आयकर अपीलीय अधिकरण
मुंबई पीठ "एच",मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एस. रिफौर रहमान, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " H ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER&
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER

आअसं.631/मुं/2013 (नि. व. 2008-09)
ITA NO.631/MUM/2013(A.Y.2008-09)

Tata Motors Limited
Bombay House, 24,Homi Mody Street,
Hutama Chowk, Mumbai – 400001.
PAN: AAACT-2727-Q ..... अपीलार्थी/Appellant

बनाम Vs.

The Addl. Commissioner of Income Tax
Circle -2(3), Mumbai.
Aaykar Bhavan, M.K.Road,
Mumbai – 400 020 .....प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by	:	Shri J.D.Mistry, Sr.Advocate with Shri Nikhil Tiwari,Advocate
प्रतिवादी द्वारा/Respondent by	:	Ms. Vatsala Jha, CIT-DR and Shri Manoj Kumar Singh, Sr.AR
सुनवाई की तिथि/ Date of hearing	:	10/11/2023
घोषणा की तिथि/ Date of pronouncement	:	05/02/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order passed under section 143(3) r.w.s. 144C of the Income Tax 1961 [in short 'the Act'] for the assessment year 2008-09.

2. The assessee in appeal has raised multiple grounds of appeal assailing additions/disallowances made in the impugned assessment year. The assessee vide application dated 20/12/2017 has raised an additional ground of

appeal. One of the additional ground raised by the assessee challenges validity of order passed u/s. 92CA(3) of the Act. The additional ground raising jurisdictional issue reads as under:

> *"16.On the facts and circumstances of the case and in law, the Order u/s. 92CA(3) of the Act passed by the Additional Commissioner of Income-tax, Transfer Pricing - II(2), Mumbai (Addl. CIT) is without jurisdiction and bad in law inasmuch as the "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorized by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons, as per Explanation to section 92CA of the Income-tax Act, 1961 ("the Act")."*

To support admission of additional ground, the assessee placed reliance on the following decisions:

(i) Jute Corporation of India Ltd. , 187 ITR 688 (SC).

(ii) National Thermal Power Company, 229 ITR 383(SC)

(iii) Pruthvi Brokers and Share Holders, 349 ITR 351 (Bom)

3. After examining the aforesaid additional ground raised by the assessee, we are of the considered view that the jurisdictional issue raised by way of additional ground goes to the root of validity of order passed by the Transfer Pricing Officer(TPO) and subsequent proceedings arising therefrom. Hence, the additional ground raised by the assessee by way of application dated 20/12/2017 is admitted for adjudication on merits.

4. Both sides are unanimous in stating that since, the additional ground raised by the assessee goes to the root of validity of assessment, therefore, the same should be taken up first for adjudication. Therefore, the legal issue raised by way of additional ground No.16 is taken up for adjudication in the first instance.

5. Shjri J.D.Mistry appearing on behalf of the assessee submitted that the assessee has entered into international transaction during the period relevant to the assessment year under appeal. To determine Arm's Length Price (ALP) of the transactions entered between the assessee and the Associated Enterprise(AE) reference was made to the TPO u/s. 92CA of the Act. Explanation to section 92CA of the Act specifies who can be the TPO for the purpose of section 92CA of the Act. He asserted that for the purpose of section 92CA of the Act, TPO can either be a Joint Commissioner or Dy. Commissioner or Assistant Commissioner authorized by the Board. He referred to the explanation to section 92CA of the Act and makes two fold submissions.

5.1 In the first plank of arguments he pointed that in the present case, the order u/s. 92CA of the Act has been passed by an Officer in the rank of Additional Commissioner of Income Tax. As per Explanation to section 92CA, Additional Commissioner cannot be appointed as TPO. The provisions of section 92CA is very specific and Explanation to section 92CA categorically mention that the TPO means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner. Since, in the instant case, the order u/s. 92CA of the Act has been passed by an Additional Commissioner, the order is without jurisdiction, hence, unsustainable in the eye of law. The ld.Counsel for the assessee to support his argument that Additional Commissioner and Joint Commissioner are different authorities referred to in the provisions of section 116 of the Act. He pointed that the Act classifies Income Tax Authorities u/s. 116 of the Act. The Additional Commissioner and Joint Commissioner have been categorized in two different clauses of section 116 of the Act. The Additional Commissioners have been put in clause (cc), whereas Joint

Commissioners have been put in clause (cca) of section 116. Hence, this itself signifies that Additional Commissioner and Joint Commissioners are not the authorities in same class. He further referred to the definition of Additional Commissioner u/s. 2(1C) of the Act . He submitted that Additional Commissioners have been defined separately u/s. 2(1C) and Joint Commissioners have been defined u/s.2(28C) of the Act . The definition of Additional Commissioner was inserted by the Finance Act, 2007 with retrospective effect from 01/06/1994, whereas the definition of Joint Commissioner was inserted by Finance (No.2) Act, 1998 w.e.f. 01/10/1998. The aforesaid definitions of two different authorities were inserted at different point of time, hence, by no stretch of explanation it can be said that Additional Commissioners and Joint Commissioners are one and the same. He further referred to the definition of Assessing Officer u/s. 2(7A) of the Act to contend that in the definition of the Assessing Officer, Joint Commissioner was included by the Finance (No.2) Act of 1998, whereas the Additional Commissioner was inserted by the Finance (No.2) Act of 2007 w.r.e.f 01/06/1994. The insertion of these two authorities in the definition of Assessing Officer at two different point of time would clearly show that these authorities fall under separate category and hence cannot be considered as one and the same. He further referred to the provisions of section 124 of the Act to again highlight that Additional Commissioners and Joint Commissioners were inserted in clause (b) of section 120(4) at different point of time. Hence, they are two different authorities under the provisions of the Income Tax Act. He vehemently argued that the intention of Legislature was never to designate Additional Commissioner as TPO as the Explanation to section 192CA of the Act does not specify Additional Commissioner as TPO. He submitted that wherever the

Legislature intended to include Additional Commissioner along with Joint Commissioner, the section provides so specifically. In support of his arguments he referred to the provisions of section 132(1) of the Act. The ld. Counsel for the assessee to thrust the point that the Additional Commissioner and Joint Commissioner are two separate authorities placed reliance on the decisions rendered in the case of Dr.Nalini Mahajan vs. Director of Income Tax, 252 ITR 123(Del) upheld by Hon'ble Supreme Court of India in Director of Income Tax vs. Nalini Mahajan, 314 ITR 340 (SC), CIT vs. Pavan Kumar Garg, 334 ITR 240(Del) and CIT vs. Jain Sons in SLP (Civil) No.8958/2009 decided on 27/07/2009.

5.2 In second plank of his submissions, the ld. Counsel for the assessee submitted that a perusal of Explanation to Section 92CA would show that "authorization by Board" is necessary to perform the functions of a TPO u/s. 92C and 92D of the Act. In the instant case, there is no authorization by the Board in the name of Shri Vatsalya Saxena, Additional Commissioner to discharge the functions of a TPO. He pointed that a request letter dated 13/01/2020 was written to the Department for providing copy of authorization in favour of Shri Vatsalya Saxena to act as TPO. Till date copy of authorization has not been provided to the assessee. The ld. Counsel for the assessee further asserted that Board authorization for designating an officer as TPO has to be in specific manner. He referred to one such Board Authorization, Notification No.239/2004 dated 09/09/2004 to point the right manner of authorization.

Finally, he submitted that where the assessment or any order is passed by an authority not competent to pass such order or is not authorized to pass

such order, the said order and any proceedings arising therefrom are bad in law. To support his argument he placed reliance on the decision in the case of Virtura Consulting Services Pvt. Ltd. Vs. DRP & Ors, 139 taxmann.com 361 (Madras).

6. *Au contraire*, Ms. Vatsala Jha representing the Department submitted that there is no difference in the work assigned to Joint Commissioner and Additional Commissioner. Both, the Joint Commissioner and the Additional Commissioner are Authorities at same level and head the Range. The Joint Commissioners after four years of service in the same rank are re-designated as Additional Commissioners with no change in nature of work or functions. In other words, time scale Joint Commissioners are designated as Additional Commissioners. The ld. Departmental Representative referring to the definition of Joint Commissioner in Sec.2(28C) of the Act contended that the said definition makes it clear that Joint Commissioner includes Additional Commissioner of Income Tax under section 117(1) of the Act. It can thus be seen that Joint Commissioner as mentioned in Explanation to section 92CA of the Act includes Additional Commissioner of Income Tax. Thus, an Additional Commissioner of Income *Tax,* is authorized by the Act to act as TPO.

6.1 In response to second limb of argument by the ld. Counsel for assessee, the ld. Departmental Representative placed on record copy of order No.59 of 2011 dated 04/04/2011 vide which the officers in the grade of Joint/Additional Commissioners are transferred in the Directorate of International Taxation and Transfer Pricing by the Board. She pointed that Shri Vatsalya Saxena was transferred from Pune Zone to Mumbai Zone under the charge of Director General of Income Tax (International Taxation), Mumbai.[in short 'the

DGIT(IT)] Thereafter, vide office order dated 05/04/2011 Shri Vatsalya Saxena was posted as TPO 2(2) at Mumbai by the DGIT(IT). The posting of officers from one Zone to other Zone are done by the Board. Further postings to the range/charge are done by the CCIT/DGIT of the respective Zones.

The aforesaid postings of the officers are on the vacancies of the TPO created by the Board. He pointed that the relevant notification of vacancies of the TPO for the impugned assessment year are notified by the Board vide Notification No.231/2007 dated 22/08/2007. The authorization by the Board vide aforesaid notification is in accordance with Explanation to section 92CA of the Act. Referring to the Notification No.231/2007 (Supra) she pointed that at Sl.No.32 Joint Commissioner TPO-II(2) Mumbai has been designated against territorial area and the class of persons assessable within his jurisdiction. She further pointed that at the end of notification there is a note which clearly states that the Board empowers Director General of Income Tax (International Taxation) or the concerned Directors of the Income Tax (Transfer Pricing) to distribute work among TPO working under them while exercising their power and performing their functions. The transfer of Shri Vatsalya Saxena, Additional Commissioner by the Board to Mumbai in the Directorate of International Taxation and Transfer Pricing and the subsequent office order issued by Director General of Income Tax (International Taxation) posting him as TPO II(2), Mumbai are in accordance with authorization by the Board.

6.2 The Ld. Departmental Representative placed on record Explanatory note to the provisions of Finance Act, 2007 vide which definition of Additional Commissioner was inserted as section 2(1C). She submitted that a perusal of

explanatory note would make it clear that the definition of Additional Commissioner was inserted only as a clarificatory amendment to the definition of Assessing Officer defined in section 2(7A) of the Act. She pointed that Joint Commissioner has been defined u/s. 2(28C) of the Act which includes Additional Commissioner u/s. 117 of the Act. The Ld. Departmental Representative referring to the decision in the case of DCIT vs. BBC Worldwide India Pvt. Ltd.112 taxmann.com 380 (Del-Trib) submitted that an additional ground challenging jurisdiction of Additional Commissioner to act as TPO was raised in the said appeal. The decision of Delhi High Court in the case of Pawan Kumar Garg (supra) was also relied upon by the ld.Counsel for the assessee therein. The Tribunal distinguished the said decision and dismissed the additional ground raised by the assessee.

7. We have heard extensive submissions made by rival sides and have considered the Notifications & decisions on which reliance has been placed by the respective sides on the jurisdictional issue i.e. "Whether Additional Commissioner can be the TPO?"

8. The ld.Counsel for the assessee has made two pronged arguments challenging validity of order passed u/s. 92CA(3) of the Act dated 20/10/2011. The said order has been passed by Shri Vatsalya Saxena, Additional Commissioner TP(II)(2), Mumbai. The first objection of the assessee is that Explanation to section 92CA does not mandate Additional Commissioner to be the TPO. Here it would be imperative to refer to Explanation to section 92CA of the Act.

> ***"Explanation:- For the purpose of this section, "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorized***

by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons. *"*

The contention of the assessee is that since, Additional Commissioner is not mentioned in Explanation, therefore, he cannot be the TPO.

9. The Additional Commissioner has been defined in section 2(1C) of the Act as under:

Section 2(1C): "Additional Commissioner" means a person appointed to be an Additional Commissioner of Income-tax under sub-section (1) of section 117;"

The aforesaid definition was inserted by the Finance Act, 2007 w.r.e.f 01/06/1994. The Joint Commissioner has been defined u/s. 2(28C) as under:

"Joint Commissioner" means a person appointed to be a Joint Commissioner of Income-tax or an Additional Commissioner of Income-tax under sub-section (1) of section 117;"

The definition of Joint Commissioner was inserted by the Finance (No.2) Act, 1998 w.e.f. 01/10/1998. Before proceedings further, it would be relevant to refer to the reasons for inserting the aforesaid definition. Circular No.772 dated 23/12/1998 gives the reasons behind the insertion of sub-section(28C) to section 2 of the Act. The relevant extract of Circular No.772(supra) is reproduced herein below:

"Redesignation of Income-tax Authorities under the Income-tax Act

5.1 The Fifth Central Pay Commission had recommended a change in the designation of Assistant Commissioner of Income-tax (Senior Scale). Consequently, it was decided to re-designate Assistant Commissioner of Income-tax (Senior Scale) and Assistant Director of Income-tax (Senior Scale) as Deputy Commissioner of Income-tax and Deputy Director of Income-tax respectively. This necessitated re-designating the existing Deputy Commissioner of Income-tax and Deputy Director Income-tax as Joint Commissioner of Income-tax and Joint Director of Income-tax respectively. The above changes in designation made it necessary to amend the various sections of the Income-tax Act so that the statutory powers continue to be exercised by the substituted authorities as a result of redesignation.

5.2 The following substitution of income-tax authorities has been globally made in the Income-tax Act:

Table

From	To
Assistant Commissioner	Assistant Commissioner or Deputy Commissioner
Assistant Director	Assistant Director or Deputy Director
Deputy Commissioner	Joint Commissioner
Deputy Director	Joint Director

5.3 Clause (74) of section 2 of the Income-tax Act containing the definition of Assessing Officer has been amended to include the redesignated authorities as above.

5.4 Clause (94) of section 2 of the Income-tax Act has been amended to include Deputy Commissioner in the definition of Assistant Commissioner.

5.5 Clauses (194) and (19C) of section 2 of the Income-tax Act have been amended to exclude the authorities of Additional Commissioner of Income-tax and Additional Director of Income-tax from the definitions of Deputy Commissioner and Deputy Director.

5.6 Two new clauses, namely (28C) and (28D) have been inserted in section 2 of the Income-tax Act to define Joint Commissioner and Joint Director.

5.7 Section 116 of the Income-tax Act has been amended by inserting clause (cca) to add a new class of income-tax authorities, namely, Joint Director of Income-tax or Joint Commissioner of Income-tax."

A perusal of aforesaid reasons would show that prior to 1998 there was no designation in the hierarchy of Income Tax Authorities as Joint Commissioner. There was restructuring of Income Tax Department in 1998. The Fifth Central Pay Commission recommended changes in the designation of the then existing authorities which necessitated re-designation of then existing authorities. As a result, Deputy Commissioner was re—designated as Joint Commissioner. A new authority Joint Commissioner came into being hence, sub-clause (28C) was inserted defining Joint Commissioner.

In the year 2007, the definition of Additional Commissioner was inserted w.r.e.f 01/06/1994. A perusal of Explanatory Notes to the Provisions of Finance Act, 2007, vide Circular No.3/2008 dated 12/03/2008 gives the reasons for insertion of the definition of Additional Commissioner. The relevant extract of the Explanatory Notes are reproduced herein:

> ***"4. Clarificatory amendment to the definition of 'Assessing Officer' and definition of certain other Income-tax Authorities;***
> *As per the provisions of clause (7A) to section 2, the expression "Assessing Officer" has been defined to include Assistant Commissioner or Deputy Commissioner or Assistant Director or Deputy Director or the Income-tax Officer who is vested with the relevant jurisdiction by virtue of directions or orders issued under sub-section (1) or sub-section (2) of section 120 or any other provision of this Act. The Joint Commissioner or Joint Director who is directed under clause (b) of sub-section (4) of section 120 can also exercise or perform all or any of the powers and functions conferred on or assigned to an Assessing Officer under this Act. The Income-tax authorities- "Additional Commissioner" and "Additional Director" were not specifically mentioned in the said definition because "Additional Commissioner" and "Additional Director" were included in the definition of Joint Commissioner and Joint Director respectively under clauses(28C) and (28D) of the section(2) respectively. However, in order to further clarify the intension of the legislature with regard in the meaning of the term "Assessing Officer", the following amendments have been carried out through the Finance Act, 2007-*
> *(i) ……*
> *(ii) ……..*
> *(iii) Clause (1C) has been inserted in section 2 so as to provide that "Additional Commissioner" means a person appointed to be an Additional Commissioner of Income-tax under sub-section (1) of section 117. This amendment will take retrospective effect and will be effective from 1st June, 1994.*
> *(iv) …….*
> *(v) ……..*
> *(vi) …….*
> *(vii) Clause (b) of sub-section (4) of section 120 has been amended so as to provide that the powers and functions conferred on or assigned to the Assessing Officer may also be exercised or performed by an Additional Commissioner. This amendment will retrospective effect and will be effective from 1st June,-1994."*

The definition of Joint Commissioner in section 2(28C) makes it unambiguous that Joint Commissioner means a person appointed to be Joint Commissioner or Additional Commissioner. The definition of Additional Commissioner was subsequently inserted u/s. 2(1C) of the Act as a clarificatory amendment. Hence, it can be safely deduced from the definition of Joint Commissioner and the reasons for inserting the definition of Additional Commissioner that Joint Commissioner and Additional Commissioner are not two authorities functioning at different levels in the hierarchy of the Income Tax Department but are authorities performing or discharging concurrent functions.

10. The designation of Additional Commissioner was created by the Finance Act, 1994, accordingly, amendment was made to section 116 of the Act and clause (cc) was inserted by the Finance Act, 1999 w.e.f. 01/06/1994. The Board Circular No.684 dated 10/06/1994 (Explanatory Notes to the Finance Act, 1994) explains the reasons for creation of new class of Income Tax authorities. The relevant extract of the same is reproduced herein below:

> *"15. At present, the classes of income-tax authorities specified in Chapter XIII of the Income-tax Act include the class of Deputy Directors of Income-tax, Deputy Commissioners of Income-tax and Deputy Commissioners of Income-tax (Appeals). The income-tax authorities referred to in this class perform different kinds of functions such as.-*
>
> *(i) supervising the work of Assistant Commissioners/Income-tax Officers.*
>
> *(ii) doing assessment functions.*
>
> *(iii) handling internal audit of the completed assessments,*
>
> *(iv) disposal of appeals,*
>
> *(v) representing Departmental cases in the Appellate Tribunal,*
>
> *(vi) handling search and seizure matters, etc.*
>
> *The above shows that some of the Deputy Commissioners and Deputy Directors have been assigned duties of higher responsibility. Therefore, there is need to recognize*

the aforesaid distinction in responsibility by making an appropriate change in the designation of such authorities.

15.2 The Finance Act has, therefore, amended the relevant provisions of the Income Tax Act in order to create a new class of income tax authorities, namely, additional directors of Income Tax, Additional Commissioners of Income Tax and Additional Commissioners of Income Tax (Appeals). Similar changes have been made to the Wealth Tax Act, the Gift Tax Act, the interest tax Act and the expenditure tax Act."

It is relevant to mention here that prior to 1998 Additional Commissioner was included in the definition of Deputy Commissioner u/s.2(19A) of the Act. By virtue of amendment by the Finance (No.2) Act, 1998 the words Additional Commissioner were omitted from the definition of Deputy Commissioner in Section.2(19A) of the Act and Additional Commissioner was included in the definition of Joint Commissioner. Thus, Additional Commissioner was never separately defined. The Additional Commissioner was initially bracketed with Deputy Commissioner (upto 01/10/1998) and thereafter with Joint Commissioner w.e.f. 01/10/1998. In the backdrop of these amendments we can say that the designation of Additional Commissioner was not per se authority superior/at a different level to the DCIT prior to the amendment or Joint Commissioner after the amendment of 1998.

11. We find that the Co-ordinate Bench in the case of BBC Worldwide (India) Pvt. Ltd. (supra) had an occasion to deal with similar legal issue wherein the assessee had challenged the validity of order passed u/s. 92CA by the Additional Commissioner. The objection of assessee therein was that the order passed by TPO is not valid as the same has not been passed by the prescribed authority under the provisions of the Act. The Co-ordinate Bench decided the issue in favour of the Department holding as under:-

"19. *We have carefully considered the rival contention. Admittedly according to the provisions of Explanation to section 92 CA of the act Transfer Pricing officer for the purposes of the section of 92 CA of the act is:*

'Explanation.—For the purposes of this section, "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorised by the Board17 to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons.]'

Provisions of section 2 (28C) of the Act defines the Joint Commissioner means a person appointed to be a Joint Commissioner Of Income Tax Or An Additional Commissioner Of Income Tax under subsection (1) of section 117 of the income tax act. Further with retrospective effect from 01/06/1994 section 2 (1C) was inserted by finance act 2007 to define Additional Commissioner means a person appointed to be an Additional Commissioner Of Income Tax under subsection (1) of section 117 of the act . Further, it is not the case of the assessee that such Additional Commissioner of income tax, who passed an order u/s 92CA (3) of the income tax act, was not an authorised officer by the central board of direct taxes. Reliance placed by the learned authorised representative on the decision of the honourable Delhi High Court in CIT v. Soyuz Industrial Resources Ltd. [2015] 58 taxmann.com 336/232 Taxman 414 decided the issue that Where re-assessment proceedings were initiated after expiry of four years from end of relevant years, sanction for issuance of notice for re-assessment proceedings was to be granted by Joint Commissioner and not by commissioner as per provisions of section 151(2) of the act. Therefore, in that case notice was to be issued by the joint Commissioner, which was issued by the Commissioner. Such is not the case before us. Therefore, the reliance on this decision does not help the case of the assessee. Further, the reliance placed by the assessee on the decision of the honourable Delhi High Court in SPL's Siddhartha Ltd. (supra) also does not help the case of the assessee as in that case it was held that Where Assessing Officer instead of taking approval from Joint Commissioner as per provisions of section 151, obtained approval from Commissioner and issued notice under section 148, said notice was invalid. Reliance placed by the authorised representative on the case of Pawan Kumar Gupta (supra) wherein the issue was that the second warrant of authorization in respect of the said locker was issued by the Additional Director, Income-tax (Investigation). The Additional Director does not find mention in the provisions of section 132(1). However, it was contended by the learned counsel for the revenue that the Additional Director would be covered in the expression 'Joint Director' in view of the provisions of section 2(28D) of the said Act. The court held that Even assuming that the expression 'Joint Director' as used in section 132(1) includes an Additional Director, such Additional Director or Joint Director would have to have initial empowerment by the Board to issue warrants of authorization in view of the provisions of section 132(1)(B). Therefore the only issue before the honourable Delhi High Court was whether the warrant issued by the additional director who was not empowered by the central board of direct taxes is a valid warrant or not. The honourable High Court held so only for the reason that there was no authorization by the board in favour of the additional director. Here it is not the case of the assessee that the Additional Commissioner of income tax who passed the order of the transfer pricing under section 92CA (3) of the act was not authorised by the central board of direct taxes to perform all or any of the functions of an assessing officer specified u/s 92C of the Act. In view of this, the reliance on the above decision of the honourable Delhi High Court does not support the case of the assessee. Thus we hold that, the order passed by the additional Commissioner of income tax u/s 92CA (3) of the income tax act is appellate order passed by a transfer pricing officer in case of the assessee for assessment year 2002 - 03. In view of this, the additional ground raised by the assessee in the cross objection is dismissed."

11.1 The ld.Counsel for the assessee has placed reliance on the decision in the case Dr.Nalini Mahajan(supra) to buttress his arguments that Additional Commissioner and Joint Commissioner are two separate authorities. We have carefully perused the aforesaid judgement. We find that the said decision is distinguishable on facts. The ld.Counsel for the assessee referring to Para – 77 and 78 of the aforesaid judgment argued that the powers conferred upon the authorities specified in a particular section must be exercised by the authorities who had expressly being conferred therein. We find that the Hon'ble Court made aforesaid observations in the case of Dr.Nalini Mahajan (supra), as in the said case search warrant were issued by Additional Director (Investigation), whereas the Act required Director or Director General or Chief Commission or Commissioner to issue such warrants. Thus, it was a case where the Act envisaged issuance of warrant by higher authorities, whereas the warrants were issued by authority junior in hierarchy. The Additional Director (Investigation) issued authorization or warrants to Joint Director. In the backdrop of the above facts, the Hon'ble Court held " *A delegation of power is essentially a legislative function. Such a power of delegation must be provided for by the staute. The Director himself for certain matters is the delegating authority. He, unless the staute expressly state, cannot sub-delegate his power to any other authority*." In the instance case it is not so. The definition of Joint Commissioner includes Additional Commissioner as well. Both, the Joint Commissioner and the Additional Commissioner perform functions in the same level of hierarchy in the Income-tax Department. Precisely for this very reason the definition of Joint Commissioner in section 2(28D) includes Additional Commissioner, hence, the case of Dr.Nalini Mahajan does not support the cause of assessee. Similar

were the facts in the case of Pawan Kumar Garg (supra). The warrants were required to be issued by Director whereas, the warrants were issued by lower

authority i.e. Additional Director. Therefore, the Hon'ble Court followed the decision in the case of Dr.Nalini Mahajan.

11.2 The second limb of the arguments advanced by the ld.Counsel for the assessee is that Shri Vatsalya Saxena, Additional Commissioner is not authorized by the Board to act as TPO. The arguments of ld.Counsel is that Explanation to Section 92CA requires Joint Commissioner/Deputy Commissioner/ Assistant Commissioner to be authorized by the Board to perform the functions of a TPO and such an authorization is in a particular manner. He referred to one such authorization Notification No.239/2004 dated 09/09/2004. Mr. Mistry asserted that the authorization furnished by the Department falls short of the requirement as envisaged u/s. 92CA of the Act. The Department has referred to the Notification No.231/2007 dated 22/08/2007, whereby the Board has notified the designation of Income-tax authorities to act as TPO and has also specified the territorial area and the class of persons on whom such an officer shall have jurisdiction. The ld. Departmental Representative stated at Bar that the Notification dated 22/08/2007 is relevant notification applicable to Assessment Year under appeal. A perusal of the said notification reveals that at Sl.No.32 the relevant entry for authorization of the officer to act as TPO II(2), Mumbai. For the sake of ready reference the relevant extract of the notification is reproduced herein under:

"NOTIFICATION NO.231/2007, DATED 22-08-2007

In exercise of the powers conferred by sub-section(1) and (2) of section 120 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following further amendment to the Notification of the Government of India, Ministry of Finance (Department of Revenue),(Central Board of Direct Taxes), number S.O 994(E) dated the 9th September, 2004, namely:-

In the said notification, for the Schedule, the following Schedule shall be substituted, namely:-

SCHEDULE

Serial Number	***Designation of Income-tax Authorities.***	***Head Quarter***	***Territorial Area***	***Persons or Class of persons.***
(1)	***(2)***	***(3)***	***(4)***	***(5)***
1.	*x*	*x*	*x*	*x*
2.	*x*	*x*	*x*	*x*
	x	*x*	-	*x*
32.	*Joint Commissioner of Income-tax (Transfer Pricing Officer)-II(2), Mumbai*	*Mumbai*	*Areas lying within the territorial limits of Metropolitan Council Greater Mumbai and Districts of Thane and Raigarh, State Maharashtra*	*Persons or class of persons who are assessed or assessable within jurisdiction of Assessing Officer having their office in the territorial area indicated in column(4) and having their names beginning with any of the alphabets 'N' to 'Z'*
-	*x*	*x*	*x*	*x*
69.	*x*	*x*	*x*	*x*
70.	*x*	*x*	*x*	*x*

Note: The Central Board of Direct Taxes empowers the Director General of Income-tax (International Taxation or the concerned Directors of Income-tax (Transfer Pricing) to distribute the working amongst the Transfer Pricing Officers working under then while exercising their powers and performing theirs functions."

A perusal of the above notification would show that the Board in exercise of powers conferred by section 120(1) & (2) of the Act has amended RBI Notification dated 09/09/2004 and has authorized the officers designated in column (2) to have territorial jurisdiction(mentioned in column (4)over the

person or class of persons mentioned in column (5). The Note in the end of the said notification clarifies that Board has empowered Director General of Income-tax (International Taxation) or Director Income-tax (Transfer Pricing) to distribute the work amongst the TPOs working under them. The Ld. Departmental Representative has placed on record order No.59 of 2011 dated 04/04/2011 vide which Board has transferred the officers in the grade of Joint Commissioner/Additional Commissioner in the Directorate of International Taxation and Transfer Pricing. The name of Shri Vatsalya Saxena figures in the list of 'Officers who are being posted to other station/region' at Sl.No.11. Thus, he was transferred in the charge of Director General of Income Tax (International Taxation) by the Board and the DGIT(IT) posted Shri Vatsalya Saxena vide office order dated 05/04/2011 as TPOII(2). Thus posting orders of Shri Vatsalya Saxena as TPO-II(2) in harmony with authorisation by the Board vide notification dated 22/08/2007 (supra). Here we would observe that what Mr. Mistry referred to as authorization is in fact the order of posting. Authorization by the Board and posting of an officer to an authorized vacancy are two different things. The authorization by Board only refers to the designation of an Income Tax Authority for a particular vacancy & the transfer/ posting orders assign a particular officer to that vacancy. To put it in simple words, the Board authorization creates a vacancy and by virtue of transfer/posting orders the Department fills the said vacancy with the designated incumbent. As pointed earlier, the definition of Joint Commissioner in Section 2(28C) includes Additional Commissioner, therefore, in our considered view there is no infirmity or irregularity in appointing officer in the grade of Additional Commissioner to a position designated for Joint Commissioner. Thus, in view of our above findings we find no merit in both

the arguments advanced by the ld.Counsel assailing validity of order passed u/s. 92CA of the Act. As a result, additional ground No.16 of appeal is dismissed.

12. The grounds of appeal on merits & other additional grounds raised by the assessee in appeal are taken up for adjudication in seriatim. The assessee has filed modified grounds of appeal (including additional grounds of appeal) vide application dated 22/02/2023. The same are taken on record.

Ground No.1 : Allowability of Pro-rata amount for the year in respect of Leasehold Lands – Rs.71,86,777/-:

13. The ld. Counsel for the assessee submits that the assessee had claimed deduction towards pro-rata amount of Leasehold land. The assessee had made claim of the aforesaid amount by way of a Note in computation of income. The A.O rejected the claim on the ground that the amount has not been claimed in the return of income or in the revised return of income. The ld.Counsel for the assessee pointed that similar claim was made in A.Y 2006-07 and 2007-08. He fairly stated that in A.Y.2006-07 the claim was made in the computation of income and requisite disclosure was made in notes to computation of income that the deduction has been claimed u/s. 37(1) of the Act. The A.O accepted the same and no disallowance was made in the assessment order. He submitted that since, the claim of assessee has been accepted in the past the same cannot be disallowed in the impugned assessment year merely for the reason that the claim was made in the notes to the Return of Income and not in the return of income. The ld Counsel further pointed that in A.Y. 2007-08 the claim of assessee was allowed by the Tribunal in ITA NO.5600/Mum/2011 decided on 25/04/2019, the Tribunal

directed the A.O to consider assessee's claim of deduction in line with earlier assessment years. The A.O while passing the order giving effect to the Tribunal order allowed the claim of assessee.

14. We find that in A.Y 2007-08 the assessee had made claim on account of pro-rata amount of leasehold land by way of Note No.4 to the computation of income. The A.O and the DRP rejected the claim of assessee citing Goetz (India) Ltd., 284 ITR 323(SC). The Tribunal admitted the claim of assessee and restored the issue back to the file of A.O holding as under:-

> *" 13. We have considered rival submissions and perused material on record. It is evident, the assessee's claim of deduction on account of amortization of upfront payment made towards leasehold land was rejected both by the Assessing Officer and learned DRP only for the reason that such deduction was not claimed either in the original or in the revised return of income. However, it is a fact on record that in the computation of income the assessee has claimed such deduction. Moreover, though, the ratio laid down in Goetz India Ltd. (supra) is applicable to the Assessing Officer, however, it is not applicable to the appellate authorities. Therefore, assessee's claim of deduction should have been examined on merit by learned DRP instead of rejecting it on technical ground. Be that as it may, in view of the ratio laid down by the Hon'ble Jurisdictional High Court in Pruthvi Brokers & Shareholders Pvt. Ltd. (supra), we restore the issue to the Assessing Officer for deciding afresh assessee's claim of deduction. While doing so, the Assessing Officer should also take note of assessee's contention that similar deduction claimed by the assessee in preceding assessment year was allowed. Further, the Assessing Officer is also directed to decide the issue on merit keeping in view the decision of the Hon'ble Gujarat High Court in Sun Pharmaceuticals India Ltd. (supra) and that of the Tribunal in Delhi International Airport Pvt. Ltd. (supra) and any other decision which may be cited by the assessee. With the aforesaid observations, this ground is allowed for statistical purposes"*

The ld. Counsel for the assessee placed on record copy of order giving effect dated 27/05/2022 for A.Y 2007-08. From perusal of the said order we find that the A.O has allowed assessee's claim of pro-rata amount on the leasehold land. Since, the claim of assessee has been allowed in the past i.e. A.Y 2006-07 and 2007-08 on similar set of facts, in principle we hold that assessee's claim of

deduction of pro-rata amount in respect of leasehold lands deserves to be accepted, however, we deem it appropriate to restore the issue to the A.O for the limited purpose to examine quantum of claim. Ground No.1 of appeal is allowed in the aforesaid terms.

Ground No.2: Write back of provision for doubtful debts- Rs.14,24,06,922/-:

15. The ld. Counsel for the assessee submitted that during A.Y. 2006-07 Tata Finance Ltd. (TFL) was amalgamated with assessee. For assessment year 2004-05 and 2005-06 TFL claimed deduction in respect of provision for doubtful debts as business expenditure. Accordingly, certain reversal of provision of Rs.14,24,06,933/- made during the year out of provision made in A.Y. 2004-05 and 2005-06 was offered to tax by the assessee in A.Y. 2008-09 in the return of income. He submitted that this was also mentioned in the Note (No.3) filed along with the computation of income. However, there were certain mistakes while offering the income to tax in the impugned assessment year. The correct amount of reversal of provision during the year was only Rs.8,48,77,596/-. During assessment proceedings the assessee requested the Assessing Officer to exclude difference of Rs.5,75,29,337/- i.e.(Rs.14,24,06,933 - Rs.8,48,77,596). The assessee inadvertently offered to tax Rs.14,24,06,933/- as against actual provision reversed pertaining to assessment year 2004-05 and 2005-06 Rs.8,48,77,596/-. He pointed that details of write back of doubtful debts were submitted to the A.O along with certificate from Chartered Accountant. He referred to the submissions made before the A.O and the certificate of the Chartered Accountant at pages 491 to 505 of the paper book. He pointed that in A.Y. 2007-08 the Tribunal restored the issue to the file of A.O.

He further submitted that second part of claim is, in A.Y 2004-05 the deduction claimed by TFL Rs.1,37,99,189/- was disallowed by the A.O in reassessment proceedings. The assessee challenged reopening of assessment before the Tribunal in ITA No.4100/Mum/2011 for Assessment Year 2004-05. The Tribunal vide order dated 31/07/2017 quashed reopening of assessment. Therefore, claim was made before the A.O/DRP in the current year, as deduction was not allowed in the hands of TFL in A.Y. 2004-05.

He submitted that third segment of relief amounting to Rs.7,10,77,678/- is in respect of deduction claimed by TFL disallowed by the A.O in Assessment Year 2005-06. The said order was passed after assessment order and order of DRP for Assessment Year 2008-09, wherein provision for doubtful debts written back during the year was offered to tax in the return of income. Since, the order of A.O was received post directions of the DRP, the issue has been raised before the Tribunal. He submitted that the issue is covered by the order of Tribunal in assessee's own case decided on merits in ITA No.5600/Mum/2011 for A.Y 2007-08 on 25/04/2019 and the order of Tribunal for A.Y 2006-07 in ITA No.8926/Mum/2010 vide order dated 18/01/2019. In support of his submissions that deduction can be allowed by the Tribunal, even if, not claimed by way of return of income /revised return of income he placed reliance on the following decisions:

(i) Jute Corporation of India Ltd. 187 ITR 688 (SC)

(ii) Pruthvi Brokers and Shareholders Pvt. Ltd., 349 ITR 336(Bom).

16. The ld. Departmental Representative supported the impugned order and prayed for dismissing this ground of appeal by the assessee. He submitted that

assessee did not make any such claim in the return of income, hence, the same was rightly rejected by the A.O and DRP.

17. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee in the return of income has made claim of write back of provision for doubtful debts Rs.14,24,06,922/-. The contention of the assessee is that the quantum of aforesaid claim has been inadvertently computed. The correct amount was Rs.8,48,77,596/- instead of Rs.14,26,06,922/-. He prayed for excluding excess amount i.e. 5,75,29,337/-. During assessment proceedings the assessee furnished details of write back of doubtful debts along with certificate from Chartered Accountant. We find that in A.Y. 2006-07, similar claim made by the assessee was denied by the A.O. The matter travelled to the Tribunal. The Tribunal restored the issue back to the file of A.O holding as under:

> *"15. Brief facts are, in the course of assessment proceedings the Assessing Officer found that in Note no.9 to computation of income, the assessee had claimed that in the assessment year 2004–05 and 2005–06, Tata Finance Ltd., which got amalgamated with the assessee in assessment year 2006–07, had claimed deduction in respect of provisions of doubtful debts / advances. It was stated that in the impugned assessment year, the assessee had reversed the provisions made in assessment years 2004–05 and 2005–06 and offered it to tax. It was submitted, though the actual reversal of provision during the year was Rs. 7,17,70,032, however, in the return of income the assessee had inadvertently offered an amount of Rs. 11,03,04,467. In this context, the assessee furnished a year–wise break–up of provisions made towards doubtful debts / advances. Further, it was submitted that deduction claimed towards provision for doubtful debt and advances in the assessment year 2004–05 was disallowed by the Assessing Officer while completing assessment under section 143(3) of r/w section 147 of the Act. Therefore, it amounts to double addition of the same income. After considering the submissions of the assessee, the Assessing Officer held that since the deduction claimed by the assessee was not made either in the return of income or in the revised return of income, it cannot be accepted".*

Taking into consideration entire facts, we deem it appropriate to restore this issue back to the file of A.O for re-examination. The Assessing Officer shall also

consider the fresh claim made by the assessee before the Tribunal amounting to Rs.7,10,77,678/-. The A.O shall grant reasonable opportunity of hearing /making submissions to the assessee, in accordance with law. In the result, ground No.2 of appeal is allowed for statistical purpose.

Ground No.3: Interest on Income-tax refund u/s. 244A of the Act – Rs.4,23,16,581/-.

18. The ld. Counsel for the assessee submits that during the period relevant to the assessment year under appeal interest u/s. 244A Rs.16,43,50,232/- on refund of tax was allowed to the assessee vide intimation u/s. 143(1) dated 07/12/2007 for A.Y. 2006-07. The assessee offered the aforesaid entire amount to tax in accordance with the decision of Special Bench in the case of Avada Trading Co. Pvt. Ltd., 100 ITD 131. In the final assessment order passed u/s. 143(3) r.w.s. 144C(13) of the Act for A.Y 2006-07 the interest amount was reduced to Rs.8,58,80,712/-. Subsequently, the A.O in rectification order passed u/s. 154 of the Act dated 21/04/2011 allowed interest of Rs.13,03,17,397/-. Subsequent to direction of the DRP, the AO again modified the interest amount vide order passed u/s. 154 dated 15/04/2013 to Rs.12,20,33,651/-. Thus, the assessee has offered interest Rs.4,23,16,581/- (Rs.16,43,50,232 – Rs.12,20,33,651) in excess.

19. The ld.Counsel for the assessee submitted that though the assessee offered to tax entire interest amount which was determined u/s.143(1) of the Act, since, interest u/s. 244A of the Act was withdrawn to the extent Rs.4,23,16,581/- in proceedings u/s. 154 of the Act vide order dated 15/04/2013. The assessee was not liable to pay tax on the part of interest that was withdrawn. The Assessing Officer and the DRP rejected assessee's claim on the ground that the assessee has not made such claim in the revised return

of income, hence, in view of the decision of Hon'ble Apex Court in the case Goetze (India) Ltd (supra) the claim of assessee cannot be entertained.

20. The facts narrated above regarding interest allowed u/s. 244A in intimation u/s. 143(1) of the Act and subsequently partial withdrawal of interest by the Assessing Officer in proceedings u/s. 154 of the Act vide order dated 15/04/2013 is not disputed by the Department. The assessee has offered to tax interest received u/s. 244A Rs.16,43,50,232/-, which was subsequently restricted to Rs.12,20,33,651/-. It is undisputed that the assessee after finalization of interest amount in proceedings u/s. 154 has not filed revised return of income, nevertheless the assessee in computation of income by way of Note No.2 has mentioned that in case interest amount is reduced or withdrawn, subsequently on completion of assessment the interest chargeable to tax for the year should be considered accordingly. Or in alternate the assessee reserve the right to claim interest withdrawn by the Department as deduction for the total income for the year in which interest is withdrawn. Nevertheless, the powers of the Appellate Tribunal are not impinged to entertain fresh claim made by assessee during appellate proceedings. It is a well settled law that Government cannot charge tax in excess of what is due. Since, assessee has offered to tax excess amount Rs.4,23,16,581/-, the Assessing Officer is directed to grant relief on the excess amount offered to tax by the assessee.

21. Thus, assessee succeeds on ground No.3 of appeal.

Ground No.4: Disallowance u/s. 14A r.w.r. 8D- Rs.60,20,00,000/-

22. The assessee has earned dividend income exempt from tax Rs.223.17 crores during the period relevant to assessment year under appeal. No suo-moto disallowance was made by the assessee for earning of exempt income. The Assessing Officer applied Rule 8D and made disallowance:

(i)	Under Rule 8D(2)(ii)	Rs.43.50 crores
(ii)	Under Rule 8D(2)(iii)	Rs.16.70 crores.

The ld.Counsel for the assessee submitted that the assessee has made investments out of own interest free funds. Referring to Fund Flow Statement at page 318 of the Paper Book he pointed that own funds of the assessee comprising of Capital and Reserves and Surplus are to the tune of Rs.7839.50 crores, as against total investment of Rs.4910.27 crores as on 31/03/2008. Thus, own funds of the assessee are sufficient to cover investments. Hence, no disallowance on account of interest expenditure u/r. 8D(2)(ii) is warranted. The ld.Counsel for the assessee submits that in preceding Assessment Years, the Assessing Officer accepted disallowance @1% of exempt income. Thus, he prayed for restricting disallowance u/r.8D(2)(iii) to Rs.2.21 crores. Without prejudice to primary prayer, he made an alternate prayer that if disallowance is restricted to investments yielding dividend income during the year in line with the decision of Special Bench in the case of Vireet Investments Pvt. Ltd.165 ITD 27 (SB-Del) then the disallowance u/s.14A would be Rs.7.23 crores.

23. Per contra, the ld. Departmental Representative vehemently defended the impugned order on this issue and prayer for upholding disallowance u/s. 14A of the Act.

24. Both sides heard. The assessee during relevant period has earned exempt income from dividend Rs.220.74 crores and interest Rs.2.43 crores. No suo-moto disallowance was made by the assessee for earning of exempt income. The Assessing Officer applied rule 8D and made disallowance on account interest expenditure Rs.43.50 crores. The contention of the assessee is that own funds of the assessee are much more than the investments, hence, no disallowance u/r.8D(2)(ii) is warranted. It is no more res-integra that where the assessee has mixed bag of funds comprising of own interest free funds and borrowed interest bearing funds and if, own interest free funds of the assessee are sufficient to cover the investment made, it shall be presumed that the investments are made by the assessee from available interest free funds.[Re.HDFC Bank Ltd. vs. CIT, 383 ITR 529(Bom)]. The assessee has substantiated availability of own interest free funds in the form of Share Capital and Reserves & Surplus from the Balance Sheet as on 31/03/2008 (at page 32 of Paper Book) and Funds Flow Statement (page 318 of the Paper Book). In view of the above, disallowance u/r.8D(2)(ii) is directed to be deleted.

In respect of disallowance u/s. 8D(2)(iii) the ld.Counsel for the assessee has made two fold submissions. The first submissions of ld.Counsel for the assessee is that the disallowance be restricted to 1% of the exempt income as was done in the preceding Assessment Years. The second submission of the assessee is that disallowance be restricted to investments yielding exempt

income. The provisions of Rule 8D would apply from the Assessment Year 2008-09 i.e. the impugned assessment year before us. Prior to Assessment Year 2008-09 disallowance u/s. 14A was made merely on estimations. Hence, the manner of making disallowance prior to Assessment Year 2008-09 would not apply to Assessment Year 2008-09 and thereafter. Hence, we are not in agreement with the first submission of the assessee, therefore, rejected. The second/alternate contention of the assessee is that disallowance be restricted to investments yielding exempt income. The Special Bench in the case of Vireet Investments Pvt.Ltd.(supra) has held that for the purposes of disallowance u/r. 8D only investments yielding dividend income should be considered. The alternate prayer of the assessee is in line with the principle laid down by Special Bench, hence, we find merit in the alternate prayer made by the ld.Counsel for the assessee. The Assessing Officer is directed to compute disallowance u/r. 8D(2)(iii) on investments yielding exempt income only.

25. In the result, ground No.4 of appeal is partly allowed.

Ground No.5- Disallowance u/s. 14A r.w.r. 8D while computing book profitu/s. 115JB of the Act:

26. The Special Bench in the case of Vireet Investments Pvt. Ltd. (supra) has held that while computing book profits u/s. 115JB of the Act disallowance made u/s.14A r.w.r. 8D shall not be considered. The Hon'ble Karnataka High Court in the case of Sobha Developers Ltd. vs. DCIT 125 taxmann.com 72 has reiterated that disallowance made u/s. 14A could not be added to book profits of assessee u/s.115JB of the Act. Thus, in view of above decisions assessee succeeds on ground No.5 of appeal.

Ground No.6 – Expenditure on issue of FCCN – Rs.22,72,48,854/- :

27. During the period relevant to the assessment year 2008-09, the assessee raised funds by issue of Foreign Currency Convertible Bonds (FCCN) aggregating to USD 490 million. In this connection the assessee incurred expenditure of Rs.2,72,48,854/- towards Arranger fees, Legal and Professional fee, Audit fee, etc. The assessee claimed the aforesaid expenditure as deduction. During assessment proceedings, the assessee pointed that the issue is squarely covered by the decision in the case of CIT vs. Secure Meters Ltd.,321 ITR 611(Raj). The SLP filed by the Department i.e. SLP (C) No. 10548 of 2009 against the said decision was dismissed vide order dated 11/08/2009. The ld.Counsel for the assessee submitted that similar issue was considered by the Tribunal in assessee's own case in Assessment Year 2006-07 in ITA NO.8926/Mum/2010. The Tribunal vide order dated 28/01/2019 allowed the expenditure. The ld.Counsel for the assessee further submitted that without prejudice to the primary submission the Authorities Below have erred in not appreciating the fact that FCCN was never converted into shares and the debt was repaid on maturity. It was further submitted that FCCN were convertible to shares, at the option of the holder.

28. Per contra, the ld. Departmental Representative strongly supporting the findings of the Assessing Officer submitted that the Special Bench in the case of Ashima Syntex Ltd. vs. ACIT, 100 ITD 247 has held that the expenditure incurred on issuance of convertible debentures is not allowable as revenue expenditure.

29. We have heard the submissions made by rival sides. We find that identical issue was considered by the Co-ordinate Bench in assessee's own

case in Assessment Year 2006-07 (supra). The Bench allowed expenditure on issuance of FCCN by observing as under:-

> *"12. We have considered rival submissions and perused material on record. Undisputedly, the Assessing Officer has disallowed assessee's claim on the reasoning that FCCNs issued by the assessee are in the nature of convertible debentures, hence, expenditure related to issue of such debenture is capital in nature. However, it is observed that while deciding identical issue in assessee's own case for assessment year 2005–06, in ITA no.3336/Mum /2011, dated 13th April 2018, the Co–ordinate Bench following the decision of the Hon'ble Rajasthan High Court in Secure Meters Ltd. (supra) has held that irrespective of the fact whether the debenture issued is convertible or non– convertible, it is in the nature of loan. Therefore, any expenditure incurred in relation to issuance of such debenture is allowable as expenditure. There being no material difference in facts in the impugned assessment year, the aforesaid decision of the Co–ordinate Bench clearly applies to the facts of the present appeal. Therefore, respectfully following the decision of the Co–ordinate Bench referred to above, we delete the addition made by the Assessing Officer"*

30. In light of the facts recorded above and the decision of Co-ordinate Bench in assessee's own case in preceding Assessment Year, ground No.6 of appeal is allowed.

Ground No.7: Deduction u/s. 80G- Rs.1,72,500/- :

31. The assessee has claimed deduction u/s. 80G of the Act in respect of donation Rs.3,45,000/- made during the year. We find that the assessee is having negative income (loss), therefore, there is no occasion for the assessee to claim benefit of deduction u/s. 80G of the Act. Consequently, ground No.7 of the appeal is dismissed as infructuous.

Ground No.8 : Adjustment u/s. 92CA (3) of the Act in respect of export of vehicles – Rs.1,72,98,698/- :

32. The ld.Counsel for the assessee submitted that during the period relevant to the assessment year under appeal the assessee sold completely built units (CBU) and vehicle spare parts to its Associated Enterprises (AEs) and non-AEs in Africa and Asia. To benchmark international transaction, the

assessee applied CUP as the most appropriate method. The TPO observed that in some of the cases sales made to AEs by the assessee were at a rate much less (i.e. below 5% tolerance price) than those charged from Non-AEs and accordingly, the TPO made adjustment in respect of such transactions. The TPO specifically pointed two instances:

Instance One: (Product 207 Di31)

(i) Third Party price (Non-AEs) - Rs. 2,72,670/-

(ii) Price sold to AEs - Rs. 2,57,861/-

(iii) Adjustment for difference in price in respect of 12 Units - Rs.1,77,714/-

Instance Two: (Product 207-4x4 -483)

(i) Third Party price(Non-AEs) - Rs.4,53,915/-

(ii) Price sold to AEs:

		No. Units	Average price	
1.	Tata Africa Holdings (Ghana) Ltd.	280	400228	1,50,32,445
2.	Tata De Mozambique Limited	25	415942	9,49,325
3.	Tata Africa Holdings (Tanzania) Ltd.	25	417218	9,17,425
4.	Tata Zambia Ltd.	6	416953	2,21,774

(iii) Adjustment made - Rs.1,71,20,979/-

The ld.Counsel for the assessee submits that the TPO has cherry picked only one transaction to make adjustment. The assessee is selling different variants of the same vehicle to AEs and Non-AEs. The TPO without appreciating the fact that there could be difference in the variant of vehicle sold to AE and Non-AE made adjustment rejecting assessee's CUP. The ld.Counsel for the assessee referred to the detailed list of vehicles exported, tabulating description/model of the vehicle, region, country, sale to AE or Non-AE and the value of vehicle in Indian rupee. He submitted that the TPO and the DRP without appreciating

the facts made the adjustment. The ld.Counsel for the assessee further referred to month wise export to AE and comparable Third Party transactions at 655 of the Paper Book. Referring to the table at page 655 he submitted that a perusal of aforesaid data would reveal that in all instances price charged to AE is more than Non-AEs.

33. Per contra, ld. Departmental Representative vehemently supported the findings of the TPO. She submitted that CUP approach can be followed where datas are exactly similar. Since, assessee is selling different models of vehicles which have different market share and price ranges, clubbing of different variants to arrive at an average selling price would give a distorted picture of arm's length price. Since, the price variation was not within +/- 5% range the TPO rightly made adjustment. Hence, ld. Departmental Representative prayed for dismissing this ground of appeal.

34. Both sides heard. The assessee is exporting vehicles (CBU) and spare parts to its AEs and non-AEs based in Africa/Asia. To benchmark international transactions the assessee applied internal CUP as the most appropriate method. The assessee is selling different models of its vehicles to its AEs and non-AEs. The TPO in respect of two models of vehicles i.e. 207Di31 and 207-4x4-483, came to the conclusion that internal CUP to determine arm's length price is not the correct method and made Transfer Pricing adjustment of Rs.1,72,98,968/-. In so far as other models, the TPO raised no objections.

The assessee has placed on record details of export of its various models. For the purpose of determining the issue in hand the details of overseas sale of models selected by the TPO for adjustment are reproduced herein below:

PRODUCT: 207-Di-31

Name of party(AE)	Qty.	FOB in INR	Average FOB in INR
Tata Africa Holdings (SA) Pty Ltd.	914	284,434,887	304,633
Tata Africa Holdings (Kenya) Ltd.	77	20,403,534	264,981
Tata Africa Holdings (Tanzania) Ltd.	78	20,474,178	262,489
Tata Uganda Ltd.	**12**	**3,904,326**	**257,861**
Tata Zambia Ltd	22	5,768,425	262,201
Total	1,103	328,175,350	297,530
Average sales price per unit		**297,530**	
Comparable transaction (Non-AE)			
Nitol Motors Ltd.	**73**	**19,904,907**	**272,670**
Diesel& Motor Engine	868	220,771,761	254,345
Total	941	240,676,668	255,767
Average sales price per unit		**255,767**	

The TPO in respect of product 207-D-31 picked the transaction with one AE i.e. Tata Uganda Ltd. having average FOB of Rs.257,861 and compared it to a transaction with non-AE Nitol Motors Ltd. with an average FOB of 272670. The Assessing Officer /TPO while cherry picking transactions with AE turn blind eye to the other transactions with Non-AE, where the average FOB is lower and number of units sold is much higher. A perusal of the table would show that the average sale price per unit charged to AEs is higher than the average sale price per unit of comparable uncontrolled transactions. Though, the TPO held that internal CUP is not acceptable but he has not specified what other method he has applied to benchmark the transaction.

PRODUCT: 207-4x4-483

Name of party(AE)	Qty.	FOB in INR	Average FOB in INR
Tata Africa Holdings (Ghana) Ltd.	**280**	112,063,745	**400,228**
Tata De MocambiqueLimita	**25**	10,398,550	**415,942**
Tata Africa Holdings (SA) Ltd.	42	18,679,145	444,742
Tata Africa Holdings (Tanzania) Ltd	**25**	10,430,450	**417,218**
Tata Zambia (Senegal)	15	6,569,062	437,937
Tata Uganda Ltd.	2	874,458	437,229
Tata Zambia Ltd.	**6**	2,501,716	**416,953**
Total	395	161,517,126	408,904
Average Sales Price per unit.		**408,904**	
Comparable transaction(Non-AEs)			
Compotec UEM	65	23,972,364	368,806
Zahira S.P.R.L	60	23,209,540	386,826
SocieteMiniere Bakwanga	15	5,925,680	395,045
United Diesel	20	8,451,518	422,576
All Trans F Z E	13	5,047,588	388,276
Paul Ries & Sons (ETH) Ltd	7	2,754,243	393,463
Al Zayani Trading Co.	12	4,813,103	401,092
Diesel & Motor Engine	**2**	**907,830**	**453,915**
Total	194	75,081,866	387,020
Average sales price per unit		**387,020**	

Similarly, in respect of product 207-4x4-483, the TPO selected the transaction with non-AE where the average price charged is more than price charged from AE ignoring the fact that there are transaction with other non-AEs where the average price charged is less than average price charged from AEs. The TPO further failed to consider the fact that the assessee has sold only two units to the non-AE where the average price charged is more than the

average price per unit charged to AEs. Thus, we are in agreement with the ld.Counsel for the assessee that to determine ALP of the transaction average price charged to AEs should have been compared to the average price of the comparable uncontrolled transactions in respect of each product/model of vehicle. The TPO has resorted to cherry picking which is unacceptable in making Transfer Pricing adjustment. Thus, in light of our above observations, the adjustment made in respect of export of vehicles deserves to be deleted. Hence, ground No.8 of appeal is allowed.

Ground No. 10: Adjustment u/s.92CA(3) of the Act in respect of transaction with Hispano Carrocera, S.A (in short 'Hispano') :

35. In ground No.9 to 13 of appeal, the assessee has assailed adjustment made by TPO in respect of international transactions between the assessee and Hispano. In ground No.10. the assessee has claimed that since, Hispano is not an Associated Enterprise(AE) within the meaning of section 92A of the Act, no adjustment could have been made by the TPO on the issues assailed in ground No.9,11, 12 and 13. Therefore, before we advert to decide the issue raised in ground No.9,11 to 13, we thought fit to first adjudicate the issue, Whether Hispano is an AE of the assessee ? The ld.Counsel for the assessee at the outset submitted that Hispano is not an AE of the assessee. Once it is established that Hispano is not AE, there is no question of making any adjustment on account of any transaction between assessee and the AE, therefore, Ground No.9, 11, 12 & 13 would become academic.

36. The ld. Departmental Representative submitted that in the annual report for Financial Year 2007-08 the assessee in Notes to Schedule forming part of Balance Sheet has reported that the assessee has given unsecured

subordinated loans of Euro 15 Million (Rs.95.99 crores) as on 31/03/2008 and Euro 7 Million (Rs.10.52 crores) as on 31/03/2007. In addition to the aforesaid loans, the assessee has also given an undertaking to Citi Bank NA for non disposal of share holding in Hispano during the tenure of loan. Thus, the assessee has locked its investments in Hispano in addition to the loan. It is pertinent to mention that the assessee had acquired 21% shares in Hispano as on 16/03/2005 and as per the terms of agreement, the assessee is open to acquire 79% of the remaining shares in Hispano in addition to the loan. The assessee falls within the definition of AE in accordance with provisions of section 92A(2)(c) of the Act. The total assets of Hispano as per Balance Sheet as on 31/03/2008 are to the tune of Euro 21.95 Million. The provisions of clause (c) to section 92A(2) is triggered when loan advanced by enterprise to the other enterprise constitutes not less than 51% of the book value of the total assets of other enterprises. In the present case the loans by assessee to Hispano exceeds 51% of total assets.

37. The ld.Counsel for the assessee fairly conceded that the assessee had extended substantial loans to Hispano. However, he submitted that for another enterprise to become AE, conditions set out in sub-section(1) to section 92A and the condition mentioned in sub-section (2) to section 92A of the Act both have to be satisfied. In support of his submissions he placed reliance on the following decisions:

(i) Kaybee Pvt. Ltd., ITA No.2164/Mum/2015 decided on 28/02/2020.

(ii) Veer Gems, 407 ITR 639(Guj)/ 256 Taxman 298(SC)

(iii) Ambico Exports and Imports Pvt. Ltd., ITA No.6822/Mum/2017 decided on 30/03/2021.

38. Both sides heard. It is an admitted position that as against total assets of Hispano aggregating to Euro 21.95 million the assessee has extended unsecured loans to the tune of Rs.15 million, which count for more than 51% of the book value of total assets of Hispano. Thus, conditions set out in section 92A(2)(c) are satisfied. A perusal of Form 3CEB at page 70 to 95 of the paper book shows that while disclosing information in Clause 7 Part B i.e. the list of AEs, the assessee has disclosed the name of Hispano Carrocera –S.A at Sl.No.7 in Annexure -I and against the column nature of relationship with AE it is mentioned "Direct/Indirect participation in capital, control and management". Thus, in view of self declaration made by the assessee in Form-3CEB there is no element of doubt that Hispano is an AE of assessee. Hence, ground No.10 of appeal is dismissed.

Ground No.9 : Adjustment u/s. 92CA(3) of the Act in respect of interest on loans granted to AE- Rs.79,91,563/- :

39. The assessee has advanced loans to its AEs i.e. Tata Motor European Technical Centre PLC (TMETC), UK, Tata Precision Industries PTE Ltd., Singapore(TPI) and Hispano Carrocera, Spain. The assessee has received interest of Rs.5,63,46,328/- on the aforesaid loans advanced to its AEs. The rate of interest charged by the assessee from its AEs is as under:

TMETC, UK	@ 3months GBP Libor + 0.5%.
TPI, Singapore	@3 months Sibor + 0.5%.
Hispano, Spain	@12 months Euribo + 1.25%

The TPO did not accept the rate of interest charged by the assessee from its AEs. The TPO held that the assessee has borrowed funds in the domestic

market at the rate ranging from 6% per annum to 14.75%. The TPO took average of the aforesaid rate i.e. 10.375% per annum and made addition of 3% per annum on account of credit risk, currency fluctuation risk and country specific risk and adopted the effective rate of lending at 13.375% and made adjustment of Rs.7,46,00,955/-. The assessee filed objections before the DRP against the aforesaid adjustment. The DRP following its own directions for earlier Assessment Years i.e. Assessment Year 2006-07 and 2007-08 granted part relief to the assessee and restricted addition to LIBOR + 200 bps. Thus, the Assessing Officer in accordance with direction of the DRP confirmed the adjustment on account of interest on loans to Rs.79,91,563/-.

40. The ld.Counsel for the assessee referring to the table at page 16 of the assessment order submitted that the Contract Rate of Interest with the AEs is more than the base LIBOR/EURIBOR rates. He further referred to base rates as per European Central Bank at page 303 of the paper book to contend that since the rate of interest charged by the assessee from its AEs is more than the base rate no adjustment was required to be made by the TPO/DRP. He further submitted that similar issue has been considered by the Tribunal in assessee's own case in appeal for Assessment Year 2006-07 and 2007-08. The Tribunal deleted the addition and restored the issued back to the file of Assessing Officer.

41. Per contra, the ld. Departmental Representative vehemently defended the assessment order and the direction of DRP, however, she fairly submitted that in the preceding Assessment Years this issue has

considered by the Tribunal and has been restored to the Assessing Officer. She further submitted that risk factor cannot be ignored and hence, reasonable adjustment is required to be made for the same.

42. Both sides heard. During the relevant period the assessee has received interest on loans advanced to its three AEs i.e. TMETC, UK, TPI, Singapore and Hispano Spain. To benchmark the transaction the assessee applied CUP and has adopted LIBOR rates. The amount of loan advanced, the rate of interest charged by the assessee and the base rate charged by the respective Banks overseas is tabulated herein below:

Name of the AE	Amount of Loan (In foreign currency)	Rate of interest charged by the assessee	Bank Rates
Hispano Carrocera, SA	EURO 15000000	12 months Euribor + 12.5% (Effective = 5.575)	European Central Bank (ECB) Interest Rate – 5.00%
Tata Motors European Technical Centre	GBP 1000000	3 months GBP Libor 0.5% (Effective = 7.54%)	i) Average interest Rate in UK-4.50% ii) Third Party borrowing rate of LIBOR plus 0.3%
Tata Precision Industries Ltd.	SGD 2500000	3 months Sibor + spread (Effective = 3.81%)	Singapore Inter Bank Offered Rate ('SIBOR') – 2.69%

The assessee has also brought to our attention table at page -16 of the assessment order indicating contracted rate, the base Libor/Euribor rates and the rate applied by the DRP. The assessee has also referred to effective base rates as per European Central Bank at page 303 of the paper book. From perusal of aforesaid table prima facie it appears that the rates charged by the assessee from its AEs is higher than the base LIBOR/EURIBOR rates. Similar adjustments were made by the TPO in the preceding Assessment Years, the

DRP restricted the rate of interest to LIBOR + 200bps. The Tribunal in Assessment Year 2007-08 deleted the adjustment and restored the issue back to the file of Assessing Officer to re-adjudicate the issue after considering submissions of the assessee. The findings of the Tribunal on this issue are as under:

> *" 30. We have considered rival submissions and perused material on record. As could be seen, the dispute is confined to the rate of interest applicable to the loan advanced to the AEs. While the DRP has directed the Assessing Officer to compute interest at LIBOR plus 200 basis points, it is the contention of the assessee that as per internal CUP available, interest rate cannot exceed LIBOR plus 50 basis points. In this context, it has been submitted by the assessee that the overseas AE in U.K. has taken a loan from third party in U.K. at LIBOR plus 30 basis points. Similarly, he had submitted that the AE in Spain has taken loan from an unrelated party in the same period at the interest rate of Euribor plus 127.79 basis points.*
>
> *31. Having considered rival submissions and perused material on record, we are of the view that assessee's contention regarding availability of internal CUP requires examination. Moreover, while deciding similar issue in assessment year 2006–07, in ITA no.8926/ Mum./2010, dated 28th January 2019, we have restored the issue to the Assessing Officer for considering various submissions made by the assessee with regard to the rate of interest. In view of the aforesaid,* ***we restore the issue to the Assessing Officer / Transfer Pricing Officer for de novo adjudication after considering assessee's claim of availability of internal CUP.*** *This ground is allowed for statistical purposes."*

We deem it appropriate to restore this issue back to the file of Assessing Officer with similar directions. In the result, ground No.9 of appeal is allowed for statistical purposes.

Ground No.11 –Adjustment u/s. 92CA of the Act in respect of purchase of property from Hispano Carrocera – Rs. 76,29,00,744/- :

43. During the period relevant to Assessment Year under appeal the assessee vide agreement dated 18/03/2008 purchased factory land and building from its AE i.e. Hispano in Spain for a total consideration of Rs.160.07 crores. The assessee determined the fair market value of the land and

building on the basis of valuation report from an independent external Valuation Expert. The assessee paid Euro 24.70 million as per valuation report. The valuation certificate is at page 540 to 545 of the paper book and the purchase agreement dated 28/03/2008 is at page 516 to 539 of the paper book. The TPO rejected valuation report stating it to be not reliable and adopted Insurable Value of the property Euro 12.99 million stated in the valuation certificate. Thus, the TPO made adjustment of Rs.76,00,29,744/- (Rs.160,07,98,815 – Rs.84,07,69,071/-). The DRP rejected assessee's objections against the aforesaid adjustment.

44. The ld.Counsel for the assessee assailing the findings of the TPO and the DRP submitted that the assessee purchased the property comprising of land and building from Hispano for Euro 24.7 million. Referring to the valuation report he pointed that the value of land alone is Euro 17.58 million, in addition the value of building/projections as per the valuation report is Euro 7.15 million. The primary reason for rejecting the valuation report by the TPO is that Valuer did not have any comparable instances to value the property and he did not deduct value of encumbrances. Thus, the value of property is overstated. The ld.Counsel for the assessee referring to the submissions made before the TPO in respect of land and building purchased from Hispano pointed that the assessee had furnished quarterly report on value of construction cost and various type of structures by the Government agency in Spain. Separate rates are given for the construction of office premises and factory with office on top of the building. He asserted that since the land has no insurable risk the insurance policy is restricted on the building and the premises constructed on the land. The assessee had paid consolidated value

of Euro 24.74 million for the land as well as the construction thereon. In so far as encumbrances are concerned, he pointed that the same has been mentioned in the Agreement for purchase of property. He vehemently argued that the assessee has applied CUP in the light of valuation report available on record. The TPO without any valid reason has rejected the report and has made adjustment on adhoc basis. He submitted that it is a well settled law that where no method is applied by the TPO for making adjustment, the adjustment is not tenable. To support his submissions he placed reliance on the following decisions:

i) Johnson & Johnson Pvt. Ltd, 247 Taxman 136 (Bom)

ii) CA Computer Associates Pvt. Ltd., 351 ITR 69 (Bom)

(ii) Merck Limited, 179 TTJ 121 (Mum-Trib) affirmed by Hon'ble Bombay High Court in Income Tax Appeal No.744 of 2017 decided on 16/09/2019.

45. Per contra, ld. Departmental Representative vehemently supported the order of TPO and the directions of DRP. She referred to the short coming in the valuation report highlighted by the TPO in para 6.6 of the order passed u/s. 92CA(3) of the Act. She pointed that valuation report cannot be relied upon as there are no comparable instances to the value of property, the valuer has not deducted the value of encumbrances from the total value. Thus, there are glaring short comings in the valuation report. The Valuer has over stated the value of property. Since, the property is situated outside India the TPO/Assessing Officer could not have referred valuation of property to the Approved Valuer. In the instant case the TPO had no other option but to adopt insured value of the property. She further submitted that the 'Other Method' of determining ALP as specified in Rule 10AB on the Income Tax Rules was inserted by the Income Tax (6th Amendment) Rules 2012 with

retrospective effect from 01/04/2012 as applicable for Assessment Year 2012-13. Therefore, the TPO could not have applied 'Other Method' at the relevant point of time. Hence, the TPO adopted insured value.

46. We have heard the submissions made by rival sides. The TPO made adjustment in respect of the land and building purchased by the assessee from HC on the ground that the assessee has over paid the real value of property. As against book value of property at Euro 9.95 million, the assessee has made a purchase agreement with Hispano on 28/03/2008 for purchase of plot of land along with constructed structure thereon for a consideration of Euro 2,47,40,014. The value of aforesaid property has been arrived at on the basis of valuation certificate from an independent valuer. The valuation certificate is at page 540 of the paper book. A perusal of the said certificate reveals that the value of land is Euro17.587 million and the value of projections/constructed area is Euro 7.152 millions. The insured value of the property is 12.99 millions. The valuer has categorically stated in the report that the value of encumbrances, taxes and possible hidden defects will have to be deducted from the value determined. The valuer has further referred to the encumbrances on the property, the value of which has to be deducted from the total value of the property. Thus, it cannot be said that the valuer was oblivious of the encumbrances or has not considered the total value of encumbrances on the said property. The valuer has categorically stated that the total value of encumbrances is to be deducted from the value determined. The assessee has also placed on record Government Agency report on construction and value of property purchased by the assessee from Hispano at page 600 of the paper book. A perusal of the said report shows the cost of

construction to be applied on the office area and workshop area separately. The assessee has paid net amount of Euro 21.34 million to Hispano after deducting payments made to various parties in discharge of encumbrances. In the absence of any contrary material valuation certificate produced by the assessee from an independent valuer has to be accepted in determination of value of the property. The TPO cannot arbitrarily adopt a value without there being any substantive basis. The insurance value possibly could be only of the building and not the land as there was no question of insuring land. Thus, taking into consideration entire facts of the case, we are of the considered view that the TPO erred in adopting insured value of the property. The transfer pricing adjustment cannot be made on adhoc basis. The TPO has to apply one of the prescribed method as is notified during the relevant point of time. We see no plausible reason to sustain the addition, hence, the adjustment on account of purchase of property from Hispano is liable to be deleted. We hold and direct accordingly. In the result, ground No.11 of appeal is allowed.

Ground No.12 – Adjustment u/s. 92CA(3) of the Act in respect of notional interest computed on alleged excess consideration paid for purchase of property from Hispano – Rs.8,35,512/- :

47. The ground No.12 of appeal is consequential to ground No.11. While adjudicating ground No.11 of the appeal, we have deleted the adjustment in respect of purchase of property from Hispano. In light of above findings ground No.12 has become infructuous and the same is dismissed as such.

Ground No.13 – Adjustment u/s. 92CA(3) of the Act in respect of property leased to Hispano adopting 10% of property as fair annual value :

48. The TPO in the order has held that the assessee has leased out property to Hispano without charging lease rent, hence, he estimated lease value @10% of property value as the ALP. The ld.Counsel for the assessee referred to the Lease Agreement of the premises dated 28/03/2008 at page 531 of the paper book. The recitals of Lease Agreement show that the property has been leased out on monthly rent of Euro 80,000, excluding Value Added Tax charged by the State. The said rent has been calculated at Euro rate of 4% in accordance with stringent market conditions. Thus, in view of specific clause of rent in the lease agreement we observe that the findings of the TPO on this issue are contrary to the facts on record. Hence, the adjustment made on account of notional rent @10% of value of property is unsustainable, accordingly, we direct the TPO/Assessing Officer to delete the same. In the result, ground No.13 of appeal is allowed.

Ground No.14 – Short TDS credit of Rs.2,94,05,368/- :

49. The ld.Counsel for the assessee submits that the Assessing Officer has erred in granting short credit of TDS by Rs.2.94 crores. The Assessing Officer is directed to examine TDS in the case of assessee during the relevant period and allow the credit of short amount, if any, in accordance with law. Thus, ground No.14 of appeal is allowed for statistical purpose.

Ground No.15 – Interest u/s. 234D :

50. The assessee has assailed the findings of Assessing Officer in charging interest u/s. 234D of the Act. Levy of interest u/s. 234D is mandatory and consequential, hence, ground No.15 of appeal is dismissed being without any merit.

Ground No.17 & 18:

51. The assessee has raised additional ground of appeal as alternate grounds to ground No.16 challenging legality of the order passed by TPO. The ld.Counsel for the assessee made a statement at Bar that he is not pressing additional grounds No.17 & 18. Thus, in view of the statement made by ld.Counsel for the assessee ground No.17 and 18 of the appeal are dismissed, as such.

Ground No.19 – Assessment order time barred by limitation, hence, liable to be quashed:

52. The assessee vide application dated 02/06/2022 has raised a legal ground assailing validity of assessment order on the ground of limitation. The additional ground raised by the assessee in ground No.19 reads as under:-

> *"19. On the facts and circumstances of the case, the learned TPO/AO erred in passing draft assessment order by following procedure laid down under section 144C of the Act without appreciating that provision of Section 144C is not applicable during AY 2008-09. Thus the assessment order passed is beyond the time limit prescribed under section 153 of the Income Tax Act, 1961 and hence bad in law and liable to be quashed."*

In support of this ground of appeal, the assessee has placed reliance on the following decisions:

(i) M/s. Vedanta Limited vs. ACIT [WP No 1729 of 2011] 22/10/2019 for AY 2007-08 - Hon'ble Madras High Court
(ii) M/s. Truetzschler India Pvt. Ltd. Vs. DCIT in ITA No.-1949/Mum/2015 decided on 30/09/2020 for AY 2009-10.
(iii) M/s A. T. Kearney Limited in ITA No 4405/Del/2011 decided on 25 May 2021.
(iv) M/s Travelport L.P. USA for **AY 2007-**08 to AY 2010-11 – in ITA Nos 6500/Del/2012, 1480/Del/2012, 217/Del/2014, 218/Del/2014 decided on9th Nov.2020.
(v) Jindal Steel & Power Ltd for AY 2010-11, 133 tax nann.com 514) (Del ITAT)

(vi) Pearson India Education Services Pvt Ltd for AY 2007-08, 142 taxmann.com 282 (Chennai),

The additional ground raised by the assessee is purely legal and no further evidence is required to be adduced for its adjudication. Hence, the aforesaid legal ground raised as additional ground is admitted for adjudication.

53. The only basis for raising the additional ground by the assessee is the decision of Madras High Court in the case of Vedanta Limited (supra). The Co-ordinate Bench in the case of Lanxess India (P) Ltd. Vs. ACIT, 142 taxamann.com 542 (Mum-Trib) after considering the decision rendered in the case of Vedanta Limited (supra) dismissed similar ground by observing as under:-

> *"8.7 We find that both, the Division Bench of the Hon'ble Andhra Pradesh High Court and Single Bench of the Hon'ble Madras High Court in the case of Vedanta Ltd., has given contrary finding and so the issue before us is which findings should be followed. We find that there is no decision on the issue of the jurisdictional High Court. The judicial discipline demand that decision of the higher forum should be followed. Since the decision of the Hon'ble Andhra Pradesh High Court is of the division bench whereas the decision of the Hon'ble Madras High Court in the case of Vedanta Ltd. (supra) is of the single bench, and therefore we are inclined to follow the decision of the Hon'ble Andhra Pradesh High Court in the case of Zuari Cement Ltd. (supra), wherein it is held that procedure of issuing draft assessment order laid down in the section 144C is to be followed with effect from 1-10-2009. In the instant case, though the assessment year involve is 2009-10, the draft assessment order has been issued on 28-3-2013, much after the specified date of 1-10-2009 and therefore we do not find any violation of the law by the Assessing Officer in issuing the draft assessment order on 28-3-2013 and passing of the final assessment order dated 26-2-2014 by the Assessing Officer. Therefore, the final assessment order passed by the Assessing Officer is well within the limitation provided in law. Thus, the additional grounds raised by the assessee are accordingly dismissed"*

54. Similar ground was considered by Co-ordinate Bench in the case of Wockhardt Ltd. vs. DCIT, 144 taxmann.com 27 (Mum-Trib). The Tribunal after

considering various decisions, including the decision in the case of Vedanta Limited (supra) dismissed the ground by observing as under:

> *" 9. In the present case, however, we have much simpler and much more objective criteria readily available, which is the strength of the bench of the Hon'ble non-jurisdictional High Court which have rendered the judgment. There is one decision of the division bench consisting of two Hon'ble judges, and there is another decision of a single judge bench consisting of only one Hon'ble judge. The plurality in the decision-making process makes the decisions of benches with a larger number of Hon'ble judges being placed on a higher pedestal than the decisions of the of the benches with a lesser number of Hon'ble judges. Explaining this principle, Hon'ble Gujarat High Court, in the case of CIT Vs VallabhdasVithaldas [(2015) 56 taxmann.com 300 (Guj)] has observed that "the law of precedent heavily relies on the collective decision-making process where multiple legal minds are simultaneously applied assisted by legal research and presentation of legal arguments. When such materials and legal contentions are processed by several judges, the decision that is rendered even if not unanimous has the advantage of input from larger number of legally trained minds". As observed by a Full Bench of Hon'ble AP High Court in the case of CIT Vs B R Constructions [(1994) 202 ITR 222 (AP-FC)], "The principles applicable to Courts in India were laid down by Subba Rao, J. (as he then was) in Dr. K.C. Nambiar v. State of Madras AIR 1953 Mad. 351, which were approved by a Full Bench of our High Court in M. Subbarayudu v. State AIR 1955 Andhra 87... A single Judge is bound by a decision of a Division Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point". Of course, as we have already noticed in our discussions earlier, so far as Hon'ble High Courts are concerned, the decisions of one of the Hon'ble High Court do not bind the other High Court, and all the Hon'ble High Courts being in the same tier of judicial hierarchy, it is not the call of judicial discipline either that one High Court follows the other High Court. What is undisputed, however, is the fact that a full bench decision is to be placed at a level higher than a division bench decision and that a division bench decision from the same forum, is to be placed at a level above the single judge bench decision forum. There cannot be two opinions on this aspect of the matter, and that is a universally accepted judicial practice, whereas the principle of following the view in favour of the assessee, as we have seen in our analysis earlier, is subject to several riders. Therefore, so far as choice between a division bench decision of a non-jurisdictional High Court and a single judge bench of a non-jurisdictional High Court is concerned, it is clear that a simple objective criterion of choice will require the division bench decision to be preferred over the single judge bench decision. Therefore, even though the decision of the Hon'ble Madras High Court, in Vedanta Ltd's case (supra), cannot be said to per incuriam, for the simple reason that a Hon'ble High Court judgment does not constitute a binding precedent for any other Hon'ble High Court other than the*

Hon'ble High rendering such a judgment, the judgment of Hon'ble Andhra Pradesh High Court in the case of Zuari Cements Ltd (supra), being a division bench decision of Hon'ble non-jurisdictional High Court, is required to be followed even if it is contrary to a single bench judgment of another High Court in the case of Vedanta Ltd (supra). The impugned assessment order thus cannot be said to be barred by limitation. We uphold the impugned assessment order on this count, and decline to interfere in the matter on this jurisdictional ground. As we are deciding this issue on this short ground alone, all other contentions on merits remain open.

10. The additional ground of appeal is dismissed. As no arguments were advanced by the parties on the remaining grounds of appeal, we deem it fit and proper to direct the Registry to fix the matter for hearing on the other grounds of appeal taken by the parties. As one of us (i.e. the Vice President) is retiring, on superannuation, next month, it will come up before the regular bench. Let the matter come up for hearing on 14th November 2022, and issue notices for the same. Ordered, accordingly."

Thus, in view of the aforesaid decisions we see no merit in this ground of appeal of assessee. Thus, the additional ground No.19 is dismissed.

55. **In the result, appeal of the assessee is partly allowed**.

Order pronounced in the open court on Monday the 5th day of February , 2023.

Sd/-	Sd/-
(S.RIFAUR RAHMAN)	(VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 05/02/2023
Vm, Sr. PS(O/S)

<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्तCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)/Sr. Private Secretary ITAT, Mumbai