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

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.273/PUN/2021

निर्धारण वर्ष / Assessment Year: 2016-17

DCIT, Central Circle-2(2), Pune.	Vs.	M/s. Bilcare Limited, 601, ICC Trade Tower, Pune- 411016. PAN : AABCB2242F
Appellant		Respondent

आयकर अपील सं. / ITA No.334/PUN/2021

निर्धारण वर्ष / Assessment Year: 2016-17

M/s. Bilcare Limited, 6th Floor, B Wing, ICC Trade Tower, Senapati Bapat Road, Pune- 411006. PAN : AABCB2242F	Vs.	DCIT, Central Circle-2(2), Pune.
Appellant		Respondent

C.O. No.14/PUN/2021
(Arising out of ITA No.273/PUN/2021)

निर्धारण वर्ष / Assessment Year: 2016-17

M/s. Bilcare Limited, 6th Floor, B Wing, ICC Trade Tower, Senapati Bapat Road, Pune- 411006. PAN : AABCB2242F	Vs.	DCIT, Circle-2(2), Pune.
Appellant		Respondent

Revenue by	:	Shri Naveen Gupta
Assessee by	:	Shri Kishor Phadke
Date of hearing	:	20.04.2023
Date of pronouncement	:	31.05.2023

आदेश / ORDER

PER INTURI RAMA RAO, AM:

These are the cross appeals filed by the Revenue as well as by the assessee directed against the order of ld. Commissioner of Income Tax (Appeals)-13, Pune ['the CIT(A)'] dated 31.03.2021 for the assessment year 2016-17. The Cross Objection filed by the assessee company against the appeal of the Revenue.

2. Briefly, the facts of the case are as under:

The assessee is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of manufacturing of Pharmaceutical Packages and providing research-driven packaging solutions and clinical supplies services to leading pharmaceutical companies. The Return of Income for the assessment year 2016-17 was filed on 28.11.2016 declaring a loss of Rs.45,98,46,394/-. The same was revised on 29.03.20218 declaring total loss of Rs.968,30,88,739/-. The said return of income was selected for scrutiny assessment. The assessee company also reported the following international transactions in its Form No.3CEB :-

Sr. No.	*Nature of International Transaction*	*Amount (in INR)*	*Most Appropriate Method*	*Method as per Form 3CEB*
1.	*Purchase of pharma packaging material*	*20,10,09,489*	*CUP*	*Transactional Net Margin Method ('TNMM')*
2.	*Sale of pharma packaging material (finished goods)*	*15,35,26,251*	*CUP*	*TNMM*
3.	*Purchase of Non-clonable ID tags, reader and applicator*	*24,73,743*	*Other Method*	*TNMM*
4.	*Sale of clinical supplies*	*18,45,660*	*Other Method*	*TNMM*
5.	*Lease of PVdC Coating Machine*	*8,75,00,000*	*CUP*	*TNMM*
6.	*Loan Guarantee Given*	*Nil*	*Other Method*	*Other Method*
7.	*Performance Guarantee Given*	*Nil*	*Other Method*	*Other Method*
8.	*Reimbursement of expenses*	*1,60,81,730*	*CUP*	*TNMM*
9.	*Subscription of shares of step down subsidiary*	*95,050*		

3. The assessee company sought to justify the consideration received for the above international transactions entered with its AE to be at arm's length price (ALP). The assessee company also submitted Transfer Pricing (TP) study report adopting the Comparable Uncontrolled Price (CUP) as the most appropriate method.

4. On noticing the above international transactions, the Assessing Officer referred the matter to the Transfer Pricing Officer (TPO) for the purpose of benchmarking the above international transactions.

The TPO by an order dated 31.10.2019 passed u/s 92CA(3) suggested the upward TP adjustments of Rs.13,91,99,000/- in respect of manufacturing segment and also suggested adjustment on account of corporate guarantee fees of Rs.8,84,79,495/-. While doing so, the TPO had rejected the CUP method as the most appropriate method and proceeded with the benchmarking of the above transactions by adopting external TNMM as the most appropriate method. While adopting OP/OC as a PLI, the TPO proceeded to benchmark the international transactions by selecting comparables, which were selected by the assessee company in the earlier assessment year i.e. A.Y. 2014-15, which are as under :-

Sr. No.	*Name of the Company*		*WCA Weighted Average PLI – PO/OC A.Y. 2016-17*
1	*P G Foils Ltd.*		*2.51%*
2	*Jhaveri Flexo India Ltd.*		*4.35%*
3	*Positive Packaging Inds. Ltd.*		*6.00%*
4	*Ecoplast Ltd.*		*7.45%*
5	*Raj Packaging Inds. Ltd.*		*8.30%*
6	*Ess Dee Aluminium Ltd.*		*8.32%*
7	*Guardian Plasticote Ltd.*		*Financials Not Available*
8	*Glory Polyfilms Ltd.*		*Financials Not Available*
		Date place	
	35th Percentile	*3*	*6.00%*
	Median		*6.73%*
	65th Percentile	*4*	*7.45%*

5. The TPO computed the weighted average of PLI of comparables at 6.00% and the PLI of the assessee company was

computed at (-)28.87%. Therefore, on the above basis, the TPO computed the upward TP adjustment of Rs.13,91,99,000/- in respect of manufacturing activity. In respect of corporate guarantees fees, the assessee company, during the previous year relevant to the assessment year under consideration, had provided the following guarantees to its AEs :-

Sr. No.	*AE party*	*Third Party Details*	*Opening balance as on 01-Apr-2014*	*Closing balance as on 31-Mar-2015*	*Closing balance as on 31-Mar-2015 (in INR Lacs)*
1	*Bilcare Inc & BSPL*	*United Drugs UK & sharp clinical services*	*USD 61,000,000*	*USD 61,000,000*	*40,495.83*
2	*Bilcare Singapore Pte Ltd. (Performance G)*	*Hitachi Capital Singapore Pte Ltd.*	*USD 7,795,670*	*USD 7,795,670*	--
3.	*Bilcare Singapore Pte Ltd.*	*SBLC – Indusind Bank*	*USD 6,500,000*	*USD 6,500,000*	*4848.71*
4	*Bilcare Packaging Ltd.*	*SBLC – The Jammu & Kashmir Bank*	*USD 10,000,000*	*USD 10,000,000*	*6603.46*
5	*Bilcare Packaging Ltd.*	*BPL – The South Indian Bank Ltd.*	*USD 21,700,000*	*USD 21,700,000*	*14394.23*
6	*Bilcare Packaging Ltd.*	*BPL – The Lakshmi Vilas Bank Ltd.*	*USD 10,000,000*	*USD 10,000,000*	*6633.29*
7	*Bilcare Packaging Ltd.*	*BPL – IDBI Bank Ltd.*	*USD 7,333,000*	*USD 7,333,000*	*4864.19*
					77,839.71

6. In respect of corporate guarantee, the assessee company had not received any guarantee commission. The assessee company contended that the transactions of providing the guarantee given by the assessee company to its subsidiary is in the nature of

shareholder activities, as all these companies are wholly owned subsidiaries of assessee company. As regards to the guarantee for performance, it does not fall within the definition of international transaction as defined under the provisions of section 92B of the Act. However, rejecting the above contention of the assessee company, the TPO had proceeded to benchmark the above international transactions by holding that the corporate guarantee and performance guarantee are treated as the international transactions and proceeded to benchmark at 1.75% of the value of the international transactions under CUP method and suggested TP adjustment of Rs.88,479,495/-. Thus, the TPO vide order dated 31.10.2019 passed u/s 92CA(3) suggested a total TP adjustments of Rs.22,76,78,495/-.

7. On receipt of the TPO's order u/s 92CA(3), the Assessing Officer passed a draft assessment order dated 31.12.2019, wherein, the Assessing Officer had made an addition on account of TP adjustment of Rs.22,76,78,495/- and rejected to take cognizance of the revised return of income, wherein, the assessee company sought to claim long term capital loss arising on sale of shares of BSPL, a

subsidiary of Bilcare Singapore Pte Ltd., which is wholly a subsidiary company of the assessee company on the ground that this claim i.e. long term capital loos arising on sale of shares of BSPL held by the assessee company, was not made in the original return of income. The assessee company also filed an application before the Joint Commissioner of Income Tax, Pune u/s 144A of the Act vide letter dated 18.12.2019 for issuance of a direction on the issue of disallowance of allowability of long term capital loss arising on sale of shares of BSPL of Rs.922 crores. The ld. Joint Commissioner of Income Tax vide order dated 30.12.2019 given following directions :-

> *"(i) The loss on sale of shares of Rs.922 crore claimed in the revised return should not be entertained.*
>
> *(ii) However, since there is a claim of capital loss of Rs.922 crore made during the course of assessment proceedings, the same may be examined on merits."*

8. On receipt of the directions of the ld. Joint Commissioner of Income Tax, the Assessing Officer passed a final assessment order u/s 143(3) r.w.s. 144C(3) dated 30.01.2020 after making the addition on account of TP adjustment of Rs.22,76,78,495/-, addition on account of commission expenditure of Rs.16,03,019/- and addition on account of difference in returned loss as per original

return of income filed by the assessee company on 28.11.2016. Accordingly, the Assessing Officer assessed total loss of Rs.22,98,86,490/-. Apart from the TP disallowances, the Assessing Officer disallowed the claim for allowance of long term capita loss arisen on sale of shares of BSPL, which is wholly owned foreign subsidiary company of the assessee company of Rs.922,33,42,911/- and also for disallowance of depreciation of Rs.27.20 crores on the Coating Line Machine leased to the Bilcare Singapore Pte Ltd.. The factual background leading to the issue is asunder :-

The assessee company had set-up wholly owned foreign subsidiary company in Singapore in the year 2002-03, namely, Bilcare Singapore Pte Ltd. i.e. BSPL. The said subsidiary company in turned had set-up subsidiaries in various countries such as Brazil, USA, Europe etc. The assessee company also acquired a company in Europe in the year 2010. Thus, the assessee company had two operating subsidiary entities, namely, Bilcare Singapore Pte Ltd. and Bilcare GMBH Germany. The pictorial diagram of Singapore group entities was extracted by the ld. CIT(A) at internal page no.40 of the order of ld. CIT(A). The Singapore entity, namely, Bilcare Singapore Pte Ltd. is 100% of the subsidiary of the assessee

company and invested in the form of equity shares of the said company from the year 2002 to 2016 to the tune of Rs.529.72 crores. The details of investments in equity shares are available in page nos.818 and 819 of the Paper Book filed before us. The said abroad investments in the equity capital of the Singapore company is approved under automatic route by the Reserve Bank of India (RBI) and the same was intimated to RBI under the Foreign Exchange Management Act, 1973 in Form No.A-2 and Form ODI. Subsequently, the said subsidiary of the assessee company i.e. BSPL went into liquidation. The circumstances that led to the liquidation of the said company as explained before the Assessing Officer were set out by the Assessing Officer in para 3.3 of the assessment order.

9. For the sake of the present proceedings, we need not go into the circumstances that led to the liquidation of the Singapore company. Suffice to say that consequent to the creditors legal action against the said company a Suit was filed before the Hon'ble High Court of Republic Singapore for recovery of dues from the BSPL, finally interim Judicial Manager was appointed for taking

over the control management of the said company. The Board of BSPL was also dissolved by ruling of the Hon'ble High Court of Republic Singapore vide order dated 21.02.2014. The said company was ordered to be liquidated within 30 days.

10. While matter stood thus, the assessee company made an application before the Hon'ble High Court of Republic Singapore on 01.10.2015 seeking permission to transfer the shares held by the assessee company in BSPL to its another foreign subsidiary company incorporated in Mauritius viz. Bilcare Packaging Ltd. for a consideration of 1 Singapore Dollar (SGD) in terms of provisions of section 259 of the Companies Act of Singapore. The Hon'ble High Court of Republic Singapore was pleased to grant the permission vide order dated 02.10.2015. Subsequently, the assessee company transferred the shares of 79,33,50,000 ordinary shares of BSPL held by the assessee company for total consideration of Singapore Dollar 1 to Bilcare Packaging Ltd., which is another wholly owned subsidiary of the assessee company. The transaction of transfer of said shares was completed on 22.10.2015 on payment of the stamp duty as evident from the pages Nos.874 to 876 of the Paper Book.

The assessee company also reported the disinvestments of the equity investments by filing Form ODI-3 under the provisions of the Foreign Exchange Management Act, 1973. The said investments were shown as a part of non-current investments in the fixed assets at the relevant page of the financial statement which is placed at page no.35 of Paper Book details of the investments are mentioned at page no.44 of the Paper Book.

11. However, for the reasons best known to the assessee company, it had not reflected the said disinvestments i.e. sale of shares in BSPL in books of account or audited financial statements. But the assessee company had sought to claim the deduction of long term capital loss arising on sale of shares of BSPL held by the assessee company in the revised return of income filed on 29.03.2018 though omitted to claim in the original return of income. The statement of computation of loss arising on sale of the said shares of BSPL is enclosed in the page no.4 of the Paper Book.

12. The Assessing Officer had denied the claim for deduction of long term capital loss arising on sale of shares of BSPL citing the following reasons :-

(i) The claim for deduction of loss on sale of shares in the revised return of income is not valid in law, as the necessity for filing the revised return of income is not on account of any omission or wrong statement in the original return of income.

(ii) The Hon'ble High Court of Republic Singapore simply permitted the assessee the sale of 77,33,50,000 ordinary shares of BSPL without mentioning the consideration for sale of shares. Therefore, the Assessing Officer was of the opinion that the transactions of sale of shares in Singapore company is not by operational of law.

(iii) The assessee company only sold the shares to its another wholly owned subsidiary, namely, Bilacare Mauritius Ltd.

(iv) The Assessing Officer alleged that the assessee company had failed to furnish the information sought by the assessee in order to determine the fair market value of the shares in terms of provisions of Rule 11UA of the Income Tax Rules, 1962.

13. On an application made by the assessee company u/s 144(A) of the Act, the ld. Joint Commissioner of Income Tax gave the following directions :-

(a) The loss on sale of shares of Rs.922 crores claimed in the revised return of income should not be entertained.

(b) However, since there is no claim of capital loss of Rs.922 crores in revised return of income, but made during the course of assessment proceedings, the same may be examined on merits.

14. Based on the above observations, the Assessing Officer had concluded that it is a dubious method adopted by the assessee company in order to avail benefit of setting off of the long term capital loss arising on sale of shares of BSPL by applying the doctrine laid down by the Hon'be Supreme Court in the case of Mcdowell & Company Ltd. vs. CTO, 154 ITR 148 (SC), accordingly, AO denied the claim for deduction of long term capital loss of Rs.922 crores arising on sale of share of BSPL held by the assessee company.

15. The other addition made by the Assessing Officer is disallowance of depreciation on WDV of Rs.27,20,59,980/- of the machine leased out to BSPL. The factual matrix of the issue is as under :-

The assessee company had leased out the Coating Line Machine to its wholly owned subsidiary BSPL under agreement of

lease rental of the said machine. During the financial year 2015-16, the said Singapore subsidiary company i.e. BSPL went into liquidation. The Hon'ble High Court of Republic Singapore vide order dated 24.06.2015 had directed the disposal of the said machine, as if, all the ownership rights are vested with the subsidiary company, namely, BSPL. The original value of the asset was Rs.51,33,74,830/- on which accumulated depreciation was of Rs.24,13,14,850/-, thus written down value asset comes to Rs.27,20,59,980/-. This amount was shown as debited to subsidiary company's account. At the time of filing the original return of income, the assessee company was stated to be under the misconception that since the assessee company ceased to be owner of the said asset, it does not qualify for the depreciation, therefore, no depreciation was claimed in the original return of income. However, during the course of assessment proceedings, the assessee company made a claim for allowance of depreciation on the net block of asset of Rs.27,20,59,980/- since the block of plant and machinery under which these plant and machinery falls still exist in the depreciation schedule placing reliance on the following two judicial precedents :-

(i) CIT vs. Yamaha Motor India (P.) Ltd., 183 Taxman 291 (Delhi)

(ii) CIT vs. Oswal Agro Mills Ltd., 197 Taxman 25 (Delhi).

16. However, the above-said claim was rejected by the Assessing Officer only on the ground that the claim for depreciation was not made either in the original return of income or in the revised return of income placing reliance on the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT, 284 ITR 323 (SC).

17. Being aggrieved by the above additions, an appeal was filed before the ld. CIT(A) contesting all the above additions made by the Assessing Officer. The ld. CIT(A) considering the submissions made by the assessee company as well as following his predecessors' order in assessee's own case for the assessment years 2013-14 and 2014-15 held that the transactions of corporate guarantee should be benchmarked at the rate of 1.75%.

18. As regards the performance guarantee, the ld. CIT(A) held that the performance of corporate guarantee does not come within the

ambit and scope of international transactions as per the Explanation (i)(c) of the Act and, accordingly, held that performance guarantee cannot be subject matter of benchmarking of the international transactions by the TPO.

19. As regards to the TP adjustments in manufacturing segment, the ld. CIT(A) directed the Assessing Officer/TPO to benchmark the international transactions on purchase and sale of pharma products to its AEs by adopting internal TNNM.

20. On the issue of allowance of long term capital loss arising on sale of shares of BSPL to Bilcare Packaging Ltd. (Mauritius Unit), another subsidiary of the assessee company, the ld. CIT(A) considering the chronology of the events and the facts of the case held that the finding of the Assessing Officer that the long term capital loss arising on sale of shares of BSPL could not have been claimed through revised return of income, however, proceeded to hold that since the assessee company had suffered loss, the claim made during the course of assessment proceedings can also be considered placing reliance on the decision of the Hon’ble Bombay

High Court in the case of CIT vs. Pruthvi Brokers & Shareholders, 23 taxmann.com 23 (Bom.) and then directed the Assessing Officer to allow the same as the ld. CIT(A) felt that the claim is genuine and bona-fide.

21. The alternative plea taken by the assessee company during the course of proceedings before the ld. CIT(A) that the long term capital loss arising on sale of shares of BSPL held by the assessee company should be allowed as business loss was dismissed holding it to be academic.

22. As regards the allowance of depreciation on machine leased out to BSPL, the ld. CIT(A) held that since the assessee company did not receive any consideration on the cessation of ownership rights of the assessee company over the machine leased to BSPL, the same should not be reduced from opening value of WDV of the block of assets, under which leased asset falls.

23. Being aggrieved by that part of order of the ld. CIT(A), wherein, the ld. CIT(A) held that the transactions of corporate

guarantee should be benchmarked adopting the commission at the rate of 1.75%, the assessee is in appeal before us in ITA No.334/PUN/2021.

24. Being aggrieved by that part of the order of the ld. CIT(A), which is against the Revenue, wherein, the ld. CIT(A) held that the (i) performance guarantee does not come within purview of international transactions, (ii) the transactions of purchase and sale of pharma products with its AEs, be benchmarked by adopting internal TNMM as the most appropriate method, (iii) the long term capital loss of Rs.922 crores arising on sale of shares of BSPL held by the assessee company is allowable as a long term capital loss, (iv) the depreciation on opening WDV block of assets under which the leased assets falls be allowed without reducing the amount of Rs.27,20,59,980/-, the Revenue is in appeal before us in ITA No.273/PUN/2021.

25. The assessee company also filed a Cross Objection in C.O. No.14/PUN/2021 challenging that the findings of the ld. CIT(A)

that the long term capital loss arising on sale of shares of BSPL held by the assessee company, cannot be allowed as revenue loss.

26. First, we shall take up the assessee's appeal in ITA No.334/PUN/2021.

ITA No.334/PUN/2021 – By Assessee :

27. The assessee company raised the following grounds of appeal :-

> *"1 General*
>
> *The Learned CIT(A)- 13 Pune erred in law and facts in partially confirming the additions made by learned DCIT, Central Circle 2(2), Pune (hereinafter as the 'AO') to the taxable income (loss) of the Appellant, amounting to Rs.5,51,37,874.*
>
> *2. Transfer Pricing- Corporate Guarantee (Addition Rs.5,51,37,874)*
>
> *2.1 The learned I-T authorities erred in law and on facts in not appreciating that extending of corporate guarantee / Stand-by Letter of Credit ('SBLC'), for the benefit of subsidiary AE companies is a shareholders' activity and per se, and not an international transaction u/s 92B of the ITA, 1961.*
>
> *2.2 The ld. CIT(A)-13 Pune erred in law and on facts in conforming the action of AO/TPO & holding that Appellant should have recovered service fees / commission @1.75% on extension of various guarantees / 'SBLC' to Bankers for providing further credit / guarantee facilities to its foreign subsidiary companies thereby making an addition of Rs.5,51,37,874 as Guarantee Commission.*
>
> *2.3 Learned I-T authorities erred in law in not following binding decisions on identical issues of Guarantee Commission. Learned I-T authorities ought to have restricted the addition of*

Guarantee Commission to extent of app. 0.50% or to such other reasonable percentage emanating from various precedents.

3. The appellant craves leaves to add, modify, alter, amend, or withdraw all or any of the Grounds of Appeal."

28. At the outset, there is a delay in filing the present appeal by the assessee by 79 days. The assessee company filed a petition praying for condonation of delay relying on the decision of the Hon'ble Supreme Court in the case of Cognizance for Extension of Limitation, In re (2022) 441 ITR 722 (SC) dated 10.01.2022, wherein, the limitation prescribed by various statutes was *suo motu* extended on account of difficulties faced by the citizens of the country on account of Pandemic Covid-19.

Considering the averments made in the condonation petition, we are of the considered opinion that the appellant is prevented by sufficient and reasonable cause in filing the appeal within due date and hence, we condone the delay of 79 days.

29. The issue raised by the assessee company in the present appeal is regarding the quantum of TP adjustments made in respect of corporate guarantee. The assessee company took a plea that the transactions of providing guarantees by the assessee company to its

subsidiary is in the nature of shareholders activity, as the bank guarantee was given only to one of the subsidiary companies. The TPO as well as the ld. CIT(A) held that the transaction of bank guarantee is international transaction should be benchmarked by adopting the commission at the rate of 1.75%.

30. Being aggrieved by the direction of the ld. CIT(A) i.e. transaction of bank guarantees provided by assessee company should be benchmarked by adopting commission @ 1.75%, the assessee company is in appeal before us in the present grounds of appeal.

31. The issue of TP adjustments on corporate guarantee was decided by this Tribunal in assessee's own case for the assessment years 2013-14, 2014-15 and 2015-16, wherein, this Tribunal held that the transactions of corporate guarantee should be benchmarked by adopting 0.5% of value guarantee as increased by the expenditure actually incurred by the assessee company by furnishing such guarantee. The relevant portion of the order of this Tribunal (supra) is as under :-

> *"8.2 Having heard the rival submissions and gone through the relevant material on record, it is seen that the issue of transfer pricing adjustment on corporate guarantee fee came up for consideration before the Tribunal in the assessee's own case for the A.Yrs. 2013-14 and 2014-15. The lead order was passed for the A.Y. 2014-15 in ITA No.1693/PUN/2018 holding that guarantee fee should be charged at 0.5%, which should be further increased by any expenditure actually incurred by the assessee in furnishing the guarantee. This order was followed for the A.Y. 2013-14 as well. Both the sides are in agreement that the facts and circumstances of the respective grounds for the instant year are similar. We, therefore, set-aside the impugned order and remit the matter to the file of the AO/TPO for computing the ALP of the transaction under consideration by firstly, ascertaining the amount of expenditure actually incurred by the assessee in furnishing the seven loan guarantees and two performance guarantees; and thereafter adding 0.5% as guarantee fee."*

32. This issue is no longer *res integra* since it is covered by the Tribunal decision in assessee's own case (supra). Respectfully following the decision of the Tribunal in assessees's own case (supra), we set-aside the order of the lower authorities and direct the Assessing Officer/TPO for computing the ALP transactions of corporate guarantee by adopting 0.5% of the corporate guarantee as guarantee fees plus actual expenditure incurred in furnishing such guarantee.

33. In the result, the appeal filed by the assessee in ITA No.334/PUN/2021 stands partly allowed.

34. Now, we shall take up the Revenue's appeal in ITA No.273/PUN/2021.

ITA No.273/PUN/2021 – By Revenue :

35. The Revenue is in appeal before us being aggrieved by that part of order of the ld. CIT(A) which is against the Revenue.

36. The Revenue raised the following grounds of appeal :-

"1) Whether on the facts and circumstances of the case, the LdCIT(A) is justified in considering Performance Guarantee and Corporate Guarantee separately ?

2) Whether on the facts and circumstances of the case, the LdCIT(A) is justified in directing TPO to adopt Internal TNMM as most appropriate method for benchmarking international transactions related with sales and purchase of the assessee in place of TNMM adopted by the TPO?

3) Whether on the facts and circumstances of the case, the LdCIT(A) is justified in directing TPO to adopt Internal TNMM as most appropriate method for benchmarking international transactions related with sales and purchase of the assessee in place of TNMM adopted by the TPO when there are significant differences in AE and Non AE segment with respect to low volume sales within Indian market and sales to different geographical location, having incomparable economic and political risks ?

4) Whether on the facts and circumstances of the case, the LdCIT(A) erred in allowing the claim of capital loss of Rs. 922 Crores made through a revised return not claimed in its original return ?

5) Whether on the facts and circumstances of the case, the LdCIT(A) erred in treating the loss of Rs.922 crores as genuine loss and failed to appreciate the findings of the AO given in para 3.7 (c) (page no.34 to 43) of the assessment order that the loss

was an artificial or notional loss created through structured transaction ?

6) *Whether on the facts and circumstances of the case, the LdCIT(A) is erred in treating the loss of Rs.922 Crores as genuine loss even though the assessee failed to substantiate the same and further it was clearly held by the AO that it was an artificial loss created through structured transaction ?*

7) *Whether on the facts and circumstances of the case, the LdCIT(A) failed to appreciate that the transaction resulting in loss was between the assessee company and its wholly owned Mauritius subsidiary and even after transferring the shares, the control over the liquidated company remained with the assessee company and thus there was no real loss ?*

8) *Whether on the facts and circumstances of the case, the LdCIT(A) erred in relying on the decision of Hon'ble Bombay high court in case of CIT V. M/s Prithvi Brokers & Shareholders - 23 Taxman.com 23 (Bombay) while allowing the loss claimed by the assessee without appreciating that the facts of both cases are different as in the Prithvi Brokers case, no revised return was filed and the assessee had inadvertently not claimed the expense whereas in this case the omission of not claiming the loss was deliberate and conscious decision and not an omission which was discovered later ?*

9) *Whether on the facts and circumstances of the case, the LdCIT(A) is justified in allowing the claim of depreciation of Rs.27,20,59,980/- not made by the assessee in its original return as well as revised return of income ?"*

37. Ground of appeal no.1 challenges the correctness of decision of the ld. CIT(A) in holding that the performance guarantee is not an international transaction. The relevant findings of the ld. CIT(A) are set out in para 3.2 at page no.11 of the order of the ld. CIT(A).

38. Before us, both the parties agreed that the issue in the ground of appeal no.1 is covered by the decision of this Tribunal in assessee's own case for assessment year 2015-16 as well as earlier years also, wherein, this Tribunal following the earlier order of this Tribunal in assessee's own case for the assessment years 2013-14 and 2014-15 had reversed the decision of the ld. CIT(A) that the performance guarantee should be excluded and further proceeded to hold that the performance guarantee should be benchmarked on par with financial guarantee. The relevant paragraphs of the decision of this Tribunal for the assessment year 2015-16 are extracted as under:-

> *"8.2 Having heard the rival submissions and gone through the relevant material on record, it is seen that the issue of transfer pricing adjustment on corporate guarantee fee came up for consideration before the Tribunal in the assessee's own case for the A.Yrs. 2013-14 and 2014-15. The lead order was passed for the A.Y. 2014-15 in ITA No.1693/PUN/2018 holding that guarantee fee should be charged at 0.5%, which should be further increased by any expenditure actually incurred by the assessee in furnishing the guarantee. This order was followed for the A.Y. 2013-14 as well. Both the sides are in agreement that the facts and circumstances of the respective grounds for the instant year are similar. We, therefore, set-aside the impugned order and remit the matter to the file of the AO/TPO for computing the ALP of the transaction under consideration by firstly, ascertaining the amount of expenditure actually incurred by the assessee in furnishing the seven loan guarantees and two performance guarantees; and thereafter adding 0.5% as guarantee fee. The impugned order holding that the transactions of performance guarantee should be excluded is also hereby overturned as this issue has also been decided in the Tribunal order against the assessee. Another important factor which*

requires consideration is that the TPO allowed credit of Rs.2.43 crore against the gross amount of guarantee fee determined by him at Rs.26.27 crore. The assessee agitated the issue before the ld. CIT(A), who allowed further credit of Rs.1.21 crore. It is seen from para 7.4 of the order passed by the Tribunal for the A.Y. 2014-15 that the assessee recovered a sum of Rs.2,43,26,467/- from Bilcare AG during the year. This shows, that the credit of Rs.2.43 crore against the gross guarantee fee determined for the year under consideration got wrongly allowed by the TPO since such credit was already allowed in the A.Y. 2014-15. Though, the ld. CIT(A) allowed further credit of Rs.1.21 crore, which was actually required to be given, but did not reduce the credit of Rs.2.43 crore that stood allowed in an earlier year as well. It is axiomatic that credit for Rs.2.43 crore allowed in an earlier year cannot be allowed once again for the year under consideration. In that view of the matter, the credit against the guarantee fee is directed to be restricted only to the extent of Rs.1.21 crore and the excess credit allowed for Rs.2.43 crore is directed to be reduced after verification. Needless to say, the assessee will be allowed an opportunity of hearing while re- determining the amount of guarantee fee in line with the above observations and those given by the Tribunal for earlier years. Thus, the Departmental ground against exclusion of performance guarantee is allowed; and for reducing the rate of guarantee fee from 2% applied by the TPO to 1.75% by the CIT(A) is dismissed. The assessee's ground against the application of corporate guarantee fee at 1.75% by the ld. CIT(A) is partly allowed in above terms."

39. Respectfully following the decision of this Tribunal, this issue is set-aside to the TPO on the similar lines indicated in the order of the Tribunal for the assessment year 2015-16 (supra). Thus, the ground of appeal no.1 stands partly allowed for statistical purposes.

40. Ground of appeal no.2 and 3 challenges the decision of the ld. CIT(A) directing the Assessing Officer/TPO to adopt the internal TNMM as the most appropriate method for the purpose of

benchmarking the international transactions of purchase and sale of pharma products from its AEs. This issue also came up before this Tribunal for the assessment year 2015-16 in assessee's own case, wherein, this Tribunal held that the external TNMM as the most appropriate method for the purpose of benchmarking the above international transactions in the given facts of the case.

41. Before us, both sides had agreed and are in agreement with the decision of this Tribunal for earlier years (supra). The relevant portion of the decision of the Tribunal in assessee's own case for the assessment year 2015-16 is extracted below :-

> *"5.2. There can be no doubt that ordinarily the internal TNMM gets precedence over the external TNMM because it takes care of differences between the material factors, conditions and features of products of the assessee vis-a-vis of comparables and dispenses with the need to make adjustments for bringing such varying factors, conditions and features at a common pedestal. Howbeit, the essential requirement for resorting to the internal TNMM is that no differences, having bearing on the operating profits, should persist in factors, conditions and features in the sale of products made by the assessee to its AEs and non-AEs. If not capable of quantification, such material differences thwart the applicability of the internal TNMM.*
>
> *5.3. Here is a case in which the assessee's total revenue from sales to AEs is Rs.16.27 crore, which is just 4.83% of the combined sales made to AEs and non-AEs. Volume of sales is an important factor in the price determination and the consequential profit rate. Further, sales to AEs are in Germany, Singapore and USA etc., whereas roughly 90% of the non-AE sales are in domestic market only. It deciphers that there are vast geographical differences between the AE and non-AE sales. It goes without saying that geographical locations largely impact the pricing*

of a product and the resultant profit. Neither any PLI in respect of non-AE exports has been placed on record nor the geographical location of such exports vis- à-vis exports to AEs is provided. To sum up, we are confronted with a situation in which not only there are huge volume differences inasmuch as sales made to AEs are less than 5% of total sales, the geographical differences also largely exist in the pattern of sales made to AEs and non-AEs. These factors cause a serious threat to the application of the internal TNMM. Under such circumstances, we hold that there can be no comparison between the price charged or profit realized by the assessee in domestic market from non-AEs and in the international markets from its AEs, thereby frustrating the application of the internal TNMM. In the hue of such significant differences, we are satisfied the internal TNMM is not the most appropriate method to be applied. We therefore, hold that it is the external TNMM which should prevail for determining the ALP of the international transaction in the manufacturing activity."

42. Therefore, respectfully following the decision of this Tribunal in assessee's own case for earlier assessment year 2015-16, we remand the matter to the file of the Assessing Officer/TPO to adopt external TNMM as the most appropriate method for the purpose of benchmarking the international transactions of purchase and sale of pharma products from its AEs. Thus, the ground of appeal nos.2 and 3 stands partly allowed for statistical purposes.

43. Ground of appeal nos.4, 5, 6, 7 and 8 challenges the decision of the ld. CIT(A) in holding that the long term capital loss arising on sale of shares of BSPL held by the assessee company is allowable as deduction and allow to be carried forward the said loss for set off

against profits in the subsequent years. The factual matrix of the claim is discussed (supra). The Assessing Officer disallowed the claim of loss arising on sale of shares of BSPL held by the assessee company, sold to its another wholly owned subsidiary foreign company holding the same to be non-genuine. While holding so, the Assessing Officer had made the following observations:-

(i) The assessee company had not made the claim for allowance of capital loss in the original return of income filed on 28.11.2016.

(ii) The claim made in the revised return of income is not valid for the reason that the revision of return of income was not warranted on account of bona-fide mistake or omission in the original return of income.

(iii) The transaction was carried out between the assessee's company and another wholly owned foreign subsidiary company of the assessee company i.e. Bilcare Packaging Ltd. (Mauritius Entity). There is complete unity of control between the seller and purchaser, therefore, the transaction was not undertaken at arm's length.

(iv) The Hon'ble High Court of Republic Singapore had not determined the actual sale consideration and the whole transaction is premeditate, is dubious transactions entered into with the intention of claiming loss for availing the benefit of losses and proceeded to apply the ratio of the decision of the Hon'ble Supreme Court in the case of McDowells & Co. Ltd. vs CTO 154 ITR 148 (SC).

44. However, on appeal before the ld. CIT(A), the ld. CIT(A) while upholding the findings of the Assessing Officer that the claim made through revising the return of income is not valid in law and proceeded to hold that the claim made during the course of assessment proceedings should be considered by the Assessing Officer placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs. M/s Prithvi Brokers & Shareholders, 23 Taxman.com 23 (Bombay). On the merits of the claim, the ld. CIT(A) held that since the assessee company had suffered the loss on investments made, the same should be allowed as capital loss applying the theory of real income.

45. The ld. CIT-DR contends that the revised return of income is not valid in law, the ld. CIT(A) ought not to have applied the ratio of the decision of the Hon'ble Bombay High Court in the case of CIT vs. M/s Prithvi Brokers & Shareholders, 23 Taxman.com 23 (Bombay) to the facts of case, as it relates to the claim made for the first time before the ld. CIT(A), whereas, the ratio of the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT, 157 Taxman 1 (SC) is squarely applicable to the facts of the case.

46. On the merits of the claim, the ld. CIT-DR submits that the ld. CIT(A) had failed to examine the colourful device adopted by the assessee company and the transactions of sale of shares of BSPL to its another wholly owned foreign subsidiary company, namely, Bilcare Packaging Ltd. (Mauritius Entity) was not at arm's length price. The assessee company accepted that the findings of the ld. CIT(A) that the revised return of income is not valid in law, as the assessee had chosen not to challenge this finding before the Tribunal.

The ld. CIT-DR further submitted that the ld. CIT(A) had failed to take cognizance of provisions of section 139(3) r.w.s. 80 of the Act. He further relies on ratio of the decision of the Hon'ble Supreme Court in the case of PCIT vs. Wipro Ltd., 446 ITR 1 (SC) drawing our attention to para 9 of the said judgement of the Hon'ble Supreme Court (supra).

47. On the other hand, ld. AR submits that the ratio of decision of the Hon'ble Supreme Court in the case of Wipro Ltd. (supra) have no application to the facts of the case, as the issue before the Hon'ble Supreme Court was regarding interpretation of the provisions of sub-section (8) of section 10B of the Act. He further submits that the claim of the present assessee's case are totally different from the facts in the case of Wipro Ltd. (supra). Therefore, the ratio of the decision of the Hon'ble Supreme Court in the case of Wipro Ltd. (supra) cannot be applied to the facts of the present case. He submits that the material on record clearly shows that after meeting the liabilities of creditors of Singapore company, there remains nothing to be distributed amongst the shareholders. Therefore, the intrinsic value of shares is "Nil" and, there cannot be

any dispute with regard to the consideration received on sale of shares. He further submits that the Rule 11UAA have no application for the year under consideration, for the reason that the provisions of rule 11UAA come into effect w.e.f. 01.04.2018. He further submits that the transaction of sale of shares of BSPL held by the assessee company is not a dubious transaction, as the transaction is real placing reliance on the documents showing the completeness of transaction of sale of shares placed at page no.874 to 876 of the Paper Book. He further submits that the ratio of the decision of the Hon'ble Supreme Court in the case of McDowells & Co. Ltd. (supra) have no application to the facts of the case as it is a real transaction and the citizens are free to arrange affairs in order to minimize the tax liability.

48. We heard the rival submissions and perused the material on record. The issue in the present grounds of appeal nos.4, 5, 6, 7 and 8 relates to the allowability of long term capital loss, arising on sale of shares of BSPL held by the assessee company to another wholly owned foreign subsidiary company, Bilcare Packaging Ltd. (Mauritius Entity). The primary reason given by the Assessing

Officer is that the claim for allowance of loss was not made in the original return of income filed on 28.11.2016 but made in the revised return of income filed on 29.03.2018, which according to the Assessing Officer, is not a valid revised return for the reason that there is no bona-fide omission or mistake in the original return of income. Therefore, we proceed to examine the validity of the revised return of income filed by the assessee company claiming the loss arising on sale of shares of BSPL. The relevant provisions of section 139(5) of the Act, which deals with the filing of revised return of income at the relevant point of time are extracted below :-

> *"139(1) .....*
> .....
> *(5) If any person, having furnished a return under sub-section (1) or in pursuance of a notice issued under sub-section (1) of section 142, discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier.:*
>
> ***Provided** that where the return relates to the previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, the reference to one year aforesaid shall be construed as a reference to two years from the end of the relevant assessment year."*

49. There is no dispute that the original return of income was filed within the due date for filing the return of income u/s 139(1) of the Act. Even the revised return of income was filed within the period

prescribed under the provisions of section 139(5) of the Act. A mere reading of provisions of sub-section (5) of section 139, it would reveal that a revised return of income can be filed in a situation, where an assessee discovers any omission or any wrong statement made in the original return of income.

50. In the present case, the circumstances, which led the assessee company not to claim the long term capital loss in the original return of income were explained before the Assessing Officer, such explanation remains uncontroverted. Therefore, it cannot be said that it is not a bona-fide omission made in the original return of income. Therefore, it cannot be said that the assessee company had failed to satisfy the conditions prescribed under the provisions of sub-section (5) of section 139 of the I.T. Act for filing the revised return of income. Therefore, we hold that the Assessing Officer was not justified in not accepting the revised return of income as filed by the assessee company. It is a settled position of law that an assessee is entitled to revise return of income within the time allowed under the provisions of sub-section (5) of section 139 of the Act, once a revised return of income is filed, the natural

consequence is that the original return of income is effaced or obliterated for all the purposes, it is not open to the Assessing Officer to advert to the original return of income. This position of law was approved by Hon'ble Supreme Court in CIT vs. Mahendra Mills/Arun Textile 'C'/Humphreys/ Glassgow Consultants, 243 ITR 56 (SC), wherein, the Hon'ble Supreme Court had *inter alia* approved the decision of the Hon'ble Karnataka High Court in the case of (i) CIT vs. Mangalore Chemicals & Fertilizers Ltd., 191 ITR 156 (Kar.), (ii) CCIT vs. Machine Tool Corpn. of India Ltd., 201 ITR 101 (Kar.) and the decision of the Hon'ble Punjab & Haryana High Court in the case of Beco Engineering Co. Ltd. vs. CIT, 148 ITR 478 (P&H).

51. As regards the applicability of ratio of the decision of the Hon'ble Supreme Court in the case of Wipro Ltd. (supra), we are of the considered opinion that in the said case the Hon'ble Supreme Court was concerned with the interpretation of provisions of sub-section (8) of section 10B and made a passing remark that the revised return of income filed by the assessee u/s 139(5) only substituted original return of income u/s 139(1) and cannot be

transformed as return u/s 139(3) in order to avail the benefit of carry forward and set-off of any loss under the provisions of section 80 of the Act. The issue of interpretation of provisions of section 139(3) and section 80 were not before the Hon'ble Supreme Court in the case of Wipro Ltd. (supra). It is settled legal position that every interpretation made by the Hon'ble Judges does not constitute the *ratio decidendi*, in any event, the observations made by the Hon'ble Supreme Court vide para 9 have no application to the facts of the present case, as the assessee company had filed the original return of income showing the loss within the time prescribed under the provisions of section 139(1) of the Act. Thus, the decision of Hon'ble Supreme Court in Wipro Ltd. (supra) is distinguishable on facts.

52. The above discussion clearly brings out that the assessee company had discovered, omitted to claim a genuine loss arising on sale of shares and, therefore, filed a revised return of income u/s 139(5) within the prescribed time limit claiming the determination and carry forward losses. It is a valid revised return of income filed u/s 139(5) of the Act. Therefore, the findings of the Assessing

Officer as well as the ld. CIT(A) to the extent that the revised return of income is not valid one are reversed.

53. In this connection, we must refer to the submissions made by the ld. CIT-DR that the findings of the ld. CIT(A) that the revised return of income is not valid, is accepted by the assessee company, as this issue was neither raised in the cross appeal nor in the cross objection. This objection cannot be accepted in view of fact that the a respondent to an appeal can always support the order of the ld. CIT(A) on the ground decided against him under the provisions of Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963.

54. Even otherwise, it is a settled position of law that in a case where the assessee files return of loss within the prescribed time u/s 139(1) of the Act, there is no bar under the provisions of the Income Tax Act to claim higher loss during the course of assessment proceedings nor are there any fetters on the Assessing Officer to allow such higher loss. The provisions of section 80 of the Act permits an assessee to carry forward loss and seek its set off u/s 72(1) or 72(2) or 74(1) except when the loss has not been

determined in pursuance of return of income filed in accordance with the provisions of sub-section (3) of section 139.

55. The Hon'ble Delhi High Court in the case of CIT vs. Nalva Investments Ltd. in ITA No.822/2005, judgment dated 07.08.2020 in a case involving the identical facts held that in the return of income when the assessee had claimed erroneous claim for a lesser amount of loss, which was corrected during the course of assessment proceedings, it was held that the Assessing Officer was not justified in not determining and allowing the carry forward losses and set off of the loss against subsequent profits as the conditions prescribed for triggering the provisions of section 80 of the Act are not applicable.

Similarly, the Hon'ble High Court of Karnataka in CIT vs. Srinivasa Builders 369 ITR 69 (Kar) held that even where an assessee had shown positive income in the original return of income filed under the provisions of section 139(1) but in the assessment, business loss was determined by the Assessing Officer, even in such situation the Hon'ble High Court held that the assessee had not violated any of the conditions of section 80 of the Act. In other

words, where a return of income was filed within due date prescribed u/s 139(1) showing positive income, loss determined by the Assessing Officer during the course of assessment proceedings on assessment in the assessment order can be carried forward and set off against the subsequent profits.

56. In the light of above legal position, it cannot be said that the conditions prescribed u/s 80 were present so as to disentitle the assessee to carry forward and set off of the losses against subsequent profits. Thus, this reasoning of the AO that loss not claimed in the original return of income, but claimed in the revised return of income cannot be allowed, cannot be sustained in the eyes of law.

57. It is not necessary for us to delve into the issue of acceptance of fresh claim during the assessment proceedings, though such claim was not made in the return of income on the strength of the decision of Hon'ble Bombay High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (2012) 349 ITR 336 (Bom), since the issue had become academic in view of our findings

in the foregoing paragraphs that the revised return of income filed by the assessee is valid in law.

58. Next, we proceed to deal with the reasoning of Assessing Officer that since the transaction of sale of shares was not reflected in the books of account, the loss arising on sale of such shares cannot be allowed as deduction. It is settled position of law that whether an assessee is entitled to a particular deduction or not will depend upon the provisions of law relating thereto and not on the treatment given in the books of account. It is also equally settled that the presence and absence of entries in the books of account is not decisive or conclusive on the issue. In this connection, useful reference can be made to landmark judgments of Hon'ble Supreme Court in CIT vs. Parakh & Co. India Ltd. 29 ITR 661 (SC) and Kedarnath Jute Manufacturing Co. Ltd. vs. CIT 82 ITR 363 (SC).

Thus, the reasoning of the Assessing Officer that in the absence of entries in the books or balance sheet reflecting the sale of shares, loss cannot be allowed as a deduction does not hold good, in view law laid down by the Hon'ble Supreme Court referred to supra.

59. Next, we deal with an important allegation of the Assessing Officer that the impugned transaction of sale of shares of Bilcare Singapore PTE Ltd. held by the assessee to its another wholly owned foreign subsidiary company Bilcare Packaging Ltd. (Mauritius Entity) for consideration of 1 Singapore Dollar is not genuine transaction, but a colourable device adopted by the assessee to avail the benefit of long term losses.

60. The material on record clearly shows that the assessee company had really sold the shares of Bilcare Singapore PTE Ltd. held by it to its another wholly owned foreign subsidiary Bilcare Packaging Ltd. (Mauritius Entity) after seeking permission from the High Court of Republic Singapore u/s 259 of the Companies Act. The transaction of investments made by the assessee in Bilcare Singapore PTE Ltd and disinvestment of such shares was duly reported by assessee company to the Reserve Bank of India under the regulations of FEMA and the factum of investments made by the assessee company in the Bilcare Singapore PTE Ltd. is not in dispute. The act of transfer of shares is complete as on 21.10.2015 as evident from the documents available at pages 874, 875 and 876

of paper book. Thus, the transaction of sale of shares which clearly shows that the transaction of sale of shares by the assessee company to its subsidiary company Bilcare Packaging Ltd. (Mauritius Entity) is a real one and not a dubious one. The assessee is entitled to claim loss arising on the sale of such shares under the provisions of Income Tax Act. The assessee had made use of said provisions of the Act. This cannot be called either abuse of law nor can it impeach the genuineness of the transaction. There is nothing on record to show that the impugned transaction is either sham or bogus. The Assessing Officer had merely given *ipse dixit* findings.

61. With regard to invoking of ruling of the Hon'ble Supreme Court in McDowells & Co. Ltd. (supra), no doubt the Assessing Officer can invoke the ruling of the Hon’ble Supreme Court in the case of McDowells & Co. Ltd. (supra) in case the transaction entered into by an assessee is found to be dubious and adopted the colourable device to evade the taxes. In view of the observations made by us (supra) that the impugned transaction cannot be termed as dubious. Therefore the reliance by Assessing Officer on the decision of McDowells & Co. Ltd. (supra) is highly misplaced.

Further, it must be stated that in the later decision of Hon'ble Supreme Court in Union of India & Anr vs. Azadi Bachao Andolan & Anr 263 ITR 706 (SC), the Hon'ble Supreme Court held that the citizen is free to carry on the business within four corners of law and further proceeded to observe that mere tax planning without any motive to evade the tax through colourable device is not frowned upon even by the Hon'ble Supreme Court in the case of McDowells & Co. Ltd. (supra). Even in the subsequent decision of Hon'ble Supreme Court in the case of CIT vs. Walfort Share and Stock Brokers Ltd. 326 ITR 1 (SC), applying the decision of Hon'ble Supreme Court in the case of Union of India & Anr vs. Azadi Bachao Andolan & Anr (supra) held that the transaction of dividend stripping held to be is not a sham and bogus and ratio of the Hon'ble Supreme Court in the case of McDowells & Co. Ltd. (supra) cannot be applied. Similarly, after referring to the judgments of Hon'ble Supreme Court in McDowells & Co. Ltd. (supra) and Union of India & Anr vs. Azadi Bachao Andolan & Anr (supra), the Hon’ble Supreme Court has observed that a subject is not to be taxed without statute support and every taxpayer has right to arrange his affairs so as to pay tax as low as possible and not that which will replenish the

treasury. The Hon'ble Supreme Court also felt that no reconsideration of the decision in the case of Union of India & Anr vs. Azadi Bachao Andolan & Anr (supra) by larger Bench is required. In view of above legal position enunciated above, we are of the considered opinion that the Assessing Officer was not justified in invoking the principle laid down in the decision of Hon'ble Supreme Court in the case of McDowells & Co. Ltd. (supra).

62. The next issue that arises for our consideration is whether the allegation of Assessing Officer that the impugned transaction was undertaken by the assessee company only in order to avail the benefit of carry forward and set off of capital losses against subsequent year profits. In the foregoing paragraphs, we held that the impugned transaction is legally valid and permissible under the law. The Hon'ble Supreme Court in the case of SA Builders Vs. CIT 288 ITR 1 (SC) had agreed with the observations made by the Hon’ble Delhi High Court in CIT Vs. Dalmia Cement (Bhart) Ltd. 254 ITR 377 (Del) that the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the

board of directors to take business decisions. The income tax authorities cannot compel a businessman to maximise his profits. The income tax authorities must put themselves in the shoes of the assessee and see as how a prudent man would act. The assessing authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated by us (supra), the transaction of sale of shares of Bilcare Singapore PTE Ltd to its another wholly owned foreign subsidiary is a genuine one and the assessee cannot be faulted with for arranging its affairs in such a manner so as to minimize its tax liability.

63. Another aspect that is required to be dealt with by us is whether or not the impugned transaction was undertaken at arm's length price. From the material available on record at pages 997 to 1006 of paper book, it would be clear that the value of assets of BSPL company after deducting the amount charged to secured creditors and debenture holders is $ 0.00 as evident from page 1005 which means that intrinsic value of share is Nil.

64. Without prejudice to the above, we are of the considered opinion that the AO cannot disturb the apparent consideration by substituting the agreed consideration by fair market value of the subject asset. The provisions of sec.48 of the Income-tax Act which deal with the computation of income chargable under the head "Capital Gains" reads as under :

> 'The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :—
>
> (*i*) expenditure incurred wholly and exclusively in connection with such transfer;
>
> (*ii*) the cost of acquisition of the asset and the cost of any improvement thereto:'

The provisions of sec.48 of the I.T. Act refers to the term 'full value of consideration' received, accrued as a result of transfer of the capital asset. The term Fair Market Value had come up for interpretation before the Hon'ble Supreme Court in the case of *CIT* v. *George Henderson and Co. Ltd*. [1967] 66 ITR

622 wherein it was held that the term "full value" means the whole price without any deduction whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for. Nor has it any necessary reference to the market value of the capital asset which is the subject-matter of the transfer. The ratio of this decision was subsequently followed by the Hon'ble Supreme Court in the case of *CIT* v. *Gillanders Arbuthnot & Co*. [1973] 87 ITR 407. Therefore, the legal position that emerges from the decision of the Hon'ble Supreme Court cited *supra* is that "full value of consideration" does not mean market value of the capital asset which is the subject matter of the transfer. Originally, the parliament has enacted the provisions of sec.52 in the I.T. Act, 1961, in order to enable the assessing authority to substitute the stated consideration by Fair Market Value of the capital asset which is the subject matter of transfer under the following two specific circumstances. These provisions had come up for interpretation before the Hon'ble Supreme Court in the case of *K.P. Varghese* v. *ITO* [1981] 7 Taxman 13/131 ITR 597 wherein the Hon'ble Supreme Court had held that mere difference between the consideration actually received and the market value of the consideration by itself would

not justify the provisions of sec.52. The Hon'ble Supreme Court further held that under-statement of consideration cannot be assumed because the fair market value was higher than the amount received. Higher fair market value by itself cannot be a ground and reason to assume and hold that there was under statement of consideration. Subsequently, the same ratio was followed by the Hon'ble Supreme Court in the case of *CIT* v. *Shivakami Co. (P.) Ltd.* [1986] 25 Taxman 80K/159 ITR 71. The Parliament in view of the judgment of Hon'ble Supreme Court in the case of *K.P. Varghese* (*supra*) omitted the provisions of sec.52 by the Finance Act, 1987 w.e.f. April, 1988. Therefore, the said provision was not applicable from the A.Y. 1999-2000 onwards. It is only from assessment year 2018-19, the Legislature had enacted provisions of section 50CA of the Income-tax Act by the Finance Act, 2017 so as to provide that where the consideration for transfer of shares of a company (other than quoted share) is less than fair market value of such shares determined in accordance with the prescribed manner, fair market value shall be deemed to be the full value of consideration for the purposes of computing income under the head “Capital Gains”. The CBDT vide circular No.2/2018 dated

15.02.2018 had clarified that this amendment takes effect only from 01.04.2018, accordingly applied for A.Y. 2018-19.

65. Thus, we find that the reasons assigned for disallowing the claim for determination and carry forward of long term capital loss on the sale of shares of Bilcare Singapore PTE Ltd. held by the assessee sold to its another wholly owned foreign subsidiary company Bilcare Packaging Ltd. (Mauritius Entity) cannot be sustained in the eyes of law. Though the order of the CIT(A) is bereft of detailed discussion on facts and law, we are in agreement with the conclusion reached by the CIT(A) that loss arising on sale of BSPL shares is allowable as Long term capital loss. We do not find any merit in the grounds of appeal nos. 4 to 8 filed by the Revenue, accordingly stands dismissed.

66. Ground of appeal no.9 challenges the decision of CIT(A) in directing the Assessing Officer not to deduct sum of Rs.27,20,59,980/- from the value of opening Written Down Value (WDV) from the Block of Assets under which the assets leased to Bilcare Singapore PTE Ltd. falls. Admittedly, the assessee

company had not received any consideration in terms of the order passed by the Singapore High Court on the cessation of ownership rights of this asset to Bilcare Singapore PTE Ltd. However, it is stated that under wrong notion, the assessee company reduced a sum of Rs.27,20,59,980/- from opening WDV of the block of assets, thereby resulting in a reduced claim of depreciation. On realization of this mistake, the assessee made a claim during the course of assessment proceedings that not to reduce a sum of Rs.27,20,59,980/- from the opening WDV placing reliance on the following judicial precedents:

(i) CIT vs. Yamaha Motor India (P) Ltd. (2009) 183 Taxman 291 (Del)

(ii) CIT vs. Oswal Agro Mills Ltd. (2011) 197 Taxman 25 (Del)

67. The above claim came to be rejected by the Assessing Officer placing reliance on the decision of Hon'ble Supreme Court in Goetz India Ltd. vs. CIT 284 ITR 323 (SC). On appeal before CIT(A), the claim was allowed by holding that it is a mere correction of error and directed the Assessing Officer not to reduce a sum of Rs.27,20,59,980/- from the opening WDV of block of assets.

68. We have heard the rival contentions and perused the record. The issue in the present ground of appeal relates to allowance of depreciation on the assets which are ceased to exist in the Block of assets. The fact that the appellant had not received any sale consideration on cessation of the asset is not in dispute.

69. From assessment year 1988-89, depreciation is to be allowed u/s 32(1)(ii) on block of assets at such percentage of WDV as may be prescribed. The term "block of assets" is defined u/s 2(11) to mean a group of assets falling within a class of assets in respect of which same percentage of depreciation is prescribed. The other provisions of law which are relevant to decide the issue in appeal are the provisions of section 50, and 43(6) of the Act, which reads as under :-

> *"**Special provision for computation of capital gains in case of depreciable assets.***
>
> ***50.** Notwithstanding anything contained in clause (42A) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the following modifications :—*
>
> *(1) where the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of assets during*

the previous year, exceeds the aggregate of the following amounts, namely :—

(i) expenditure incurred wholly and exclusively in connection with such transfer or transfers;

(ii) the written down value of the block of assets at the beginning of the previous year; and

(iii) the actual cost of any asset falling within the block of assets acquired during the previous year,

such excess shall be deemed to be the capital gains arising from the transfer of short-term capital assets;

(2) where any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short-term capital assets:

*[**Provided** that in a case where goodwill of a business or profession forms part of a block of asset for the assessment year beginning on the 1st day of April, 2020 and depreciation thereon has been obtained by the assessee under the Act, the written down value of that block of asset and short-term capital gain, if any, shall be determined in such manner as may be prescribed[1].]*

[2] [Explanation.—For the purposes of this section, reduction of the amount of goodwill of a business or profession, from the block of asset in accordance with sub-item (B) of item (ii) of sub-clause (c) of clause (6) of section 43 shall be deemed to be transfer.]"

"43(6)....

(c) in the case of any block of assets,—

(i) in respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted,—

(A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year;

(B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; and

(C) in the case of a slump sale, decrease by the actual cost of the asset falling within that block as reduced—

(a) by the amount of depreciation actually allowed to him under this Act or under the corresponding provisions of the Indian Income-tax Act, 1922 (11 of 1922) in respect of any previous year relevant to the assessment year commencing before the 1st day of April, 1988; and

(b) by the amount of depreciation that would have been allowable to the assessee for any assessment year commencing on or after the 1st day of April, 1988 as if the asset was the only asset in the relevant block of assets, so, however, that the amount of such decrease does not exceed the written down value;
(ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1989, the written down value of that block of assets in the immediately preceding previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i).

70. The Central Board of Direct Tax vide Circular No.469 dated 29.09.1986 had explained the new scheme of depreciation which reads as under :-

"12. The Court thereafter took into consideration the Direct Taxes Circular no. 469 issued on 23.09.1986. The same reads as follows:

"6.3 As mentioned by the Economic Administration Reforms Commission (Report No. 12, para 20), the existing system in this regard requires the calculation of depreciation in respect of each capital asset separately and not in respect of block of assets. This requires elaborate bookkeeping and the process of checking by the Assessing Officer is time consuming. The greater differentiation in rates, according to the date of purchase, the type of asset, the intensity of use, etc., the more disaggregated has to be the record-keeping. Moreover, the practice of granting the terminal allowance as per section 32(1)(iii) or taxing the

balancing charge as per section 41(2) of the Income-tax Act necessitate the keeping of records of depreciation already availed of by each asset eligible for depreciation. In order to simplify the existing cumbersome provisions, the Amending Act has introduced a system of allowing depreciation on block of assets. This will mean the calculation lump sum amount of depreciation for the entire block of depreciable assets in each of the four classes of assets, namely, buildings, machinery, plant and furniture.""

71. The Hon'ble Delhi High Court in the case of Sony India (P.) Ltd. vs. CIT, 88 taxmann.com 58 (Delhi) had occasion to interpret the above provisions of section 32 r.w.s. 43(6) and section 50 held in para 13, which reads as under :-

"13. In Oswal (supra) and Ansal Properties (supra), it was noticed that the Parliament had deleted the provision for terminal depreciation in respect of each asset that was previously allowed under Section 32(1)(c) and the taxation of balancing charge under Section 41(2) in the year when the sale was concluded. The Court noticed in Oswal (supra) as follows:

"Instead of these two provisions, now whatever is the sale proceed of sale of any depreciable asset, it has to be reduced from the block of assets. This amendment was made because now the assessees are not required to maintain particulars of each asset separately and in the absence of such particular, it cannot be ascertained whether on sale of any asset, there was any profit liable to be taxed under section 41(2) or terminal loss allowable under section 32(1)(iii). This amendment also strengthen the claim that now only detail for "block of assets" has to be maintained and not separately for each asset.

33. Having regard to this legislative intent contained in the aforesaid amendment, it is difficult to accept the submission of the learned counsel for the Revenue that for allowing the depreciation, user of each and every asset is essential even when a particular asset forms part of "block of assets". Acceptance of this contention would mean that the assessee is to be directed to maintain the details of each asset separately and that would frustrate the very purpose for which the amendment was brought

> *about. It is also essential to point out that the Revenue is not put to any loss by adopting such method and allowing depreciation on a particular asset, forming part of the "block of assets" even when that particular asset is not used in the relevant assessment year. Whenever such an asset is sold, it would result in short term capital gain, which would be exigible to tax and for this reason, we say that there is no loss to Revenue either.*
> *34. The upshot of the aforesaid discussion is that though we are not entirely agreeing with the reasoning of the Tribunal contained in the impugned judgment, we are upholding the conclusion of the Tribunal based on the "block of assets" as discussed above. The consequence would be to dismiss these appeals. However, there will be no order as to costs."'*

72. The ratio that can be discerned from the above decision is that once a particular asset, forms a part of particular block of assets in respect of depreciation was allowed, even when that particular asset is not used in the relevant assessment year, the depreciation on that particular block of asset on WDV of that particular block of asset in which this asset falls is still allowable. There is no finding by the Assessing Officer that the block of asset, in which this plant and machinery leased to Singapore company falls, has ceased to exist or there was a surplus in the block of asset in that particular block of asset and, therefore, it is indisputable that no consideration was received by the assessee company on cessation of the ownership rights over the plant and machinery. Therefore, the question of deduction from opening value of that block of assets

in terms of section 43(6)(c)(i)(a) does not arise. It is not even the case of the Assessing Officer that there was surplus on that particular block of assets triggering the provisions of section 50 of the Act. Therefore, we are of the considered opinion that the assessee would be entitled to depreciation in respect of assets which were part of the block of assets, even if said asset could not be used for the relevant previous year. Even if, the assessee company ceased to be owner of that particular asset in view of the fact that WDV of that particular block of assets is not required to be reduced. We are fortified in taking this view by the decisions of the Hon'ble Delhi High Court in the case of CIT vs. Oswal Agro Mills Ltd. 341 ITR 467 and subsequent decision of the Hon'ble Delhi High Court in the case of Sony India (P.) Ltd. vs. CIT, 88 taxmann.com 58 (Delhi).

73. Then, the issue that comes up for consideration before us is whether the fact that the assessee company itself had reduced the WDV of the assets from the opening WDV of block of assets in the return of income, can be a bar to claim the higher depreciation during the course of assessment proceedings. Admittedly, in the present case, under wrong notion, the assessee company had

reduced the WDV of the assets leased to BSPL from the opening value of the block of assets under which it falls. However, during the course of assessment proceedings, it sought to rectify this mistake by claiming the higher depreciation without such reduction. The CBDT vide Circular No.14/1995 had clarified that while computing the taxable income of an assessee should be computed in accordance with the provisions of law, even a fresh claim made during the course of assessment proceedings in the absence of any statutory bar should be considered by the Assessing Officer. The Hon'ble High Court of Gujarat in CIT vs. Mitesh Impex 367 ITR 85 held that the income tax proceedings cannot be treated as adverse proceedings and income should be computed in accordance with the provisions of law and further held that the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) does not put any fetters on the powers of Appellate authorities in entertaining a new claim. The relevant paragraphs of the decision are extracted below:

> ***"33.*** *In case of Goetze (India) Ltd. (supra) the Supreme Court distinguished the judgment in the case of National Thermal Power Co. Ltd. (supra) on the ground that the same pertained to the power of the Tribunal under section 254 of the Act to entertain a point of law for the first time and commented that such decision does not relate to the*

power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return. In the process the Supreme Court recognized that a new claim could not be entertained by the assessing officer without the assessee revising the return. While doing so it was clarified that:—

> *"4. . . However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs."*

34. *In the case of CIT v. Jai Parabolic Springs Ltd. [2008] 306 ITR 42/172 Taxman 258 (Delhi), the Delhi High Court held that there is no prohibition on the powers of the Tribunal to entertain an additional ground which according to the Tribunal arose in the matter and for just decision of the case.*

35. *In case of CIT v. Pruthvi Brokers & Shareholders (P.) Ltd. [2012] 349 ITR 336/208 Taxman 498/23 taxmann.com 23 (Bom.) the Bombay High Court considered the issue at considerable length and held that Commissioner (Appeals) as well as the Tribunal have the jurisdiction to consider the additional claim and not merely additional legal submissions. The appellate authorities have discretion to permit such additional claims. Such claims need not be those which became available on account of change of circumstances of law but which were even available when the return was filed.*

36. *The Delhi High Court once again in recent judgment in the case of CIT v. Sam Global Securities Ltd. [2014] 360 ITR 682/[2013] 38 taxmann.com 129 observed that the Courts have taken a pragmatic view and not a technical one as to what is required to be determined in taxable income. In that sense assessment proceedings are not adversarial in nature. With these observations Court confirmed the view of the Tribunal reversing the decision of the assessing officer rejecting the claim of the assessee on the ground that no revised return was filed.*

37. *In case of CIT v. Cellulose Products of India Ltd. [1985] 151 ITR 499 (Guj.), Full Bench of this Court held that merely because a ground has not been raised though it could have been raised in support of the relief sought in the appeal, it cannot be said that such ground cannot be raised before the Tribunal. Such ground can be raised provided it falls within the contours of the subject matter of the appeal.*

> ***38.*** *It thus becomes clear that the decision of the Supreme Court in the case of Goetze (India) Ltd. (supra) is confined to the powers of the assessing officer and accepting a claim without revised return. This is what Supreme Court observed in the said judgment while distinguishing the judgment in the case of National Thermal Power Co. Ltd.(supra) and that is how various High Courts have viewed the dictum of the decision in the case of Goetze (India) Ltd.(supra). When it comes to the power of Appellate Commissioner or the Tribunal, the Courts have recognized their jurisdiction to entertain a new ground or a legal contention. A ground would have a reference to an argument touching a question of fact or a question of law or mixed question of law or facts. A legal contention would ordinarily be a pure question of law without raising any dispute about the facts. Not only such additional ground or contention, the Courts have also, as noted above, recognized the powers of the Appellate Commissioner and the Tribunal to entertain a new claim for the first time though not made before the assessing officer. Income-taxproceedings are not strictly speaking adversarial in nature and the intention of the Revenue would be to tax real income."*

74. Thus, it is clear that the decision of Hon'ble Supreme Court in Goetz (India) Ltd. (supra) had no application on the power of the appellate authorities in view of the decision of the Hon'ble Bombay High Court in the case of CIT vs. Pruthvi Brokers & Shareholders, 349 ITR 336 (Bom.), decision of the Hon'ble Delhi High Court in the case of CIT vs. Jai Parabolic Springs Ltd., 306 ITR 42 (Delhi), decision of the Hon'ble Gujarat High Court in the case of CIT vs. Mitesh Impex (supra). Therefore, in our considered opinion, the ld. CIT(A) is correct in allowing the claim of assessee. We do not find any perversity or illegality in the findings of CIT(A). We do not

find any merits in grounds of appeal filed by the Revenue, hence dismissed.

75. In the result, the appeal filed by the Revenue in ITA No.273/PUN/2021 stands partly allowed for statistical purposes.

C.O. No.14/PUN/2021 – By Assessee :

76. The present cross objection is filed by the assessee company against the findings of the ld. CIT(A) that the loss arising on sale of shares of BSPL held by the assessee company to its another wholly owned foreign subsidiary company cannot be allowed as a business loss. In the appeal filed by the Revenue in ITA No.273/PUN/2021, we have decided the said issue in favour of the assessee company by holding that the loss arising on sale of shares of BSPL be allowed to be determined and carried forward to be set-off against the subsequent profits. Thus, this issue has become academic and hence the cross objection filed by the assessee company stands dismissed.

77. In the result, the cross objection filed by the assessee company stands dismissed.

78. To sum up, both the appeals filed by the Revenue and the assessee company stand partly allowed and the cross objection filed by the assessee stands dismissed, as indicated above.

Order pronounced on this 31st day of May, 2023.

Sd/-	**Sd/-**
(S. S. VISWANETHRA RAVI)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 31st May, 2023.
Sujeet/GCVSR

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13, Pune.
4. The Pr. CIT (Central), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**C**" बेंच, पुणे / DR, ITAT, "**C**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.