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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI PAVAN KUMAR GADALE, JM

ITA Nos. 2266 & 2239/Mum/2022

(Assessment Years: 2017-18 & 2018-19)

Macrotech Developers Ltd. (MDL) 412, Floor-4, 17G, Vardhaman Chamber, Cawasji Patel Road, Horniman Circle, Fort, Mumbai-400 001	Vs.	DCIT-7(3), Room No.655, 6th Floor, Aaykar Bhavan, M.K. Road, Mumbai-400 020
(Appellant)		**(Respondent)**

PAN No. AAACL1490J

Assessee by	:	Shri Vijay Mehta, AR
Revenue by	:	Shri Manoj Kumar, CIT DR

Date of hearing: 18.01.2023
Date of pronouncement : 17.04.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. These are the two appeals filed by the same assessee i.e. M/s Macrotech Developers Ltd (the Assessee/Appellant) for two assessment years i.e. 2017 – 18 and 2018 – 19, involving identical grounds and same set of facts and circumstances, therefore, both the parties argued them together, therefore, we dispose of both these appeals by this common order.

ITA No.2266/Mum/2022
AY 2017-18

02. ITA No.2266/Mum/2022 is filed for AY 2017-18 by the assessee against the assessment order passed by the Asst. Commissioner of Income-tax, Central Circle-7(3), Mumbai (the learned Assessing Officer) dated 30th July, 2022 raising following grounds of appeal:-

"The following grounds of Appeal are without prejudice to each other:-

Transfer Pricing Grounds

1. *On the facts and in the circumstances of the case and in law, the Assistant Commissioner of Income-tax, Central Circle 7(3), Mumbai ("Ld. AO'), the Assistant Commissioner of Income-tax, Transfer Pricing- 3(2)(1), Mumbai, the Hon'ble Dispute Resolution Panel ('DRP') erred in:*

   1.1. *not appreciating that explanation to section 92B of the Act as amended by Finance Act, 2012 does not alter the basic character of the definition of 'international transaction' u/s 928 and therefore, since provision of guarantee (by the assessee to its AE) did not have any bearing on profits, income, losses or assets of enterprise, it would be outside the ambit of 'international transaction'.*

   1.2. *not appreciating that provision of guarantee is essentially in the nature of shareholder*

activity and is arising out of implicit support due to passive association of the assessee with its AE; accordingly, ALP for the same should be Nil.

1.3. *Adopting the arm length rate for the guarantee commission at 0.50% as directed by DRP.*

1.4. *without prejudice to the above, the Ld. AO/TPO erred in disregarding the detailed benchmarking analysis based on interest savings approach conducted by the appellant without providing any cogent reason for doing*

1.5. *Each one of our previously mentioned grounds of appeal is without prejudice to the other*

2. *On the facts and in the circumstances of the case and in law, the Ld AO/Hon'ble DRP, erred in:*

2.1. *disallowing an amount of Rs. 10,22,402 under section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (the Rules) as expenditure incurred for earning exempt dividend income under normal provisions of the Act without considering the fact that the Appellant has not earned any exempt income during the year under consideration*

2.2. *adding the disallowance made under section 14A of the Act to the book profits computed under section 115JB of the Act.*

2.3. not appreciating the fact that amendment to Section 14A by Finance Act, 2022 is prospective in nature and not retrospective.

2.4. On the facts and circumstances of the case and in law, the learned AO / DRP has erred in not following the binding decision of the Hon'ble Jurisdictional Tribunal, Mumbai in the appellant own case on the issue under consideration.

2.5. Each one of our previously mentioned grounds of appeal is without prejudice to the other

3. On the facts and the circumstances of the case and in law, Ld AO/Hon'ble DRP, erred in:

3.1. disallowing foreign exchange loss of Rs. 99,06,468 by capitalizing the same to inventory.

3.2. Without prejudice to the above, if it is held that foreign exchange loss is capitalized then the foreign exchange gains should also be considered as capital receipts and only the net amount debited to profit and loss account 1.e., Rs.48,63,974/- should be capitalized and not the gross amount disallowed by the learned AO.

3.3. Without prejudice to the above, if the foreign exchange loss is considered as part of inventory the same should be allowed in the

subsequent assessment year as and when the said inventory forms part of the cost of project.

3.4. Each one of our previously mentioned grounds of appeal is without prejudice to the other

4. On the facts and the circumstances of the case and in law, Ld AO/ Hon'ble DRP, erred in:

4.1. disallowing an amount of Rs. 2,03,051 under section 43CA of the Act as the difference between the value adopted by Stamp Duty Authority and value of sale consideration.

4.2. Not appreciating that the stamp duty value does not exceed 105% of the consideration received and is therefore covered by the proviso to section 43CA of the Act.

4.3. On the facts and the circumstances of the case and in law, the learned AO/ DRP failed to appreciate that the said tolerance band of 5% / 10% under first proviso to section 43CA of the Act, is curative in even though stated to be prospective must be held to relate back to date when related statutory provisions were made effective.

4.4. Each one of our previously mentioned grounds of appeal is without prejudice to the other

5. On the facts and the circumstances of the case and in law, Ld AO/DRP, erred in:

5.1. making a disallowance of Rs. 3,20,92,006 under section 40(a) (i) of the Act.

5.2. Not appreciating that services availed by the appellant do not make available any technical knowledge, experience, skill, know-how or processes, etc. to the assessee under Article 12 of the India-Singapore DTAA and hence shall not be subject to tax in India.

5.3. Each one of our previously mentioned grounds of appeal is without prejudice to the other

6. On the facts and in circumstances of the case and in law, the learned AO has erred by initiating penalty proceedings under section 270A of the Act and holding that the appellant has under reported its income.

7. The appellant craves leave to add, amend, alter or delete the said ground of appeal."

03. Brief facts of the case shows that the assessee is a company engaged in the business of builders and developers. Assessee has undertaken residential and commercial projects. It is following Percentage Completion Method for revenue recognition.

04. Assessee filed its return of income on 31st October, 2017, declaring total income of ₹140,25,03,230/- as

per normal computation and book profit under Section 115JB of the Income-tax Act, 1961 (the Act) at ₹105,54,66,739/-. The ld AO selected it for scrutiny.

05. Assessee has entered into international transactions and therefore, the learned Assessing Officer referred the matter to the learned Asst. Commissioner of Income Tax, Transfer Pricing, 3(2)(1), Mumbai [The Ld TPO] for determination of Arm's Length Price.

06. Assessee has issued a corporate guarantee in the name of its Associated Enterprise, Lodha Developers International Limited (LDIL) along with few other group companies. Fact show that during F.Y. 2014-15,

i. Lodha Developers International Limited (LDIL), a Mauritius base company, has raised USD 200 Million by way of issuance of 12% Senior Notes Due 2020 ('Bonds') listed on Singapore Exchange to be used for the purpose of construction and development of real estate project in United Kingdom (UK).

ii. For the issuance of bonds, corporate guarantee was issued by the assessee along with other parties.

iii. Bond agreement provides that M/s Lodha Developers International Limited have to

provide corporate guarantee, jointly and severally, up to 175% of the value of outstanding principal bonds.

iv. Accordingly, seven Indian entities have provided corporate guarantee for the issuance of bonds to USD 200 Million, as on 31 March 2017, assessee is one of them.

v. Assessee did not charge any guarantee commission.

vi. Claim of the assessee is that it is not an international transactions and it is shareholders' activity. Assessee submitted that it is a subsidiary of shareholder of the associated enterprises for issuance of securities by whom guarantee is given. It was further stated that guarantee was given on behalf of its holding company and was fully indemnified by the holding company. Therefore, no commission was charged.

vii. Learned Transfer Pricing Officer held that it is an international transaction and further the assessee should have charged the guarantee commission fee.

viii. He issued show cause notice on 20th January, 2021, noted that the M/s Lodha

Developers International Limited, Mauritius has taken a loan from the assessee on interest at the rate of 14% which is without guarantee, He stated that Arm's Length Price interest rate without guarantee is 14% and arm's length rate after guarantee is 12% [Interest on bonds] therefore, interest spread of 2% is saved which is required to be shared between both the entities on the basis of Functions, Assets and Risk ('FAR') analysis.

ix. Assessee without prejudice to the earlier submissions computed the guarantee fee adopting interest saving approach. The assessee analyzed the guarantee transaction by determining the creditworthiness of the Associated Enterprises by Moody's credit ratings result and further carried out search on DealScan database. Based on search, 839 number of deals without guarantee were identified whose average margin of BPS was found to be 500.21 and after that tenor adjustment of (-) 30.08 was made determining arm's length margin of 470.13 where transactions are without guarantee. It also selected 12 guaranteed deals whose average margin was 429.75

and after tenor adjustment of (-) 30.08 reached at arm's length of 399.67 BPS where deals are guaranteed. Based on that, it found that savings in interest cost due to guarantee is 70.46 BPS and distributed this interest saving at the rate of 50:50 between both the parties. Therefore, the arm's length rate of guarantee commission was determined at 35.23 BPS i.e. 0.35%. Thus, the assessee contended that at the most guarantee fee could be 0.35%.

x. Learned Transfer Pricing Officer rejected the benchmarking of the assessee. The learned Transfer Pricing Officer held that interest rate without guarantee is 14% charged by Palava Developers Private Limited to Lodha Developers International Limited and further when assessee stood guarantor for the bonds the interest paid by the Associated Enterprises is 12%. Therefore, interest saved is 2%. He also challenged the tenor adjustment computed by the assessee and reached at the calculation of 1.088% and reached at the interest rate with guarantee at 13.05%, the resultant analysis was that interest rate as per internal CUP was 12%, interest rate after tenor adjustment

is 13.05% in USD terms and interest rate after tenor and currency adjustment in bonds was determined at 12.73%. Accordingly, the comparable interest rate for bond transactions corresponding to 7 years and in GBP is 12.73%. Thus, the interest rate difference [savings] is 1.27%. The learned Transfer Pricing Officer further held that total assets of the assessee shows that the creditworthiness of the assessee is much higher than that of the Associated Enterprises and therefore, interest savings of 1.27% should be shared between parties in the ratio of 80:20 and accordingly, he proposed guarantee commission at the rate of 1%.

xi. Ld AO computed amount of bond raised and applying 1% guarantee rate amount to total guarantee commission of ₹12,94,93,600/- which is divided between 7 parties and thereafter in case of the assessee for number of days the guarantee commission was computed at ₹1,98,25,276/-.

07. Accordingly, the order under Section 92CA (3) of the Act was passed on 29 January 2021, proposing the above adjustment. The learned Assessing Officer

incorporated the above adjustment in the draft assessment order.

08. The learned Assessing Officer made following corporate adjustments:-

i. Though assessee has not received any dividend income during the year, however, there are investments, which are capable of earning exempt income. Accordingly, the disallowance under Section 14A r.w.r. 8D of the Act was computed at 1% of annual average value of investment amounting to ₹10,22,402/-.

ii. Learned Assessing Officer also noted that assessee has claimed foreign exchange loss of ₹ 99,06,468/- which is incurred because of purchase of material and is revenue expenditure. The learned Assessing Officer held that the foreign exchange loss incurred on material purchases forms part of construction cost and should be part of the cost of the project. Accordingly, he disallowed the foreign exchange loss.

iii. During the assessment proceedings, assessee was asked to reconcile information as per annual information return and return of income. The learned Assessing Officer found that on 30th March, 2017, assessee has sold Taj Majala Wing 11, New Cuff pared, Wadala, Mumbai for ₹4.75

crores whose stamp duty value is ₹4,77,03,051/- and therefore, according to Section 43CA of the Act the above addition is required. The claim of the assessee is that the difference is within the tolerance bond of 5%, which is increased to 10% with effect from 1 April 2021. The above tolerance bond of 10% is increased from 5% is curative in nature as held by several judicial precedents and therefore, no addition is required. The learned Assessing Officer rejected the same and made the addition of ₹2,03,051/- u/s 43CA of the Act.

iv. Learned Assessing Officer also found that assessee has made a payment of ₹3,20,92,006/- to Singapore based non-resident entities and assessee has not deducted tax at source u/s 195 of The Act and therefore, same are disallowable u/s 40(a)(i) of The Act . Assessee submitted that the amount paid to Singapore entities are not 'fees for technical services' as they do not satisfy 'Make Available Test'. The learned Assessing Officer rejected the argument of the assessee and disallowed the above sum for non-deduction of tax at source.

09. Accordingly, the total income of the assessee was computed at ₹146,55,52,430/- as per normal computation. Further, book profit was increased by disallowance under Section 14A of the Act of

₹10,22,402/- at ₹107,19,96,962/-. Accordingly, the draft assessment order was passed on 25 September 2021.

010. Assessee preferred the objections before the learned Dispute Resolution Panel, who passed its direction on 29 June 2022. The learned Dispute Resolution Panel

i. Rejected objections no.1 of the assessee holding it to be general in nature. It also confirmed disallowance under Section 14A of the Act.

ii. Objection no.2 with respect to disallowance of foreign exchange loss was also confirmed vide paragraph no.8.

iii. Objection no 3 , The addition under Section 43CA of the Act of ₹2,03,051/- was also confirmed by paragraph no.11 of the direction.

iv. Objection no.4 with respect to disallowance of ₹3,20,92,006/- being foreign payment for which tax is not deducted are also confirmed vide paragraph no.14 of the Act.

v. With respect to the objection no.6 of upward adjustment of ₹1,98,25,276/- on account of corporate guarantee, ld DRP decided by Para no.20, rejecting benchmarking of the ld TPO without giving any reason following the

decision of Hon'ble Bombay High Court in case of CIT vs. Everest Kanto Cylinders Ltd. (2015) 378 ITR 57 (Bom.), held that Arm's Length rate for guarantee commission should be 0.5% accordingly, confirmed the Transfer Pricing adjustment of ₹99,14,138/- against adjustment of ld TPO of Rs 1,98,25,276/-.

011. Based on this, the assessment order under Section 143(3) of the Act was passed on 30th July, 2022 determining the total income of the assessee as per normal computation of income at ₹145,67,53,980/- and book profit at ₹107,90,96,962/-.

012. Assessee is aggrieved with that and has preferred this appeal.

013. During the course of hearing, the assessee has raised an additional ground of appeal as per letter dated 24th November, 2022, raising following two issues:-

i. That tax deduction at source of ₹6,40,23,793/- was claimed by the assessee, however, the learned Assessing Officer granted the credit of only ₹6,38,02,475/- and therefore, there is a short credit of ₹2,21,318/- which should be granted to the assessee

ii. The second issue was that disallowance under Section 14A of the Act computed in the normal

computation of total income was also added by computing the book profit under Section 115JB of the Act. It further challenges charging of interest under Section 234B and 234C of the Act.

014. It was claimed that these additional grounds are required to be admitted, as no fresh facts are required to be investigated and are apparent from assessment order that can be raised at any time.

015. The learned Departmental Representative vehemently objected the same.

016. We find that the grounds raised by the assessee are apparently verifiable from the records available before us and no fresh facts are required to be investigated. In view of this, we admit the additional grounds raised by the assessee. We direct the ld AO to grant credit to the assessee of prepaid taxes in accordance with the law. With respect to addition to the book profit of disallowance computed u/s 14 A of The Act , we find that this issue is now squarely covered in favour of the assessee by the decision of PCIT V J J Glastronics P Limited **[**2022] 139 taxmann.com 375 (Karnataka) where in it has been held that :-

> "8. Section 115JB of the Act is a complete code in itself. The controversy relating to disallowance under section 14A of the Act for determining book profit under

section 115JB was dealt with, in *extenso* by the Delhi ITAT Bench in the case of *Vireet Investment (P.) Ltd.* (*supra*) and the relevant portion of the said decision has been quoted by the Tribunal in the order impugned which reads thus:-

"6. We have considered the submissions of both the parties and have perused the record of the case. There cannot be any quarrel with the submissions of ld. Sr. counsel for the assessee that section 115JB is a complete code in itself. Chapter XII-B provides alternate scheme for computing tax liability of certain companies, whose total income under normal provisions is below the threshold Book Profits as prescribed under Chapter XII-B. Under section 115JB this threshold limit is 18.5%. Thus, total income as computed under the normal provisions of the Act in respect of any previous year relevant to the assessment year commencing on or after the Is day of April 2012, is less than 18.5% of its Book Profits, such Book Profits shall be deemed to be the total income of the assessee and tax shall be payable on such total income @18.5%. Thus, the scheme of the Act is that the computation is first made under the normal provisions of Income-tax Act and, thereafter, under an alternate scheme provided u/s 115JB for computing total income as per the prescribed method. If the tax liability on the basis of total income as per MAT provisions is more than the tax computed under the normal provisions of the Act, then the former becomes the final tax liability of the assessee. The mode of computation of Book Profits has been prescribed under MAT provisions. The issue posed for our consideration is whether computation provisions prescribed for computation of total income under normal provisions with reference to section 14A can or cannot be taken into consideration while

computing Book Profits under MAT provisions."

9. Having regard to this decision, the decision cited by the revenue in the case of *Sobha Developers* (*supra*) has been considered. At this juncture, it would be beneficial to refer to the co-ordinate bench decision of this Court in the case of *Karnataka State Industrial and Infrastructure Development Corporation Ltd.* v. *Dy. CIT* [2021] 125 taxmann.com 221/278 Taxman 126/431 ITR 255 (Kar.), wherein the computation of book profit with reference to sections 14A and 115JB has been considered and it is held that *Explanation 1* in section 115JB(2) has been inserted so as to provide that if any provision for diminution in the value of any asset has been debited to the profit and loss account, it shall be added to the net profit as shown in the profit and loss account for the purpose of computation of book profit. Any disallowance computed under section 14A pertains to computation of income under the normal provisions of the Act and cannot be read into the provisions of section 115JB of the Act pertaining to computation of book profits for levy of minimum alternate tax. Amounts disallowed under section 14A cannot be added to the book profits computed under section 115JB.

10. Similarly, in the case of *CIT* v. *Gokaldas Images (P.) Ltd.* [2020] 122 taxmann.com 160/276 Taxman 420/429 ITR 526 (Kar.), having regard to clause (*f*) of *Explanation 1* to section 115JB(2) of the Act, it has been observed that additions made by the assessing officer determining book profit under section 115JB of the Act cannot be sustained. Any disallowance computed under section 14A of the Act pertains to computation of income under the normal provisions of the Act and cannot be read into the provisions of section 115JB of the Act pertaining to levy of minimum alternate tax

and there is no express provision in clause (*f*) of *Explanation 1* to section 115JB of the Act to that extent."

017. Thus we hold that increase of book profit by the addition u/s 14 A of the Act is not correct, hence ld AO is directed to delete it.

018. Accordingly, both the additional grounds are allowed.

019. Coming to the regular grounds of appeal, we find that ground no.1 is with respect to the transfer pricing adjustments. The learned authorized representative first took us to the facts of the case and then submitted that the assessee has given corporate guarantee to its associated enterprises that is not an international transaction and further it does not affect the profit/loss or assets of liabilities of the company. Even otherwise, it is a shareholders activity. Therefore, the assessee did not charge any guarantee commission. It was submitted that during the course of transfer pricing assessment, the assessee submitted without prejudice to the other contention the computation of the arm's-length price of the guarantee commission adopting the interest saving approach. The learned transfer pricing officer accepted the interest saving approach however further made an adjustment with respect to the transaction of loan by the assessee to its associated enterprises and further making adjustment on

account of currency swap and then distributed the interest saved to the respective parties. However, the learned dispute resolution panel has rejected the finding of the learned transfer-pricing officer and has held that 0.5% is the appropriate arm's-length price of the guarantee commission following the decision of the honourable Bombay High Court. He submitted that the approach of the assessee is also based on the interest saved by the assessee and after that, it has been appropriately allocated between these two parties. Therefore, the arm's-length price determined by the assessee is to be accepted. He submitted that originally, assessee did not compute the arm's-length price, but without prejudice, the ALPA was computed at 0.35%, the learned TPO computed at 1% and the learned DRP upheld at 0.5%. He therefore submitted that 0.5% arm's-length price of the guarantee commission is not sacrosanct. He further submitted that scientific approach adopted by the assessee based on the credit rating of associated enterprises coupled with proper search on standard database and thereafter deriving the interest saved after making adjustment on tenure of the bond and then allocating the benefit between the associated enterprise and the assessee is the most creditable approach and therefore it should be upheld. He also referred to several judicial precedents wherein the honourable High Court has also upheld the guarantee commission rate at less than 0.5%. Accordingly, he

submitted that 0.35% of the arm's-length price of the guarantee commission, subject to the other contention of the assessee, is the arm's-length price of the international transaction.

020. The learned departmental representative vehemently supported the direction of the learned dispute resolution panel that upheld the arm's-length price of the guarantee commission at 0.5% following the decision of the honourable Bombay High Court.

021. We have carefully considered the rival contention and perused the orders of the Ld TPO as well as the direction of the learned dispute resolution panel. Claim of the assessee is that provision of corporate guarantee to the associated concerns is not an international transaction and further it is a shareholder activity and therefore, assessee is not required to be remunerated. Second limb of the argument is that the guarantee commission upheld by the learned Dispute Resolution Panel at the rate of 0.5% is not correct.

022. We find that the first argument that Corporate Guarantee is not an international Transaction is no more valid in view of the decision of Honourable Madras High court in case of PCIT V Redington [India] Limited [2021] 430 ITR 298 (Mad) where in it has been held as under :-

"75. The concept of bank guarantees and corporate guarantees was explained in the decision of the Hyderabad Tribunal in the case of Prolific Corporation Limited. In the said case, the Revenue contended that the transaction of providing corporate guarantee is covered by the definition of inter- national transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the corporate guarantee is an additional guarantee, provided by the parent company. It does not involve any cost of risk to the shareholders. Further, the retrospective amendment of section 92B does not enlarge the scope of the term "international transaction" to include the corporate guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, the guarantor has to fulfill the liability and therefore, there is always an inherent risk in providing guarantees and that may be reasons that finance provider insist on non- charging any commission from associated enterprise as a commercial principle. Further, it has been observed that this position indicates that pro- vision of guarantee always involves risk and there is a service provided to the

> associated enterprise in increasing its creditworthiness in obtaining loans in the market, be from financial institutions or from others. There may not be immediate charge on profit and loss account, but inherent risk cannot be ruled out in providing guarantees. Ultimately, the Tribunal upheld the adjustments made on guarantee commissions both on the guarantees provided by the bank directly and also on the guarantee pro- vided to the erstwhile shareholders for assuring the payment of associated enterprise.
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> 76. In the light of the above decisions, we hold that the Tribunal committed an error in deleting the additions made against corporate and bank guarantee and restore the order passed by the Dispute Resolution Panel."

023. In view of this, we find that the argument of the learned authorized representative that corporate guarantee issued by the assessee to its associated enterprises is not an international transaction is not acceptable.

024. Another argument of the assessee is that issuance of the corporate guarantee is a shareholders' activity and therefore non-charging of corporate guarantee commission is proper. We find that assessee is not a

shareholder in an associated enterprises but a subsidiary of the shareholder of the company in whose favour of the guarantee is issued. We find that it is not the shareholder, which is issued corporate guarantee in favour of its subsidiary company. The relationship between the assessee and the company in whose favour of the guarantee is given is of fellow subsidiary. Further, it is not shown before us that Guarantee is given for supporting continuous cash flow of subsidiary. It is also not for control of capital structure and not solely for ownership purposes. Guarantee was issued for the business of the fellow subsidiary. Further when Guarantee is covered in clause 92B (2)(1)© specifically and it is a capital financing transaction specifically included there in, it is unnecessary to stretch it to bring in to clause (d) of ' Provision of services'. Immediate benefit to subsidiary is demonstrated by the assessee as well as ld TPO by showing substantial interest savings due to guarantee which both the parties accrued that to both the contracting parties. The ld AR heavily relied on decision of Coordinate bench on ITA 2873/Ahd/2010 dated 27/11/2015 for AY 2006-07. However, he could not show us a single paragraph on facts to show that what are the compelling factors existing to call it as shareholders' activity. Not every transaction with a subsidiary can be called a shareholder's activity unless reasons are demonstrated with credible facts. Thus, we reject the

argument that it is a shareholder's activity. Therefore, this argument is also rejected.

025. Now we come to the last claim of the ground number 1 that is against the quantum of the guarantee commission. The learned dispute resolution panel has categorically held that they do not agree with the contention of the learned Transfer Pricing Officer. The learned dispute resolution panel after that straight away followed the judicial precedent of the honourable Bombay High Court in case of Everest Kanto cylinders Ltd [TS-200-HC-2015(BOM)-TP] where arm's-length price of the corporate guarantee was held to be 0.5% of the guarantee amount. It was held so only for the reason that the learned transfer-pricing officer in that particular case has compared the corporate guarantee with the bank guarantee. That is not the case before us. In the present case, assessee without prejudice to the other argument, benchmarked the guarantee commission by looking at the credit rating of the company in whose favour of the guarantee is issued, based on that interest saving approach (yield approach) was used to find out difference between interest rates charged, where the loans are guaranteed and interest rates where the loans are not guaranteed. The difference between these two rates was further adjusted by the tenure of the loan (Tenor adjustment). The resultant interest was found to be the interest saved because of corporate guarantee of the assessee along with

others issued in favour of the AE. The assessee distributed the same between the guarantor and AE equally. The learned transfer-pricing officer found that there is a cup available where assessee has given loan to the associated enterprise without guarantee at the rate of 14% interest. The interest rates of the bonds, which are guaranteed by the assessee issued by the AE, are carrying 12% interest. Therefore, interest saving of 2% was further reduced/adjusted by the tenor adjustment. The cup available was indifferent jurisdiction where the learned TPO applied the currency swap and adjusted the interest saved. After that, the learned TPO looked at the financial worth of the AE as well as the assessee and based on that he found that 80% of the interest saving should go to the FAR of the assessee and accordingly he held that 1% of the guarantee commission rate is at arm's-length.

026. Thus, there is no difference between methodology adopted by assessee and LD TPO, both adopted interest saving approach. Both also reached at same interest rate saved. i.e. 2 %. . The only difference is in Tenor adjustment, Currency swap and attribution of interest saved between contracting parties.

027. The learned Dispute Resolution Panel issued the direction as per paragraph number 20 is under:-

" 20. We have used the TPO's order. We have also considered the written submissions

of the assessee. Briefly stated the facts of the issuer that the company has provided security, guarantee given on senior notes on behalf of its AE station outside of India. The assessee has not charged any commission for the same. The TPO stated that the corporate guarantee in question is in the nature of international transaction and therefore required benchmarking as per the TP regulations. The TPO determine the arm's-length price of the commission for the corporate guarantee at ₹ 19,825,276/–. The assessee objected to the action of the TPO.

We have considered the approach of the TPO and also the objections and pleadings of the assessee. The TPO has recorded reasons for treating the corporate guarantee in question as international transactions needing to be benchmarked. We are of the considered opinion that the corporate guarantee in question is an international transaction under section 90 2B, which is needed to be benchmarked. Therefore, we do not find any reason to interfere with the approach of the TPO in this regard.

As far as benchmarking of the rate of guarantee commission is concerned, we do not agree with the approach of the TPO determining the arm's-length rate of commission. Because guarantees by corporate Sara on different footing because it facilitates acquisition of loan by AE's. We find support in the judgment of m/s Everest Kanto cylinders Ltd by the honourable Bombay High Court (Para 10 of income tax appeal number 1165 of 2013, dated 8/05/2015). We find that the issue of charging of rate of guarantee commission has been a matter of adjudication in several honourable Mumbai ITAT decisions. These decisions were 0.5% as the arm's-length and

> the proper rate of commission on corporate guarantee. Therefore, in our considered opinion, the arm's-length rate for a commission should be adopted at 0.5%, which was the adjustment of ₹ 9,914,138/–. The ground of objection number six with sub- grounds is disposed of accordingly."

028. The learned DRP neither looked at the methodologies required to benchmark the international transaction of issuing a corporate guarantee and nor cared to look into the economic aspect of the whole international transaction. The approach and adopted by the learned DRP in rejecting the benchmarking methodology without writing a one single word that which method should have been applied by the parties for benchmarking international transaction of corporate guarantee. This is in clear violation of the provisions of section 92CA (3) of the act. The learned dispute resolution panel has failed to look that transfer pricing is more an economic concept than a judicial concept.

029. We are not saying that judicial decisions should not have been applied but there should have been applied if they pertain to the similar assessment year, shows similar economic conditions, have proper benchmarking methodology adopted, and is in consonance with the provisions of transfer pricing assessment and computation.

030. According to us, the corporate guarantee commission can be benchmarked by employing (1) CUP method,

(2) yield method or interest saving method, (3) cost to the guarantor. The yield method or interest saving method could be the maximum guarantee commission charges and cost may be considered as the lowest guarantee commission rate. We find that the corporate guarantee commission is required to be benchmarked, in absence of cup available, and where no cost is found to be incurred by the guarantor, following the credit rating of the company in whose favour of the guarantee is issued, geographical location of the AE, adopting yield method. This has been done by the assessee as well as by the learned TPO. The learned TPO further went in a more scientific manner by using the currency swap as well as attribution of interest saving on the creditworthiness of both the parties. However, unfortunately, the learned dispute resolution panel did not look into the merits of benchmarking of the learned TPO and proceeded to follow a judicial precedent. It is required to be accepted that transfer pricing is more an economics then blindly following judicial precedent. That decision was rendered for assessment year 2007 – 08 with respect that transaction only, not giving any finding about the arm's-length price of all guarantee commission income or expenditure, and for any other assessee or for any other assessment year, or for even any other transaction between the same contracting parties. Therefore, though, we disagree with the

finding of the learned dispute resolution panel that the arm's-length price of the guarantee commission is 0.5%. We also appreciate that the direction of the learned dispute resolution panel are binding on the AO and are not applicable. Therefore, limited choice available with us is now either to uphold the alternative benchmarking of the assessee or to uphold the arm's-length price of guarantee commission at the rate of 0.5%. We find that between the above two, we would be more likely to uphold the benchmarking of the assessee of the guarantee commission based on yield approach, which is derived after the proper credit rating of associated enterprises, on DealsScan database, determining the appropriate interest saving and thereafter attributing it between the two parties. It is also to be noted that the arm's-length price of the guarantee commission by yield method would be the maximum rate. Therefore, we uphold the alternative benchmarking provided by the assessee of the guarantee commission at the rate of 0.35%. Accordingly, ground number 1 of the appeal is partly allowed.

031. Ground 2 of appeal is with respect to the disallowance under section 14 A of the act. The learned authorized representative submitted that assessee has not earned any exempt income during the year and therefore there is no question of any disallowance under section 14 A of the act. He

specifically referred to the decision of honourable Delhi High Court in case of principal Commissioner of income tax versus Era infrastructure (India) Ltd 448 ITR 674

032. The learned departmental representative vehemently stated that there is no requirement of earning any exempt income to make any disallowance under section 14 A of the act. He further referred to the explanation introduced with effect from 1/4/2022.

033. We have carefully considered the rival contention and perused the orders of the lower authorities. It is an admitted fact that during the year assessee has not earned any exempt income. As assessee has not earned any exempt income during the year, the disallowance under section 14 A of the act is not warranted. We find that this issue is squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in PRINCIPAL COMMISSIONER OF INCOME-TAX vs. [2022] 448 ITR 674 (Del) wherein it has been held that the explanation inserted in section 14 A of the act by the finance act 2022 with effect from 1/4/2022 is prospective in nature. Accordingly, ground number 2 of the appeal of the assessee is allowed and the learned AO is directed to delete the disallowance under section 14 A the act.

034. Ground number 3 is with respect to the foreign exchange gain incurred on purchase of material

claimed by the assessee as revenue expenditure and the learned assessing officer is of the view that it should be included in the cost of project. The learned authorized representative submitted that foreign exchange gain incurred by the assessee is not required to be capitalized to be included in the cost of inventory. For this proposition, he referred to Ind As 21 placed at page number 605 – 630 of the paper book and further referred to the accounting standard 2, which is also placed at page number 61 – 638 of the paper book. He submitted that same is required to be recognized in the profit and loss account only and not to be shown in the cost of inventory as it is a monetary item. He further referred to the accounting standard 2 and stated that only the cost of purchases consisting of the purchase price including duties and taxes, freight in verse and other expenditure which are directly attributable to the acquisition are required to be included in the cost of purchases. He further submitted that that identical issue arose in case of ITA number 3035/M/2017 for assessment year 2012 – 13 dated 3/6/2019 wherein the coordinate bench has held that for the purpose of valuation of the closing stock of inventory, foreign exchange gain or loss is not to be included. He specifically referred to paragraph number [8] of that order. He further submitted that in ITA number 3735 and 2013 for assessment year 2009 – 10 dated 29/6/2016 also the coordinate bench per paragraph

number 10 has held that foreign exchange gain or loss does not increase or decrease the value of the cost of the raw material and therefore it is not required to be included in the valuation of closing stock or in project cost. He therefore submitted that the treatment given by the assessee in its books of accounts clearly is in conformity with the accounting standards issued by the Institute of chartered accountants of India and supported by the judicial precedents. Therefore, the foreign exchange gain or loss on purchase of raw material should not be included in the cost of inventory or in project cost but is to be allowed as revenue expenditure in the year in which it is incurred. Alternatively he referred that assessee is also on the foreign exchange gain and it should be net of and further loss on account of foreign exchange should also be carried forward as cost of project and should be granted as deduction as opening stock in the next year.

035. The learned departmental representative vehemently supported the orders of the lower authorities. He specifically referred to the direction of the learned dispute resolution panel wherein it has been held that the above foreign exchange loss is required to be added to the cost of inventory.

036. We have carefully considered the rival contentions and perused the orders of the lower authorities. The assessee is engaged in the business of construction

and development of realistic projects including purchase and sale of building materials. The assessee purchases various materials for its construction activity. During the year, it earned foreign exchange loss by making payment for the various raw materials imported by the assessee for the purpose of its business. The expenditure incurred on material purchased by the assessee for its construction activity business is debited to the profit and loss account of the assessee. The foreign exchange gain or loss arises when the amount of sundry creditors outstanding at the time of payment are settled. The sundry creditors are the monetary items as per the Ind As 21. Even as per the Accounting Standard 2, monetary items are not required to be carried to the cost of inventory. Therefore, the foreign exchange gain or loss arising on settlement of dues of sundry creditors does not have any correlation with the cost of inventory or putting 88 the present location. Hence, it is not required to be included in the cost of project/cost of inventory. The accounting treatment of the assessee is supported by the authoritative pronouncement of the Institute of chartered accountants of India as well as the Ministry of corporate affairs. In view of this, we do not find any substance in the findings of the lower authority that foreign exchange loss on purchase of material should be included in the cost of project. Accordingly, the foreign exchange loss of ₹

9,906,468/– incurred by the assessee is revenue expenditure and cannot be included in the cost of project. Accordingly, we allow ground number 3 of the appeal of the assessee.

037. Ground number 4 of the appeal is with respect to the addition of Rs 2,03,051/- by invoking the provisions of section 43CA of the act. During the year, the assessee has sold a commercial property to a customer for the sale consideration of ₹ 47,500,000. The stamp duty value of the flat as determined by the stamp duty authority is ₹ 47,703,051/– which exceeded the value of the sale consideration by ₹ 203,051. Thus, the difference between the sale consideration and stamp duty value is merely 0.43%. The learned assessing officer has made the addition of the above sum by invoking the provisions of section 43CA of the act. This was also upheld by the learned dispute resolution panel.

038. The learned authorized representative submitted that first proviso to section 43CA (1) of the act states that where the difference between the sale consideration and value adopted for the purpose of stamp duty does not exceed 1 10% of the sale consideration, the deeming provisions of this section will not apply and the actual sale consideration will be considered for the purpose of calculation of the profit. Prior to 1 April 2021, the proviso provided tolerance band of 105% of the sale consideration it was submitted that

the enhancement of the tolerance band should apply retrospectively as it is amended to your the genuine hardship faced by the stakeholders and therefore it should be applied retrospectively. The assessee relied upon several judicial precedents. Accordingly, it was argued that the addition requires to be deleted.

039. The learned departmental representative supported the orders of the lower authorities and submitted that such tolerance bench should not be applied retrospectively. The learned departmental representative referred to the historical background of provisions of section 43CA of the act and submitted that earlier it did not apply to transfer of immovable property held as stock in trade and for curbing the use of unaccounted money by parties involving in transfer of immovable property where the stock in trade is sold the above provisions were included. He relied upon the decision of the honourable Bombay High Court in case of principal Commissioner of income tax versus Swanand properties private limited (2019) 111 taxmann.com 94, the decision of the honourable allowable High Court where retrospective operation of rule 6AA was held to be prospective in case of CIT versus Rajasthan Charm Kal Kendra (2005) 144 taxman 320 and decision of the coordinate bench in welfare properties private limited versus deputy Commissioner of income tax 180 ITD 591 wherein it

has been held that prior to incorporation of proviso to section 43CA (1) with effect from 1/4/2019, there was not on rent Limited envisaged in section 43CA regarding difference between stamp duty value and actual sale consideration received by assessee on transfer of asset and therefore, the benefit of tolerance limit is not available to the assessee in view of these decisions.

040. The learned authorized representative vehemently opposed the submission of learned departmental representative and referred to page number 21 of the assessment order wherein assessee specifically objected to the above addition before the learned assessing officer submitting that that there can be several reasons for the difference such as shape of the plot, location et cetera and therefore, the learned AO should have referred the matter to the valuation officer. Even otherwise, he submitted that the several judicial precedents have held that it is retrospective in nature. He further referred to the central board of direct taxes Circular number 8 of 2018 dated 26/12/2018 wherein the tolerance band of 5% was provided which is enhanced to 10% with effect from 1/4/2021. He therefore submitted that there is no reason why assessee should not be given a benefit of the above tolerance band.

041. We have carefully considered the rival contention and perused the orders of the lower authorities.

042. We find that identical issue arose before the coordinate bench in case of Sai Bhargavanath Infra v Assistant Commissioner of Income-tax* 2022] 144 taxmann.com 168 (Pune - Trib.) For assessment year 2015 – 16 wherein it has been held that:-

"4. We observe from plain reading of sec. 43CA that it provides in a case where consideration received or accruing as a result of the transfer by an assessee of an asset other than the capital asset being land or building is lesser than the value adopted or assessed by any Government authority for the purpose of payment of stamp duty then the difference will taxed as deemed income. At the same time, the proviso to this section states that if there is a difference of such value within 10% margin then there cannot be any addition on the pretext of deemed income and this 10% margin has been inserted by Finance Act, 2020 w.e.f. 1-4-2021. The assessment year under consideration before us is A.Y. 2015-16 that is prior to the date when the amendment took place and such 10% margin was inserted. The question therefore, arises whether this amendment effective from 1-4-2021 can even apply to prior assessment years as well. The assessee had relied on Pune Tribunal decision in ITA No. 923/PUN/2019 (*supra*) where the Tribunal has given retrospective effect in regard to section 43CA first proviso where the tolerance margin of 10% has been held to be applicable even for the prior assessment years.

However, in this decision, reliance was placed on another decision of Bombay Tribunal in the case of *Maria Fernandes Cheryl* v. *ITO (International Taxation)* [2021] 123 taxmann.com 252/187 ITD 738 (Mum) which relates to section 50C of the Act. It was contended that section 43CA and section 50C of the Act are pari materia provisions and therefore, holding of retrospective application of section 50C is even applicable making retrospective application to section 43CA of the Act as well. The ld. A.R was unable to place on record before us any direct decision where the first proviso of section 43CA which has been brought into effect from 1-4-2021 was held to be applicable retrospectively. In such scenario, we place reliance on the doctrine enshrined in the judgment of the full bench decision of Hon'ble Supreme Court in the case of *CIT* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466. The fact in this case was that search and seizure u/s 132 was conducted on 10-2-2001 pursuant to which the assessment order for the block period from 1-4-1989 to 10-2-2000 was passed on 28-02-2002 at a total undisclosed income of Rs. 85,00,000/-. The tax was charged as prescribed in section 113 of the Act. Subsequently, a proviso was inserted u/s 113 by the Finance Act, 2002 w.e.f. 01 -06-2002 to provide for levy of surcharge at 10%. The A.O took the view that the said amendment was clarificatory in nature and he

levied surcharge by passing rectification order u/s 154 of the Act. However, the Tribunal and the Hon'ble High Court upheld the assessee's claim that the said amendment was prospective in nature and did not apply to block period falling before 01 -06-2002. However, the plea of the assessee was rejected by the Hon'ble Supreme Court in *CIT* v. *Suresh N. Gupta* [2008] 166 Taxman 313/297 ITR 322 also held that the proviso to section 113 is clarificatory and hence, should be read into block assessment scheme under Chapter XIV-B with retrospective effect. Similar view was reiterated by the Hon'ble Supreme Court in *CIT* v. *Rajiv Bhatara* [2009] 178 Taxman 285/310 ITR 105 by holding the proviso u/s 113 to be retrospective in nature. Then the Supreme Court was of the view that the issue ought to be referred to a larger Bench of Five Judges. In this decision, the Hon'ble Supreme Court has given fundamental doctrine of retrospective applicability of provision. It has been held that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the Act or arises by necessary and distinct implication. The assessment creates a vested right on the assessee. The assessee cannot be subjected to re-assessment unless the provision to that effect is inserted by amendment either retrospectively or by necessary implications retrospectively. The Hon'ble Apex Court also opined

that there cannot be any imposition of tax without the authority of law and such law has to be unambiguous and should prescribe liability to pay taxes in clear terms. This very principle is based on the doctrine, which means that if a particular provision of statute is not clear regarding imposition of tax or because of persons from whom the tax has to be collected, in such case the persons should not be fastened with any liability to pay tax. It was further observed that though the Chief Commissioner in their Conference suggested that there should be retrospective amendment to section 113 of the Act, the Legislature chose not to do so even though for other provisions in which the legislature in its wisdom felt the need to do so has brought in amendments made with retrospective effect. The CBDT circular No. 2002 dated 27-08-2002 also makes it clear that the amendment to section 113 is prospective. Consequently, the conclusion reached in *N. Suresh Gupta* (*supra*) treating the proviso to section 113 of the Act as clarificatory and having retrospective effect was held to be incorrect and was over-ruled.

5-6. The essence of the decision is that if any liability has to be fastened with the assessee tax-payer retrospectively then the statute and the provision must spell out specifically regarding such retrospective applicability. However, if the provision is beneficial for the assessee, in view of the welfare

legislation spirit imbibed in the Income-tax Act, such beneficial provision can be applied in a retrospective manner. In the case of the assessee before us for the preceding assessment year *i.e.* A.Y. 2014-15, the difference of the consideration received from transfer of asset and the value adopted for stamp duty valuation was apparently not less than 10% tolerance margin which has been brought into effect from 1-4-2021 in the first proviso to section 43CA and therefore, the Tribunal in its wisdom had restored the matter to the file of the A.O for fresh adjudication (*supra*). Before us, admittedly such difference of tolerance margin is less than 10%. Now the question of applicability of this proviso of section 43CA retrospectively covering the assessment year in question *i.e.* A.Y. 2015-16, from the spirit of Supreme Court decision in *Vatika Township (P.) Ltd.* (*supra*) case is analysed. Now, the intent of the legislature is to provide relief to the assessee in case such difference is less than 10% which has been brought into effect from 1-04-2021 thereby providing benefit to the assessee. This being the beneficial provision therefore will even have retrospective effect and would apply to the present assessment year 2015-16. At this juncture we would also refer to the decision of Pune Tribunal in *Dinar Umeshkumar More* v. *ITO* [IT Appeal No. 1503 (Pune) of 2015, dated 25-1-2019], where the said proposition of applicability of a beneficial provision was considered

in light of Hon'ble Apex Court decision in the case of *Vatika Township (P.) Ltd.* (*supra*). In the said Tribunal order, the Bench observed that if the legislature is going to confer a benefit then such an averment will have a retrospective effect. The Tribunal observed that while discussing this issue in para 33 of the said judgment, the Hon'ble Apex Court held that "We would also like to point out, for the sake of completeness, that where a benefit is conferred by legislation, the rule against a retrospective construction is different. If legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect". The net effect of this judgment is that if a fresh benefit is provided by the Parliament in an existing provision, then such an amendment should be given retrospective effect. Therefore, even without going into the merits of the case by the application of first proviso to section 43CA having retrospective effect, the grounds of appeal of the assessee stands allowed."

043. Therefore, the above decision of the coordinate bench clearly clinches the issue in favour of the assessee wherein it has been held that tolerance

band of 10% would be applicable retrospectively. We also find that similar view has also been taken in

i. SHRI HARISH H GANDHI VERSUS ACIT 33 (1) , MUMBAI ITA No.1244/Mum/2019 And ITA No.2603/Mum/2019

ii. V.K. DEVELOPERS VERSUS THE ACIT, CIRCLE-3, PUNE. ITA No.923/PUN/2019

iii. M/S. SHETH DEVELOPERS PRIVATE LIMITED VERSUS DEPUTY COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE-4 (2) , MUMBAI AND (VICE-VERSA) TA No.1953/Mum/2020 And ITA No.1954/Mum/2020 And ITA No.11/Mum/2021 And ITA No.12/Mum/2021

iv. M/S. CITY CORPORATION LIMITED, (EARLIER KNOWN AS M/S. AMANORA FUTURE TOWERS PVT. LTD.,) VERSUS DCIT, CIRCLE-1 (1) PUNE AND VICE VERSA [2022] 96 ITR (Trib) 246 (ITAT [Pune])

044. We find that the decision of the coordinate bench in case of welfare properties private limited versus DCIT (supra) did not consider the retrospective applicability of the tolerance band provided under section 43CA of the act same was not the issue argued before it.

045. The decision of the honourable Bombay High Court in case of 111 taxmann.com 94 in case of Swanand properties private limited was only with respect to applicability of provisions of section 43CA of The act for assessment year 2005 – 06 wherein it has been held that this provisions are applicable only with effect from 1/4/2014. Therefore, it does not help the case of the revenue.

046. Accordingly we hold that if the difference between the stamp duty value of a stock in trade and the transaction value covered by the provisions of section 43CA is less than 10% even prior to 1/4/2021, does not warrant any addition in the hands of the assessee. Accordingly, we direct the learned assessing officer to delete the addition of ₹ 203,051/– made under section 43CA of the act. Ground number 4 of the appeal of the assessee is allowed.

047. Ground number 5 is with respect to the disallowance of ₹ 32,092,006/– under section 40 (a) (i) of the income tax act being amount paid to non-resident without deduction of the tax rejecting the contention of the assessee of applicability of article 12 of the India Singapore double taxation avoidance agreement only if the technical knowledge, experience, skill, know-how or process is made available to the non-resident.

048. Brief facts of the case shows that assessee has availed certain services from foreign service providers for development of certain projects and services are in relation to nature of architectural design layout including designing positioning of various buildings, common amenities, inclusion of certain other common amenities such as swimming pool and clubhouse, planning of floor space index with respect to number of units that can be placed on each floor and layout of such unit, landscape play out et cetera. The total fees paid are with respect to make the project aesthetically beautiful and appealing. For these purpose assessee has made payment to Singapore-based parties. On such payment had admittedly no tax is deducted at source under section 195 of the act. Assessee submits that no tax is required to be deducted on such payment in terms of article 12 of the India Singapore DTAA, as it does not satisfy make available condition. The learned assessing officer rejected this contention holding that from the plain reading of the nature of work mentioned in the assessee's submission, it is clear that the designing services were provided by the consultant in clause connection with the architect/contractor appointed by the assessee and the whole process was approved by the owner after satisfying itself about understanding the designing services stop the consultant even interprets the whole design to the onus contractor which clearly

makes available the service to the owners' contractor for using the said design independently. These service providers submit that report to the assessee. Therefore, it is clear that the services were made available to the assessee. The learned AO was also of the view that provisions of section 195 are attracted. However the main reason of making the about disallowance was that during the course of survey of group entities for assessment year 2015 – 16 this information was found and AO has reached at the conclusion that it is required to deduct tax at source on such payment.

049. When objections were raised before the learned dispute resolution panel, it was held: –

> "We have considered all the materials placed before us. We have also gone through the provisions of sections relied upon by both the assessee as well as the assessing officer. We have also gone through the relevant articles of the DTAA. We find that the nature of the services is such that it would have required a very long the presence of the service providers or its man to see the desired result on the ground. We note that such projects go on for very long time. We also know that the services were for multistoried projects, which have complex nature of engagements. We also note that

services are of such nature that trading of the main power of the assessee would be a prerequisite for subsequent observation and upkeep. Therefore, in our considered opinion, prima facie there was a dominant possibility of make available element being present in rendering of the services. We note that tax deduction mechanism works on tax deduction in the first instance when such payments for such elaborate services are made. We note that at the time of tax deduction the assessee should not itself determine the taxability of such payments under the act/DTAA. We note that the assessee relied upon the certificate issued by chartered accountant. In any case, the taxability of the payment is not dependent upon certificate issued by chartered accountant. The taxability is decided by the provisions of the act/DTAA. We note that the taxability of such payments as income in the hands of the non-resident are recipient is a complex process of law as provided in the act. It should be left to the expertise of respective assessee officer. Therefore, we are of the considered opinion that the export to have been deducted under section 195 of the act and without such deduction, the payments (expenditure) is liable to be

disallowed under section 40 (a) (i) of the act."

050. The learned authorized representative referred to each of the payment and submitted that all the parties are based out of Singapore. The services rendered by them are in the nature of architectural/landscape design and layout, interior designing and lighting services provided by the vendor's while proceeding with the development activities for its project. He referred to each of the agreement based on which the nature of services rendered by those parties was explained. He submitted that the services provided by the vendor's are unique, project specific and cannot be performed by anybody and everybody unless such person is a possession of a specific skill set and knowledge. Therefore the assessee cannot on its own apply those services/ skill etc in a different project. Each project requires expertise of the vendor to prepare reports/design separately. He further referred to the article 12 (4) (b) of the India Singapore tax treaty where it is provided that the services would be characterized as 'fees for technical services' if such services 'make available' technical knowledge, experience, skill, know-how or processes which enables the person acquiring the services to apply the technology contained therein. He further referred to the definition of Article 12 of the treaty along with the definition of the term 'fees for included services'

specifically contain the condition of 'make available'. He further referred to the memorandum of understanding under the India US tax treaty where the meaning of the expression make available used in article 12 is explained examples. Submitted that the direction of the learned dispute resolution panel is vague, not sustainable with respect to the concept of 'make available'.

051. The learned Authorized Representative has further referred to the decision of the co-ordinate Bench in case of Gera Developments (P.) Ltd. Vs. DCIT (72 taxmann.com 238), wherein on identical facts the co-ordinate bench in case of Developer when fees were paid to US resident architectural design and drawings, it was held that fees for such technical services do not fall within the scope of expression 'fee for included services', wherein also the condition of make "make available" was there. He further relied on the decision of Buro Happold Ltd. Vs. DCIT [2019] 103 taxmann.com 344 (Mumbai), wherein considering India UK Double Taxation Avoidance Agreement (DTAA), the services rendered by UK NTT for services provided of consulting did not satisfy the make available. The learned Authorized Representative also relied on DCIT vs. M/s Forum Homes Pvt. Ltd. in ITA No. 5804/Mum/2018 dated 4th October 2021. The learned Authorized Representative further referred to the submissions made before the learned Assessing Officer, Dispute

Resolution Panel and form no. 15CB submitted. He also referred to the agreement of the parties as well as the invoices to show that it does not make available many services to the assessee and therefore, it is not chargeable to tax in India according to Double Taxation Avoidance Agreement and therefore, no tax should have been deducted at source. Accordingly, the disallowance made by the learned Assessing Officer is not correct.

052. The learned departmental representative vehemently supported the orders of the lower authorities. It was the claim of the learned departmental representative that these consultants have made available the technology and skill to the assessee and therefore it satisfies the conditions of article 12 of the double taxation avoidance agreement and therefore tax should have been deducted at source and hence disallowance, as assessee failed to do so.

053. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly, the assessee has paid fees to various persons based in Singapore for the project consultancy. The services of the consultancy were included undisputedly by the learned assessing officer as well as the assessee under article 12 of the India Singapore DTAA . In Article 12 (4) of DTAA provided that :-

"4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :

(*a*) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
(*b*) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or
(*c*) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of (*b*) and (*c*) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person."

054. The assessee has made payment to following parties:-

serial number	name of party	nature of remittance	amount	nature of services
1	Site Techtonix private limited Singapore	consultancy services	2,43,46,781	the area of work include both the landscape, water and soft space responsibilities for the external area of development inclusive of road and drive it treatment, the area of the work for landscape included podium

				landscape, a per podium landscape, entrance drop-off courtyard, peripheral landscape treatment, overall site development and sky terraces. It included the scope of services as per agreement clause number three
2	Woha design PT Ltd Singapore	architectural services	43,86,182	consultancy for vertical transportation for the commercial tower including concept pro-scheme design, design and the DD stage, design development as per tender specification, review of VT tenders these services are including master plan.
3	Lightening planner associates PTE Ltd Singapore	Architectural services	33,59,043	It also included concept design, is committing design, design development and documentation. This contract was for overall plan and lighting strategy such as landscape areas, water features and contrary yards

055. The claim of the learned assessing officer is also with respect to applicability of article 12 (4) (b) of DTAA

claiming that such services make available technical knowledge, experience, skill, know-how or processes that enables the assessee to apply the technology contained therein. The learned DRP is also stating in its direction that the income is falling in article 12 (4) (b) of the Double Taxation Avoidance Agreement and requires to be tested whether 'make available test' is satisfied or not. It is not the case of the revenue that the services falls under article 12 (4) (C) of the DTAA.

056. While paragraph number 10.3 of the assessment order says that that the designing services were provided by the consultant in close coordination with the architect/contractor appointed by the assessee and the whole process was approved by the owner after satisfying. Therefore, consultant even interprets the whole design to the owner's contractors, which clearly makes available the services to the owner's contract for using the said design independently. Therefore the condition of make available a satisfied. The learned DRP at page number 74 of the direction held that the nature of services are such that it would have required very long presence of the service provider or its people to see the desired result on the ground. Such projects go on for a very long time. The DRP also noted that the services are of such a nature that training of the main power of the assessee would be a prerequisite for subsequent observation and upkeep. Therefore in the considered

opinion of the learned DRP was a dominant possibility of make available element being present in rendering of the services. We do not approve the findings of the learned dispute resolution panel because it is apparent that the services rendered by the consultant are highly technical and cannot be replicated by the assessee on its own. Even the lower authorities have also expressed merely a possibility of make available condition being satisfied, however, no evidences were led which shows that those consultants have made available the technical skill or expertise to the assessee which assessee can apply on its own without the help of those consultant in its business. The learned lower authorities have failed to understand that there is a basic distinction between the services that are rendered and such services that are made available. It is much more than rendition of the services, which makes available technology, skill, knowledge etc. to the assessee. In fact it should unable the assessee to derive any enduring benefit and applies the technology contained therein. In fact, the condition of make available again is examined only with respect to the agreement, documentation, communication, the manner in which services are rendered, the manner in which services are received and consumed by the assessee. In the services rendered, we do not find any condition of training by these consultants to the staff of the assessee for designing, development, conceptualizing these

services. In this case, looking at the limited aspect of article 12 (4) (B) of the double taxation avoidance agreement it is evident that make available test fails and therefore under article 12 (4) (b) the above services cannot be held to be chargeable to tax as fees for technical services as per India Singapore double taxation avoidance agreement. Therefore, the assessee was not required to deduct tax at source under section 195 of the act.

057. The learned authorized representative has relied upon the decision of the

i. coordinate bench in case of 72 taxmann.com 238 Gera Developments Private Limited dated 29 July 2016 wherein in case of an assessee was engaged in the business of development of land and construction of the building, the services were with respect to the site requirements, surroundings, conceptual designs and drawings and the issue involved was the interpretation of fees for technical services or royalty with respect to Indo US DTAA which is identically worded as India Singapore DTAA (there were two sub clauses in US DTAA wherein there were three sub clauses in Singapore DTAA) wherein in case of make available condition was applied with respect to the above services. We find that we are concerned here with the India Singapore

DTAA which has used a separate clause in article 12 (4) © "consist of the development and transfer of a technical plan or technical design but excludes any services that does not enable the person acquiring the services to apply the technology contained therein". That is not the question before us as we are concerned only with article 12 (4)(b) in this case which is invoked by the revenue and not concerned with whether the make available condition should also apply to article 12 (4) (C) of the DTAA.

ii. Same is the issue with the decision relied upon by the learned authorized representative in case of 103 taxmann.com 344 in case of Buro Happlod Ltd versus Deputy Commissioner Of Income Tax where the coordinate bench was concerned with the interpretation of Double Taxation Avoidance Agreement between India and United Kingdom wherein in paragraph number 20 of that decision it simply followed the decision of the coordinate bench in case of Gera developments private limited.

iii. The third decision relied upon by the learned authorized representative is of Deputy Commissioner Of Income Tax, Mumbai Vs Forum Homes Pvt Ltd in ITA number

5804/M/2018 dated 4/10/2021 wherein an assessee was engaged in the business of real estate and has availed services of consultancy and architect services of Singapore resident. The coordinate bench applying the India Singapore DTAA held that from the nature of services provided by the non-resident entities in the terms and condition under which it is provided, it is clear that whatever services were provided a project specific it cannot be used for any other project by the assessee. Further while providing such services neither any technical knowledge, skill et cetera is made available to the assessee for utilizing them in future, independently nor any developed drawing or design have been provided to the assessee which can be applied by the assessee independently. Therefore the coordinate bench in paragraph number 11 held that the conditions of article 12 (4) of the tax treaty are not fulfilled. The coordinate bench further held that the lower authorities have made a general observation that services have been made available however, no substantive material has been brought on record to back such conclusions. Though it is not clear from the decision that whether coordinate bench is applying article 12 (4) (b) or (c), but it is clear that the nature of the activities of the recipient

of the services and the nature of activities of the provider of services are identical as in case before us. Doubt always remains that whether in case of provision of services are consisting of the development and transfer of a technical plan and technical design, the condition of make available applies to that or not. However wordings of the India Singapore Double Taxation Avoidance Agreement which makes an exclusion in article 12 (4) (c) stating that it "excludes any services that does not enable the person acquiring the services to apply the technology contained therein." It gives a hint that it is identical to'make available' condition applicable to article 12 (4) (b) of the Double Taxation Avoidance Agreement.

iv. Later on it has come to our notice that coordinate bench in assessee's own case for assessment year 2014 – 15 to 2016 – 17 and 2018 – 19 in ITA number 497 – 500 & 784/M/2022 along with cross objections number 73 – 75 and 85/MUM/2022 dated 24/1/2023 where the learned AO was in appeal against the order of the learned CIT – A deleting the claim under section 201 (1) and interest under section 201 (1A) of the act for not withholding tax under section 195 of the income tax act pertaining to the payment

made to architectural consultancy and payment for other services, brokerage payment and reimbursement of expenses. The parties involved were identical to the issue before us. The nature of services is also governed by the same agreement. The coordinate bench upholding the order of the learned CIT – A following the decision of the coordinate bench in case of DCIT versus Forum homes private limited (supra) held that the income of these entities were not taxable in India and therefore the assessee was not required to deduct tax at source on this payment under section 195 of the income tax act. The coordinate bench also upheld the order of the learned CIT – A. Therefore it is conclusively now held by the coordinate bench in assessee's own case for earlier years and assessment year 2018 – 19, appeal of which is also decided by the same order by us, that assessee was not required to deduct tax at source under section 195 of the income tax act on payment made to the Singapore entities as they were not chargeable to tax in India according to article 12 of the DTAA.

v. Furthermore ITA number 782 and 7834 assessment year 2015 – 16 and 2016 – 17 as well as cross objection number 83 – 84 for the same assessment year was also decided by

the coordinate bench on 24/1/2023 (same date as another appeal for different years on the same issue) wherein identical eight has been held that the assessee is not required to deduct tax at source with respect to the payment made to Singapore entities and other countries holding that the income was not chargeable to tax in India according to article 12.

vi. As the coordinate bench in assessee's own case for the same assessment years have held that the assessee was not required to deduct tax on source on payment made to Singapore entities as they were not chargeable to tax in India according to article 12 of the double taxation avoidance agreement and also for the subsequent and earlier years, we respectfully following the decision of the coordinate bench, hold that assessee was not required to deduct tax at source under section 195 of the income tax act for the above payment which is disallowed by the learned assessing officer.

058. However, as we have made it absolutely clear that the claim of the revenue is that those services fall under article 12 (4) (b) and it has been made available to the assessee, which is unfounded, we hold that the services do not satisfy the make available condition and therefore are not chargeable

to tax as per the double taxation avoidance agreement. Thus, assessee was not obliged to deduct tax at source on such payment. Consequently, no disallowance can be made under section 40 (a) (i) of the act. In the result we direct the learned assessing officer to delete the disallowance of ₹ 3 20,92,006/–. Accordingly, we allow ground number 5 of the appeal.

059. Ground number 6 is against initiation of penalty proceedings under section 270A of the act, it is premature, and therefore does not require adjudication, hence dismissed.

060. Accordingly, appeal of the assessee is partly allowed.

ITA number 2239/M/2022
Assessment Year 2018 – 19

061. Now we come to the appeal of the assessee for assessment year 2018 – 19 in ITA number 2239/M/2022 wherein the assessee has raised following grounds of appeal.

"

1. The learned assessing officer/TPO/DRP has erred in making transfer-pricing adjustment in respect of

transaction of provision for guarantee by applying the rate of 0.5% of the guarantee amount.

2. The learned assessing officer/DRP has erred in disallowing an amount of ₹ 54,199,690/– under section 14 A of the act.

3. The learned assessing officer/DRP has erred in enhancing the book profit of ₹ 54,199,690/– by disallowance under section 14 A of the act while calculating MAT liability under section 115JB of the act

4. The learned assessing officer/DRP has erred in disallowing loan processing fee of ₹ 46,843,401/–.

5. The learned assessing officer/DRP has erred in disallowing ₹ 105,373,481/– under section 40 (a)(i) of the act by categorizing consultancy fees as fees for technical services

6. The learned assessing officer has erred in disallowing an amount of ₹ 444,627,471/– under section 43CA of the act. The learned

assessing officer/DRP ought to have held that no addition is called for under section 43CA of the act including the sumo to addition made by the appellant in its return of income.

7. The learned assessing officer ought to have granted MAT credit of merged entities.

8. The learned assessing officer/DRP has erred in short granting tax deduction at source credit of ₹ 48,157,988/– including TDS credit of merged entities.

9. The learned assessing officer has erred in computing/charging interest under section 234B of the act

10. The learned AO erred in holding that the appellant has underreported the income and thereby initiating penalty proceedings under section 270A of the act.

062. Briefly stated, assessee filed its return of income on 30/11/2018 declaring a total income of ₹ 9,350,168,890/– as per normal computation of the income and book profit under section 115JB of ₹ 789,73,32,756/–. The return of income was picked up for scrutiny as per the computer-aided scrutiny selection. The fact also shows that during the year under consideration the assessee has revised its return of income due to merger of 11 different entities into the assessee with effect from 1/4/2017 as per the order of the National company law Tribunal. The assessee has entered into several international transactions and therefore the reference was made to the learned transfer-pricing officer to determine the arm's-length price of that transaction. The learned transfer pricing officer passed an order under section 92CA (3) of the act on 31/7/2021 wherein he has proposed three adjustment to the international transaction:-

i. Adjustment of corporate guarantee commission of ₹ 137,810,366/– on security, guarantee given on the senior notes. The facts relating to this is identical to assessment year 2017 – 18.

ii. Corporate guarantee commission of ₹ 569,235/– in respect of tenancy agreement of the overseas associated enterprises. The fact shows associated enterprise of the assessee

Lodha UK had taken its office premises only is in United Kingdom for a period of nine years with total rental of £ 2,589,307 payable on quarterly basis. The rental agreement was signed into thousand nine and the guarantee was issued on 30/12/2009 and the date of releases 30/12/2018. On the requirement of the property owner, assessee has given the guarantee to the property owner for an amount not exceeding the total rental of £ 2,589,307 over the nine years lease. Towards the unpaid rent if any as well as breach of any other letting terms by the tenant. The unpaid rent as of the financial year 2017 – 18 was £ 520,771. The claim of the assessee was that it is not involving any cost, the tenant has also not obtained any borrowing of finance for any other benefit. This guarantee is merely a security to the property owner to ensure the recovery of the rent and therefore no guarantee commission was charged. The learned TPO held it to be a guarantee contract for which assessee should have been remunerated. The learned TPO obtained the bank guarantee rate of four different banks whose average was 1.575%. To this rate the learned TPO granted deduction based on the decision of the honourable Bombay High Court in case of CIT versus Everest Kanto cylinders

Ltd and decision of the coordinate bench in case of landmark pharmaceuticals Ltd with a downward adjustment of 0.375 percentage to the net" of the bank guarantee. Accordingly, the rate of 1.20 percent was taken as the arm's-length price for this guarantee. Therefore on the lease rent the amount of guarantee commission was determined at ₹ 569,235/–.

iii. The assessee has also given various guarantees for interest shortfall and demolition cost and procurement guarantee, right of light guarantee, financial guarantee, completion, cost overrun and interest guarantee and indemnity, sponsored guarantee to its various associated enterprises. These were not benchmarked, as assessee did not receive any guarantee commission. The learned transfer-pricing officer considered all these guarantees, adopted the arm's-length price of the guarantee commission at 1.20%, and determined the arm's-length price of the guarantee receipt to various entities that were amalgamated with the assessee with effect from 1/4/2016 amounting to ₹ 74,068,482.

063. Accordingly, the learned transfer pricing officer passed an order under section 92CA (3) of the act on 31/7/2021 proposing the total adjustment on

account of various guarantee fee is chargeable to ₹ 212,448,083/–.

064. The learned assessing officer passed a draft Assessment order under section 144C of The Act on 29/9/2021 wherein the total income of the assessee was determined at ₹ 1,573,340,960 as per normal computation of total income and further the book profit under section 115JB of the act was further enhanced by disallowance under section 14 A of the act of ₹ 62,503,451 determining the revised book profit at ₹ 7,959,836,207/–.

065. The learned assessing officer has made following corporate addition to the total income of the assessee over and above transfer pricing adjustment:-

i. disallowance under section 14 A read with rule 8D of ₹ 62,503,451/–

ii. disallowance of loan processing fee of ₹ 46,843,401

iii. addition under section 43CA of ₹ 383,532,986/– on account of the difference between the documented sale price of the stock in trade and the stamp duty value of the same

iv. disallowance under section 40 (a) (i) of the act of ₹ 105,373,481/– for non-deduction of tax at

source on payment made to 5 Singapore entities for consultancy work with respect to projects

066. Assessee preferred an objection before the learned dispute resolution panel, which passed its direction is on 28/6/2022. Based on that:-

i. The learned dispute resolution panel reduced the total adjustment of guarantee commission of ₹ 212,448,083 to only ₹ 98,653,150/– directing the learned transfer pricing officer to follow the decision of the honourable Bombay High Court in case of Everest Kanto and computed the arm's-length price of the guarantee commission fee at ₹ 0.5 percent.

ii. The disallowance under section 14 A on receipt of dividend income of ₹ 8,303,761/– as exempt income, where the assessee on its own offered a disallowance under section 14 A of the act to the exempt income of ₹ 8,303,761/– but the learned assessing officer made a disallowance of ₹ 62,503,451/– was restricted to only ₹ 54,199,690/– granting assessee the benefit of disallowance offered by it in its return of income.

iii. With respect to the disallowance of loan processing fee of ₹ 4,68,43,401 as capital expenditure was upheld

iv. the disallowance of expenditure of foreign remittance for non-deduction of tax under section 40 (a) (i) of the act with respect to the five different entities from Singapore amounting to ₹ 105,378,481/– was also upheld

v. With respect to the disallowance under section 43CA of the act where the sale consideration offered by the assessee is less than the value adopted for assessed by the authority of state government for the purpose of stamp duty amounting to ₹ 383,532,986/– was also upheld. In this case, the assessee has offered addition of RS. 1 44,25,474/– in its return of income.

067. Accordingly order under section 143 (3) read with section 144C capital (13) of The Income Tax Act was passed on 30/7/2022 determining the total income of the assessee at ₹ 1,451,242,270/– in the book profit computed under section 115JB of the act in addition of ₹ 54,199,690/– was also made on account of disallowance under section 14 A. The book profit was determined at ₹ 7,955,032,446/–. Assessee is aggrieved with that order and is in appeal before us by the grounds of appeal stated above.

068. The learned authorized representative submitted that ground number 1, 2, 3, 5 and 6 are identical to grounds of appeal of the assessee for assessment

year 2017 – 18 and their arguments also remains the same. It was submitted that there is no change in the facts and circumstances of the case compared to the facts and circumstances for assessment year 2017 – 18. It was submitted that only ground number 4 is the new ground in this appeal. Further ground number 7 is with respect to granting of credit of MAT in case of merged entities and further ground number 8 is with respect to short grant of TDS credit. Ground number nine is with respect to the interest charged under section 234B and ground number 10 is with respect to the initiation of penalty proceedings.

069. The learned departmental representative also agreed with above statement of facts.

070. We have carefully considered the rival contentions and perused the orders of the lower authorities as well as the direction of the learned dispute resolution panel on this issue.

071. With respect to ground number 1 of the appeal regarding arm's-length price of the guarantee commission fee from associated enterprises. We have already decided this issue in the appeal of the assessee for assessment year 2017 – 18 wherein we have categorically upheld that the arm's-length price of guarantee commission income at the rate of 0.35% with respect to the senior bonds issued by the associated enterprise.

072. Assessee is AE namely Lodha developers UK Limited is a rented office premises only is in United Kingdom for a period of nine years from 30 December 2009 to 30 December 2018 for payment of rent, the unpaid rent as on the end of financial year 2018 was only £ 520,771. Assessee did not benchmark this guarantee. The learned AO considered the average bank guarantee rate as arm's-length rate for benchmarking the guarantee issued by the assessee to its AE. The learned TPO computed the average of bank guarantee commission charged by four different banks at 1.575% and granted certain deduction based on the decision of the honourable Bombay High Court of 0.375% and computed the arm's-length price of this guarantee income on this is 1.20%. The learned dispute resolution panel directed the learned TPO to accept the arm's-length price of the guarantee commission income at 0.5% based on the decision of the honourable High Court. When in case of guarantee of borrowing by the associated enterprises we have computed arm's-length price of such guarantee commission at 0.35%, there is no reason that guarantee commission rate should be higher than 0.35% in this case. We are also guided by the fact that guarantee was executed in 2009 for nine years, in earlier years there is no commission charged by the assessee, there is no default in any of the rent payment for those years. Accordingly amount of guarantee commission charged by the

learned TPO at the rate of 1.20% is ₹ 5 69235/– we direct the learned AO/TPO to compute the arm's-length price of the guarantee commission at 0.35%. Accordingly, the adjustment to the extent of ₹ 166,026 is confirmed.

073. With respect to the various guarantee amount on loan raised by associated enterprise the AO has adopted the same guarantee rate of 1.20%. The learned DRP has reduced it to 0.5%, based on nature of guarantee is which are for borrowing obtained by the associated enterprises, as held in case of guarantee of senior notes, we direct the learned AO to adopt the arm's-length price of guarantee commission at 0.35%.

074. With respect to the guarantee given to the property owner against the payment of rent, we do not find that there is much difference in the functions, assets and risk involved of the assessee. It would meet the interest of the Justice, if arm's-length price of the guarantee commission income of this transaction is also restricted to 0.35%.

075. Accordingly, ground number 1 of the appeal of the assessee is partly allowed.

076. Ground number 2 is against disallowance under section 14 A of the income tax act of ₹ 54,199,690/– . The brief of the fact shows that during the year the assessee has earned exempt income of ₹

8,303,761/–. Assessee disallowed the same sum under section 14 A of the act. The learned AO disbelieved the disallowance and computed the same applying provisions of rule 8D read with section 14 A of the act and arrived at the disallowance of ₹ 62,503,451. The AO also did not grant credit of the original disallowance made by the assessee. The learned dispute resolution panel granted deduction of already disallowance made by the assessee in its computation of total income to the extent of exempt income of ₹ 8,303,761. Therefore disallowance was retained of ₹ 54,199,690/–.

077. The learned authorized representative has made the several arguments against the disallowance however the clinching argument was that the disallowance should be restricted to the extent of the exempt income of ₹ 8,303,761/– which is already been disallowed by the assessee and therefore no further disallowance is called for.

078. The learned departmental representative may mentally submitted that there is no correlation between the amount of exempt income and amount of the disallowance. It can even exceed the amount of exempt income also.

079. We have carefully considered the rival contention and perused the orders of the lower authorities. We find that the issue that disallowance under section 14 A cannot exceed the exempt income earned by the

assessee is covered in favour of the assessee by the decision of the honourable Bombay High Court in principal chief Commissioner of income tax versus Ajit Ramakant Phatarpekar* [2021] 124 taxmann.com 124 (Bombay) that :-

> **"9.** There is no perversity in the orders passed by the Commissioner (Appeals) and the ITAT on this issue. Besides in *Nirved Traders (P.) Ltd.* (*supra*), this Court has held that disallowance under section 14A of the IT Act cannot be more than the exempt income earned by the Assessee during the assessment year in question.."

080. Accordingly, ground number 2 of the appeal of the assessee is allowed.

081. Ground number 3 is with respect to the disallowance under section 14 A of the act added by the learned assessing officer while computing the book profit under section 115JB of the act. Identical issue arose in the case of the assessee for assessment year 2017 – 18 wherein we have followed the decision of the honourable Karnataka High Court and held that disallowance under section 14 A of the act cannot be added to the book profit under section 115JB of the act. Accordingly we direct the learned assessing officer to not to make any adjustment in the book profit with respect to disallowance under section 14 A of the act. Ground number 3 of the appeal is allowed.

082. Ground number 4 is with respect to the disallowance of loan processing fee of ₹ 46,843,401. The fact shows that during the year the assessee has incurred the aggregate loan processing fees of ₹ 461,656,164/–. Out of which a sum of ₹ 46,843,401 has been charged to the profit and loss account and expenditure incurred during the year based on fund flow of the assessee and the balance loan-processing fee has been taken to the cost of the project and included in the work in progress. The learned assessing officer has held that the above loan processing fees of ₹ 46,843,401 should also have been capitalized at work in progress. The learned DRP upheld action of the learned AO.

083. The learned authorized representative submitted that assessee is engaged in the business of construction and development of realistic project including purchase and sale of building materials. The assessee has aggregated all project cost incurred including land cost and also aggregated its own sources of funds such as customers collection et cetera. The net deficit if any is calculated and the weighted average borrowing cost are located on such deficit to arrive at the interest cost, which is capitalized, to the cost of the project. Accordingly, part of loan processing fee has been effectively charged to profit and loss account based on the fund flow of the assessee and the balance is already taken by the assessee to the cost of project. It was the

claim of the assessee that such processing fees are revenue in nature and should be allowed to the assessee as deduction.

084. The learned departmental representative vehemently supported the orders of the lower authorities and submitted that when the assessee has loan-processing fee of ₹ 461,656,164/– except the above sum there is no reason that this should be allowed to the assessee as a deduction in this year. Therefore, he vehemently supported the order of the learned assessing officer that the above sum should also be capitalized as a work in progress.

085. We have carefully considered the rival contention and perused the orders of the lower authorities. Assessee is engaged in business of construction and development of realistic projects including purchase and sale of building materials. It is in fact borrowing cost the method adopted by the assessee is that it has allocated the finance cost to a specific project based on the fund flow of the company. The assessee aggregated all project cost incurred up to 31/3/2018 including land and also aggregates own sources of funds. The net deficit if any is calculated and the weighted average borrowing cost are located on such deficit to arrive at the interest cost, which has to be included into the cost of project. Accordingly assessee out of the total loan processing fees of ₹ 46.16 crores and balance sum of Rs. 4.68

crores. The loan processing fee is interest and deductibility is required to be tested under section 36 (1) (iii) of the act. We find that this issue is squarely covered in favour of the assessee by the decision of the honourable Bombay High Court in case of CIT versus Lokhandwala constructions industries Ltd 131 taxman 810 (Bom) wherein it has been held that:-

> "**4.** From the facts found by the Tribunal on record, it is clear that assessee undertook two-fold activities. It bought and sold flats. Secondly, the assessee was also engaged in the business of construction of buildings. The profits from both the activities were assessed under section 28 of the Income-tax Act. In this case, we are concerned with the second activity (hereinafter referred to, for the sake of brevity, as "Kandivali Project"). According to the Commissioner, loan was raised for securing land/development rights from the Mandal. That, the loan was utilised for purchasing the development rights, which, according to the Commissioner, constituted a capital asset. According to the Commissioner, since the loan was raised for securing capital asset, the interest incurred thereon constituted part of capital expenditure. This finding of the Commissioner was erroneous. In the case of *India Cements Ltd.* v. *CIT* [1966] 60 ITR

52 , it was held by the Supreme Court that in cases where the act of borrowing was incidental to carrying on of business, the loan obtained was not an asset. That, for the purposes of deciding the claim of deduction under section 10(2)(*iii*) of the Income-tax Act, 1922 [section 36(1)(*iii*) of the present Income-tax Act], it was irrelevant to consider the purpose for which the loan was obtained. In the present case, the assessee was a builder. In the present case, the assessee had undertaken the Project of construction of flats under the Kandivali Project. Therefore, the loan was for obtaining stock-in-trade. That, the Kandivali Project constituted the stock-in-trade of the assessee. That, the Project did not constitute a fixed asset of the assessee. In this case, we are concerned with deduction under section 36(1)(*iii*). Since the assessee had received loan for obtaining stock-in-trade (Kandivali Project), the assessee was entitled to deduction under section 36(1)(*iii*) of the Act. That, while adjudicating the claim for deduction under section 36(1)(*iii*) of the Act, the nature of the expense - whether the expense was on capital account or revenue account - was irrelevant as the section itself says that interest paid by the assessee on

the capital borrowed by the assessee was an item of deduction. That, the utilization of the capital was irrelevant for the purposes of adjudicating the claim for deduction under section 36(1)(*iii*) of the Act - *Calico Dyeing & Printing Works* v. *CIT* [1958] 34 ITR 265 (Bom.). In that judgment, it has been laid down that where an assessee claims deduction of interest paid on capital borrowed, all that the assessee had to show was that the capital which was borrowed was used for business purpose in the relevant year of account and it did not matter whether the capital was borrowed in order to acquire a revenue asset or a capital asset. The said judgment of the Bombay High Court applies to the facts of this case."

086. Therefore, respectfully following the decision of the honourable Bombay High Court, we direct the learned assessing officer to allow the deduction of ₹ 46,843,401 of loan processing fee as expenditure allowable under section 36 (1) (iii) of the act. Accordingly, ground number 4 of the appeal is allowed.

087. Ground number 5 is with respect to the disallowance under section 40 (a) (i) of the act amounting to ₹ 105,373,481/– being amount paid as a consultancy

fees to the foreign parties without deduction of tax at source.

088. The fact shows that during the year the assessee has paid to several Singapore entities professional fees such as landscape architectural consultancy services, architectural design consultancy services, interior designing fees, and reimbursement of expenditure. The total sum paid is ₹ 105,373,481/–. The assessing officer was of the view that assessee should have deducted tax at source under section 195 of the income tax act and as assessee has failed to do so, he disallowed the same. The learned dispute resolution panel also confirmed the same.

089. The learned authorized representative submitted identical issue arose in the case of the assessee for assessment year 2017 – 18 and therefore his arguments also remains the same.

090. The learned departmental representative vehemently supported the orders of the learned AO as well as the direction of the learned DRP.

091. We have carefully considered the rival contention and perused the orders of the lower authorities. This issue is identical to the issue in appeal of the assessee for assessment year 2017 – 18 wherein the learned assessing officer disallowed the above sum paid to Singapore entities without deduction of tax at source. We have dealt with this issue in ground

number 5 of the appeal for assessment year 2017 – 18. There is no change in the facts and circumstances of the case in this year. Even the parties to the payments are made are also same and the contract based on which the payments are made are also the same. The claim of the assessee is that these are fees for technical services, which fails the make available test. While deciding ground number 5 of the appeal for assessment year 2017 – 18 identical ground of the appeal is allowed and the learned AO is directed to delete the about disallowance. For the similar reasons and more precisely when coordinate bench has decided this issue in favour of the assessee while deciding the appeal of the revenue under section 201 holding that there is no failure on the part of the assessee to deduct tax at source is no taxes required to be deducted, we allow ground number 5 of the appeal of assessee and direct the learned assessing officer to delete the disallowance of ₹ 105,373,481.

092. Ground number 6 is with respect to addition under section 43CA of the act amounting to ₹ 344,627,471/– wherein the sale consideration declared by the assessee with respect to its stock in trade is less than the amount of stamp duty value of those properties. The fact shows that during the year the assessee company has sold various properties both commercial and residential in nature. Assessee in its computation of total income with respect to

several properties has offered few disallowance of Rs. 1,44,25,474/–. The learned assessing officer noted that though the total variation as per section 43CA of the actors ₹ 397,958,460/– however assessee has offered the disallowance only to the extent of ₹ 14,425,474/–, therefore the learned AO made the balance disallowance of ₹ 383,532,986/–. The learned dispute resolution panel confirmed the same.

093. The learned authorized representative referred to page number 210 of the paper book wherein complete arguments were noted. These arguments are:-

i. the significant inventory is have been piled up and huge amount of funds have been locked up and therefore the company has sold certain properties at the prevailing market prices which were lower than the stamp duty value adopted by these authorities.

ii. The assessee has supported its sale by valuation report from the independent valuer which has considered the relevant factors of the particular property such as area, nature, use, width, adjacent localities, urgency of sale, need of the buyer, other relevant market factors and prevalent market demand and supply conditions. It was submitted that

the valuation report of the registered valuer supports the sale price of the assessee.

iii. Assessee has objected before the learned assessing officer with respect to the stamp duty value applied as deemed sales consideration by supporting it with a valuation report and pointing out various conditions. Despite this the ld AO has not referred the matter to valuation cell and non this ground the addition requires to be deleted. He relied up on Decision of Cordinate bench in (1) Mohd. Iyas Ansari [ITA No 6174/M/2017 and (2) DCIT V Goverdhan Prasad Singhal [ITA No 62 & 64/JP/2022] & (3) ACIT V Lalitha Karan [ITA No 1130/Hyd/2015]

iv. The tolerance band of 10% though inserted with effect from 1/4/2021 but it applies retrospectively.

094. Accordingly, it was submitted that the addition made by the learned assessing officer under section 43CA of the act is required to be deleted.

095. The learned departmental representative vehemently supported the orders of the learned assessing officer and direction of the learned dispute resolution panel stating that the addition made by the learned assessing officer on account of deemed sale

consideration of the property which are sold less than the market rate i.e. Circle rate. It was further stated that the tolerance band of 10% does not apply retrospectively but applies prospectively.

096. Both the parties confirmed that the facts and circumstances of the case and their argument also remains the same as per ground number 04 of the appeal for assessment year 2017 – 18.

097. We have carefully considered the rival contention and perused the orders of the lower authorities. The facts and circumstances of the case identical to ground number 4 of the appeal of the assessee for assessment year 2017 – 18. While disposing off that ground, we have categorically held that the tolerance band limit of 10% though inserted with effect from 1/4/2021 applies retrospectively relying upon the several judicial precedents.

098. Therefore, for the reasons given by us in ground number 4 of the appeal for assessment year 2017 – 18, we direct the learned assessing officer to compute the disallowance afresh after granting the benefit of tolerance band of 10% to the assessee for this year.

There is another aspect also in this ground. As per provisions of (2) of section 43CA provides that provisions of subsection (2) and subsection (3) of section 50 C shall, so far as may be, apply in

relation to determination of the value adopted or assessed or assessable under subsection (1).

099. Assessee submitted before ld AO as under :-

During the year under consideration the assessee company has sold various properties both commercial and residential in nature. In this respect working u/s 43CA as required by your goodself is enclosed as under for assessee company Macrotech Developers Pvt Ltd (Formerly known as Lodha Developers Pvt Ltd) along with entities which have been merged with assessee company during the year under consideration.

Sr. No.	Company	Commercial	Residential	Total Variation	Suo Moto Disallowed in COI	43 CA working
I	Macrotech Developers Ltd. (Assessee Company)	5,52,51,772	16,19,03,666	21,71,55,438	1,40,34,524	Annexure-A
II	Palava Dwellers Pvt. Ltd. (Merged entity)	-	17,87,84,264	17,87,84,264	-	Annexure –B
III	Bellissimo Developers Thane Pvt. Ltd. (Merged entity)	-	17,15,680	17,15,680	3,90,950	Annexure-C
VI	Bellissimo Mahavir Associates Dwellers Pvt. Ltd. (merged entity)	-	3,03,078	0,03,078	-	Annexure-D
	Total	5,52,51,772	34,27,06,688	39,79,58,460	1,44,25,474	

Further, we are also enclosing the 43CA working of other merged entities as Annexure - F where there is no difference between sale consideration and stamp duty value.

Further, company wise detailed submission with respect to difference between sale consideration and stamp duty value is explained in subsequent paras.

I. Macrotech Developers Limited

The assessee in the year under consideration was developing the projects comprises of residential and commercial units. Details of projects in which units sold during the year and where difference is

on account of sale consideration and stamp duty value is as under:-

Sr. No.	Project	Nature of units	Location	Variation as per 43CA working
i.	Lodha Boulevard	Commercial	Majiwada	96,80,203
ii	Lodha Supremus	Commercial	Tungwa	4,55,71,568
iii	Codename Goldmine	Residential	Majiwada	1,64,65,127
iv	Lodha Eternis	Residential	Mulgaon Andheri	4,20,626
v.	Lodha Fiorenza	Residential	Pahadi Goregaon	6,20,83,162
vi.	Lodha Luxuria	Residential	Majiwada	43,93,198
vii.	Lodha Luxuria	Residential	Majiwada	78,13,643
viii	Lodha Luxuria Priva	Residential	Majiwada	3,54,500
ix	Lodha Venezia	Residential	Parel-Shivdi	5,65,922
x	New Cuffe Parade	Residential	Saltpan	3,65,94,476
xi	The park	Residential	Lower Parel	3,32,13,013
Total				21,71,55,438

1) Commercial Property - Serial no (i) & (1)

i. We would like to state that assessee has sold retail shops to customers at Project "Lodha Supremus" and "Lodha Boulevard" and during the year under consideration, the real estate market had been sluggish and slow moving. The commercial real estate market is even worse, where the sales are even more difficult to achieve. The prices have not increased over last few years and the company has been finding it difficult to sell its inventory at the expected prices. This has resulted in piling up of inventory with the company. Considering that the company had significant inventory, and huge amount of funds locked up in it and the company was bound to sell the said properties at the prevailing market prices which was lower as compared to stamp duty value adopted.

ii. In this regard at the outset we submit that the stamp duty value of the property sold is not at its "fair market value". It is well known fact that an immovable property may have various attributes, charges, encumbrances, limitations and conditions. The object of the valuation by the Stamp Valuation Authority is to secure revenue

on such sale and not to determine the true, correct and fair market value of the immovable property on which it may be purchased by a willing purchaser subject to and taking into consideration its situation, condition and other attributes. The Stamp Valuation Authority does not take into consideration the attributes which drives the prices of the property for determining the fair market value in a given condition for which it is sold. The Stamp Valuation Authority is bound to value the property as per the circle rates fixed. Further, it is nothing in any law which recognizes that the value adopted for the purpose of stamp duty is the fair market value of the property exchanged between the seller and buyer.

iii. Circle rate is nothing, but, a guidance given by the higher ranking Administrative Officer to the subordinate officer. Under the Indian Stamp Act, it has been clearly stated that "The valuation so fixed by the Government shall act as guide/Indicator for the purposes of assessing the duty chargeable on the value or the consideration of any immovable property". Thus, the circle rate so fixed cannot only be considered as the decisive factor in valuation of the immovable property without considering the other relevant factors which contributes greatly to the market value of the property. The following are the relevant factors which also contributes in the determination of fair market value of the property-

- The area of the plot or the property in question
- Nature of the Property .The use of the property
- The width of the road upon which the property is located
- The nature of the adjacent properties
- The urgency of sale by the owner
- Need of the Buyer to Purchase the Property
- Other existing market factors which vary from time to time
- Prevailing market demand and supply

iv. In support of our claim, we have obtained the valuation report from the independent recognised property valuer determining the fair market value of the property after considering all the relevant as under -

a. Lodha Boulevard - With respect to this project, we have obtained the valuation from independent registered valuer of Unit No. 32 for "Lodha Boulevard". Copy of the same is enclosed as Annexure - F for your ready reference and records. On perusal of the same, your goodself will observe that in the valuation report it is stated that the sale consideration of the assessee is the fair market value of the

property after considering all the relevant factors for determining the fair market value of the property for the period under consideration. Therefore disallowance u/s 43CA is not warranted

b. Lodha Supremus (Powai) - With respect to this project, we have obtained the valuation from independent registered valuer of Unit No. 1701 for building "Lodha Supremus". Copy of the same is enclosed as Annexure-G for your ready reference and records. On perusal of the same, your goodself will observe that in the valuation report it is stated that the sale consideration of the assessee is the fair market value of the property after considering all the relevant factors for determining the fair market value of the property for the period under consideration. Accordingly, it is submitted that the other units sold by the assessee company in the same building "Lodha Supremus" are also sold at the fair market value and therefore disallowance u/s 43CA is not warranted.

Further, if your goodself is not satisfied with the above submission and valuation report of registered valuer substantiating such claim then we would request your goodself to kindly refer the said matter for valuation as per the provisions of section 43CA(2) of the Act.

……..

II. Palava Dwellers Private Limited

The assessee in the year under consideration was developing the projects comprises of residential and commercial units. Details of projects in which units sold during the year and where difference is on account of sale consideration and stamp duty value is as under:

Sr. No.	Project	Nature of units	Location	Variation as per 43CA working
i.	Casa Bella Gold	Residential	Usargar	3,500
ii.	Casa Rio	Residential	Ghesar Village	3,74,56,988
iii.	Casa Rio Gold	Residential	Ghesar Village	8,34,82,637
iv.	Lodha Freshia	Residential	Ghesar Village	5,78,41,139
Total				17,87,84,264

With reference to above we would like to submit as below:

1. Sr.no (ii), (ii) and (iv): In this respect we would like to state that the assessee has sold residential flats to customers at Project Casa Rio, Casa Rio Gold and Lodha Freshia. In relation to this we wish to state as under-

A. Fair Market Value of the property is less than Stamp Duty Value

i. In this regard at the outset we submit that the stamp duty value of the property sold is not at its "fair market value". It is well known fact that an immovable property may have various attributes, charges, encumbrances, limitations and conditions. The object of the valuation by the Stamp Valuation Authority is to secure revenue on such sale and not to determine the true, correct and fair market value of the immovable property on which it may be purchased by a willing purchaser subject to and taking into consideration its situation, condition and other attributes. The Stamp Valuation Authority does not take into consideration the attributes which drives the prices of the property for determining the fair market value in a given condition for which it is sold. The Stamp Valuation Authority is bound to value the property as per the circle rates fixed. Further, it is nothing in any law which recognises that the value adopted for the purpose of stamp duty is the fair market value of the property exchanged between the seller and the buyer.

ii. Circle rate is nothing, but, a guidance given by the higher ranking Administrative Officer to the subordinate officer. Under the Indian Stamp Act, it has been clearly stated that "The valuation so fixed by the Government shall act as guide/indicator for the purposes of assessing the duty chargeable on the value or the consideration of any immovable property". Thus, the circle rate so fixed cannot only be considered as the decisive factor in valuation of the immovable property without considering the other relevant factors which contributes greatly to the market value of the property. The following are the relevant factors which also contributes in the determination of fair market value of the property-

- The area of the plot or the property in question
- Nature of the Property
- The use of the property
- The width of the road upon which the property is located
- The nature of the adjacent properties
- The urgency of sale by the owner
- Need of the Buyer to Purchase the Property
- Other existing market factors which vary from time to time
- Prevailing market demand and supply

iii. Details of units sold by Assessee Company during the year under consideration is an follows;

Project	Units sold at < RR	Unit sold at >	Total Units	Percentage of units sold <RR
Casa Rio	99	25	124	80%
Casa Rio	178	54	232	77%
Lodha Freshia	62	1	63	98%
Average				85%

From the above table it may be observed that on an average assessee has sold 85% of units below the ready reckoner rate considered for the purpose of payment of stamp duty. Thus, it is evidently clear that the substantial sales made by the assessee company fails under the "below the ready reckoner rate" category and the value determined by the stamp duty authority is not the fair market value of the property as there was no market existed for such a price determined by stamp duty authority. Accordingly, the circle rate so decided is not the only factor contributing to the fair market value of the property.

iv. In support of our claim, we have obtained the valuation report from the independent recognized property valuer determining the fair market value of the property after considering all the relevant as under-

a. CASA RIO With respect to this project, we have obtained the valuation from Independent registered valuer of Flat No. 501 for building "Nautica" under project "CASA RIO". Copy of the same is enclosed as Annexure H for your ready reference and records. On perusal of the same, your goodself will observe that in the valuation report it is stated that the sale consideration of the assessee is the fair market value of the property after considering all the relevant factors for determining the fair market value of the property for the period under consideration. Accordingly, it is submitted that the other units sold by the assessee company in the same project

"CASA RIO" are also sold at the fair market value and therefore disallowance u/s 43CA is not warranted

b. CASA RIO GOLD With respect to this project, we have obtained the valuation from independent registered valuer of Flat No. 603 for building "Exotica D - Wing" under project "CASA RIO GOLD". Copy of the same is enclosed as Annexure-I for your ready reference and records. On perusal of the same, your goodself will observe that in the valuation report it is stated that the sale consideration of the assessee is the fair market value of the property after considering all the relevant factors for determining the fair market value of the property for the period under consideration. Accordingly, it is submitted that the other units sold by the assessee company in the same project "CASA RIO GOLD" are also sold at the fair market value and therefore disallowance u/s 43CA is not warranted.

c. Lodha Freshía - With respect to this project we would like to bring to your kind attention that, we have obtained the valuation from independent registered valuer of Flat No. 102 for building "D Wing" under project "LODHA FRESHIA". Copy of the same is enclosed as Annexure-J for your ready reference and records. On perusal of the same, your goodself will observe that in the valuation report it is stated that the sale consideration of the assessee is the fair market value of the property after considering all the relevant factors for determining the fair market value of the property for the period under consideration. Accordingly, it is submitted that the other units sold by the assessee company in the same project "LODHA FRESHIA" are also sold at the fair market value and therefore disallowance u/s 43CA is not warranted.

Accordingly we submit that, none of the transactions falls under the ambit of 43CA disallowances and there should not be any disallowances under this section.

……..

IV. Bellissimo Developers Thane Private Limited

The assessee in the year under consideration was developing the projects comprises of residential units. Details of projects in which units sold during the year and where difference is on account of sale consideration and stamp duty value is as under:

Sr. No.	Project	Nature of Units	Location	Variation as per 43CA working (refer Table 3)
i.	Amra	Residential	Kolshet, Khokali &	17,15,680

			Balkum	
Total				17,15,680

Table 3

Project/ Building	Above tolerance band of 10% (disallowable under Section 43CA based on Percentage completion method)	Percentage of Completion	Disallowance
Amara	17,15,680	66.00%	11,32,349
Total			11,32,349

Based on the above submission, total disallowance u/s 43CA works out to be Rs. 11,32,349/- and the assessee in its computation of income has suo moto disallowed a sum of Rs. 3,90,950/- and the net disallowance will be Rs. 7,41,399/-. Further, we wish to state that the balance disallowance will be offered to tax in subsequent assessment years as and when the assessee recognises the corresponding revenue based on the percentage completion method.

0100. The Ld AO did not take any cognizance of the submission of the assessee with respect to claim of the assessee that stamp duty rates are not the fair market value of the property and to support such claim it produced valuation reports of authorized valuers.

0101. Before ld DRP on the aspect where assessee objects to stamp duty valuation rate , it was held as under :-

> "The assessee has raised without prejudice' sub-ground of objection no. 4.3, which relates to the claim that if its objection

supra is not accepted then a reference needs to be made to 'valuation officer by the assessing officer. Briefly stated facts of the issue are that the assessee is claiming tolerance' provided in the proviso to section 43CA of the Act. As held supra, the same is not admissible in the instant AY 2018-19, because it is applicable from AY 2019-20. The assessee submitted valuation reports to the assessing officer to support its claim that the properties were sold at fair market value (FMV), which were lower than the stamp duty valuation of these properties. The assessee claimed before the assessing officer that if the claim under the proviso (in question) was not allowed, then these properties should be referred to a valuation officer, because section 43CA(2)of the Act, provides that the provisions of section 50C(2)/ (3) of the Act would apply for determination of the value adopted or assessed or assessable u/s. 43CA(1) of the Act The assessing officer chose not to accede to the request by the assessee in this regard.

We have noted all facts and material brought before us with regard to the issue. We have also gone through the valuation reports submitted by the assessee. We

have noted the legal provisions provided in sections 43CA and 50C(2)/ (3) of the Act. We note that section 43CA(2) of the Act provides for application of section 50(C)(2)/(3) of the Act in relation to 'determination of the value adopted/ assessed/assessable under section 43CA(1) of the Act. We note that section 50C(2)/(3) of the Act, provides that if the assessee claims before the assessing officer that the value adopted/ assessed/ assessable by the stamp valuation authority (SVA) exceeds FMV on the date of transfer and the value adopted/ assessed/ assessable by the SVA has not been disputed in any appeal/ revision/ reference before any other authority/ court/ the High Court, then the assessing officer 'may' refer the valuation to a 'valuation officer'. Thus we note that the sections provide an exception to the 'rule of stamp duty valuation adopted in section 43CA(1) of the Act. We note that the exception, so provided by virtue of application of section 50C(2) & (3) of the Act, has two preconditions as mentioned supra. The first condition is that the assessee should claim before the assessing officer that the value adopted/ assessed/ assessable by the stamp valuation authority

(SVA) exceeds FMV on the date of transfer, and the second condition is that the value adopted/ assessed/ assessable by the SVA has not been disputed in any appeal/ revision/ reference before any other authority/ court the High Court. We note that when these two conditions exist, then the assessing officer 'may' (in his discretion) refer the valuation to a 'valuation officer'. We note that in the instant case of the assessee, only first condition existed, where it had claimed that the stamp duty value exceeded the FMV. We note that the second condition was not existing/ fulfilled by bringing any material on record to establish that the value adopted/ assessed/ assessable by the SVA has not been disputed in any appeal/ revision/ reference before any other authority/ court/ the High Court. In our considered opinion, the onus was on the assessee to show that the second condition was also existing in its case before asking the assessing officer to exercise his discretion to refer the matter to a valuation officer. We note that the assessee has not shown before us also that the second condition existed in the instant case. Thus, we are not inclined to grant the without

prejudice' sub-objection. Hence, the ground of sub-objection no. 4.3 is dismissed."

0102. On careful perusal of the submission made by the assessee placed at page number 210 to 222 of the paper book we find that assessee has objected before the learned assessing officer per letter dated 27 September 2021 with respect to the sale value of the property being less than the stamp duty rates. Assessee has submitted company wise, project - wise, type wise (commercial or residential), name of the owners, date of booking of the property, saleable area, sales consideration and stamp duty valuation. It objected by submitting the valuation report prepared by Mr Deven K Dadbhawala dated 2/9/2021 with respect to all properties where there is a difference with respect to project (1) Lodha Boulevard, (2) Lodha Supreme Pawai , (3) casa Rio Gold , (4) Lodha Freshia D Wing. Before the assessing officer, as well as the learned DRP, assessee submitted that if the assessee's contention is not accepted and the valuation reports obtained from independent valuer's stating that the sale consideration of the assessee is the fair market value of the property is disregarded, then, the assessee submitted that the properties in respect of which disallowance/addition is proposed under section 43CA of the act, be referred for valuation by the learned AO as per subsection (2) of section 43CA of

the act. Assessee placed reliance on following judicial precedents:-

i. S MuthuRaja V CIT 37 taxmann.com 352 (Madras)

ii. Sunil Kumar Agarwal versus CIT 47 taxmann.com 158 (Calcutta)

iii. Avishkar film private limited versus ITO 108 taxmann.com 270

iv. Meghraj baid V Ito 23 SOT 25 (jd)

0103. Before the assessing officer, assessee has submitted a 66 page summary of all the sale transactions comparing the actual sale price as well as the deemed sale consideration under section 43CA of the act. Wherever assessee did not find any reason to substantiate that actual sale consideration is the market rate, assessee itself accepted and has offered such higher deemed sale consideration for the purpose of computation of profits and gains. Wherever, assessee had objected, it has objected by submitting the reasons, substantiated such reasons with the valuation report and made a specific request to the learned assessing officer to refer the matter to the valuation cell for arriving at deemed sale consideration. Repeatedly saying so before the AO, the learned assessing officer did not care to look into

all the submissions and made the addition under section 43CA of the act. The learned AO even did not care to look into the disallowance already offered by the assessee itself.

0104. In fact, in this situation the learned AO is duty-bound to follow the mandate of subsection (2) of section 43CA of the act. That meant that takes the AO to the provisions of 50 C (2) and (3) of the act. Those provisions clearly states that if the assessee claims before AO that the value of the property determined by the stamp valuation authority exceeds the fair market value of the property as on date of transfer, the AO is duty-bound to refer valuation of such capital asset to valuation officer and thereafter to look at provisions of subsection (3) to substitute the actual sale consideration with the such valuation. The AO has failed to do what the law mandates him to do. He conveniently does not look into the claim of the assessee at all.

0105. When the matter reached before the learned dispute resolution panel, the learned DRP did not reject the claim of the assessee of making a reference to the valuation officer by the learned AO but has held that according to the provisions of section 50 C (2) (b) the assessee has not given any evidence that the stamp valuation authorities valuation has not been disputed before specified authorities. The plain reading of the provisions of section 50 C (2) the

assessee's claim is required only with respect to clause (a) of that section. It does not extend to clause (b) of that subsection. Therefore assessee is not required to show that valuation by stamp duty authorities are not disputed before higher forums. The learned DRP therefore rejected the contention of the assessee on the second condition of section 50 C (2) of the act i.e. 50C(2)(b) of the act. We do not find any justification for rejecting the claim of the assessee by holding that the assessee failed to substantiate that valuation of stamp duty authority is not challenged/disputed. It is not the duty of the assessee. The duty of the assessee to make a claim as per 50 C (2) (a) of the act before the AO that stamp duty valuation exceeds the fair market value of the property. For fair market value, assessee has given the reasons, substantiated it with a valuation report and raised a specific claim before the AO to refer the matter to the valuation cell. Accordingly, we do not find any justification in the direction of the learned dispute resolution panel. In fact the learned DRP should have directed the learned AO to refer the matter to the valuation cell in terms of provisions of section 43CA (2) read with section 50 C (2) of the act.

0106. Apparently, the learned AO has failed to carry out the mandate of the law of referring valuation of those properties to the valuation cell for valuing those properties. We refer to Para no 21 of The

decision of Honourable Delhi high court in PCIT V Headstrong Services India Pvt Ltd ITA 77/2019 dated 24/12/2020 where in it has been held that

> "21. It is further settled law that when a power is given to do certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are forbidden. [See: Taylor Vs. Taylor,1875) 1Ch.D.426; Nazir Vs. King Emperor, AIR 1936 PC 253, AIR 1975 SC 985; Babu Verghese Vs. Bar Council of Kerala, (1999) 3 SCC 422]."

0107. Thus where the law mandates the learned assessing officer to do the things in a particular manner, if he fails to do so as per the provisions of the law, we do not have any other alternative but to delete the addition. Such a view has been taken even in case of violation of procedures; we are dealing with the substantive addition in the hands of the assessee.

0108. Accordingly, ground number 6 of the appeal of the assessee is allowed.

0109. Ground number 7 of the appeal of the assessee is with respect to the grant of minimum alternative tax credit to the assessee of merged entities. Ground number 8 is with respect to short grant of tax deduction at source credit of ₹ 48,157,988 including the tax deduction at source credit of merged entities.

0110. The learned authorized representative vehemently submitted that on amalgamation, all assets and liabilities of the amalgamating companies are transferred to amalgamated company and one of the assets is the minimum alternative tax credit, which is also transferred to the amalgamated company, and therefore the credit should be allowed. He vehemently referred to the decision of coordinate bench in ITA number 1857/Pune/2017 for assessment year 2013 – 14 dated 30/8/2022 wherein at Para number 48 of 11 ground number 11 of the appeal of the assessee the coordinate bench has held that mat credit of amalgamating company has to be allowed in the hands of the amalgamated company.

0111. The learned departmental representative submitted that the provisions of section 72A of the act clearly prohibit such set of. He specifically referred to number 49 of the decision referred by the learned AR. It was further submitted that there is no provision in the act itself to grant any such credit under section 115JAA of the act.

0112. We have carefully considered the contentions of the parties and find that when the effective date of merger is 1/4/2017 whereby 11 companies merged with the assessee company by the order of the National company law Tribunal. since pursuant to an 'amalgamation',

(i) all assets and liabilities of the amalgamating company become the assets and liabilities of the amalgamated company,

(ii) the amalgamating company ceases to exist and the amalgamated company becomes successor of the amalgamating company.

(iii) Act provides as per Section 2(1B), that in an amalgamation "all assets and liabilities" of the amalgamating company should become the "assets and liabilities of the amalgamated company". If all the assets and liabilities of the amalgamating companies are not transferred to the amalgamated company, the amalgamation scheme itself becomes non-tax neutral.

(iv) "Guidance Note for accounting of credit available in respect of Minimum Alternative Tax under Income-tax Act, 1961" issued by the Institute of Chartered Accountants of India also recognizes MAT Credit as an "asset" and lays down the conditions and manner in which it has to be recognized in the financial statements of the amalgamated company.

(v) As MAT Credit is included in the definition of "assets" under a scheme of amalgamation naturally, unutilized MAT Credit is an 'asset' of the amalgamating company, it should also move to the amalgamated company upon amalgamation.

(vi) we find that provisions of section 115JA of the act provides specific treatment with respect to sections 35AB(3), 35D(5), 35DDA(2), 72A(1), 80-IAB(3)/80-IAC(4)/80-IC(7)/80-ID(5)/80-IE(6) read with Section 80-IA(12), 10AA(5) etc which contain specific provision entitling the amalgamated company to claim the benefit of certain deductions to which the amalgamating company was entitled to. Admittedly, there is no such reference of minimum alternative tax credit of amalgamating companies. However, as we have already held that MAT is an asset of that company and therefore there is no specific provision required. Further, 115JAA of the act deals with certain rights of claim of deductions, which are entitled to the amalgamated company.

(vii) in several judicial precedents of coordinate benches the above view has been upheld

a) M/s. Caplin Point Laboratories Ltd. v. Assistant Commissioner of Income-tax 31/1/ 2014 [ITA No.667/Mad/2013 (Chennai)]

b) Ambuja Cements Ltd. v. Deputy Commission of Income-tax 5/9/2019 [ITA no.3643/Mum./2018 (Mumbai)]

c) Capegemini Technologies Services India Limited [1857/PUN/2017 dated 30/8/2022]

0113. In view of this, we direct the learned assessing officer to allow the minimum alternative tax credit available in the hence of those 11 companies to the assessee after proper verification. Accordingly, ground number 7 of the appeal is allowed.

0114. Ground number 8 is with respect to short granting of tax deduction at source credit of ₹ 48,157,988 including the tax credit of merged entities. For the reasons given by us in deciding ground number 7 of the appeal of the assessee, we direct the learned assessing officer to grant credit of such sort deduction of tax at source of the assessee as well as of merged entities after proper examination. Thus, ground number 8 of the appeal is allowed.

0115. Ground number 9 is with respect to the charging of interest under section 234B of the act, which is consequential in nature, and ground number 10 of the appeal is with respect to initiation of penalty proceedings under section 270A of the act, which is premature, hence both these grounds are dismissed.

0116. Accordingly, appeal of the assessee for assessment year 2018 – 19 is partly allowed.

Order pronounced in the open court on 17.04.2023.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 17.04.2023
Sudip Sarkar, Sr.PS/Dragon

Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai