the Indian parent as guarantor agrees to pay the entire amount due on a loan instrument on default by the borrower. The guarantee helps an associated entity of the Indian parent to secure a loan from the bank. The Indian transfer pricing administration generally determines the ALP of such guarantee under the Comparable Uncontrolled Price Method. In most cases, interest rates quotes and guarantee rate quotes available from banking companies are taken as the benchmark rate to arrive at the ALP. The Indian tax administration also uses the interest rate prevalent in the rupee bond markets in India for bonds of different credit ratings. The difference in the credit ratings between the parent in India and the foreign subsidiary is taken into account and the rate of interest specific to a credit rating of Indian bonds is also considered for determination of the arm's length price of such guarantees.

10.4.10.4. However, the Indian transfer pricing administration is facing a challenge due to non-availability of specialized databases and of comparable transfer prices for cases of complex inter-company loans as well as mergers and acquisitions that involve complex inter-company loan

instruments as well as an implicit element of guarantee from the parent company in securing debt."

42. *The first paragraph quoted above, rightly stipulates that inter-company loans would require examination of the loan agreement, comparison of the terms and conditions of loan agreements, the determination of credit rating of the lender and the borrower, identification of comparable third party loan agreements and suitable adjustments should be made. In addition to the aforesaid factors, the comparability analysis should also take into account the business relationship and the functions performed by the subsidiary AE for the parent company. In the present case, we are not concerned with paragraph 10.4.10.3 of the United Nations Transfer Pricing Manual. However, we are unable to agree with the position set out and asserted in paragraph 10.4.10.2 of the Manual. The reasoning given therein is contrary to the accepted international tax jurisprudence and the rules adopted and applied. There is no justification or a cogent reason for applying PLR for outbound loan transactions where the Indian parent has advanced loan to an AE abroad. Chapter 10 of the United Nations Practical Manual on Transfer Pricing relates to country practices. The said Chapter sets out an individual country's view point and its experiences for the information of the readers. The said Chapter does not reflect the view of the Manual. Paragraph 10.1 of the United Nations Practical Manual on Transfer Pricing for Developing Countries reads:—*

"10.1. Preamble by the Subcommittee on Transfer Pricing: Practical Aspects

10.1.1. In the first nine chapters of this Manual, the Subcommittee has sought to provide practical guidance on the application of transfer pricing rules based on Article 9(1) of the UN Model Tax Convention and the arm's length principle embodied in that Article. With regard to chapters one through nine, the Subcommittee has discussed and debated the merits of the guidance that is provided and, while there may be some disagreement on certain points, for the most part the Subcommittee is in agreement that the guidance in those chapters reflects the application of the arm's length principle as embodied in the UN Model Tax Convention.

10.1.2. The Subcommittee recognizes that individual countries, particularly developing and emerging economies, struggle at times with the details of applying these treaty-based principles in a wide variety of practical situations. It therefore seemed appropriate to allow representatives of individual countries an opportunity to set out their individual country viewpoints and experiences for the information of readers. Those individual country views are contained in this chapter. It should be emphasized that it does not reflect a consistent or consensus view of the Subcommittee."

43. *Normally there would be a difference between the lending rate and borrowing rate in each country. Some authors and writers suggest that the average or mid-point between the two should be taken. However, others like Klaus Vogel, have suggested that economic purpose and substance of the debt-claim or debt for which granting of credit calls for the lending rate would be determinative. Thus, in case of a capital investment, the borrowing rate will apply, whereas in case of credit allowed to a customer on sale of goods, the*

> *lending rate would apply. We do not deem it necessary to enter into this controversy and express our view as regards the same.*

19.3. Further, we find that the Hon'ble Jurisdictional High Court in the case of PCIT vs. Manugraph India Pvt. Ltd in Income Tax Appeal No.758 of 2017 dated 09/09/2019 also had an occasion to consider the same issue. The relevant question raised before the Hon'ble Jurisdictional High Court was as under:-

> *"(a). Whether on the facts and in the circumstances of the case and in law, in terms of provision of Section 92C of the Income Tax Act read with Rule 10B of the Income Tax Rules, the Hon'ble Tribunal was right in restricting the rate of interest on loans given to Associated Enterprises @ LIBOR + 2% instead of 17.22% proposed by the Transfer Pricing Officer?*

19.3.1. This question was disposed of by the Hon'ble Jurisdictional High Court by observing as under:-

> ***3. Regarding Question No.(a)***
> *(a) It is an agreed position between the parties that the issue raised herein stand concluded against the Revenue and in favour of the Respondent - Assessee. This by the decision of this Court in the case of the same Respondent viz. Principal Commissioner of Income Tax v/s. Manugraph (Income Tax Appeal No. 454 of 2016) rendered on 19 November 2018.*
>
> *(b) The aforesaid decision was rendered following an earlier decision of this Court in the case of CIT v/s. M/s. Everest Kanto Cylinders Ltd. (378 ITR 67).*
> *(c) Therefore, for the reasons indicated in the above orders, the question No.(a) does not raise any substantial question of law, Thus not entertained.*

19.4. Similar views were expressed by the Hon'ble Jurisdictional High Court in the case of CIT vs. Everest Kanto Cylinder Ltd in Income Tax Appeal No.435 of 2015 dated 18/07/2017; Income Tax Appeal No.294 of 2016 dated 20/07/2018 and in the case of PCIT vs. Manugraph India Ltd in Income Tax Appeal No.454 of 2016 dated 19/11/2018. Respectfully

following the same, we direct the ld. AO to delete the TP adjustment made in respect of interest on loan advanced to AE in A.Y.2007-08. Accordingly, the ground No.1 raised by the assessee is allowed.

20. The ground No.2 raised by the assessee is challenging the disallowance u/s.14A of the Act which was stated to be not pressed due to smallness of the amount. We accordingly, dismiss the said ground as not pressed with an observation that the same shall not be construed as precedent for other years.

21. The ground No.3 raised by the assessee is challenging the disallowance of payments made to various clubs and institutions u/s.40A(9) of the Act.

21.1. We have heard rival submissions and perused the materials available on record. We find that assessee had made payments to the following clubs / institutions.

<u>Corporate Office</u>

Tata Sports Club	- Rs 3,30,000

<u>Mithapur</u>

Mithapur Nutan Balshikshan Sangh	- Rs 19,00,000
Kindergarten Primary School	- Rs 10,75,000

<u>Babrala</u>

Tatachem D A V Public School	- Rs 47,89,989
Tatachem Sports and Cultural Club	- Rs 83,260

Payments made to clubs towards entrance fees and subscription

Wellington Sports club	- Rs.8,85,000
Bombay Gymkhana club	- Rs. 42,702
Cricket club of India	- Rs.30,00,000
Poona club Ltd.	- Rs. 3,50,000
Country Club India Ltd	- Rs. 70,000
Total	**Rs 125,25,951**

21.2. The said payments were sought to be disallowed by the ld. AO by applying the provisions of section 40A(9) of the Act pursuant to the directions of the ld. DRP. Both the parties mutually agreed that this issue has already been settled in favour of the assessee by the co-ordinate bench decisions of this tribunal in assessee's own case as under:-

Contribution to Tata Sports Club

Covered by Tribunal order for A.Y.2006-07 supra vide ground No.3

Mithapur Nutan Balshikshan Sangh

Covered by Tribunal order for A.Y.2006-07 supra vide ground No.3

Kindergarten Primary School

Covered by Tribunal order for A.Y.2006-07 supra vide ground No.3

Tatachem D A V Public School

Covered by Tribunal order for A.Y.2006-07 supra vide ground No.3

Tatachem Sports and Cultural Club

Covered by Tribunal order for A.Y.2006-07 supra vide ground No.3

21.3. With regard to payment made to various clubs as detailed above, we find that the Hon'ble Supreme Court in the case of CIT vs. United Glass Manufacturing Co. Ltd reported in 28 taxmann.com 429 had stated that club membership fees paid for employees for seeking membership in the clubs and accordingly payment of entrance fees and subscription made thereon are allowable business expenditure u/s.37 of the Act. Similar propositions were also laid down by the Hon'ble Jurisdictional High Court in the case of Otis Elevator Co. India Ltd. vs. CIT reported 195 ITR 682 (Bom).

21.4. Respectfully following the aforesaid decisions, we direct the ld. AO to delete the disallowance made in this regard. Accordingly, the Ground No. 3 raised by the assessee is allowed.

22. The ground No. 4 & 5 raised by the assessee for A.Y.2007-08 are identical with ground No.4 & 5 raised by the assessee for A.Y.2006-07 supra. Hence, the decision rendered in A.Y.2006-07 shall apply mutatis mutandis for A.Y.2007-08 also. Accordingly, the ground No.4 is allowed and ground No.5 is dismissed as not pressed.

23. The ground No.6 raised by the assessee with regard to the claim in respect of amount paid on margin of FCCB, was stated to be not pressed by the ld. AR at the time of hearing. The same is reckoned as a statement made from Bar and accordingly, dismissed as not pressed.

24. The ground Nos. 7,8 & 9 raised by the assessee for A.Y.2007-08 are identical to ground Nos. 6,7 & 10 raised by the assessee for A.Y.2006-07 supra. Hence, decision rendered thereon in A.Y.2006-07 shall apply mutatis mutandis for A.Y.2007-08 also. Accordingly, the ground No.7

raised by the assessee is dismissed as not pressed; ground No.8 is allowed and ground No.9a is allowed and ground No.9b is dismissed as not pressed.

25. The ground No.10 raised by the assessee is with regard to claim of deduction made in respect of post retirement medical benefits provided to retired employees by the assessee company.

25.1. We have heard rival submissions and perused the materials available on record. The assessee company has a scheme whereby the existing employees and employees who had retired from the services of the company on attainment of normal retirement age, are entitled for their medical check-up and medicines at the company hospital for the rest of their life. The defined obligation as on the opening of the financial year in respect of this expenditure was debited to general reserves as per the mandate provided in Accounting Standard-15 (AS-15) issued by Institute of Chartered Accountants of India (ICAI). Accordingly, the sum of Rs.6,23,86,226/- towards provision for post retirement medical benefits was debited to general reserve by the assessee in its books but since that expenditure had accrued for the year under consideration, in view of the mercantile system of accounting followed by the assessee, the assessee claimed the said provision for post retirement medical benefits in the sum of Rs.6,23,86,226 as a deduction while filing the return of income. The assessee submitted that the said provision has been made based on actuarial valuation report obtained by a registered valuer who is a Fellow Member of Institute of Actuaries, England and Fellow Member of Actuarial Society of India. The said Actuarial valuation report duly determined the provision figure to be made as on 31/03/2007 and as on 01/04/2006. The copy of the Actuarial valuation report was placed on record by the ld. AR

based on the directions given by this Tribunal. This actuarial valuation report was prepared in accordance with the mandate provided in AS-15 issued by ICAI. In our considered opinion, this provision based on actuarial valuation would be clearly an ascertained liability for the assessee at the end of the year. The ld. AO however, strangely applied the provisions of Section 43B of the Act and held that since the said provision made for post retirement medical benefits had not been actually paid by the assessee, the same would become disallowable in terms of Section 43B of the Act. We are unable to comprehend ourselves to understand this contention of the Revenue. On perusal of the provisions of Section 43B of the Act, this expenditure provision made for post retirement medical benefits would not fall under any of the clauses provided in Section 43B of the Act. It is an admitted fact that no fund is created by the assessee in respect of this post retirement medical benefits. However, since the actuarial valuation report was placed before this Tribunal for the first time to justify the fact that the said provision has been made on a scientific basis by placing reliance on the registered valuation report, and also considering the fact that this report was not in the possession of the lower authorities, we deem it fit and appropriate in the interest of justice and fair play, to remand this issue to the file of the ld. AO for denovo adjudication in accordance with law. Accordingly, the ground No.10 raised by the assessee is allowed for statistical purposes.

26. The ground No.11 raised by the assessee was stated to be not pressed by the ld. AR. The issue is left open from our side. Accordingly, the ground No.11 is dismissed as not pressed.

27. The ground No.12 is with regard to weighted deduction in respect of scientific research and development u/s.35(2AB) of the Act.

27.1. We have heard rival submissions and perused the material available on record. We find that the assessee vide letter dated 27/12/2010 filed before the ld. AO during the course of assessment proceedings made a claim that it had incurred capital and revenue expenses on research and development which would be eligible for deduction u/s.35(1)(iv) / 35 (2AB) while completing the assessment. The assessee also drew the attention of the ld. AO to page 23 of the annual printed accounts. The break-up of the said expenditure was as under:-

Capital expenses	-	Rs.3.32 Crores
Revenue expenses	-	Rs.6.02 Crores

27.2. The ld. AO did not agree to the contentions of the assessee on the ground that this claim is made for the first time before him during the course of assessment proceedings and since the claim was not made either in the return of income or in the revised return of income, applying the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd reported in 284 ITR 323 (SC), denied to grant deduction for the same. We find that the decision of Goetze India Ltd does not prohibit an assessee who has a valid claim to be made before the appellate authorities. Moreover the restriction provided by the said decision, shall not apply to appellate authorities. This is provided in the last paragraph of the decision of the Hon'ble Supreme Court. However, the veracity of the claim had not been examined at all by the ld. AO. Hence, we deem it fit and appropriate, in the interest of justice and fairplay, to restore this issue to the file of the ld. AO for denovo adjudication in accordance with law. The assessee is at liberty to produce fresh evidences, if any, in

support of its contentions. Accordingly, the ground No.12 raised by the assessee is allowed for statistical purposes.

28. The ground No.13 raised by the assessee claiming deduction for provision for wealth tax and provision for advances while computing book profit u/s.115JB of the Act is similar to ground No.14 raised by the assessee for A.Y.2006-07. Hence, the decision rendered in A.Y.2006-07 shall apply to this assessment year also.

29. The additional grounds raised by the assessee on 10/12/2015 was stated to be not pressed by the ld. AR at the time of hearing. Hence, the additional grounds is not even taken up for admission and hence dismissed in limine.

30. In the result, appeal of the assessee for A.Y.2007-08 in ITA No.8710/Mum/2011 is partly allowed.

ITA No.6900/Mum/2012 (A.Y. 2007-08) Assessee Appeal

31. The assessee has raised the following grounds of appeal:-

> *1. The learned Assessing Officer erred in:*
>
> *A. Passing an order u/s 154 without appreciating that there is no mistake apparent from record.*
>
> *B. Passing an order u/s 154 on the basis of order of Addl. CIT TP- II(2), Mumbai which is without authority of law or as per the provisions of the Income Tax Act.*
>
> *C. Passing an order u/s 154 on the basis of an order of the TPO which was passed after the order of the Dispute Resolution Panel was received, though the directions of the Hon. Panel did not require him to pass any such order.*
>
> *2. The learned assessing officer erred in adding a sum of Rs. 5,73,71,698 to the total income, in respect of the interest to be charged to the AE, on the basis of*

erroneous observations of the learned Transfer Pricing Officer, though the treatment in respect of the said addition had already been given at the time of passing the order u/s 143(3) read with section 144C, after due application of mind.

3. The appellant craves the leave to add amend, alter, modify or delete any of the above grounds, before or at the time of hearing of the appeal.

32. The assessee has also raised the additional grounds:-

"In the facts and circumstances of the Appellant's case and in law, the order dated 31.07.2012 passed by the Ld. Assessing officer under provisions of section 154 of the Income-tax Act, 1961 is barred by limitation in view of section 144C(13) and is, therefore, bad in law and illegal."

32.1. Since the additional ground goes to the root of the matter and does not require any verification of fresh facts, we are inclined to admit the same and take up the same for adjudication.

33. We have heard rival submissions and perused the materials available on record. In the instant case, the ld. DRP gave directions to the ld AO / ld. TPO u/s.144C(5) of the Act on 30/09/2011. The ld. AO passed the final assessment order u/s.143(3) r.w.s. 144C(13) of the Act on 19/10/2011 and quantified the TP adjustment. The ld. TPO gave effect to the directions of the ld. DRP and passed an order on **25/10/2011** which is after the date of passing of final assessment order on 19/10/2011 by the ld. AO. In the said order passed by the ld. TPO, the ld. TPO had enhanced the TP adjustment figure by considering the different approach with regard to appropriation of repayment of loan made by the AE. The ld. AO thereafter passed an order u/s.154 of the Act on 31/07/2012 pursuant to this TPO order and made the addition as enhanced by the ld. TPO.

33.1. The ld. AR before us made submissions that once the final assessment order is framed on 19/10/2011, pursuant to the directions of

the ld. DRP, the ld. TPO passing the order on 25/10/2011 has got no legs to stand in the eyes of law and the ld. AO erred in taking cognizance of the belated order passed by the ld. TPO and rectifying the same by way of an order u/s.154 of the Act.

33.2. In our considered opinion, this entire appeal becomes infructuous as there will be no grievance left to the assessee in view of our decision rendered in ground No.1 of assessee's appeal for the A.Y.2007-08 in ITA No.8710/Mum/2011, wherein we have directed the ld. AO to completely delete the TP adjustment made in respect of interest on loans with AE. Hence, this entire appeal is hereby dismissed as infructuous. Accordingly, there is no need to go into the various legal arguments advanced by the ld. AR and they are left open.

34. To Sum Up:

ITA NO	**A.Y.**	**APPEAL BY**	**RESULT**
9057/Mum/2010	**2006-07**	**Assessee**	**Partly Allowed**
8710/Mum/2011	**2007-08**	**Assessee**	**Partly Allowed**
6900/Mum/2012	**2007-08**	**Assessee**	**Dismissed as Infructuous**

Order pronounced on 31/03/2023 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(PAVAN KUMAR GADALE)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 31/03/2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai