

**THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 491/Del/2021 : Asstt. Year : 2016-17

Religare Enterprises Ltd., Plot No. A-3, 4, 5 Prius Global Section-125, GB Nagar, Noida, Uttar Pradesh-201301	Vs	ACIT, Circle-19(1), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AAACV5888N		

SA No. 77/Del/2021 : Asstt. Year : 2016-17

Religare Enterprises Ltd., Plot No. A-3, 4, 5 Prius Global Section-125, GB Nagar, Noida, Uttar Pradesh-201301	Vs	ACIT, Circle-19(1), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AAACV5888N		

**Assessee by : Sh. Ajay Vohra, Sr. Adv. &
Sh. Deepesh Jain, CA**

Revenue by : Sh. Bhaskar Goswami, CIT DR

Date of Hearing: 22.06.2023

Date of Pronouncement: 19.09.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal and Stay Application have been filed by the assessee against the order dated 31.03.2021 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1.0 That on the facts and circumstances of the case and in law, impugned assessment completed vide order dated 31.03.2021 passed under section 143(3) read with section 144C

of the Income Tax Act, 1961 ('the Act5) by the assessing officer ('impugned order") is illegal and bad in law.

1.1 That on the facts and in law, the impugned order passed by the assessing officer is barred by limitation in terms of section 153(1) of the Act and is therefore, liable to be quashed.

1.2 That the assessing officer erred on facts and in law in assessing total income of the appellant Rs.414,84,28,733 as against returned/ declared income of Rs.9,68,74,129.

Re: Special Audit under section 142(2A) of the Act

2.0 That the special auditor erred on facts and in law in exceeding jurisdiction under section 142(2A) of the Act in commenting on legal aspects/ implications of the transactions while issuing audit report and thus, the same is vitiated in law and liable to be ignored/ excluded: from consideration.

2.1 That on the facts and circumstances of the case, the assessing officer/ DRP erred in merely relying on the observations/ comments of special auditor without any independent application of mind in ignorance of the correct factual and legal: position and consequently, the impugned order passed is illegal and bad in law.

2.2 That on the facts and circumstances of the case and in law, the assessing officer erred in directing the special auditor to deal .with issues which were outside purview of latter's jurisdiction but forms part of 'assessment4 to be conducted-by assessing officer himself, and thus the audit report and consequential assessment order so passed is bad in law.

Without prejudice:

Re: Disallowance of long-term and short-term capital loss on write-off of investment in preference shares of Religare Capital Markets Ltd ('RCML')

3.0 That the assessing officer/ DRP erred on facts and in law in disallowing loss computed under the head 'capital gains' [long-term capital loss of Rs,344.26 crores and short-term capital loss of Rs.500 crores] on write-off of investments in preference shares held in Religare Capital .Markets Ltd ('RCML').

3.1 That the assessing officer/ DRP erred on facts and in law in alleging that the investments made by the assessee in RCML was an instrument to siphon off funds, without any evidence and purely on conjectures and surmises.

3.2 That the assessing officer/ DRP erred in not appreciating that investment in preference shares was written off as a

consequence of capital reduction of RCML, which was duly approved and sanctioned by the Delhi High Court.

3.3 That the assessing officer/ DRP erred on facts and in law in not appreciating that funds were invested by the appellant holding company in its subsidiary (RCML) on account of financial commitments for capital/ business requirements of the subsidiary (including step-down subsidiaries).

3.4 That the assessing officer/ DRP erred in doubting the genuineness of capital loss without appreciating that major part of investment in RCML was made by the assessee in earlier years, in which years investments were accepted as genuine by the Department.

3.5 Without prejudice, on the facts and circumstances of the case, write off of investments in RCML ought to be alternatively allowed as business deduction/ loss in the hands of the appellant.

Re: Disallowance of alleged interest expenditure relatable to investment in preference shares of RCML

4.0 That the assessing officer/ DRP erred on facts and in law in arbitrarily disallowing interest expenditure to the extent of Rs.5,19,61,760 imputed on investment of Rs.229.40 crores made in preference shares of RCML during the year, alleging that the investments were not made for the purposes of business.

4.1 That the assessing officer/ DRP failed to appreciate that the non-interest bearing funds/ owned funds of appellant were utilized to make- investment in preference shares of RMCL and, therefore, no interest expense could be disallowed.

4.2 Without prejudice, the assessing officer/ DRP erred in adopting arbitrary higher interest rate of 8.84% p.a. for the purpose of computing aforesaid disallowance.

Re: Sale of investment in shares of Aegon Reiligare Life Insurance Company Ltd ('ARLICL') taxed as business income instead-of capital gains

5.0 That the assessing officer/ DRP erred on facts and in law in re-characterizing gains arising on sale of shares/ promoter stake in ARLICL as 'business income' [Rs.392,77,49,391] under section 28(va)/(iv) of the Act, as against 'capital gain' (long term- Rs.10,60,83,585 and short term- Rs.38,12,53,581) offered by the appellant.

5.1 That the assessing officer/ DRP erred on facts and in law in alleging that the appellant did not hold interest in ARLICL as

shareholders' investment but was actively engaged in the business operation of the said company.

5.2 That the assessing officer/ DRP erred on facts and in law in not appreciating that the investment in ARLICL is held by the appellant on capital account (as promoter stake) and not as stock-in-trade in the capacity of a trader, and consequential gain on transfer of such shares is assessable under the head 'capital gain'.

5.3 That the assessing officer/ DRP further erred on facts and in law in not allowing legal and professional fee of Rs.21.30 crore paid to Credit Suisse Securities India Pvt. Ltd. in connection with transfer of the investment in ARLICL.

Re: Disallowance of prior period items debited to >fit and loss account

6.0 That the assessing officer/ DRP erred on facts and in law in disallowing net expenses on account of (i) legal and professional fee and (ii) telephone/ mobile, to the extent of Rs. 1,89,810 alleging the same to be prior period expenditure.

6.1 That the assessing officer/ DRP erred on facts and in law in not appreciating that the aforesaid expenses were crystallized during the relevant year when the bills/ invoices were received by the appellant.

6.2 Without prejudice, the aforesaid expenses may be directed to be allowed as deduction in the preceding year(s), i.e., the year to which it relates.

Re: Disallowance of interest on Non-Convertible Debentures LNCDL paid to Religare Securities Ltd ('RSL') under section 40f AW2) of the Act

7.0 That the assessing officer erred on facts and in law in disallowing interest payable on zero-coupon NCDs to RSL to the extent of Rs.7,08,90,686 under section 40(A)(2) of the Act, alleging the same to be excessive or unreasonable in comparison to interest paid Standard Chartered Bank ('SCB').

7.1 That the assessing officer erred of facts in holding that effective yield/ interest paid to RSL (related, concern) is 18.27% as against 14% payable to SCB, without appreciating that rate/ yield payable on both the loans/ instruments is same @ 14% p.a.

7.2 That the assessing officer in not appreciating that excess amount computed and disallowed is basically compounded interest @ 14% only, on interest accrued but not paid annually on zero coupon NCDs as the same is payable only on maturity as against interest payable annually on loans from SCB.

7.3 That the assessing officer failed to appreciate that interest paid to RSL was at arm's length and comparable to interest paid on same category zero coupon bonds issued to M/s Peerless Mutual Funds (unrelated party) and was thus neither excessive nor unreasonable.

7.4 That the assessing officer erred in making the disallowance of interest without appreciating that similar interest provided for on NCDs in previous years stands accepted by the Department.

7.5 That the assessing officer erred in treating the interest paid to RSL as excessive without appreciating that the same being specified domestic transaction was duly reported in Form 3CEB and was duly accepted to be at arm's length by the transfer pricing officer.

7.6 That the assessing officer erred in not correctly examining and deleting the disallowance despite binding directions of the DRP, which is in gross violation of the provisions of the Act.

Re: Transfer Pricing Adjustment

8.0 That the assessing officer erred on facts and in law in making transfer pricing adjustment of Rs.7,62,966 without considering the order dated 05.03.2021 passed by the Transfer Pricing Officer ('TPO') reducing the adjustment to Nil after giving effect to binding directions issued by the DRP.

Re: Others

9.0 That on the facts and circumstances of the case and in law, education cess paid on total income and dividend distribution tax, should be directed to be allowed as deduction, in terms of the law clarified by the Bombay High Court in the case of Sesa Goa Ltd. vs. JCIT: 423 ITR 426 (Bom.) and other decision.

10.0 That the Assessing Officer erred on facts and in law in charging/computing interest under section 234B and 234C of the Act."

3. The assessee company REL was incorporated on January 30, 1984 and is the holding company of Religare Group. REL is registered as a Non-Banking Financial Institution (Non-Deposit Accepting) under, section 45fA of Reserve Bank of India Act 1934. REL operates through its Indian/overseas/subsidiaries.

4. The assessee company has more than 90% of its assets invested in non-current investments-in group companies.

5. For the year relevant to assessment year 2016-17, the appellant filed its return of income on 30.11.2016 declaring income of Rs.44,64,06,771/- which was subsequently revised on 28.03.2018, declaring income of Rs.9,68,74,129/-. The return filed by the appellant was selected for scrutiny and was then referred to transfer pricing officer (TPO) under section 92CA of the Income Tax Act, 1961 ('the Act') in respect of international transactions entered into by the appellant. Subsequently, a show-cause notice dated 13.06.2019 was issued to the appellant to explain why its case for assessment year 2016-17 should not be referred for special audit under section 142(2A) of the Act, which was objected to by the appellant. The objections raised by the appellant were however rejected and the case was referred for special audit under section 142(2A) of the Act vide order dated 06.08.2019.

Ground No. 1.0 to 1.2

6. General in nature so do not require any comments on our part.

Ground No. 2.0 to 2.2

Special Audit u/s 142(2A) of the Act:

7. The matter stands settled by the order of the Hon'ble High Court of Delhi wherein the WP (C) 9358/2019 filed by the assessee has been dismissed vide order dated 28.08.2019. The operative part of the said order is as under:

"24.....We do not find any reason to hold that the Assessing Officer has shifted the responsibility of scrutinizing the accounts and passed buck to the special auditor, as has been contended by the Petitioner. The special auditor who has been appointed, has been asked to give comments on several issues. Of course, while carrying out the audit, the special auditor would have to verify the books of accounts of the Petitioner so that the report furnished by him, is of assistance to the Assessing Officer to determine the taxable income. We have perused the terms of reference and do not find the same to be inappropriate, especially having regard to the fact that despite the honest attempt made by the Assessing Officer in understanding the accounts of the assessee, it has not yielded the desired results, thereby warranting the appointment of the special auditor. At this stage, we cannot hold that there is no co-relation between the aspects which require scrutiny and the terms of reference for the special auditor under the law. Petitioner can raise such objections at the appropriate stage.

25. In view of the afore-going observations, the Court is of the opinion that there is no infirmity in the order directing the special audit. The writ petitions have no merit, and consequently the same are dismissed. The assessees in both the petitions are directed to cooperate with the special auditor. There shall be no order as to costs."

8. Since, the matter has been adjudicated by the Hon'ble High Court, this ground no. 2 & 2.1 of the assessee is hereby dismissed.

Ground No. 3 to 3.5**Ground No. 4.0 to 4.2****Long Term Capital Loss:****Short Term Capital Loss:****Interest Expenditure:**

9. From the review of Computation of total Income submitted, the Assessing Officer observed that the assessee company claimed short term capital loss of Rs. 500 crores and long term capital loss of Rs.344,26,75,159/- on account of write off of investment of Rs.750 crores in preference shares of RCML as per following details:

Date of acquisition	Nature of security	Value of investment	Indexed Cost	Sale Price	Capital Loss	Nature of capital loss
31-May-11	Preference shares	2,50,00,00,000	3,44,26,75,159		3,44,26,75,159	Long Term
3-Mar-12	Preference shares	5,00,00,00,000			5,00,00,00,000	Long Term
Total		7,50,00,00,000			8,44,26,75,159	

10. The assessee was issued show cause by the Assessing Officer as to why this amount should not be disallowed. The assessee submitted reply vide letter dated 24.02.2020. After considering the reply of the assessee, the revenue authorities held as under:

"The assessee is not able to justify the allegations of special auditors in respect of diversion of funds to RCMIML through its investment in wholly owned subsidiary RCML and the sole purpose of the investment in RCML is to take over the liability of RHC towards capital commitment or repayment of existing liability of RHC. There is no dispute to the fact that no one can step in the shoe of the businessmen but a business expediency need to be established. In the present case, the assessee failed to establish the same except that the same is done as per investment agreement. The investment of funds by the assessee in RCML is used to funds RCMIML which already incurring loss. It was also established that

investment in RCML was treated by the assessee as permanently declined to NIL as and when made by the assessee over last several years, which show that there is no intention of receiving it back or earning any income from it. The assessee has also submitted that reduction of capital is made as per order of Delhi High court. This fact is not disputed but the genuineness of investment made by the assessee is considered and found to be bogus.

Therefore, it is established that the assessee company has siphoned off an amount of Rs.1755.50 crores through instrument of investment in RCML over several years. Thus, the special auditor's has appropriately proposed to disallow the short term capital loss of Rs. 500 crores and long term capital loss of Rs. 344,26,75,159/- on account of write off of investment of Rs. 750 crores claimed during the year under consideration.

*Additionally, investment of Rs. 229Cr. made by the assessee company, during the year under consideration, is also part of total investment made in its wholly owned subsidiary. Therefore, considering the amount of Rs. 5,19,61,760/- [2,29,40,00,000 *8.84%, as computed by special auditor on page no. 64 of the special audit report in FORM 6B] on funds being not utilized for wholly and exclusively for the purpose of the business but charged to the Profit & Loss account under Note No 24 'Finance Costs', is disallowed under Section 37 of Income Tax Act, 1961.*

Therefore based on the above facts and circumstances (i) short capital loss of Rs. 500 crores and long term capital loss of Rs. 344,26,75,159/- and (ii) proportionate interest expense amounting to Rs. 5,19,61,760/- under section 37 of the act are disallowed and added back to the total income of the assessee company.

(Disallowance of short term and long term capital loss of Rs.8,442,675,159/-)

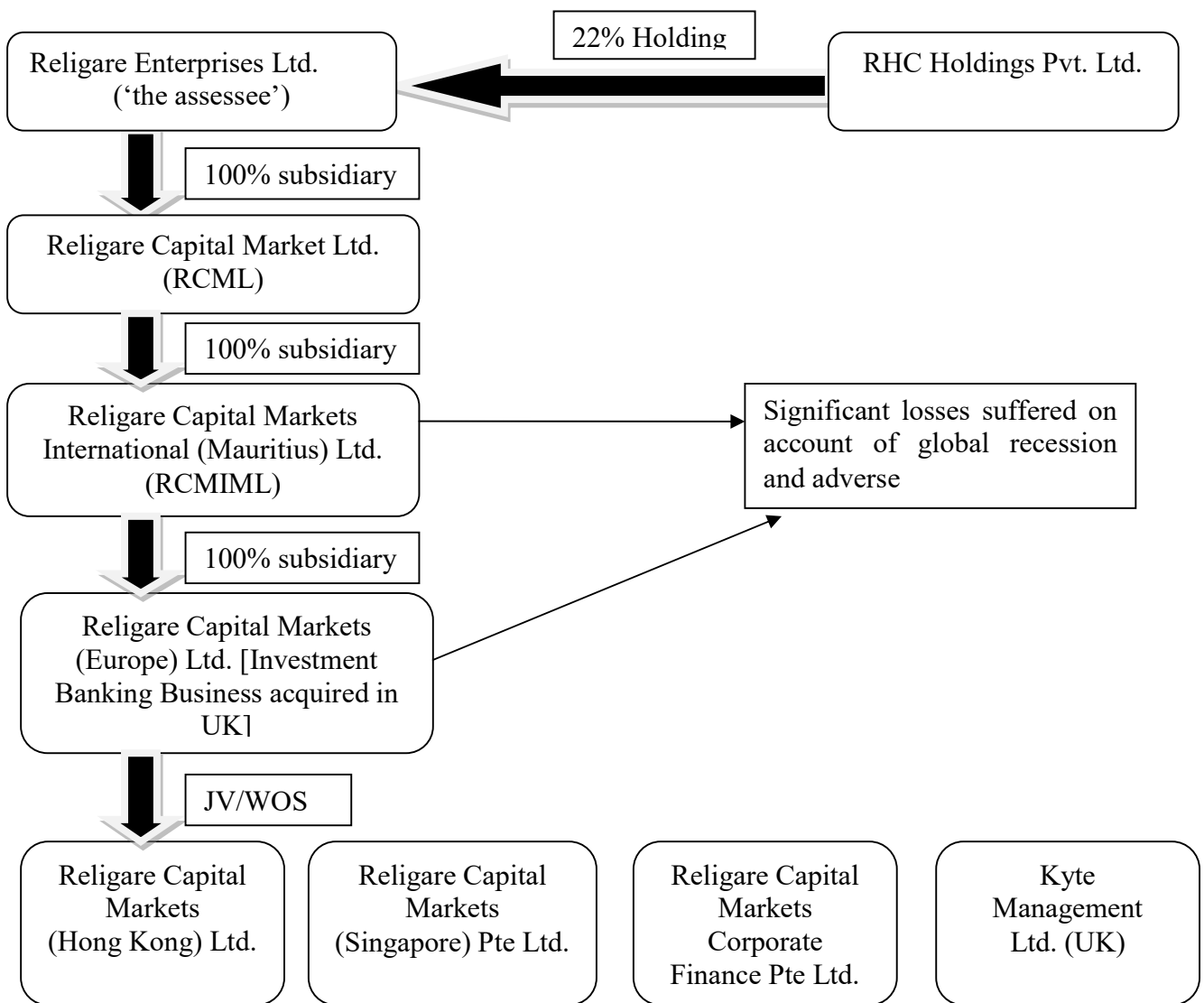
(Disallowance of interest expense of Rs.5,19,61,760/-)"

11. The Id. DRP concurred with the findings of the TPO. The Id. DRP held that the funds invested by the assessee company in the RCML was not made for any business investment but to repay its associate company i.e. RHC by routing of funds through RCML. The funds invested by RHC earlier was already transferred to RCML (Mauritius) and booked as loss in RCML (Mauritius) financial statements. The sole purpose of the

investment in RCML is to take over the liability of RHC towards capital commitment or repayment of existing liability of RHC. Therefore, the Id. DRP concurred with the action of the AO that the assessee company has utilized an amount of Rs.1755.50 Crores through instrument of investment in RCML. This investment in Mauritius company over the period of time by the assessee company which are reduced to NIL as and when made has been scrutinized by the AO in the relevant Assessment Year.

12. Before us, the Id. AR argued at length.

13. The holding pattern of the assessee company is as under:



14. From the above, it can be deciphered that the losses were in fact suffered by Religare Capital Markets International (Mauritius) Ltd. (RCMIML) and Religare Capital Markets (Europe) Ltd. [Investment Banking Business acquired in UK] which are independent entities situated in Mauritius and UK/Europe. These entities are taxable in their respective countries.

15. The appellant had invested in 0.001% non-convertible cumulative redeemable preference shares of its wholly owned subsidiary, M/s Religare Capital Market Ltd. ('RCML') as under:

- May 2011 : Rs. 250 crores [2.5 crores shares @ Rs. 100 (including Rs.90 premium)]
- March 2013 : Rs. 500 crores [50 crore shares @ Rs.10]

16. RCML had a wholly owned subsidiary company in Mauritius, i.e., Religare Capital Markets International (Mauritius) Limited ('RCMIML'). RCMIML, in turn, had a UK subsidiary called Religare Capital Markets (Europe Limited, UK, which acquired investment banking business, which, in turn, had Joint Ventures (JV)/ Wholly Owned Subsidiary (WOS) in various countries like UK, US, Hongkong, Singapore, Japan, South Africa, etc.

17. RCMIML incurred huge losses resulting in erosion of the net worth of RCMIML and consequently, RCML made provision for diminution in the value of its investments in RCMIML. Consequently, the appellant company made provision for diminution in the value of the investment made in the shares of RCML.

18. RCML reduced its share capital against the accumulated losses. RCML after approval of board of directors and shareholders carried capital reduction of fully paid up non-convertible redeemable preference shares held by the appellant company. RCML accordingly filed scheme for reduction of 52,50,00,000, 0.001% Non-Convertible Cumulative Redeemable Preference Shares of Rs.10 each fully paid-up aggregating to Rs.525 crores (face value) before Hon'ble Delhi High Court, which was approved on March 23, 2015 and thereafter, registered with the ROC on 8.5.2015. The Hon'ble High Court order is in the case of Religare Capital Markets Ltd. in which the assessee investments.

19. As a result of the order of the Hon'ble Delhi High Court, the value of the investment made by the appellant of Rs.750 crores in the preference shares of RCML stood extinguished and became Nil and the assessee booked consequent capital loss on such investment. Such capital loss claimed by the assessee has not been accepted by the revenue authorities. The revenue authorities argued that the approval of the Hon'ble High Court in the case of RCML is on the issue of company affairs but not on taxation issues in the case of the assessee company REL. It was argued that the taxation issues have to be examined keeping in view the entire facts and circumstances in the case of the assessee.

20. For the sake of ready reference, the entire proceedings before the Assessing Officer are reproduced below:

“During the year under consideration, the assessee company disclosed following transactions with a wholly owned subsidiary namely Religare Capital Markets Ltd. (RCML):

1. Investment of Rs. 4,99,99,900/- in 0.002% Cumulative Non-convertible redeemable preference shares of RCML on 21.10.2015.
2. Investment of Rs. 224,40,00,100/- in 0.002% Cumulative Non-convertible redeemable preference shares of RCML on 30.12.2015.
3. Write off investment of Rs. 750,00,00,000/- invested in 0.001% Cumulative Non-convertible redeemable preference shares of RCML the financial year 2011-12 (Rs.250 crores) and financial year 2012-2013 (Rs. 500 crores).

Questionnaire was issued to the assessee company for providing details relating to such investment vide our letter no. DGA/REL/16-17/001 dated 08.08.2019 as reproduced below:

1. The company has shown investment of Rs. 385,55,00,000/- in equity shares, Rs.620,00,00,000/- in 0.002% of Cumulative Non Convertible Preference Shares, Rs.750,00,00,000/- in 0.001% Cumulative Non Convertible Preference shares of Religare Capital Markets Ltd. totaling to Rs. 1755,55,00,000/-. Out of the same, it is observed that provision for diminution of Rs. 750,00,00,000/- was

made in earlier years and provision for diminution of Rs. 229,40,00,000/- was created during the year under consideration. Please provide following documents:

1. Copy of agreement entered into among the company, RHC Holding Pvt. Ltd. (RHC) and Religare Capital Markets Ltd. (RCML) on 13.02.2012 for capital contribution commitment and any changes thereafter.
2. Board resolution specifying the terms & conditions for creation in the value of such diminution.
3. Board resolution authorizing investment of Rs.229,40,00,000/- in RCML despite of write off of Rs. 750,00,00,000/- in the same financial.

The assessee company submitted its response on 11.10.2019 as follows:

With respect to the information required by your goodself in the aforementioned point, please find attached following:

1. Copy of agreement entered into among the company, RHC Holding Pvt. Ltd. (RHC) and Religare Capital Market Limited on 13.02.2012 alongwith its first amendment and second amendment agreement is enclosed as Annexure-2, Annexure -2(a) and Annexure-2(b).
2. The provision for diminution of Rs. 7,500,00,000/- was made in earlier year and written back in the year under consideration as per the order of Hon'ble Delhi High Court. Copy of order is enclosed as Annexure-3. Further, the provision of Rs. 2,294,000,000/- was created in the

year under consideration however, the same was disallowed while computing the taxable income for the year under consideration.

3. The investment of Rs. 2,294,000,000/- was made by the assessee company in the year under consideration in the shares of M/s. Religare Capital Market Limited as per terms of agreement dated 13.02.2012 followed by its first amendment agreement dated 24.05.2012 and second amendment dated 28.03.2013 (enclosed as Annexure-2, Annexure-2(a) and Annexure-2(b) of point a above) The relevant clause i.e. clause 6 of the second amendment agreement dated 28.03.2013 is reproduced as under for your reference:

"5 A On the effective date, REL undertakes to fulfill the financial commitments in full by agreeing to subscribe to Series D Preference shares amounting to Rs. 11,198,324,660 (Rupees One Thousand One Hundred Nineteen Crores Eighty Three Lacs Twenty Four Thousand Six Hundred and Sixty Only) at such terms As mutually agreed between REL and RCML at the time of issuance of such Series D Preference Shares for the avoidance of doubt, it is hereby clarified that unless otherwise agreed in writing amongst the Parties, REL obligation to make capital infusion shall only be limited to the financial commitments and REL shall not be responsible for any new borrowings nor interest accrued on such new borrowings that relate to a period after September 30, 2011, unless such new borrowings are for the purpose of refinancing the financial commitments."

Hence no separate board resolution was required for investment of Rs. 2,294,000,000/-.

The assessee company has submitted that the investment of Rs.229,40,0,000/- was made in the shares of M/s. Religare Capital Market Limited as per terms of agreement dated 13.02.2012 with amendment agreements dated 24,05.2012 & 28.03.2013.

Therefore, from above discussion/ following facts are observed:

1. RCML has made investment in RCML (Mauritius) from funds made available by RHC before 31.03.2013. RCML (Mauritius) has shown accumulated losses for US \$ 39,31.42,633/- (equivalent to Rs. 2,358 crores (@ US 1 = INR 60) in its financial statements before 2014.
2. RHC controlled management & financial decision of RCML including appointment of CEO, CFO and investment decision by virtue of agreement dated 13.02.2012, which remain unchanged even after amendment agreements dated 24.05.2012 & 28.03.2013.
3. All agreements between RHC, RCML & the assessee company entered on 13.02.2012, 24.05.2012 & 28.03.2013 were signed by same persons namely Mr. Hemant Dhingra (RHC), Mr. Shachindra Nath (the assessee company) and Mr. Anil Saxena (RCML).
4. Mr. Shachindra Nath & Mr. Anil Saxena were common directors of RCML & RCML (Mauritius) from the financial year 2011-12 to 2015-16. Also, Hemant Dhingra was

director of RCML from 2007 to 2010. Similarly, Mr. Sunil Godhwani was the common director of the assessee company & RCML from the financial year 2011-12 to 2015-16, This shows that person taking decision are same in all companies and are inter-related.

5. Investment made by RCML in RCML (Mauritius) was controlled by RHC and the same was also made before funds were introduced as per agreement dated 28.03.2013 by the assessee company.
6. The Assessee company, through amendment agreement dated 28.03.2013, invest Rs. 810 crores in RCML. These funds were used by RCML to refund investment of Rs. 659 crores made by RHC in RCML preference shares alongwith redemption premium of Rs. 55.60 crores which totals to Rs. 714.60 crores.
7. The Assessee company further made investment of Rs. 80.60 crores in financial year 2013-14 & Rs. 229.40 crores in financial year 2015-16 in RCML.
8. All value of investment made by the assessee company in RCML including investment shown in (7) above, were treated as permanently declined to NIL as and when made. This shows that the assessee company knows before making such investment, that value of its investment will be zero and through such investment, repayment were made to RHC only.
9. The investment of funds by the assessee company was not in accordance with guidance provided in its Memorandum of Association.

10. RCML (Mauritius) has shown investment of more than Rs. 580.74 crores in an entity established at British Virgin islands as on 31.03.2016, which shows that consequential assets of RCML and the assessee company stands recoverable. But the assessee company disclosed such investment as permanently declined to NIL.
11. No permission from RBI, income Tax Department and Enforcement Department were taken for reduction of share capital of Rs. 750 crores at the time of taking approval from Hon'ble Delhi High Court and only an undertaking was submitted by Anil Saxena, Director that RCML will comply with them. Therefore, this is for the first time that the issue of write off Rs. 750 crores is considered as per provisions of the Income Tax Act 1961.

Therefore, based on above facts and circumstances, it is observed that funds invested by the assessee company in RCML was not made for any business investment but to repay its associate company i.e. RHC by routing of funds through RCML. The funds invested by RHC earlier was already transferred to RCML(Mauritius) and booked as loss in RCML(Mauritius) financial statements. The sole purpose of the investment in RCML is to take over the liability of RHC towards capital commitment or repayment of existing liability of RHC. Similarly, investment were made in the financial year 2013-14 & 2015-16 which was treated as loss.

This issue of investment in Mauritius company over the period of time by the assessee company which are reduced to

NIL as and when made, needs to be scrutinized by with respect to financials of the RCML (Mauritius) for which the assessing officer may take appropriate decisions as considered necessary relating to investment made from financial year 2007-08 to 2014-15 and years succeeding the year under consideration.

During the year under consideration, out of Rs. 1755.50 crores, the assessee company made investment of Rs. 229.40 crores in RCML and claimed long term & short term loss on investment of Rs. 750 crores.

1. Regarding investment of Rs. 229.40 crores: From the review of books of accounts of the assessee company, it is observed that the assessee company invested funds in making the investment of Rs. 229.40 crores in RCML which would otherwise results in earning of the interest income. The assessee company simultaneously created provision for diminution in the value of such investment thereby reducing the value of investment to NIL. By no stretch of imagination this is a diminution of the value of the investment but such creation of the provision of the diminution of the value of the investment is nothing but an effective write off of the investment as done in the case of previous diminution of the value of the investment explained earlier with respect to Rs. 750 crores. These funds were utilized by RCML for clearing its financial commitments which got created on account of its investment in its Mauritius subsidiary.

Therefore, as established above, such investment is part of total investment of Rs. 1755.50 crores which were not used

wholly and exclusively for the purpose of business of the company & accordingly, interest cost incurred by the assessee company is disallowed to the extent of utilization of funds in the such investments.

During the year under consideration, the shareholder funds was Rs. 2539.97 crores and borrowed funds of Rs. 931.93 cr. & investment in subsidiaries are Rs. 3198.62 crores (net of provision). This shows that the shareholder funds were not sufficient to invest in subsidiary and borrowed funds were used for such investment.

Therefore, the AO worked out the disallowance of interest cost as follows:

<i>Date of Investment</i>	<i>No. of Days till 31.03.2016</i>	<i>Amount (in Rs.)</i>	<i>interest cost @ 8.84%</i>
21-Oct-15	162	4,99,99,900	19,61,750
30-Dec-15	92	2,24,40,00,100	5,00,00,011
<i>Total</i>		2,29,40,00,060	5,19,61,760

Therefore, the interest of Rs. 5,19,61,760/- on funds being interest expenditure not laid out or expended wholly and exclusively for the purpose of the business & charged to the Profit & Loss account under Note No 24 "Finance Costs" is proposed to be disallowed under Section 37 of Income Tax Act. 1961.

1. Long Term Capital Loss & Short Term Capital Loss claimed

From the review of Computation of total Income submitted, it is observed that The assessee company claimed short term capital loss of Rs. 500 crores and long term capital loss of Rs.344,26,75,159/- on account of write off of investment of Rs.750 crores in preference shares of RCML as per following details:

Date of acquisition	Nature of security	Value of investment	Indexed Cost	Sale Price	Capital Loss	Nature of capital loss
31-May-11	Preference shares	2,50,00,00,000	3,44,26,75,159		3,44,26,75,159	Long Term
3-Mar-12	Preference shares	5,00,00,00,000			5,00,00,00,000	Long Term
Total		7,50,00,00,000			8,44,26,75,159	

The assessee was issued show cause as to why this amount should not be disallowed.

1. In response, the assessee vide its submissions dated 24.02.2020 submitted as under:

The brief facts in respect of the aforesaid issue, is set out as under:

At the outset, the inter-se holding/relationship of entities which have entered into transactions that are under consideration in the special audit report is pictographically illustrated as under:

Xxxxx

The assessee had, in the past assessment year(s), invested in preference shares of its wholly owned subsidiary, M/s. Religare Capital Market Ltd. (hereinafter referred to as 'RCML') as under:

Date of Investment	No. of preference shares purchased	Purchase cost per share	Total cost of purchase consideration
May 2011	2,50,00,000	Rs.100 (including premium of Rs.90)	Rs.250,00,00,000
March 2013	50,00,00,000	Rs.10	Rs.500,00,00,000
Total	52,50,00,000		Rs.750,00,00,000

The aforesaid preference shares were, it is submitted, in the nature of 0.001% non-convertible cumulative redeemable preference shares and for the purpose of acquiring 52,50,00,000 preference shares, the assessee paid total consideration of Rs.750 crores to RCML during the period May 2011 to March 2013.

Religare Capital Market Limited (RCML) owned a wholly owned subsidiary company in Mauritius i.e. Religare Capital Markets International (Mauritius) Limited (RCMIL). Due to economic slowdown and significant decline in the investment banking business overseas, RCMIL incurred huge losses. This resulted in erosion of the net worth of RCMIL and consequently RCML made provision for diminution in the value of its investments in RCMIL and showed a loss of Rs. 1580.00 crores in its books of account as on 31st March, 2014. Consequently, the assessee company being the holding company of RCML also made provision for diminution in the value of the investment made by it in the shares of RCML.

Due to such huge losses, RCML, the wholly owned subsidiary company of the assessee company, decided to reduce its share capital against the accumulated losses. RCML after discussion with board of directors and shareholders decided

to carry out capital reduction by reduction, extinguishment and cancellation of fully paid up non-convertible redeemable preference shares held by the assessee company to the extent of Rs. 525 crores. The reduction of capital pursuant to section 100 of the Companies Act, 1956 was approved in the EGM of RCML on 22.10.2014. Subsequently, RCML, it is further submitted, had filed scheme for reduction of 52,50,00,000 0.001% Non-convertible Cumulative Redeemable Preference Shares of Rs.10 each fully paid up aggregating to Rs.525,00,00,000 before Hon'ble Delhi High Court, which was approved on March 23, 2015 and the order was duly registered with the Registrar of Companies (ROC) on May 8, 2015. A copy of the judgment of the Hon'ble Delhi High Court is already submitted with letter dated 28.06.2019. As a result of the order of the Hon'ble Delhi High Court, the value of the investment made by the assessee of Rs. 750 crores in the preference shares of RCML became nil and the assessee company booked capital loss for the investment made by it in RCML.

In support of the investment in the preference shares of RCML and extinguishment of preference shares, the assessee company submitted the following documents vide letter dated 28.06.2019, 11.10.2019 and 21.10.2019 during the course of assessment and special audit proceedings:

Particular of documents submitted	Date of submission before Income Tax Department	Date of submission before Special Auditors
1. A detailed working showing the date of purchase, purchase price, no. of shares purchased, date of sale of shares, sales consideration, no. of shares sold and the capital gain on it.	Page No. 6 of the Submission dated 28.06.2019 - Please refer Annexure-13	Page No. 9 of the Submission dated 04.11.2019 - Please refer Annexure - 26 of the submission.
1. A copy of allotment letter/terms sheets issued by RCML for issue of shares to the assessee.	Page No. 6 of the Submission dated 28.06.2019- please refer Annexure-14.	-
1. The photocopy of the demat account showing the investment made by the assessee company in the shares of RCML	Page No. 6 Submission dated 28.06.2019 - please refer Anneure-15.	-
1. The photocopies of the relevant extracts of bank statements showing payment for purchase of shares.	Page No. 6 of the Submission dated 28.06.2019- please refer Annexure-16.	-
1, A copy of opinion an opinion from a senior advocate Shri Arvind Datar in respect of capital loss on the extinguishment of the rights in the preference shares.	Page No. 7 of the Submission dated 28,06.2019- please refer Annexure-18.	-
1. A copy of agreement entered into among the company, RHC Holding Pvt. Ltd, (RHC) and Religare Capital Market Limited (RCML) on aiongwith its first amendment dated and second amendment agreement dated 28.03.2013	Copy of the same is enclosed as Annexure-1, 1(a) and 1(b) for your reference.	Page No. 2 of the Submission dated 11.10.2019- please refer Annexu re-2, 2(a) and 2(b).
1. A copy of the order of the Hon'ble Delhi High Court for the reduction in the capital investment made by the assessee company in RCML.	Page No. 7 of the Submission dated 28.06,2019 - Please refer Annexure-17.	Page No. 2 of the Submission dated 11.10.2019- please refer Annexure-3.
1 A resolution passed in 2013 for infusing Rs.1120 cr. by REL in RCML alongwith call letters received from RCML with respect to the outstanding amount on partly paid up preference share.	Copy of the same is enclosed as Annexure- 2&2(a) for your reference.	Page No. 2 of the Submission dated 21stOctober, 2019 - Please refer Annexure- 1 and 1(a).

In pursuance of the aforesaid reduction of preference share capital which was effective from May 8, 2015, the assessee was constrained to write off the entire cost of investment in preference shares of its subsidiary company i.e., RCML

aggregating to Rs.750 crores in the previous year relevant to the assessment year 2016-17 i.e., the year under consideration. Further, since the reduction in preference share capital resulted in 'transfer' of such preference shares, being permanent extinguishment of rights of the assessee in such preference shares, the consequential capital loss of Rs.8,44,26,75,159 suffered thereon was declared in the return of income as under:

1. Long term capital loss - Rs. 344.26 crores
2. Short term capital loss- Rs.500 crores

The calculation of capital loss as per section 45 of the Act is tabulated as under:

Particulars	Actual cost of acquisition of preference shares	Indexed cost of acquisition	Safe Consideration	Loss suffered due to capital reduction
Long Term Capital Loss	Rs.250,00,00,000	Rs.344,26,75,159	Nil	(Rs.344,26,75,159)
Short Term Capital Loss	Rs.500,00,00,000	Rs.500,00,00,000	Nil	(Rs.500,00,00,000)
Total				(Rs.844,26,75,159)

In the show-cause notice dated 14.12.2019, your Honour has, merely on the basis of the comments made by the special auditor in the special audit report, sought to disallow the claim of long term capital loss of Rs.344.26 crores and short term capital loss of Rs.500 crores.

In the special audit report, the special auditor has alleged that the assessee has "siphoned off" funds to group companies under the garb of investments made in RCML during financial year 2007-08 to 2015- 16 and accordingly;

the capital loss of Rs.844.26 crores claimed during the assessment year 2016-17, on account of capital reduction of such preference shares should be denied, in arriving at such erroneous conclusion, the special auditor has made following false and baseless allegations:

1. Investment made by the assessee in preference shares of RCML was not for earning any return therefrom, but was merely to facilitate RCML to repay one of its associate company i.e. RHC Holding Pvt. Ltd. (hereinafter referred to as 'RHC') by way of redeeming preference shares for Rs.714.60 crores (including premium of Rs.55.60 crores) held by RHC and on this account all the investments made by the assessee in RCML were immediately treated as permanently declined to NIL in the year of investment;

2. The funds which were earlier invested by RHC in RCML in the form of preference shares, was utilized by RCML to make investments in the form of unquoted equity instruments and 0% optionally convertible redeemable preference shares of Religare Capital Markets International (Mauritius) Limited ('RCMIL'), which had huge accumulated losses.

AO held that

1. RHC controlled the management and financial decisions of RCML including appointment of key managerial persons and investment decision by virtue of certain agreements. Thus, it has been presumed that

investment made by RCML in RCMIL was controlled by RHC.

2. The capital reduction of preference share capital of Rs.750 crores was undertaken by RCML in the absence of permissions/approvals from RBI, Income tax authorities and Enforcement department.

In rebuttal to the aforesaid the assessee submitted that the conclusions sought to be drawn by the special auditor is based on incorrect appreciation of facts and position in law as demonstrated hereunder:

Investment duly accepted as genuine in past years

In this regard, it is at the outset respectfully submitted that the entire capital loss of Rs.844 crores claimed by the assessee was undisputedly in respect of investments made in RCML in the past assessment year(s) i.e., much prior to assessment year 2016-17 and such investments were duly accepted as genuine by the assessing officer after undertaking detailed verification in the year such investment was made as demonstrated hereunder:

1. In the assessment proceedings for AY 2012-13 under section 143(3) of the Act, the AO vide its questionnaire dated 07.02.2014 in point no. 22 asked the assessee company to furnish scrip wise details of all the investment held by it. In response to the aforesaid questionnaire the assessee company has duly submitted the details respecting all the investments, on page no 3 of the submission dated 15 March 2016, held as on

31.03.2012 and investments held on 31.03.2011. Copy of questionnaire and submission made by the assessee company is enclosed as Annexure(s) 5 and 6.

2. Further, during the course of re-assessment proceedings under section 148 of the Act for the assessment year 2012-13, the AO has asked assessee to furnish details respecting diminution in the value of its long term investment in the value of following securities:

1. Religare Insurance Broking Limited
2. Religare Arts Initiative Limited
3. Vistaar Religare Capital Advisors Limited
4. Religare Macquaire Wealth Management Ltd
5. Religare Capital Markets Limited

In response to the above question the assessee company has made detailed submission respecting the investments made by the assessee company in the above mentioned securities and further details respecting creation of provision for diminution in the value of the same. Copy of questionnaire and submission made by the assessee company is enclosed as Annexure(s) 7 and 8.

However, no adverse consequence on the aforesaid transaction observed by the assessing officer with respect to the investment made by the assessee company during the course of assessment proceedings u/s 143(3) and reassessment proceedings u/s 148 of the Act.

1. In assessment proceedings for AY 2013-14 the assessing officer vide its questionnaire dated June 09, 2015 has asked us to submit details respecting the details of investment made and in response to the aforesaid questionnaire the assessee company has submitted details vide its submission dated 29th February, 2016. Copy of questionnaire and submission made by the assessee company is enclosed as Annexure(s) 9 and 10.

However, no adverse consequence on the aforesaid transaction observed by the assessing officer with respect to the investment made by the assessee company.

Furthermore apart from the specific questions raised during the course of assessment proceedings, it is pertinent to note that, the assessee company has duly disclosed its investments in audited financial statements every year and all the transactions have been duly verified and assessed by the AO in AY 2012-13, AY 2013-14 and AY 2014-15 and after undertaking detailed verification, the investment was accepted as genuine and no adverse inference was drawn in any of the past assessment proceedings.

It may thus be appreciated that once the genuineness of investment is tested in the year of acquisition, it is not open to the Revenue authorities to doubt the transaction in the year of transfer of such investment.

In the present case, it is respectfully submitted that the genuineness of the investment having been accepted by the assessing officer after due verification in the year such

investment was made i.e., in AY 2012-13 and 2013-14, it is now not open to deny the claim of loss on transfer of such investments, that too based on mere conjectures and surmises. Thus, on the aforesaid preliminary ground itself, the comments of the special auditor calls for being ignored from consideration and there remains no ground for denial of loss claimed by the assessee.

Investment in RCML genuine

Without prejudice to the above, it is submitted that investment made by the assessee in RCML was even otherwise genuine and purely motivated by business consideration as explained hereunder:

In the special audit report, the auditor has alleged that the funds invested by the assessee was routed through other Religare group companies for the ultimate benefit of RCMIL, a foreign company based in Mauritius, which had suffered huge losses. Such investment made by the assessee has been incorrectly termed as 'siphoning of funds' by the special auditor, without attempting to appreciate the business rational behind making such investments, which is explained as under:

It is submitted, that RCML, i.e. the investee company, incorporated a wholly owned subsidiary in Mauritius in the year 2008 by the name Religare Capital Markets International (Mauritius) Limited (RCMIL). The RCMIL obtained a unique identification number, from RBI, as per the requirements of Foreign Exchange and Management Act for the purpose of

overseas investments. Copy of certificate issued by RBI is enclosed as Annexure-11. Thereafter, RCMIML acquired an investment banking company in United Kingdom ('UK') through its intermediary subsidiary namely Religare Capital Markets (Europe) Ltd. The said Europe subsidiary further established subsidiaries in various companies and entered in different businesses and joint ventures in United Kingdom, United State of America, Hong Kong, Singapore, Japan, South Africa and Mauritius. Additionally, Religare Capital Markets International (Mauritius) Limited also acquired/ set-up subsidiaries in Sri Lanka and Australia.

However/due to economic slowdown and significant decline in the investment banking business overseas, the business interest of RCMIL running through various subsidiaries were severely affected. Losses incurred by the RCMIML and its step down subsidiaries as on 31.03.2016 are tabulated as under:

S.NO.	Name of Entity	Profit (Loss) incurred till 31.003.2016 (in USD)	Losses Incurred during the year FY 2015-16
1.	Religare Capital Market International Mauritius Limited.	(405,662,933)	(6,173,547)
2.	Religare Capital Market (Europe) Limited.	(118,197,000)	(550,000)
3.	Kyte Management Limited	9,940	(800)
4.	Religare Capital Market (Hong Kong) Limited	(486,499,354)	(188,594,940)
5.	Religare Capital Markets (Singapore) Pte Limited	(22,170,043)	(1,913,889)
6.	Religare Capital Markets Corporate Finance Pte Limited	(38,610,994)	(2,668,609)

The same facts are evident from the relevant extract of audited financial statements of entities mentioned above enclosed as Annexure(s)-12, (12a), (12b), (12c) (12d) and (12e).

In order to meet the financial requirements of its wholly-owned subsidiary and other step-down subsidiaries, RCML was constrained to infuse funds in RCMIL. However, since RCML did not have sufficient own funds to cater to huge financial needs of its foreign subsidiary and its business, it was constrained to request the assessee i.e., its holding company and RHC to provide support in the form of capital funding/infusion. Copy of request letter(s) received from RCML is enclosed as Annexure -13.

In pursuance of the aforesaid request and purely on account of compelling business expediency i.e., to protect the brand name of the group which would be severely affected if business operations of overseas subsidiary closed down, the assessee made investment in RCML in the form of preference share capital. Further, the assessee also entered into tripartite agreement dated 13.02,2012 with RCML and RHC, the terms and conditions of which have explained in later part of this reply.

As a result, the assessee made investment aggregating to Rs.1755.55 crores in RCML from financial year 2008-09 to 2015-16, which, inter alia, included investment of Rs.750 crores made in 0.001% non-convertible cumulative redeemable fully paid up preference shares of RCML.

The aforesaid funds invested by the assessee, it is submitted, were utilized by RCML partly towards making capital contribution to RCMIL for reviving its business and partly towards redemption of its financial commitments. With respect to the same we wish to submit following documents:

- The chart showing details of investment made by the assessee company in RCML and its utilization from FY 2010-11 till FY 2015-16, is enclosed as Annexure-14.
- Further, the chart showing details of investments made by RCML in RCMIL from FY 2010-11 till FY 2015-16, is enclosed as Annexure- 15, along with applications made and approvals obtained from RBI and SEBI is enclosed as Annexure 15(a) and Board resolutions is enclosed as Annexure- 15(b).
- Copy of detailed cash flow statement of RCML from the FY 2010-11 to 2015-16 is enclosed as Annexure-16.

It is further emphatically submitted that the funds infused in RCMIL was utilized by RCMIL for meeting operational expenses, making capital investment' in its subsidiaries An overall fund utilization by RCMIL during the period from FY 2006-07 to FY 2015-16 is enclosed as Annexure-17.

It may thus be appreciated that the funds were ultimately utilized by RCMIL purely for business purposes, in order to revive its faltering business overseas, which fact has not been denied by the auditor in the special audit report.

However, despite best efforts, the banking business of RCMIL and its step-down subsidiaries continued to remain in slump owing to bad market conditions and global financial crisis. As a result, the company suffered consistent losses and some of the step down subsidiaries of RCMIL were forced to shut their operations (e.g. like UK, USA, Japan and Australia) and at some places, RCMIL had to restructure its business to hold minority stake (e.g. in Africa). The chart showing losses suffered by RCMIL in preceding assessment years is tabulated as under:

Financial Year	Profit (Loss) [in USD]
2011-12	(193,704,946)
2012-13	(168,645,752)
2013-14	(27,548,179)
2014-15	(6,346,753)
2015-16	(6,173,547)

The aforesaid losses, it is submitted, resulted in significant erosion in the net-worth of RCMIL and consequent decline in net-worth of RCML. As a result, RCML even made provision for diminution of Rs. 1165 crores in the value of its investments in RCMIL as on 31.03.2013 and showed a cumulative loss of Rs.264.77 crores in its books of account as on 31st March, 2013. Consequently, the assessee company being the holding company of RCML also made provision for diminution in the value of the investment made by it in the shares of RCML. Copy of relevant extract of financial statements of RCMIL for the preceding financial years i.e. FY

2011-12 and FY 2012-13 is enclosed as Annexure(s) 18 and 19.

In addition to this, certain other factors like slowdown in Indian economy, weak currency, high- inflation, low growth projections further led to decline in business opportunities resulting in significant losses to RCML. Therefore, in order to attract more business opportunities and better presentation of its books of accounts, RCML decided to write off its accumulated losses by reducing its share capital.

Consequently, RCML, after obtaining approval of its Board of Directors and shareholders, decided to reduce its capital by extinguishment and cancellation of fully paid up non-convertible redeemable preference shares held by the assessee company having paid up value of Rs.525 crores. The said reduction in capital was in accordance with provisions of section 100 of the Companies Act, 1956, being duly approved in the EGM of RCML on 22.10.2014 and thereafter, sanctioned by the Hon'ble Delhi High Court vide order 23.03.2015, which was registered with ROC on 08.05.2015.

In this regard, following documents are enclosed herewith for your Honour's kind consideration:

- Copy of judgment of the Hon'ble Delhi High Court approving capital reduction - Annexure-3 above;
- Copy of Board Resolution passed by RCML- Annexure-20;
- Copy of approvals obtained from NSE and BSE- Annexure-21;
- Copy of Shareholder's Resolution passed by RCML- Annexure-22;

.....
The details of investment made by the assessee in RCML are provided as under:

(i) Re: Investment of Rs.750 crores in 0.001 % preference shares of RCML

It is submitted that total investment of Rs.750 crores was made in 0.001% preference shares of RCML in two tranches as under:

Re (i): Investment of Rs.250 crores in preference shares of RCML in May, 2011: The assessee made investment of Rs.250 crores in 0.001% non-convertible cumulative redeemable fully paid up preference shares of RCML on 31.05.2011. The aforesaid investment was made in compliance with all the requirements of various authorities as is evident from the following:

- i) Copy of allotment letter/term sheets issued by RCML for issue of shares to the assessee is enclosed as Annexure -23
- ii) Photocopy of the Demat account showing the investment made by the assessee company in the shares of RCML is enclosed as Annexure -24.
- iii) Photocopies of the relevant extracts of bank statements showing payment for purchase of shares is enclosed Annexure-25.
- iv) Copy of board resolutions is enclosed as Annexure -26.

The said funds were utilized by RCML for the purpose of investment in equity shares of RCMIL, its wholly owned foreign subsidiary, in compliance with various statutory requirements as is evident from the following:

- i) Copy of board resolutions passed in the meetings of RCML is enclosed as Annexure- 27;
- ii) Copy of approvals obtained from RBI for remittances made to RCMIL along with copy of application made to RBI is enclosed as Annexure-28.
- iii) Copy of various reporting made to RBI is enclosed as Annexure- 29;
- iv) Copy of No objection obtained from SEBI along with copy of application made is enclosed as Annexure- 30.
- v) Relevant extract of financial statement stating holding of RCML as on 31.03.2012 is enclosed as Annexure- 31.

It may be appreciated in this regard, that due to economic slowdown, the business of RCMIL, the wholly owned subsidiary of RCML, was adversely affected. In order to meet the financial requirements of its step-down subsidiary, it was incumbent on the assessee, being the ultimate holding company, to infuse funds in RCML to revive business operations.

Re (ii): Investment of Rs.500 crores in preference shares of RCML in March, 2013:

It is submitted that the aforesaid investment of Rs.500 crores was made by the assessee pursuant to a tripartite agreement dated 13.02.2012 read along with amendment agreement(s)

dated 24.05.2012 and 28.03.2013 entered between the assessee, RCML and RHC. The aforesaid investment was made in compliance with all the requirements of various authorities as is evident from the following:

(i) Copy of allotment letter/terms sheets issued by RCML for issue of shares to the assessee is enclosed as Annexure -32.

The said funds were utilized by RCML for the purpose of repayment of preference shares liability of RHC. The aforesaid funds were infused by the RHC time to time in the form of preference share capital to meet the financial commitments of RCML, which were owned by the assessee company as per the tri-party agreement. However, due to inability of REL to infuse funds in RCML, RHC has made capital contributions in RCML.

It is submitted, that in terms of the aforesaid agreement, RHC was to provide capital contribution to RCML for its capital requirement commencing from 1st October, 2011 to 30th September, 2015. Further, as per the agreement, RHC undertook to make available adequate capital at all times to RCML. Some of the important terms and conditions of the tripartite agreement are discussed hereunder:

- Clause 2.3 requires RHC to make adequate capital available to RCML at all times to maintain the applicable capital adequacy.
- Clause 4.2 requires that RCML shall utilize the capital contribution received under the agreement from RHC only for purpose of its capital requirement;

- Clause 5 imposed certain restrictions on the assessee regarding transfer of equity shares of RCML held by it. Relevant extracts of clause 5.2 are re-produced as under:

"5.2. In the event REL proposes to transfer all or part of equity shares of RCML held by it or its nominees, to any third party before all the Series B Preference Shares subscribed by RHC during the Capital Contribution Period are fully redeemed through the payment of Redemption Amount per Share for all Series B Preference Shares to RHC, REL shall be obliged to cause such third party to purchase all the outstanding Series B Preference Shares then held by RHC ("Outstanding Series B Preference Shares") alongwith the sale of equity shares held by the REL. Out of the proceeds of the sale of the equity shares held by REL and Outstanding Series B Preference Shares RHC shall first be paid Redemption Amount per Share for all the Outstanding Series B Preference Shares.

Provided however, if the third party refuses to purchase the Preference Shares, REL shall not consummate the sale of its equity shares in RCML."

- Schedule 2 of the Agreement further gave right to RHC to appoint director/nominee director to the Board of RCML Relevant extracts of the schedule are re-produced as under:

"7. Board of directors of RCML

- a. As long as any Series B Preference Shares are outstanding, RHC shall be entitled to appoint 1 (one) director on the board

of directors of RCML, RHC shall also be entitled to appoint its nominee director on the audit committee of RCML.

b. In the event RCML or REL breach the terms and conditions of this Agreement, RHC shall have the right, subject to the receipt of requisite regulatory approvals, in India or outside India, to remove and appoint the majority of the directors on the board of directors of RCML,"

- Thereafter, an amendment agreement dated 24,05,2012 was entered between the parties wherein it was agreed that in case of need of financial assistance, RCML shall require. REL i.e., the assessee to infuse capital and such contribution shall be used only for the purpose of repaying/re-financing of Financial commitments. It was further provided that RCML shall not make any contribution request to RHC for satisfying any of its financial commitments. The relevant extracts of the Clause 4A, inserted vide the amendment agreement is reproduced hereunder:

"4A RCML agrees that as and when RCML requires financial support to satisfy its Financial Commitments, RCML shall delivers written notice (each a "Financial Commitment Request") to REL, requesting REL to infuse capital, on the terms and conditions mutually agreed between REL and RCML, (each such capital infusion is hereinafter referred to as "Contribution"). RCML hereby undertakes that the Contribution shall be used only for the purpose of repaying any portion of the Financial Commitments or re-payment of any refinancing of such Financial Commitments and for no other purpose. RCML further undertakes that it shall not

make any Contribution Request to RHC for satisfying any Financial Commitments."

- Further, new clause 5A was also inserted which required the assessee to make contribution in RCML upon any such request made by RCML. However, it was further provided that the assessee's obligation shall be limited to financial commitments aggregating to Rs.1,119.83 crores that relate to period before 30.09.2011.
- However, due to inability of the assessee to infuse funds in RCML in accordance with amended agreement dated 24.05.2012, RCML made a request to RHC for assistance in re-financing its debt, which was accepted by RHC vide letter dated 01.06.2012.
- As a consequence, another amendment agreement was entered into between the parties on 28.03.2013 wherein the Clause 4A and 5A of the agreement were substituted. The relevant extracts of the amendment agreement are reproduced as under:

"Clause 4A of Amendment No. 1(i.e., RCML's UNDERTAKINGS) shall be deleted in its entirety and shall be replaced by the following:

"4A RCML has delivered a written notice requesting REL to infuse capital for the purpose of satisfying the Financial Commitments and RCML hereby undertakes that the capital infused by REL towards satisfaction of the Financial Commitments shall be used only for the purpose of repaying

the Financial Commitments of re-payment of any refinancing of such Financial Commitments.”

Clause 5A of Amendment No.1 shall be deleted in its entirety and shall be replaced by the following:

“5A On the effective date, REL undertakes to fulfill the Financial Commitments in full by agreeing to subscribe to Series D Preference Shares amounting to Rs.1119,83,24,660 (Rupees One Thousand One Hundred Nineteen Crores Eighty Three Lakhs Twenty Four Thousand Six Hundred and Sixty Only) at such terms as mutually agreed between REL and RCML at the time of issuance of such Series D Preference Shares. For the avoidance of doubt, it is hereby clarified that unless otherwise agreed in writing amongst the Parties, REL obligation to make capital infusion shall only be limited to the Financial Commitments and REL shall not be responsible for any new borrowings nor interest accrued on such new borrowings that relate to a period after September 30, 2011, unless such new borrowings are for the purpose of refinancing the Financial Commitments.”

Therefore, in accordance with the aforesaid amended agreement, the assessee was under an obligation to infuse funds in RCML, its wholly owned subsidiary company. However, due to inability of the assessee to infuse funds in RCML, RCML raised funds from RHC. The same facts is evident from the request for contribution made by the RCML to REL and subsequently on refusal of the aforesaid request, RCML has requested RHC for contribution. Copy of request

letter(s) received from RCML is enclosed as Annexure -13 above.

On perusal of the above, it may be noted that \$ was the primary obligation, of the assessee, being, the ultimate holding company, to infuse funds in RCML to meet its capital commitments. However, due to paucity of funds, the assessee was unable to meet its obligation and RHC stepped in to provide temporary funding support to RCML. Thus, eventually, when the assessee infused its own funds, it was utilized to first repay RHC as such obligation was primarily that of the assessee.

(ii) In the special audit report, the auditor has failed to appreciate the context in which the aforesaid investments were made and has proceeded to draw adverse inference merely because transactions were undertaken between group companies.

It is submitted, that in alleging that funds were "siphoned off by the assessee, the auditor has nowhere been able to pin point how such funds were utilized for non-business purposes. On the contrary, the auditor has accepted that the funds were used to fund RCML, which was suffering losses, which in itself proves that the investment made by the assessee was clearly for the purpose of reviving its subsidiary's business, which was clearly to advance its own business interest and nothing more.

In view of the aforesaid, the conclusion drawn by the special auditor that the funds invested by the assessee in RCML were

siphoned off is based on surmises and conjectures and all such allegations leading to such an inference are false, baseless and contrary to actual facts placed on record.

In the present case, the following facts cumulatively establish, without any doubt whatsoever, that the transactions undertaken by the assessee were bona fide transactions driven by commercial motive:

- (a) The assessee being the ultimate holding company of RCML and RCML, undisputedly had deep business interest in both the entities, which were operating in the similar line of business and their performance had a direct impact on the assessee;
- (b) The assessee, being the ultimate holding company, was obligated to help revive its step down subsidiary RCML which was operating in overseas market, in order to advance its own business interest;
- (c) It was only account of temporary inability on the part of the assessee to infuse funds in RCML that RHC was constrained to make investment in RCML and eventually when the assessee fulfilled its commitment, the funds infused by the assessee was first utilized by RCML to repay RHC;
- (d) The assessee had, as a matter of fact, invested in preference shares of RCML, its wholly owned subsidiary which was duly supported by various documentary;
- (e) The funds infused by the assessee in RCML in the form of investment in preference shares of the said company was undisputedly, as also admitted by the special auditor, utilized

by RCML to make investment in RCMIL, in order to revive its faltering business;

- (f) There was actual payment of consideration by the assessee to RCML and the shares were registered in the name of the assessee and duly reflected in the books of the assessee. The said facts have not been disputed by the special auditor;.
- (g) The capital reduction in preference shares by RCML was duly approved by Hon'ble Delhi High Court vide order dated 23.03.2015.
- (h) The capital reduction by RCML was on account of genuine bona-fide reasons, in so far as the performance of its wholly owned foreign subsidiary was significantly declining and was reporting consistent losses on a year to year basis.
- (i) The transaction of write-off of shares in RCML was undertaken after due approval from the board of the assessee and was duly supported by share transfer and the transaction was duly recorded in the books of the assessee;
- (j) There is not even a shred of evidence that has been pin pointed or placed on record by the special auditor to even remotely doubt the genuineness of transaction undertaken by the assessee or allege that the funds were utilized for non-business purposes.

To summarize, the special auditor has made baseless allegation without appreciating that the transaction had commercial substance, part of legitimate business transaction, having no disguised purpose/ element involved therein and the tax benefit, if at all any, was only incidental in nature and not the main purpose of the transaction.

.....

Rebuttal to specific allegations made by the special auditor

In the special audit report, the auditor has made certain specific allegation to conclude that the capital loss claimed by the assessee is not allowable as under:

- (a) The investment made by the assessee in RCML was not with the intent of earning any return but was merely to facilitate RCML to repay one of its associate company i.e. RHC, therefore, on this account all the investments made by the assessee in RCML were immediately treated as permanently declined to NIL in the year of investment and thereby does not qualify as a legitimate business investment;
- (b) The funds infused in the form of investments made in RCML were ultimately routed and utilized for the benefit of RCML, which is a loss making concern of the assessee group.
- (c) RHC controlled and managed the operations of RCML;
- (d) The capital reduction undertaken by RCML was allegedly not approved by various regulatory authorities.
- (e) Mr. Shachindra Nath and Mr. Anil Saxena are common directors of RCML and RCML (Mauritius) from the financial year 2011-12 to 2015-16. Similarly, Mr. Sunil Godhwani was the common director of the assessee-company and RCML from the financial year 2011-12 to 2015-16. During these financial years, investment were made by the assessee company in RCML and accordingly, RCML made investment in RCML (Mauritius).

- (f) In the financial statements of RCML (Mauritius) it has shown investment of US \$ 7,30,85,459/- (equivalent to INR 580.74 crores) in Kyte Management Limited which was further invested by Kyte in Religare Capital Markets (Hong Kong). Thus, there are assets which are available with RCML (Mauritius) and therefore, the 100% diminution in the value of investment by the assessee company in RCML is not based on facts and circumstances.

Each of the aforesaid allegation of the special auditor is rebutted as under:

Re (a): Investment made without intent of earning return

In the special audit report, the auditor has alleged that the assessee made investment in RCML without the intent of earning any profit/return therefrom as the funds were ultimately infused by RCML into RCMIL, which was suffering huge losses.

In rebuttal to the aforesaid, it is respectfully submitted that an assessee is free to conduct business in a manner most conducive/ advantageous to the assessee. The Revenue cannot step into the shoes of the businessman and determine as to how the business ought to have been carried out. There is no bar under the Act prohibiting an assessee to run the business more efficiently and effectively. In simple words, it is entirely the choice of an assessee to determine as to in what manner business is to be run, transactions are to be

undertaken to carry on the business in an efficient and profitable manner.

Reference can be made to the decision of the Supreme Court in the case of Eastern Investment Ltd. vs. ITO 20 ITR 1 (SC), wherein it was observed that, "there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under Section 12(2) of the Income-tax Act."

The Courts have repeatedly held that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. Reference in this regard is invited to the following decisions of the apex Court:

- CIT vs. Malayalam Plantations Limited: 53 ITR 140 (SC)
- CIT vs. Walchand & Co. etc. (1967) 65 ITR 381
- J K Woollen Manufacturers vs. CIT: 72 ITR 612(SC)
- CIT vs. Birla Cotton Spg. And Wvg. Mills Ltd.: 82 ITR 166 (SC)
- Madhav Prasad Jatia vs. CIT U.P.: 118 ITR 200 (SC)
- S.A. Builders Ltd. vs. CIT: 288 ITR 1 (SC)

The freedom available to carry on business in a manner most conducive to the assessee is, however, not unfettered. The assessee cannot, under the shield of such freedom, for instance, carry out transaction(s) which are sham, bogus or

device to evade tax. So long as the transaction is within the framework of law, having 'commercial substance' (than merely/ mainly to avoid payment of taxes), the authorities have no right to re-write the transaction, notwithstanding that the transaction may result in mitigation of tax liability.

Reference, in this regard may be made to the decision of the Delhi High Court in the case of CIT v. EKL Appliances Ltd. 345 ITR 241 wherein, the Court, in the context of transfer pricing provisions, frowned upon, re-characterization of the transaction, inter-alia, observing s under:

"The significance of the guidelines of OECD lies in the fact that they recognize that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage restructuring of legitimate business transactions. The reason for characterization of such restructuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured."

The Revenue authorities, therefore, cannot, it is submitted, dictate to the assessee, the method/ manner of implementing a transaction nor can the Revenue re-write a legitimate,

bonafide commercial transaction merely because incidental tax benefit results to the assessee.

Reliance is further placed on the decision of the Delhi High Court in the case of *Zaheer Mauritius vs. DIT*: 270 CTR 244 (Del.) wherein debt instruments, including CCDs were upheld to be legally valid mode of investments. The Court relying upon the decision in the case of *Vodafone (supra)* concurred with the view that the transaction must be looked at as a whole, and not by dissecting it and that by applying the 'look at' test, the corporate veil could only be lifted when it was established that the transaction was overtly a sham.

In the present case, the assessee, being the ultimate holding company, was obligated to support its subsidiary company(ies), i.e., RCML,RCMIL and all step down subsidiaries under the umbrella of the holding co. i.e. REL, to revive its business operations which was negatively impacted on account of adverse overseas market conditions as it had deep rooted interest in the business of its step down subsidiary which was in the similar line of business as that of the assessee. Accordingly, the investment was made purely on account of pressing business expediency and was undoubtedly with bonafide intentions to revive the business of its subsidiary. Merely because the assessee did not earn any return from such investment cannot be the basis to doubt the genuineness of the transaction, more so when the investment was made keeping in mind the long term business interest of the group as a whole.

In view of the aforesaid, it is respectfully submitted that there is no warrant to disallow the capital loss suffered by the assessee on account of capital reduction undertaken by RCML. Further, the said capital reduction scheme of RCML was approved by the Hon'ble Delhi High Court as submitted above. Therefore, questioning the capital reduction by the special auditor's tantamount to contempt of court. The revenue must abide by the order of the Hon'ble Delhi High Court and therefore, your goodself is requested to not consider the allegation of the special auditor and allow the claim of the assessee.

Further, with regard to allegation of creation of provision for diminution in value of investment immediately after making investment in RCML in preceding assessment years; it is categorically submitted to the special auditors as well as before your goodself that such provision in diminution in the value of investments was always suo-moto disallowed and never claimed as deduction by the assessee while computing its taxable income. The details respecting the provisions for diminution created on the investment made in RCML from the FY 2011-12 to FY 2015-16 and their treatment is as follows:

Financial Year	Amount of provision created	Remarks
2011-12	2,50,00,00,000	The provision was created in the FY 2011-12 and the same is disallowed while computing, the taxable income of FY 2011-12
2012-13	8,10,00,00,000	The provision was created in the FY 2012-13 and the same is disallowed while computing the taxable income Of FY 2012-13

2013-14	80,60,00,000	The provision was created in the FY 2013-14 and the same is disallowed while computing the taxable income of FY 2013-14
2015-16	2,20,40,00,000	The provision was created in the FY 2015-16 and the same is disallowed while computing the taxable income of F 2015-16

Computation of income highlighting the disallowance of the provision is enclosed as Annexure- 33.

With reference to the same, it is submitted that RCML is a wholly owned subsidiary of the assessee company. RCML is the holding company of RCM International (Mauritius) Limited. Under RCM international (Mauritius) Limited, there are other subsidiary companies which are engaged in the business of financial services.

As per the audited financial statements of RCML for the year ended on 31st March 2016, RCML was incorporated in February 9, 2007 and obtained license as a broker and a full service investment banker from Securities and Exchange Board of India. RCML offered a comprehensive suite of services across investment banking and institutional equities. The investment banking operations provide equity capital markets and corporate finance clients worldwide. The institutional equities business specializes in equity research, sales and execution in emerging market equities. It had a presence in several emerging markets and in key international financial centers through subsidiaries in Singapore and Hong Kong. In India, RCML offers boutique of

investment banking services including equities trading platform to its institutional clients.

As per the consolidated audited financial statements of the RCML with its subsidiaries for the year ended on 31.03.2016, the total revenue from operations were of Rs. 98,43,41,280/- . However there was a loss of Rs. 106,44,71,329/-. Relevant extract of CFS of RCML as on 31.03.2016 is enclosed as Annexure- 34. RCML was incorporated as a wholly owned subsidiary of the assessee company. RCML and its subsidiaries were having global presence in the field of financial services. The object of a business is to do business and if there is loss from such business, it does not mean that immediately the business which had been set up after a lot of effort should be closed down immediately. Since, the said company was running in losses, an agreement was entered into amongst the assessee company, RHC and RCML dated 13.02.2012 as mentioned above which was subsequently amended on 24.05.2012 and 28.03.2013. As per the terms of the said agreement, the assessee company was required to fulfill the financial commitments due to the said company as on 30.09.2011. A statement showing the total commitments as on 30.09.2011 has been enclosed herewith as Annexure - 35.

Being the holding company of RCML and as per the terms of the agreement, the assessee company had to make investment in the shares of RCML. However, since there was accumulated losses in the said company and the said company with its subsidiaries was having negative net worth,

the provision was made in the books of account for diminution of the value of the investment. For the said reason, as per the accounting policy, the provision was made for diminution for the value of such 'Non-Current Investments' in RCML. However, the said provision was not claimed by the assessee as loss till the assessment year 2015-16. It is only after the order of the Hon'ble Delhi High Court dated 23rd March, 2015, the value of shares issued to the assessee company by RCML were considered at Nil and the loss on the same was considered as capital loss.

Merely stating that the provision for diminution was made immediately on the date of investment made by the assessee company in RCML does not prove that the investment made by the assessee in the shares of RCML was not genuine transaction. It was the pure decision of the assessee company whether to invest in a company or not. The revenue cannot dictate the assessee as to how to do business. In this regard, reliance is placed on the following authorities: -

Re (b): Funds utilized for ultimate benefit of loss making concern of group;

As elaborately discussed above, RCML is a wholly owned subsidiary of the assessee. Being the holding company, it was the obligation of the assessee to infuse funds in RCML to enable it to carry on its business operations and meet its financial obligations. Accordingly investment was made in RCML in order to facilitate revival of its step down subsidiary RCMIL, which was incurring huge losses on account of

adverse foreign market conditions and permanent closure of business operations of RCMIL would have severely affected the brand name/image of the group as a whole.

Further, in rebuttal to the allegation made by the special auditor, with respect to the utilization of funds for ultimate benefit of loss making concerns of group, it is submitted that, the business is started by a businessmen considering the future profits from the said business. However, it is not necessary that from starting itself the businessmen start earning profit from the business. Several times, when a business is set up, it takes time to give profits. Initially there may be losses, the assessee company formed subsidiaries to provide financial, services in various countries through these subsidiaries. However, due to some unfavourable circumstances, the business of the assessee could not take off. When the losses accrued to the subsidiaries, the assessee made investment as a business decision to continue the said companies in the hope of favourable conditions and profit in future. The assessee company as well as its subsidiaries was registered with several government agencies and taken registration / licenses for running business. These licenses are not given so easily and therefore even if there were losses continuing the assessee company could not close down the said companies in the hope of future benefits. It is a decision of the businessmen how to run the business, how to grow it, when to close down and till which time bear the losses.

Furthermore, it is pertinent to note that, since, there were losses incurred by the RCML (Mauritius), the provision was created for diminution of the investment made by RCML in the said company. A copy of the audited financial statements of RCML (Mauritius) for the financial year ended on 31st March, 2016 is enclosed as Annexure-12 above, showing the negative net worth of US \$ 14,91,720/- (equivalent to Rs. 8,95,03,200/- considering US \$ 1 = Rs. 60/-) of the said company. The Hon'ble Delhi High Court has also considered the said fact and considering the same only the order was passed for reduction in the share capital of RCML. Refer para no. 6 and 7 of the said order in which the submission of the assessee company were given as were considered by the Hon'ble Delhi High Court.

Merely because there were losses in the subsidiary companies of the assessee company, it cannot be stated that no investment can be made in such case by the holding company in its subsidiary company.

In support of the fact that the step down subsidiary and the foreign subsidiaries were incurring losses, we are placing on record the financial statements of the following entities as Annexure-12 above:

- a) RCML
- b) RCM International (Mauritius) Ltd.
- c) Kyte Management Limited
- d) RCM (Hong Kong) Ltd.
- e) RCM (Singapore) Pte. Ltd.

f) RCM Corporate Finance Pte. Ltd.

In view of the aforesaid, it is respectfully submitted that adverse conclusion drawn by the special auditor merely on the basis of fact that RCML has made investment in its loss making foreign subsidiary, without appreciating the business rationale behind making such investment is highly erroneous.

Re (c). RHC allegedly controlled management and financial decisions of RCML

As regard the allegation made by the special auditor that RHC controlled management and financial decisions of RCML including appointment of key managerial persons and investment decision the same is factually incorrect as explained hereunder:

It is submitted that RHC made substantial investments of Rs.1030 crore upto 31.03.2016 in RCML (out of which 809 crore was redeemed till 31.03.2016,) and merely in order to protect its investments, RHC was granted following rights:

- a) Right to appoint one director to the Board of RCML;
- b) Right to appoint its nominee director on the audit committee of RCML.
- c) In case of breach of the terms and conditions of the agreement, RHC has been given the right to remove and appoint majority of the directors on the Board of RCML;

Re (d): No approval by regulatory authorities sanctioning capital reduction

In so far as the allegation of the auditor that requisite approvals were not obtained from regulatory authorities, it is respectfully submitted that the Hon'ble High Court sanctioned the scheme of capital reduction only on being satisfied that the assessee fulfilled all the stipulated conditions.

It is emphatically submitted with all emphasis that it is trite law that it is not open to anyone, much less the Tax Authorities, to question the genuineness of the scheme duly approved by the High Court. Reliance in this regard is placed on the following decisions rendered in context with effect of scheme of amalgamation duty sanctioned by High Court:

- The Supreme Court in the case of Miheer H. Mafatlal vs. Mafatlal Industries Ltd.: Civil Appeal No. 11 \$79 of 1996 wherein the Apex Court specifically observed that while sanctioning a scheme, the Court has to consider the pros and cons of the scheme with a view to finding out whether scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy.
- The Gujarat High Court in Wood Polymer Ltd., in re: 109 ITR 177 observed that a scheme of amalgamation is framed for achieving some object; companies do not amalgamate for fun. The Court further held that the requirement that the scheme should not be prejudicial to public interest/policy would also include that it should not be in contravention of any law, including tax law.

- It was similarly held by the Karnataka High Court in the case of Shankaranarayana Hotels Pvt. Ltd. vs. Official Liquidator, Govt. of Karnataka (1992) 74 Comp. Cases 290

It may thus be appreciated that once the Scheme is approved by the Court after following due process of law, it cannot be said that the sole purpose of the Scheme was only to avoid tax; indeed, it is settled law that the arrangement, once approved by the Company Court, gets statutory recognition. Reliance in this regard is placed on the following decisions:

- The Gujarat High Court in the case of Vodafone Essar Ltd. Vs. Department of Income Tax : 35 taxmann.com 397, which has subsequently been affirmed by the Supreme Court in Department of Income-tax Vs. Vodafone Essar Gujarat Ltd. (66 taxmann.com 374), held that if the scheme has been framed and is approved by the shareholders in their wisdom, it cannot be said that the scheme itself is floated with the sole criteria of tax avoidance simply because it may have effect and result into avoidance tax.
- The Bombay High Court in the case of Sadanand S. Varde Vs. State of Maharashtra 247 ITR 609 observed that after approval by a Company Court, a scheme of arrangement acquires statutory recognition.

The aforesaid principle of law equally applies in case of scheme of capital reduction too, which too is duly approved by the High Court, Thus, no authority, much less the income tax department, has the right to tinker with the same.

In so far as approvals, it is submitted that the RCML had obtained all requisite approvals from NSE and BSE is enclosed as Annexure -20 and 21 above.

For the aforesaid cumulative reasons, it is respectfully submitted that the capital loss claimed by the assessee is genuine, being guided by pure business consideration and deserves to be allowed.

Re (e): Mr. Shachindra Nath and Mr. Anil Saxena are common directors of RCML and RCML (Mauritius)

The special auditor stated that Mr. Shachindra Nath and Mr. Anil Saxena are common directors of RCML and RCML (Mauritius) from the FY 2011-12 to 2015-16 and Mr. Sunil Godhwani was the common director of the assessee company and RCML from the financial year 2011-12 to 2015-16 when the investment was made by the assessee company in RCML and RCML (Mauritius).

It is not understood as to what the special auditor wants to prove from this fact, RCML is the subsidiary company of the assessee company and RCML (Mauritius) is the subsidiary company of RCML. All these companies are related companies and investment by the assessee company was made in its related companies. When the companies are related companies, how does it matter that these companies are having common directors. It is very common in the business world that the director of the holding company is also director of the subsidiary company and the second layer of subsidiary company. Merely because there are common

directors, does not make a transaction between these companies non genuine. For this purposes, the transfer pricing concept has been introduced in the Income tax Act. There is no observation of the transfer pricing officer for any transfer not being at arm's length price. There is no observation/evidence produced by the special auditor in the special audit report that the investments by the assessee were not genuine and were not at arm's length price. The investments were made by the assessee company as per the terms of the agreement, board resolutions, RBI approvals, wherever necessary etc. No deficiency could be pointed out by the special auditor in any of the documents furnished by the assessee before the special auditor as well, as in the assessment proceedings vide several letters submitted earlier. The copies of the RBI approval letters, board resolutions; investment call letters, letter to SEBI, FEMA compliances etc. are enclosed as Annexure - 15(a) above.

Thus, the observation of the special auditor that the directors were common directors does not prove anything and should not be considered against the assessee company.

Re (f): Creation of 100% diminution in the value of investment by the assessee company in RCML is not based on facts and circumstances as RCML (Mauritius) had investment of US \$ 7,30,85.459/- (equivalent to Rs. 580.74 crores) in Kyte Management Limited:

In this regard, first of all it is stated that the reduction in the value of shares was as per the order of the Hon'ble Delhi

High Court in the case of RCML as per which, the value of shares issued to REL would have no value. Copy of order of Hon'ble Delhi High court is enclosed as Anneure-3 above. Thus, questioning the value of shares at nil and reduction in the investment made by the assessee company in RCML is incorrect.

Secondly, the special auditor has stated that RCML (Mauritius) had an investment in Kyte Management Limited and thus, the net worth of RCML (Mauritius) cannot be considered as nil. In this regard,, the copy of the audited balance sheet of RCML (Mauritius) for the financial year ended on 31st March, 2016 is enclosed as Annexure - 12 above. It should be appreciated that the net worth-of a company is the total of, the share capital as well as the reserves and surplus, However, in the case at present as per the audited balance sheet, the total of the share capital and reserve and surplus of the said company is in negative i.e. US \$ 14,91,720/-. The special auditor has not considered the total balance sheet of the company but only considered a single figure. The total share capital and the reserve and surplus of the company has to be looked into to determine its net worth and not the single amount of any asset. There were other liabilities also which has to be adjusted against the assets to determine the net worth of the company. Hence, the observation of the special auditor regarding the value of investment is incorrect.

Thus, for the aforesaid reason, the loss suffered on transfer of such preference shares held in its subsidiary company is,

in the alternate, allowable as business loss in terms of section 28/37 of the Act.

Re: Disallowance of interest cost of Rs. 5.19 crores on investment of Rs.229.40 crores in RCML

During the assessment year 2016-17, the assessee made investment of Rs.229.40 crores in partly paid-up 0.002% preference shares of RCML. The said investment was made by the assessee out of its own surplus funds and money generated by liquidating other investments held.

In the show-cause notice, your Honour has, by merely relying upon the observations made by the special auditor, directed the assessee to show-cause why the proportionate interest cost of Rs.5.19 crores allegedly incurred in connection with investment of Rs.299.40 crores made in RCML should be not disallowed.

In the special audit report, it has been alleged that the investment of Rs.229.40 crores made by the assessee in RCML was not wholly and exclusively utilized for the purpose of business of the company and accordingly, interest cost aggregating to Rs.5.19 crores, being allegedly attributable to funds utilized for making such investment is proposed to be disallowed.

In response to the aforesaid allegation, it is respectfully submitted as under:

Re: Investment in RCML not wholly and exclusively for the purpose of business

It is submitted that during the relevant assessment year 2016-17, investment of Rs.229.40 crores was made by the assessee in partly paid-up preference shares of RCML as under:

Date of investment	Amount
21.09.2015	Rs.4,99,99,900
30.12.2015	Rs.224,40,00,100
Total	Rs.229,40,00,000

It is submitted that RCML is wholly owned subsidiary of the assessee and is engaged in the business of providing securities broking services and investment banking & financial advisory services. Further, RCML holds 100% shares of Religare Capital Markets International (Mauritius) Limited ("RCMIL"), which is engaged in the business of investment and banking in overseas market. However, due to economic slowdown and significant decline in the investment banking business overseas, the business interest of RCMIL running through various subsidiaries were severely affected.

Therefore, in order to meet the financial requirements of its wholly-owned subsidiary and other step-down subsidiaries, RCML had, from time to time, infused significant amount of capital in RCMIL.

However, since RCML did not have sufficient own funds to cater to huge financial needs of its foreign subsidiary and its business, therefore, RCML had, on multiple occasions,

approached the assessee, its holding company and RHC with a request for capital infusion. As a result, apart from investment made by the assessee in RCML in past assessment years in various forms, a tri-partite agreement dated 13.02.2012 read along with amendment agreement(s) dated 24.05.2012 and 28.03.2013 was entered between the assessee, RCML and RHC, the terms and conditions of which have already been explained supra.

However, due to inability of the assessee company to infuse funds in RCML in earlier assessment years, RHC, in accordance with the agreement, made substantial investment in RCML. However, such investment was subject to the condition that proceeds from any investment made in RCML by the assessee shall be first utilized by RCML to repay its financial commitments and for repayment of re-financing of its financial commitments (i.e. repayment of money invested by RHC).

During the year under consideration, an investment of Rs.229.40 crores was made by the assessee in preference shares of RCML. In this regard, we wish to submit following documents:

- (a) Copy of term sheet of preference shares enclosed as Annexure -36.
- (b) Copy of board resolution passed by the assessee-company at the time of making the investment is enclosed as Annexure-37.

(c) Copy of call letters issued by RCML calling third and final call money is enclosed as Annexure-38.

In accordance with the terms of amended tri-partite agreement, the aforesaid funds were utilized by RCML to repay its financial commitments and for repayment of its financial commitments which included redemption of money invested by RHC. The chart showing utilization of funds by RCML is tabulated as under:

Detail of Investment	Utilization
Investment of Rs.5 crores made on 21.09.2015	Funds were utilized by RCML to repay Inter-Corporate Deposits of Religare Comtrade Limited.
Investment of Rs.224 crores made on 30.12.2015	Funds were utilized by RCML to redeem preference shares issued to RHC during the period June, 2012 to August, 2012 in accordance with the agreement.

It may be appreciated that the assessee, being the ultimate holding company, was obligated to support its subsidiary company(ies) i.e., RCML and RCMIL to revive its business operations which was negatively impacted on account of adverse overseas market conditions as it had deep rooted interest in the business of its step down subsidiary which was in the similar line of business as that of the assessee. Accordingly, the investment was made purely on account of pressing business expediency and was undoubtedly with bona-fide intentions to revive the business of its subsidiary.

In view of the aforesaid, the conclusion drawn by the special auditor that the funds invested by the assessee in RCML were not utilized wholly and exclusively for the purpose of

business, is based on surmises and conjectures and all such allegations leading to such an inference are false, baseless and contrary to actual facts placed on record.

The special auditor did not appreciate that the Hon'ble Delhi High Court accepted the petition considering the business transactions and the losses incurred by the petitioner RCML (i.e. the subsidiary company of the assessee company) and reduced the capital of the petitioner company during FY 2015-16. The copy of Order of Hon'ble Delhi High Court is submitted as Annexure-3 above.

Re: Investment in RCML out of interest-bearing loan funds

Without prejudice to the primary contention that the investment of Rs.229,40 crores made by the assessee in RCML was purely for business purposes, it is submitted that the presumption drawn by the special auditor that the investment made by the assessee in RCML was out of interest bearing borrowed funds is factually incorrect as explained hereunder.

Investment made out of own funds

The special auditor, in the special audit report, has alleged that the assessee has utilized interest bearing funds to make investment in its subsidiary in the form of subscription of preference share capital and thereby interest expense to the extent of Rs.5,19,61,760 is disallowable.

In this regard, as already discussed supra, it is submitted that the investment of Rs.229.40 crores made by the assessee-company in RCML was wholly and exclusively for the purpose of business of the subsidiary company, which further advanced the business interest of the assessee-company.

Further, it is of utmost importance to note that the investment of Rs.229.40 crores made by the assessee was not out of borrowed funds. During the said financial year, the assessee, it is submitted, had surplus funds amounting to Rs.2539.97 crores (comprising of share capital of Rs.203.33 crores and reserves & surplus of Rs.2,336.64 crores). It is respectfully submitted that no portion of the borrowed funds were utilized for making investment in RCML. The said investment of Rs.229.40 crores made by the assessee in the preference shares of RCML was out of its own surplus funds and no part of the borrowed funds were utilized to make any such investment as illustrated as under:

Particulars	Source of funds
Investment of Rs. 5 crores made on 21.09.2015	Partly from proceeds of Rs.47,00,97,881 received on redemption of investment made in Invesco Mutual Fund and partly from surplus funds available with the assessee.
Investment of Rs. 224 crores made on 30.12.2015	Out of proceeds received on redemption of investments made in Inter-Corporate Deposits (ICD) of (a) Oscar Investment Ltd. – Rs.155.04 crores; (b) ANR Securities

	<p>Ltd. – Rs.70 crores.</p> <p>It is submitted that the aforesaid investment in ICD was made by the assessee out of its own surplus funds. Copy of Memorandum of Understanding entered with the said companies is enclosed as Annexure-39.</p>
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It is thus evident from the above that the assessee had more than sufficient own funds to invest in its subsidiary company and the presumption drawn by the special auditor that the investment was made out of borrowed funds is factually incorrect and unsubstantiated.

That apart, your Honour's kind attention in this regard is invited to the following decisions wherein it has been held that in the case of mixed pool of funds, where own funds exceed the amount of investment and sufficient funds/deposits are available for advancing interest free loans or making investment in shares etc. and there is nothing on record to show that borrowed funds have been directly utilized for such purpose, presumption can be drawn that own funds and not borrowed funds have been used to make investments.

The Supreme Court in the case of East India Pharmaceutical Works Ltd. Vs. CIT: 224 ITR 627, though dismissed the appeal of the assessee on the ground that the contention*now raised by the assessee before this Court was not raised before the Tribunal or the High Court, approved

the contention of the assessee that, where interest free funds/ profits available with an assessee are much more than the borrowed funds, it should be presumed that in essence and true character the amounts were paid out of the profits of the relevant year and not out of borrowed funds. The relevant observations of the Court is extracted as under:

“Having considered the rival submissions at the Bar, though we find considerable force in the arguments advanced by teamed counsel appearing for the appellant, but in the facts and circumstances of the present case, on going through the order of the Tribunal as well as the question referred by the Tribunal for being answered by the High Court and the arguments advanced before the Tribunal as well as in the High Court by counsel appearing for the assessee, it is not possible for us to hold that any such contention, as was advanced before this court by the assessee had in fact been advanced either before the Tribunal or before the High Court. The question whether a presumption can be drawn that the taxes were Paid out of the Profits of the relevant year and not out of the overdraft account for the running of the business as was drawn in Woolcomber's case [1982] 134 ITR 219 by the Calcutta High Court and was followed in three other cases of the same High Court, would essentially depend upon the fact as to whether the entire profits had been pumped into the overdraft account, whether such profits were more than the tax amount paid for the relevant year and all other germane factors. But when the assessee never advanced the contention either before the Tribunal or before the High Court and the amplitude of the question posed

before the High Court does not bring within its sweep the contention as is advanced by Mr. Bhattacharyya, learned counsel in this court, it would not be appropriate for this court to look into the additional papers produced by the assessee for entertaining the contention and answering the same.”

.....

In the instant case, as demonstrated above, the assessee had sufficient own funds and thereby it can safely be presumed that the investment was made by the assessee in its subsidiary company out of its own funds.

For the aforesaid cumulative reasons, in the absence of any direct nexus between the interest bearing borrowed funds and investment in preference shares made by the assessee, no disallowance of interest expenditure is called for.

Without prejudice to the aforesaid, it is submitted that, even otherwise, assuming without admitting that borrowed funds were utilized for making investment in RCML during the year since the assessee had deep financial interest in its subsidiary, even then no part of the interest expenditure can be disallowed, since the investment was made out of commercial expediency and, thus interest expenditure was incurred for the purpose of business as explained above.

It is a settled principle of law that where interest free advance/investment is made by a company to another company pursuant to commercial expediency, then interest on funds borrowed by the borrowing company is admissible

as business deduction, irrespective of the fact that no interest is charged/ actually received on such loan.

in the aforesaid decisions, interest on borrowed funds utilized to make investment in sister concerns/ subsidiary companies were held to be allowable as deduction so long as it is established that such investment was made on account of commercial expediency. Further the expression "commercial expediency", as has been explained by Supreme Court in the case of S.A. Builders (supra), is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of the business, with the test of commercial prudence being examined from the point of view of the businessman.

Reference, in this regard, may further be made to the following decisions wherein it has been held that no disallowance of interest is warranted in case where interest free funds are advanced to sister concerns out of commercial expediency or where there is a business justification for the same:

- J K Woolen manufacturers v. CIT: 72 ITR 612 (SC)
- CIT vs. Rockman Cycle Industries Ltd.: 176 Taxman 21 (P&H)
- CIT vs. Dalmia Cement (P.) Ltd.: 254 ITR 377 (Del)
- Regal Theatre vs. CIT: 225 ITR 205 (Del.)
- CIT vs. Bombay Samachar Limited: 74 ITR 723{Bom}

- D & H Secberon Electrodes Pvt. Limited vs. CIT : 142 ITR 528 (MP)D & H Secheron Electrodes P. Ltd. vs CIT: 149 ITR 400 (MP)
- Ram Kishan Oil Mills v. CIT: 56 ITR 186 (MP)
- Amma Bai Hajee Issa v. CIT: 51 ITR 835 (Mad)
- JCIT vs. BeekayEngg. Corpn.: 325 ITR 384 (Chhattisgarh HC)
- Mid-Day Multimedia Ltd. vs. DCIT: ITA No. 263C/Mum/2010 (Mum ITAT)
- Akula and Co. vs. ITO: ITA No. 1786/Mds/2Q09 (ITAT Chennai)

In view of the above, it is submitted that the no disallowance of interest expenditure of Rs. 5,19,61,760/- as computed by the special auditor is called for.

21. On going through the entire matter, the AO held as under:

"The assessee is not able to justify the allegations of special auditors in respect of diversion of funds to RCMIML through its investment in wholly owned subsidiary RCML and the sole purpose of the investment in RCML is to take over the liability of RHC towards capital commitment or repayment of existing liability of RHC. There is no dispute to the fact that no one can step in the shoe of the businessmen but a business expediency need to be established. In the present case, the assessee failed to establish the same except that the same is done as per investment agreement. The investment of funds by the assessee in RCML is used to funds RCMIML which already incurring loss. It was also established that investment in RCML was treated by the assessee as permanently declined to NIL as and when made by the assessee over last several years, which show that there is no intention of receiving it back or earning any income from it. The assessee has also submitted that reduction of capital is made as per order of Delhi High court. This fact is not disputed but the genuineness of investment made by the assessee is considered and found to be bogus.

Therefore, it is established that the assessee company has siphoned off an amount of Rs.1755.50 crores through instrument of investment in RCML over several years. Thus, the special auditor's has appropriately proposed to disallow the short term capital loss of Rs. 500 crores and long term capital loss of Rs. 344,26,75,159/- on account of write off of investment of Rs. 750 crores claimed during the year under consideration.

*Additionally, investment of Rs. 229Cr. made by the assessee company, during the year under consideration, is also part of total investment made in its wholly owned subsidiary. Therefore, considering the amount of Rs. 5,19,61,760/-[2,29,40,00,000 *8.84%, as computed by special auditor on page no. 64 of the special audit report in FORM 6B] on funds being not utilized for wholly and exclusively for the purpose of the business but charged to the Profit & Loss account under Note No 24 'Finance Costs', is disallowed under Section 37 of Income Tax Act, 1961.*

Therefore based on the above facts and circumstances (i) short capital loss of Rs. 500 crores and long term capital loss of Rs. 344,26,75,159/- and (ii) proportionate interest expense amounting to Rs. 5,19,61,760/- under section 37 of the act are disallowed and added back to the total income of the assessee company.

(Disallowance of short term and long term capital loss of Rs.8,442,675,159/-)"

22. During the hearing before us, the Id. DR argued based on the findings taken by the AO as well as the Id. DRP and also filed the arguments in writing which are as under:

"2. The principal objection of the Appellant that the Revenue cannot take contrary stands in case of two assesses who are parties to the transaction. The Appellant states that the genuineness of the investments have been accepted in the hands of RCML for assessment year 2012-13 and 2013-14.

3. *In this connection it is submitted that each assessment year is a separate assessment and res-judicata does not apply in the proceedings under the Income tax Act. The investigations that have been carried out by the AO and special auditor were not available to the Revenue in the assessment year cited by the Appellant. Now that some new and material facts have come on record, the Revenue is entitled to the fruits of that efforts. It would be irrational to expect that these very material findings be ignored simply because this information was not available in a previous assessment.*

4. *The next objection of the Appellant is that once a transaction is done as per legal norms it cannot be termed as a sham. The Appellant has stated that so long as the transaction is within the framework of the law, the authorities have no right to deny the tax benefit if any, arising to the assessee, notwithstanding that the transaction may result a mitigation of tax liabilities.*

5. *In this connection it is submitted that simply because a transaction is given a legal form, the factual matrix against which any judgement needs to be made cannot be ignored.*

6. *In this connection certain material facts that have been brought on record by the Hon'ble DRP (quoted from the reports of the special auditors) are reproduced below:*

4.4 *The Special auditor has given its findings as under:*

"RCML has made investment in RCML (Mauritius) from funds made available by RHC before 31.03.2013. RCML (Mauritius) has shown accumulated losses for US\$ 39,31,42,633/- (equivalent to Rs. 2,358 crores (@US 1 = INR 60) in its financial statements before 2014.

1. *RCH controlled management & financial decision of RCML including appointment of CEO, CFO and investment decision by virtue*

of agreement dated 13.02.2012, which remain unchanged even after amendment agreements dated 24.05.2012 & 28.03.2013.

2. All agreements between RHC, RCML & the assessee company entered on 13.02.2012, 24.05.2015 & 28.03.2013 were signed by same persons namely Mr. Hemant Dhingra (RHC), Mr. Shachindra Nath (the assessee company) and Mr. Anil Saxena (RCML).

4. Mr. Shachindra Nath & Mr. Anil Saxena were common directors of RCML & RCML (Mauritius) from the financial year 2011-12 to 2015-16. Also, Hemant Dhingra was director of RCML from 2007 to 2010. Similarly, Mr. Sunil Godhwani was the common director of the assessee company & RCML from the financial year 2011-12 to 2015-16. This shows that person taking decision are same in all companies and are interrelated.

5. Investment made by RCML in RCML (Mauritius) was controlled by RHC and the same was also made before funds were introduced as per agreement dated 28.03.2013 by the assessee company.

6. The Assessee company through amendment agreement dated 28.03.2013, invest Rs. 810 crores in RCML. These funds were used by RCML to refund investment of Rs. 659 crores made by RHC in RCML preference shares alongwith redemption premium of Rs. 55.60 crores which total to Rs.714.60 crores.

7. The Assessee company further made investment of Rs. 80.60 crores in financial year 2013-14 & Rs. 229.40 crores in financial year 2015-16 in RCML.

8. All value of, investment made by the assessee company in RCML including investment shown in (7) above, were treated as permanently declined to NIL as and when made. The shows that the

assessee company knows before making such investment, that value of its investment will be zero and through such investment, repayment were made to RHC only.

9. *The investment of funds by the assessee company was not in accordance with guidance provided in its Memorandum of Association.*

10. *RCML (Mauritius) has shown investment of more than Rs.580.74 crores in an entity established in British Virgin Islands as on 31.03.2016, which shows that consequential assets of RCML and the assessee company stands recoverable. But the assessee company disclosed such investment as permanently decline to NIL.*

11. *No permission from RBI, Income Tax Department and Enforcement Department were taken for reduction of share capital of Rs. 750 crores at the time of taking approval from Hon'ble Delhi High court an only an undertaking was submitted by Anil Saxena, Director that RCML will comply with them. Therefore, this is for the first time that the issue of write off Rs. 750 crores is considered as per provisions of the Income Tax Act, 1961.*

4.5 *Special Auditor has further observed as below:*

"Therefore, based on above facts and circumstances, it is observed that funds invested by the assessee company in RCML was not made for any business investment but to repay its associate company i.e. RHC by routing of funds through RCML (Mauritius) and booked as loss in RCML (Mauritius) financial statements. The sole purpose of the investment in RCML is to take over the liability of RHC towards capital commitment or repayment of existing liability of RHC. Similarly, investment were made in the financial year 2013-14 & 2015-16 which was treated as loss.

Therefore it is established that the assessee company has siphoned off an amount of Rs. 1755.50 crores through investment of investment in RCML from the financial year 2007- OS to 2015-16 (more than 75% invested after financial year 2011-12).

This issue of investment in Mauritius company over the period of time by the assessee company which are reduced to NIL as and when made, needs to be scrutinized by with respect to financials of the RCML (Mauritius) for which the assessing officer may take appropriate decisions as considered necessary relating to investment made from financial year 2007-08 to 2014-15 and years succeeding year under consideration.

During the year under consideration out of Rs. 1755.50 crores the assessee company made investment of Rs. 229.40 crores in RCML and claimed long term & short term loss on investment of Rs. 750 crores.

(i) Regarding investment of Rs. 229.40 crores from the review of books of accounts of the assessee company, it is observed that the assessee company invested funds in making the investment of Rs. 229.40 crores in RCML which would otherwise results in earning of the interest income. The assessee company simultaneously created provision for diminution in the value of such investment thereby reducing the value of investment to NIL. By no stretch of imagination this is a diminution of the value of the investment but such creation of the provision of the diminution of the value of the investment is nothing but an effective write off of the investment as done in the case of previous diminution of the value of the investment explained earlier with respect to Rs. 750 crores. These funds were utilized by RCML for clearing its financial commitments which got created on account of its investment in its Mauritius subsidiary.

Therefore, as established above, such investment is part of total investment of Rs. 1755.50 crores which were siphoned off by assessee company through RCML, as such, not used wholly and exclusively for the purpose of business of the company & accordingly, interest cost incurred by the assessee company is disallowed to the extent of utilization of funds in the such investments.

During the year under consideration, the shareholder funds was Rs.2539.97 Crores and borrowed funds of Rs. 931.93 crores & investment in subsidiaries are Rs. 3198.62 crores (net of provision). The shows that the shareholder funds were not sufficient to invest in subsidiary and borrowed funds were used for such investment.

Detailed working to compute weighted average cost of commercial paper raised during and working of disallowance of interest was calculated for Rs. 5,19,61,760/ Therefore, the interest of Rs. 5,19,61,760/- on funds being interest expenditure not laid out or expended wholly and exclusively for the purpose of the business & charged to the profit & loss account under not no 24 "Finance Costs" is proposed to be disallowed under Section 37 of Income Tax Act, 1961.

Long Term Capital Loss & Short Term Capital Loss Claimed

From the review of computation of total income submitted, it is observed that the assessee company has claimed short term capital loss of Rs. 500 Crores and long term capital loss of Rs.

344,26,75,159/- on account of write off of investment of Rs. 750 crores in preference shares of RCML, as per following details.

As established above, such investment is part of total investment of Rs. 1755.50 crores which were siphoned off by assessee company

through RCML, therefore, the short term capital loss of Rs. 500 crores and long term capital loss of Rs.

344.26 crores claimed by the assessee company are proposed to be disallowed.

7. It is absolutely clear from the facts that have been brought on record that no matter what is claimed by the Appellant, this transaction is definitely such that its genuineness is in grave doubt.

8. The next objection of the tax payer is that the transaction being one between related parties, cannot be the sole basis to the genuineness.

In this connection it is submitted that transactions between the related parties need to be established to be identical to those that a carried out in an uncontrolled environment. This is the basis of the framing of Transfer Pricing rules all over the world. It may also be pointed out that Transfer Pricing rules within Income Tax Act are anti-avoidance provisions which mean that the primary onus lies upon the assesses to show that the transaction it related party is a arm's length such a nature that would be as carried between unrelated entities.

9. The Appellant has stated that it be the ultimate holding company was obligated to support its subsidiary companies likes RCML to revive their business operations. The Appellant seems to ignore the facts that RHC Holdings Pvt. Ltd. is also part of this multi-national group and it is its responsibility to support the step-down subsidiaries as much it is that of the Appellant. Therefore, the plea that this such a responsibility lies up only upon the Appellant is rather out of place. It is extremely clear that transaction has been so arranged that RHC Holdings Limited is the ultimate beneficiary of

this entire transaction leaving the assessee to suffer losses. It is not a transaction that answers the arm's length standard.

10. Therefore, it is humbly prayed that the addition made by the Assessing officer disallowing the long term and short-term capital losses be upheld."

Sd/-

(BHASKAR GOSWAMI)

CIT(DR)

23. Rebutting the submissions of the Departmental Representative, the Id. AR filed their rejoinder which is as under:

"1. The appellant is in receipt of written submission dated 28.06.2023 filed by the learned Department Representative (DR) in the captioned matter in respect of Ground of Appeal No. 3 to 3.5 - Disallowance of capital loss of Rs.844.26 crore on write-off of preference shares held in Religare Capital Markets Ltd. ('RCML').

2. In this regard, it is respectfully submitted that the allegation/contentions of the learned DR in the aforesaid submissions filed in support of the impugned assessment order, wherein loss on account of write-off of preference share on account of Court approved capital reduction of RCML is disallowed, has already been dealt in the written submissions dated 01.08.2021 already placed on record by the appellant.

3. In continuation to our detailed submission dated 01.08.2021, the point wise brief rebuttal to the submissions made by the Id. DR are as under:

Para of DR Sub.	Allegations in DR Submissions	Rebuttal to Revenue's allegations/ observations
1-3	<p>The Id. DR has mentioned that the arguments of the appellant that investments were accepted as genuine in the hands of RCML in earlier years is not tenable since principles of res judicata do not apply to the income tax proceedings.</p>	<p>The revenue has failed to appreciate the argument of the appellant. It is not the sole case of the assessee that since investments have been accepted as genuine in the hands of RCML in earlier years, loss on write off cannot be doubted in the hands of the appellant.</p> <p>The appellant has, at pages 8-12 of the written submissions, pointed out that relevant investments were made in previous years relevant to assessment years 2012-13 and 2013-14 and such investments were duly accepted as genuine by the assessing officer in the hands of the appellant after detailed verification in those years as demonstrated from the questionnaire raised and replies furnished.</p> <p>Further, as regards write off, the same was a consequence Court approved capital reduction of investee company, i.e., RCML. It is important to note that the capital reduction is accepted as genuine in the hands of RCML as no adverse inference is drawn in the hands of RCML.</p>
4 and 5	<p>The appellant has objected that once a transaction is done as per legal norms and falls within the framework of law, it cannot be termed as a sham.</p> <p>In this connection it is submitted that simply because a transaction is given a legal form, the factual matrix against which any judgement needs to be made cannot be ignored.</p>	<p>It is respectfully submitted that the investment in preference shares of RCML was made out of business exigency to enable RCML to expand investment banking business overseas through a wholly owned subsidiary company in Mauritius, i.e., Religare Capital Markets International (Mauritius) Limited ('RCMIML').</p> <p>However, due to year-on-year losses incurred by foreign companies, slower economic growth and global financial crisis, the net-worth of RCMIML was significantly eroded, which led to significant losses to RCML.</p> <p>Accordingly, after considering all facts and with the aim to reduce the losses, a scheme of reduction of share capital of RCML was sanctioned by the Delhi High Court, wherein, the High Court categorically took note of business rationale behind funds being invested.</p> <p>It was only after the capital reduction of RCML was sanctioned by the Hon'ble Delhi</p>

		<p>High Court that the appellant had written off its investment made in preference shares of RCML aggregating to Rs.750 crore.</p> <p>In this regard, it is a trite law that scheme of reorganization sanctioned by High Court operates as a judgment in rem, binding on all stakeholders [refer Marshall Sons & Co (India) Ltd v.v. ITO: 223 ITR 809 (SC); Dalmia Power Ltd vs. ACIT: 420 ITR 339 (SC); Ponni Sugar (Erode) Ltd vs. ACIT: WP 12510/2004 (Mad)].</p> <p>Benches of the Tribunal have in the undemoted cases unanimously held that sanctioned scheme of arrangement cannot be doubted as sham / colourable device by the Revenue:</p> <ul style="list-style-type: none"> • Aamby Valley Ltd vs ACIT: ITA No.1 148/Del/2017 (Delhi Trib.) • Priapus Developers (P) Ltd vs ACIT: 176 ITD 223 (Delhi Trib.) • ACIT vs TVS Motors Co Ltd: 8 taxmann.com 288 (Chennai Trib.) • Electrocast Sales India Ltd vs DCIT: 170 ITD 507 (Kolkata Trib.) • Purbanchal Power Co Ltd vs DIT: ITA No.201/Kol/2010 (Kolkata Trib.) - affirmed by Calcutta High Court in 145 taxmann.com 215 (2022) <p>In view of the aforesaid, the appellant was constrained to write off its investment made in preference shares of RCML which stood extinguished as a result of binding scheme of reduction of share capital sanctioned by High Court and accordingly, the loss incurred on such write off is allowable.</p> <p>This aspect has been dealt in detail in the written submissions and not repeated herein for the sake of brevity.</p>
6-7	Referred to DRP order and observations in Special Audit Report	The observations of the DRP/ AO basis the report of the special auditor, as reproduced by the DR in para 6 and 7, have been rebutted at length at pages 12-37 of the written submission dated 01.08.2021 filed by the appellant and the same are not repeated here for the sake of brevity.
8	Transactions between related parties need to	In this regard, as stated supra, the shares

	<p>be established to be identical to those carried out in an uncontrolled environment. This is the basis of the framing of Transfer Pricing rules all over the world. It may also be pointed out that Transfer Pricing rules within Income Tax Act are anti-avoidance provisions which mean that the primary onus lies upon the assessee to show that the transaction with related party is a arm's length such a nature that would be as carried between unrelated entities.</p>	<p>have been written off by the appellant only as a consequence of the reduction of share capital of RCML sanctioned by the Delhi High Court. Merely because the transaction was between related parties, the same cannot be the basis to doubt the genuineness of the transaction.</p> <p>The appellant has, in order to provide the genuineness of the transaction, placed on record all possible documentary evidences and the business rationale has been established beyond doubt. Pertinently, not an iota of evidence to the contrary has been placed by the assessing officer or special auditor.</p> <p>In view of the aforesaid, the write-off of shares, as a consequence of the binding scheme sanctioned by the High Court after acknowledging the same to be between related parties, cannot be doubted.</p> <p>It is further submitted that the reliance on the provision of Transfer Pricing placed by the DR is, it is respectfully submitted, not relevant to the facts of the present case inasmuch as the said provisions apply only to international transactions or specified domestic transactions entered into between two or more associated enterprises.</p> <p>The transaction under consideration i.e., capital loss arising on write-off of shares pursuant to the binding scheme of High Court, it is respectfully submitted, is not covered under the definition of either 'international transaction' or 'specified domestic transaction'. Being so, reference made to the TP provision for determining ALP is misplaced.</p> <p>That apart, the Id. DR has erred in conveniently shifting the burden on the assessee by alleging that it was the duty of the appellant to prove the genuineness. Be that as it may, it is reiterated that all the possible documentary evidences including the following was placed on record by the appellant:</p>
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		<p>a) A detailed working showing the date of purchase, purchase price, number of shares, and consequential capital gain on</p> <p>b) extinguishment (pg 945 of PB Vol III);</p> <p>c) A copy of allotment letter/term sheets issued by RCML for issue of shares to the appellant (pg 946- 947 of PB Vol III);</p> <p>d) The photocopy of the demat account showing the investment made (pg 952- 955 of PB Vol III);</p> <p>e) The photocopies of the relevant extracts of bank statements showing payment for subscription of shares (pg 956 of PB Vol III);</p> <p>f) A copy of agreement between the appellant company, RHC Holdings Pvt. Ltd. (RHC) and RCML entered on 13.02.2012 alongwith first amendment dated 24.05.2012 and second amendment agreement dated 28.03.2013 (detailed infra) (pg 957- 986 of PB Vol III);</p> <p>g) Resolution passed in 2013 for infusing Rs.1120 crores by appellant in RCML alongwith call letters from RCML qua outstanding amount on partly paid- up preference share (pg 988-991 of PB Vol III);</p> <p>h) Order of the Delhi High Court approving reduction in the capital investment made by the appellant company in RCML (pg 1181-1190 of PB Vol III);</p> <p>i) A copy of opinion from Shri Arvind Datar, Senior Advocate in respect of capital loss on the extinguishment of the rights in the preference shares (pg 1229-1236 of PB Vol III).</p>
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		<p>j) Detailed explanation and rebuttal to all the allegations of the assessing officer/ special auditor.</p> <p>On the other hand, Revenue has not brought on record any evidence, much less credible evidence, to prove that the transaction entered into by the appellant was not genuine. In absence of any evidence, the adjustment made by the assessing officer is illegal and bad in law.</p>
9.	<p>The Appellant has stated that it be the ultimate holding company was Obligated to support its subsidiary companies like RCML to revive their business operations. The Appellant seems to ignore the facts that RHC Holdings Pvt. Ltd. is also part of this multi-national group and it is its responsibility to support the step down subsidiaries as much it is that of the Appellant.</p> <p>Therefore, the plea that such a responsibility lies up only upon the Appellant is rather out of place. It is extremely clear that transaction has been so arranged that RHC Holdings Limited is the ultimate beneficiary of this entire transaction, leaving the assessee to suffer losses. It is not a transaction that answers the arm's length standard.</p>	<p>While making the said allegations, the Id. DR, it appears, has not appreciated the structure of organizations. The observations made by the Id. DR is based on incorrect factual premises and thus not sustainable.</p> <p>Kind attention in this regard is invited to the inter-company holding/ relationship of entities which have entered into the transaction under consideration:</p> <p>On a perusal of the aforesaid structure, it will be appreciated that RHC Holding had a stake of only 22% in the appellant company. It will thus be appreciated that RHC Holding, not being a majority shareholder of the appellant, was not obligated to support the step-down subsidiaries of the appellant.</p> <p>It was, in fact, the appellant's responsibility to assist the subsidiaries inasmuch as the appellant was holding 100% shares of RCML, which, in turn, held 100% shares of the foreign subsidiaries.</p> <p>Further, as explained in detail in the written submissions, the funds were paid to RHC as repayment of commitments met by RHC for supporting RCML at request of the appellant. RHC was not the ultimate beneficiary as alleged and that, too, at the behest of the appellant suffering the losses.</p>

24. We have perused the special audit report filed u/s 142(2a) of the Income Tax Act, 1961, Forensic Audit Report in the case of the assessee, order of SEBI u/s 11(1), u/s 11(4), u/s 11B of the SEBI Act, 1992, orders of the revenue authorities, submissions of both the counsels, written submissions and other facts on record.

25. The assessee invested Rs.250 Cr. on account of purchase of 2.5 crores of shares each worth Rs.10/- having a premium of Rs. 90/- per share in March 2011. The assessee has made further investments in March 2013 of Rs.500 Cr. of 50 crores of shares each worth Rs.10/- in its wholly owned subsidiary, M/s Religare Capital Market Ltd. (RCML). The RCML further owned a subsidiary company in Mauritius namely M/s Religare Capital Market International (Mauritius) Ltd., (RCMIML). This company RCMIML had UK subsidiary called M/s Religare Capital Markets (Europe) Ltd. which had JVs/ wholly owned subsidiary (WOS) in various countries like, US, UK, Singapore. Thus, the entire monies in the Indian company went into subsidiary companies situated abroad. The Mauritius entity namely, RCMIML incurred losses resulting in erosion of its net worth. RCML by the way of the Hon'ble High Court order allowing the value of the investments made by the appellant of Rs.750 Cr. in the RCML stood extinguished became Nil and the assessee booked capital loss on such investments.

26. The arguments of the assessee that the investment was duly accepted as genuine in the past years and hence the disallowance of loss cannot be upheld is found to be a non-plausible explanation as the revenue has examined the source

of investment which doesn't necessarily certify the purpose, scheme and the genuineness of the investment. The sources have been examined by the revenue department in relation to the provisions of Section 68. Hence, it cannot be considered as a contrary view taken by the revenue in disallowing the losses claimed. It is a fact on record that the investments have been made in RCML owing to the losses incurred by the RCMIML and since RCML did not have sufficient own funds to cater the financial needs of foreign subsidiary, the funds of the assessee have been used. The assessee tried to protect the brand name of the group by infusing the capital in RCML in the form of preferential shares which have been ultimately utilized by RCMIML. In total, the assessee made investments aggregating to Rs.1755.55 Cr. in RCML from F.Y. 2008-09 to F.Y. 2015-16 which included the investments of Rs.750 Cr. made in 0.001% non-convertible cumulative redeemable fully paid up preferential shares of RCML. Thus, this is a clear case of flight of capital from India to abroad and Indian entity incurring and claiming long term capital loss of Rs.344.26 Cr. and short term capital loss of Rs.500 Cr.

27. These entire operations of the assessee engender us to examine the concepts of tax planning vs. tax avoidance vs. tax evasion. Tax planning is a completely logical and legal way of minimizing one's tax liabilities by availing the benefits of all the provisions, deductions, exemptions and treaty benefits provided under the Income Tax Act. It is a process of arranging the financial activities and transactions in such a way that it legally minimizes the amount of the taxes, the taxable entities required to pay. It is an acceptable legitimate practice which allows the

taxpayers to use the Income Tax Act to their advantage while observing the due compliances with the Act. Tax planning also involves processes namely, analysis, restructuring, investment, expansion, capitalization and other legal processes. At the same time, the concept of tax avoidance is primarily an Act of minimizing one's tax liability by legitimate methods and procedures which are within the contours of law and the legal proposition. It would be a well thought plan within the legal domain. Tax avoidance also involves structuring the financial affairs in such a way it complies with the letter of the law. It is for the tax authorities to unravel the actual working, structure and scheme of the assesseees to bring such incomes to tax by collating, examining and investigating the affairs of the entity and collection of tangible evidences. Tax evasion is the activity in which the entity deliberately underreports the income, inflates the deductions and shows bogus expenses in order to minimize the tax liability. Tax evasion involves acts like non-reporting of cash transactions and stashing of money in offshore accounts etc. The processes of tax evasion, tax avoidance and tax planning are to be examined keeping in view the nature attributes, permissibility, motives, adjectives and consequences.

28. In the instant case, the banking business of the RCMIML and its step down subsidiary remained in slump as per the assessee as a result of which the RCMIML suffered losses and some of the step down subsidiaries of the RCMIML have shut down their operations. The RCMIML has consistently incurred losses from the F.Y. 2011-12 to F.Y. 2015-16. The RCMIML is a

Mauritius entity which in turn had a UK subsidiary. The losses made by RCMIML in the last 5 years is tabulated below:

Financial Year	Loss incurred (USD)
2011-12	(193,704,946)
2012-13	(168,645,752)
2013-14	(27,548,179)
2014-15	(6,346,753)
2015-16	(6,173,547)

29. The assessee has invested in the company RCML which is the 100% shareholder of RCMIML in the A.Y. 2011-12 and A.Y. 2012-13. There was no benefit received by the assessee by making investment in this company. It is not necessary that all the investments should yield profits and the revenue also cannot look into business propositions of the assessee. At the same time, the taxation principles in any sovereign nation aims & protects the amounts due to them by way of taxation.

30. Further, we have found that the losses incurred by RCMIML and its step down subsidiary are as under:

S.NO.	Name of Entity	Loss incurred till 31.003.2016 (in USD)	Losses Incurred during the year FY 2015-16
1.	Religare Capital Market International Mauritius Limited.	(405,662,933)	(6,173,547)
2.	Religare Capital Market (Europe) Limited.	(118,197,000)	(550,000)
3.	Kyte Management Limited	9,940	(800)
4.	Religare Capital Market (Hong Kong) Limited	(486,499,354)	(188,594,940)
5.	Religare Capital Markets (Singapore) Pte Limited	(22,170,043)	(1,913,889)
6.	Religare Capital Markets Corporate Finance Pte Limited	(38,610,994)	(2,668,609)

31. We have also gone through the tripartite agreement with the assessee with RCML and RHC. We have also gone through the forensic report in the case of the assessee submitted to SEBI which found out diversion of funds by the assessee. The relevant portion of the order of SEBI dated 14.03.2019 is reproduced as under:

"1. Securities and Exchange Board of India (hereinafter referred to as "SEBI") received complaints, inter-alia, alleging financial mismanagement and diversion of funds in Religare Finvest Ltd. (hereinafter referred to as "RFL"), a subsidiary of Religare Enterprises Limited (hereinafter referred to as "REL"), a listed company, for the benefit of promoters / group companies of REL. The complaints alleged inter alia the following:

a) RFL had not complied with its Board approved investment policy with respect to fixed deposits ("FDs") and that FDs amounting to Rs. 750 Crores (approx.) placed with Lakshmi Vilas Bank (hereinafter referred to as "LVB") had been adjusted by LVB against loan availed by two group companies of REL's promoters.

b) Investment by RFL in Non-Convertible Debentures ("NCDs") of OSPL Infradeal Private Limited (hereinafter referred to as "OSPL") amounting to Rs.200 Crores was allegedly not consistent with the Board approved investment policy of RFL. As per the complaint, the said funds had been transferred by RFL to OSPL without any approval and the entire documentation was done thereafter i.e. approximately 3 months after the actual transfer of funds. The date of maturity of these debentures was June 14, 2017. However, the NCDs were not re-paid by OSPL even as on September 30, 2017. Since OSPL, which was incorporated on November 07, 2012, had a net worth of Rs. 1 Lakh only as on March 31, 2016, it was alleged that these transactions had been designed to facilitate back-to-back borrowing by and for the benefit of the Promoters and group entities of REL and the recorded recipients of funds were merely a facade for REL's promoters and their agents.

There was no approval or documentation with respect to corporate loan given by RFL to Bharat Road Network Limited (hereinafter referred to as "BRNL") amounting to Rs.50 Crores. There was allegedly no credit justification for making these investments, which appear to be of dubious quality, given lack of interest payment and non-repayment.

d) On January 27, 2017, RBI issued a letter to RFL raising concerns regarding its Corporate Loan Book ("CLB") for the FY 2014-15. RBI, in its letter, inter alia, mentioned that some of the top borrowers of RFL were related entities and financials of such borrowers were weak and raised concerns regarding the creditworthiness of some borrowers and inefficient credit appraisal methodologies adopted by RFL to advance loans to group companies with weak financial standing. Further, RBI had raised concerns regarding improper practices followed by RFL and observed that accounts of various borrowers were used by RFL to route the funds to group companies. RFL had submitted its reply to RBI (letter dated February 20, 2017) stating that it would be able to reduce the CLB portfolio by Rs.100 Crores in the first quarter of FY 2017-18. However, the total CLB exposure increased from Rs.1,846 Crores as on March 31, 2017 to Rs.2,517 Crores, as on October 31, 2017.

e) With regard to the aforesaid CLB, it was alleged that companies to whom loans have been given by RFL under CLB were not the actual users of loans and that they were primarily used as vehicles for usage of the funds by others as well as by various group companies of the promoters of REL.

f) Further, the auditors of REL viz. PricewaterhouseCoopers (PwC) had qualified their opinion on the financials of REL for FY 2016-17 highlighting the amounts doubtful of recovery to the tune of Rs.1,846 Crores and highlighted directions from the RBI dated January 27, 2017 regarding concerns over the corporate loan portfolio of RFL.

2. In order to find the ultimate utilization of funds of RFL, the entire transactions in the bank accounts of the companies and the promoter/promoter connected entities needed to be examined in detail from FY 2008-09 to FY 2017-18. This required analysis of voluminous data in

trailing of funds in the bank statements of the RFL, promoter/ promoter connected entities and any other entities that have significant financial transactions with these entities along with the analysis of nature of transactions and underlying documents. Hence, SEBI appointed MSA Probe Consulting Pvt. Ltd. ("MSA") as a Forensic Auditor on May 10, 2018 to examine the alleged diversion of funds from REL/ its subsidiaries for the benefit of promoter / promoter connected entities.

3. MSA submitted its final report in the matter of REL/RFL on December 12, 2018 (hereinafter referred to as "The audit report"). The major findings of MSA are as under:

A. Diversion of Funds through fixed deposits with Lakshmi Vilas Bank (LVB) of Rs. 750 Crores:-

(a) RFL had placed Rs. 750 Crores (approx.) as fixed deposits with LVB. Against these fixed deposits of Rs. 750 Crores, LVB had given loan of Rs. 729.13 Crores to Ranchem Private Limited ("Ranchem") and RHC Holding Private Limited ("RHC Holding") which were the promoter group entities of REL. Further these promoter group entities then utilized the said money to pay off their debts to multiple entities and for internal purposes. The details of the same are as follows:-

(b) RFL placed fixed deposits amounting to Rs. 750 Crores with LVB on November 11, 2016 (Rs. 400 Crores) and January 09, 2017 (Rs. 350 Crores) at interest rates ranging from 4.50% - 5.25% per annum. At the same time, the company had outstanding working capital loans in the form of Cash credit and Overdraft loans facilities from different entities during the same period borrowed at a cost between 10.10% -10.19% per annum. Thus the company placed funds in fixed deposits earning them 4.50% - 5.25% when they were paying 10.10% - 10.19% for Overdraft loans, resulting in a direct loss of over 5% on the whole amount.

(c) As the cost of funds to RFL was much higher (almost double) than the rate of return i.e. interest on fixed deposits it was getting from LVB, the fixed deposits placed by RFL were not in the normal course of business.

(d) The audit report stated that apart from the two fixed deposits placed with LVB, RFL had opened multiple fixed deposits during the year 2016-2017 for various business purposes, such as for availing Overdraft Facility, giving guarantees to Regulatory Authorities or for facilitating securitization transactions. All of these fixed deposits were pledged and made with specific business related purposes. Given that the fixed deposits placed with LVB were the only ones against which no lien was created and no business transaction was facilitated, it strengthens the concern that the fixed deposits were not created as part of normal business transactions.

(e) Moreover, RJFL and REL were having banking relations with some of the largest banks in India, including State Bank of India, Punjab National Bank, HDFC Bank, Bank of India, ICICI Bank, among others. LVB is comparatively a small bank with total net worth (aggregate of Share Capital and Reserves & Surplus) of Rs. 1,763.59 Crores as on March 31, 2016.

(f) Thus, as far as safety of the deposits is concerned, placing fixed deposits of Rs. 750 Crores at a single bank with relatively low net-worth is difficult to justify. Also, all the other FDs opened by RFL were with large sized banks. The choice of a much smaller bank for creating fixed deposits of such a huge amount against which it had not taken any loan itself or had not given it as security, raises doubts about its true purpose.

iii. The Noticee nos. 24 and 25 (viz. Shri Malvinder Mohan Singh and Shri Shivinder Mohan Singh) shall not associate themselves with the affairs of REL and RFL, in any manner whatsoever, till further directions."

32. We have gone through the order of Hon'ble High Court in Company Petition No. 680 of 2014 in the matter of Section 100 to Section 105 of Companies Act, 1956 r.w.r. 46 and 47 of the Companies (Court) Rules, 1959. The petition filed pertains to Companies Act by which the Hon'ble High Court agreed the reduction in the share capital in accordance with the Companies Act. The assessee was authorized by virtue of Article 24 of its

Articles of Association to reduce its share capital as per the provision of Section 100 of Companies Act, 1956. As per the provisions of the Companies Act and Article of Association, the Hon'ble High Court held that there was no legal impediment in allowing the petition. The issue of tax liability has never been the grounds raised before the Hon'ble High Court. Further, we are in agreement with the arguments of the revenue that RHC controlled management & financial decision of RCML including appointment of all the key personnel and the agreements between RHC, RCML & the assessee company entered on 13.02.2012, 24.05.2015 & 28.03.2013 were signed by same persons namely Mr. Hemant Dhingra (RHC), Mr. Shachindra Nath (the assessee company) and Mr. Anil Saxena (RCML). Mr. Shachindra Nath & Mr. Anil Saxena were common directors of RCML & RCML (Mauritius) from the financial year 2011-12 to 2015-16. Also, Hemant Dhingra was director of RCML from 2007 to 2010. Similarly, Mr. Sunil Godhwani was the common director of the assessee company & RCML from the financial year 2011-12 to 2015-16. This shows that person taking decision are same in all companies and are same. Investment made by RCML in RCML (Mauritius) was controlled by RHC and the same was also made before funds were introduced as per agreement dated 28.03.2013 by the assessee company. Ultimately, the funds invested in RCML or used to refund investment of RHC in RCML preference shares. The Assessee company further made investment of Rs. 80.60 crores in financial year 2013-14 & Rs. 229.40 crores in financial year 2015-16 in RCML. All value of, investment made by the assessee company in RCML including investment shown in (7) above, were treated as permanently

declined to NIL as and when made. The shows that the assessee company knows before making such investment, that value of its investment will be zero and through such investment, repayment were made to RHC only. RCML (Mauritius) has shown investment of more than Rs.580.74 crores in an entity established in British Virgin Islands as on 31.03.2016.

33. From the entire events, it can be found that the funds invested by the assessee company in RCML was not made for any business investment but to repay its associate company i.e. RHC by routing of funds through RCML (Mauritius) and booked as loss in RCML (Mauritius) financial statements. The sole purpose of the investment in RCML is to take over the liability of RHC towards capital commitment or repayment of existing liability of RHC and investment made by the assessee company are treated as loss. We are in agreement with the submissions that anti-avoidance provisions provides that the primary onus lies upon the assesses to show that the transaction it related party is a arm's length such a nature that would be as carried between unrelated entities. The assessee states that it be the ultimate holding company was obligated to support its subsidiary companies likes RCML to revive their business operations, if so, the entity RHC Holdings Pvt. Ltd. which is also part of this multi-national group and it is its responsibility to support the step-down subsidiaries as much it is that of the assessee. From the entire facts, it is clear that transaction has been so arranged that RHC Holdings Limited is the ultimate beneficiary of this entire transaction leaving the assessee to incur losses and hence, the capital loss claimed by the assessee cannot be allowed.

34. In the result, the appeal of the assessee on this ground is dismissed. With regard to the disallowance of interest, since the assessee had sufficient own funds, no disallowance on account of interest is called for.

Grounds of Appeal Nos. 5.0 to 5.3

Sale of Investment in Shares (ARLIC):

35. The appellant had entered into a joint venture agreement dated 19.06.2007 with AEGON Group [Aegon India Holding B.V. and Aegon International N.V.] to co-promote a Joint Venture (JC) company in India to be called Aegon Religare Life Insurance Company Limited ('ARLIC') for providing life insurance and pension services in India.

36. In accordance with the aforesaid joint venture agreement, the appellant invested an aggregate amount of Rs.576,62,00,000, for acquiring 44% stake in the company, in tranches for a period of eight years from assessment years 2007-08 to 2014-15. The joint venture company formed by appellant and Aegon, i.e., ARLIC was duly registered with the Insurance Regulatory and Development Authority ('IRDA') vide certificate dated 27th June, 2008. The aforesaid investment in shares of ARLIC was disclosed by the appellant under the head 'Non-Current Investments' in its balance sheet in the relevant financial year(s) 2007-08 to 2014-15.

37. During the year under consideration, the appellant sold its entire holding in ARLIC i.e., 57,66,20,000 shares to M/s. Bennett Coleman & Co. Ltd. In pursuance of the said transaction of sale of shares, the appellant company disclosed long-term capital gain of Rs.10,60,83,585 and short-term capital gain of

Rs.38,12,53,181, which was duly offered for tax in the return of income under the head "capital gains". The details are as under:

Particulars	As per Profit and Loss Account	Profit as per the computation of income		
	Profit on Sale	LTCG	STCG	Total
Sale Consideration	971,45,04,162	871,74,79,507	99,70,24,655	971,45,04,162
COA / Indexed COA	576,62,00,000	840,18,04,975	59,18,00,000	899,36,04,975
Cost on sale/ expenses	23,35,62,021	20,95,90,947	2,39,71,074	23,35,62,021
Net Amount	371,47,42,141	10,60,83,585	38,12,53,581	48,73,37,166

38. In support of the aforesaid, the following documents have, inter alia, been placed on record before the revenue authorities:

- Detailed working of capital gain/loss (refer pg 1367-1368 of PB Vol IV);
- Detailed working of sale consideration (refer pg 1369-1372 of PB Vol IV);
- Copy of the original Joint Venture agreement dated 19.06.2007 read with Novation Agreement dated 23.05.2008 entered, inter alia, between the appellant with Aegon for investment in ARLIC (JV Agreement) (refer pg 1374-1485 of PB Vol IV);
- Copy of the restated joint venture agreement entered by the appellant with Aegon for investment in ARLIC on 30.03.2013 (refer pg 1504-1531 of PB Vol IV);
- Copy of the restated joint venture agreement entered by the appellant with Aegon for investment in ARLIC on 25.08.2014 (refer pg 1532-1569 of PB Vol IV);
- Copy of first share purchase agreement entered into between the company & Bennett Coleman & Co. Ltd. on 08.05.2015 (refer pg 1617-1646 of PB Vol IV);

- Copy of secondary share purchase agreement entered on 08th May 2015 between the appellant company and Bennett, Coleman & Co. Ltd (refer pg 1647-1687 of PB Vol IV);
- Copy of the demat account showing the shares held by the appellant and sold during the year under consideration (refer pg 1700-1707 of PB Vol IV);
- The relevant extracts of the copies of the bank statements and the audited balance sheet for FY's 2007-08 to 2014-15 showing the investment of the appellant in the shares of ARLIC (refer pg 1708-1713 of PB Vol IV);
- Evidences in support of financial advisory fee for sale of shares (copy of invoices) (refer pg 1740-1749 of PB Vol IV)

39. The Assessing Officer held that the transaction is taxable as business income and not capital gains, treated the aforesaid sale of investment in shares as 'sale of business' in joint venture company and re-characterized the gains arising thereon as business income of the appellant in terms of section 28(va) read with section 28(iv) of the Act. Accordingly, the Assessing Officer made an addition of Rs.392.77 crores to the business income of the appellant. The Id. DRP confirmed the addition.

40. Aggrieved, the assessee filed appeal before the Tribunal.

41. The arguments taken up by the Id. AR before us are as under:

"The assessee is the holding company of Religare Group of companies and is engaged in the business of acquisition of shares

and securities of subsidiary companies/ joint venture companies. The appellant, being a non-deposit taking Core Investment Company (CIC) is not engaged in the business of purchase and sale of shares but invests amount in shares of group companies/ joint ventures to earn reasonable return/ appreciation on such investments. Investing in shares of group companies with an intent to earn appreciation, it will be appreciated, is the business model of the appellant company, which is in accordance with the guidelines issued by the RBI for CICs.

5.10 In this background, it will be appreciated that investment in shares of ARLIC was made with a purpose of long-term capital appreciation and not as 'stock-in-trade'. The said investment, it is submitted, was not made with a purpose of starting a new line of business, but to hold shares of a company engaged in insurance business as a long-term strategic investment.

Legal position:

5.11 It is respectfully submitted that the nature of income arising from shares depends upon the nature of asset, viz., whether the shares were held as "capital asset" or as "stock-in-trade".

5.12 The term 'capital asset' has been defined in section 2(14) of the Act as under:

"Capital asset' means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include— any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;"

5.13 The term 'stock in trade' has not been defined under the Act. In general parlance 'stock-in trade' is understood as an asset, which is held with an objective to deal therein.

5.14 'Stock-in-trade' is something "in which" a businessman deals, whereas a 'capital asset' is something "with which" he deals. The essential characteristic of stock-in-trade is that it must be a commodity in which there is dealing as distinguished from a commodity with which the business is carried on, viz., from the exploitation of which income is derived [see H. Mohammed & Co. vs. CIT 107 ITR 637 (Guj.)].

5.15 The nature of asset, whether 'stock in trade' or 'capital asset' primarily depends upon the intention with which investment is made. If the intention behind holding an asset is to deal in it, the same qualifies as 'stock in trade' and if the asset is held with an intent not to deal therein but to reap benefit through holding the same, by way of controlling interest, in the form of capital appreciation, deriving rental/royalty/dividend income, etc., it will qualify as 'capital asset'. The intention of the assessee, inter alia, is to be ascertained predominantly from the following:

- (a) Objective of acquiring the shares - whether objective was to acquire shares/securities as an investment and enjoy income therefrom or to trade in shares?*
- (b) Method of classification in the books of accounts - whether shares are classified as "investments" or held as 'stock in trade'?*
- (c) Method of valuation - whether shares are valued at cost or at cost or market price, whichever is lower?*
- (d) Period for which shares/ securities are held - whether shares/ securities are held for very short period or is held for reasonable period;*
- (e) Source of acquisition/ investment — whether investment is made out of own fund or out of borrowed funds?*

- (f) *Nature of business of the assessee - whether trading in shares/ securities is normal business activity or not?*
- (g) *Nature of transactions - whether transactions are delivery based or not?*

5.16 Reliance, in this regard, is made to the following decisions wherein it has been consistently held that classification of assets as 'investment' or 'stock in trade' primarily depends on the intention with which such asset was acquired:

5.17 The Hon'ble Supreme Court in the case of Raja Bahadur Kamakhya Narain Singh: 77 ITR 253 observed as under:

"The fact that the original purchase was made with the intention to resell if an enhanced price could be obtained is by itself not enough but in conjunction with the conduct of the assessee and other circumstances it may point to the trading character of the transaction. For instance, an assessee may invest his capital in shares with the intention to resell them if in future their sale may bring in higher price. Such an investment, though motivated by a possibility of enhanced value, does not render the investment a transaction in the nature of trade. The test often avnlied is. has the assessee made his shares and securities the stock-in-trade of a business."(emphasis supplied)

5.18 The Gujarat High Court in the case of PCIT v. Ramniwas Ramjivan Kasat : 248 Taxman 484 (refer pages 19-22 of CLPB) after considering Circular dated 29.02.2016 {infra) was pleased to hold that in respect of listed shares and securities held for a period of more than 12 months immediately preceding date of its transfer, if the assessee desires to treat income arising from transfer as capital gain, same shall not be put to dispute by assessing officer subject to

condition that stand taken by assessee in a particular year would be followed in subsequent years.

5.19 It has similarly been held in the following cases:

- *Sutlej Cotton Mills Supply Agency Ltd: 100 ITR 706 (SC)*
- *Karam Chand Thapar & Bros. (P) Limited v. CIT: 82 ITR 899 (SC)*
- *CIT v. Rewashankar A. Kothari: 283 ITR 338 (Guj.)*
- *CIT vs. Sahara India Housing Corporation Ltd: ITA No. 740/2009 (Del.)*
- *ITO V. Rohit Anand: 34 SOT 42 (Del.) affirmed in 327 ITR 445 (Del.)*
- *CIT v. Vinay Mittal: 208 Taxman 106 (Del.)- Departmental SLP dismissed*
- *Jindal Photo Investment Ltd.: 334 ITR 307 (St.) (SC)*
- *CIT v. Devasan Investment Pvt. Ltd. : 365 ITR 452 (Del) (Supreme Court has dismissed the Department's SLP vide CC 17946/2014 : 229 Taxman 496)*
- *CIT v. Consolidated Finvest and Holding Ltd: 337 ITR 264 (Del.)*
- *CIT v. Avinash Jain : 362 ITR 441 (Del)*
- *CIT v. PNB Finance & Industries Ltd: 236 CTR 1 (Del)*
- *CIT v. Ess Jay Enterprises (P) Limited: 173 Taxman 1 (Del.)*
- *CIT v. Gopal Purohit: 336 ITR 287 (Bom) [Departmental SLP dismissed: 334 ITR (st.) 308 (SC)]*

5.20 The CBDT vide Circular No. 4 of 2007, dated 15.6.2007: 291 ITR (St.) 384 CBDT laid down various guidelines (as listed above) for determination of investment in shares as 'capital asset' or 'stock in trade (refer pages 14-15 of CLPB).

5.21 Further, the vide Circular No.6/ 2016 dated 29.02.2016, CBDT issued instructions to the assessing officers to accept capital gains on transfer of listed shares and securities held for a period of more than 12 months (refer pages 16-17 of CLPB).

5.22 Most importantly, attention is invited to the letter/ instructions dated 02.05.2016 issued by CBDT wherein it has been clarified that income arising from transfer of unlisted shares would be considered under the head 'Capital Gain', irrespective of period of holding, subject to certain exceptions. The relevant extract of the CBDT letter reads as under (refer page 18 of CLPB):

"2. Similarly, for determining the tax-treatment of income arising from transfer of unlisted shares for which no formal market exists for trading, a need has been felt to have a consistent view in assessments pertaining to such income. It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head 'Capital Gain' irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach....." (emphasis supplied)

5.23 On perusal of the aforesaid Circulars, it may be noted that the controversy on the issue of taxability of gains arising on sale of shares has been put to rest by the CBDT by clarifying/ directing that income arising from transfer of unlisted shares shall be considered under the head 'capital gains' in every situation, irrespective of period of holding.

5.24 It is trite law that Circulars issued by the CBDT are binding on the Department [refer *K.P. Varghese v. ITO*: 131 ITR 597 (SC), *Navnit Lai C. Javeri v. AAC*: 56 ITR 198 (SC), *Ellerman Lines Ltd. v. CIT*: 82 ITR 913 (SC)].

5.25 Attention is further invited to the following decisions wherein gains on transfer of shares have been held to be capital gains after taking into consideration the aforesaid CBDT Circulars dated 29.02.2016 and 02.05.2016:

- *PCIT v. Ramniwas Ramjivan Kasat*: 248 Taxman 484 (Guj.)
- *PCIT vs. Bhanuprasad D Trivedi (HUF)*: 87 taxmann.com 137 (Guj)- Revenue's SLP dismissed in 256 Taman 292 (SC);
- *Suresh Babulal Shah (HUF) vs. DCIT*: 161 ITD 514 (Pune)
- *DCIT vs. Mahender Kumar Bader*: 48 ITR(T) 596 (Jaipur)
- *Sh. Anil Kumar Goel vs. ACIT*: ITA No. 3142/Mds/2016 (Chennai)
- *ACIT v. Sachin Tendulkar*: 163 ITD 65 (Mum.)
- *ACIT v. Puran Associates Pvt. Ltd.*: ITA. No.3078/Del/2011(Del. Trib.)

Legal position applied to the facts of the present case;

5.26 The appellant is, undisputedly, engaged in business of financing and is not a dealer in various instruments of investments. Purchase of shares/ securities is not at all the business of the appellant company.

5.27 It is also a matter of record, that the appellant made investment in shares of ARLIC as long-term strategic investment. The intent of making such investment was not to trade therein but to reap benefits on account of long-term capital appreciation. It is not at all the intention of the appellant to engage in the business of sale-purchase of such investments.

5.28 In this regard, it is important to take note of the following pertinent facts:

- (a) The appellant is a Non-Banking Financial Company (NBFC) registered with the Reserve Bank of India. Thus, the appellant

is a pure investor and is not registered with any authority or body, such as Stock Exchange, SEBI, etc., as being engaged in the business of dealing in shares/ securities. This fact goes to show that the appellant is an investor and not trader.

(b) The investment in insurance company and the said insurance company is duly regulated by IRDA, which is a Government regulator; the investment were not freely tradable and is subject to relevant rules/ guidelines laid by the regulator.

(c) Investment in shares in ARLIC was made as part of strategic long-term investment in pursuance to the joint venture with Aegon group to co-promote a JV company.

The fact that the appellant has acquired shares of ARLIC for long term and not for the purpose of trading is even evident from the JV Agreement (as amended from time to time) placed on record.

Attention, in this regard, is illustratively invited to the following provisions/ clauses of the Joint Venture Agreement (as amended from time to time):

- ✓ The appellant is mandatorily required to make investment for acquisition of substantial stake, i.e., 44% while balance stake would be held by other co-promoter(s) [refer Clause F to 'Whereas' recitals of the JV Agreement]- page 1385 of PB Vol IV.*
- ✓ The appellant has powers to nominate certain members of the Board (refer clause 6 read with clause 9 of JV Agreement read with subsequent amendments) which is usually provided when an investor acts as a co-promoter/ strategic-long term investor*

*and not where shares are held as trader for purpose of trading-
page 1388, 1389 of PB Vol IV.*

- ✓ *Various binding covenants and undertakings were given/undertaken (refer clause 15 of JV Agreement read with subsequent amendments)- refer 1394 to 1396 of PB Vol IV. No trader in shares shall take upon itself similar binding covenants/ undertakings.*
- ✓ *Fixed commitments were agreed with respect to investment of capital and funding on the basis of pro-rata shares (refer clause 16 of JV Agreement read with subsequent amendments)- refer pages 1396-1397 of PB Vol IV. Trader shall not commit any such funding since the objective of the trader is short-term of earning gains/ profits by trading in shares.*
- ✓ *Under the JV Agreement, there were substantive restrictions on transfer of shares including (refer clauses 17 to 21 of JV Agreement read with subsequent amendments) the following- refer pages 1397-1407 of PB Vol IV:*
 - *Transfer of shares was not permitted except in circumstances, specified (clause 17.1);*
 - *Shares can only be transferred subject to compliance of conditions prescribed in the JV Agreement and not otherwise (clause 17.2- 17.3);*
 - *Transfer could not be made freely to anyone but to only eligible third parties which are prescribed in schedule to the JV Agreement (clause 17.2);*
 - *Transfer could be made after expiry of lock-in period of 9 year (subject to exceptions) (clause 18_;*
 - *Specific exit mechanism had been prescribed and plain/ blanket sale was not permissible (clause 20);*
 - *If appellant seeks to transfer the shares, first right of refusal was with the AEGON (clause 21).*

- ✓ *2 year non-compete clause after exit from shareholding exists in the JV Agreement (clause 26 at page 1415 of PB Vol IV)*

(Note: Original, Religare General Insurance Company Ltd. ('Ranbaxy') was had entered into JV Agreement with Aegon. However, the appellant, i.e., Religare Enterprises was appointed instead of Ranbaxy by way of Novation Agreement dated 23.05.2008-refer pg 1453 to 1485 of PB Vol IV)

The aforesaid terms clearly substantiates that the investment made by the appellant was intended to be long-term strategic investment and are not made/ held for trading. It will be appreciated that no trader, whose intention is merely to sell shares at short interval, shall agree to the aforesaid substantive restrictions on transfer of shares.

- (d) The aforesaid investment was made after receiving approvals from IRDA. Even transfer of shares were effectuated after taking approval from regulatory authorities, including IRDA. Thus, shares were not tradable as such. Copy of approval of IRDA placed at pages 1688 to 1689 of PB Vol IV.*
- (e) Classification in the books of accounts – Investment in shares of ARLIC had always been reflected under the head 'investment'/'capital asset' in the books of account as opposed to 'stock in trade'.*

This clearly goes to show that the activity of purchase/ sale of shares of ARLIC was part of investment activity and not a trading activity.

Kind attention is also invited to the decision of the Supreme Court in the case of Karam Chand Thapar (supra) wherein their Lordships observed that the manner of disclosure in the balance-sheet, though not conclusive, is a relevant circumstance.

(f) Accounting Standard-13 on 'Accounting for Investments' being followed: As per Accounting Standard-13 on 'Accounting for Investments' issued by the Institute of Chartered Accountants of India (ICAI), the term 'investments' has been defined as under:

"Investments are assets held by an enterprise for earning income by way of dividends, interest, and rentals, for capital appreciation, or for other benefits to the investing enterprise. Assets held as stock-in-trade are not 'investments.'"

The aforesaid definition clearly states that investments in shares / mutual fund units held for earning dividend/ interest income, capital appreciation over a period of time come under the purview of 'investments' as against 'stock in trade'. Accounting Standard 13 mandates investments to be valued at cost.

On the other hand, in the case of securities held as stock-in-trade, valuation is required to be done as per Accounting Standard-2 on "Valuation of Inventories", which requires inventory to be valued at lower of cost or net realizable value.

In terms of section 211 of the Companies Act, 1956, it is mandatory for every corporate-assessee to strictly follow the aforesaid accounting standards.

The appellant has consistently followed the Accounting Standard 13 and valued the investments at cost and not at lower of cost or net realizable value. The accounting treatment followed by the appellant has always been accepted by the Revenue in the earlier year(s).

Further, the Statutory Auditors in their Audit Report(s) over the years have also certified that the aforesaid accounting treatment to be correct, and has also been accepted by the Department.

- (g) In the audited profit and loss account, only net gain/loss on transfer of securities is shown, which is strictly in line with the method of recognition of profits on transfer of capital investments. Had the shares/ securities been held as "stock in trade" and not as "investments", cost of purchases and sales would have separately been shown in the profit and loss account.*
- (h) Neither purchase and sale of shares nor is insurance not recognized/shown as a separate business segment in the published audited annual accounts of the appellant, which is filed before various regulatory authorities, including but not limited to Stock Exchange(s), SEBI, RBI, etc.*
- (i) Majority of shares in AJRLIC were held by the appellant for a period of more than 5 years, which clearly demonstrates the intent of the appellant to hold such shares as long-term strategic investment to reap benefit of appreciation and' not for trading purposes.*
- (j) The entire investment has been made by the appellant out of own funds, and not out of borrowed funds, as is generally/normally the case with a trader in shares.*
- (k) The entire transactions entered into by the appellant were delivery based.*
- (l) All the directors appointed by REL on the board of M/s. Aegon Religare Life Insurance Limited were non-executive directors and not whole-time directors. Therefore, the directors appointed by the REL were not involved into the day to day management of the business.*

(m) It is pertinent to note that none of the Key Managerial personal or the CFO of ARLIC and appellant were common.

5.29 In view of the aforesaid and specifically having regard to binding instruction of CBDT, it is submitted that investments in shares of ARLIC were held by the appellant as "investments" on capital account (not as "stock in trade") and, therefore, profit arising from sale thereof is liable to tax under the head 'capital gains' only.

Re: Shareholding represented controlling stake/interest

5.30 As evident from the facts on record, the appellant acquired controlling stake/ promotor stake aggregating to 44% in ARLIC pursuant to the JV Agreement (as amended from time to time).

5.31 Reliance, is placed on the following decisions, wherein shares acquired with a view to have controlling interest in the companies were held to be 'capital assets' and profit arising from sale thereof was held as resulting in income taxable under the head 'capital gains':

5.32 The Bombay High Court in the case of Accra Investments (P) Ltd. v. ITO: 359 ITR 116, held that profit arising from sale of shares of a company acquired by an assessee-investment company, in order to have controlling/managing interest in such company, would be taxable as capital gains and not business income (refer pages 40-49 of CLPB).

5.33 It has been held likewise by the Karnataka High Court in the case of CIT v. Nadatur Holdings and Investment (P) Ltd.: 210 Taxman 597.

5.34 The apex Court in the case of Ram Narain Sons (P.) Ltd. v. CIT: 41 ITR 534 held that where the shares were purchased for

acquisition of managing agency, sale of some of the shares could not be treated as an adventure in the nature of trade to result in business income (refer pages 36-39 of CLPB).

5.35 The Delhi Bench of Tribunal in the case of Everplus Securities and Finance Ltd. vs DCIT: 101 ITD 151 held that investment in shares to acquire controlling interest did not mean that assessee was in the business of investment in shares.

5.36 In the case of Slocum Investment (P) Ltd. vs. DCIT: 106 ITD 1 before the Delhi Bench of the Tribunal, the assessee, being an investment company as defined by the objects clause of its Memorandum, had acquired shares of HCL Ltd., to acquire and retain controlling interest in the said company. The said shares were shown by the assessee-company in its books of account separately as investments and not stock-in-trade and the profit/loss on the same thereof was declared under the head "capital gain" in the year under consideration before the Tribunal as well as in the earlier years. It was observed by the Tribunal that the mere fact that a company is incorporated to carry on investment business does not automatically lead to the inference that it is carrying on business by purchase and sale of their shares held as investments. Even though acquiring and maintaining the controlling stake was the business of the assessee-company, the shares purchased as well as controlling stake acquired, were business assets of a capital nature and did not constitute stock-in-trade. The controlling interest/stake so acquired by purchase of shares was held to be a capital asset in the hands of the assessee-company, surplus from sale whereof was held taxable as capital gains.

5.37 The Delhi Bench of the Tribunal in the case of Gomti Credits (P) Limited vs. DCIT: 100 TTJ 1132 (refer pages 50-55 of CLPB), (since merged with Jubilant Capital Ltd) similarly held that income

arising from shares held by promoter, reflected as investment and sold after 4-6 years was assessable as capital gains. The Department's appeal against the aforesaid order of the ITAT was dismissed by the Delhi High Court vide order dated 28.04.2008, in appeal no. 109/200, on the ground that the same did not give rise to any substantial question of law.

5.38 The Delhi Bench of the Tribunal in the case of Pace Industries Ltd.: ITA No. 1106/Del/2004 held that the gains arising on sale of shares held by the assessee promoter company in the promoted company are to tax under the head 'capital gains'. Revenue's appeal against the said order has been dismissed by the Delhi High Court in ITA No. ITA No.252/2009.

5.39 In view of the above, it is submitted that the shares of ARLIC were held as capital assets and again on transfer was on capital account, which was outside the ambit of section 28 of the Act.

Re: Rebuttal to specific allegations of special auditor/ assessing officer

5.40 The primary case of the special auditor as followed by the assessing officer/ DRP is that appellant was actively participating in the business of ARLIC, inasmuch as the appellant controlled the Board and other committees, the appellant had right to appoint CEO, consent of appellant was required for merger/ demerger, etc., and thus any gain from transfer of shares of ARLIC is to be allegedly assessed as business income under section 28(iv)/(va) of the Act.

5.41 The aforesaid allegation/ observations are patently erroneous for the following reasons:

5.42 It is reiterated that the intention of the appellant in making investment in ARLIC was not for the purpose of carrying on insurance business but to co-promote a company as a joint venture with a

foreign partner to carry on insurance business, with the underlying intent to enjoy return therefrom in the form of dividend and/or long-term appreciation in value of such strategic investment. It is submitted that the rights and privileges accorded to the appellant pursuant to the investment of 44% in ARLIC was merely incidental to acquiring controlling stake in the company and were merely in the nature of shareholder rights.

5.43 It is submitted that on account of majority shareholding in the JV, the appellant was provided with certain rights, including the power to nominate directors on the board of the JV Company, which merely constituted shareholder rights and nothing more. Such rights are normally given to the majority shareholder making substantial investments in any JV company.

5.44 Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. vs UOI and Anr: 341 ITR 1 wherein it was held that the activity to nominate the directors on the board of a company was a shareholding activity. Their Lordships in paras 66-79, observed as under (refer pages 56-80 of CLPB):

"66. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle. i.e. treat a company as a separate person. The Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income-tax. Companies and other entities are viewed as economic entities with legal independence vis-a-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their

actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/ participants. Furthermore, shareholders / participants, that are subject to (personal or corporate) income-tax, are generally taxed on profits derived in consideration of their shareholding/ participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct taxpayers.

67. It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Further, if a company is a parent company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end. This obviously implies a restriction on the autonomy of the subsidiary's executive directors. Such a restriction, which is the inevitable consequences of any group structure, is generally accepted, both in corporate and tax laws. However, where the subsidiary's executive directors' competences are transferred to other persons/bodies or where the subsidiary's executive directors' decision making has become fully subordinate to the Holding Company with the consequence that the subsidiary's executive directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about.

.....

74.....The directors of the subsidiary under their Articles are the managers of the companies. If new directors are appointed even at the request of the parent company and even if such directors were

removable by the parent company, such directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. They cannot be reduced to be puppets. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that subsidiary can no longer be' regarded to perform those activities on the authority of its own executive directors." (Emphasis supplied)

5.45 The fundamental/well accepted legal principles that may be culled out from the aforesaid decision and to the extent relevant, are as under:

- a) Matters of corporate taxation are founded on the separate entity principle, i.e., treat a company as a separate person;*
- b) Each company and other entities are viewed as economic entities with legal independence vis-a- vis their shareholders/ participants and that a subsidiary and its parent are totally distinct taxpayers;*
- c) Entities are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/ participants;*
- d) It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries;*

- e) *In group structure, it is well accepted that the company's shareholder's may exercise some influence over the subsidiary, but that is only inevitable consequence ,of any group structure, not in any way affecting the autonomy and independence of the subsidiary;*
- f) *Once the directors of the subsidiary are appointed under their Articles, even at the request of the parent company and such directors may be removable by the parent company, such directors of the subsidiary owe their duty to their respective companies (i.e., subsidiaries);*
- g) *Undertaking of certain shareholder's activities exercising control over the investee' company is well accepted and does not in any manner affect the independence of the investee.*

5.46 In the present case, it is reiterated that investment in shares ARLIC, an unlisted company, was made with the predominant intent to reap benefits on account of capital appreciation and not with an intent to engage in the business of sale-purchase of shares. This is clearly evident from the fact that investment in shares of Joint Venture was consistently being disclosed/ reflected under the head 'Non-Current Investment'/ 'capital asset' as opposed to 'stock in trade' in the financial statements of the appellant since financial year 2007-08 and which was always accepted by the Department in the past years. Further, the rights and privileges allowed to the appellant was merely incidental to its acquiring shareholding in ARLIC and were merely in the nature of shareholder rights. The business of the investee/ ARLIC cannot be regarded as the business of the appellant merely because the appellant may exercise certain shareholder influence.

5.47 *The assessing officer/ special auditor have totally failed to appreciate the aforesaid settled principles. In view of the aforesaid, it is respectfully submitted that the appellant has rightly declared the gains arising on transfer of shares of joint venture under the head 'Capital Gains' and the action of the assessing officer in re-characterizing the gains as business income calls for being reversed.*

Re: Section 28(va) and Section 28(iv) of the Act - Not applicable

5.48 *The assessing officer has applied provisions of 28(va)/(iv) of the Act to tax the gains on transfer of shares of ARLIC as business income. In this regard, it is submitted that the said sections are not applicable to the facts of the present case as explained hereunder:*

5.49 *Section 28(va) brings to tax any amount received, inter alia, for undertaking/ accepting a non-compete negative covenant during the currency of the non-compete agreement. The said section is clearly not applicable in the present case, since consideration was not received for warding off competition but for transfer of shares.*

5.50 *In so far as applicability of section 28(iv) of the Act is concerned, it is submitted that the condition precedent for attracting the provisions of the said section is that the benefit received must be non-monetary [refer CIT v. Mahindra & Mahindra Ltd.: 404 ITR 1 (SC)].*

5.51 *In the instant case, the appellant has received cash consideration on transfer of shares, i.e., consideration in the form of actual money and thus provisions of section 28(iv) of the Act has no application. Even otherwise, the transaction undertaken by the appellant is transfer of shares held as investment, which is a*

transaction on capital account, taxable under the head "capital gains".

5.52 It is submitted that for applicability of provisions of section 28(iv) of the Act, the condition precedent for attracting the provisions of the said section is that the benefit must be non-monetary which may be convertible into money or not as has been held in the following cases:

- CIT v. Mahindra & Mahindra Ltd.: 404 ITR 1 (SC)*
- Jindal Equipments Leasing and Consultancy Services Ltd.: 325 ITR 87 (Del)*

5.53 In the instant case, the appellant has received cash consideration on transfer of shares, i.e., consideration in the form of actual money and is not a benefit per se. Thus, provisions of section 28(iv) of the Act have no application at the very threshold.

5.54 For the aforesaid cumulative reasons, it is respectfully submitted that the action of the assessing officer in re-characterizing the gains received on transfer of shares in ARLIC is patently erroneous and the same calls for being reversed.

Expenses in connection with transfer- allowable as deduction

5.55 Further, the assessing officer also erred in disallowing professional fee paid to Credit Suisse Securities India Pvt. Ltd. ('CSS') holding that the business expediency of the said amount could not be explained as sale price for transfer of shares was pre-decided.

5.56 It is pertinent to mention that the impugned assessment order does not assign any reason for disallowance of the fee paid, other than stating that the sale price was pre-decided and hence fee paid

to CSS is being disallowed, which is patently erroneous and unsustainable for the following reasons:

5.57 The appellant had paid professional advisory fee of Rs.21.30 crores to CSS in connection with transfer of shares of ARLIC in terms of the agreement entered into with CSS for their assistance in sale of shares of ARLIC. Copy of agreement between appellant and CSS is placed at pg 1750-1756 of PB Vol IV and copy of invoice is placed at pages 1749 of PB Vol IV. The same is thus clearly allowable as deduction while computing capital gains under section 48 of the Act, which aspect has not been disputed by the assessing officer.

5.58 Reliance in this regard is placed on the following decisions wherein it has been held that expenses incurred in connection with transfer of capital asset are allowable as deduction for the purpose of computation of capital gains:

- CIT vs. Shakuntala Kantilal: 190 ITR 56 (Bom.)*
- Gopee Nath Paul and Sons v. DCIT: 278 ITR 240 (Cal.)*
- Mrs. June Perret vs. ITO: 298 ITR 268 (Kar.)*
- ACIT vs. Shri Ajay Agarwal: ITA No.405 of 2011 (Agra Trib.)*
- AIG Offshore Systems Services Inc vs. ACIT: 175ITD 647 (Mum Trib.)(refer pages 81-85 of CLPB)*
- KRA Holding & Trading (P.) Ltd vs. DCIT: 46 SOT 19 (Pune Trib.)*

5.59 Strictly without prejudice to the aforesaid, the assessing officer has grossly erred in disallowing the same while computing business income alleging that professional advisory fee paid has no business nexus.

5.60 It is respectfully submitted that the assessing officer cannot sit in the armchair of a businessman and govern how the business is

to be conducted and which expenditure should or should not be incurred by the assessee. It is trite law that necessity of incurrence and also reasonableness of the expenditure has to be seen from the point of view of businessman and not that of the Revenue.

5.61 Reliance in this regard is placed on the following decisions:

- *CIT vs. Walchand & Co.: 65 ITR 381 (SC)*
- *J.K. Woollen Manufacturers vs. CIT: 72 ITR 612 (SC)*
- *Aluminium Corporation of India Ltd. vs. CIT: 86 ITR 11 (SC)*
- *CIT vs. Panipat Woollen & General Mills Co. Ltd.: 103 ITR 666 (SC)*
- *J.J. Enterprises vs. CIT: 254 ITR 216 (SC)*
- *CIT vs. Dalmia Cement (P.) Ltd: 254 ITR 377 (Del.) affirmed in S.A. Builders: 288 ITR 1 (SC)*

5.62 It is submitted that professional advisory fee was incurred by the assessee for facilitating the transaction of sale of shares. It has not been appreciated that transaction of sale of shares does not merely involve negotiation on sale price but involves various complex facets of' negotiations including but not limited to identifying the buyer, deciding/ negotiating various terms of the share purchase, preparing the marketing plan, documentation to be prepared for entering into binding share purchase and connected agreements, advise/ guidance on various terms and conditions including warranties, indemnification clauses, etc., to the agreed upon, terms relating to mode and manner of discharge of consideration etc.

5.63 The agreement between the appellant and CSS dated 19.09.2014 (pg 1750-1756 of PB Vol IV) clearly defines the scope of CSS in the transaction of sale of shares of ARLIC and provides as under:

- *CSS would act as exclusive financial advisor with respect of transaction involving appellant's stake in ARLIC;*
- *The services of CSS would include:*
 - (a) *Analysing and evaluating the business, operations and financial position of ARLIC;*
 - (b) *Preparing and implementing a marketing plan relation to sale of ARLIC shares;*
 - (c) *Coordinating the data room and due diligence investigations of potential purchasers of ARLIC shares;*
 - (d) *Evaluating proposals that are received from Potential Purchasers; and*
 - (e) *Structuring and negotiating the sale terms etc.*

5.64 Further, TDS has been deducted and deposited by the appellant on the payment made to CSS details of which are at pages 1757-1758 of PB Vol IV.

5.65 It is submitted that there is no legal bar on the assessee/ taxpayer seeking appropriate advice before or at the time of entering into a transaction and so long as expenditure is incurred in connection with the transaction undertaken, the same is allowable as expenditure.

5.66 The aforesaid clearly substantiate that the expenditure has been incurred in connection with sale of shares of ARLIC by the appellant and is allowable as deduction under section 48(i) of the Act.

5.67 Without prejudice, if the gains on transfer of shares of ARLIC is treated as business income, the said expenses are deductible in terms of section 37(1) of the Act."

42. We find that the assessee has continuously treated the same as investments in the balance sheet. We have gone through the page no. 1376 of the paper book reflecting joint venture agreement relating to Life Insurance business in India amongst Aegon International NV and Religare Insurance Holding Company Ltd. As per this agreement, the parties agreed to establish the JV company for the purpose of carrying on the business of providing insurance products. The assessee has invested 99.41% of share capital consisting of 50,20,000 shares. The relevant part of the agreement proving the intention to "carry on the business of providing Life Insurance product" is as under:

"A. By the Joint Venture Agreement dated December 12, 2006 entered into AEGON, de AEGON Confirming, Party and RHC ("Joint Venture Agreement"), the foregoing parties had agreed to establish the JV Company for the purpose of inter alia carrying on the business of providing life insurance products and, to the extent allowed by Applicable Law, pension products in the Territory, on the terms and conditions and in the manner as set out in the Joint Venture Agreement.

B. Ranbaxy is a company incorporated under the laws of India with the sole purpose of holding shares in the equity share capital of the JV Company. As of the date hereof, the paid-up equity share capital of the Ranbaxy is held by the following Persons who are Affiliates of RHC as follows:

<i>Name of entity</i>	<i>No. of Shares</i>	<i>Percentage of Equity Share Capital</i>
<i>Religare Enterprises Limited</i>	<i>5,020,000</i>	<i>99.41</i>
<i>Oscar Investments Limited</i>	<i>15,000</i>	<i>0.30</i>

<i>Ralaxy Holding Company</i>	<i>14,600</i>	<i>0.29</i>
<i>Mr. Sunil Godwani</i>	<i>100</i>	<i>0.00</i>
<i>Mr. Harpal Singh</i>	<i>100</i>	<i>0.00</i>
<i>Mr. Malvinder Mohan Singh</i>	<i>100</i>	<i>0.00</i>
<i>Mr. Shivinder Mahan Singh</i>	<i>100</i>	<i>0.00</i>
<i>Total</i>	<i>5,050,000</i>	<i>100.00</i>

43. We have also gone through the share purchase agreement between the assessee and the purchaser. We have gone through the conditions precedence in the agreement at page no. 1631 of PB. The relevant portion is as under:

"(e) The Seller Company and the Company have informed the Purchaser that the Seller Company, Aegon and the Company have agreed that the Company shall and Aegon (to the extent it is able) shall cause the Company to:

(i) complete the following actions within a maximum period of 90 days from the receipt of the Name Change Approval Date ("Name Change Period").

(x) remove the term "Religare" from the name of the Company;

(y) remove the term "Religare" from the brand, logo, letterhead and all other branded material of the Company, provided that the Company shall not be required to remove the term "Religare" or its logo from: (1) any existing or executed customer agreements, policies, written customer communications, customer documentation or other like documents that are in existence as on and including the date of issuance of the fresh certificate of incorporation of the Company reflecting the removal of the term "Religare" from the name of the Company ("Name Change Date"); or (ii) non-customer facing records that are used in the ordinary course of business and

for internal purposes only that are in existence as on and including the Name Change Date; and

(z) change the name of the AEGON Religare Employee Benefits Trust ("EWT") such that the term "Religare" is no longer part of the name of the EWT,

(ii) file the application for obtaining the approval from the IRDAI required for effecting the changes contemplated in Clauses 3.7(e)(1)(x). (y) and (2) no later than 15 (fifteen) days from the Execution Date, it being clarified that such application shall be filed separately from the application to the IRDAI for the IRDAI Approval and the Aegon IRDAI Approval;

(iii) within the Name Change Period:

(w) file the application with and obtain the confirmation of the Registrar of Companies for reservation of a name for the Company that does not include the term "Religare" as well as ensure that such name remains reserved with the Registrar of Companies at all times during the Name Change Period;"

44. The salient features of sale of shares Vs. business sale (sale of business) are as under:

The Basics of a Sale of Shares

45. In order to acquire proprietary interest in a company, one must acquire shares in such company. Shares are a bundle of intangible property rights which shareholders receive from the company in return for their contribution of cash or non-cash assets to the company. A share entitles its holder to indirect control of the company and the right to participate in the profits

of the company. A sale of shares, therefore, constitutes a sale of such intangible property rights by the shareholder to the purchaser against payment of a consideration.

The Basics of a Sale of Business

46. A sale of business agreement constitutes a company, as the seller, disposing of its business, usually as a going concern, to the purchaser, in return for a consideration of some form. The term "going concern" simply means a whole or part of the business that is capable of generating income. Notwithstanding that the business as an operating entity is being sold, the sale involves the separate legal transfer of each type of asset constituting the business. Such assets generally include immovable property, fixed assets, intellectual property, goodwill, know-how, incorporeal rights, debts and stock. The effect of a sale of business is such that the company as a legal entity remains and only those assets which were not sold, if any, remain in such company.

Comparison Table

47. A sale of shares and a sale of business may be simply illustrated in the following table:

Subject	Selling Shares	Selling Business
Ownership of the Company	Ownership of the company will change. The purchaser will now own the company by	Ownership of the company remains unchanged. The incorporator will still

	virtue of their newly acquired shareholding in the Company.	hold all of the shares in the company however, such company will no longer consist of the operating business.
Ownership of the Business/Assets	The business/assets will remain under the ownership of the Company.	The business/assets will be transferred to the purchaser.
Liabilities	The purchaser will assume all of the assets and the liabilities pertaining to the Company.	The purchaser may exclude certain liabilities relating to the business. If the purchaser does assume certain liabilities, this usually results in a reduction of the purchase price.
Business Contracts	The contracts will remain with the company and do not need to be transferred.	The contracts will need to be transferred to the purchaser by virtue of the company ceding and assigning such agreements to the purchaser.
Employees	As the employer of the employees (the	As the employees form part of the business

	company) remains unchanged, the employees will remain employees of the company.	(as a going concern) such employees will need to be transferred to the purchaser as the new employer.
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48. In this case, the assessee has made investment in the shares over a period of 8 years and sold the shares to M/s Bennett Coleman & Co. Ltd. and the proceeds have been offered under the head "capital gains".

49. We have gone through the provisions of Section 28(va) and Section 28(iv) invoked by the revenue authorities. The assessee has invested the amount for acquiring 44% stake in the ARLIC and sold the same. Hence, it cannot be said that there is sale of business as the assessee do not own the 100% stake in ARLIC. The receipts be taxed under the head "capital gains" after giving due indexation. The AO shall verify the expenses incurred in connection with the transfer of shares and allow the same.

Ground No. 6.0 to 6.2

Prior Period Expenses:

50. The assessee has claimed Rs.1,89,801/- which have been disallowed holding that they are prior period expenses. It was submitted that the expenses have been crystallized during the year and were not claimed in any of the earlier years. Having gone through the facts on record, we hold that the expenses be allowed in the current year.

51. In the result, the appeal of the assessee on this ground is allowed.

Ground No. 7.0 to 7.6

Disallowance of Interest on Non-Convertible Debentures (NCD)- U/s 40(A)(2)(b):

52. During the year under consideration, the assessee company has made payment of interest on Non-Convertible Debentures to Standard Chartered Bank at the rate of 14% p.a. However, the assessee company has made payment of interest on Non-Convertible Debentures to its subsidiary company i.e. Religare Securities Ltd. of Rs.30,33,19,165/- on Rs.1,66,00,00,000/- the effective rate of which comes out to be 18.27% p.a. the difference of 4.27% comes to Rs.7,08,90,686/- as shown below:

Total interest expense	Effective Rate of Interest	Excessive Rate of interest	Excess Amount of Interest
(A)	(B)	(C)	(D = A*C/B)
10,33,19,165	18.27%	4.27%	7,08,90,686

53. Therefore, the excess interest payment of Rs.7,08,90,686/- i.e. 4.27% has been treated by the TPO to be excessive and unreasonable in terms of Section 40A(2)(b) and added back to the income of the assessee company.

54. Before the revenue authorities, the assessee submitted that during the previous year, the assessee allotted 8,455 Non-Convertible Debentures (NCDs), having face value of

Rs.10,00,000 to the following two entities and received total consideration of Rs. 845.50 crores as under:

<i>Particulars</i>	<i>NCDs</i>	<i>Amount</i>
<i>Religare Securities Limited</i> <i>[Zero Coupon NCDs with yield rate of 14%]</i>	<i>3,000</i>	<i>Rs.300 crores</i>
<i>Standard Chartered Bank</i> <i>['Regular' NCDs with yield rate of 14%]</i>	<i>5,455</i>	<i>Rs.545.50 crores</i>
<i>Total</i>	<i>8,455</i>	<i>Rs.845.50 crores</i>

55. Out of the aforesaid 8,445 NCDs issued, 3,372 NCDs were redeemed in the subsequent Assessment years) 2014-15 to 2016-17 as under:

<i>Particulars</i>	<i>Total NCDs issued in AY 2013-14</i>	<i>NCDs redeemed in AY 2014-15</i>	<i>NCDs transferred in AY 2014-15</i>	<i>NCDs redeemed in AY 2015-16</i>	<i>NCDs redeemed in AY 2016-17</i>
<i>Religare Securities Limited</i>	<i>3,000</i>	<i>1,240 and 100 Transferred to Peerless Mutual Funds</i>	<i>-</i>	<i>-</i>	<i>-</i>
<i>Standard Chartered Bank</i>	<i>5,455</i>	<i>-</i>	<i>-</i>	<i>1,366</i>	<i>1,366</i>

56. Thus, as on 31.03.2016, 4,483 NCDs were outstanding in the books of the assessee, against which interest @14% was provided as under:

Particulars	<i>NCDs outstanding as on 31.03.2016</i>	<i>Interest on NCOs</i>
<i>Religare Securities Limited</i>	<i>1,660</i>	<i>Rs.30,33,19,164</i>
<i>Standard Chartered Bank</i>	<i>2 723</i>	<i>Rs.28,01,34,122</i>
<i>Peerless Mutual Funds</i>	<i>100</i>	<i>Rs. 1,82,72,239</i>
<i>Total</i>	<i>4,483</i>	<i>Rs.60,17,25,525</i>

57. It was submitted that in the special audit report, the auditor has alleged that the effective interest paid by the assessee on NCDs issued to RSL was @ 18.27% p.a. as against yield rate of 14% p.a. paid to Standard Chartered Bank. On the basis of the above, the revenue authorities concluded that interest on NCDs issued to RSL is excessive or unreasonable to the extent of Rs. 7,08,90,686 (i.e. 4.27%) and disallowable in terms of section 40A(2)(b) of the Act.

58. During the hearing, it was submitted that the NCDs issued to both RSL and Standard Chartered bank had the same yield rate of 14% p.a. However, the only distinguishing feature was that the NCDs issued to RSL was in the nature of "Zero Coupon Bond" i.e., interest payout is made only at the time of redemption of the bond as against regular NCDs issued to Standard Chartered Bank with 14% coupon rate, where interest/yield was payable on an annual basis. These facts were duly disclosed in the audited annual accounts of the assessee for the financial year ended 31.03.2016 under the head 'Long term borrowings' as under:

"5.1 Details of Privately Placed Secured Non-Convertible Debentures (NCDs) outstanding as on March 31, 2016 are as below:

Coupon Rate	Current	Non-Current	As at March 31, 2016	Current	Non-current	As at March 31, 2016
14%	1,361,500,000	1,361,500,000	2,723,000,000	1,363,000,000	2,726,000,000	4,089,000,000
Zero	-	1,760,000,000	1,760,000,000	-	1,760,000,000	1,760,000,000
Total	1,361,500,000	3,121,500,000	4,483,000,000	1,363,000,000	4,486,000,000	5,849,000,000

59. On perusal of the above, it could be noted that 1,660 NCDs issued to RSL has been classified as NCDs with "Zero Coupon Rate" as against 2,723 NCDs issued to Standard Chartered Bank with 14% p.a. coupon rate. Further, the terms of the allotment specifically provided that the NCDs issued to RSL was in the nature of "Zero Coupon Bond" with yield of 14% p.a. The relevant terms of the Debenture Trust deed dated 14.05.2013, in respect of 3000 NCDs issued to RSL in assessment year 2012-14 is extracted as under:

.....

2. issued, subscribed and paid-up

.....

C. With a view to meet the company's requirements of funds and refinancing of existing debt, the company intended to raise certain funds by issuing Secured Rated Listed Redeemable Non-Convertible Debentures of the aggregate nominal value of Rs.300,00,00,000 (Rupees Three Hundred Crores only) as follows:

S.No	Tenure	Amount (Rs. In Crs.)	No. NCDs	Face Value per NCD (Rs.)	Term Sheet/Information Memorandum dated	Rate of interest (p.a.) and mode of interest payment date/yield on the Debentures
(1)	5 years	300	3,000	Rs.10,00,000	March 26, 2013	Zero coupon/yield at the rate of 14% p.a.
	Total	300 Cr.				

.....
G. The company has pursuant to:-

.....
Allotted fixed rate, secured, rated, listed redeemable Non-Convertible Debentures (NCDs) of the aggregate nominal value of Rs.300,00,00,000/- (Rupees Three hundred crores only) in De-mat form for cash at para on private placement basis to the subscribers of the NCDs (hereinafter referred to as the "Debenture Holders" or "Debenture-holders") as under:

<i>Aggregate nominal value of NCDs (Rs. In crores)</i>	<i>No. of NCDs</i>	<i>Computation of interest and frequency on interest payment</i>	<i>Deemed date of allotment</i>	<i>Redemption/maturity date and put/call option dates</i>
<i>Rs.300,00,00,000 (Rupees three hundred crores only)</i>	<i>3000</i>	<i>Zero Coupon</i>	<i>March 28, 2013</i>	<i>March 28, 2018</i>

....."

60. It was submitted that thus the yield on 3000 NCDs issued to RSL was 14% p.a. only i.e., at par with NCDs issued to Standard Chartered Bank, as against 18.27% p.a. alleged by the revenue authorities. It was argued that the revenue authorities have failed to appreciate the concept of 'Zero Coupon Bond', which is explained as under:

"4.10 A zero-coupon bond is a debt security that does not pay interest annually, but is compounded at a stated rate. Thus, it is only when the bond is redeemed at maturity that the entire payment comprising of face value of bond alongwith compounded interest thereon is offered to the investor. As against this, in case of regular

bond, interest is payable at a pre- determined rate i.e. the yield rate on an annual basis, without having to wait till the date of redemption/maturity."

61. It was submitted that the primary difference between a regular bond and a zero-coupon bond is the payment of interest, known as coupons. A regular bond pays regular annual interest to bondholders, while a zero-coupon bond does not make such interest payments and instead, zero-coupon bondholders receive the entire value of the bond inclusive of compounded interest when it reaches maturity/redemption. The interest of Rs. 30,33,19,164/- was recorded as payable by the assessee to RSL on the Zero coupon NCDs that were outstanding as on 31.03.2018. The Id. DRP held that the assessee has stated that the interest rate for the regular bond and zero-coupon bond issued to Standard Chartered bank and Religare Securities Limited ("RSL") respectively, has been same i.e. 14% only. The difference of Rs.7,08,90,686/- is on account of compound interest paid against the zero-coupon bond to Religare Securities Limited. In case of the regular bond issued at the rate of 14% to Standard Chartered bank the interest, was paid to the company against the debenture issued on annual basis. On the other hand, no interest on annual basis was paid to Religare Securities Limited as the payment in this case is to be made at the time of maturity when Religare Securities Limited supposed to receive the principal amount plus the accumulated compound interest over the period. Thus observing, the Id. DRP directed the AO to verify the assessee's claim on record that payment @ 14% interest rate was payable at the time of maturity under the said bond.

62. Since, the matter has been referred to the AO for examination, we refrain to interfere with the directions of the Id. DRP on this issue.

63. In the result, the appeal of the assessee on this ground is allowed for statistical purpose.

Transfer Pricing Issue:

Ground No. 8

ALP on Legal & Advisory Services:

64. The TPO made adjustment of Rs.7,62,966/- after determination of ALP for receipt of legal & advisory services. The TPO has taken following comparables:

S.No.	Company Name	OP/OR
1.	Indovision Securities Private limited	3.10%
2.	BN Rathi Securities Limited	3.73%
3.	Cholamandalam Securities Limited	4.32%
4.	P P F A S Asset Mgmt. Pvt. Ltd.	11.19%
5.	I C R A Management Consulting Services Ltd.	12.15%
6.	Alankit Ltd.	16.75%
7.	Aditya Birla PE Advisors Pvt. Ltd.	25.78%
8.	Pushpak Financial Services Ltd.	30.41%
9.	Inmacs Management Services Ltd.	44.36%

		OP/OR
35 th percentile	3.15	11.19%
65 th percentile	5.85	16.75%
Median		12.15%

65. Accordingly, the Arm's Length Price of the international transaction is computed as follows:

Operating Revenue	1258294931
OP/Sales of Comparable (%)	12.15%
Arm Length Margin	152882834
Arm Length Cost D	1105412097
Cost shown by the Assessee	1190812222
Difference F	85400125
Proportionate Adjustment Difference	762966

66. The Id. DRP directed to delete Alankit Ltd., Indovision Securities Private limited, BN Rathi Securities Limited and Cholamandalam Securities Limited as they functionally dissimilar. We have also gone through the functions of other comparables which are as under:

S. No.	Company Name	Assessee's contention	DRP Directions
1.	PPFAS Asset Mgmt. Pvt. Ltd.	Functionally not comparable	This company function as an investment management. Provides investment management services to its customers. REL offers an integrated suite of financial services Broadly similar. Should be retained.
2.	ICRA Management Consulting Services Ltd.	Functionally not comparable	REL offers an integrated suite of financial services. ICRA is also providing advisory services to its clients. Broadly similar should be retained.
3.	Alankit Ltd.	Functionally not comparable	Alankit is providing stock broking advisory Services. Far different. Should be excluded.
4.	Aditya Birla PE Advisors Pvt. Ltd.	Functionally not comparable	This company is also engaged in rendering financial services, similar to the assessee coman Should be retained.
5.	Pushpak Financial Services Ltd.	Functionally not comparable	It provides financial advisory and management services with focus on managing venture capital funds and alternate

			investment funds. Broadly similar. Should be retained.
6.	Inmacs Management Services Ltd.	Functionally not comparable	Provides Management consultancy services and other business advisory services. Broadly similar. Should be retained.

67. Having heard the arguments of both the parties and having gone through the FAR of the comparables and direct the AO to recompute the margin by considering the 5 comparables mentioned above.

68. In the result, the appeal of the assessee on this ground is dismissed.

Ground No. 9

Education Cess:

69. Not pressed

70. Owing to adjudication in the Income Tax Appeal, the Stay Petition becomes in fructuous and hence dismissed.

71. In the result, the appeal of the partly allowed and the Stay Application of the assessee is dismissed.

Order Pronounced in the Open Court on 19/09/2023.

Sd/-

(Yogesh Kumar US)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 19/09/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR