IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

IT(SS)A No.17/Kol/2018
Assessment Year: 2008-09

Himatsingka Seide Ltd. 10/24, Kumara Krupa Road, High Grounds, Bangalore-560001. (PAN: AAACH3507N)	Vs.	Deputy Commissioner of Income Tax, Central Circle-XVI, Kolkata.
(Appellant)		**(Respondent)**

&

IT(SS)A No.20/Kol/2018
Assessment Year: 2008-09

Assistant Commissioner of Income-Tax, Central Circle-3(4), Kolkata.	Vs.	Himatsingka Seide Ltd.
(Appellant)		**(Respondent)**

&

ITA No.785/Kol/2018
Assessment Year: 2008-09

Assistant Commissioner of Income-Tax, Central Circle-3(4), Kolkata.	Vs.	Himatsingka Seide Ltd.
(Appellant)		**(Respondent)**

Present for:
Assessee by : Shri Nageswar Rao, Sr. Advocate
Revenue by : Shri Abhijit Kundu, CIT, DR

Date of Hearing : 11.03.2024
Date of Pronouncement : 15.03.2024

O R D E R

PER BENCH:

Both the cross appeals vide IT(SS)A Nos. 17/Kol/2018 and 20/Kol/2018 filed by the assessee and revenue are against the order

of Ld.CIT(A)-22, Kolkata vide Appeal No. 221/CIT(A)-22/Kol/08-09/14-15, dated 30.01.2018 passed against the assessment order by DCIT, Central Circle-XVI, Kolkata u/s.153A/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 31.03.2014 for AY 2008-09. ITA No. 785/Kol/2018 filed by the revenue is against the order of Ld.CIT(A)-22, Kolkata vide Appeal No. 173/CIT(A)-22/Kol/08-09/14-15/Kol, dated 30.01.2018 passed against the assessment order by Addl. CIT, Range-11, Bangalore u/s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 03.01.2012 for AY 2008-09.

2. Grounds raised by the assessee in IT(SS)A No.17/Kol/2018 are reproduced as under:

"On the facts and circumstances of the case and in law:

1. *The order of the learned CIT(A) is based on incorrect interpretation of law and facts, and therefore bad in law;*

2. *The learned CIT(A) has erred, in law and in facts, by confirming with the learned Assessing Officer ('AO')/Transfer Pricing Officer ('TPO') on the disallowance of expenditure u/s 14A read with Rule 80 of the Act for earning exempt income of Rs. 32,84,540/-.*

3. *The learned CIT(A) has erred, in law and in facts, by confirming with the AO/TPO in disallowing the interest in spite of the fact that no borrowed funds were used for acquiring the investments resulting in dividend income.*

4. *The learned CIT(A) has erred, in law and in facts, by confirming with the AO/TPO in making an adjustment on account of export to subsidiary amounting to Rs. 1,02,35,877/-.*

5. *The learned CIT(A) has erred, by upholding the initiation of penalty proceedings u/s 271 (1)(c) of the Act.*

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

2.1. Common Grounds raised by the revenue in IT(SS)A No.20/Kol/2018 and ITA No. 785/Kol/2018 are reproduced as under:

"1) That the Ld. CIT (A) has erred on facts & law in deleting the arm's length price adjustment of Rs. 3,86,54,453/- made by the AO/TPO on account of inter corporate loan to the AE.

2) That the Ld. CIT (A) has erred on facts & law by not allowing the method of determining the cost of funds plus credit spread as the most appropriate method in the facts of the case of the assessee determining on the basis of Comparable Uncontrolled Price (CUP) method.

3) That the Ld. CIT (A) has erred on facts & law by not determining the arm's length rate of interest in accordance with Section 92C of the Income-tax Act, 1961 (the Act) read with Rule 10B & 10C of Income Tax Rules' 1962 (the Rules).

4) That the Ld. CIT (A) has erred on facts & law to also ignore the fundamental fact that LIBOR is just the inter-bank rate to transact between banks and to determine arm's length interest rate for loan transactions between two companies (assessee and its associated enterprise), an appropriate adjustment for difference between international transaction and comparable uncontrolled transaction as envisaged under Rule 10B & 10C of the Rules becomes imperative.

5) That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the adjustment made by the AO/TPO amounting to Rs. 2,02,00,000/- for international transaction in respect to the corporate guarantee to it's AE.

6) That on the facts and in the circumstances of the case, the Ld. CIT (A) has erred in not appreciating that the creditworthiness of the AE has increased substantially on account of corporate guarantee provided by the assessee company to its AE and hence, the provision of corporate guarantee is not a shareholder activity and an arm's length charge needs to be determined in relation to the said transaction.

7) That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in not appreciating that the receipt of loan by the AE from an independent lender by virtue of the corporate guarantee provided by the assessee company to its AE increases the profit potential of the AE thereby generating substantial benefit for the business of the AE and hence, the provision of corporate guarantee is not a shareholder activity and an arm's length charge needs to be determined in relation to the said transaction.

8) That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in law as well as on facts to hold that disallowance under section 14A read with rule 8D will not apply, thus ignoring the provisions of Rule 8D that provides for computation of expenditure in respect of not only those investments, which actually yielded dividend income but also those investments, income from which shall not form part of total income.

9) That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in law as well as on facts in deciding that disallowance u/s 14A read with Rule 8D without considering the CBDT's Circular No. 5/2014 dated: 11.02.2014.

10) That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in law as well as on facts, in deleting addition of Rs. 40,03,074/- in computation of Book Profit u/s 115JB, thus ignoring the provision of clause (f) of explanation 1 to section 115JB of the Act.

11) That the appellant craves leave to add to and/or alter, amend, modify or rescind the grounds hereinabove before or hearing of this appeal."

3. In IT(SS)A No. 17/Kol/2018 assessee has filed an application dated 05.07.2023 for admission of additional ground which according to the assessee are fundamental and goes to the root of the matter. The said additional ground i.e. ground no. 6 is reproduced as under:

"6. That impugned order dated 30.01.2018 of Ld. Commissioner of Income Tax (Appeals) is contrary to law, illegal and unlawful to the extent it upholds additions illegally made to returned income in computation portion of said order dated 31.03.2014 by mere reference to non-est order u/s. 14393) dated 3.1.2012, which by itself has abated under section 153A and/or barred by limitation."

3.1. Assessee submitted that the issue raised is legal in nature and arises out of the orders of the authorities below and does not require any fresh examination of facts and can be adjudicated on the basis of material on record. On confrontation of these submissions to the Ld. CIT, DR, nothing objectionable was submitted. Accordingly, the additional ground is admitted.

4. Before we delve into the issues raised into three appeals BY both, the revenue and the assessee, certain events with their chronology are important to be taken note of. A search and seizure operation u/s. 132 of the Act was conducted in "Himatsingka Group" on 22.09.2011. Pursuant to the search operations, notices u/s. 153A of the Act was issued on the assessee on 15.05.2012. At the time of search, assessment

proceedings u/s. 143(3) of the Act for the impugned assessment year i.e. AY 2008-09 was in progress before the Ld. AO, Addl. CIT, Range-II, Bengaluru. In section 153A, 2nd proviso to sub-section (1) provides that assessment if any, relating to any assessment year falling within the period of six assessment years, pending on the date of initiation of the search u/s. 132 of the Act shall abate. According to this second proviso to section 153A(1), the pending assessment proceedings before the Addl. CIT, Range-II, Bengaluru stood abated. However, the said AO completed the assessment and passed an order u/s. 143(3) of the Act on 03.01.2012. Subsequent to the passing of this assessment order u/s. 143(3) even though abated, the file of the assessee was transferred to Kolkata jurisdiction by the order of CIT-1, Bengaluru u/s. 127 of the Act dated 20.03.2012. After the transfer of files to Kolkata jurisdiction, notices u/s. 153A were issued on the assessee on 15.05.2012. In compliance of the said notices, assessee filed its return on 12.06.2012 and the assessment was completed vide order dated 31.03.2014 u/s. 153A read with section 143(3).

4.1. Against both the assessment orders for the same impugned assessment year, assessee went in appeal before the Ld. CIT(A). Ld. CIT(A)-22, Kolkata disposed of both the appeals vide two separate orders on the same date i.e. 30.01.2018.

4.2. First we deal with appeal of the revenue in ITA No. 785/Kol/2018 filed against the appellate order of ld. CIT(A) which in turn is against the assessment order passed u/s. 143(3) by AO passed at Bengaluru, order dated 03.01.2012.

As already noted above, second proviso to section 153A(1) provides for abatement of pending assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years on the date of initiation of search u/s. 132 of the Act. The impugned assessment year is a year which falls within the period of six assessment years considering the date of search as 22.09.2011. Admittedly, the assessment proceedings u/s. 143(3) were pending at the time of initiation of search. Thus, the proceedings u/s. 143(3) got abated. There was no occasion for the AO at Bengaluru to pass assessment order in terms of the second proviso to sec. 153A(1) and, therefore, is non-est. Since the assessment order passed by the AO u/s. 143(3) is held to be non-est, the instant appeal by the revenue is infructuous. Accordingly, the appeal vide ITA No. 785/Kol/2018 by the revenue is dismissed as infructuous.

5. Now, we take up the cross appeals vide IT(SS)A Nos. 17 & 20/Kol/2018, it is pertinent to note that while undertaking assessment proceedings u/s. 153A r.w.s. 143(3) by the AO after the transfer of file from Bengaluru jurisdiction to Kolkata jurisdiction, pursuant to conduct of search are based on the original assessment made by the AO u/s. 143(3) even though it got abated. The additions/disallowances have been borrowed as such without making discussion on the same in the impugned order made u/s. 153A read with sec. 143(3) for the purpose of computation of total assessed income. In the computation of total income contained in para 7 of the said assessment order, Ld. AO has included three items by referring them

under the heading *"Addition made by the AO vide order u/s. 143(3) dated 03.01.2012".* Three items are –

i)	T.P. Adjustment u/s. 92CA		Rs.6,90,90,330
ii)	Disallowance u/s. 14A read with Rule 8D Less: Disallowance u/s. 14A made by the assessee	Rs.40,03,074 Rs. 7,18,534	Rs. 32,84,540
iii)	Disallowance of capitalized interest expense		Rs.3,88,41,000

5.1. Against this addition/disallowance, assessee went in appeal before the Ld. CIT(A), who partly allowed the same. Thus, both revenue and assessee are in appeal before the Tribunal.

6. Before us, ld. Counsel for the assessee propounded that the case is squarely covered by the decision of Hon'ble Supreme Court in the case of Abhisar Buildwell [2023] 149 taxmann.com 399 (SC) by referring to non-availability of incriminating material for the addition/disallowance made in the said assessment. The said proposition of the Ld. Counsel is rejected at the threshold because the impugned assessment year is an abated assessment year as already observed and held while disposing the appeal of the revenue in ITA No. 785/Kol/2018, dealt above.

7. For ground nos. 2 and 3 raised by the assessee in respect of disallowance made u/s. 14A read with Rule 8D, ld. Counsel submitted that AO without any discussion on the said disallowance has borrowed the same from the order passed u/s. 143(3) dated 03.01.2012 and, therefore, no such disallowance is warranted as the assessment u/s. 143(3) is held to be non-est.

8. Per contra, Ld. CIT, DR referred to ground no. 2 dealt by Ld. CIT(A) in his order from para 07 to 09. Ld. CIT(A) has made detailed observations and discussion on the ground raised by the assessee. He thus, submitted that Ld. CIT(A) has co-terminus powers of the AO and, therefore, what AO could not do has been done by the Ld. CIT(A) on the disallowance made u/s. 14A read with Rule 8D.

9. From the perusal of the findings and decisions arrived at by the Ld. CIT(A) on this issue in para 9, we observe that he had gone through the submissions of the assessee and referred to the decision of Hon'ble jurisdictional High Court of Calcutta in the case of CIT Vs. REI Agro Ltd. in ITA No. 220 of 2013 which had upheld that Rule 8D(2) can be applied only in respect of investment which actually yielded dividend income during the year. Based on this observation, ld. CIT(A) directed the AO to recompute the disallowance u/s. 14A in accordance with Ruled 8D only with reference to investments which actually yielded dividend income during the year. He thus, partly allowed the said ground raised by the assessee on this issue.

9.1 From the above discussion, we are in agreement with the submission made by the Ld. CIT, DR and, therefore, Ld. CIT(A) has rightfully given the direction for recomputing the disallowance u/s. 14A which is in consonance with the decision of Hon'ble jurisdictional High Court of Calcutta in the case of REI Agro Ltd. (supra). We do not find any reason to interfere with the finding and decision arrived at by the

Ld. CIT(A) on this issue. Accordingly, ground nos., 2 and 3 of the assessee are dismissed.

9.2. We note that Revenue has also taken grounds vide ground nos. 8 and 9 in respect of disallowance u/s. 14A read with Rule 8D on the direction given by the Ld. CIT(A) to the AO for recomputing the disallowance as stated above. Considering our observations and findings noted above, these grounds vide ground no. 8 and 9 of the revenue are also dismissed.

10. Further, revenue has raised ground no. 10 whereby it has challenged the deletion of Rs.40,03,074/- in computing book profit u/s. 115JB of the Act, ignoring the provisions of clause (f) of explanation (1) to the said section. This issue is no longer res integra and is squarely covered by the decision in the case of DCIT Vs. Birla Corporations in ITA No. 1964/Kol/2019 dated 16.01.2024. The relevant extract in this respect is reproduced as under:

> "28. **Ground No.13**– Vide Ground No.13, the revenue has agitated the action of the CIT(A) in deleting the upward adjustment made to book profit on account of disallowance of expenditure computed u/s 14A of the Act r.w.r. 8D of the Income Tax Rules.
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> 29. The ld. counsel for the assessee, in this respect, has relied upon the decision of the Tribunal in the assessee's own case dated 07.02.2023 passed in ITA Nos.2142&2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:
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> ***"Revenue's common Ground no. 9 for AY 2013-14 & 2014-15 relating to the upward adjustment made to book profit for disallowance computed u/s 14A r.w. Rule 8D of the Rules:***
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> *16. We have heard rival contentions and perused the records placed before us. We find that this Tribunal in assessee's own case for AY 2011-12 & 2012-13 dealt with this issue and decided in assessee's favour observing as follows:*

"17. The eighth common ground of the Department's appeal is against the deletion of upward adjustment made to book profit on account of the disallowance computed under section 14A read with rule 8D. The assessee had disallowed a sum of Rs. 6,40,792/- in the computation of its book profit in terms of clause (f) of Explanation 1 to section 115JB of the Act on account of expenditure relatable to exempt dividend income. Whilst working out the disallowance under section 14A of the Act read with rule 8D of the Rules under the normal computation provisions, ld. CIT(A) made a further disallowance of Rs. 5,71,31,208/-. The same disallowance of Rs. 5,71,31,208/- was made in the computation of book profit under section 115JB of the Act. On appeal, ld. CIT(A) held that the provisions of section 14A and rule 8D cannot be applied in the computation of book profit under section 115JB of the Act. He placed reliance on the judgment of the Hon'ble Calcutta High Court in CIT v. Jayshree Tea and Industries Limited in ITAT 47 of 2014 and G.A. 1501 of 2014 decided on November 19, 2014.

17.1. It is submitted that this question is decided in favour of the assessee by the judgment of the Hon'ble Calcutta High Court in Jayshree Tea's case (supra) (page 152 of the Compilation of Case Laws). Question No. 2 in Jayshree Tea's case is relevant in this behalf. The material extracts from the said judgment are as below:

<u>QUESTION 2 in Jayshree Tea's case</u>

"2. Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in upholding the order of CIT (Appeals) that disallowance under Section 14A of the I.T. Act, 1961, amounting to Rs.2,20,15,787/- is not to be considered for book profit for calculation of book profit under Section 115JB of the I.T. Act, 1961?"

<u>DECISION OF THE HON'BLE COURT</u>

"We admit the question no.2 for adjudication in this appeal. By consent of the parties, the appeal is treated as ready for hearing and taken up as such.

We find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under section 115JB of the Act. We remand the matter for such computation to be made by the learned Tribunal.

We accept the submission of Mr. Khaitan, learned Senior Advocate that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act."

(emphasis added)

17.2. The same view was taken by the Hon'ble Karnataka High Court in CIT v. Gokal Das Images Private Limited, (2020) 429 ITR 526 (Karn) – paragraph 10 at page 533 of the Reports (Page 156 at page 163 of the Compilation of the Case Laws). Relevant portion of the decision of the Karnataka High Court in Gokaldas Images' case (supra) is extracted hereinbelow:

"10. The Commissioner of Income-tax (Appeals) has held that as per section 115JB of the Act, the assessee being a company is liable to tax on

book profits in accordance with the aforesaid provision and there is no exemption granted to the non-dividend company in this regard. However, the tribunal by placing reliance on decision of the Supreme Court in Apollo Tyres v. CIT [2002] 122 Taxman 562/255 ITR 273 has held that Assessing Officer while determining book profits under section 115JB of the Act cannot tamper with the profits as per profit and loss account prepared in accordance with the Companies Act except in the manner provided in Explanation 1 to section 115JB of the Act. Thus, it has been held that the additions made by the Assessing Officer while determining the book profits under section 115JB of the Act cannot be sustained. Any disallowance computed under section 14A of the Act pertain to computation of income under normal provisions of the Act and cannot be read into the provisions of section 115JB of the Act pertaining to computation of book profits by levy of Minimum Alternate Tax (MAT) and there is no express provision in clause (f) of Explanation 1 to section 115JB of the Act to that extent. For the aforementioned reasons, the third substantial question of law is answered against the revenue and in favour of the assessee."

(emphasis added)

17.3. Respectfully following the judgments/decisions referred herein above, we fail to find any infirmity in the finding of ld. CIT(A) in deleting upward adjustment made to book profit for disallowance computed u/s 14A r.w. Rule 8D of the Rules. Thus, common ground no. 8 raised by the Revenue for AY 2011-12 & AY 2012-13 are dismissed."

16.1. Respectfully following the judgments/decisions referred herein above, we fail to find any infirmity in the finding of ld. CIT(A) in deleting upward adjustment made to book profit for disallowance computed u/s 14A r.w. Rule 8D of the Rules. Thus, common ground no. 9 raised by the Revenue for AY 2013-14 & 2014-15 are dismissed."

30. However, the ld. DR, in this respect, has made the following submissions:

"2. As regards the issue of inclusion of the disallowance u/s 14A for the purpose of computation of book profit u/s115JB, reliance is placed on the decision of Hon'ble ITAT, Kolkata bench in A.C.I.T. Vs M/s. Ridhi Portfolio (P) Ltd, vide order dated 16.02.2018 in IT (SS) Nos. 106 to 109/Kol/2016. It was held as under:

In the case of CIT vs Jayshree Tea Industries Ltd. (ITAT No. 47 of 2014 dated 19.11.20 14), Hon'ble Kolkata High Court has also expressed a similar view by holding that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act. Hon'ble Kolkata High Court has further held that the computation of the amount of expenditure relatable to exempt income of the assessee must be made independently by applying clause (f) of Explanation (1) under section 115JB of the Act where the assessee has not claimed such expenditure to be nil. Respectfully following the said decision of the Hon'ble Jurisdictional High Court in the case of Jayshree Tea Industries Ltd. (supra), we set aside the impugned orders of the Ld. CIT(A) on this issue and restore the matter to the file of the A.O. for computing the amount of expenditure relatable to the exempted income of the assessee independently for all the four years under

consideration by applying clause (f) of Explanation (1) under section 115JB of the Act without resorting to section 14A or Rule 8D." (Emphasis provided)

31. We have considered the rival submissions and gone through the record. The ld. DR has placed reliance on Explanation 1 Clause (f) to section 115JB of the Act, which reads as under:

"Explanation [1] – For the purposes of this section, "book profit" means the [profit] as shown in the [statement of profit and loss] for the relevant previous year prepared under sub-section (2), as increased by –

(f) the amount or amount of expenditure relatable to income to which [section 10 (other than the provisions contained in clause (3) thereof) or [***] section 11 or section 12 apply; or]"*

32. The ld. counsel for the assessee, in this respect, has submitted that the provisions of section 115JB are complete code in itself and therefore, the Assessing Officer cannot tinker with the book profits. However, we do not find force in the aforesaid contention of the ld. counsel for the assessee in this respect. It is to be pointed out that as per Explanation 1(f), the book profit means the profit shown in the statement of profit and loss account as increased by the amount of expenditure relatable to the exempt income. The said amount of expenditure has already been ordered to be determined as per our observations made above while adjudicating the issue relating to the disallowance u/s 14A vide Ground No.10 of the revenue's appeal. It has to be further noted that section 115JB in itself does not prescribe any procedure to calculate the expenditure relatable to exempt income earned by the assessee. The said provision has been separately and specifically placed in the Act u/s 14A of the Act. Therefore, the book profits of the assessee are liable to be increased by the expenditure as calculated u/s 14A of the Act as provided under Explanation 1 to Clause (f) of section 115JB of the Act. In view of this, it is directed that the book profits will be increased u/s 115JB of the Act by the disallowance calculated as per our directions given while adjudicating Ground No.10 of the revenue's appeal. This ground of the revenue's appeal is hereby allowed."

11. Considering the facts of this case and the decision above and by placing reliance on the decision of Hon'ble jurisdictional High Court of Calcutta in Jayshree Tea & Industries Limited in ITAT 47 of 2014 and G.A 1501 of 2014 decided on November 19, 2014, we hold that the provisions of section 115JB clause (f) to explanation (1) applies as claimed by the revenue for the purpose of computing the book profit. Accordingly, the disallowance as computed by the AO in terms of the directions noted above is liable to be taken into

account. Accordingly, ground no. 10 of the revenue is allowed.

12. In ground no. 4, assessee has contested on the transfer pricing adjustment of Rs.1,02,35,877/- on account of export to subsidiary. Revenue has also contested on the Transfer pricing Adjustment made by the Ld. AO/Transfer Pricing Officer vide ground nos. 1 to 7

12.1. In this respect, ld. Counsel for the assessee asserted that the adjustments made in respect of transfer pricing have been borrowed from the assessment made u/s. 143(3) which has been held to be non-est. In the present assessment made pursuant to search operation, the AO has referred to the earlier reference made to the Transfer Pricing Officer for arms' length price verification in the assessment u/s. 143(3) and also the order dated 31.10.2011 passed by the Transfer Pricing Officer which relates to the assessment made u/s. 143(3). According to the Ld. Counsel, since this assessment proceeding u/s. 143(3) stood abated and the assessment order held to be non est, the order of Transfer Pricing Officer passed pursuant to reference made by the AO in that assessment proceeding also stands non-est. Reference to the adjustments suggested by the Transfer Pricing Officer pursuant to those non-est proceeding cannot be verbatim borrowed into the present assessment proceedings which in the present case are pursuant to search operation and made u/s. 153A read with sec. 143(3).

12.2. Section 92CA requires that where the AO considers it necessary or expedient so to do for international transactions

or specified domestic transactions entered into by the assessee, he may with the previous approval of Pr. Commissioner or Commissioner, refer the computation of arms' length price in relation to such transactions u/s. 92C to the Transfer Pricing Officer. Further, sub-section (2) of section 92CA requires that Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or caused to be produced any evidence in support of the computation made by him of the arms' length price in relation to the said transactions referred in sub-section (1), where a reference is made to the Transfer Pricing Officer.

12.3. In the present case before us, it is undisputed that assessee has entered into transactions as referred to in section 92CA(1) during the year. The AO has incorporated the TP adjustment suggested by the Transfer Pricing Officer for which reference was made in the assessment u/s. 143(3) which is held to be non-est. Accordingly, in the present case, if the AO considered it necessary to incorporate the same adjustments, it was necessary on his part to make a reference to the Transfer Pricing Officer as per section 92CA(1) and based on the said reference, the Transfer Pricing Officer ought to have served a notice on the assessee to make submissions in support of the computation of arms' length price as contained in section 92CA(2). From the material placed on record, it is noted that in the impugned assessment u/s. 153A read with sec. 143(3), there is no reference by the AO to the Transfer Pricing Officer for the transactions covered by Transfer Pricing Regulations. The AO has simply incorporated the suggestion and adjustment made

by the Transfer Pricing Officer vide order dated 31.10.2011 which has no locus standi and is non-est.

12.4. We notice that the Central Board of Direct Taxes, vide instruction no.3/2016 dated 10th March 2016 has issued Guidelines for Implementation of Transfer Pricing Provisions replacing the Instruction No. 15/2015 dated 16th October 2015. The relevant guidelines as per the said circular are as extracted below -

> *3.2. All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard — for example, Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters (in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.*
>
> *3.3. Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:*
>
> *(a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under Section 92E at all or has not disclosed the said transactions in the Accountant's report filed;*
>
> *(b) where there has been a transfer pricing adjustment of Rs.10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and*
>
> *(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the*

AO.

3.4. For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

- *where the taxpayer has not filed the Accountant's report under Section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO,'*
- *where the taxpayer has not declared one or more international transaction or specified domestic transaction in the Accountant's report filed under Section 92Eofthe Act and the said transaction or transactions come to the notice of the AO; and*
- *where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified domestic transactions or they do not impact the income of the taxpayer.*

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determination the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, then AO must consider the taxpayer's objections and pass a speaking order so as to comply with the principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT.

3.5. In addition to the cases to be referred as per paragraphs 3.2 and 3.3, a case involving a transfer pricing adjustment in an earlier assessment year that has been fully or partially set-aside by the ITAT, High Court or Supreme Court on the issue of the said adjustment shall invariably be referred to the

TPO for determination of the ALP.

3.6. Since the provisions of Section 92CA of the Act, inter-alia, refer to the computation of the ALP of the international transaction or specified domestic transaction, it is imperative for the AO to ensure that all international transactions or relevant specified domestic transactions or both, as the case may be, are explicitly mentioned in the letter through which the reference is made to the TPO. In this regard, guidelines as under may be followed:

(a) If a case has been selected for scrutiny on a TP risk parameter pertaining to international transactions only, then the international transactions shall alone be referred to the TPO:

(b) If a case has been selected for scrutiny on a TP risk parameter pertainingtospecifieddomestictransaction-sonly,thenthespecifieddomestictransactions shall alone be referred to the TPO; and

(c) If a case has been selected for scrutiny on the basis of TP risk parameters pertaining to both international transactions and specified domestic transactions, then the international transactions and the specified domestic transactions shall together be referred to the TPO.

Since international transactions may be benchmarked together at the entity level due to the inter-linkages amongst them, if a case has been selected for scrutiny on a TP risk parameter pertaining to one or more international transactions, then all the international transactions entered into by the taxpayer — except those about which the AO has decided not to make a reference as per paragraph 3.4 –shall be referred to the TPO.

3.7. For administering the transfer pricing regime in an efficient manner, it is clarified that though AO has the power under Section 92C to determine the ALP of international transactions or specified domestic transactions, ***determination of ALP should not be carried out at all by the AO in a case where reference is not-made to the TPO.*** *However, in such cases, the AO must record in the body of the assessment order that due to the Board's Instruction on this matter, the transfer pricing issue has not been examined*

(emphasis supplied)

12.5. From the above it is clear that the Ld. AO does not have the jurisdiction to propose any transfer pricing adjustment in case where he has not made any reference to the TPO. Therefore the additions made

by the AO towards transfer pricing adjustment for which both, assessee and revenue are in appeal, are not tenable and deleted.

13. Accordingly, transfer pricing adjustment made by the AO in the impugned assessment u/s. 153A read with section 143(3) are not in compliance with the provisions contained in section 92CA of the Act read with aforesaid CBDT Instruction. Thus, ground no. 4 taken by the assessee in this respect is allowed and ground nos. 1 to 7 taken by the revenue in this respect are dismissed.

14. In the result, appeal of the assessee in IT(SS)A No. 17/Kol/2018 is allowed and appeal of the revenue in IT(SS)A No. 20/Kol/2018 is partly allowed and appeal in ITA No. 785/Kol/2018 of revenue is dismissed as infructuous.

Order is pronounced in the open court on 15thMarch, 2024.

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 15th March, 2024

JD, Sr. P.S.
Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A)-22, Kolkata
4. CIT
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata