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

BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND MS. KAVITHA RAJAGOPAL, HON'BLE JUDICIAL MEMBER

ITA NO.1218/MUM/2021 (A.Y. 2016-17)

ITA NO. 752/MUM/2022 (A.Y. 2017-18)

ITA NO. 2541/MUM/2022 (A.Y. 2018-19)

Thomas Cook (India) Limited Thomas Cook Building Dr. D.N. Road, Fort Mumbai - 400001 **PAN: AAACT4050C**	*v.*	Additional/Joint/Dy. /Asst., CIT National e-Assessment Centre Delhi
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri J.D. Mistry Shri Madhur Agrawal & Shri Fenil Bhat**
Department Represented by	**:**	**Shri K.C. Selvamani**
Date of Conclusion of Hearing	**:**	**26 & 27.09.2023**
Date of Pronouncement	**:**	**24.11.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. The appeal relating to A.Y. 2016-17 is filed by the assessee against the final Assessment Order of the Dispute Resolution Panel of

Learned Commissioner of Income Tax (DRP-2), Mumbai – 2 [hereinafter in short "Ld. DRP)"] dated 18.03.2021 for the A.Y.2016-17. The appeals relating to A.Y.2017-18 and A.Y. 2018-19 are filed against order of directions of the Dispute Resolution Panel of Learned Commissioner of Income Tax (DRP-2), Mumbai – 3 [hereinafter in short "Ld. Ld. DRP"] dated 27.01.2022 and 30.06.2022 for the A.Y. 2017-18 and 2018-19 respectively.

2. Since the issues raised in all these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA No.1218/MUM/2021 relating to Assessment Year 2016-17 as a lead case for adjudication.

ITA No. 1218/MUM/2021 (A.Y. 2016-17)

3. Assessee has raised following grounds in its appeal: -

> *"1.* ***Transfer Pricing adjustment for adding the notional interest of INR 81,21,14,830 on receivables on account of issuance of NCCRPS (Ground 1.1. to Ground 1.8):***
>
> *On the facts and in the circumstances of the case, and in law, the Learned Assessing Officer (Ld. AO), following the directions of Hon'ble Dispute Resolution Panel (Hon. DRP), erred in confirming the transfer pricing addition of interest of Rs 81,21,14,830 on deemed receivables which is overdue for the difference in the face*

value of Non-convertible Cumulative Redeemable Preference Shares (NCCRPS) issued vis-à-vis the market price of the equity share as on the date of issuance (hereby referred as alleged transaction')

1.1 On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in not adjudicating the jurisdictional requirement, as laid by the CBDT Instruction 3 of 2016, of existing of an income which is a pre-requisite before making a reference to Lt. TPO or proposing an addition on the capital transaction of issuance of NCCRPS. The Hon. DRP/ Ld. AO/ Ld TPO failed to appreciate that in the absence of any income arising on account of issuance of NCCRPS, transfer pricing provisions contained in Chapter X of the Act do not apply to the facts of the present case

1.2 On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in rejecting the reliance placed by the Appellant on the Hon'ble Bombay High Court's decision dated 10 October 2014 in Writ Petition No. 871 of 2014 in the case of Vodafone Services Pvt Ltd vs UOI [2015] Taxmann.com 286 (Bombay) and concluding that no income arises to it from such a transaction and accordingly transfer pricing provisions contained in Chapter X of the Act will not apply to the facts of the present case.

1.3. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPOhave erred in not recording any reasons to show that the conditions mentioned in clause(a) to (d) of section 92C(3) of the Act were satisfied, either before initiating the transfer pricing assessment or before the completion of the assessment proceedings.

1.4. On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO have erred in violating the principles of natural justice by not granting reasonable and adequate opportunity, including not issuing show cause notice, as required under provisions of Section 92C(3) of the Act, to the Appellant before passing the order under section 92CA(3) of the Act.

1.5 On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in recharacterizing a legitimate business transaction of issuance of NCCRPS as quasi equity and thus comparing the NCCRPS with equity shares in the absence of any current statutory provisions to support such re-characterization.

1.6. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in treating the quoted market price of the equity share of the Appellant as the arm's length price for issuance of NCCRPS which were redeemable at par thereby considering the alleged shortfall arising on account of alleged transaction as a nature of debt/receivable in the hands of the Appellant, thus creating a notional transaction.

1.7 On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in making secondary adjustment that is not permitted under the Indian regulations for the year under consideration i.e. AY 2016-17.

1.8. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in adopting an adhoc and arbitrary approach in determining the interest rate to be imputed on the deemed receivable determined by the Hon. DRP/Ld. AO/ Ld. TPO without undertaking a benchmarking analysis. An interest rate of 9.945 percent was determined based on the stray interest rates on redeemable NCDs issued by the Appellant

1.9. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in not following DRP's own direction in the Appellant's case for AY 2015-16 wherein reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Vodafone Services Pvt Ltd. v/s UOI [2015] 53Taxmann.com 286 (Bombay) and concluded that an element of income was a prerequisite for applicability of transfer pricing provisions since they are merely 'machinery provisions and not charging provisions

2. Disallowance of principal lease payment of finance lease

2.1. On the facts and in the circumstances of the case, and in law, the Ld AO, following the directions of Hon'ble DRP, erred in disallowing Rs 73.02.481 related to "principal lease payment of finance lease under section 37(1) of the Act treating the same as capital expenditure.

2.2 Without prejudice to the above, the Hon'ble DRP erred in not adjudicating alternate prayer of the Appellant to allow tax depreciation on such expenditure under section 32 of the Act in the event Hon'ble DRP upholds the disallowance

3. ***Disallowing Rs. 7,01,54,021 related to Employee Stock Option Plan***

3.1 On the facts and in the circumstances of the case, and in law, the Ld. AO. following the directions of Hon. DRP, erred in disallowing Rs 7,01,54,021 related to Employee Stock Option Plan (ESOP) under section 37(1) of the Act.

3.2 On the facts and in the circumstances of the case, and in law, the Ld. AO and Hon'ble DRP erred in not allowing the additional claim made during the course of assessment proceedings for ESOP expenses (being difference between market price at the time of exercise of options and market price at the time of grant of options) of Rs. 2.48.85,009 under section 37(1) of the Act

4. Disallowance under section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962

4.1 On the facts and in the circumstances of the case, and in law, the Ld AO and Hon'ble DRP erred in not appreciating the fact that the Company has not incurred any direct or indirect expenditure during the year in relation to earning the exempt income and making disallowance of Rs. 5,78.21,490 under section 14A of the Act read with Rule 80 of the Income-tax Rules, 1962 ('Rules").

4.2 On the facts and in the circumstances of the case, and in law, the Hon'ble DRP erred in directing the Ld. AO to make addition under section 14A of the Act read with Rule 8D of the Rules by exercising powers beyond the jurisdiction conferred under section 144C(8)of the Act

4.3 Without prejudice to the above, the Ld. AO and Hon'ble DRP erred in not considering thecontention of the Appellant while computing the disallowance under section 14A readwith Rule 8D disregarding the fact that no interest expenditure has been incurred to earn exempt income and sufficient owned funds are available to make the investment

4.4 Without prejudice to the above, the Ld. AO and Hon'ble DRP erred in not considering the contention of the Appellant that only investment from which exempt income is earned during the year should be considered while computing disallowance under section 14A of the Act read with rule 8D of the Rules.

4.5 On the facts and in the circumstances of the case, and in law, the Ld. AO and Hon'ble DRP. erred in disallowing Rs. 5,78.21.490 under section 14A of the Act read with Rule 8D of the Rules while computing the MAT on the book profits in accordance with section 115JB of the Act.

5. Adjustment on Dividend Distribution Tax

5.1 On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the learned AO:

(a) erred in not granting excess Dividend Distribution Tax (DDT) paid erroneously amounting to Rs 3,96,056, arising on account of payment of DDT at the rate of 20.925% on the entire dividend paid, instead of the statutory rate of 20.385% (including surcharge and cess), since as per the provisions of Section 237 of the Act read with Article 265 of the Constitution of India, only legitimate tax could have been retained.

Your Appellant prays that the AO be directed to grant refund of Rs 3,96,056 to the appellant

(b) erred in not appreciating that the DDT paid by the appellant in relation to the dividend of Rs 5,48,24,449 paid to its overseas shareholder je Fairbridge Capital (Mauritius) Limited (FCML) out of total dividend of Rs 13,64,11,665 ought to have been paid at the rate of 5% having regard to Article 10(2) of the India-Mauritius tax treaty as against the rate of 20.925% (erroneously as against the statutory rate of 20.385%) (including surcharge and cess) specified under Section 115-0 of the Income Tax Act 1961.

Your Appellant prays that the AO be directed to apply the applicable rate under Article 10(2) of the India-Mauritius tax treaty being beneficial to the Appellant.

(c) erred in not granting refund of excess DDT paid of Rs 84,34,742 to the appellant in respect of dividend of Rs 5,48,24,449 paid to FCML, since as per the provisions of Section 237 of the Act read with Article 265 of the Constitution of India, only legitimate tax could have been retained

Your Appellant prays that the AO be directed to grant refund of ₹.84,34,742 to the appellant.

(d) erred in not considering the submissions dated 20 November 2019 filed before the Learned AO and was duly furnished before the DRP as well, wherein refund of excess DDT paid of Rs 88,30,798 was claimed by the appellant.

Further, the DRP has erred is stating that no claim in this regard has been made before the Learned AO during the course of assessment proceedings

(e) erred in adjudicating that since there was no variation of income and since there was no adjustment being made to the income of the Appellant in the assessment order, the said claim of refund of DDT could not have been raised before the DRP.

(f) erred in observing that provisions of Section 115-0 of the Act overrides the provisions of Section 90(2) of the Act and hence, beneficial rate as per Article 10(2) of the India- Mauritius tax treaty will not be applicable and hence, erred in subjecting the Appellant to additional income tax in terms of section 115-0 of the Act.

(g) erred in observing that tax as per Section 115-0 of the Act is a tax on net distributed profit of the company and not a tax on dividend income of shareholder. The AO failed to appreciate that the dividend income was that of the non-resident recipient who was governed by the provisions of relevant DTAA

(h) erred in observing that DDT is a secondary tax on corporate profit distributed and not akin to withholding of tax.

6. Short grant of credit of tax deducted at source

6.1 The Ld. AO erred in not granting credit of tax deducted at source as claimed in the return of income amounting to ₹.14,28,61,602

7. Penalty under section 271 (1)(c)

7.1 The Ld. AO erred in proposing to levy penalty under section 271(1)(c) of the Act for furnishing inaccurate particulars of income

8. Levy of interest under section 234B of the Act

8.1. The Ld. AO erred in levying interest under section 234B of the Act.

The Appellant craves leave to add, alter, amend, substitute or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing so as to enable the Honble Tribunal members to decide these according to the law.

4. Assessee has filed additional grounds on jurisdictional issue, for the sake of clarity it is reproduced below: -

*"**Ground No. 9**:*

1. On the facts and in the circumstances of the case and in law, the final assessment order dated 20 April 2021 passed by the under section 143(3) read with section 144C(13) of the Act, having been passed beyond the limitation provided in terms of section 153(1)

r.w. section 153(4) of the Act, is illegal, being barred by limitation, void-ab-initio and is therefore liable to be quashed.

Ground No. 10:

2. On the facts and in the circumstances of the case and in law, the directions dated 18 March 2021, issued under section 144C(S) of the Act by the Ld. DRP, not being signed by all the members of the Hon'ble DRP, are illegal, bad in law, void-ab-initio and liable to be quashed.

It is humble prayer of the Appellant that the final assessment order and DRP directions are bad in law, null and void and liable to be quashed, and the entire addition made by Ld. AO/ Ld. TPO/ Hon'ble DRP be deleted."

5. At the time of hearing, Ld.AR of the assessee submitted that assessee is not pressing the additional grounds of appeal. Accordingly, these additional grounds of appeal are dismissed as such. Therefore, we shall deal with only main grounds of appeal raised by the assessee.

6. We proceed to dispose of the issues raised by the assessee in its main appeal in ground wise.

7. Ground No. 1 is relating to Transfer Pricing adjustment for adding the notional interest on receivables on account of issuance of Non-Convertible Cumulative Redeemable Preference Shares (for short "NCCRPS"). The relevant facts are, assessee filed its return of Income on 30.11.2016 declaring loss at ₹.6,85,08,728/- under regular provision of the Act and Book Loss of ₹.6,48,55,009/- under section 115JB of the

Act. The case of the assessee was selected for scrutiny and notices under section 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee.

8. Since assessee has entered into international transactions a reference under section 92CA(1) of the Act was issued to Transfer Pricing Officer – 4(2)(1), Mumbai. The background of the assessee is, assessee is the leading integrated travel and travel related financial services company offering a broad spectrum of services that include Foreign Exchange, Corporate Travel, MICE, Leisure Travel, Insurance, Visa & Passport services and E-Business. During this AY, Assessee has issued 12,50,00,000 Cumulative Redeemable Non-Convertible Preference Shares (NCCRPS) @₹.10/- per share to its AE Hamblin Watsa Investment Counsel Limited.

9. The TPO observed from the Form 3CEB that the assessee has not bench marked the above transaction of issue of NCCRPS. With regard to above, transactions, assessee contended that no income arises to it from issue of Non-Convertible Preference shares to its associated enterprise. Therefore, assessee believes that it should not be liable to comply with the requirements embodied in the Transfer Pricing provisions contained

in sections 92 to 92F of the Act r.w. Rules 10A to 10E of the I.T. Rules. Assessee heavily relied on the decision of Hon'ble Bombay High Court in the case of Vodafone India Services Private Limited [WP No. 871 of 2014. (2014) 50 taxmann.com 300 (Bombay), dated 10.10.2014.

10. In assessee's submissions before Transfer Pricing Officer, assessee submitted that T.P. provisions are not applicable to the transaction under consideration and submitted copy of Board resolution indicating the terms of issue and has not submitted any further details including financials of the AE. The Transfer Pricing Officer rejected the submissions of the assessee and he observed that assessee is a listed company and during current assessment year it has issued 12,50,00,000 Cumulative Redeemable Non-Convertible Preference Shares (NCCRPS) @₹.10 per share to its AE on 01.12.2015, which are redeemable at par within a period not exceeding seven (7) years from the date of allotment. The Transfer Pricing Officer observed that the NCCRPS issued by the assessee are in the nature of quasi equity and thus the transaction is squarely covered under the provisions of section 92B(2) and Explanation (i)(c) thereto as introduced by Finance Act, 2012 with retrospective effect from 01.04.2002. He observed that the assessee is required to report this transaction in Form No.3CEB and also should

have first benchmarked the same using most appropriate method for determination of ALP. By rejecting the benchmarking and TPSR submitted by the assessee, Transfer Pricing Officer proceeded to benchmark the same using other method. He extracted the points from Board Resolution the similarities in the regular Preference shares and NCCRPS issued by the assessee, for the sake of clarity, it is reproduced below: -

1. The priority with respect to payment of dividend or repayment of capital vis-à-vis equity shares	The said preference shares shall rank for dividend in priority to the equity shares for the time being of the Company. The dividend rate shall be up to 9%
1. The participation in surplus fund,	The said preference Shares shall in winding up be entitled to rank, as regards repayment of capital and arrears off dividend, whether declared or not, up to the commencement of the winding up, in priority to the equity shares but shall not be entitled to any further participation in profits or assets or surplus fund.
1. The participation in surplus assets and profits, on winding-up which may remain after the entire capital has been repaid	
1. The payment of dividend on cumulative non-cumulative basis.	The payment of dividend shall be on Cumulative basis.
1. The conversion of preference shares in equity shares.	The said preference Shares shall be Non-Convertible
1. The voting rights,	The voting rights of the persons holding the said Preference Shares shall be in accordance with the provisions of Section 47 of the Act (including any statutory modifications or re-enactment thereof for the time being in force)
1. The redemption of preference shares.	At the option of the issuer, at any time within a period not exceeding seven years from the date of allotment as per the provisions of the Act.

11. Based on the above table, TPO is of the opinion that the transaction entered by the assessee is in the form of capital with debt-like properties and equity-like functionality and he observed that this transaction is in the form of financing with flexibility and value. The capital listed is less expensive than straight equity, yet provides virtually the same level of value add as a straight equity investment. According to him, it can be mezzanine debt, venture debt or convertible debt, structured equity or preferred equity. It can be used for anything as the company needs including expansion capital, acquisition capital or to recapitalize.

12. Transfer Pricing Officer discussed the salient features of a quasi-equity in his order at Page No. 3 to 5 of this order with the above observation he concluded that the NCCRPS issued by the assessee being in the form of quasi equity bears its valuation based on all the above factors. He observed that assessee is listed company and its shares are listed and traded on browsers at very high average rates which is at ₹.205.45 as on the date of issue above NCPS by assessee i.e. 01.12.2015. According to him, a third party scenario, no prudent business entity will invest in such a high value company at a face value of ₹.10/- unless there is a factored return on exit. Therefore, the quoted

market rate can be considered as ALP rate which is ₹.205.45 for issue of such NCPS as on the date of issue of shares. Accordingly, he determined the ALP for issue of such NCPS as on the date of issue of shares. Accordingly, he determined the ALP of the issue of shares at ₹.205.45 after adjusting the issue price, he determined the difference of ₹.195.45 per share. He suggested for upward adjustment to the issue price. The total adjustment works out to ₹.2443,12,50,000/-.

13. Transfer Pricing Officer added the above differential amount as receivable in the hands of assessee. As per the opinion of the TPO, this receivable amount is required to be separately benchmarked for determination of ALP interest. Since, assessee has not benchmarked this transaction, therefore treating the amount so receivable as a loan or advance to the AE, arm's length interest is considered taking into account the average borrowing rates of 9.945% shown by assessee in its audited financials. Accordingly, he determined the adjustment of ₹.81,21,14,830/- (i.e. interest @9.945% from 01.12.2015 to 31.03.2019 for 122 days on the amount of dividend receivable) and proposed ALP adjustment of ₹.81,21,14,830/-.

14. Aggrieved, assessee preferred objection before Ld.DRP against the draft assessment order passed. Before Ld. DRP assessee has challenged the jurisdiction of Transfer Pricing Officer against treating of this transaction as T.P. transaction by relying on the decision of Vodafone India Services Private Limited (supra); raised jurisdictional issue as assessment is bad in law, inadequate opportunity was given to the company and objected of re-characterization of Non-convertible Cumulative Redeemable Preference Shares and creation of Notional transaction by the Transfer Pricing Officer and also objected to the secondary adjustments. For the sake of clarity, from the issue of recharacterization of transaction of Non-Convertible Cumulative Redeemable Preference Shares as equity are reproduced below: -

> *"IV.* ***Recharacterizing transaction of Non-Convertible Cumulative Redeemable Preference Shares (NCCRPS) as quasi equity:***
>
> *During the year 2015-16, the assessee and allotted 8.5% 125000000 NCCRPS of Rs 10 each to Hamblin Watsa Investment Counsel Limited amounting to INR 1,250,000,000. From the following extract of Financial Statement of the Company for FY 2015-16(refer paper book page no. 504to 528) wherein it is evident that Cumulative redeemable non-convertible preference shares were issued on 1 December 2015 at par*
>
> > *"NCRPS 125,000,000 NCRPS of Rs. 10 each were allotted on December 1, 2015 (Due for redemption on December 1, 2022 at par) to Hamblin Watsa Investment Counsel Limited, a wholly owned subsidiary of Fairfax Financial Holdings Limited at face value in order to partly fund the investment made by the Company in SOTC Travel Services Private*

limited (formerly known as 'Kuoni Travel India (Private) Limited"). The NCRPS are entitled to a dividend of 8.5% per annum. The Company has proposed to Reserve Bank of India, that Promoter will not divest any of its shareholdings In the Company (except inter-se transfers) till such time the NCRPS is not redeemed."

- *Further, the assessee was governed with the following regulations applicablefor issuance of NCCRPS(refer paper book page no. 732 to 859):*

Extract of provisions of Sections 42, 55 of the Companies Act, 2013,

The Companies (Prospectus and Allotment of Securities) Rules, 2014; The Companies (Share Capital and Debentures) Rules, 2014

The Securities and Exchange Board of India (Issue and Listing of Non- Convertible Redeemable Preference Shares) Regulations, 2013

The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015

- *Further, submitted had following set of documentation before the TPO/AO(refer paper book page no. 861 to 904)*

Certified true copy of extract of the resolution passed at the meeting of Board of Directors on 24 October 2015 for consent of issuance of NCPS Notice dated 24 October 2015 issued by the Company for the Extra Ordinary General meeting to be scheduled on 27 November 2015 wherein issuance of NCPS was set forth in the agenda and the result of the meetings,

Copy of the terms of issuance for NCCRPS;

Copies of regulatory filings made by the Company for issuance of NCCRPS

Further, following documentation about the redemption of NCCRPS at par were also available in public domain and filed with the AO:

Intimation to stock exchange providing intimation of the outcome of boardmeeting wherein redemption of NCPS was approved on 30 November 2017; Copy of Financial Statement of the Company for FY 2017-18 wherein it is evident that Cumulative redeemable non-convertible preference shares were redeemed on 28 December 2017 at par(refer paper book page no. 951 to 1017).

REDEMPTION OF NON CONVERTIBLE CUMULATIVE REDEEMABLE PREFERENCE SHARES

"During the year 2015, the Company issued and allotted 8.5% 125000000 Non Convertible Cumulative Redeemable Preference Shares (NCCRPS) of Rs. 10 each, aggregating to Rs. 1250 Mn on private placement basis. The Company in accordance with the terms of the Information Memorandum of NCCRPS and applicable provisions of the Companies Act, 2013, Securities and Exchange Board of India (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013, and other applicable laws, rules and regulations. has successfully redeemed NCCRPS at par on December 28, 2017."

Based on the above documentation, it is clear from that regulate only, the NCCRPS did not enjoy equity upside comparing NCCRPS with equity shares is incorrect approach. In this regard we would further like to rely on the decision of J.P. Morgan Advisors India Pvt. Ltd. [TS-724-ITAT-2019(Mum)-TP] wherein the tribunal held that

> *As could be seen from the material on record, while deciding the disputed addition in the appeal preferred by the assessee in the assessment year 2008-09 vide ITA no.7573/Mum /2012, etc., dated 25th March 2015, the Tribunal following the decision of the Hon'ble Jurisdictional High Court in Vodafone India Service Pvt. Ltd. (supra) held that the difference between the market price of equity shares and the face value cannot be treated as deemed loan to the AE Accordingly, the Tribunal deleted the addition made on account of notional interest on such deemed loan. Facts being identical, respectfully following the aforesaid decision of the Co-ordinate Bench, we delete the addition made on account of notional interest. This ground is allowed."*

- *. While the TPO admitted that the transaction was issuance of non-convertible preference shares it still erred in classifying the same as quasi equity. Further, from the perusal of the order of the TPO it is evident that cogent reasons as not provided in the order justifying the claim of the TPO: Thus, the order of the TPO is being vague, it is required to be stuck down*

In view of the above, it is evident that the assessee has issued and redeemed non-convertible redeemable preference share at the same price. Thus, the action of TPO treating the alleged transaction as quasi equity without providing cogent reasons is baseless and required to be struck down.

V. ***Creation of Notional Transaction by TPO- Not permitted under Indian Law***

- *The TPO eared in equating NCCRPS with equity shares and thereby considering quoted market rate of equity shares for determine the arm's length price of NCCRPS which are redeemable at par. Further, the TPO failed to appreciate that NCCRPS does not have the rights similar to equity shares ofthe assessee and thus cannot be compared.*

- *The TPO has also erred in considering the alleged shortfall arising on accountof the alleged transaction as an amount receivable by the assessee from its AE*

- *We further submit that the Income-tax Act is a fiscal statute. It has to beinterpreted strictly. One cannot tax an assessee based on intendment. In the absence of clear words, income on which tax is computed cannot be deemed The Income-tax Act does not contain any general provision for imputing income in excess of what is actually earned or received by the assessee except in specific situations such as Section 50C, Section 92 of the Act (Section 92 has been discussed in detail in following paragraph) etc. The income received and computed as per the provisions of the Act has to be accepted by the revenue as the taxable income.*

- *Transfer pricing provisions as contained under Sections 92 to 92F of the Act, read with Rules 10A to 10E of the Rules envisage determination of arm's length price in case of a "transaction actually undertaken by the assessee with associated enterprises. In this regard, we submit as under.*

  Section 92(1) of the Act provides as under:

  92. (1) Any income arising from an international transaction shall be computed having regard to the arm's length price.

  Further, section 92F(v) of the Act defines transaction

  v) transaction" includes an arrangement understanding or action in concert- TAX DEPARTMENT arrangement, understanding or action is formal or in writing, or

  (B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding.]

- *In the instant case, we submit that since, there is no overdue receivable from AE, so there is no question of "Transaction" as defined under Section 92F of the Act or*

"International Transaction" as defined under Section 92B of the Act being entered into by the assessee.

- *As such, the action of the TPO of treating the alleged transfer pricing adjustment as a deemed receivable is patently erroneous in law. If this approach is followed, then every transfer pricing adjustment would result in a notional loan / receivable between the associated enterprises, which is not envisaged by the law as it stands for the year under consideration. The law only requires actual international transactions to be at arm's length and does notpermit imputation of arm's length price based on notional transactions. There is no provision in the Act which stipulates that the difference between them arm's length price and the transaction price represents amount which must bereceived by the assessee for the year under consideration.*

- *The Act requires that the income or expense arising from an international transaction should be at arm's length: The Act relevant for the year under consideration nowhere requires that the arm's length income should be brought in to India by way of inflow of cash. In the absence of such a provision an adjustment to the arm's length price couldn't be considered as an amount receivable from associated enterprises. Hence, the proposal of the TPO / AO is bad in law, void-ab-initio and non-est in the eyes of law.*

- *It may be noted that Section 92CA(3) which enables the TPO to make transfer pricing adjustments inter-alia states that "by order in writing, determine the arm's length price in relation to the international transaction or specified domestic transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.*

- *Section 92CA(4) of the Act states that on the receipt of the order, the AO shall proceed to compute the total income of the assessee according to section 92C(4) of the Act. On the perusal of the section 92C(4) of the Act, your Honor will appreciate that the manner of computation of the income arising from the international transaction is to be according to the provisions prescribed under various Chapters of the Act, eg Chapter III, Chapter IV. Chapter VI-A, Chapter XVIIB etc.*

- *Thus, the proposal made by the TPO of creating a transaction of a deemed receivable is clearly tantamount to applying transfer pricing provision to notional transaction, which is beyond TPO's jurisdiction as prescribed under section 92CA. Hence, the said proposal is bad in law, void-ab-initio and non-est in the eyes of law.*

- *In support of above contention, the assessee wishes to place reliance on the rulings of Authority for Advance Ruling in the case of Dana Corporation Vs. Director of Income-tax A.A.R. No.788 of 2008 (2010 321 ITR 178) wherein it was held that notional figures or hypothetical figures cannot be used for calculation profit or gain or full value for consideration.*

> *"The profit or gain or the full value of the consideration, cannot be arrived at onnotional or hypothetical basis. The profit or gain to the transferor must be adistinctly and clearly identifiable component of the transaction."*

- *Further, in Poona Electric Supply Co. Ltd. v. CIT [1965] 57 ITR 521, Honourable Supreme Court has said (page 530):*

……

Evonik Degussa India P Ltd [ITA no. 7653/Mum./2011]

……

Honourable Supreme Court ruling in the case of Bombay Steam Navigation Co P Ltd vs CIT [1953] 56 ITR 52 (SC)

…….

Nimbus Communications Ltd vs ACIT [2011] 43 SOT 695 (Mum)

…….

Patni Computer System vs DCIT [ITA No 426 & 1131/PN/06 (Assessment Year 2002-03 & 2003-04)]

……

The assessee also wishes to draw your attention towards OECD Guidelines. which states the following:

"1.64 A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapter II. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured…..

Based on the above, it is submitted that the transfer pricing guidelines of the OECD provides for recognition of actual transaction undertaken between entities. Such guidelines specifically provide that in other than exceptional cases, the tax administration should not disregard the actual transaction or substitute other transaction for them. It is further provided that restructuring of legitimate business transaction would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured. The guidelines recognize that the actual transaction can be disregarded only when (1) where the economic substance of transaction differ from its form; and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differs from those which would have been adopted by independent enterprises behaving in a commercially rationale manner. These guidelines have also been recognized and taken into consideration by the Delhi High Court in the case of CIT v. EKL Appliances Ltd. (ITA Nos. 1068/2011 & ITA Nos. 1070/2011), wherein the Court has observed that OECD guidelines should be taken as a valid input and the tax administration should not disregard the actual transaction or substitute other transaction for them and the examination of the controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the AES.

In view of the above, it is submitted that re-characterization of a transactioncannot be done on an arbitrary basis unless and until the transaction isregarded as a sham.

VI. Secondary Adjustments - Not permitted under Indian Regulations for the year under consideration

We further wish to draw your attention to the fact that by imputing interest on alleged overdue the TPO has proposed to make a secondary adjustment for which there is no provision in the Act. As per OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines'), secondary adjustment is an adjustment that arises from imposing tax on a constructive transaction that some countries will assert under their domestic legislation after having proposed a primary adjustment in order to make the actual allocation of profits consistent with the primary adjustment. Secondary transactions may take the form of constructive dividends, constructive equity contributions, or constructive loans In this regard, we wish to submit the following extracts of the OECD Guidelines:

4.69 The Commentary on paragraph 2 of Article 9 of the OECD Model Tax Convention notes that the Article does not deal with secondary adjustments, and thus it neither forbids nor requires tax administrations to make secondary adjustments. In a broad sense the purpose of double tax agreements can be stated as being for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital. Many countries do not make secondary adjustments either as a matter of practice or because their respective domestic provisions do not permit them to do so. Some countries might refuse to grant relief in respect of other countries' secondary adjustments and indeed they are not required to do so under Article 9.

Thus, in the commentary on Article 9 of the model treaty convention, OECD has clarified that sovereign countries can opt for secondary adjustments, if permissible by their domestic laws

Since India has specifically introduced specific legislation for inflicting upon "secondary adjustments" vide Finance Act 2017 ie. w.e.f 1 April 2018, provisions of secondary adjustment are not applicable for the year under consideration. Thus, such "secondary adjustment" made by TPO is liable to be struck down, as lacking the necessary legislative mandate for the year underconsideration.

Based on above, we submit that the approach adopted by the TPO is prima facie arbitrary, capricious or perverse in the eye of law and not tenable underthe law and on the given facts.

1. Arbitrary approach in determining rate of interest

Without prejudice to the above, it is submitted that the TPO has erred in determining the interest rate of 9,945 percent based on the stray interest rates on redeemable NCDs issued by the Assessee.

It has been upheld in the following cases that stray transactions cannot be considered as comparable / TPO is not justified in considering only selective transactions in favor of Revenue.

K.R. Ushasree Vs DCIT [TS-292-ITAT-2012(COCH)]

Everest Canto Cylinders Ltd v/s. DCIT(LTU) (ITA No. 542/Mum/2012-AY 2007- 08 dated 23-11-2012)

Asian Paints Limited Vs CIT (ITA 408/Mum/2010 dated 31-10-2011)

Gharda Chemicals Ltd Vs. The Deputy Commissioner of Income Tax (2009- TIOL-790-ITAT-MUM)

Without prejudice to our argument that there is no deemed receivable, we submit that interest rate should be determined based on the comparable transaction. Thus, the arbitrary approach adopted by the TPO of comparing NCCRPS with NCDs is likely to be rejected or set aside.

VIII. Initiating Penalty Proceeding

In the absence of a show cause notice, the assessee could not furnish the required information. Thus, assessee request your Honors to instruct the AO/TPO to drop the penalty proceedings initiated under Section 271G of the Act for allegedly furnishing inaccurate particulars, concealing the taxable income and failure to maintain documents relating to alleged Transactions as per Section 92D of the Act

The Assessee craves leave to add and submit such further facts, statements, documents and papers as may be considered necessary either before or during the hearing of the objections."

15. After considering the submissions of the assessee, Ld.DRP discussed the issue in detail and rejected the objections raised by the assessee with regard to provision of section 92 of the Act, which do not apply to capital account transaction. Ld. DRP sustained the observation of the Assessing Officer/Transfer Pricing Officer that the current transaction under consideration is covered by Explanation (i)(c) to section 92B of the Act by observing that this transaction is covered under capital financing. Therefore, this transaction is covered under international transaction and required to be benchmarked. With regard to recharacterizing of transaction and adjustment of interest is concerned Ld. DRP discussed the issue in detail in their order at Page No. 111 to 114 of the order with the following observations: -

*"2) **Whether the re-characterization of transaction and adjustment of interest is permissible for the year under consideration:***

a) The assessee totally ignored the basic tenet of transfer pricing as enshrined in section 92F(ii), as no unrelated party in uncontrolled circumstances would have fore gone such huge sum of money without charging interest from AE. Therefore, the receivable representing the difference in the ALP value of the 7 years 8.5% NCCRPS to its AE and the issue price has been rightly characterised and treated as loan to AE by the TPO

b) in benchmarking the transaction the assessee totally ignored the BEPS (Base Erosion and Profit Shifting) Action plan 9 of which India is a party and clearly mandates that transactions can be disregarded for TP purpose where they lack commercial rationality, as far as proper return on deemed advance is concerned and that substance over form, economic reality over legal form and conduct of parties over contracts have to be "looked through"

c) Hon'ble Delhi High Court decision in the case of CIT vs. EKL Appliances Ltd, 345 ITR 241 held that such re-characterization is possible in exceptional circumstances as under?

> *"18. Two exceptions have been allowed to the aforesaid principle and they are*
>
> *(i) Where the economic substance of a transaction differs from its form; and*
>
> *(ii) Where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner."*

d) To claim the nature of issue of NCCRPS, the assessee has relied on certain documents and statutory compliance under Company Act and SEBI Regulations. It is to be observed here that even when there is proper compliance to the said acts, it does not automatically determine the arm's length nature of transactions as was clearly held by the Hon'ble Punjab and Haryana High Court in the case of Coca Cola India Inc v. Assistant Commissioner of Income-tax, Gurgaon [2009] 309 ITR 194, [2009] 221 CTR 225. [2009] 177 Taxman 103 (Punjab & Haryana). This was subsequently reiterated by the Hon'ble ITAT Delhi in Perot Systems TSI (India) Ltd. v Deputy Commissioner of Income-tax [2010] 5

ITR (T) 106, [2010] 37 SOT 358, [2010] 130 TTJ 685 (Delhi). Thus, the substance of the transaction has to be judged under the transfer pricing regulations. In this regard, compliance to Companies Act and SEBI regulations does not put a seal of approval on the true character of the transaction from the perspective of transfer pricing regulations.

e) The very essence of transfer pricing is to be seen in the backdrop of this vital question: Whether unrelated enterprises under uncontrolled conditions wouldenter into such transaction? The answer would be a clear 'no'. No company would park such huge money in another unrelated company for no return. Then, it is essential for the transfer pricing machinery of the country to set it right. This very essence of transfer pricing is embedded in section 92F(ii) of the Act.

f) The very concept of transfer pricing is that the transactions have to be looked into by removing the related-party nature. Whether two independent unrelated entities would have entered into such transaction? This is the vital question to be addressed in transfer pricing. The answer here is 'no', as no independent entity would have parked such huge sums for no return in a negative net-worth company. If the answer is 'no', then it calls for transfer pricing adjustment to address the base erosion for this country.

g) The assessee has taken an argument that the investment is to be redeemed at face value with coupon rate, so it is not quasi-equity in nature and therefore the said investment cannot be treated as loan financing. It is to be noted here that they have been redeemed at par in terms of issue which mandates coupon rate of 8.50%. Hence, this argument of the assessee is untenable. These facts further strengthen that the investment is essentially in the nature of quasi equity only and requires determination of ALP and in case of difference the difference so receivable shall also be imputed with equal amount of ALP interest. h.

h. The assessee's argument that the said investment falls beyond the scope of provisions of Chapter X of the Act is misplaced and untenable as provisions of section 92B of the Act are clearly applicable to transactions in the nature of capital financing too.

i. By "looking through" the "substance" of the transaction instead of merely "looking at the superficial "form" of the

transaction, it is clear that the transaction is essentially a loan transaction.

j. BEPS (Base Erosion and Profit Shifting) Action Plan 9 of which India is a party clearly mandates that transactions can be disregarded for TP purposes where they lack commercial rationality, as far as proper return on investments is concerned. BEPS Action Plan emphasizes substance over form, economic reality over legal form and conduct of parties over contracts. Viewed in this context also, what the assessee and the AE are reflecting the investment in their financials has to be disregarded and based on the commercial rationalityand it has to be considered as loan only and interest needs to be benchmarkedand brought to tax.

k. In an arm's length situation the assessee would have expected a certain rate of return of any receivable from AE. As the assessee has not received any return on the deemed advance which are basically in the nature of loan, the transaction has not happened at arm's length. As the assessee has failed to substantiate that a proper benchmarking has been done, the same is to be benchmarked as a loan transaction.

l. The assessee has taken a stand that the investment cannot be re- characterized as loan. This objection of the assessee is not acceptable under the facts and circumstances of the assessee in view of the judgment pronounced by Hon'ble Delhi High Court in the case of Commissioner of Income-tax v. EKL Appliances Ltd. (2012) 345 ITR 241. [2012] 250 CTR 264, [2012] 209 Taxman 200 (Delhi) in which para 1.36 of the OECD Transfer Pricing Guidelines was referred to This para clearly mentions that, "in other than exceptional case, the tax determination should not disregard the actual price. Further the issue has been discussed at length by the Hon'ble Delhi High Court (at para 18) in this decision as under.

> *18 Two exceptions have been allowed to the aforesaid principle and they are (1) where the economic substance of a transaction differs from its form; and (i) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been*

> *adopted by independent enterprises behaving in a commercially rational manner"*
>
> *Therefore it is held that, the transaction treated as loan by TPO is clearly an International Transaction and required to be bench marked as per the provisions of Chapter X of the IT Act and the rules framed there under and TPO has rightly benchmarked the same using Other Method as Most Appropriate Method.*
>
> *Accordingly the objection raised by the assessee on this issue at objection No.6 is found to be not tenable and the ground of objection is, accordingly, rejected."*

16. Aggrieved assessee is in appeal before us. At the time of hearing, Ld.AR of the assessee submitted that assessee has issued NCCRPS at par which is in the nature of preference shares and redeemable within the period of seven years. However, assessee has preferred to redeem the same at par within three years itself. He objected to treat this transaction equating with equity shares. He brought to our notice various observations of the Transfer Pricing Officer and observations of Ld.DRP at Page No. 89 to 93 of the Ld. DRP Order and he also objected to the recharacterizing of the transaction as deemed loan by the tax authorities. He also brought to our notice Page No. 109 of the Ld. DRP order and their conclusions.

17. Ld.AR of the assessee basically objected that the issue under consideration is issue of preference share capital and subsequently

assessee also redeemed the same at par, hence by recharacterizing the transaction under consideration into loan transaction is far-fetched. In this regard he relied on the decision of Vodafone India Services Private Limited (supra) and he brought to our notice Page No. 42 and 51 of the above said order wherein in Hon'ble High Court has observed that "Chapter X of the Act is a machinery provision to arrive at the ALP of a transaction between AEs. The substantive charging provisions are found in Sections 4, 5, 15 (Salaries), 22 (Income from house property), 28 (Profits and gains of business), 45 (Capital gain) and 56 (Income from other Sources). Even Income arising from International Transaction between A.E. must satisfy the test of Income under the Act and must find its home in one of the above heads i.e. charging provisions. This the revenue has not been able to show". Further, they observed that the machinery Section of the Act cannot be read de-hors charging Section and in the ratio of the decision they held that in the present facts issue of shares at a premium by the Petitioner to its non-resident holding company does not give rise to any income from an admitted International Transaction.

18. Ld.AR of the assessee brought to our notice Page No. 11 of the Paper Book to submit that even in the above case the revenue has

added the value of shares issued by the assessee to its holding company. This deemed loan was sought to be charged with interest @13.5% per annum and he submitted that similar issue was raised in the present case also.

19. Further, he brought to our notice Page No. 64 of the Paper Book on the decision of the J.P. Morgan Advisors India Pvt. Ltd., *v.* DCIT in ITA No. 990, 1754/MUM/2014 dated 19.06.2019 wherein similar facts were involved. He brought to our notice facts of the case wherein assessee has issued equity shares to its holding company and even in this case the Transfer Pricing Officer has re-characterized sale of equity shares as long term loan to the AE without charging any interest. He also brought to our notice the ratio of this case wherein it was held that difference between market price of equity shares and the face value of the shares was treated as deemed loan to the AE. Accordingly, ITAT deleted the addition made on account of notional interest on such deemed loan. He prayed that in the given case the issue of issue of non-convertible preference shares whereas in the above said decision the issue involved is transfer of equity shares and recharacterization of such equity shares in the loan transactions. He submitted that the case of the assessee is in better footing. He also brought to our notice

Balance Sheet of the AE which is placed on record at Page No. 685 of the Paper Book [A.Y. 2018-19] wherein the AE has recorded as preference shares @ ₹.10 only.

20. On the other hand, Ld. DR relied on the orders of the Ld. DRP / Assessing Officer. He also took us to the various findings of the DRP/TPO and objected the various submissions of the Ld AR and submitted that the case relied by the assessee are distinguishable.

21. Considered the rival submissions and material placed on record, we observe that assessee has issued NCCRPS at the face value of ₹.10/- to its AE with the commitment to pay dividend at 8.5% as per the Board Resolution. The assessee has issued these shares to be redeemed within seven years. However, assessee has redeemed the same within three years by redeeming at par. We observe from the Balance Sheet of AE which is placed on record that even the AE has recorded the investment in Non-convertible preference shares at the face value of ₹.10 only. We observe that assessee has preferred to finance its company by way of issuing non-convertible preference shares at 8.5% of dividend. This way of financing by the assessee from its own AE was not considered as the international transaction by the assessee.

However, the Transfer Pricing Officer has treated the same as the international transaction and treated the same as quasi equity. Ld.Transfer Pricing Officer observed that the above transaction is a capital financing which falls under the provisions contained in section 92B Explanation (i)(c) of the Act. Since assessee has not benchmarked the above transaction, he adopted the other method to determine the ALP.

22. Assessee has made elaborate submissions before tax authorities as well as before us by relying on the decision of Vodafone India Services Private Limited (supra) to submit that this transaction is not out of the international transaction considering the fact that it does not generate any income or loss. After careful evaluation of submissions of both the parties we observe that as such the issue of preference shares perse will not fall under category of transaction involving generation of income or loss. However, it has to be evaluated whether it falls within the definition of International Transaction. The transaction involving issue of shares/debentures/debt funds will certainly fall within the category of capital financing. It is not necessary that the transaction itself should generate the profit or loss but the impact of such transaction is relevant. In this case, there is involvement of cost of borrowing, it could be in any

form. However, the assessee has relied heavily on the decision of Vodafone India Services Private Limited (supra) wherein the Hon'ble Bombay High Court has dealt with the issue of shares with premium and held that such premium will not fall under the category of any income defined under the Income Tax Act (i.e., Sections 4, 5 ,15, 22, 28, 45 and 5b. In our view, the ratio of the above decision has no relevance to the issue in hand in which the TPO has not treated the mere issue of share capital as income of the assessee but treated the transaction as capital finance. In the given case Transfer Pricing Officer has treated the issue of non-convertible preference shares as quasi equity and he proceeded to adopt the market value of equity shares as on the date of issue of the above said preference shares which is at ₹.205.45. We are in agreement with the findings of TPO that it is an international transaction which falls within the definition u/s 92B in the nature of capital finance. Accordingly, he proceeded to bench mark the same by treating the same as quasi Equity, however in our view, it is not **quasi equity** but it is **quasi capital**. There is considerable difference in the both the categories. The instrument issued by the assessee is non convertible preference shares. It is distinct liability on the company, which is not similar to the Equity Capital. The difference between them are, the

equity share holders are the real owners of Assets and liabilities of the company and Preference Share holders are additional share issued for additional capital requirement for the company. It is an additional finance option to the company without parting or diluting the voting rights or ownership of Equity shareholders. The only assurance given to the preference shareholders are preference in refund of capital and dividends. We are in agreement with the submissions of the assessee that Transfer Pricing Officer cannot equate the issue of non convertible preference shares with equity shares. The preference shares can never be treated as equal to equity shares or adopt the value of equity shares for the purpose of valuing the preference shares. The preference shares are no doubt a separate financial instrument guaranteeing repayment of capital in preference to equity shareholders and also preference to issue of dividend. It can never replace the place of equity shares and as far as liability towards preference shares are concern it is limited to the value as agreed in the instrument with its cost i.e., in this case, preference shares were issued at par and redeemed at par with the commitment to pay 8.5% of the dividend. The reliance of Vodafone case (supra) by the assessee is not applicable in this case as discussed above.

23. Ld. Transfer Pricing Officer however, treated the transaction of issue of NCCRPS as quasi equity, in our view, it is not proper but it can be treated as quasi capital, to that extent we are in agreement that the above transactions fall under capital financing as per section 92B of the Act. However, TPO cannot adopt the value of the preference shares on the basis of equity shares. The equity shares are valued considering the fact that they are the real owners of the company and whereas the preference shares are no doubt liability and treated as distinct shareholders as far as liability is concern on the company and as far as the cost to the above liability is on the shareholder funds (profit after tax) of the company which is available to distribute among the shareholders. To the extent of treating the above transactions as capital financing we are in agreement with the Transfer Pricing Officer, however, treating the value of the above preference shares which was issued at par with the value of equity shares, in our view, is not proper and at the outset we reject the same. Therefore, it can never be treated as part of equity share capital considering the fact that it is non-convertible. In case it is issued on convertible basis, to certain extent, we could have treated as part of capital which will be converted in the near future. Still, till such conversion, the preference shares can

never take the place of equity shares. Therefore, the valuation adopted by Transfer Pricing Officer @₹.205.45 is not acceptable and unjustified. However, it can be treated as capital financing and the bench marking has to be done on the cost of employing the capital in the business like any other capital instruments. In this case, it is issued as non convertible preference shares, it clearly indicates that it is more of debt instrument than the equity instrument. Therefore, the bench-marking has to be done on the basis of cost of borrowing in the international market.

24. Coming to the next issue of treating the above transactions as capital financing we are in agreement with the Transfer Pricing Officer it is a Capital financing. However, it can never be quasi-equity. Therefore, the assessee preferred to finance the company by adopting this method of issue of preference shares instead of taking finance from external borrowings or issue of dividend or issue of similar debt instrument. As per the definition of section 92B any long term finance is treated as international transaction. Therefore, issue of preference or debentures or external finance has cost, which may or may not be in the character of interest. In this case, it is in the nature of dividend which may not be burden on the company; however, it is burden on the shareholders or on the profit available for appropriation. In our view, this has a cost of

employing the capital in the company, hence, it has to be bench marked. That being so, considering the fact that it is treated as the international transaction as per the definition / Explanation (i)(c) to section 92B of the Act, it is a capital financing opted by the assessee from outside India and it will not be paying interest, however, there is an outflow of dividend from India. What needs to be considered is whether the cost of finance in this case (dividend) is within the arm's length or not, in order to benchmark the same. Since it is already considered as the capital finance transaction as per the definition of international transaction u/s 92B, we are inclined to accept partial finding of the Transfer Pricing Officer that it is a quasi-capital and its cost has to be benchmarked in the international market. In the given case, the Transfer Pricing Officer has already observed that the cost of capital of the assessee is at 9.945% based on the Balance Sheet submitted by the assessee. Since it is an international transaction we cannot benchmark the same at the Indian market rate and as held in the various judicial pronouncements, the international transactions have to be benchmarked at the cost of capital based on the respective Libor rate. In this case, the preference shares are issued for a period of 7 years, however, it is redeemed within 3 years. Therefore, the

bench-marking has to be undertaken by adopting the 3 years LIBOR rate. It is normal on the part of the various banks to charge the interest on the basis of Libor rate plus certain basis points considering the risk factors involved in financing the same. However, in the given case assessee has taken financing from its own AE. Therefore, the benchmark has to be done based on the Libor rate i.e., LIBOR + basis points + adjustment of risk factor, considering the fact that the AE has invested in India without any collateral securities. Therefore, in this case, the cost involved in the capital financing is 8.5% of dividend. Therefore, it has to be benchmarked on the basis of Libor rate available on the date of issue of preference shares. Accordingly, we direct the Assessing Officer to benchmark the same by adopting the Libor rate (3 years quote) basis as indicated above. Since assessee has incurred the cost of 8.5% in comparison to the LIBOR rate, accordingly, we direct the Assessing Officer / Transfer Pricing Officer to benchmark the same and determine the ALP i.e., the difference of dividend of 8.5% and the LIBOR rate as per above discussion. Accordingly, we are inclined to allow the Ground No.1 raised by the assessee for statistical purpose. It is needless to say that the bench marking may be carried out by the

assessee and confirm by the TPO or vice versa after giving proper opportunity of being heard to the assessee.

25. With regard to Ground No. 2, brief facts of the case are, during the years under consideration, assessee has taken vehicles on lease from lessors (Kotak Mahindra Prime Limited and L&T Finance Limited). For A.Y. 2016-17, the assessee, in its capacity as Lessee, had paid lease rentals to the Lessor for the entire year under consideration. Out of the total amount of lease rentals, an amount of ₹.73,02,481 was with respect to principal payment and the balance constituted interest on such lease rentals. The factual and legal submissions submitted by Ld.AR of the assessee are reproduced below: -

> *2.1 At the outset, the Appellant humbly submits that out of total lease rental payment, Rs. 73,02,481 pertains to the payment made by the Appellant towards the principal component of the car lease rental payments (capitalised in the books of accounts as per Ind-AS accounting system of the Appellant).*
>
> *2.2 As regards disallowance in respect of payment made by the Appellant towards the principal component of the car lease rental payments, the Appellant submits that it did not have any ownership rights over the leased vehicles during the tenure of the lease (i.e. from April 2015 March 2016). The amount paid was not for acquiring any leasehold right by way of annual lease rent. Although the lease rentals paid by the Appellant are broken up into the principal and interest component, the payment made by the Appellant is in effect a lease rental payment for assets acquired by the Appellant under a lease arrangement. The lease rentals paid during the tenure of lease is an expenditure incurred wholly and*

exclusively for the purpose of business of the Appellant and is revenue in nature. While the Ld. AO allowed deduction for the interest component of the lease payment, he disallowed the principal component of such lease payment.

2.3 The Appellant places reliance on the decision of the Hon'ble Supreme Court in the case of I.C.D.S Limited v. CIT [2013] 350 ITR 527 (SC) wherein the Apex Court listed the following broad principles to reach to the conclusion that the ownership of the leased assets remains with the lessor:

- *The lessor is the exclusive owner of the asset at all points of time;*
- *If the lessee committed a default, the lessor is empowered to re-possess the asset (and not merely recover money from the lessee);*
- *At the conclusion of the lease period, the lessee is obligated to the return the asset to the lessor;*
- *The lessor will have the right of inspection of the asset at all times.*

2.4 In the instant case, the Appellant does not have any ownership rights over the asset during the lease tenure. The amount paid was not for acquiring any leasehold right. The lessor is exclusive owner of the asset at all points of time. The lease rentals are paid by the lessee to the lessor and thereby, the lessee is eligible to claim deduction under section 37(1) of the Act.

2.5 The Appellant would also like to place reliance on the following additional judicial precedents claiming allowability of lease rentals as a revenue expenditure under section 37(1) of the Act, even though the lease was categorized as finance lease:

- *Rajshree Roadways vs. Union of India [2003] 129 Taxman 663 (Raj. HC)*
- *CIT vs. Banswara Synthetic Ltd. [2013] 216 Taxman 113 (Raj HC)*
- *M/s Rak Ceramics India Private Limited us DCIT (ITA No 2226/Hyd/ 2017) (15 November 2019)*

2.6 Further, it is a settled law that treatment in the books of accounts is not determinative of liability towards income tax for the purpose of the Act. The liability under the Act is governed by the provisions of the Act and is not dependent on the treatment followed for the same in the books of accounts. For the above proposition, the Appellant would like to reply on the following decisions as under:

- *Sutlej Cotton Mills Ltd. vs. CIT [1979] 116 ITR 1 (SC)*
- *Kedarnath Jute Mfg. Co. Ltd. vs. CIT [1971] 82 ITR 363 (SC)*

2.7 In the instant case, the Appellant has duly disallowed the book depreciation on the assets taken on finance lease which has been capitalized in the books of account in accordance with AS-19/ Ind-AS accounting for the period for which the assets were taken on lease by the Appellant. Further, the Appellant has not claimed any depreciation under the Act and therefore, claimed deduction for the lease rentals lease in its tax return in accordance with Circular No. 2 of 2001 for the period for which the assets were taken on lease by the Appellant.

2.8 Further, the Appellant does not have any ownership rights over the assets and the lessor is the exclusive owner of the asset at all points of time. Therefore, the lessee is eligible to claim deduction under section 37(1) of the Act."

26. On the other hand, Ld. DR submitted that as per the agreement assessee has purchased the vehicle and paid the premium bifurcating the same as capital and interest portion separately. He submitted that till the end of period of lease, assessee owns the vehicle and at the end of terms assessee will buy the vehicle at 20% of the cost. He strongly supported the findings of the tax authorities.

27. Considered the rival submissions and material placed on record, we observe that assessee has claimed deduction of ₹.3,69,29,423/- under the head "any other amount liable as deduction" in schedule BP of the returned income, which included principle lease payment of finance of ₹.73,02,481/-. From the records, we observe that Assessing Officer has disallowed the portion of expenses related to principal repayment of lease for assets taken on Finance Lease. Before Assessing Officer, assessee submitted that assessee did not have any ownership right over the assets and the amount paid was not for acquiring any lease hold rights by way of annual lease rent. The lessor is exclusive owner of the asset at all point of time and assessee is obligated to return the assets at the end of the period to the lessor. Therefore, the claim of the assessee that the payments are revenue in nature and incurred wholly and exclusively for the purpose of business. However, Assessing Officer and Ld.DRP held that the assessee makes payments of lease rentals during the tenure of the lease which has two portions one towards interest and another towards capital repayment of principal value of assets. After considering the similar submissions that assessee is not the owner and assessee has to return the assets after the completion of the lease period, tax authorities held that the assessee has claimed

portion of principal amount of the installment paid against the assets taken on Finance Lease. Therefore, the principal amount component is a capital in nature and is not allowable as revenue expenses under section 37(1) of the Act.

28. Before we proceed further, let us understand the Lease transaction and its recording in the books as per Accounting Standard, the leases are classified as Finance Lease and Operating Lease. As per the accounting standards a lease is classified as Finance Lease if the lessor transfers substantially all the risks and rewards incidental to the ownership. Otherwise it is called operating lease when the lessor does not transfer substantially all the risks and rewards incidental to the ownership. It is fact on record that the issue under consideration is of Finance lease and it is accepted by both the parties that it is a Finance Lease of Vehicles. From the characteristics of the Finance Lease, if the following characteristics are present in the transaction then it will be classified as Finance Lease i.e.,

> *(a) the lessor transfers ownership of the assets to the lessee by the end of the lease term;*
>
> *(b) lessee has the option to purchase the asset at a price i.e., accepted to be sufficiently lower than the fair market value.;*

(c) the lease term is for the major part of the economic life of the asset; and

(d) the lease assets are such a nature that only the lessee can use them without major modifications.

29. Therefore, from the facts available on the record we observe that as per the lease agreement submitted before us it clearly shows that the assets/vehicles are leased to the assessee on the basis of fixed lease rentals as per schedule and which is not cancelable by the lessee or the lessor except as per the clause (8) agreed between them i.e., making available the vehicle for pollution checks and other statutory mandated technical / fitness tests. Further, as per the agreement assessee has the option to buy back the vehicle at the end of the terms of lease or at the cancellation of the above said lease prematurely. Therefore, from the above terms of lease it is clear that the lease taken by the assessee is purely a Finance Lease.

30. As per the Accounting Standard, the initial recognition of Finance Lease, the lessee (i.e., Assessee) should recognize Finance Lease as assets and liabilities in their Balance Sheet at amounts equal to the fair value of the leased property, both assets and liabilities are determined and recorded at the inception of the lease. The discount rate to be used

in calculating the present value of the minimum lease payments is the interest rate implicit in the lease. Although the legal form of a lease agreement is that the Lessee i.e., assessee may acquire no legal title to the lease asset, in the case of Finance Lease the substantial and financial reality are that the assessee acquires the economic benefits of the use of the lease asset for the major part of its economic life in return for entering into an obligation to pay for that right an amount approximating at the inception of the lease, the fair value of assets and related finance charges. Therefore, for a Finance Lease, both assets and the obligation/liability to pay for future lease should be recognized in the assessee's Balance Sheet. Therefore, the liability recognized in the Balance Sheet is only towards the obligation to pay the lease rentals. However, the assets value recognized in the Balance Sheet is eligible to claim as depreciation as per IND AS-17. Therefore, the assessee is eligible to claim the value of assets as recognized in the Balance Sheet which include both finance as well as principal amount of the assets capitalized in the Balance Sheet. Therefore, the Lessee accepted to recognize both finance commitment as well as value of assets in their Balance Sheet being deemed owner of the property as per the terms of Finance Lease.

31. From the above discussion, we have discussed the various aspects of recognizing the Leases and the case law relied by the assessee are relating to operating lease which is distinct from finance lease, where the main distinction is that in operating lease, the ownership remains with the lessor whereas in the finance lease, the ownership passes on to lessee.

32. Let us discuss the method followed by the assessee in the financial statement, it has declared the accounting policy in its notes to account as under:

> *"2.14 Leases*
>
> *Leases in which a significant portion of the risks and rewards of ownership are retained by the lessor are classified as operating leases. Payments made under operating leases are charged to the Statement of Profit and Loss on a straight-line basis over the period of the lease.*
>
> *The Company leases certain tangible and intangible assets and such leases where the Company has substantially all the risks and rewards of ownership are classified as finance leases. Finance leases are capitalised at the Inception of the lease at the lower of the fair value of the leased asset and the present value of the minimum lease payments.*
>
> *Each lease payment is apportioned between the finance charge and the reduction of the outstanding liability. The outstanding lability pertaining to non-current portion is included in other long-term borrowings and the current portion is included in other current liabilities. The finance charge is charged to the Statement of Profit and Loss over*

the lease period so as to produce a constant periodic rate of interest on the remaining balance of the ability for each year."

Accounting standard declared by the assessee in its notes forming part of accounts clearly indicate that the assessee has declared the method of recording of operating lease and finance lease separately.

33. From the above, assessee has rightly disclosed the accounting method of leases, which has two types and method to record the same. However, while recording the transactions of finance lease, they have recorded the discounted value of assets in their Balance Sheet and claimed the depreciation as per Companies Act as well as Income tax Act as far as Finance Leases are concerned. The lease payments has two portions, first is finance cost and other is repayment of principal. Strictly speaking assessee has followed the AS-19 issued by ICAI. However, assessee preferred to treat the assets acquired by it on Finance Lease and charged the same to its profit and loss account in two parts, as finance charges to the extent of interest relating to the current AY and depreciation for the actual value of assets, as per the method suggested in the AS 19 of ICAI. For the sake of clarity, the relevant note forming part of Financial Statement is reproduced below: -

37 Leases

(A) Finance Leases

	Amount in ₹	
	Year ended March 31, 2016	*Year ended March 31, 2015*
(i) Minimum Lease Payments payable		
• *Not later than one year*	*1,14,32,697*	*1,00,36,117*
• *Later than one year but not later than five years*	*2,86,07,721*	*1,55,29,730*
	4,00,40,418	*2,55,95,847*
(ii) Present Value of Minimum Lease Payments payable		
• *Not later than one year*	*781,17,463*	*78,14,459*
• *Later then one year but not later than five years*	*2,37,83,042*	*1,77,55,109*
	3,16,00,505	*2,05,69,565*
(iii) Reconciliation of Minimum Lease Payments and their Present Value		
• *Minimum Lease Payments Payable as per (i) above*	*4,00,40,418*	*2,55,95,847*
• *Less Finance Charges to be recognised in subsequent years*	*84,39,913*	*50,26,279*
• *Present Value of Minimum Lease Payments payable as per (i) above*	*3,16,00,505*	*2,05,69,568*
(iv) Finance Charges recognised in the Statement of Profit and Loss	*36,32,547*	*26,19,534*

(B) Operating Leases

	Year ended March 31, 2016	*Year ended March 31, 2015*
Disclosures in respect of cancellable agreements for office and residential premises taken on lease		
(i) Lease expenses recognised in the Statement of Profit and Loss		
(ii) Significant leasing arrangements	*18,39,37,076*	*18,09,43,175*
• *The Company has given refundable interest free security deposits under certain agreements.*		
• *The lease agreements are for a period of eleven months to nine years.*		
• *The lease agreements are cancelable at the option of either party by giving one month to six months notice.*		
• *Certain agreements provide for increase in rent.*		
• *Some of the agreements contain a provision for their renewal*		
(iii) Future minimum lease payments under non-cancellable agreements		
• *Not later than one year*	*81,11,408*	*36,87,993*
• *Later than one year and not later than five years*	*92,38,000*	

The assessee has also recognized the same in the Depreciation Schedule as under: -

Thomas Cook (India) Limited
Notes forming part of the Financial Statements as and for the year ended March 31, 2016
Note 14
Tangible Assets

Description	Gross Stock (As Cost)				Depreciation					Net Stock	
	As at April 1, 2015	Additions	Disposals	As at March 31,2016	As at April 1, 2015	For the year	Disposals/ Adjustments	Adjustments in Retained Earning	As at March 31, 2016	As at March 31, 2016	As at March 31, 2015
Owned											
Office Building	25,5275,549	1,10,12,50,585		1,35,65,26,134	5,87,54,436	74,09,569			6,61,64,005	1,29,03,62,129	19,65,21,113
Leasehold improvements	8,94,97,054	2,09,89,019	37,48,000	10,67,37,673	4,20,71,805	81,07,413	13,27,700		4,88,51,518	5,78,86,155	4,74,25,249
Furniture and Fixtures	24,89,01,691	9,57,79,649	63,75,806	33,83,05,534	10,92,19,448	3,95,19,126	96,04,896	59,37,065	15,10,70,743	18,72,34,791	13,96,82,243
Computers	19,20,89,253	5,61,60,142	1,57,68,550	23,24,80,845	14,37,85,462	3,15,96,856	1,57,53,892	23,09,662	16,19,38,088	7,05,42,757	4,83,03,791
Office Equipment	14,95,48,937	5,33,01,234	85,70,140	19,42,80,031	6,56,40,237	2,52,34,771	82,94,176	4,92,93,189	13,18,74,021	6,24,06,010	8,39,08,700
Vehicles	35,73,155			35,73,155	33,62,063	38,453			34,00,516	1,72,639	2,11,092
Plant and Machinery	33,16,953	3,52,172		36,69,125	5,99,719	2,52,984			8,52,703	28,16,422	27,17,234
Leased											
Computers	30,53,425	2,17,09,312	1,23,00,750	30,53,425	30,53,425	1,49,62,778			30,53,425		
Vehicles	3,44,27,990	1,34,95,42,113	4,67,63,646	4,38,36,552	1,12,93,033	12,71,21,950	1,09,26,649	5,75,39,916	1,53,29,162	2,85,07,390	2,31,34,957
	97,96,84,000	**1,34,95,42,113**	**4,67,63,646**	**2,28,24,62,474**	**43,77,79,628**	**12,71,21,950**	**3,99,07,313**	**5,75,39,916**	**58,25,34,181**	**1,69,99,28,293**	**54,19,04,379**
Previous Year	98,81,60,491	6,28,49,440	7,44,62,900	97,96,84,007	43,16,34,717	6,46,44,352	5,88,62,863		43,77,79,628	54,19,04,379	
Notes:											
1. Cost of office building includes											
(a) 60 (Previous year – 60) unquoted fully paid – up shares of ₹. 3,000 (previous year – ₹.3000) in various co-operative societies.											
(b) Share application money of ₹. 2,040 (previous year 2,040) to various co-operative societies											
(c) Premises of ₹.118,194,714 (previous year ₹. 147,252,688) where the Co-operative Society is yet to be formed											

"Thomas Cook (India) Limited
Notes forming part of the Financial Statements as at and for the year ended March 31, 2016
Note 14(a)
Tangible Assets

Description	Gross block (at Cost)				Depreciation						Net Block	
	As at April 1, 2014	Taken over pursuant to scheme of Arrangement (Refer Note 12	Additions	deductions	As at March 31 2015	As at April 1 2014	Taken over pursuant to scheme of Arrangement (Refer Note 12)	For the Year	on deductions	AS at March 31, 20158	AS at March 31, 2015	As at March 31, 2014
Tangible Assets owned												
Office Building	25,52,75,549	--	--	--	25,52,75,549	5,45,93,444	---	41,60,992	---	5,87,54,436	19,65,21,113	20,06,82,105
Lease hold improvements	7,70,70,803	--	1,71,76,306	47,50,055	8,94,97,054	4,02,73,990	---	65,06,911	47,09,096	4,20,71,805	4,74,25,249	3,67,96,813
Furniture and fixture	26,96,91,705	--	40,27,568	2,48,17,582	24,89,01,691	11,20,87,089	---	1,51,53,922	1,80,21,563	10,92,19,488	13,96,82,243	15,76,04,616
Computers	18,38,90,353	--	2,67,47,842	1,85,48,942	19,20,89,253	13,81,28,572	---	2,38,87,498	1,82,30,608	14,37,85,462	8,39,08,700	4,57,61,781
Office Equipment `	16,39,85,153	--	33,17,344	1,77,53,560	14,95,48,937	7,06,92,897	---	72,79,798	1,23,32,458	6,56,40,237	2,11,092	9,32,92,256
Vehicles	41,89,412	--	---	6,16,257	35,73,155	39,27,734	---	50,612	6,16,283	33,62,063	27,17,234	2,61,678
plant and machinery	---	31,36,978	1,79,975	---	33,16,953	---	3,63,422	2,36,297	---	5,99,719	---	---
Leased												
Computers	30,53,425	---	--		30,53,425	30,53,425	---	---	---	30,53,425	---	---
Vehicles	3,1004,291	---	1,14,00,403	79,76,506	1,44,27,990	88,77,565	---	73,68,322	49,52,855	1,12,93,033	2,31,34957	2,23,36,525
	58,81,60,491	31,36,978	6,28,49,440	7,44,62,902	97,96,84,007	43,16,34,717	3,63,422	6,46,44,352	5,88,62,863	43,77,79,628	54,19,04,379	55,65,25,774
Previous year	98,59,34,455		6,01,01,437	5,78,75,401	98,8150,491	41,39,89,829		5,87,57,652	4,11,12,764	43,16,34,717	55,65,25,774	

34. From the above two depreciation schedules, the assessee has recognized the finance charges and also claimed the depreciation based on Schedule rates on the Vehicles as per Companies Act. Further, it has also calculated the depreciation as per Income Tax on the Vehicles.

35. Till this there is no issues, however, for the purpose of Income tax computation, assessee added the depreciation on the vehicles acquired on finance- lease and claimed as deduction the payment of principal portion. This is where the whole issues crept up. In our view, the method adopted by the assessee is not proper and the proper method would be only to claim the depreciation as per Income tax as calculated at 152 of paper book as stated above. However, in our view, the assessee has to explain the various values declared in the depreciation schedule as well as the value adopted in the Computation sheet before AO, even we are not in a position to understand since it was not explained at the time of hearing. In our view, the method adopted by the assessee in following the Accounting standard and calculating the depreciation seems to be right however, the method to claim differently for computation of Income tax i.e., claim the principal repayment instead of relevant depreciation may not be right method. Therefore, it

needs proper explanation and verification of various figures declared by the assessee in Depreciation schedule and computation sheet. The right method is to claim only the depreciation as per the depreciation schedule prepared under Income Tax Act because the assessee is the deemed owner of the assets and it has rightly recognized in its books of account. The assessee cannot bifurcate the claim under the I.T. Act separately for interest & depreciation. Therefore, we direct A.O to allow only the depreciation on the assets under I.T. Act.

36. Accordingly, we deem it fit and proper to remit this issue back to the file of the Assessing Officer to recheck the claim of assessee as per IND-AS – 17 [AS-19] and at the same time we also direct the assessee to explain the accounting of leases properly before the AO and we direct AO to verify the same, after verifying the same allow the depreciation as per the above direction after providing adequate opportunity of being heard to the assessee. Accordingly, this ground of appeal is allowed for statistical purpose.

37. With regard to Ground No. 3 which is relating to Employees Share Option Scheme [ESOP], brief facts of the case are, during the course of assessment proceedings Assessing Officer observed that assessee has debited an amount of ₹.7,01,54,021/- towards Employees Share Option Scheme when the details were called from assessee, assessee vide letter

dated 31.12.2019 submitted that ESOP options are given to whole-time Directors, officers or employees of the company, the benefit of or right to purchase or subscribe to the securities offered by the assessee at a future date and at a predetermined prices. During the assessment year assessee has claimed ESOP of ₹.7,01,54,021/- and the same was disclosed at Note – 34 and Note – 35 of the financial statements. In order to claim the ESOP benefits the employee obliged to render services to the company from the vesting period and on completion of the vesting period, the options vest with the assessee. The ESOP cost represents discount given to the employee being the difference between market price at the time of grant of options to employees and exercises prices of the ESOP is recognized equally over the vesting period of ESOP. This is in accordance with the guidelines and accounting principle laid down by SEBI for listed entities. If the expenditure is laid out or expended fully for the purpose of business and it is claimable revenue expenditure under section 37(1) of the Act. Further, it was submitted that the discount on issue of ESOP is one of the mode of compensation to employees for their services and they have relied on the decision of the Special Bench of the Bangalore in the case of Biocon Ltd. *v.* DCIT [2013] 35 taxmann.com 335) and other Tribunal orders. Further,

assessee also made a further claim of ₹.2,48,85,009/- for grant of ESOP to the employees and the same was not claimed in the return of income and the details of additional claim was submitted before Assessing Officer.

38. After considering the submissions of the assessee, Assessing Officer rejected the submissions of the assessee and observed that ESOP expenses debited by the assessee in its profit and loss account is not crystalized in the previous year as the same is contingent, notional and capital in nature, hence he rejected the claim of the assessee by observing as under: -

> *"9.6 A scheme of Employee Stock Option (ESOP) is one such process where employers reward employees by making them partners/ rightful owners in wealth which they have build together by issuing shares in the entity at a discounted price which otherwise is available at higher price in the market due to various reasons such as market expecting to reap the reserves sitting in the books of accounts, goodwill generated by the Company in the market, expected discounted cash flow forecasts of the Company etc.*
>
> *9.7 ESOP is a plan wherein an option is provided by the employer to employee to opt for issue of shares in the company at the end of vesting period on satisfying specific conditions set in by employer at an agreed pre-determined discounted price against a commitment from the employee of provision of uninterrupted services to the company The major benefits out of such ESOP scheme are (i) Employers do not have immediate payout obligation while they continue to lure the employees and receive their uninterrupted services(ii) Employees feel a sense of ownership and Cheir efforts can directly be remunerated in an employee oriented industry (iii) Employees may get a sense of getting retained with*

the company for at least a near Future time period (iv) Employees get a very good opportunity to become partners in wealth creation in a twofold manner wherein on one side they are issued shares at a discounted price when compared to market price or sometimes even at free of cost and on the other side they become eligible for all the future shareholder payouts whether be it dividends or buyback/ redemption of capital.

9.8 An employer who wishes to issue ESOP proposes a plan to the employees on certain date i.e. grant date with certain conditions attached to it which inter-alia includes a minimum period of employment with the company i.e. vesting period. There is a certain time period within which the employee after the ESOP getting vest gets an opportunity to exercise the option i.e. Exercise period. The value at which the hares are issued to employees is technically called exercise price some companies also keep a lock in period for the exercised ESOP within which an employee cannot sell those shares in the market.

9.9 Accounting treatment of ESOP:-

As per the Guidance Note issued by Institute of Chartered Accounts of India (ICAI) and SEBI the main objective to issue an ESOP share or say sweat equity share is to remunerate the employee for, his past services, for making available intellectual property rights to the employer However, due to the issue of ESOP the rights of the existing shareholders get diluted and therefore there is a need to compensate such dilution by creating an artificial reserve. The only resource available with any company is the corporate profits. Hence the ICAI and SEBI have suggests to create such reserve from the current profits earned by the company. The methodology to be adopted as suggested by ICAI and SEBI to compute the quantum of reserve is the difference between market value as computed under SEBI rules on the date of grant and the price at which the shares are issued to the employees in order to compensate the payout obligation which might arise on ESOP shares either at buyback or at liquidation.

9.10 Allowability of ESOP expense in the income Tax Act-

There is no specific section under which ESOP expenditure is allowable under the Income Tax Act 1961 ('Act). The only provision where a company can claim the expenditure is section 37 of the ActHence, it is pertinent to test the conditions mentioned in section 37 in order to conclude whether the expenditure is allowable? Section 37 of the Act

allows an assessee to claim expenditure if it fulfills the following conditions:

It should be an expenditure,

• It should not be dealt in section 30 to 36,

• It should not be a capital expenditure or personal expense of the assessee, and

It should be incurred or laid out wholly and exclusively for the purpose of business or profession.

9.11 As discussed above, the expense which is debited to profit and loss account (P&L) is the difference between the market value of share as computed under the guidelines of SEBI and the value at which the share are issued to employees In this connection it is submitted that

- *The company is choosing to either receive securities premium of a lower amount or no securities premium when compared to that of which it would have received during a normal course of share issue. Hence there is no expenditure that the company is incurring or laying out.*
- *The issue of shares is also not crystallized till the date on which the employee exercises the option and hence any expenditure debited during the vesting period remains contingent in nature.*
- *The ESOP expense even if treated as expenditure is a capital expenditure since securities premium being a capital item.*

9.12 It is also submitted that the Hon'ble Delhi ITAT in the case of ACIT Vs Ranbaxy Laboratories ITA No 2613 & 3871 has held that the ESOP expense debited to P&L is notional in nature, since the assessee has neither laid out or expended any amount while choosing to receive no lesser securities premium. The alternative argument that this ITAT has supported is since the receipt of securities premium is not chargeable to tax being a capital receipt any short collection of securities premium should also so be considered as capital outlay and cannot be allowed as expenditure.

9.13 The Delhi ITAT in the case of Ranbaxy (Supra) has relied on the following court rulings which have held that shares issued against assets/technical know-how contributed by shareholders cannot be claimed as revenue expenditure:

- *Eimco K.C.P Ltd Vs CIT 159 CTR 137 (Supreme Court)*

- *CIT Vs ReinzTalbros Pvt Ltd 252 ITR 637 (Delhi) COME TAX DEPARTENT*

9.14 Further, there are rulings as to what constitutes an expenditure In the case of Indian Mollasses Co Pvt Ltd Vs CIT 37 ITR 66, CIT VS Nainital Bank Ltd 62 ITR 38, it is held that what denotes expenditure in the normal course as spending paying out or away of money Accordingly ESOP cannot be held as expenditure of me assessee.

9.15 The above views of Delhi ITAT in the case of Ranbaxy (supra) were also pheld subsequently by the following judicial courts:

- *Hyderabad ITAT in the case of Medha Servo Drivers Limited ITA No 1114/Hyd/2008.*

Mumbai Tribunal in the cases of:

- *DCIT Vs Blow Plast Limited ITA No 512/Mum/2009.*
- *Mahindra & Mahindra Vs DCIT ITA No 8597/Mum/2010.*
- *M/s VIP Industries Vs DCIT ITA No 7242/Mum/2008*

39. Aggrieved with the above order assessee preferred objection before Ld. DRP and filed the detailed submissions before Ld. DRP. Ld. DRP followed the findings of the proceedings for the A.Y. 2015-16 and in order to keep the issue alive, they have rejected the submissions of the assessee and further, they observed that the decision of the Special Bench of the ITAT is pending before the Hon'ble Karnataka High Court and it was admitted and pending for adjudication.

40. Aggrieved with the above order assessee is in appeal before us raising the issue before us.

41. At the time of hearing, Ld.AR of the assessee brought to our notice issues under consideration raised before Assessing Officer and Ld. DRP and he brought to our notice that the issue under consideration is covered in favour of assessee and brought to our notice Page No. 191 of the Paper Book where the similar issue was considered by the Tribunal in assessee's own case for the A.Y. 2015-16 in ITA No. 7807/MUM/2019 dated 31.05.2023 and decided the issue by relying on the decision of the Hon'ble Karnataka High Court in the case of CIT *v.* Biocon Ltd., (21 taxmann.com 351). He brought to our notice Page No. 191 to 196 of the case law Paper Book and prayed that similar issue was raised by the assessee in this appeal and the same may be allowed.

42. With regard to second issue of claim of additional ESOP he also brought to our notice similar issue was considered by the Coordinate Bench in assessee's own case in ITA No. 7807/MUM/2019 dated 31.05.2023 and the same was remitted back to the file of the Assessing Officer to verify the claim of the assessee and he prayed that this issue of additional claim may also be remitted back to the file of the Assessing Officer for verification.

43. On the other hand, Ld. DR relied on the orders of the lower authorities.

44. Considered the rival submissions and material placed on record, we observe that assessee has claimed ESOP expenses before Assessing Officer which the Assessing Officer has rejected and also assessee claimed additional claim of ESOP expenses before Assessing Officer which was rejected by the Assessing Officer. Ld.DRP has also rejected the claim of the assessee in order to keep the issue alive since the case was pending before Hon'ble Karnataka High Court in the case of CIT *v.* Biocon Ltd., (21 taxmann.com 351). However, the Hon'ble Karnataka High Court has decided the issue in favour of assessee and respectfully following the above decision the Coordinate Bench of this Tribunal in assessee's own case for the A.Y. 2015-16 has decided the issue in favour of assessee. For the sake of clarity, the relevant portion of the order is reproduced below: -

> *"14. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. Counsel of the assessee submitted that subsequent to the passing of the order of the Ld. DRP the Hon'ble Karnataka High Court in the case of CIT v. Biocon Ltd -21 taxmann.com 351 has upheld the finding of the Special Bench Tribunal in the case of CIT v. Biocon Ltd (supra). The relevant finding of the Hon'ble Karnataka High Court is reproduced as under:*

6. We have considered the submissions made by learned counsel for the parties and have perused the record. The singular issue, which arises for consideration in this appeal is whether the tribunal is correct in holding that discount on the issue of ESOPs i.e., difference between the grant price and the market price on the shares as on the date of grant of options is allowable as a deduction of the Act. Before proceeding further, it is apposite Section 37(1) of the Act, which reads as under:

> *Section 37(1) says that any expenditure (not being expenditure of the nature described in nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head, "Profits and Gains of Business or Profession".*

7. Thus, from perusal of the aforesaid provision permits deduction for the expenditure laid out or expanded and does not contain a requirement that there has to be a pay out. If an expenditure has been incurred, provision of Section 37(1) of the Act would be attracted. It is also pertinent to note that Section 37 cash.

8. Section 2(15A) stock option' to mean option given to the whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vest with the employees.

9. In the instant case, the ESOPs vest in an employee over a period of four years i.e., at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen accounting year, the same is permissible as deduction, even though, liability may have to

quantify and discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P Ltd., supra and has recorded a finding that discount on issue of ESOPS is not a contingent liability but is an ascertained liability.

10. From perusal of Section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of Section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital The tribunal therefore, in paragraph 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under Section 37(1) of the Act subject to fulfillment of the condition.

11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of accounts, which has been prepared in accordance with Securities And Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

12. So far as reliance place by the revenue in the case of CIT VS. INFOSYS TECHNOLOGIES LTD is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a proceeding under Section 201 of the Act for non deduction of tax at source and it was held that there was no cash inflow to the employees. The aforesaid decision is of no assistance to decide the issue of allowability of expenses in the hands of the employer. It is also pertinent to mention here that in the decision rendered by the Supreme Court in the aforesaid case, the Assessment Year in question was 1997-98 to 1999- 2000 and at that time, the Act did not contain any specific provisions to tax the benefits on ESOPS. Section 17(2)(iiia) was inserted by Finance Act, 1999 with effect from 01.04.2000. Therefore, it is evident that law recognizes a real benefit in the hands of

the employees. For the aforementioned reasons, the decision rendered in the case of Infosys Technologies is of no assistance to the revenue. The decisions relied upon by the revenue in Gajapathy Naidu, Morvi Industries and Keshav Mills Ltd supra support the case of assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on ESOPs has rightly been debited as expenditure in the books of accounts. We are in respectful agreement with the view taken in PVP Ventures Ltd. And Lemon Tree Hotels Ltd Supra.

13. It is also pertinent to mention here that for Assessment Year 2009-10 onwards the Assessing Officer has permitted the deduction of ESOP expenses and in view of law laid down by Supreme Court in RadhasoamiSatsang vs. CIT, (1992) 193 ITR 321 (SC)the revenue cannot be permitted to take a different stand with regard to the Assessment Year in question.

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assesseeIn the result, we do not find any merit in this appeal, the same fails and is hereby dismissed

14.1 Respectfully following the finding of the Hon'ble Karnataka High Court(supra), the Ld. Assessing Officer is directed to delete the addition. The ground of appeal of the assessee is accordingly allowed."

45. Respectfully following the above decision in assessee's own case for the A.Y. 2015-16, we are inclined to allow the Ground No. 3.1 raised by the assessee.

46. With regard to additional claim on ESOP raised by the assessee the similar issue was considered by the Coordinate Bench in A.Y. 2015-16 and remitted the issue back to the file of the Assessing Officer / Ld.DRP

to verify claim of the assessee. For the sake of clarity, it is reproduced below: -

> *"16. We have heard rival submissions of the parties and perused the relevant material on record. We find that the LdDRP has rejected the additional claim mainly on the ground that proceedings before the Ld. DRP are in continuance of the assessment proceedings and not in the nature of appellate proceedings and therefore, the Ld. DRP was not authorized to admit such a additional claim otherwise then by revised return of income However, the Tribunal being appellate authority is entitled to admit such a claim if same is purely being legal in the nature and n investigation of the fresh facts is required. Before us, the Ld. Counsel of the assessee has filed all details in respect of claim and submitted that all such details were filed before the Ld. DRP and therefore, same are available on record. In view of the facts and circumstances, we admit this claim of the assessee relying on the decision of the Hon'ble Bombay High Court in the case of CIT v. Pruthvi Brokers & Shareholders (ITA No. 3098/2010) and restore the matter back to the file of the Ld. Assessing Officer for examining the claim in accordance with law after verifying the documentary evidence submitted by the assessee. The ground No. 4 of the assessee is accordingly allowed for statistical purposes."*

47. Respectfully following the above decision, we are inclined to remit this issue also back to the file of the Assessing Officer to verify the claim of the assessee and allow the same as per law. Ground No. 3.2 raised by the assessee is allowed for statistical purpose.

48. With regard to Ground No. 4 which is relating to disallowance under section 14A of the Act, relevant facts on this ground are, during the course of assessment proceedings Assessing Officer observed that assessee has invested substantial amount in investments yielding

exempt income to the extent of ₹.1219,90,07,951/- in "equities and mutual funds" as on 31.03.2016 and ₹.1158,31,14,189/- as on 31.03.2015. During the year assessee has earned dividend income of ₹.6,14,35,915/- from mutual funds and dividend of ₹.6,85,86,320/- from investments in subsidiary company and claimed the same as exempt under section 10(35) of the Act. When the details were called from the assessee, assessee filed its response vide letter dated 06.12.2019, for the sake of clarity it is reproduced below: -

> *"During the year under consideration, our company has earned dividend income from Mutual Fund of Rs. 6,14,35,915/-. The said dividend income is claimed as exempt in computation of total income under section 10(35) of the Act. Further, the Company has earned dividend of Rs. 6,85,86,320/- from subsidiary.*
>
> *No disallowance in the absence of any expenditure:*
>
> *1. Section 14A of the Act provides disallowance of expenditure "incurred in relation to income claimed exempt in the return of income. It is submitted that the Company has not incurred any direct or indirect expenditure in relation to earning the said exempt income*
>
> *2. As per section 14A of the Act, only expenditure which has been proved to have been incurred in relation to the earning of tax-free income can be disallowed and this section cannot be extended to disallow any expenditure which is assumed to have been incurred for the purpose of earning tax-free income.*
>
> *1. It has been held in the below judicial precedents that expenditure incurred refers to actual expenditure and not to some imaginary expenditures Accordingly, if no expenditure is incurred in relation to the exempt income, no disallowance can be made under Section 14A of the Act.*
>
> - *CIT v. Hero Cycles Ltd. (323 ITR 518) (P&H HC) (2010)*
> - *Yatish Trading Co. (P.) Ltd. vACIT (129 ITD 237) (Mum ITAT) (2011)*

- *Justice Sam P. BharuchavACIT (53 SOT 192) (Mum ITAT) (2012)*
- *Principal Commissioner of Income tax- IL&FS fax -04 v IL & FS Energy Development Co Ltd (84 taxmann.com 186) (Delhi HC) (2017)*

2. It is therefore emphasized that our company has not incurred any direct expenditure to earn the dividend income during the captioned assessment year, hence, no disallowance should be made as per the provisions of section 14A.

3. Further, we would like to submit that the onus is on the department to prove that any expenditure was incurred for earning tax free income. The burden of proof or onus in this regard would lie on the AO, not only to show that some expenditure was factually incurred but also to show its relationship with the income exempt from taxIn the regard, reliance is placed on the following legal precedents:

- *WIMCO Seedlings Ltd. Vs Dy.CIT [2007] 109 TTJ 462 (Del) (TM)*

"It has been held in this case that burden would lie on the AO not only to show that some expenditure was factually incurred, but also to show its relationship with the income exempt from tax.

- *MarutiUdyog Ltd. VsDy.CIT [2005] 92 TTJ 987 (Del.)*

"It was, inter alia, held in this case that onus is on the Revenue to prove that interest paid by the assessee on borrowed funds related to the acquisition of shares yielding tax-free income."

- *ACIT vsEicher Ltd. [2006] 101 TTJ 369 (Del.).*

"It was held in this case that burden is on the AO to establish nexus of expenses incurred with the earning of exempt income, before making any disallowance under section 14A."

Accordingly, your goodself will appreciate the fact that section 14A of the Act has no application in the absence of any direct expenditure actually incurred by the company.

Nexus of expenditure with exempt income:

1. *The company has utilized the fund received from sale of short term investment for purchase of short term investment in mutual funds.*
2. *In this regard, we submit that in the absence of nexus between expense and earning of exempt income, disallowance under section*

14A of the Act cannot be made. The same has been upheld in the following judicial precedents

- *CIT vs Sintex industries (93 taxmann.com 24) (SC) (2018)*
- *CIT vHero Cycles Ltd(323 ITR 518) (P&H HC) (2010)*
- *Justice Sam P. Bharucha v Addtl. CIT [2012] 53 SOT 192 (Mum Trib.) (URO) [AY 2008-09];*
- *DCIT vAllied Investments Housing P Ltd.(Chennai) (Trib.) [AY 2009- 10]*
- *Gujarat Narmada Valley Fertilizer Company Limited (ITA No 1151 of 2013) (Gujarat HC)*
- *Aditya Birla Finance Ltd v Assistant Commissioner of Income tax -2(1) (83 taxmann.com 85) (Mumbai ITAT) (2017)*

1. *In the decision of the Delhi ITAT in case of Mohan Exports (P.) Ltd. [(2012) 138 ITD 108, it has been held that Rule 8D (2)(ii) would not apply in case where investments have been made from interest-free funds available with assessee. It is necessary to examine whether the interest paid during the year is directly attributable to any particular income/receipt or not. If there is a finding that the interest is not directly related to receipts by way of dividends, it follows that the payment of interest is in respect of income other than dividend income. In such a situation, the interest cannot be said to be a kind of general expenditure incurred for earning of various kinds of incomes. Therefore the provision contained in Rule 8D(2)(ii) would not apply.*

2. *Without prejudice to the above, our company contends that no disallowance under section 14A of the Act is warranted on account of the following:*

    1. *Our company contends that while considering the average value of investment, for the purpose of calculation of disallowance under section 14A read with rule 8D(iii) of the Income-tax Rules, 1962, only those investments are to be considered that have yielded exempt income and not those investments that did not yield any exempt income during the year. Reliance in this connection is placed on the decision of Hon'ble Kolkata Tribunal in the case of REI Agro Ltd v Deputy Commissioner of Income tax, Central Circle-XXVII [2013] 35 taxmann.com 404 has held that disallowance under rule 8D(i) can be computed only by taking into consideration average value of investment appearing in balance sheet as on first and last day of previous year from which income not falling within total income has been earned.*

2. Further, the company would like to submit that the provisions of section 14A read with Rule 8D is not applicable to the company. Reliance in this connection is placed on the decision of Hon'ble Delhi ITAT Special Bench (SB) in case of Vireet Investment (P.) Ltd (82 taxmann.com 415) held that disallowance under section 14A while computing income under MAT provision under section 115JB of the Act is to be made without resorting to computation as contemplated under Rule 8DWe reiterate that the company has not incurred any direct expenditure to eam the exempt income, and in absence of a direct expenditure no disallowance can be made as per the provisions of section 14A read with Rule 8D of the Act.

1. view of the above, we submit that no disallowance is warranted other hat above as per the provisions of section 14A read with Rule 8D since;

No disallowance can be made in absence of any direct expenditure

• Interest expenditure has not been incurred to earn exempt income;

Onus is on the department to prove that expenditure has been incurred to earn exempt income;

Without prejudice, to the above, only those investments which have incurred exempt income should be considered for the calculation disallowance as per the provisions of section 14A read with rule 8D(iii);

• Provision for calculating disallowance as per section 14A read with rule 8D are not applicable for calculation of book profits as per provisions of section 115JB of the Act."

49. After considering the submissions of the assessee Assessing Officer found not acceptable, the Assessing Officer observed that assessee has not disallowed any expenditure under section 14A of the Act and the main contention of the assessee is that if no expenditure is incurred then there should not be any disallowance under section 14A and strategic investments to be excluded while computing the

disallowance under Rule 8D2(i) of I.T. Rules. Assessing Officer rejected the above said submissions and by relying on CBDT Circular No. 5 of 14 dated 11.02.2014 and other case law, held that 14A disallowance are applicable in this case and accordingly, he determined the disallowance under section 14A by invoking Rule 8D2(ii) of I.T.Rules and disallowed at 1% of the annual average of the monthly average of investments and disallowed an amount of ₹.12,19,90,079/- under section 14A r.w.s. Rule 8D of I.T. Rules.

50. Aggrieved assessee preferred objection before Ld. DRP and filed affidavit before Ld. Ld. DRP. Before Ld. DRP assessee has made the submissions that no disallowance can be made in absence of any expenditure, the disallowance made by applying Rule 8D of I.T.Rules are erroneous relying on the CBDT Circular and also objected that amended Rule 8D are applied in the case of assessee and amended Rule are applicable prospectively and further, submitted that Rule 8D should be restricted to the investments which has given rise to exempt income. After considering the submissions of the assessee Ld. DRP rejected the submissions of the assessee and sustained the additions proposed by the Assessing Officer.

51. Aggrieved assessee is in appeal before us raising the issue. At the time of hearing, Ld.AR of the assessee brought to our notice findings of the Assessing Officer at Page No. 33 of the final assessment order and he submitted that Assessing Officer has determined the disallowance applying the annual average of the value of investment without eliminating the value of investments which has not yielded any dividend and he prayed that this issue may be remitted back to the file of the Assessing Officer for proper disallowance by removing the investments which has not yielded any dividend income.

52. On the other hand, Ld. DR relied on the order of the lower authorities.

53. Considered the rival submissions and material placed on record, we observe that Assessing Officer has invoked the provisions of section 14A r.w. Rule 8D of I.T. Rules and determined the disallowance by applying 1% of the annual average of the monthly average of opening and closing balance of value of investments mechanically. We observe that Assessing Officer has taken total value of average investments which may include those investments which has not generated any exempt income in the above said total investments made by the

assessee, however, it is settled position of law that the Assessing Officer has to consider only those investments which has actually yielded exempt income. Therefore, we deem it fit and proper to remit this issue back to the file of the Assessing Officer to consider those investments which has actually yielded the exempt income. Accordingly, Ground No. 4.1 is allowed for statistical purpose.

54. With regard to Ground No. 4(b) of grounds of appeal, it is brought to our notice that Assessing Officer has invoked clause (f) of Explanation (ii) to section 115JB of the Act to disallow the 14A disallowance as determined by him under section 14A of the Act. This issue is settled as far as assessee is concerned that the 14A disallowance cannot be part of clause (f) of Explanation (ii) of section 115JB of the Act. We observe that the Delhi Special Bench of the Tribunal in the case of ACIT *v.* Vireet Investments Private Limited [165 ITD 27] held that the computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s. 14A r.w. Rule 8D of the I.T Rules, 1962. Thus respectfully following the said decision, we direct assessing officer to delete the above adjustment made in the book profit u/s 115JB of the Act. This ground is accordingly allowed.

55. With regard to Ground No. 5 which is relating to adjustment of dividend distribution tax. At the time of hearing, Ld.AR of the assessee submitted that this issue is decided by the Tribunal against the assessee. Therefore, we dismiss the ground raised by the assessee.

56. With regard to Ground No. 6 which is relating to short grant of TDS credit to the assessee, since this issue is factual matter which needs verification on the part of the Assessing Officer, we deem it fit and proper to remit this issue back to the file of the Assessing Officer to verify the claim of the assessee and allow the same as per law. Accordingly, this ground of appeal is allowed for statistical purpose.

57. With regard to Ground No. 7 which is on penalty levied under section 271(1)(c) of the Act, which is premature ground raised by the assessee at this stage, accordingly, this ground is dismissed as such.

58. With regard to Ground No. 8 which is relating to levy of interest under section 234B which is consequential in nature, accordingly, this ground is also dismissed.

59. In the result, appeal filed by the assessee is partly allowed as indicated above.

ITA No. 752/MUM/2022 (A.Y. 2017-18)

60. Assessee has raised following grounds in its appeal: -

> *"1.* ***Transfer Pricing adjustment for adding the notional interest of INR 2,42,96,87,813 on receivables on account of issuance of NCCRPS (Ground 1.1. to Ground 1.10):***
>
> *On the facts and in the circumstances of the case, and in law, the Learned Assessing Officer (Ld. AO), following the directions of Hon'ble Dispute Resolution Panel ('Hon. DRP), erred in confirming the transfer pricing addition of interest of Rs 2,42,96,87,813/- on deemed receivables which is overdue for the difference in the face value of Non-convertible Cumulative Redeemable Preference Shares (NCCRPS) issued vis-à-vis the market price of the equity share as on the date of issuance (hereby referred as 'alleged transaction').*
>
> *1.1. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in not adjudicating the jurisdictional requirement, as laid by the CBDT Instruction 3 of 2016, of existing of an income which is a pre-requisite before making a reference to Lt. TPO or proposing an addition on the capital transaction of issuance of NCCRPS. The Hon. DRP/ Ld. AO/ Ld. TPO failed to appreciate that in the absence of any income arising on account of issuance of NCCRPS, transfer pricing provisions contained in Chapter X of the Act do not apply to the facts of the present case.*
>
> *1.2 On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in rejecting the reliance placed by the Appellant on the Hon'ble Bombay High Court's decision dated 10 October 2014 in Writ Petition No. 871 of 2014 in the case of Vodafone Services Pvt Ltd vs UOI [2015] Taxmann.com 286 (Bombay) and concluding that no income arises to it from such a transaction and accordingly transfer pricing provisions contained in Chapter X of the Act will not apply to the facts of the present case.*

1.3. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPOhave erred in not recording any reasons to show that the conditions mentioned in clause (a)to (d) of section 92C(3) of the Act were satisfied, either before initiating the transfer pricingassessment or before the completion of the assessment proceedings.

1.4. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in recharacterizing a legitimate business transaction of issuance of NCCRPS as quasi equity without providing cogent reasons and thus erred in comparing the NCCRPS with equity shares in the absence of any current statutory provisions to support such re- characterization.

1.5 On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in treating the quoted market price of the equity share of the Appellant as the arm's length price for issuance of NCCRPS which were redeemable at par thereby considering the alleged shortfall arising on account of alleged transaction as a nature of debt/receivable in the hands of the Appellant, thus creating a notional transaction

1.6. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in making secondary adjustment that is not permitted under the Indian regulations for the year under consideration ie. AY 2017-18.

1.7. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in adopting an adhoc and arbitrary approach in determining the interest rate to be imputed on the deemed receivable determined by the Hon. DRP/Ld. AO/Ld. TPO without undertaking a benchmarking analysis. An interest rate of 9.945 percent was determined based on the stray interest rates on redeemable NCDs issued by the Appellant.

1.8. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in mechanically relying on observations and conclusions made during the transfer pricing assessment of AY 2016-17 with respect to issuance of NCCRPS and have not examined evaluated the matter afresh in AY 2017-18. This demonstrates pre- determined mindset to make the impugned adjustment.

1.9. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in not following DRP's own direction in the Appellant's case for AY 2015-16 wherein reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Vodafone Services Pvt Ltd. v/s UOI [2015]

53Taxmann.com 286 (Bombay) and Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. Vs CIT [2015] 64Taxmann.com

150(Delhi) and gave a finding that an element of 'income' was a prerequisite for applicabilityof transfer pricing provisions since they are merely machinery' provisions and not chargingprovisions

2. ***Addition of Rs. 11.57,22,000/- under section 68 of the Act in respect of cash deposit in Specified Bank Note (SBN) during demonetization period.***

2.1 On the facts and circumstances of the case and in law, the Ld. AO erred in passing the final assessment order u/s 143(3) r/w 144C of the Act, without giving effect to the binding directions of the Ld. DRP wherein the DRP had directed the Ld AO to verify the cash deposits and restrict the additions only to the unverifiable deposits. Accordingly, the Ld AO issued the final assessment order identical to the draft assessment order without giving cognizance to the DRP directions and accordingly the order in this context bad and illegal in law and liable to be quashed

2.2 On the facts and circumstances of the case and in law, the Ld. AO erred in not considering the fact that in the cases referred in faceless assessment, on or after the 1st day of April, 2021, shall be non-est if such assessment is not made in accordance with the procedure laid down under this section. The Ld. AO failed to consider all the relevant material filed by the Appellant before passing of the draft assessment order. He also failed to adhere to the request made by the Appellant for virtual hearing, in case the AO proposes to make any variation prejudicial to the interest of the Appellant. Since the opportunity for virtual hearing was not provided, the same is against the principal of natural justice and de hors the provisions of section 1448(9) of the Act. Thus, the draft assessment order and the final assessment order passed by the Ld. AO should be treated as non-est and should be quashed.

2.3 On the facts and in the circumstances of the case, the Ld. AO erred in law and in facts in making and addition of Rs. 11,57,22,000 as income under section 68 of the Act for depositing cash in SBN in bank accounts during demonetization period;

2.4 On the facts and circumstances of the case, the Ld. AO failed to appreciate the source and nature of cash deposited during demonetization period which was on account of normal cash balances maintained during demonetisation period and record his satisfaction based on the submissions,

2.5 On facts and circumstances of the case, the Ld. AO failed to appreciate that the cash deposit in SBN during the demonetisation period was on account of the following:

- *Collection from customers arising in the normal course of business pre demonetisationperiod.*
- *Cash withdrawal from bank accounts required for maintaining cash balance atbranches as foreign exchange dealer.*
- *Petty cash requirements of branches all over India.*

2.6 On facts and circumstances of the case, the Ld. AO failed to bring anything on record to prove that cash in SBN deposited in bank accounts are out of unaccounted and unexplained income of the Assessee.

2.7 On facts and circumstances of the case, the Ld. AO failed to appreciate that the cash deposition of SBN was done as per the instruction given by the government under the demonetisation policy.

3. ***Disallowance of depreciation on Jodhpur property of Rs. 72,328/-***

3.1 On the facts and circumstances of the case and in law, the Ld. AO erred in passing the final assessment order u/s 143(3) r/w 144C of the Act, without giving effect to the binding directions of the Ld. DRP wherein the DRP had directed the Ld AO to exclude the disallowance of depreciation on Jodhpur property. Accordingly, the Ld. AO issued the final assessment order similar to the draft assessment order without giving cognizance to the DRP directions and accordingly the order in this context bad and illegal in law and liable to be quashed;

3.2 On the facts and circumstance of the case, the Ld. AO failed to appreciate that depreciation has already been suo-moto disallowed by the Appellant while computing income under the head 'profit and gains from business and profession

3.3 On the facts and circumstances, the Ld. AO erred in not considering the submission filed by the Appellant during the course of assessment proceedings explaining the fact that the depreciation on Jodhpur property has already been disallowed in the return of income.

4 Claim of Employee Stock Option Plan (ESOP) of Rs.7,42,11,889

4.1. On the facts and in the circumstances of the case, and in law, the Hon. DRP/Ld.AO erred in not allowing the additional claim made during the course of DRP proceedings for ESOP expenses (being difference between market price at the time of exercise of options and market price at the time of grant of options) of Rs. 7,42,11,889 under section 37(1) of the Act

5. Refund of excess Dividend Distribution Tax

On the facts and in the circumstances of the case and in law, the Hon. DRP and the Ld. AO:

5.1 erred in not appreciating that the DDT amounting to 1,89,74,977 paid by the appellant inrelation to the dividend of Rs 9,32.08,092/- paid to its overseas shareholder le FairbridgeCapital (Mauritius) Limited (FCML) out of total dividend of Rs. 24.39.75,525/- ought tohave been paid at the rate of 5% having regard to Article 10(2) of the India-Mauritius taxtreaty as against the rate of 20.358% (including surcharge and cess) specified under Section 115-0 of the Income Tax Act 1961 and inadvertently paid the the Appellant.

5.2 erred in not granting refund of excess DDT paid of ₹.1,43,14,573/- to the appellant in respect of dividend of ₹.9,32,08.092/-paid to FCML, since as per the provisions of Section 237 of the Act read with Article 265 of the Constitution of India, only legitimate tax could have been retained.

5.3 erred in adjudicating that since there was no variation of income and since there was no adjustment being made to the income of the Appellant in the assessment order, the said claim of refund of DDT could not have been raised before the DRP.

5.4. erred in observing that provisions of Section 115-0 of the Act overrides the provisions of Section 90(2) of the Act and hence, beneficial rate as per Article 10(2) of the India- Mauritius tax treaty will not be applicable and hence, erred in subjecting the Appellant to additional income tax in terms of section 115-O of the Act.

5.5. erred in observing that tax as per Section 115-0 of the Act is a tax on net distributed profit of the company and not a tax on dividend income of shareholder. The AO failed to appreciate that the dividend income was that of the non-resident recipient who was governed by the provisions of relevant DTAA.

5.6. erred in observing that DDT is a secondary tax on corporate profit distributed and not akin to withholding of tax.

6. ***Penalty under section 270A, 271AA and 271AAC***

6.1. The Ld. AO erred in proposing to levy penalty under section 270A for under reporting of income.

6.2. The Ld. AO erred in proposing to levy penalty under section 271AA for non-compliance to the provisions of section 92C, 92D and 92E of the Act.

6.3. The Ld. AO erred in proposing to levy penalty under section 271AAC of the Act towards addition made under section 68 of the Act

7. ***Levy of interest under section 2348 of the Act***

7.1. The Ld. AO erred in levying interest under section 2348 of the Act.

61. Assessee has filed additional grounds on jurisdictional issue, for the sake of clarity it is reproduced below: -

*"**Ground No. 9:***

1. On the facts and in the circumstances of the case and in law, the final assessment order dated 20 April 2021 passed by the under section 143(3) read with section 144C(13) of the Act, having been passed beyond the limitation provided in terms of section 153(1) r.w. section 153(4) of the Act, is illegal, being barred by limitation, void-ab-initio and is therefore liable to be quashed.

Ground No. 10.

2. On the facts and in the circumstances of the case and in law, the directions dated 27 January 2022, issued under section 144C(5) of the Act by the Ld. DRP, not being signed by all the members of the Hon'ble DRP, are illegal, bad in law, void-ab-initio and liable to be quashed

62. At the time of hearing, Ld.AR of the assessee submitted that assessee is not pressing the additional grounds of appeal. Accordingly, these additional grounds of appeal are dismissed as such. Therefore, we shall deal with only main grounds of appeal raised by the assessee.

63. We proceed to dispose of the appeal by adjudicating the issues ground wise.

64. Ground No. 1 is relating to Transfer Pricing adjustment for adding the notional interest of ₹.2,42,96,87,813 on receivables on account of issuance of NCCRPS, this ground is similar to Ground No. 1 raised by the assessee for the A.Y. 2016-17. Since the issue is exactly similar and grounds as well as the facts are also identical, the decision taken in Ground No. 1 for the A.Y. 2016-17 shall apply mutatis-mutandis to the appeal for the A.Y. 2017-18. We order accordingly.

65. With regard to Ground No. 2 which is relating to Addition of ₹.11,57,22,000/- under section 68 of the Act in respect of cash deposit in Specified Bank Note (SBN) during demonetization period, brief facts relating to the ground are, during the course of assessment proceedings Assessing Officer observed that assessee had deposited cash amount of ₹.11,57,22,000/- during demonetization period i.e., from 08.11.2016 to 31.12.2016 and the assessee was asked to furnish copy of bank statements of relevant bank accounts during the demonetization period and also assessee was asked to submit the cash deposits during the financial year 2015-16 and 2016-17 as per the format given in show

cause notice issued under section 142 of the Act. However, assessee did not made any submissions or reply to the above show cause notice and several opportunities were given to the assessee as discussed by the Assessing Officer at Para No. 5.1 of his order. Therefore, Assessing Officer came to the conclusion that the total cash deposited during the demonetization period was generated in specified bank notes is treated as unexplained and out of unaccounted income of the assessee for the year under consideration, accordingly, he proceeded to make the addition under section 68 of the Act and made tax under section 115BBE of the Act.

66. Aggrieved assessee preferred objection before Ld. DRP and filed detailed submissions in this regard, for the sake of clarity it is reproduced below: -

> *"1. Retail sale of currency*
>
> *i) In this case, the customer approaches the Assessee to purchase foreign currency. The Assessee asks the customer, the purpose of purchasing foreign currency and RBI approval, if required, for an amount exceeding certain limits.*
>
> *ii) Screening of the customer is done into the system by checking his transaction history using his passport number and necessary documents are required to be submitted.*
>
> *iii) Once screening is done, the purchase request of the customer is approved after obtaining necessary internal approvals depending on amount of foreign currency to be*

released. The payment in cash is accepted for currency exchange equivalent of amount not exceeding INR 50,000.

iv) The system captures PAN Card, customer name, Date of birth and country of the customer. Once the transaction is saved, the Sales bordereaux is generated which is signed and stamped by the teller. The Cashier need to input manually on bordereaux, the INR denomination received by him and foreign currency sold to the customer.

v) The customer signs the acknowledgement of the bordereaux copy and the copy of such acknowledgement along with hardcopies of all the documents submitted by the customers are filed in the records. NCOME TAX DEPARTMEN

vi) Similar process is followed when customer approached for buying foreign currency prepaid card, Demand Draft.

vii) Also, when the customer approaches to sell the foreign currencysimilar process is followed. For Indian customers, the INR cash is paid for foreign currency amount not exceeding USD 1000

2. Corporate Sale and Purchase

i) In this case, the corporate customer requests for purchase or sale of foreign currency through email/ letter.

ii) The Assessee asks for the necessary documents required to be submitted. At this stage, the screening of corporate client is done. The Assessee also asks the information regarding purpose of buying foreign currency and RBI approval if required.

iii) Once screening is done, the transaction details are saved into the system. The bordereaux is generated which is signed and stamped by the teller.

iv) The corporate customer makes payment in INR or out of balance in EEFC account for purchase of foreign currency or vice versa for sale of foreign currency.

v) An acknowledgement on A2 form & bordereaux duly signed by the corporate customer is filed along with all hard copies of documents.

7.2.3 Based on above, the assessee has claimed that it maintains adequate trail of information/ documents to substantiate the source of INR cash generated into the system and also that there are

enough checks and balances into the system. Thus, submitting that the operations are also governed by RBI regulations which are duly complied by the Assessee, the assessee, has argued that the proposition that the assessee is not able to substantiate the source of cash is ill-founded.

7.2.4 The assessee has submitted that the Cash deposited by the Assessee during the demonetisation period is on account of normal cash balances maintained at various branches as foreign exchange dealer and collection from customers in normal course of business pre demonetisation period and that the Assessee had deposited cash amounting to Rs. 11,57,22,000 at 39 bank accounts across all branches in India, as per the instruction given by the government under the demonetisation policy.

7.2.5 The assessee has further submitted that the details of cash deposited during the FY 2015-16 & FY 2016-17 were duly submitted by the Assessee during the course of assessment in the specified format as requested by the Ld. AO whereby it was submitted that increase in cash deposited during the demonetisation period is only 2.03% compared to the last year for the same period and that the increase in the deposit of cash during the demonetisation period is due to all SBN available across all the branches having deposited into the bank accounts. The assessee has stated to have submitted the details of cash deposited during the FY 2015-16 and FY 2016-17 in specified format as requested by the Ld. AO as under:

Sr. No.		**Particulars**	**Amount (in Rs.)**
i)	(a)	Total Cash deposit in bank in financial year 2015-16	2,38,35,88,414
	(b)	Total Cash deposit in bank from 01.04.2015 to 08.11.2015	1,64,77,33,772
	(c)	Total cash deposit in bank from 09.11.2015 *to*30.12.2015	21,66,82,920
ii)	(a)	Total Cash deposit in bank in financial year 2016-17	1,92,82,34,566
	(b)	Total Cash deposit in bank from 01.04.2016 to 08.11.2016	1,49,25,68,258
	(c)	Total cash deposit in bank from 09.11.2016 to30.12.2016	22,10,71,066
iii)	(a)	Percentage increase between (ii)(a) & (i)(a)	Decrease by 23.61%
	(b)	Percentage increase between (ii)(b) & (i)(b)	Decrease by 10.40%
	(c)	Percentage increase between (ii)(c) & (i)(c)	Increase by 2.03%

7.2.6 The Assessee stated that it has made the submissions before the Ld. AO: vide Letter dated 15 February 2021, Letter dated 10

March 2021 Letter dated 12 April 2021 and placed these letters on record as part of paper book

7.2.7. the Assessee has placed reliance on judgment of the Hon'ble Madras High Court in the case of Salem SreeRamavilas Chit Company (P.) Ltd v Deputy Commissioner of Income Tax Circle 1(1) 2020] 114 taxmann.com 492 wherein the amount deposited out of total collection was not in variance with cash deposit made by assessee during preceding financial year, the court remanded the matter to the file of AO for verification of the facts

7.2.8 The assessee has further submitted that the details of bank accounts in which cash was deposited during demonetisation period and details of bank accounts held for FY 2015-16 and 2016-17 was submitted during the course of assessment proceedings, however, of cash book and bank account statements could not be submitted due, the data being voluminous, the Assessee had to collate information from various sources and due to restrictions imposed by the state government on account of rising COVID-19 cases in Mumbai Area, the Assessee's offices were closed hence, it was difficult to compile the details from various source during such period.

7.2.9 Further the Assessee has submitted that books of account and the financial statement of the Assessee is audited, the transactions are verified by the Auditors, hence, the provisions of section 68 should not be applied in the present case. Reliance placed on the Hon'ble Patna High Court's decision in the case of Laxmi Rice Mills v CIT [1974] 97 ITR 258wherein it is held that when books of accounts of assessee were accepted by revenue as genuine, and cash balance shown therein was sufficient to cover high denomination notes held by assessee, assessee was not required to prove source of receipt of said high denomination notes which were legal tender at that time.

67. After considering the detailed submissions Ld. DRP observed that assessee is a leading travel agent and tourism company which holds Authorised Dealer licence for dealing in foreign exchange conversion and remittance through its foreign exchange conversion outlets all over in India. Further, they observed that operations of the assessee are also

governed by RBI regulations and that the assessee also keeps records of all the foreign exchange transaction on a system, that captures PAN Card, customer name, Date of birth and country of the customer etc. and once the transaction is saved, the Sales bordereaux is generated which is signed and stamped by the teller. The customer also signs the acknowledgement of the bordereaux copy and the copy of such acknowledgement along with hard copies of all the documents submitted by the customers are filed in the records as well. Therefore, assessee maintains adequate trail of information/documents to substantiate the source of INR cash generated into the system. Further, they observed that assessee had submitted the details of cash deposited during the F.Y.2015-16 and F.Y.2016-17 in the format prescribed, as required by the Assessing Officer, which apparently the Assessing Officer has not taken into account. The details submitted by the assessee shows that there is a marginal increase of 2.03% in cash deposited during the demonetization period as compared to the last year for the same period and the increase in the deposit of cash during the demonetization period is attributable to cash available across all the branches which was deposited into the bank accounts as per the instruction given by the Government under the demonetization policy. However, they also

observed that assessee has not submitted the cash book and bank account statements before the Assessing Officer as it could not compile the details and information from various sources and due to restrictions imposed by the state government on account of rising COVID-19 cases in Mumbai Area, which the assessee now claim to have compiled. Accordingly, they directed the Assessing Officer to verify the respective deposits from the transactions recorded by the assessee on the system maintained for recording the transaction and restrict the addition to the extent deposits are not verifiable from the transactions recorded as above or the books of accounts maintained by the assessee for such purpose.

68. Aggrieved with the above directions, assessee is in appeal before us. At the time of hearing, Ld.AR of the assessee brought to our notice Page No. 18 of the Ld. DRP order and explained the nature of business of the assessee and submitted that cash received from customers for foreign exchange purpose and tour related services is deposited into bank accounts regularly by all branches / outlets all over India and the modus operandi of the assessee business operation as authorised dealer which was explained before Ld. DRP are reproduced at Para No. 18 of the Ld. DRP order. He also brought to our notice detailed submissions

made by the assessee before Ld. DRP that assessee has submitted the cash deposits by it during demonetization period on account of normal cash balances maintained at various branches as foreign exchange dealer and collection from customers in normal course of business pre demonetization period and the Assessee had deposited cash amounting to ₹.11,57,22,000 at 39 banks of various branches across all branches in India, as per the instruction given by the government under the demonetization policy and he also brought to our notice that assessee has submitted details as called for by the Assessing Officer for the F.Y. 2015-16 and F.Y. 2016-17. When compared the transaction during that period the cash deposited during demonetization period is only 2.03% more than the cash deposited during previous financial year and the increase in cash deposits during demonetization period is due to all the specified bank notes available across all the branches having deposited into the bank accounts. He further, submitted that assessee has submitted the details of cash deposits during the demonetization period vide letter dated 15.02.2021, 10.03.2021 and 12.04.2021 these letters are part of Paper Book submitted before us.

69. He also submitted that the assessee has deposited during demonetization period various specified bank notes in 39 branches

which consist not only of cash deposits from customers and it also the specified bank notes available in the business as per the directions of RBI during demonetization period. Further, he brought to our notice Page No. 3 to 5 of the final assessment order and submitted that Assessing Officer has not followed the direction of Ld. DRP and as per the direction Assessing Officer should have called for the relevant information and made the verification instead he followed the findings in the draft assessment proceedings.

70. He also brought to our notice Page No. 898 of the Paper Book and prayed that the cash deposited during demonetization period is nothing but cash generated by the business and the cash in Hand available of such specified bank notes denomination which is part of cash available in the business.

71. On the other hand, Ld. DR submitted that since no information was submitted before Assessing Officer during the draft assessment period and subsequently after the Ld. DRP direction, even though Assessing Officer may not have called, assessee should have made the submissions before Assessing Officer to comply with the direction of Ld.DRP. Since it needs detailed verification he submitted that this issue

may be remitted back to the file of the Assessing Officer to verify the whole transaction afresh.

72. Considered the rival submissions and material placed on record, we observe that assessee has deposited cash of ₹.11,57,22,000/- during demonetization period from 08.11.2016 to 31.12.2016 from 39 branches across India. The assessee has submitted the information as per the format provided by the Assessing Officer which are generic in nature i.e., the cash deposited during financial year 2015-16 which was bifurcated into cash deposited in bank from 01.04.2015 to 08.11.2015 and cash deposited from 09.11.2015 to 30.12.2015. Similarly, for financial year 2016-17 with the same break up. Based on the above details of cash deposits it was noticed that there is variation of only 2.03%. In our considered view it is just a general information submitted before Assessing Officer, no doubt this is how the Assessing Officer has called for the information. Since assessee is in the business of travel agent and tourism where it is dealing in foreign exchange conversion and relevant remittances being authorized dealer across India. As discussed earlier it has 39 branches across India and during demonetization period it has deposited huge cash generated by the 39 branches of the specific bank notes. Since the assessee is in this line of

business and dealing in cash transactions it may have carried cash balances which was subsequently deposited through 39 branches in the respective banks. Since it is an authorised dealer assessee is required to maintain books of accounts and details of cash deposits and remittances across the branches and it has to report back to the RBI in regular intervals. Therefore, assessee must be having details of closing cash balances across the branches. Therefore, these details may be submitted before Assessing Officer for verification to prove that assessee had sufficient cash balances in the above said specific bank notes and which assessee has deposited across the branches. Since no proper details submitted before Assessing Officer we direct assessee to submit the above said details of cash balances available across the branches during the demonetization period, which was reported in regular intervals to RBI may be submitted for verification before Assessing Officer. Accordingly, we direct the Assessing Officer to verify the documents which assessee will submit before him as per the RBI norms, after giving proper opportunity of being heard, and decide the issue in accordance with law. Accordingly, the ground raised by the assessee is, accordingly, allowed for statistical purpose.

73. With regard to Ground No. 3 which is relating to Disallowance of depreciation on Jodhpur property of ₹.72,328/-, at the time of hearing, Ld.AR of the assessee submitted that this ground is not pressed, accordingly, this ground is dismissed as not pressed.

74. With regard to Ground No. 4 which is relating to the Claim of Employee Stock Option Plan (ESOP) of ₹.7,42,11,889/-, this ground is similar to Ground No. 3 raised by the assessee for the A.Y. 2016-17. Since the issue is exactly similar and grounds as well as the facts are also identical, the decision taken in Ground No. 3 for the A.Y. 2016-17 shall apply mutatis-mutandis to the appeal for the A.Y. 2017-18 also. We order accordingly.

75. With regard to Ground No. 5 which is relating to Refund of excess Dividend Distribution Tax, this ground is similar to Ground No. 5 raised by the assessee for the A.Y. 2016-17. Since the issue is exactly similar and grounds as well as the facts are also identical, the decision taken in Ground No. 5 for the A.Y. 2016-17 shall apply mutatis-mutandis to the appeal for the A.Y. 2017-18. We order accordingly.

76. With regard to Ground No. 6 which is relating to Penalty under section 270A, 271AA and 271AAC, this issue is premature at this stage, accordingly, this ground is dismissed.

77. With regard to Ground No. 7 which is relating to Levy of interest under section 234B of the Act, this issue is consequential in nature, accordingly, this ground is dismissed at this stage.

78. In the result, appeal filed by the assessee is partly allowed as indicated above.

ITA No. 2541/MUM/2022 (A.Y. 2018-19)

79. Assessee has raised following grounds in its appeal: -

> *"1. **Transfer Pricing adjustment for adding the notional interest of INR 180,39,60,000 on receivables on account of issuance of NCCRPS (Ground 1.1. to Ground 1.10):***
>
> *On the facts and in the circumstances of the case, and in law, the Learned Assessing Officer/Transfer Pricing Officer ('Ld. AO') Ld. TPO), following the directions of Hon'ble Dispute Resolution Panel ('Hon. DRP), erred in recharacterizing the issuance of Non-convertible Cumulative Redeemable Preference Shares ('NCCRPS) as quasi equity, and thereby erred in treating the difference of the market price of the equity share of the appellant as on the date of issuance of NCCRPS vis-à-vis the face value of NCCRPS as a deemed loan. The Ld. AO') Ld. TPO thus erred in confirming the transfer pricing adjustment of INR 180,39,60,000, being notional interest on aforesaid deemed loan (hereby referred as 'alleged transaction').*

1.1. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in not adjudicating the jurisdictional requirement, as laid by the CBDT Instruction 3 of 2016, of existing of an income which is a pre-requisite before making a reference to Ld. TPO for proposing an addition on the capital transaction of issuance of NCCRPS. The Hon. DRP/ Ld. AO/ Ld. TPO failed to appreciate that in the absence of any income arising on account of issuance of NCCRPS, transfer pricing provisions contained in Chapter X of the Income-tax Act 1961 (the Act) do not apply to the facts of the present case.

1.2. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in rejecting the reliance placed by the Appellant on the Hon'ble Bombay High Court's decision dated 10 October 2014 in Writ Petition No. 871 of 2014 in the case of Vodafone Services Pvt Ltd vs UOI [2015] Taxmann.com 286 (Bombay) and concludingthat no income arises to it from such a transaction and accordingly transfer pricingprovisions contained in Chapter X of the Act will not apply to the facts of the present case.

1.3 On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in not recording any reasons to show that the conditions mentioned in clause (a) to (d) of section 92C(3) of the Act were satisfied, either before initiating the transfer pricing assessment or before the completion of the assessment proceedings.

1.4. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in recharacterizing a legitimate business transaction of issuance of NCCRPS as quasi equity without providing cogent reasons and thus erred in comparing the NCCRPS with equity shares, in the absence of any current statutory provisions to support such re-characterization.

1.5. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in treating the quoted market price of the equity share of the Appellant as the arm's length price for issuance of NCCRPS which were redeemable at par, thereby considering the alleged shortfall arising on account of alleged transaction as a nature of debt/receivable in the hands of the Appellant, thus creating a notional transaction.

1.6. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in adopting an ad-hoc and arbitrary approach in determining the interest rate to be imputed on the deemed receivable as determined by the Hon. DRP/Ld. AO/ Ld. TPO. without undertaking a benchmarking analysis. An interest

rate of 9.945% was determined based on the stray interest rates on redeemable NCDs issued by the Appellant.

1.7. The Hon'ble DRP/Ld. TPO/AO erred in not taking cognizance of the fact that during the year under consideration i.e. in AY 2018-19, the appellant redeemed 125,000,000, 8.5% Nonconvertible Redeemable Preference Shares of INR 10 each that were issued at par during FY 2015-16 and accordingly the action of the Hon'ble DRP/ Ld.AO/TPO in treating interest on notional income on issue of NCCRPS is contrary to the facts of the case and should accordingly be deleted.

1.8. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in mechanically relying on observations and conclusions made during the transfer pricing assessment of AY 2016-17 and AY 2017-18 with respect to issuance of NCCRPS and have not examined/ evaluated the matter afresh in the year under consideration i.e. for AY 2018-19. This demonstrates pre-determined mindset to make the impugned adjustment.

1.9. On the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPOhave erred in not following Hon'ble DRP's own direction in the Appellant's case forAY 2015-16, wherein reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Vodafone Services Pvt Ltd. v/s UOI (2015) 53Taxmann.com 286 (Bombay) and Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. Vs CIT [2015] 64Taxmann.com 150(Delhi), and giving a finding that an element of income accruing/ arising was a prerequisite for applicability of transfer pricing provisions since they are merely 'machinery provisions and not charging provisions'

2. Addition on account of disallowance of car lease rentals (Ground 2.1 to Ground 2.3)

2.1. On the facts and in the circumstances of the case and in law, the Ld. DRP/ the Ld. AO erred in disallowing an amount of Rs. 24,86,533 in respect of principal portion of lease payment for assets taken on finance lease on the basis that the said expenditure is capital in nature and should not be allowed as deduction under section 37(1) of the Act.

2.2. Without prejudice to the above ground, on the facts and in the circumstances of the case and in law, the Ld. DRP/ the Ld. AO erred in not granting depreciation on the alleged capital expenditure towards principal portion of lease rentals under section 32 of the Act.

2.3. On the facts and in the circumstances of the case and in law, in spite of the Ld. DRP's directions, out of the total disallowance of Rs. 24,86,533, the Ld. AO erred in not granting deduction of Rs. 12,23,347 in respect of notional adjustments made under Ind-AS method of accounting, which had already been disallowed by the Appellant while computing its total income.

3. Addition on account of depreciation on vehicles (Ground 3.1. to Ground 3.3):

3.1. On the facts and in the circumstances of the case and in law, the Ld. AO, following the directions of the Ld. DRP, erred in not granting deduction of Rs.77,88,870 in respect of depreciation on vehicles on the grounds that the Appellant was unable to provide the details of the cost of acquisition of the said vehicles as directed by the Ld. DRP.

3.2. On the facts and in the circumstances of the case and in law, the Ld. DRP erred ininterpreting the provisions of Section 43(6) of the Act by holding that the depreciated valueof the vehicles in the balance sheet of the lessor (i.e. seller) ought to be taken as the costof acquisition of the said vehicles to the Appellant for the purposes of computingdepreciation under Section 32 of the Act, as against the actual cost incurred by theAppellant for acquisition of the said vehicles.

3.3. On the facts and in the circumstances of the case and in law, the LD. DRP erred in not considering the submission filed by the Appellant during the course of proceedings before the Ld. DRP outlining the provisions of Section 43(6) read with Section 43(1) of the Act, as to why claim of depreciation under Section 32 should be granted on the amount actually paid by the Appellant to the sellers.

4. Addition on account of expenditure on Employee Stock Option Plan (ESOP) (Ground 4.1 & 4.2):

4.1. On the facts and in the circumstances of the case and in law, the Ld. DRP / the Ld.AO erred in not granting deduction of Rs 6,12,20,000 in respect of expenditure relating to ESOP under Section 37(1) of the Act by simply following its orders for the earlier assessment years.

4.2 On the facts and in the circumstances of the case and in law, the Ld. DRP/ the Ld.AO erred in not granting deduction of Rs. Rs. 46,70,22,783 in respect of the additional claim made during the course of DRP proceedings for ESOP expenses (being difference between market price at the time of exercise of options and market price at the time of grant of options) under section 37(1) of the Act.

5. Addition on account of disallowance under Section 14A of the Act:

5.1. On the facts and in the circumstances of the case and in law, the Ld. DRP/ the Ld.AO erred in disallowing an amount of Rs. 11,52,88,300/- under Section 14A of the Act read with Rule BD of the Income Tax Rules, 1962 by simply following its orders for the earlier assessment years, without appreciating the fact that no direct or indirect expenditure was incurred by the Appellant for earning exempt income.

6. Addition on account of depreciation on building (Ground 6.1 & 6.2):

6.1. On the facts and in the circumstances of the case and in law, the Ld. DRP/ the Ld.AO erred in disallowing an amount of Rs. 45,64,124 in respect of depreciation on building on the grounds that the Appellant failed to produce any cogent evidence to show that the said premises was put to use' by it for its own business purposes.

6.2 On the facts and in the circumstances of the case and in law, the Ld. DRP / the Ld.AOerred in concluding that some expenditure or activity would have been required to beincurred to bring the premises in the category of asset which have been 'put to use' by theAppellant, and thereby erred in denying claim of depreciation to the Appellant, withoutappreciating the Appellant's contention that the said premises were in active use by its tenant, and that once put to use, the Appellant shall always be entitled to claim depreciation thereon.

7. Addition on account of disallowance under section 14A of the Act while computing book profits under section 115JB of the Act

7.1. On the facts and in the circumstances of the case and in law, the Ld. DRP/ the Ld AO erred in disallowing an amount of Rs. 11,52,88.300/- under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 under Section 115JB of the Act without appreciating that the provisions of Section 14A of the Act cannot be extended and read into Section 115JB of the Act, which is a complete code in itself.

8. Addition on account of disallowance while computing the book profits under section 115JB of the Act (Ground 8.1 & 8.2);

8.1. On the facts and in the circumstances of the case and in law, the Ld. DRP/ the Ld.AO erred in adding an amount of Rs.

21.98,18,240, representing the difference between the original cost of shares and the indexed cost of shares while computing the book profits in accordance with section 115JB of the Act.

8.2 On the facts and in the circumstances of the case and in law, the Ld. DRP/ the Ld.AO erred in making the said adjustment in spite of decision of the Hon'ble Kamataka High Court in the case of Best Trading and Agencies Ltd v. DCIT, Circle 11(2), Bangalore [2020] (119 taxmann.com 129), which squarely applies to the facts of the Appellant, wherein the said claim was allowed by the Hon'ble Karnataka High Court.

9. Refund of excess Dividend Distribution Tax

On the facts and in the circumstances of the case and in law, the Hon. DRP and the Ld. AO:

9.1. erred in not appreciating that the DDT amounting to Rs. 1,87,71,184 paid by the appellant in relation to the dividend of Rs. 9,22,07,027 paid to its overseas shareholder le Fairbridge Capital (Mauritius) Limited ('FCML') out of total dividend of Rs. 25, 16,70,423 ought to havebeen paid at the rate of 5% having regard to Article 10(2) of the India-Mauritius tax treatyas against the rate of 20.358% (including surcharge and cess) specified under Section115-0 of the Income Tax Act 1961and inadvertently paid the Appellant.

9.2. I erred in not granting refund of excess DDT paid of Rs 1,41,60,832 to the appellant in respect of dividend of Rs 9,22,07,027 paid to FCML, since as per the provisions of Section 237 of the Act read with Article 265 of the Constitution of India, only legitimate tax could have been retained.

9.3. erred in adjudicating that since there was no variation of income and since there was no adjustment being made to the income of the Appellant in the assessment order, the said claim of refund of DDT could not have been raised before the DRP.

9.4. erred in observing that provisions of Section 115-0 of the Act overrides the provisions of Section 90(2) of the Act and hence, beneficial rate as per Article 10(2) of the India- Mauritius tax treaty will not be applicable and hence, erred in subjecting the Appellant to additional income tax in terms of section 115-0 of the Act.

9.5. erred in observing that tax as per Section 115-0 of the Act is a tax on net distributed profit of the company and not a tax on dividend income of shareholder. The AO failed to appreciate that the dividend income was that of the non-resident recipient who was governed by the provisions of relevant DTAA.

9.6. erred in observing that DDT is a secondary tax on corporate profit distributed and not akin to withholding of tax.

10. Penalty under section 270A of the Act

10.1. The Ld. AO erred in proposing to levy penalty under section 270A for under reporting of income.

10.2 The Ld. AO erred in proposing to levy penalty under section 271AA for non-compliance to the provisions of section 92C, 92D and 92E of the Act,

11. Short grant of TDS credit

11.1. On the facts and in the circumstances of the case and in law, the Id. AO erred in short- granting TDS credit of Rs. 54,08,328.

12. Non-grant of TCS credit

12.1. On the facts and in the circumstances of the case and in law, the Id. AO erred in not granting TCS credit of Rs. 3,71,922 as claimed by the Appellant in the return of income.

13. Levy of interest under section 234B of the Act

13.1. On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest of Rs. 7,44,40,051 under section 234B of the Act.

14. Levy of interest under section 234C of the Act

14.1. On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest of Rs. 1,74,49,212 under section 234C of the Act.

15. Levy of interest under section 234D of the Act

15.1. On the facts and in the circumstances of the case and in law, the Ld. AO erred in charging interest of Rs. 19,41,750 under section 234D of the Act.

The Appellant craves leave to add, alter, amend, substitute or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered

necessary either at or before the appeal hearing so as to enable the Hon'ble Tribunal members to decide these according to the law."

80. Assessee has filed additional grounds on jurisdictional issue, for the sake of clarity it is reproduced below: -

"Ground No. 9:

1. On the facts and in the circumstances of the case and in law, the final assessment order dated 31 July 2022 passed by the under section 143(3) read with section 144C(13) of the Act, having been passed beyond the limitation provided in terms of section 153(1) r.w. section 153(4) of the Act, is illegal, being barred by limitation, void-ab-initio and is therefore liable to be quashed.

Ground No. 10:

2. On the facts and in the circumstances of the case and in law, the directions dated 30 June 2022, issued under section 144C(5) of the Act by the Ld. DRP, not being signed by all the members of the Hon'ble DRP, are illegal, bad in law, void-ab-initio and liable to be quashed.

It is humble prayer of the Appellant that the final assessment order and DRP directions are bad in law, null and void and liable to be quashed, and the entire addition made by Ld. AO/ Ld. TPO/ Hon'ble DRP be deleted."

81. At the time of hearing, Ld.AR of the assessee submitted that assessee is not pressing the additional grounds of appeal. Accordingly, these additional grounds of appeal are dismissed as such. Therefore, we shall deal with only main grounds of appeal raised by the assessee

82. We proceed to dispose off this appeal by adjudicating the issues ground wise.

83. With regard to Ground No. 1 which is relating to Transfer Pricing adjustment for adding the notional interest of INR 180,39,60,000 on receivables on account of issuance of NCCRPS, this ground is similar to Ground No. 1 raised by the assessee for the A.Y. 2016-17. Since the issue is exactly similar and grounds as well as the facts are also identical, the decision taken in Ground No. 1 for the A.Y. 2016-17 shall apply mutatis-mutandis to the appeal for the A.Y. 2018-19. We order accordingly.

84. With regard to Ground No. 2 which is relating to Addition on account of disallowance of car lease rentals, (Ground 2.1 to Ground 2.3), this ground is similar to Ground No. 2 raised by the assessee for the A.Y.2016-17. Since the issue is exactly similar and grounds as well as the facts are also identical, the decision taken in Ground No. 2 for the A.Y.2016-17 shall apply mutatis-mutandis to the appeal for the A.Y.2018-19.

85. Further, in Ground No. 2.3, assessee has raised a ground that Assessing Officer has disallowed additional amount of ₹.12,23,347/- during this year. Ld.AR of the assessee brought to our notice Para No.7.11 of the Ld. DRP order and submitted that assessee has claimed

deduction of ₹.12,63,186/- towards claim of principal lease payment of Finance Lease an amount of ₹.1,46,28,472/- instead of lease deposit and he treated the same as principal lease payment and disallowed both the amounts. Aggrieved assessee filed an objection before Ld. DRP and Ld.DRP has considered the submissions of the assessee and acknowledged that assessee has claimed ₹.12,63,186/- and ₹.1,46,28,472/- on account of principal lease payment of Finance Lease and lease deposit and they also acknowledged that assessee has suo moto disallowed an amount of ₹.1,34,05,125/- out of lease deposit. In this regard, he submitted that even Ld. DRP has misunderstood that assessee has claimed ₹.24,86,533/-. In this regard he brought to our notice Page No. 295 of the Paper Book which is computation of income for the purpose of tax. He brought to our notice the assessee added the inadmissible amount i.e., lease deposit expenditure of ₹.1,34,05,125/- and deducted the admissible lease deposited income of ₹.1,46,28,472/- in the net result assessee has actually claimed expenses of ₹.12,23,347/-. Therefore, as per the directions of Ld. DRP, if it is implemented, it amounts to double disallowance.

86. On the other hand, Ld. DR relied on the order of the lower authorities.

87. Considered the rival submissions and material placed on record, we observe that we have already remitted the issue of determining the allowability of lease rental to the Assessing Officer to determine the depreciation to be allowable instead of interest and repayment of principal amount. Once it is determined as per AS-17 of the IND-AS the controversy of allowability of lease rental will settle. Even this claim of double deduction will be addressed in that process of determining proper allowability of lease rental under Finance Lease. Accordingly, this issue also remitted back to the file of the Assessing Officer. Accordingly, this ground is allowed for statistical purpose.

88. With regard to Ground No. 3, it is submitted that assessee has taken cars on Finance Lease from Lessors and subsequently in July 2017 assessee has purchased the vehicles from the lessors. Therefore, assessee has become the owner of the cars and fulfilled the conditions specified under section 32 of the Act, the foreclosure has merely changed the nature of arrangements from that of leasing of vehicles to ownership of vehicles and it is not in dispute that the above said vehicles were used for official/ business purpose. It is also brought to our notice that in the remand proceedings the Assessing Officer has changed the valuation of the cars. However, transaction being between two

unrelated parties the actual cost of the assets being entitled for depreciation is the amount actually paid by the assessee, the supporting documents of which is already been submitted to the Ld. DRP as well as Assessing Officer.

89. Ld.AR of the assessee also brought to our notice Page No. 989 to 990 of the Paper Book which is the additional evidences submitted before Ld. DRP, Page No. 1026 of the Act 1046 the policies of entitlement of cars to various officers and Page No. 1294 to 1339 contains extract of bank statements evidencing payment for above said acquisition of cars and copy of vehicle surrender agreement and copy of valuation reports. He also brought to our notice Page No. 25 of the Ld. DRP order wherein Ld.DRP has considered additional evidences submitted by the assessee and remand report from the Assessing Officer and they rejected the submissions made by the assessee and the method of valuation adopted by the assessee which is based on discounted future rentals and they dismissed the objections by observing as under: -

> *"8.3.2 Keeping in view the report submitted by the AO, the additional evidence submitted by the assessee are admitted and the report submitted by the AO is also taken into consideration for deciding the issue. In his report the AO has submitted as under:*

Disallowance in respect of depreciation on vehicles:

4.1. The Assessee has submitted that it has paid an aggregate amount of Rs. 5,19,25,798 to its lessors towards purchase of vehicles and accordingly capitalized the said amount in its books of accounts. The Assessee has placed on record following additional evidence.

4.2 Policy for entitlement of cars(Pg. No. 32 to 46 of application for AdditionalEvidence (DRP) dated 25 April 2022);List of Assessee's offices/ branches across the country (Pg. No. 47 to 50 of application for Additional Evidence (DRP) dated 25 April 2022);

List of employees to whom cars have been provided(Pg. No. 51 to 52 of application for Additional Evidence (DRP) dated 25 April 2022);

- *Copy of the statement showing the employee-wise details of the foreclosure amount paid by the Assessee to the lessors (Copy enclosed at Annexure 9 of submission (AO) dated 26 May 2022):*

- *Sample copies of statements received from the lessor indicating the amount payable by the Assessee upon foreclosure of the respective vehicles (Copy enclosed at Annexure 10 of submission (AO) dated 26 May 2022); and*

- *Extract of Bank statement for payment towards purchase of vehicles(Copy enclosed at Annexure 8 of submission (AO) dated 26 May 2022).*

4.3 The Assessee submitted that it has added the said amount of Rs. 5,19,25,798 to the block of assets, as it represents the actual amount paid by the Assessee to its lessors, and that it has claimed depreciation on the said amount in accordance with the provisions of Section 43(6) and Section 43(1) of the Act.

4.4 The claim of the Assessee has been duly considered. It is seen from the Simulation report' that the valuation of car has been done on the basis of 'Discounted Future Rentals and RV "as increased by 'Proportionate Interest till termination." A sample example of one of the cars at Annexure 10 is duly examined. The car user is prescribed as 'Krishna Mohan' and the vehicle is 'Vento. A search in google shows that the car price in July, 2017 was between the range of Rs. 10.84 lacs to Rs. 13.43 lacs (copy of screenshot is enclosed for reference).

4.5 It is seen from the 'Simulation Report' that, the assessee has made 'Rental Payment' from July 2017 to August 2019 i.e. for

about 27 months, to the tune of Rs. 9,27,554/-. The assessee has further paid an amount of Rs. 8,04,606/- (excluding VAT) while taking over of the car from the finance company. It is thus, considered that the assessee has paid excessively for the takeover of car after a period of about 27 months and its depreciated value has not been considered. The assessee has made a total payment of Rs. 17,32,160/-. A perusal of the one of the agreements with Finance lease company shows that the assessee company is liable for all the payments towards the car viz. Insurance & Repairs and all other incidentals for maintaining and servicing a car during the period of lease. Thus, the finance: company has been allowed to earn Rs. 3,89,160/- (17,32,160 (-) 13,43,000) at the rate of about 29%. Considering these facts and in absence of any valid valuation report, the payments made towards thecars are considered highly excessive. The Hon'ble DRP may kindly decidethe matter on merits and facts as explained above.

4.2 Disallowance in respect of depreciation on vehicles: The AO has submitted that on the basis of the facts and absence of any valid valuation report, the payments made towards to the cars are considered highly excessive.

8.3.4 In our considered view, we find that the assessee has been able to demonstrate that the cars under question were used for business purposes and the depreciation is admissible to the assessee on the same as per the provisions of the Act. However, we are of the considered opinion that the depreciated value of the cars in the balance sheet of the lessor (now seller) at the time of the transfer of the asset (cars) ought to be taken as the cost of acquisition to the assessee and depreciation need to be restricted as per this cost of acquisition as per the provisions of section 43(6)(b) of the Act, because the cars have only changed ownership from the lessor to the assessee. Therefore, the ground of objection no. 4 is disposed off accordingly."

90. Aggrieved assessee is in appeal before us and at the time of hearing, Ld. AR submitted that this is extension of Finance Lease controversy and because of this controversy assessee decided to acquire the vehicle which were on Finance Lease from the financial institutions and based on that assessee has revalued the cars from the date of

purchase. Since assessee has become owner of the vehicles from the date of purchase and it has fulfilled the conditions and provision of section 32 of the Act, therefore, assessee should be allowed to claim the depreciation and he prayed that the valuation reports submitted by the assessee are from the independent valuer and it should be accepted for the value of acquisition and also assessee has made the payment for the above purchase of cars which were used by the assessee in its own business under Finance Lease. He submitted that it is fact on record that the finance companies i.e., lessors are not related concerns and it should be considered as independent transactions.

91. On the other hand, Ld. DR submitted that the finance companies are the interested parties and the valuation adopted for the purpose purchase of cars are highly valued and this valuation cannot be accepted and he supported that these vehicles were used in the business of the assessee. Therefore, the depreciation value in the Balance Sheet of the lessor should be the value of vehicles purchased by the assessee and he relied on the order of the lower authorities.

92. Considered the rival submissions and material placed on record, as we have already addressed the issue of Finance Lease at Para Nos. 27

to 30 and as per which assessee has to follow the method of accounting for Finance Lease and as per the method of accounting assessee has to record the value of assets and liabilities in the Finance Lease transactions and Accordingly, the assessee also recorded the same in their books of account. As discussed in the Para nos. 27 to 30 and it was remanded back to Assessing Officer to verify the values adopted by the assessee in the accounts relating to finance lease. However, the assets value of the assessee to be recorded on the date. Since the assessee has already recognize the values of vehicle in their books, there is no need to revalue or valuation report, the assesse has already adopted the value of the assets, it needs to continue to adopt the same and at the time of foreclosure, the assessee has to settle the value based on the value of assets alongwith the penalty if there is any as per the lease agreement. Therefore, we are directing the Assessing Officer to adopt the value as per the Balance sheet and reject the valuation submitted by the assessee. Still the Assessing Officer has to verify the recording of lease transaction and relevant adoption of depreciation claim as per the law and adopt the same here for the value for recognizing the value for foreclosure, as such there should not be any difference to the value in the depreciation schedule. Therefore, the controversy of valuation of

vehicle will be addressed and the value of assets as on the date of foreclosure in the Balance Sheet of the assessee will be the actual value as per depreciation schedule on the date of foreclosure. Therefore, this ground of appeal also remitted back to the file of the Assessing Officer to determine the value of assets for the purpose of Finance Lease in the books of accounts of the assessee. Accordingly, we also direct the assessee to determine the value of assets in its books of accounts as per AS-17 of the IND-AS and it is needless to say that the Assessing Officer may extend opportunity of being heard to the assessee and determine the value of assets purchased by the assessee on the date of foreclosure. Accordingly, this ground of appeal is allowed for statistical purpose.

93. With regard to Ground No. 4 which is relating to Addition on account of expenditure on Employee Stock Option Plan (ESOP), this ground is similar to Ground No. 3 raised by the assessee for the A.Y.2016-17. Since the issue is exactly similar and grounds as well as the facts are also identical, the decision taken in Ground No. 3 for the A.Y. 2016-17 shall apply mutatis-mutandis to the appeal for the A.Y.2018-19 also. We order accordingly.

94. With regard to Ground No. 5 and 7 which is relating to Addition on account of disallowance under Section 14A of the Act, this ground is similar to Ground No. 4 raised by the assessee for the A.Y. 2016-17. Since the issue is exactly similar and grounds as well as the facts are also identical, the decision taken in Ground No. 4 for the A.Y. 2016-17 shall apply mutatis-mutandis to the appeal for the A.Y. 2018-19 also. We order accordingly.

95. With regard to Ground No. 6, relevant facts of the ground are, Assessing Officer observed that assessee has earned rental income from M/s. Gem Photographic India Pvt. Ltd., which is consistently offered as income from house property. During the year, a compensation of ₹.8,69,06,480/- was paid to the tenant for surrendering of their tenancy right and also stamp duty of ₹.43,76,000/- was paid on registration of this deed. Therefore, total amount spent is ₹.9,12,82,480/-. However, the said amount has been added to the block of Building (10%) and the assessee claimed depreciation on the same. Since the period of addition was considered as less than 180 days the depreciation is worked out as 50% of allowable depreciation i.e., ₹.45,64,124/- claimed by the assessee in its profit and loss account.

96. The Assessing Officer observed that premises were let out by the assessee, then how is that depreciation is allowable on the same under the Profits and Gains from Business or Profession. The assessee was asked to substantiate the claim of the depreciation.

97. In response assessee submitted that the tenant had discontinued its tenancy and after closure, the said premises were used for the purposes of business or profession thereafter. The Assessing Officer observed that however, no documentary evidences were submitted to substantiate the claim. Further, he observed that compensation was paid in February 2018 and the surrender deed does not provide any specific date of eviction of tenant although the deed does state that the possession shall be handed over upon execution of surrender deed. The assessee must have conducted certain modifications in the premises to make it conducive to conduct its business. Such modifications / renovation generally takes a period of two to three months which would fall beyond March 2018. Accordingly, Assessing Officer observed that it is not possible for the assessee could have put to use in its business on or before 31.03.2018. Accordingly, he disallowed the depreciation claimed by the assessee for the current year.

98. Aggrieved with the above order assessee preferred objection before Ld. DRP and before Ld. DRP assessee made detailed submissions. After considering the detailed submissions Ld. DRP rejected submissions of the assessee and submitted as under: -

> *"We have considered all the material placed before us. We have considered the relevant facts and circumstances attending to the issue, including the fact that the said premises was acquired at the fag end of the previous year. We note that the assessee has not submitted any cogent evidence to prove that the said premises was 'put to use' by the assessee for its business purposes, except the auditor's certificate. We note that the auditor has also not mentioned any specific cogent evidence to show reliance on the basis of which he had certified that the said premises was 'put to use' for the business purposes by the assessee. We note that even though the said premises was inhabitable it would require some expenditure or activity to bring it in the category of asset which have been put to use' by the assessee for its business purposes. In our considered opinion, an averment to the effect that the said premises was 'put to use' by the assessee for its business purposes is not sufficient and the assessee needs to corroborate the averment with some cogent evidence to show that the said premises was 'put to use' by it for its own business purposes. Therefore, we are not inclined to grant the objection of the ore, we are assessee. Hence the ground of objection no. 7 is rejected."*

99. Aggrieved assessee is in appeal before us. At the time of hearing, Ld.AR of the assessee brought to our notice Page No. 39 of the draft assessment order and Page No. 55 of the Ld. DRP order and submitted that the assessee has given on lease a portion of the building on rent to M/s. Gem Photographic India Pvt. Ltd., he submitted that the assessee has given a portion of the building on rent to the tenant and it is fact on record that assessee was holding the possession of the whole building.

Since the tenant has vacated the portion of the building the assessee has kept that building with the minimum repairs and made it habitable. He brought to our notice Page No. 147 to 149 of the Paper Book which is the additional evidences filed before Ld. DRP which is nothing but the auditor certification on the occupation of building and the additions made in the block of building for the financial year 31.03.2018 which includes expenditure incurred by the assessee to put to use of the office premises vacated by the tenant. He submitted that at the time of surrendering of building the building was in a habitable condition and was already used by the tenant for the purpose of their business. Therefore, the building was already in a ready to use condition and was occupied by the assessee on immediate basis. When the assets are in a ready to use condition from the date of occupation by the assessee depreciation can be claimed.

100. On the other hand, Ld. DR relied on the order of the lower authorities.

101. Considered the rival submissions and material placed on record, we observe from the record that the tenant has vacated the portion of office premises and the assessee has occupied the building and claimed

the depreciation for the period of reoccupation by the assessee. The Assessing Officer and Ld. DRP was of the view that immediate surrender of tenancy rights at the fag end of the previous year and it may not be possible for the assessee to put to use for its business purposes. The assessee has submitted auditor certificate certifying that assessee has incurred certain expenditure on the building and occupied the same for the purpose of business, as per record, it is also acknowledge by the Ld.DRP. However, the Ld. DRP was of the view that the premises was inhabitable and it would require some expenditure or activity to bring it in the category of asset which have been put to use by the assessee in its business, hence they rejected that the said premises was put to use by the assessee for its business purposes and assessee has not brought on record any corroborative evidences to show that the said premises was put to use by it for its own business purposes. However, we noticed from the record that assessee is owner of the whole building and it has let out the portion of the building and after surrender of the tenancy rights the assessee became the owner of the total building and assessee also paid compensation for surrender of rights to the ex-tenant which was capitalized by the assessee, not just the capitalization but it also spent some expenditure on renovation of the building which was

certified by the auditor. It shows that assessee has spent considerable amount and in order to claim the depreciation assessee has to fulfill the conditions laid down in section 32 of the Act, i.e., assessee should be the owner and should have the control of the assets and also it should have been used for the purpose of business. In the given case the tenancy rights were surrendered at the fag end of the previous year. However, the ownership of the building is still with the assessee and it is not relevant whether assessee occupies the building for the purpose of business or not. It is evident that assessee is owner of the property and it has renovated for the purpose of utilizing the same for its own business, as such assessee is in possession of the building which is under renovation that itself shows that it is under the control of the assessee and it will be used for the purpose of business. Once it has become ready to be occupied by the assessee for running its own business and with that it fulfills the conditions of sec 32, the depreciation is automatically applicable. Therefore, the assessee has claimed only the depreciation for the period after surrender of the tenancy rights by the tenant. Therefore, it is not relevant whether actually utilizes for the remaining period, as long as it is in its position and the depreciation can be claimed for utilization as well as based on

the concept of passage of time during which the property was in its control and possession. Therefore, the above said depreciation cannot be denied to the assessee. Accordingly, this ground of appeal is allowed.

102. With regard to Ground No. 8 which is relating to addition on account of disallowance while computing the book profits under section 115JB of the Act, during the course of assessment proceedings Assessing Officer observed that assessee has reduced an amount of ₹.21,98,18,240/- from its book profits and the said item was reduced as others. The assessee was asked to substantiate the above reduction, in response assessee submitted as under: -

> *"During the captioned assessment year, our company Thomas Cook (India) Limited (TCIL), had sold shares of Quess Corp Limited being a listed entity. The company has reduced an amount of Rs. 21,98, 18,240/- from the book profits for computation of MAT.*
>
> *Your goodself has requested us to show cause why Rs. 21,98, 18,240/- reduced from Book Profits while computing MAT on account of indexation benefit on long term capital gains, should not be added back to book profits. In this regard, our company submits as under:*
>
> > *1. The company has earned long term capital gains on sale of shares of listed entity amounting to Rs. 5,35,36,03.045- Such capital gains are exempt as per the provisions of section 10(38) of the Income tax Act, 1961 (the Act) for computing tax under normal provisions of the Act.*

2. Under MAT, However, such exempt income is taxable for computation of book profit as per the provisions of section 115JB of the Act

3. Clause (1) of Explanation 1 of section 115JB(2) of the Act requires that cost pertaining to any income' exempt from tax should be added back to the book profit

4. Clause (i) to Explanation to section 115/3 lays down that the amount of income to which provisions Of section 10, Other than provisions Of sub-section (38) Of section 10 or sections and 12 if any such amount is credited to profit and loss account shall be reduced from the book profits for the purpose of computing tax liability

6. However, clause (0) as well as clause (0) keeps expenditure and income pertaining to capital gains exempt under section 10(38) out of its purview Consequently, any income' considered exempt under section 10(38) under the normal tax provisions is regarded as taxable for the purpose of section 115JB of the Act

6. On the reading of clause (0) and clause (ii) it can be derived that the intention of the section is to tax 'any income' exempt under section 10(38) of the Act Therefore, the issue revolves around interpretation Of the term any income as used in sub-section (38) of section 10 from the transfer of long-term capital asset.

7. Provisions of section 48 provide for method Of computation Of income chargeable under long-term capital gains. It is provided that long-term capital gain shall be computed by deducting from full value of consideration received as a result of long term capital asset expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the asset and the cost of any improvement thereto. It is further provided that the amount in case of long-term capital gain arising from transfer of long-term capital asset, cost of acquisition shall be substituted by indexed cost of acquisition.

8. Therefore, the term 'any income, used in section 10(38) of the Act refers to only the amount of long-term capital gains computed under the provisions of section 48 of the Act which means that the benefit of indexation of cost of acquisition was to be given to the assessee while computing long term capital gain for the purpose of section 115JB of the Act

9. Reliance in this regard is also placed on the following judicial precedents;

(i) Best Trading and Agencies Ltd vs Deputy Commissioner of Income tax, Circle 11(2), Bangalore [2020] (119 taxmann.com 129) (Karnataka HC)

(ii) M.S.R & Sons Investments Ltd (ITA No 3189 of 2005) (Karnataka HC)

(iii) Karnataka State Industrial Infrastructure Development Corporation Limited vs Deputy Commissioner of Income tax TAXD15) (2016) (76 taxmann.com 360) (Bangalore Tribunal)

1. In view of the above judicial precedents, the company submits that the term 'income' as appearing under the provisions of section 115JB Act refers to long term capital gains as computed as per the computation mechanism provided under the Act i.e. giving effect to section 48 of the Act and thus, the company shall be entitled to the benefit of indexation.

2. Accordingly, our company has computed the capital gains on sale of shares of listed company Of Rs. 5, 13,37 after giving effect to indexation and offered such gains under MAT

3. The profit on sale of listed shares considered in the books of accounts without giving effect to indexation is Rs. Accordingly, the differential amount of Rs. 21.98, 18,240/- has been reduced from the book profits to give effect to the indexation benefit.

Your goodself will appreciate that the above position i.e. negating profits on sale (without indexation) from books profits and offering capital gains (with indexation benefit) under MAT is based on the provisions of the law and the position laid down under high court decisions. Accordingly, the reduction Of Rs. 21,98,18,240/- ought not to be added back in computing book profits under MAT."

103. The Assessing Officer / Transfer Pricing Officer rejected the submissions of the assessee by observing that the provisions of section 115JB of the Act empowers the Assessing Officer to add or reduce only such items which are mentioned in section 115JB of the Act and restricts

the Assessing Officer from making any addition / reduction in any other items which is not covered under section 115JB of the Act. Accordingly, rejected the claim of the assessee. Therefore, they added back of ₹.21,98,18,240/- by stating that the benefit of indexation shall not be available while computing the book profits as per provisions of section 115JB of the Act.

104. Aggrieved assessee filed an objection before Ld. Ld. DRP. Before Ld. DRP, assessee reiterated the submissions made before Assessing Officer and it has relied on the decision of the Hon'ble Karnataka High Court in the case of Best Trading and Agencies Ltd. *v.* DCIT [202] (119 taxmann.com 129.

105. After considering the submissions of the assessee Ld. DRP by relying on the decision of the ITO *v.* Galaxy Saws (P) Ltd., (2011) 132 ITD 236, wherein the ITAT has reiterated that Assessing Officer can only make adjustments specified as per Explanation1 to section 115JB(2) of the Act. The above said proposition is also settled by the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd., *v.* CIT, by relying on those decisions Ld. DRP has rejected the adjustment made by the assessee in the book profits that price difference between the

original cost of shares and the indexed cost of shares, accordingly, the objections was dismissed.

106. Aggrieved assessee is in appeal before us. At the time of hearing, Ld AR submitted that Section 115JB(5) provides that all other provision of the Act are applicable except as provided otherwise in this section. Hence, he submitted that in view of section 115JB(5) of the Act, provision of section 48 which allows indexation for computing long term capital gains would be applicable as no exclusion is provided for the same in the main section. This view has been accepted by the Karnataka High Court in the case of Best Trading and Agencies Ltd. *v.* DCIT (119 Taxmann.com 129) wherein the Karnataka High Court has after considering the decision of the Apex Court in the case of Apollo Tyres Ltd *v* CIT [255 ITR 273] has allowed the claim of the Assessee of indexation while computing book profit.

107. Further, reliance is placed on the decision of the coordinate bench of the Tribunal in the case of Karnataka State Industrial Infrastructure Development Corporation Ltd *v.* DCIT [76 taxmann.com 360 (Bang)]. The Assessee submits that even as per clause (ii) of Explanation 1 to

section 115JB of the Act, indexation is required to be allowed to the Assessee. Clause (ii) of Explanation 1 reads as under-

> *"the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof) or section 11 or section 12 apply, if any such amount is credited to the (statement of profit and loss);"*

108. In view of the aforesaid, the Assessee submits that firstly, the whole of the amount of capital gains as credited in the profit and loss account i.e. without indexation is the amount of income to which the provision of section 10 is applicable, and then what is to be excluded is the what is covered in section 10(38) which refers to capital gains which is computed after considering indexation. It is therefore, submitted that the intention of the legislature is clear to only tax capital gains which is exempt in section 10(38) i.e. after allowing indexation.

109. On the other hand, Ld. DR relied on the order of the lower authorities.

110. Considered the rival submissions and material placed on record, we observe from the record that the assessee has reduced the indexation cost acquisition of transfer of shares while calculating the book profit u/s 115JB of the Act. While claiming the benefit, the

assessee acknowledged that this transfer of shares is exempt from tax u/s 10(38) of the Act and relied on the decision of Hon'ble Karnataka High Court in the case of Best Trading and Agencies Ltd (supra) wherein it was held that indexation benefit should be allowed. It was held that the indexation benefit was allowed for the reason that the assessee company was established as SPV for transfer of Land and Building. Further it was held that indexed cost of acquisition is a claim allowed by sec.48 to arrive at the income taxable as per sec.45 at the rates provided u/s 112. Further, it was held that the assessee has to be given the benefit of indexed cost of acquisition as considering the profits on sale of land without giving the benefit of indexed cost of acquisition results in taking the income other than actual/real income. Since the Hon'ble court allowed the indexation while determining the book profit u/s 115JB. Further they relied on the decision of ITAT Bangalore, Karnataka State Industrial (supra), wherein it was held as under:

> *"15. In ground No.2(c) the assessee-company contends that while computing the tax liability u/s 115JB, amount of capital exempt u/s 10(38) should alone be considered. It is the contention of the assessee-company that the amount of capital gain computed u/s the IT Act is exempt, though such amount is exempt from tax u/s 10(38) of the Act. In short, it is the contention of the assessee-company that long-term capital gain arrived at by reducing indexed cost of acquisition from sale proceeds of the assets sold should be considered for the purpose of computing tax liability u/s 115JB whereas the AO was of opinion that long-term capital gain without*

indexing the cost of acquisition are to be considered for the purpose of computing tax liability u/s 115JB of the Act.

16. Clause (ii) to Explanation to section 115JB lays down that the amount of income to which provisions of section 10, other than provisions of sub-section (38) of section 10 or sections 11 and 12 if any such amount is credited to P&L A/c shall be reduced from the book profits for the purpose of computing tax liability. The provisions of section 10(38) read as under:

> *"10(38) any income arising from the transfer of a long-term capital asset, being equity share in a company or a unit of an equity oriented fund where —*
>
> > *(a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No.2)Act,1004 comes into force.*
> >
> > *(b) such transaction is chargeable to securities transaction tax under that Chapter:*
>
> *Provided that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section 115JB.*
>
> *Explanation : For the purposes of this clause, "equity oriented fund" means a fund —*
>
> > *(i) where the investible funds are invested by way of equity shares in domestic companies to the extent of more than 65% of the total proceeds of such fund; and*
> >
> > *(ii) which has been set up under a scheme of a Mutual Fund specified under clauses (23D);*
>
> *Provided that the percentage of equity shareholding of the fund shall be computed with reference to the annual average of the monthly averages of the opening and closing figures."*

Therefore, the issue revolves around interpretation of the term 'any income' as used in sub-section (38) of section 10 of the Act from the transfer of long-term capital asset. Provisions of section 48 provide for method of computation of income chargeable under long-term capital gains. It was provided that long-term capital gain shall be computed by deducting from full value of consideration received as a result of long-term capital asset expenditure incurred

wholly and exclusively in connection with such transfer and the cost of acquisition of the asset and the cost of any improvement thereto. It is further provided that the amount in case of long-term capital gain arising from transfer of long-term capital asset, cost of acquisition shall be substituted by indexed cost of acquisition. Therefore, the term 'any income' used in sub-section (38) of section 10 of the Act refers to only the amount of long term capital gains computed under the provisions of section 48 which means that the benefit of indexation of cost of acquisition should be given to the assessee while computing long term capital gain for the purpose of section 115JB of the Act. Even the Hon'ble Supreme Court, in the case of Ajanta Pharma v. CIT [2010] 327 ITR 305/194 Taxman 358 in the context of deciding whether amount eligible profits u/s 80HHC or the amount of deduction u/s 80HHC to be deducted from book profits for the purpose of computing u/s 115JB held that it is only the amount of eligible profits which are eligible as deduction from the book profits. The relevant part of the judgment is extracted:

> *'10. One of the contentions raised on behalf of the Department was that if clause (iv) of Explanation to Section 115JB is read in entirety including the last line thereof (which reads as "subject to the conditions specified in that section"), it becomes clear that the amount of profits eligible for deduction under Section 80HHC, computed under clause (a) or clause (b) or clause (c) of subsection (3) or sub-section (3A) as the case may be, is subject to the conditions specified in that Section, http://www.itatonline.org According to the Department, the assessee herein is trying to read the various provisions of Section 80HHC in isolation whereas as per clause (iv) of Explanation to Section 115JB, it is clear that book profit shall be reduced by the amount of profits eligible for deduction under Section 80HHC as computed under clause(a) or clause(b) or clause(c) of subsection (3) or sub-section (3A), as the case may be, of that Section and subject to the conditions specified in that Section, thereby meaning that the deduction allowable would be only to the extent of deduction computed In accordance with the provisions of Section 80HHC. Thus, according to the Department, both "eligibility" as well as "deductibility" of the profit have got to be considered together for working out the deduction as mentioned in clause (iv) of Explanation to Section 115JB. We find no merit in this argument. If the dichotomy between "eligibility" of profit and "deductibility" of profit is not kept in mind then Section 115JB will cease to be a self-contained code. In Section 115JB, as in Section 115J A, it has been clearly*

> *stated that the relief will be computed under Section 80HHC(3)/(3A), subject to the conditions under sub-clauses (4) and (4A) of that Section. The conditions are only that the relief should be certified by the Chartered Accountant Such condition is not a qualifying condition but it is a compliance condition. Therefore, one cannot rely upon the last sentence in clause (iv) of Explanation to Section 115JB (subject to the conditions specified in sub-clauses (4) and (4A) of that Section) to obliterate the difference http://www.itatonline.org between "eligibility" and "deductibility" of profits as contended on behalf of the Department. '*
>
> *Therefore following the same ratio, we hold that the amount of profit eligible u/s 10(38) should alone be considered for the purpose of tax liability u/s 115JB of the Act. The co-ordinate bench in the case of M.S.R & Sons Investments Ltd. v. Dy. CIT [IT Appeal No.769 (Bang.) of 2000, dated 20-05-2005] held while computing capital gains, benefit of indexed cost of acquisition is to be considered for the purpose of computing tax liability u/s 115JB. This decision was appealed by the Revenue before the Hon'ble jurisdictional High Court in ITA No.3189 of 2005 and the Hon'ble jurisdictional High Court by its judgment dated 14th September 2011 had upheld the order of the Tribunal. The same ratio is squarely applicable to the facts of the case. Therefore, the assessee-company is entitled to the benefit of indexation while calculating long-term capital gains which are to be considered for the purpose of computing tax liability u/s 115JB of the Act. This ground of appeal viz. 2(b)is allowed."*

111. Respectfully following the above decision, we are inclined to allow the ground raised by the assessee wherein the facts and claim of the assessee in this case also exactly similar. Hence the ground raised by the assessee is accordingly allowed.

112. With regard to Ground No. 9 which is relating to refund of excess dividend distribution tax, this ground is similar to Ground No. 5 raised by the assessee for the A.Y. 2016-17. Since the issue is exactly similar and

grounds as well as the facts are also identical, the decision taken in Ground No. 5 for the A.Y. 2016-17 shall apply mutatis-mutandis to the appeal for the A.Y. 2018-19. We order accordingly.

113. With regard to Ground No. 10 which is relating to penalty under section270A of the Act, this issue is premature at this stage, accordingly, the same is dismissed.

114. With regard to Ground No. 11 which is relating to short grant of TDS credit, this ground is similar to Ground No. 6 raised by the assessee for the A.Y. 2016-17. Since the issue is exactly similar and grounds as well as the facts are also identical, the decision taken in Ground No. 6 for the A.Y. 2016-17 shall apply mutatis-mutandis to the appeal for the A.Y.2018-19. We order accordingly.

115. With regard to Ground No. 12 which is relating to Non- grant of TDS credit, at the time of hearing Ld AR submitted that Assessing Officer has not granted the TDS credit in its account and he prayed that this issue may be directed to Assessing Officer so that the proper credit may be granted after proper verification and Ld DR has not made any objection, therefore, we are also inclined to remit this issue back to the

file of AO to verify the claim of the assessee as per law and after due verification, the same may be allowed. Accordingly, this ground is allowed for statistical purpose.

116. With regard to Ground Nos. 13, 14 and 15 which are relating to levy of interest under section 234B, 234C and 234D of the Act, since these grounds are consequential in nature, accordingly, the same are dismissed.

117. In the result, appeal filed by the assessee is partly allowed.

118. To sum-up, all the Appeals filed by the assessee are partly allowed.

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

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 24.11.2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum