आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" , HYDERABAD

BEFORE

SHRI R.K. PANDA, VICE PRESIDENT
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

आ.अपी.सं / **ITA Nos.312 and 313/Hyd/2023**
(निर्धारण वर्ष / Assessment Year: 2017-18 and 2018-19)

Hetero Labs Limited, Hyderabad. PAN : AAACH5506R	Vs.	The Assistant Commissioner of Income Tax, Central Circle – 3(4), Hyderabad.
अपीलार्थी / Appellant		**प्रत्यर्थी** / Respondent

आ.अपी.सं / **ITA Nos.348 and 349/Hyd/2023**
(निर्धारण वर्ष / Assessment Years: 2017-18 and 2-18-19)

The Assistant Commissioner of Income Tax, Central Circle – 3(4), Hyderabad.	Vs.	Hetero Labs Limited, Hyderabad. PAN : AAACH5506R
अपीलार्थी / Appellant		**प्रत्यर्थी** / Respondent

निर्धारिती द्वारा/Assessee by: Shri D. Prabhakar Reddy, Advocate.
राजस्व द्वारा/Revenue by: Shri M.Vijay Kumar, CIT-DR

सुनवाई की तारीख/Date of hearing: 28.02.2024
घोषणा की तारीख/Pronouncement on: 21.05.2024

आदेश / **O R D E R**

PER BENCH

These cross appeals filed by the assessee and Revenue are directed against the separate orders of Commissioner of Income Tax (Appeals) -11, Hyderabad dt.06.04.2023 passed u/s 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 (in short 'Act') for the assessment years 2017-18 and 2018-19, respectively.

2. As the facts of the case in the captioned appeals are identical, except the amounts involved, we are reproducing the facts in ITA No.312/Hyd/2023 for A.Y. 2017-18 for the sake of brevity.

2.1. The grounds raised by the assessee in ITA No.312/Hyd/2023 reads as under :

> *"1. The learned CIT(A) erred in Confirming the action of the T.P.O. and the A.O. in restricting the retention by AEs to 5% of consideration derived against supply of dossier.*
>
> *(i) The CIT(A) ought to have considered the fact that the T.P.O. cannot make any adjustment when there are no comparables and when no such adjustment was made in the earlier years.*
>
> *(ii) The CIT(A) ought to have considered the fact that the AE makes efforts in selling the dossier which is more advantageous to the appellant company.*
>
> *(iii) The CIT(A) ought to have noticed and considered the fact that the action of the TPO is without making any Transfer Pricing Exercise in determining ALP for the services.*
>
> *2(a) The learned CIT(A) erred in confirming the action of the Assessing Officer in holding that any adjustment can be made in respect of corporate guarantee provided to Pharmed Health Care Company SAE and Hetero FZC0, UAE.*

2(b) The learned CIT(A) ought to have Same as in 2(a) above seen that Pharmed Health Care Company SAE is a Joint Venture company wherein the appellant is holding equity shares and the bank guarantee was provided for 30.50% of the borrowings, and is in accordance with Joint Venture agreement.

2(c) The learned CIT(A) ought to have considered the fact that even other constituents were not paid any fee for the corporate guarantee provided by them and, therefore, the learned CIT(A) should hot have accepted the plea of TPO that adjustment can be made towards Corporate guarantee fee.

3. On the facts and in the circumstances of the case the learned CIT(A) ought to have considered that Hetero FZCO is a 100% subsidiary of the appellant and therefore, he ought to have held that no fee, against any corporate guarantee provided, can be collected and ought to have deleted the addition suggested in this regard.

4(a) The learned CIT(A) erred in confirming the action of the Assessing Officer in making adjustments towards interest on outstanding trade receivables. On the facts and in the circumstances of the case he ought not have made such adjustments.

4(b) The learned CIT(A) ought to have seen that in respect of trade receivables from the non-AEs, the appellant did not collect any interest.

4(c) The learned CIT(A) ought to have Same as in 4(a) above considered the fact that the date on which the payment against the goods supplied is to be received (due date) is already mentioned in the invoice itself and there is no mention about charging of interest in the invoice, in case of late payment.

4(d) The learned CIT(A) erred in imputing interest on such delayed debtors at the rate of LIBOR + 200 basis points even when the assessee has shown by way of internal CUP (Comparable Uncontrolled Price) that the assessee did not charge any interest on such delayed export debtors from non-AEs much beyond interest free credit period and did not pay interest on trade payables."

2.2. Similar grounds are raised by the assessee in ITA No.313/Hyd/2023 for A.Y. 2018-19 as raised in ITA No.312/Hyd/2023. However, the same are not reproduced for the sake of brevity.

2.3. The grounds raised by the Revenue in ITA No.348/Hyd/2023 for A.Y. 2017-18 read as under :

> *"1. The Ld. CIT(Appeals) erred both in law and on facts of the case in granting relief to the assessee.*
>
> *2. Whether on the given facts and circumstances of the case, the CIT(A) is justified in rejecting the benchmark of the corporate guarantee fee adopted by the TPO @ 1.9% and directing to charge corporate guarantee fee @0.53% relying on the case laws in the cases of M/s. Mylan Laboratories Ltd., Vs.ACIT (2015) ITA No.2123/Hyd/2011 and Rain Commodities Ltd., (2016) 65 taxmann.com 240.*
>
> *3. Whether on the given facts and circumstances of the case and in law, the CIT(Appeals) is correct in directing to charge the corporate guarantee fee at 0.53% contravening the India Transfer Pricing regulations, which prescribe that the data to be used for the purpose of comparability analysis should relate to the year in which the international transaction has taken place.*
>
> *4. Whether on the facts and circumstances of the case, the CIT(Appeals) was justified in directing to adopt corporate guarantee fee @ 0.53% relying on the decisions of the earlier years without appreciating the fact that TPO has conducted a comparability analysis and arrived at arm's length rate @ 1.9%.*
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> *5. Whether on the facts and circumstances of the case, the CIT (Appeals) is justified in directing to adopt rate of interest @ LIBOR+200 basis points on account of interest on delayed receivables without giving any direction with regard to the benchmarking of the transaction which has to be benchmarked as per section 92B of the Act.*
>
> *6. Whether on the facts and circumstances of the case, the CIT(Appeals) is justified in directing to adopt rate @LIBOR+200 basis points on account of transfer on delayed trade receivables by rejecting SB! short term deposit rates as Comparable Uncontrolled Price for benchmarking the interest on delayed receivables.*
>
> *7. Whether on the facts and circumstances of the case, the CIT(A) is justified in directing to adopt interest rate @ LIBOR+200 basis points on account of interest on delayed receivables without recognizing the fact that delayed receipt of receivables from Associated Enterprises(AEs) can be the strain on taxpayer's cash flow due to charging of interest for the delayed period at LIBOR+200 basis points.*
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> *8. Whether on the facts and circumstances of the case, the CIT(A) is justified in directing the TPO to include M/s. Sun Pharma*

Laboratories Limited holding that the comparable is having export turnover without appreciating the fact that the data with regard to the export turnover of the company is not available in the Annual Report and thus passing of export turnover filter adopted by the TPO is unverifiable.

9. Whether on the facts and circumstances of the case, the CIT(A) is justified in directing the TPO to include M/s. Macleods Pharmaceuticals Ltd as the company passes export turnover filter (32.99%) without appreciating the fact that out of the three weighted average years taken into consideration i.e., FY 2014- 15 to 2016-17, the comparable company fails export turnover for two years i.e., F.Y. 201546 and 2014-15. .

10. CIT (A) erred in assuming that R&D expenses and Marketing expenses are operating expenses of assessee's eligible unit and hence should be considered while computing PLI without evidence to prove that either any part or whole of R&D expenses and Marketing expenses were utilized wholly and exclusively for earning revenue for eligible unit.

11. CIT(A) erred in directing to exclude R&D expenses and Marketing expenses from the comparable companies while working out the PLI which indirectly means apportioning entire R&D expenses and Marketing expenses to assessee's eligible unit without evidence and ignoring the fact that assessee has other ineligible units also where these expenses could have been incurred.

12. Whether on the facts and circumstances of the case and in law, the CIT(A) is justified in directing to exclude R&D expenses and Marketing expenses from the comparable companies while working out the PLI without appreciating the fact that the eligible unit has worked out the 'profits and gains derived from the export of such article or thing' as mandated u/s. 10AA wherein no such expenses were attributed to these units and thus none of these expenses are attributable to the eligible units.

13. Whether on the facts and circumstances of the case and in law, the CIT(A) is justified in directing to exclude R&D expenses and Marketing expenses from all the comparable companies while working out the FL! without appreciating the fact that the assessee company also has R&D expenses and Marketing expenses at entity level (which includes both ineligible and eligible units) similar to that of comparable companies and the assessee's eligible unit per-se did not have R&D expenses and marketing expenses attributable to it.

14. Whether on the facts and circumstances of the case and in law, the CIT(A) is justified in directing to exclude R&D expenses and Marketing expenses from all the comparable

companies while working out the PLI without having any segmental information about the units of the comparable companies similar to that of assessee's eligible units.

15. Whether on the facts and circumstances of the case and in law, the CIT(A) is justified in directing to exclude R&D expenses and Marketing expenses from all the comparable companies while working out the PLI in contravention of Rule 46A of the Income Tax Rules, as the assessee has not made such submissions before the Transfer Pricing proceedings and submitted for the first time before the CIT(A) only.

2.4 Similar grounds are raised by the Revenue in ITA No.349/Hyd/2023 for A.Y. 2018-19, hence, we are not reproducing the same for the sake of brevity.

3. First we will take the appeal of Revenue in ITA No.348/Hyd/2023 for A.Y. 2017-18 and also the assessee's appeal for this year. As the facts are similar except the quantum figures, we are reproducing the brief facts for the year 2018-19:

4. The brief facts of the case are that assessee is a limited company engaged in manufacture of Active Pharmaceutical Ingredients and Genetic Finished Dosages. Assessee filed its return of income for the assessment year 2018-19 on 30-11-2018 admitting income of Rs. 167,41,21,350/- under the normal provisions and admitted an income of Rs.336,89,42,640/- as per the provisions of section 115JB. The return was processed u/s 143(1) on 21-02-2020. Subsequently, the case was selected for scrutiny through CASS and notices under section 143(2) and 142(1) of the Act along with questionnaire were issued and served on the assessee. In response to the said notices, the assessee uploaded the information called for from time to time. After verifying the information/documents furnished and considering the submissions made by the assessee,

draft assessment order was passed on 17/09/2021 as per the provisions of Section 144C(1) of the Act. The assessee Company submitted a letter on 22/09/2021 accepting the order u/s.144C(2) of the Income Tax Act, 1961. Accordingly, a final assessment order was passed.

4.1. During the course of scrutiny, on going through Form 3CEB, the Assessing Officer noted that assessee has made international transactions amounting to Rs.1473,14,81,020/- and specified domestic transactions to the tune of Rs.1836,91,97,901/-. Hence after obtaining the prior approval of the Pr.CIT, a reference was made to Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP) in respect of both the international transactions as well as the specified domestic transactions. The TPO, vide his Order u/s 92CA(3) of the I.T Act dated 31-07-2021 determined the Arms Length Price (ALP) adjustments of the International transactions pertaining to transactions i.e., availing of marketing Services at Rs.18,53,42,817/-, Corporate Guarantee Fee at Rs.1,50,00,000/- and Interest on delayed receivables at Rs.56,86,90,526/- totalling to Rs.76,98,33,343/-. Thus, the adjustment of Rs.76,98,33,343/- on account of international transactions determined u/s 92CA(3) by the Transfer Pricing Officer (TPO) was added to the total income of the assessee. Thereafter, the ALP adjustments on account of specified domestic transactions was proposed at Rs.34,15,08,428/-. The Assessing Officer also disallows Rs.1,88,12,419/- u/s 35(2AB) of the Act. Thus, the Assessing Officer passed the order assessing the total income at Rs.280,42,75,540/-.

5. Ground Nos.1 raised by the Revenue in ITA No.348/Hyd/2023 for A.Y. 2017-18 are general in nature and requires no adjudication.

5.1. Ground No.1 and 5 raised by the assessee in ITA No.312/Hyd/2023 for A.Y. 2017-18 are not pressed by the learned counsel for the assessee. Hence, the same are dismissed as not pressed.

GROUNDS 2 TO 4 – CORPORATE GUARANTEE FEE

5.1.1. Ground nos. 2 to 4 are with respect to Corporate Guarantee Fee.

5.2. Ld.DR has drawn our attention to pages 23 and 24 of the order of TPO, which is to the following effect :

> ***"11. Issue of Corporate Guarantee by the assessee on behalf of the AE***
>
> *11.1 In the TP Study report, the assessee did not furnish any details with regard to the corporate guarantee given and aggregated the transaction along with the sale and purchase transactions under TNMM. In response to the notice issued under05.11.2020, the taxpayer vide submission dated 10.12.2020 has stated as under:*
>
> *During the year under consideration, the company has not extended Corporate Guarantee to the AEs. However, guaranteed extended in the earlier years and outstanding loans as on 31.03.2017 are as under:*

Name of the Company	***Currency in which corporate guarantee provided***	***Outstanding Loan as on 31-03-2017 US$***

Hetero FZCO	*US $*	*9,000,000*
Pharmed Health Care Company SAE	*US $*	*9,305,376*

Pharmed Healthcare Company SAE

The taxpayer has extended corporate guarantee in connection with term loan of USD 10 million during the year 2012-13 by its AE Pharmed Healthcare SAE, Egypt form Exim Bank an Indian Bank.

Hetero FZCO

The taxpayer extended corporate guarantee in connection with loan of USD 15 million obtained during the year by Hetero FZCO from Bank of Baroda an Indian Bank. The loan was disbursed on 31.03.2014.

The said corporate guarantee continues during the F.Y. 2016-17 also. The assessee has reported these transactions in the Form 3CEB as well as the TP Study report. The assessee further stated that Hetero FZCO is 100% subsidiary and hence guarantee extended as parent company capacity. Since the ultimate beneficiary is the parent company (Hetero Labs Limited) guarantee commission has not been charged. Further, Pharmed Healthcare Company SAE is a 45% Joint Venture with other group company Hetero Drugs Ltd. Both the companies have extended corporate guarantees in their promoter capacity. As admitted by the assessee in the TP study report and its submission dated 10/12/2020, no fee was charged by the assessee for providing such guarantee on behalf of the AE.

From the above information furnished by the assessee, it is seen that the assessee has not charged (from its AEs) any fee towards the Corporate Guarantee issued by it on behalf of the above mentioned AEs. The Corporate guarantee provided by the assessee is in the nature of services rendered and it has a bearing on the profits or income or losses or assets of the assessee as well as its AE. In an arm's length situation, no independent party would render such services at free of cost. Further, as per the explanation inserted w.e.f. from 01/04/2002 in Section 92B by Finance Act, 2012, it has been clarified that guarantee is an international transaction and hence, Arm's Length Price has to be determined as per the provision of Section 92C of the Act.

In view of the above, show cause notice dated 21.12.2020 was issued to the assessee asking it to show cause as: to why a fee of 1.9% should not be charged on the amount of corporate guarantee issued by it on: behalf of its AEs. The relevant extracts of the show-cause notice is reproduced as follows,

"For the determination the ALP of the. Fee on the corporate Guarantee, the TPO chose 'CUP' as the most appropriate method as other methods are not applicable for this transaction. The following facts were considered to determine the ALP of transaction.

i) When the assessee issues corporate guarantee' on behalf of its AE, the assessee incurs the following non-monetary costs viz. opportunity cost, cost of credit rating, cost of blocked finance to meet the contingencies. Further, the provision of provision of corporate guarantee by the parent company makes the risk-laden loan seem risk-free once it is gilded by corporate guarantee. This is the true breadth of the transaction.

ii) To put the transaction in perspective, a corporate guarantee is akin to undergirding a loan, wherein in the case of a default, the promising party is under a liability to honor the commitment. Hence the guarantor carries the liability in the balance-sheet, be it contingent or not, until the liability is settled by the subsidiary/AE. This is a strain in the credit worthiness and credit sourcing abilities of the corporate entity. Any prudent company, in the face of such a liability makes a provision to meet a possible contingency pay-out in the future. On the flip-side, by virtue of assessee's corporate guarantee, the AE gets certain benefits viz. easy availability of loan, interest saving on the loan etc.,. In an arm's length situation, no independent party would pass on such benefits to a third party, while retaining with itself all the risks attached to such benefits, without charging any fee. Hence, an appropriate fee needs to be charged on the corporate guarantee issued by the assessee to its AE.

iii) For the purpose of determining the ALP of the fee on Corporate Guarantee, the relevant information was obtained from 6 commercial banks u/s. 133(6) of the Income Tax Act, 1961 and the fee charged by them on the 'Financial Guarantee' were considered for the computation of the ALP as detailed below.

Bank Guarantee rates for F.Y. 2016-17			
Name of the Bank	*Upto Rs. 5 Crore Rate in %*	*Rs 5 to 13.10 Crore Rate in %.,*	*Above Rs. 10 Crore Rate in %*
SBI	*2.2*	*1.9*	*1.6*
HDFC Bank	*1.8 ...*	*1.8*	*1.8*

Canara Bank	*3*	*3*	*1.8*
Axis	*2*	*2*	*2*
Union Bank	*3*	*3*	*3*
Indian Bank	*4.08*	*4.08*	*4.08*
35th Percentile	*2.2*	*2*	*1.8*
Median	***2.6***	***2.5***	***1.9***
65th Percentile	*3*	*3*	*2*

From the above, it could be seen that the various banks charge fee, ranging from 1.8% to 2%. Hence, for the computation of the ALP, the various rates (data) were arranged in ascending order and the median of the same was adopted as the ALP as provided in Rule 108 of the Income Tax Rules, 1962. Thus, the ALP works out to 1.9% for the corporate guarantee of above Rs. 10 Crores....."

5.3. The ld.DR has also drawn our attention to page 98 of the order of ld.CIT(A).

"3.4 Issue of Corporate Guarantee by the assessee on behalf of foreign AE

During the year under consideration, the company has not extended any Corporate Guarantee to the AEs. However, guaranteed extended in the earlier years and outstanding loans as on 31.03.2017 are as under:

Name of the Company	***Currency in which Corporate guarantee provided***	***Outstanding As on 31- 03- US $***
Hetero FZCO, UAE	*US$*	*9,000,000*
Pharmed Healthcare Company, SAE, Egypt ,	*US $*	*9,305,376*

The taxpayer has extended corporate guarantee in connection with term loan of USD 10 million during the year 2012-13 taken by its AE, Pharmed Healthcare Company SAE, Egypt from Exim Bank Pharmed Healthcare Company SAE Egypt is a joint venture of the assessee company with 55% shareholding in it as on 31-03-2017.

The corporate guarantee agreement was executed on 11-06-2012 and loan agreement was executed on 31.05.2012. The salient features of the deed of corporate guarantee are -

i. In the event of any default on the part of the borrower (AE) in the due repayment of the Loan or any part thereof (whether at stated maturity or upon acceleration or otherwise) including any converted Rupee amount(s) consequent upon default (in case of Loan in foreign currency) or in payment of any interest, compound interest, additional interest by way of liquidated damages or other monies in accordance with the Loan agreement, or in due compliance with any of the formalities for drawal of the Loan or otherwise in the observance or performance of any other terms and conditions of the Loan Agreement, then and in such event, the Guarantor shall, within a period not exceeding fifteen days front the date of dispatch or delivery by Exim Bank to the Guarantor of a notice in writing of such default by the Borrower (AE), pay to Exim Bank, at Mumbai on first demand without delay, demur or protest.

ii. The Guarantee shall be a continuing guarantee and shall remain in force until the outstanding amount upto 35% of the Loan i.e. USD 3.5 mn together with interest, service fee and all other moneys in respect thereof shall be paid off to Exim Bank in full.

iii. The Loan limit is USD 10 million

iv. The Loan is taken to part finance cost of setting up of a new manufacturing facility for pharmaceutical formulations of the Borrower (AE) at a project cost of USD 14 mn.

iv. The Guarantee shall, be irrevocable and binding on the Guarantor (Assessee) and its successors.

vi. The Guarantor (asstssee) agrees that until the Guarantor shall have fully discharged all of its obligations under to Exim Bank hereunder, the Guarantor (Assessee) shall not, without prior written consent from Exim Bank, shall not materially change the nature of its business, or sell, assign, mortgage, charge, or create any lien or encumbrance or otherwise deal with or dispose of all or any part of its business or movable / immovable properties or any right, title, and interest therein [Clause 14(6)1.

Similarly, the assessee extended corporate guarantee in connection with loan of USD 15 million obtained during the year by Hetero FZCO, UAE from

Bank of Baroda and Indian Bank. Hetero FZCO is a joint venture between the assessee company and Medsy FZE, UAE and the assessee company holds 95% shareholding as on 31-03-2017.

The corporate guarantee agreement was executed on 07-03-2014 and loan was disbursed on 31.03.2014. The salient features of the deed of corporate guarantee are –

i. The guaranteed liability is limited to a maximum of USD 15 mn.

ii. The assessee company to pay to the lender on demand and in the currency of which the same falls due for payment, every and all sum and sums of money which are now or shall at any time be owing by the foreign AE as a borrower to the lending bank(s), anywhere on any account whatsoever, from borrower, the said monies which the foreign AE is liable to pay the lender and remain unpaid to the lender under the financial arrangement.

iii. The guarantee shall be a continuing guarantee for the purpose of securing the whole of the monies and shall remain in full force and effect till such titte the borrower (AE) or the guarantor (assessee), as the case may be, repays in fiill the amounts / financial liabilities, due and payable under the financial arrangement with the lender.

iv. The creation of this Guarantee and the performance and observance of the obligations under the guarantee agreement does not and will not result in the creation or imposition of or oblige it or any of its subsidiaries to create any charge or other encumbrance on any of its or its subsidiaries' assets, rights or revenues (Clause'l)).

v. The guarantee shall be unconditional and irrevocable

Based on the above corporate guarantee extended by the assessee company to Hetero FZE, UAE, the foreign AE took a loan of US 15 mn from the bankers for the purpose of working capital requirements of its business.

As these corporate guarantees extended by the assessee to its foreign AEs did not involve any costs to the assessee company, did not have any bearing on its profits, income, losses or assets, and are for the purpose of promoting its business interests in UAE and Egypt, the assessee did not charge any corporate guarantee fee from the foreign AEs."

5.4. In support of its case, the ld.DR filed written submissions. The written submissions with respect to Corporate Guarantee are to the following effect :

"In Transfer Pricing Study Report, the taxpayer did not furnish any details with regard to corporate guarantee given and aggregated the guaranteed transaction along with the sale and purchase transactions under TNMM. The taxpayer has not extended any new corporate guarantee to AEs, however, guarantees extended in the earlier years and the outstanding loans as on 31.03.2018 are as under :

Name of the company	Outstanding loan as on 31.03.2018 in US $	Outstanding loan as on 31.03.2018 in INR
Hetero FZCO	60,00,000	38,89,80,000
Pharmed Health Care Company SAE, Egypt	74,99,880	48,62,17,200
		87,51,97,220

The TPO determined Arm's Length Price of fee on Corporate Guarantee fee @1.9% taking into consideration the median of Bank Guarantee rates for the FY 2016¬17 of commercial banks and proposed adjustment of Rs.1.58 crores (1.9% of Rs.87.52 crores).

The CIT(A) held that corporate guarantee is covered well within the meaning of international transaction and ALP for corporate guarantee transaction cannot be determined based on bank guarantee rates. Relying on the decisions of Hon'ble ITAT in the cases of Mylan Laboratories Ltd. and M/s. Rain Commodities Ltd. held that the corporate guarantee commission rate should be adopted @0.53%. Further, the CIT(A) on perusal of deed of guarantee for Corporate Guarantee advanced to AE, observed that the taxpayer provided corporate guarantee to the extent of 30.50% only to Pharmed Healthcare Company, Egypt. In view of this, the CIT(A) directed to calculate corporate guarantee @0.53% of 30.50% (taxpayer's share on outstanding loan balance of US $ 7,499,880).

The decision of the CIT(A) to calculate corporate guarantee fee in respect of corporate guarantee extended to Pharmed Healthcare Company @0.53% of 30.50% and not on full value of guarantee was accepted by the Department.

However, the decision of the CIT(A) with regard to guarantee fee rate to be applied 0.53% is not acceptable. The rate of guarantee commission/ fee changes with time i.e., year to year. Therefore, the rate adopted for earlier years may not be appropriate for the year under consideration. Further, as can be seen from order u/s. 92CA(3) the TPO has finalized the fee @1.8% based on information obtained from various commercial banks and after conducting a comparability analysis arrived at the arm's length margin/PLI rate of corporate guarantee @1.8%. Moreover, the case of MIs. Mylan Laboratories Ltd. which was relied upon by the CIT(A), the AY is 2008-09 whereas the AY involved in the present case is AY 2018-19. Hence, application of guaranteed fee rate for AY 2008-09 to AY 2018-19 is not logical and

appropriate. Hence, the CIT(A) is not justified in directing the TPO to restrict the corporate guarantee fee @ 0.53% without any reasoning."

6. Per contra, ld. AR has drawn our attention to pages 168 to 174 of the order of ld.CIT(A) which is to the following effect :

*"**2. Corporate Guarantee Fee :***

In the TP Study report, the appellant did not furnish any details with regard to the corporate guarantee given and aggregated the guarantee transaction along with the sale and purchase transactions under TNMM. During the year under consideration, the company has not extended any new Corporate Guarantee to the AEs, however, guarantees extended in the earlier years and outstanding loans as on 31.03.2017 are as under:

Name of the Company	Currency in which outstanding guarantee provided	on 3103-2017 US $	Loan / Outstanding loan as on 31.03.2017 INR164.84 Vs USD)
Hetero FZCO	S	9,000,000	58,36,41,000
PharmedHealth Care Compere SAE, Egypt	S $	9,305,376	60,34,44,328
			118,70,85,328

The AE, Hetero FZCO is a 100% subsidiary of the appellant company and hence guarantee was extended by the appellant as parent company capacity. Since the ultimate beneficiary is the parent company (the appellant), guarantee commission was not charged. Further, Pharmed Healthcare Company SAE is a 45% Joint Venture of the appellant with other group company Hetero Drugs Ltd. Both the companies have extended corporate guarantees to Pharmed Healthcare Company SAE in their promoter capacity. In this case also, no fee was charged by the appellant for providing such guarantee on behalf of the AE. However, the TPO observed that the corporate guarantee provided by the appellant is in the nature of services rendered and it has a bearing on the profits or income or losses or assets of the appellant as well as its AE. In an arm's length situation, no independent party would render such services at free of cost and accordingly, the TPO determined the Arm's Length Price of fee on corporate guarantee @ 1.9% on the outstanding loan by taking into consideration the median of Bank Guarantee rates for the FY 2016-17 of commercial banks and proposed adjustment of Rs.2,25,54,621/- (1.9% of Rs.118,70,85,328/-) u/s 92CA(3) of the Act.

During the course of appellate proceedings, the appellant submitted that corporate guarantee does not fall under the definition of 'guarantee' under international transaction unless such transaction have a bearing on profits, in income, losses or assets of the enterprise and in the present case, the guarantee does not have a bearing on profits, in income / losses or assets of the appellant.

In this regard, it is necessary to go through the provisions of Sec. 92B of the Act, the relevant extract of section 92B of the Act along with explanations is reproduced as below:

"92B. (1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

(2) A transaction entered into by an enterprise with a person ;other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be an international transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise where the enterprise or the associated enterprise or both of them are non-residents irrespective of whether such other person is a non-resident or not.

Explanation—For the removal of doubts, it is hereby clarified that--

(i) the expression "international transaction" shall include—

(a). the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;

(b). the purchase, sale, transfer, lease or use of intangible properly, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licenses, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

(c). capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities

or any type advance, payments or deferred payment or receivable or any other debt arising during the course of business;

(d). provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;

(e). a transaction of business restructuring or reorganization, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date;"

On plain reading of the Explanation (i)(c) to section 92B of the Act, it is seen that it merely reads 'lending or guarantee' but does not make any distinction i.e. specify as to whether it is a guarantee by bank or by any corporate. The word 'guarantee' should be read along with main provisions of the section 92B(1) of the Act which reads 'any other transaction having a bearing on the profits, income, losses or assets of such enterprises'. Thus, the word 'guarantee' covers the corporate guarantee given by any assessee on behalf of its AE, if it has a bearing on profits or income or losses or assets of the assessee as well as its AE. It is to be noted here that the phrase 'such enterprises' refers to both the assessee and its AE. Thus, it is to be seen whether any transaction has a bearing on the profits or income or losses or assets of either the assessee or its AE and if it is found to be so, then the said transaction would be covered within the meaning of an international transaction. In the instant case, in obtaining the loan, the credibility and bargaining power of the AE increases, by virtue of the corporate guarantee issued by the appellant on behalf of the former. Further, the provision of corporate guarantee issued by the parent company makes the risk-laden loan into risk-free one and the corporate guarantee issued by the appellant on behalf of its subsidiary results in interest saving by helping the AE to get a loan at lower interest rate and thus has a bearing on the profit of the AE. Hence, the said transaction is covered well within the meaning of international transaction and the TPO has rightly considered the same for determining the arm's length price.

Coming to the next point, whether the TPO is correct in determining the ALP of fee on corporate guarantee @1.9% on the outstanding loan by using median of Bank Guarantee rates for FY 2016-17 of commercial banks? It is seen that the bank guarantee and corporate guarantee are two different transactions and cannot be compared in the case of the appellant for the following reasons:

(i). The appellant is not engaged in the bus ness of extending guarantees, unlike Banks,

(ii). The corporate guarantee is in respect of guaranteeing a loan extended by a Bank, to a related party, whereas banks are prohibited to give bank guarantees for guaranteeing loans,

(iii). If bank guarantee is invoked by a third party, then bank recovers all such expenses from the assessee and the default amount is treated as a loan till such expenses are paid by the assessee, whereas in corporate guarantee, there is no option to recover such costs from the AE, as it is the AE which was in default.

Further, reliance is placed on the decision of Hon'ble Bombay High Court in the case of Everest Canto Cylinders [2015] (ITA 1165/2013 dated 08-05-2015), wherein it was held that the corporate guarantees cannot be compared with bank guarantees.

The Hon'ble Bombay High Court reconfirmed the above stand in its judgement in the case of CIT Vs. Glenmark Pharmaceuticals Ltd (ITA No.1302 of 2014 dated 02-02-2017). Further, the SLP filed by the Department against the said decision was dismissed by the Hon'ble Supreme Court on merits vide its order dated 11.12.2018 (CIT(LTU) Vs. Glenmark Pharmaceuticals Ltd, Civil Appeal No.12632/2017). Thus, it is a settled matter by the Hon'ble Supreme Court that the corporate guarantee cannot be compared with the bank guarantee.

In view of the above decision, it is concluded that the TPO is not correct in comparing corporate guarantee with the bank guarantee and determining the Arm's Length Price of corporate guarantee based on bank guarantee rate.

To summarize the above paragraphs, the corporate guarantee is covered well within the meaning of international transaction and Arm's Length Price for corporate guarantee transaction cannot be determined based on bank guarantee rates.

Regarding the quantification of the Arm's Length Price for corporate guarantee advanced by the appellant to its AEs, the reliance is placed on the decisions of Hon'ble ITAT, Hyderabad in the cases of Mylan Laboratories Ltd. Vs. ACIT [2015] ITA No.2123/Hyd/2011) and Rain Commodities Ltd. [2016] 65 taxmann.com 240, in which the corporate guarantee fee was determined at the rate of 0.53% and 0.50%. Therefore, in view of above decisions, the corporate guarantee commission rate should be adopted @0.53% instead of 1.90% as determined by the TPO.

Further, the appellant has submitted the deed of guarantee dated 23.05.2012 for corporate guarantee advanced to AE, Pharmed Healthcare Company, Egypt. The relevant extracts of the deed of guarantee are reproduced as under:

It is seen that the appellant has provided corporate guarantee to the extent of 30.50% only for the loan of US $10 million advanced to its AE, Pharmed Healthcare Company, Egypt by the Export Import Bank, Mumbai. Accordingly, the corporate guarantee fee for the loan advanced to Pharmed Healthcare Company, Egypt should be calculated proportionately on the appellant's share of 36.50% of guarantee on the outstanding loan balance.

In view of the above discussion, the arm's length price of corporate guarantee advanced by the appellant to its AEs is determined @ 0.53%.Further, the corporate guarantee for its AE, Pharmed Healthcare Company, Egypt is directed to be calculated @ 0.53% of 30.50% (appellant's share on the outstanding loan balance of US $93,05,376). The AO is directed to give effect accordingly. Accordingly, ground no.4(a) of the appeal is partly allowed and the ground no. 4(b) is dismissed."

7. The ld.CIT(A) had relied upon the decision of the Tribunal in the case of Mylon Laboratories Ltd Vs. ACIT wherein the Tribunal has decided the issue in favour of the assessee by quantifying the bank guarantee charges at 0.53%.

8. Before us, ld.AR submitted that the assessee had filed detailed reply before the Ld. CIT(A) which was reproduced at Pages 98-106 of the order of the CIT(A). The summary of contentions of the assessee regarding charging of any corporate guarantee fee is as follows:-

(i) The Corporate Guarantee fee does not fall under the definition of 'guarantee' under international transaction as such transaction does not have a direct or indirect bearing on profits, income, losses or assets of the assessee company.

(ii) As these corporate guarantees extended by the assessee to its foreign AEs did not involve any costs to the assessee company, did not have any bearing on its profits, income, losses or assets, and are for the purpose of promoting its business interests in UAE and Egypt, the assessee did not charge any corporate guarantee fee from the foreign AEs.

(iii) Even if such guarantee is an international transaction, no separate fee is required to be paid by foreign subsidiary / Joint Venture, as corporate guarantees are given to protect the assessee company as a shareholder in these foreign associated enterprises and thus form part of shareholder activities and don't require fee at arm's length.

(iv) The corporate guarantee agreements and also the business transactions carried out by the assessee with these foreign AEs, it is very clear that the corporate guarantees are given by the assessee, not as service to foreign AEs, but to protect its own interest as a shareholder of these foreign AEs and also to promote its own business. Since, the revenue from these foreign AEs is a paramount importance of the assessee, the guarantee was given in a way to protect assessee's own business interest in such subsidiaries.

8.1. The ld.AR in his written arguments submitted that the corporate guarantees extended to its foreign AEs are in the nature of shareholder activities and the assessee did not incur any expenditure, therefore, benchmarking of an activity of shareholder without any consideration is not in accordance with provisions of the Act and well accepted principle that no service fee is required to be paid for rendering shareholder services by an enterprise to its associated enterprise as a shareholder. The ld.AR further submitted that as the assessee company provided guarantee to the extent of only 30.50% of the borrowings of the foreign JV, Pharmed Healthcare Company SAE, the corporate guarantee fee, if anything is charged, to be restricted to 30.50% of the outstanding loan taken by the

Foreign AE on the strength of the corporate guarantee given by the assessee to it.

9. We have heard the rival arguments and perused the material on record. The TPO at pages 22 to 24 of the order had made the adjustment of Rs.1.48 crore in the hands of the assessee on account of Corporate Guarantee. While computing the same, the TPO/Assessing Officer had captured the Corporate Guarantee fee at 1.8% at the outstanding loan amount. The Ld.CIT(A) while hearing the appeal of the assessee has granted the relief to the assessee on the ground no.1 that the TPO is not correct in comparing that Corporate Guarantee with the Bank guarantee and determined the Arm's Length Price of corporate guarantee based on bank guarantee rate. The Ld.CIT(A) has granted relief to the assessee by relying upon the decision of co-ordinate Bench of the Tribunal in the case of Mylon Laboratories Ltd Vs. ACIT (ITA No.2123/Hyd/2011) and had computed the corporate guarantee commission @0.53as against 1.90% as determined by the TPO.

9.1. The submissions of both the assessee as well as the Revenue are captured hereinabove. Infact, we have the occasion to examine the identical issue recently in the cases of M/s. Aurobindo Pharma Limited, Hyderabad Vs. ACIT, Central Circle – 1(2) (ITA No.485/Hyd/2022 dt.27.04.2023 and ITA No.1860/Hyd/2019 for A.Y. 2015-16). In the case of M/s. Aurobindo Pharma Limited (ITA No.485/Hyd/2022 dt.27.04.2023) (supra), we have held as under :

> *"8. We have heard the rival contentions of the parties and perused the material available on record. The issue of whether the corporate bank guarantee given by the assessee on behalf of its AE is an international*

transaction or not, is no more res integra, as the explanation to section 92B of the Act itself had made it abundantly clear that if the assessee is providing the capital financing, including any type of long term or short term borrowing, lending or ***"guarantee",*** *purchase or sale etc., then such transaction shall be considered as international transaction. Undoubtedly, the assessee has given Corporate Guarantee on behalf of its AE, which fact has not been disputed by the assessee either before the TPO or before the DRP and, therefore, we are of the opinion that the corporate guarantee given by the assessee is an international transaction and, therefore, the same has rightly been held so by the lower authorities.*

8.1 Having held that the corporate guarantee issued by the assessee on behalf of its AE is an international transaction, the sequator to that is whether the corporate guarantee estimated by the DRP to the tune of 1% on the amount guaranteed as a corporate guarantee commission as against 0.10% was justified or not.

8.2 In this regard, the assessee had made elaborate submissions which are reproduced elsewhere and submitted that the assessee is taking the financial facilities from the SBI and is paying 0.10% as schedule of fees and charges to the bank.

8.3. We have considered the submissions and found that the charges paid by the assessee cannot be compared for the purposes of determining the ALP of corporate guarantee commission. In our view, no third party would provide similar type of services/corporate guarantee on behalf of its AE and expose itself to the risk of giving the corporate guarantee. Therefore, the charges paid by the assessee to SBI cannot be compared for the purpose of determining the ALP of corporate guarantee commission. The Co-ordinate Bench in the case of Vivimed Labs vide its decision dated 12-04-2022 had adjudicated corporate guarantee commission @ 0.5% qua the extent of the amount of the assessee's corporate guarantee actually utilised in these four assessment years. Thereafter, similar view had been taken by various Tribunals restricting the addition to 0.5% of the amount guaranteed as corporate guarantee commission. Recently, Delhi Tribunal in the case of Havells India Ltd. Vs. ACIT (LTU) in ITA No.6509/Del/2018 dt.09.05.2022 had also echoed the above said view and held that the addition of 0.5% on the amount guaranteed would be the appropriate benchmark to determine the ALP. Similar decision was also passed by the Bangalore and Pune Benches of the Tribunals in the case of GMR Infrastructure Ltd in ITA No.344/Pun/2022 dt.25.05.2022 and Jain Irrigation Systems in ITA 822/Pun/2022 dt.22.12.2022, respectively. Respectfully following the view taken by the Delhi, Bangalore and Pune Benches of the Tribunals in the above cited cases and also in the case of Vivimed Labs (supra), we partly allow the ground of the assessee and restrict the addition to the tune of 0.5% on the amount guaranteed as corporate guarantee commission. ***Thus, ground nos. 1 to 4 are partly allowed."***

9.2 In our view, the facts of the present case are similar to the facts in the case of Aurobinda Pharma (supra). Therefore, relying upon the decision of the co-ordinate Bench of the Tribunal in the case of Aurobinda Pharma (supra), we uphold the computation of Corporate Guarantee Commission at 0.53%. Undoubtedly, in the facts of the case of Aurobinda Pharma (surpa), we had determined the amount guaranteed as corporate guarantee commission @ 0.5%. However, considering the facts of the present case, we are of the opinion that the computation of the amount guaranteed as corporate guarantee commission @ 0.53% would be appropriate. Furthermore, the Revenue cannot be worsen of thereby reducing the corporate guarantee commission from 0.53% to 0.50% in its appeal. Accordingly, the appeal of the Revenue on this aspect is without any basis.

9.2.1 The other aspect on which the Ld.CIT(A) has granted relief is that the assessee has only provided the corporate guarantee to its AE to the extent of 30.50% on the outstanding loan balance of US $ 10 million advance to its AE. In our view, the pro rata corporate guarantee is required to be calculated as directed by the Ld.CIT(A) on the amount for which the assessee has sought which would be 30.50% of the total amount of US $ 10 million advanced to its AE. Therefore, the corresponding corporate guarantee commission @ 0.53% is required to be computed on the amount of 30.50% of assessee's share on the outstanding loan balance of US $ 93,05,376. **Accordingly, grounds 2 to 4 of the Revenue appeal are dismissed.**

9.3 Coming to the assessee's appeal in ITA No.312/Hyd/2023 for A.Y. 2017-18, written Submissions filed by Revenue with regard to Assessee's appeal are to the following effect:

I. Ground No. 1 & 2 Corporate Guarantee:

In Transfer Pricing Study Report, the taxpayer did not furnish any details with regard to corporate guarantee given and aggregated the guarantee transaction along with the sale and purchase transactions under TNMM. The taxpayer has not extended any new corporate guarantee to AEs, however, guarantees extended in the earlier years and the outstanding loans as on 31.03.2018 are as under:

Name of the company	Outstanding loan as on 31.03.2018 in US $	Outstanding loan as on 31.03.2018 in INR
Hetero FZCO	60,00,000	38,89,80,000
Pharmed Health Care Company SAE, Egypt	74,99,880	48,62,17,200
		87,51,97,220

The TPO determined Arm's Length Price of fee on Corporate Guarantee fee @1.9% taking into consideration the median of Bank Guarantee rates for the FY 2016¬17 of commercial banks and proposed adjustment of Rs.1.58 crores (1.9% of Rs.87.52 crores).

The CIT(A) held that corporate guarantee is covered well within the meaning of international transaction and ALP for corporate guarantee transaction cannot be determined based on bank guarantee rates. Relying on the decisions of Hon'ble ITAT in the cases of Mylan Laboratories Ltd. and M/s. Rain Commodities Ltd. held that the corporate guarantee commission rate should be adopted @0.53%. Further, the CIT(A) on perusal of deed of guarantee for Corporate Guarantee advanced to AE, observed that the taxpayer provided corporate guarantee to the extent of 30.50% only to Pharmed Healthcare Company, Egypt. In view of this, the CIT(A) directed to calculate corporate guarantee @0.53% of 30.50% (taxpayer's share on outstanding loan balance of US $ 7,499,880).
The decision of the CIT(A) to calculate corporate guarantee fee in respect of corporate guarantee extended to Pharmed Healthcare Company @0.53% of 30.50% and not on full value of guarantee was accepted by the Department.

However, the decision of the CIT(A) with regard to guarantee fee rate to be applied 0.53% is not acceptable. The rate of guarantee commission/ fee changes with time i.e., year to year. Therefore, the rate adopted for earlier years may not be appropriate for the year

under consideration. Further, as can be seen from order u/s. 92CA(3) the TPO has finalized the fee @1.8% based on information obtained from various commercial banks and after conducting a comparability analysis arrived at the arm's length margin/PLI rate of corporate guarantee @1.8%. Moreover, the case of M/s. Mylan Laboratories Ltd. which was relied upon by the CIT(A), the AY is 2008-09 whereas the AY involved in the present case is AY 2018-19. Hence, application of guaranteed fee rate for AY 2008-09 to AY 2018-19 is not logical and appropriate. Hence, the CIT(A) is not justified in directing the TPO to restrict the corporate guarantee fee @0.53% without any reasoning.

9.4. The written submissions filed by the assessee in ITA No.312/Hyd/2023 for A.Y. 2017-18 with respect to ground nos.2 and 3 are to the following effect :

"The assessee submitted detailed reply before Ld. CIT(A) which is reproduced at Pages 98-106 of the order of the CIT(A). The summary of contentions of the assessee regarding charging of any corporate guarantee fee is as follows:-

(i) The Corporate Guarantee fee does not fall under the definition of 'guarantee' under international transaction as such transaction does not have a direct or indirect bearing on profits, income, losses or assets of the assessee company.

(ii) As these corporate guarantees extended by the assessee to its foreign AEs did not involve any costs to the assessee company, did not have any bearing on its profits, income, losses or assets, and are for the purpose of promoting its business interests in UAE and Egypt, the assessee did not charge any corporate guarantee fee from the foreign AEs.

(iii) Even if such guarantee is an international transaction, no separate fee is required to be paid by foreign subsidiary / Joint Venture, as corporate guarantees are given to protect the assessee company as a shareholder in these foreign associated enterprises and thus form part of shareholder activities and don't require fee at arm's length.

(iv) The corporate guarantee agreements and also the business transactions carried out by the assessee with these foreign AEs, it is very clear that the corporate guarantees are given by the assessee, not as service to foreign AEs, but to protect its own interest as a shareholder of these foreign AEs and also to promote its own business. Since, the revenue from these foreign AEs is a paramount importance of the assessee, the guarantee was given in a way to protect assessee's own business interest in such subsidiaries.

So, in view of the above, the corporate guarantees extended to its foreign AEs are in the nature of shareholder activities and the assessee did not

incur any expenditure, therefore, benchmarking of an activity of shareholder without any consideration is not in accordance with provisions of the Act and well accepted principle that no service fee is required to be paid for rendering shareholder services by an enterprise to its associated enterprise as a shareholder.

Further, as the assessee company provided guarantee to the extent of only 30.50% of the borrowings of the foreign JV, Pharmed Healthcare Company SAE, the corporate guarantee fee, if anything is charged, to be restricted to 30.50% of the outstanding loan taken by the Foreign AE on the strength of the corporate guarantee given by the assessee to it."

10. We have heard both parties and perused the material on record. In the present case, the Ld.CIT(A) while deciding the grounds of appeal at page 175 to 178 (supra) has discussed the issue whether the corporate guarantee given by the assessee to its AE would constitute the international transactions or not ? The Ld.CIT(A) after relying upon the Explanation to 22A had decided the issue and has held that the grant of corporate guarantee to its AE would constitute international transactions. After holding the grant of corporate guarantee as international transaction, the Ld.CIT(A) has adjudicated and determined the corporate guarantee @0.53% instead of @1.90% on the outstanding amount of the corporate guarantee. Hence, we do not find any reasons to interfere with the findings given by the Ld.CIT(A) **and accordingly, the grounds 2(a) to 2(c) and 3 raised by the assessee for A.Y. 2017-18 are dismissed.**

GROUNDS 5 TO 7 – OUTSTANDING TRADE RECEIVABLES

11. Grounds 5 to 7 are with respect to interest on outstanding Trade Receivables. In this regard, the ld. DR has drawn our attention to pages 178 to 187 of the order of ld.CIT(A), which is to the following effect :

"4. Interest on Outstanding Trade Receivables:

As it can be seen from the TP study report, outstanding receivables were not benchmarked separately, in this regard, during transfer proceedings the appellant was asked to furnish invoice wise aging details of outstanding receivables, in respect of all invoices raised during the FY 2016-17 as well as the invoices which were raised in previous FYs but remained unpaid on the opening day of current FY 2016-17 vis a vis credit period as per the service agreement with AEs in the following format:

S.No.	Name of AE	Invoice No.	Date of Invoice	Amount (INR)	Due date of receipt of payment as per agreement	Actual date / dates of receipt of payment (INR)**	Period of delay	Interest for the delay period***	Credit Period as per the agreement of the AE

And to provide reasons why, the interest @SBI Short Term Deposit rate (i.e. Month wise) during .the financial year 2016-17 should not be charged on trade receipts from AEs beyond credit period. In response, the appellant submitted that outstanding receivables cannot be treated as separate transaction, when the . international transaction is that of sale, the interest aspect is embedded in it and it had not charged any interest on non-AEs as well. The appellant further submitted that since the receivables are a result of the international transactions and intrinsically linked to the main transaction, the same should not be segregated separately as a distinct transaction. However, the TPO observed that the deferred receivables would constitute separate international transaction and has to be benchmarked in regard to delay beyond the reasonable credit period. Accordingly, the TPO computed the interest of Rs.42,78,66,807/- on opening receivables and invoices raised during the year as per short term deposit rate of SBI for FY 2016-17. Subsequently, order u/s 154 of the Act was also passed on 26.02.2021 wherein further interest of Rs.25,27,05,530/- was added in the earlier interest of Rs.42,78,66,807/-, making the total adjustment to Rs.68,05,72,337/-.

During the course of appellate proceedings, the appellant submitted that it is not charging interest from non-AEs on delayed receivables due beyond the credit free period of 90 days, and also not paying any interest on trade payables, there is no financial benefit that is extended by the appellant to foreign AEs. Therefore, trade receivables outstanding beyond credit period is not an international transaction and no such ALP interest can be imputed on the same. The appellant further submitted that if at all the interest to be charged on trade receivables, the interest rate on delayed receivables are to be benchmarked with LIBOR (London Interbank Offer Rati, rather than Indian interest rates, as the exports are denominated predominantly in US dollars. Alternatively, interest rate @2.46% p.a. based on the rate charged by the banker to the appellant for short-term (6 months) foreign currency

loan extended towards exports known as packing credit foreign currency (PCFC) loan can be taken into consideration.

Now the question arises whether outstanding trade receivables constitute separate international transaction and should be benchmarked separately or not. To answer this, the explanation (i)(c) to section 92B and section 92F(v) are referred, which are reproduced as below:

Explanation (i)(c) to section 928:

"Capital financing, including any type of long-tern or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or ***receivable or any other debt arising during the course of business".***

Section 92F(v):

"Transaction" includes an arrangement, understanding or action in concer4-

A. whether or not such arrangement, understanding or action is formal or in uniting; or
B. whether or not sucA arrange, understanding or action is intended to be enforceable by legal proceeding..."

On plain reading r of explanation (i)(c) to section 92B, it is seen that international transaction specifically include within its ambit "receivable arising during the course of business". In the present case, the appellant has provided benefit to its AEs by way of advancement of interest free loan in the garb of delayed receipt of sale proceeds. These funds could have been otherwise deployed for at least earning interest income. The appellant has therefore incurred cost in connection with a benefit and services provided to the AEs by way of delayed receipt of sales proceeds. Accordingly, the delay in receipt of receivables is an international transaction u/ s 92B(1) read with clause (v) of section 92F. The above view was supported by ***Hon'ble ITAT, Delhi in the case of Bechtel India Pvt. Ltd. (in ITA No.6530/De1/2016 dated 16.05.2017),*** *the relevant extract of the said decision is reproduced as under:*

"In the case of Techbooks India International Pvt. Ltd. vs. DCIT (supra), taking note of the Explanation inserted by the Finance Act, 2012 to Section 92B, it was observed that there remained no doubt that apart from any short term or long-term borrowing, etc., or even advance payments or deferred payments, 'any other debt arising during the course of business' had also been expressly recognized as an international transaction. In the said decision, the decision of the Montle Bombay High Court in, the case of CIT vs. Patni Computer Systems was also considered, wherein Hon'ble Bombay

High Court set aside the view taken by the Tribunal in view of amendment to section 92B. The decision in the case of Kusum Healthcare Pvt. Ltd. was duly considered in the case of Ameriprise India Pvt. Ltd. and it was observed from para 20 to 23 as under-

20. The Id. AR supported the impugned order by relying on a Tribunal order dated 31.3.2015 passed in Kusum Healthcare Pvt. Ltd. vs. ACIT (ITA No.6814/ Del/ 2014) in which it has been held that no additional imputation of interest on the outstanding receivables is warranted if the pricing/profitability is more than the working capital adjusted margin of the comparables. In the opposition, the Id. DR relied on a later order dated 6.7.2015 passed by the Tribunal in the case of Techbooks International Pvt. Ltd. (supra), in which the transfer pricing adjustment on account of the delayed realization of invoices from AEs has been upheld. The Id. DR contended that the order in the case of Kusum Healthcare Pvt. Ltd. (supra), has been passed without considering the amendment to section 92B carried out by the Finance Act, 2012 with retrospective effect from 1.4.2002, which has been duly taken into account by the Tribunal in its later order in Techbooks International Put. Ltd. (supra).

21. After considering the rival submissions and perusing the relevant material on record, it is noticed as highlighted above, that the assessee argued. before the TPO that interest on receivables is not an international transaction. At this stage, it would be apposite to note that the Finance Act, 2012 has inserted Explanation to section 92B with retrospective effect from 1.4.2002. Clause (0 of this Explanation, which is otherwise also for removal of doubts, gives meaning to the expression 'international transaction' in an inclusive manner. Sub-clause (c) of clause (i) of this Explanation, which is relevant for our purpose, provides as under' Explanation—For the removal of doubts, it is hereby clarified that— (0 the expression "international transaction" shall include— (a) (b) (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business.

22. On going through the relevant part of the Explanation inserted with retrospective effect from 1.4.2002, thereby also covering the assessment year under consideration, there remains no doubt that apart from any long-term or short-term lending or borrowing, etc., or any type of advance payments or deferred payments, 'any other debt arising during the course of business' has

also been expressly recognized as an international transaction. That being so, the payment/ non-payment of interest or receipt/ non-receipt of interest on the loans accepted or allowed in the circumstances as mentioned in this clause of the Explanation, also become international transactions, requiring the determination of their ALP. If the payment of interest is excessive or there is no or low receipt of interest, then such interest expense/income need to be brought to its ALP. The expression 'debt arising during the course of business' in common parlance encompasses, inter cilia, any trading debt arising, from the sale of goods or services rendered in the course of carrying on the business. Once any debt arising during the course of business has been ordained by the legislature as an international transaction, it is, but, natural that if there is any delay in the realization of such debt arising during the course of business, it is liable to be visited with the TP adjustment on account of interest income short charged or uncharged. Under such circumstances, the contention taken by the assessee before the TPO that it is not an international transaction, turns out to be bereft of any force.

23. The Hon'ble Bombay High Court in the case of CIT vs. Patni Computer Systems Ltd., (2013) 215 Taxmann 108 (Born.) dealt, inter alia, with the following question of law:- (c) Whether on the facts and circumstances of the case and in law, the Tribunal did not err in holding that the loss suffered by the assessee by allowing excess period of credit to the associated enterprises without charging an interest during such credit period would not amount to international transaction whereas section 92B(1) of the Income-tax Act, 1961 refers to any other transaction having a bearing on the profits, income, losses or assets of such enterprises?"

24. While answering the above question, the Hon'ble High Court noticed that an amendment to section 92B has been carried out by the Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside the view taken by the Tribunal, the Hon'ble High Court restored this issue to the file of the Tribunal for fresh decision in the light of the legislative amendment.

25. The foregoing discussion discloses that non-charging or undercharging of interest on the excess period of credit allowed to the AB for the realization of invoices amounts to an international transaction and the ALP of such an international transaction is required to be determined."

Similar views have been taken by the ***Hon'ble ITAT, Bangalore in the case of Ingersoll Rand (I) Pvt. Ltd. (dated 10.11.2017)***

and ITAT Delhi in the case of BT e- serve India Pvt. Ltd. (dated. 30.10.2017) (87 Taxmann.com 251)

The appellant's contention that the interest aspect is embedded in the sale price is not supported by any evidence, even the appellant does not know for sure as to when the. payment will be received. This is the very reason a credit period is agreed between the parties in normal course of business, so that the seller knows as lo how much interest should be loaded in the selling price. Further, regarding the contention of the appellant that it is not charging interest from non-AEs on similar trade receivables, the appellant did not furnish the invoice-wise realization details of sales proceeds w.r.t. AE and non-AE. Therefore, this contention of the appellant cannot be considered. In view of the above discussion, it is concluded that outstanding trade receivables constitute separate international transaction and should be benchmarked separately.

Coming to the next point, what rate of interest on outstanding trade receivables in the case of the appellant should be benchmarked at arm's length and whether the TPO is correct in considering the short term deposit rates of SBI. It is seen that the appellant exports to its AEs in foreign currency and in return foreign AEs also make payments in foreign currencies. Therefore, since the exports are denominated predominantly in foreign currencies, the interest rate on delayed receivables should be benchmarked with LIBOR (London Interbank Offer Rate) as applicable to the country in which AE is situated rather than Indian interest rate i.e. SBI short term deposit rate as considered by the TPO. Also, the Central Board of Direct Taxes has placed reliance on LIBOR denominated rates for benchmarking foreign currency loan transactions as part of the safe harbor regulations [vide Rule 10TD(2A)), which provides authenticity for usage of LIBOR rates for benchmarking rather than Prime Lending Rate.

Further, it is seen that LIBOR is a rate applicable in the transactions entered into between banks and the loans advanced by these banks are secured by security and guarantee. However, in the case of the appellant, the loans advanced in the form of outstanding trade receivables to its AEs are without any security or guarantee and hence LIBOR plus a reasonable markup should be considered as arm's length interest rate. The reliance is placed on the decision of ***Hon'ble ITAT, Hyderabad in the case of Albany Molecular Research Vs. DCIT, Circle-1(1), Hyderabad dated 26.11.2020*** *in which it was held that assessee had to receive its outstanding receivables from its AE in foreign currency, it would be just and fair to adopt LIBOR rate + 200 basis points as the applicable ALP interest rate for the purpose of imputation of interest on outstanding receivables from AEs. The relevant portion of the said decision is reproduced as under:*

> *"5.5. For the A Yrs 2013-14 and 2014-15, there is no dispute that assessee had realised its receivable from its AEs after abnormal delay beyond the agreed credit period.* ***This, in our considered opinion, tantamount to indirect funding made by the***

assessee to its AEs by allowing the AE to utilize funds of the assessee as per its whims and fancies. Merely because the assessee is a debt free company except BCE loan, it cannot allow its funds to be utilized by its AB for an indefinite period of time beyond the agreed credit period. *We find that Clause-C of Explanation to Section 92B of the Act has been introduced in Albany Molecular Research Hyd. Research Center Pvt. Ltd. & Anr. the statute by the Finance Act 2012. For the sake of convenience, Clause C of relevant explanation is reproduced hereunder:-*

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;" The aforesaid clause C states "capital financing" to include "debt arising during the course of business". Manifestly, in the instant case the deferred receivables fall squarely within the ambit of debt arising during the course of business which is included in the category of expression "capital financing" under clause C of Explanation of Section 92B of the Act. Hence, we hold that the outstanding receivables from AE constitute a separate international transaction and on which interest is to be imputed thereon and consequently ALP adjustment to be made. Hence, the ***primary*** *argument made by the Id. AR that the adjustment made on account of outstanding receivables cannot be construed as an international transactions is hereby rejected and dismissed.*

5.6. We find that the Id. AR vehemently argued that the working capital adjustment has been granted by the Id. 'TPO to the assessee for both the years and hence, there cannot be further imputation of interest on outstanding receivables as the same gets subsumed in the working capital adjustment itself. In this regard the Id. AR placed reliance on the decision of Delhi High Court in the case of Kusum Healthcare Pvt. Ltd., in ITA No.765 of 2016 dated 25/ 07/ 2017 and also the Co-ordinate bench decision in the case of Albany Molecular Research Hyd. Research Center Pvt. Ltd. 85.Anr. Value Labs Llp. 1909 and 1910/Hyd/2017 dated 09/07/2020. We find that there is absolutely no dispute that working capital adjustment had indeed been granted by Al TPO to the assessee for A.Y.2013-14 and 2014-15. Intact, there is also an exclusive discussion made by the Id. DRP in para 2.1.12 of its order regarding the same for A. Y. 2014-15. Hence, by applying the ratio of the Hon'ble Delhi High Court in the case of Kusum Healthcare referred to supra, no imputation of interest on outstanding receivables could be made thereon for both the years. However, in respect of invoices raised in earlier years, where the amounts were realized during the year under consideration but

beyond the agreed credit period, imputation of interest by applying LIBOR + 200 basis points is to be made from 1st day of April of the relevant years till the date of realization of debts. In respect of invoices raised during the respective years, where the amounts were realized during the respective years itself, but beyond the agreed credit period, imputation of interest by applying LIBOR +200 basis points is to be made from the date of expiry of agreed credit period from the date of raising the invoice and the same is to be charged till the date of realization of debts. We hold that the decision of the Hon'ble Delhi High Court in Kusum Healthcare talks about only outstanding receivables at the end of the year i.e. to say when working capital adjustment is given to the assessee, no separate adjustment need to be made on the outstanding receivables at the end of the year. In our considered opinion, the decision of Hon'ble Delhi High Court does not speak about the invoices that Albany Molecular Research Hyd. Research Center Pvt. Ltd. 83Anrwere realized from the AE beyond the agreed credit period during the year. Hence, it could be safely concluded that the decision of the Hon'ble Delhi High Court in Kusum Healthcare does not give any finding with regard to invoices realized during the year from AE. To that extent alone, we are giving our independent finding by treating that as a separate international transaction and directing the Id. TPO to charge interest by applying LIBOR + 200 basis points in the aforesaid manner.

5.7. It would be relevant to note in the aforesaid paragraph that assessee had to receive its outstanding receivables from its .AE in foreign currency, it would be Just and fair to adopt LIBOR rate + 200 basis points as the applicable ALP interest rate for the purpose of imputation of interest on outstanding receivables from AEs. *Needless to mention that the said imputation of interest is to be made on invoice to invoice basis on outstanding receivables so that the period of delay in respect of each invoke could be actually worked out.*

5.8. The ground raised by the assessee for both the years praying for getting of outstanding payables to AEs with outstanding receivables from AEs cannot be entertained in view of our direction that imputation of interest is to be made on invoice to invoice basis on supplies made / services rendered by the assessee to its AEs. In view of this direction and in view of the fact that date of raising of export invoice on AE would be different from date of purchase of Albany Molecular Research Hyd. Research Center Pvt. Ltd. &Ann goods or import of services from AE. Accordingly, the ground raised on netting of outstanding payable with outstanding receivable is hereby dismissed for both the years.

5.9. To sum up for the A.Yrs 2013-14 & 2014-15, we hold that the outstanding receivables front AEs would constitute a separate international transaction on which imputation of interest is to be made by applying LIBOR + 200 basis points."

Following the above decision of Hon'ble ITAT, Hyderabad, it is directed to compute interest on outstanding trade receivables to the appellant from its AEs by adopting LIBOR as applicable to the country in which AE is situated + 200 basis points instead of short term deposit rates of SBI.

It is noted that the TPO has allowed credit period of 60 days while calculating interest on outstanding trade receivables and the appellant is seeking the credit period of 90 days which has not been substantiated by the appellant with regard to its transactions with unrelated parties nor any explicit invoices regarding the same have been produced. The credit period of 60 days allowed by the TPO is found reasonable as this is the prevalent credit period allowed in the line of business of the appellant unless specifically proved otherwise by the appellant in the peculiarity of its own operations and transactions with non-AEs for similar product/ transactions.

The credit period of 60 days was also found reasonable in the decision of ***Mumbai Bench of the ITAT in the case of Tecnimont ICB House Vs. DCIT in ITA No.487/Mum/1014 vide order dated 08.07.2015.*** *Accordingly, ground no.5(b) and 5(c) are dismissed and 5(a) is partly allowed to the extent of relief granted on the basis of LIBOR plus 200 basis points."*

11.1. The written submissions filed by the ld.DR with respect to Interest on Outstanding Trade receivables are to the following effect :

"The TPO during the course of TP proceedings treated the outstanding receivables as separate international transactions and computed interest of Rs.56,86,90,526/- on delayed receivables @ SBI short term deposit rates.

The CIT(A) directed the TPO to adopt interest on outstanding trade receivables @LIBOR + 200 basis points relying on the decision of the Hon'ble ITAT, Hyderabad in the case of Albany Molecular Research vs. DCIT, Circle-1(1), Hyderabad dated 26.11.2020.

The decision of CIT(A) is not acceptable for the following reasons :

(a) that TPO has taken SBI Deposit Rate which is an independent non AE parameter as comparable.

(b) Hon'ble ITAT in recent decisions in the cases of (I) M/s Zeta Interactive Systems (India) Pvt. Ltd. For the AY 2011-12 in ITA No.1812/Hyd/ 2017 dated 07.06.2022 (ii) M/s. Satyam Ventures Engineering Services for the AY 2010-11 in ITA No.362/Hyd/2021 dated 28.06.2021 and (iii) M/s. Apache Footware India Pvt. Ltd. for the AY 2018-19 in ITA No.568/Hyd/2022 dated 16.01.2023directed to adopt interest on delayed receivables @6% as ALP instead of LIBOR + 200 pints.

(c) The adoption of LIBOR + 200 points would amount to shifting the profit of the taxpayer to its AE situated abroad. In fact the transaction of the taxpayer is required to be examined from the perspective of a prudent businessman and required to be analyzed whether the taxpayer would give similar benefits to unrelated parties or not. Further, if the outstanding receivable are due for a longer period, then taxpayer would be required to deploy more resources

either in the form of debt/equity to meet out the cash flow/working capital requirements. Further, it would tantamount to indirect funding made by the taxpayer to its AEs by allowing the AE to utilise funds of the taxpayer as per its whims and fancies.

11.2. The ld.CIT(A) while allowing the claim of the assessee with respect to interest as trade receivables has not applied his mind before following the decision of the Tribunal in the case of M/s. Aurobindo Pharma Limited, Hyderabad Vs. ACIT, Central Circle – 1(2) (ITA No.485/Hyd/2022 dt.27.04.2023). The ld.CIT(A) relied on the decisions of ITAT, Delhi in the case of Bechtel India Pvt. Ltd. (in ITA No.6530/De1/2016 dated 16.05.2017), ITAT, Bangalore in the case of Ingersoll Rand (I) Pvt. Ltd. (dated 10.11.2017), ITAT Delhi in the case of BT e-serve India Pvt. Ltd. (dated. 30.10.2017) (87 Taxmann.com 251), ITAT, Hyderabad in the case of Albany Molecular Research Vs. DCIT, Circle-1(1), Hyderabad dated 26.11.2020 and further the decision of Mumbai Bench of the ITAT in the case of Tecnimont ICB House Vs. DCIT in ITA No.487/Mum/1014 vide order dated 08.07.2015.

11.3. Per contra, the ld. AR has made the following written submissions :

"The assessee's main argument is that it did not charge any interest whatsoever on the similarly delayed foreign Non-AE debtors. In this regard, the assessee submitted a summary of invoices realised with various delays from AEs and non-AEs and was submitted before the Ld. CIT(A), which is available on Page 110 of the order of the CIT(A) for AY 2017-18. This is further expanded as under by including the amounts involved in respect of these invoices:-

Further, the assessee also submitted Annexure-L in physical form before CIT(A) in respect of invoice details of realisation of AE and Non-AE exports from two plants. However, the CIT(A) rejected this ground by simply stating that (at Pages 183 & 184 of the order) that the appellant did not furnish the invoice-wise realisation details of sales proceeds w.r.t. AE and Non_AE.

As can be seen from the above table, the assessee has exported goods worth 3223 crores during FY 2016-17 (mistakenly written as Rs 3003.11 Cr in the written submissions made before the CIT(A)), out of which the exports to foreign AEs amounted to Rs. 1569.19 crores (48.68%) and the remaining 51.32% of the exports were with foreign Non-AEs. So, the assessee made significant exports to non-AEs as well. Number of export invoices raised against foreign AEs stood at 1671 out of total export invoices of 4934.

Further, the analysis of above table with Annexure-L as submitted to CIT(A), these non-AE exports realised beyond credit free period can be considered as comparable uncontrolled transactions for the following factual reasons:-

(i) The delay on account of trade receivables from AE exports varies from 0 to 1250 days and for Non-AE exports, the delay on account of trade receivables varied from 0 to 1303 days.

(ii) The number of delayed invoices of Non-AE exports for each period are significant when compared to the number of delayed invoices from AEs

(iii) The export invoices are spread over all the period for FY 2016-17 for both AE and Non-AE exports

(iv) The export invoices with significant amounts were delayed for both the AE and Non-AE exports

(v) The Non-AE exports are denominated in foreign currency as similar to that of the AE exports

(vi) No interest is charged in respect of Non-AEs even where the delay is more than 500 days (as can be seen from the above table).

In view of the above, it is clear that there is equal delay of realisation of exports proceeds from foreign AEs and Non-AEs and all these Non-AE exports delayed beyond the due dates of the respective periods are comparable to that of AE exports.

Further, the assessee also did not pay any interest on trade payables of Rs 588.76 crores outstanding as on 31-03-2017.

The delay in realisation of export proceeds both from the foreign AE and Non-AEs is mainly for the following two reasons:-

(i) As all these foreign AEs and non-AEs are engaged in distribution and marketing of pharmaceutical finished products, there is naturally a delay for the stock to travel from wholesale chains to retailer and realisation of sale proceeds from retailers in their respective countries, which typically exceeds 180 days.

(ii) In order to penetrate in the pharmaceutical markets of the respective countries, the assessee company has to extend credit period beyond the due date for foreign AEs and Non-AEs.

So, it is commercial decision of the assessee out of its business expediency to give extended credit facility for both the foreign AEs and Non-AEs equally.

In summary, as the assessee did not charge interest for equal delay in realisation of Non-AE exports, under internal CUP method, the assessee is justified in not charging interest on delayed receivables from foreign AEs.

Credit Free Period:-

Without prejudice to the above argument that non-charging of interest on delayed receivables from foreign AEs is justified in view of the fact that the assessee is not charging any interest for such equal delay of realisation of receivables from foreign AEs, the assessee submits that even if interest is chargeable on delayed receivables, the interest-free credit period must be allowed for 180 days, rather than 60 days as allowed by the Ld. CIT(A) mainly for the following reasons:-

(i) There are significant number of export invoices raised against foreign AEs with 180 days credit period. A sample list is enclosed herewith as Annexure-I.

(ii) There are also significant number of export invoices raised against foreign Non-AEs with 180 days credit period. Some of the sample invoices raised during the year 2016-17 are enclosed herewith as Annexure-II.

(iii) The TPO or the Department allowed 180 days credit free period while computing interest on delayed receivables in similar set of facts and circumstances in the preceding assessment year i.e. AY 2016-17. A copy of the order of the TPO dated 09-02-2024 is attached herewith as Annexure-III.

(iv) The TPO or the Department allowed 180 days credit free period while computing interest on delayed receivables in similar set of facts and circumstances for the subsequent assessment year i.e. AY 2022-23. A copy of the order of the TPO dated 09-02-2024 is attached herewith as Annexure-IV.

On without prejudice basis, and on the rule of consistency, the Hon'ble Tribunal may allow 180 days credit period for AY 2017-18 as well."

12. We have heard the rival submissions and perused the material on record. We have examined whether the interest on delayed outstanding payments is an international transaction or not. This issue has come up for our consideration in the following matters :

1. M/s Zeta Interactive Systems (India) Pvt. Ltd. For the AY 2011-12 in ITA No.1812/Hyd/ 2017 dated 07.06.2022
2. M/s. Satyam Ventures Engineering Services for the AY 2010-11 in ITA No.362/Hyd/2021 dated 28.06.2021 and
3. M/s. Apache Footware India Pvt. Ltd. for the AY 2018-19 in ITA No.568/Hyd/2022 dated 16.01.2023

12.1. We have consistently held that the interest on delayed outstanding trade receivables is an international transaction and after holding so, we have benchmarked the international transactions at 6% SBI rate.

12.2 In the case of Apache Footware India Pvt. Ltd. (supra), we have held as under :

"9. We have heard the rival submissions and perused the material on record. From the perusal of the order passed by the TPO, it is clear that both the lower authorities have given an elaborate reasoning for coming to the conclusion that the delay in receiving the receivables is an international transaction and is required to be bench marked in accordance with law. We are reproducing hereinbelow the chart filed by the assessee which is to the following effect :

	APACHE FOOTWEAR INDIA PVT. LTD / AY 2018-19			
	Export Receivables Realisation pattern during A.Y. 2018-19			
	Particulars	Total Number of Invoices during the A.Y. 2018-19	Amount Export Invoice value in Rs.	% of invoices realized to total invoices raised during the year
A)	Realised within credit period	3,001	6,48,15,77,864	91.22
B)	Realised beyond credit period of 60 days			
	<10 days	241	36,27,20,363	5.10
	10-20 days	204	18,88,04,889	2.66
	20-30 days	45	7,11,80,351	1.00
	30-45 days	--	--	--
	45-60 days	--	--	--
	>=60 days	29	11,63,338	0.02
	Sub total (B)	519	62,38,68,941	
	Total (A) + (B)	3520	7,10,54,46,805	

10. From the perusal of the Chart, it is absolutely clear that there were 519 invoices valued at Rs.62,38,68,941/- for which the payments were due beyond the credit period 60 days. In our view, the lower authorities have computed the Arm's Length Price and have mentioned that the same being international transaction, the same is required to be bench marked by considering the SBI short term deposit interest rate.

11. The above-said issue of delay in receivables is no more res integra. The co-ordinate Bench in the cases relied upon by the Revenue examined the issue and thereafter directed the TPO / Assessing Officer to apply rate of interest of 6% on outstanding receivable at the year end. The assessee had relied upon various judgements. All these judgments have been considered by the coordinate Bench and thereafter, the above said direction was issued by the Bench. 12. The reliance of the assessee on the decision of Hon'ble

Delhi High Court in the case of PCIT Vs. Boeing India Pvt. Ltd., reported in 2022 (10) TMI 498 is of no use to the assessee as in the said judgement, the Hon'ble Delhi High Court in Para 15 had mentioned that the issue receivable is essentially a question of fact. As mentioned hereinabove, in the present case, there is a delay in receiving the outstanding of Rs.62,38,68,941/- in respect of 519 invoices as mentioned hereinabove and there is no explanation given by the assessee for such a delay in receiving the amount. The very purpose of benchmarking the transaction is to ascertain whether assessee, who is similarly situated, would render the same kind of services at the same or similar price to a third party or not. If we examine the issue in the above-said 21 Apache Footwear India Pvt.Ltd. context, it would be clear that the assessee would charge bank interest or any other interest with a view to compensate itself on account of delay in making the payment. Hence, we do not find any error in the same.

13. The reliance of the assessee in the case of Betchal India Pvt Ltd (supra) is also not correct as A.Y. in that case was 2010-11. By the Finance Act, 2012, the Explanation was inserted in Sec.92B of the Act and by virtue of which "payment or deferred payment or receivable or any other debt arising during the course of business" has been considered to be an international transaction which is required to be benchmarked. Following the above said Explanation, the co-ordinate Bench for the subsequent assessment years vide order dt.16.05.2017 in the case of Betchal India Pvt. Ltd ITA No.6530/Del/2016 (supra) had decided the issue against the assessee. In view of the above, the decision relied upon by the assessee is of no help to assessee.

14. So far as the argument of the assessee that the assessee is a debt free company and therefore, no borrowed fund was used for making supplies to it's A.E. and therefore, is not liable to be compensated for the delay in receiving the receivable is concerned, the same in our view, suffers from inherent flaw as in the T.P. analysis, the TPO is required to examine whether the assessee had supplied the product / services to it's A.E. at Arm's Length Price or not ? If by providing the services / goods at a discounted rate or permitting the assessee to receive the payment after a long period of 60 days or 90 days, then it will amount to permitting the A.E. to use the working capital of the assessee for the purposes of earning the profit. No prudent business man would venture into 22 Apache Footwear India Pvt.Ltd. this kind of activity and permit a third party to use the working capital of the assessee and earn profit thereon. In the present case, though the assessee was required to maintain the T.P. Study and file the same before the TPO to show that the assessee's transactions with it's A.E. were at Arms Length however, nothing has been brought to our notice that the assessee has brought any comparable instance. In these circumstances, the TPO had applied the banking rate as applicable to short term loans. In our view, the same is required to be corrected and instead thereof, ALP is to be computed by adding notional interest @ 6% on the receivable. Considering the totality of facts and circumstances, in view of the decisions cited supra and in view of foregoing discussion, we dismiss the appeal of the assessee. Accordingly, the appeal of the assessee is dismissed."

14. Respectfully following our own decision, we direct the Assessing Officer to determine the ALP and compute the same by adding notional interest @ 6% on the receivable beyond a period of 60 days. ***Thus, ground nos. 5 to 10 are partly allowed."***

12.3. However, while holding the outstanding trade receivables as international transactions, we have granted a credit period of 60 days in the case of Apache Footware India Pvt. Ltd.

12.4. In the present case, the assessee argues that the Assessing Officer granted the assessee a credit period of 180 days in the previous assessment year and in the subsequent assessment.

12.5 The learned TPO in para 13.3.1 of its order dt.29.01.2021 had computed the interest on delayed receivables as under :

"13.3. Computation of interest on delayed receivables

13.3.1. As discussed in the preceding paragraphs, interest on the delayed trade receivables was proposed to be computed and the assessee (vide the show cause issued on 21.12.2020) was asked to furnish invoice wise details of all the trade receivables from AEs during the year. The following details were asked in a particular format: Amount raised in invoice; date of invoice,,date of receipt, delay in no. of days.

13.3.2. Accordingly, interest is computed' by adopting the short term deposit rate of SBI for F.Y. 2016-17.

Duration	Revised For Public w.e.f. 05.10.2015	Revised For Public w.e.f. 27.04.2016	Revised For Public w.e.f. 01/09/2016	Revised For Public w.e.f. 24.10.2016	Revised For Public w.e.f. 17.11.2016	Revised For Public w.e.f. 01.03.2017
7 days to 45 days	**5.25**	5.50	5.50	5.50	5.50	5.50
46 days to 179 days	6.50	6.50	6.50	6.50	6.50	6.50
180 days to 210 days	6.75	6.75	6.75	6.75	6.75	**6.50**
211 days to less than 1	7.00	7.00	7.00	7.00	7.00	**6.50**

year						
1 year to 455 days	**7.25**	7.25	**7.15**	**7.05**	**6.90**	6.90
456 days to less than 2 years	7.50	7.50	**7.25**	**7.10**	**6.95**	**6.75**
2 years to less than 3 years	7.50	7.50	**7.25**	**7.00**	**6.85**	**6.75**
3 years to less than 5 years	7.00	7.00	7.00	**6.50**	6.50	6.50
5 year and upto 10 years	7.00	7.00	7.00	**6.50**	6.50	6.50

Sl. No.	Name of AE	Interest on opening receivables	Interest on invoices raised during the year	Total interest
1	HETERO MEXICO SA DE CV	3,01,78,410	55,03,857	3,56,82,267

2	AKAR COLUMBIA SAS	52,24,990	18,18,045	70,43,035
3	AMAROX PHARMA SA DE VE		94,451	94,451
4	ASCENT PHARMACEUTICALS INC	2,63,32,273	36,013	2,63,68,286
5	CAMBER PHARMACEUTICALS	21,92,12,999	1,82,93,454	23,75,06,453
6	HETERO FZCO	1,42,37,109	10,11,80,711	11,54,17,820
7	HETERO MALTA LTD		5,76,717	5,76,717
8	HETERO USA INC.	3,34,270	20,66,486	24,00,756
9	HETERO THAILAND LTD	2,13,219	4,84,915	6,98,134
10	MAKIZ PHARMA	6,55,505	28,026	6,83,531
11	MINT PHARMACEUTICALS	6,48,342	4,50,702	10,99,044
12	PHARMA MED HEARLTHCARE	22,218	61,354	83,572
13	HETERO SINGAPORE PTE LTD		2,12,741	2,12,741

	TOTAL	**29,70,59,335**	**13,08,07,472**	**42,78,66,807**

Thus, arm's length interest amount to be charged works out to be Rs. 42,78,66,807/-. The same is treated as adjustment u/s 92CA for interest on delayed receivables from AEs."

12.6 The ld.CIT(A), in the impugned order, restricted the period to 60 days, though the assessee sought a credit period of 90 days. The finding of the ld.CIT(A) at page 187 is as under :

"It is noted that the TPO has allowed credit period of 60 days while calculating interest on outstanding trade receivables and the ***appellant is seeking the credit period of 90 days which has not been substantiated by the appellant*** *with regard to its transactions with unrelated parties nor any explicit invoices regarding the same have been produced. The credit period of 60 days allowed by the TPO is found reasonable as this is the prevalent credit period allowed in the line of business of the appellant unless specifically proved otherwise by the appellant in the peculiarity of its own operations and transactions with non-AEs for similar product/ transactions.*

*The credit period of 60 days was also found reasonable in the decision of Mumbai Bench of the ITAT in the case of Tecnimont ICB House Vs. DCIT in ITA No.487/Mum/1014 vide order dated 08.07.2015. Accordingly, ground no.5(b) and 5(c) are dismissed and 5(a) is partly allowed to the extent of relief granted on the basis of LIBOR plus 200 basis points****."(emphasis supplied by us)***

12.7 Surprisingly, the assessee before us in the written submissions had sought the credit period of 180 days as against 90 days claimed before the ld.CIT(A). The basis for claiming 180 days by the assessee before us was the order passed by the Assessing Officer / TPO u/s 92CA(3) for the assessment year 2016-17 and 2022-23 dt.09.02.2024. In order for the assessment year 2016-17, the TPO in Para 6.5.6 to 6.5.8 in order dt.09.02.2024 it was held as under :

"6.5.6 In view of the above, SBI short Term deposit rates as applicable for F Y 2015¬16 is considered as appropriate under Other Method to determine ALP of Outstanding receivables'. During the course of Transfer Pricing Proceedings of the cases for AY 2016-17, the then TPO gathered the SBI Term deposit rates vide issuance of notice u/s. 133(6) of the Income Tax Act, 1961. The details of SBI Term deposit rates are as under:

	wef	wef	wef	wef	wef	wef	wef
Duration	08-12-2014	10-04-2015	11-05-2015	08-06-2015	08-06-2015	08-06-2015	08-06-2015
7 days- 45 days	5.00%	6.0 ⁹	64)0%	5.50%	5.50%	5.50%	5.25%
46 days- 90 days	7.00%	6.00%	6.00%	5.5d%	5.50%	5.50%	5.25%
91 days - 179 days	7.00%	" 7.00%	7.00%	6.75%-	6.75%	6.75%	6.50%
180 days - 210 days	7.25%	7.25%	7.25%	7.25%	7.25%	7.00%	6.75%
211 days to 1 year	7.50%	7.50%	7.50%	7.50%	7.50%	7.25%	7.00%
1 year to 455 days	8.50%	8.25%	8.00%	8.00%	7.75%	7.50%	7.25%
456 days to <2 years	8.50%	8.50%	8.25%	8.25%	8.00%	7.75%	7.50%
2 years to <3 years	8.50%	8.50%	8.25%	8.25%	8.00%	7.75%	7.50%

6.5.7 Accordingly, interest is computed' by adopting the short term deposit rate of SBI for F.Y. 2015-16 after allowing a credit period of 180 days(computation is attached as annexure):

Description	Amount (Rs.)
Interest on delayed trade receivables in respect of invoices raised during the FY 2015-16	4,51,00,952
Add : Interest on delayed trade receivable in respect of invoices which were raised in previous FYs but remained unpaid on the opening day of the current FY 2015-16	4,08,58,682
Total interest on delayed receivables	**8,59,59,634**

6.5.8 Accordingly, an amount of Rs.8,59,59,634/- is proposed as an adjustment towards interest on delayed trade receivables."

12.8 Similarly, in order dt.09.02.2024 for the assessment year 202-23, the TPO at Para 6.5.6 to 6.5.9 has held as under :

"6.5.6 With regard to the contention of the taxpayer that if at all any interest is to be charged the same is to be computed with reference to credit period allowed to Non-AEs. The contentions of the taxpayer were examined. Considering the facts of the case and submissions of the taxpayer and keeping in view of the fact that credit period allowed to most of the Non-AEs is 180 days, a credit period of 180 days is considered as internal CUP and thereby considered for the purpose of working of interest in respect of receivables from AEs.

6.5.7 In view of the above, SBI short Term deposit rates as applicable for F Y 2021¬22 is considered as appropriate Other Method to determine ALP of 'Outstanding receivables. The details of SBI Term deposit rates are as under:

Duration	Revised for public w.e.f 08.01.2021	Revised for public w.e.f 15.01.2022	Revised for public w.e.f 15.02.2022	Revised for public w.e.f 14.06.2022
7 days to 45 days	2.90	2.90	2.90	2.90
46 days to 179 days	3.90	3.90	3.90	3.90
180 days to 210 days	4.40	4.40	4.40	4.40
211 days to less than 1 year	4.40	4.40	4.40	4.60
1 year to less than 2 years	5.00	5.10	5.10	5.30
2 years to less than 3 years	5.10	5.10	5.20	5.35
3 years to less than 5 years	5.30	5.30	5.45	5.45
5 years and up to 10 years	5.40	5.40	5.50	5.50

6.5.8 Accordingly, interest is computed by adopting the short term deposit rate of SBI for F.Y. 2021-22 after allowing a credit period of 180 days as under:

Description	Amount (Rs.)
Interest on delayed trade receivable in respect of invoices raised during the F.Y. 2021-22.	8,69,73,742
Add : Interest on delayed trade receivable in respect of invoices which were raised in previous FYs but remained unpaid on the opening day of the current F.Y 2021-22.	24,03,09,219
Total interest on delayed receivables	**32,72,82,961**

6.5.9 Accordingly, an amount of Rs.32,72,82,961/- is proposed as an adjustment towards interest on delayed trade receivables."

12.9 From the perusal of para 6.5.7 for the assessment year 2016-17, it is clear that the Assessing Officer has computed the interest by adopting the short term deposit of SBI for financial year 2015-16 after allowing a credit period of 180 days. No reasoning was given by the Assessing Officer in order dt.26.09.2023 while granting the credit period of 180 days.

12.9.1. Similarly, the Assessing Officer for the A.Y 2022-23 in order dt.09.02.2024, it had mentioned by the Assessing Officer that "considering the facts of the case and submissions of the taxpayer and keeping in view of the fact that credit period allowed to **most of the Non-AEs is 180 days, a credit period of 180 days is considered** as internal CUP and thereby considered for the purpose of working of interest in respect of receivables from AEs."

12.10 Though the assessee has relied upon the assessment order for the A.Y 2022-23 dated 09.02.2024, however, this Tribunal

cannot blindly follow the order of the Assessing Officer for the present assessment year. In fact, in the written submissions reproduced hereinabove, the assessee has mentioned that **"The assessee's main argument is that it did not charge any interest whatsoever on the similarly delayed foreign Non-AE debtors."** This statement of fact made by the assessee for the AY. 2017-18 is contrary to the statement of facts made for the assessment years 2016-17 and 2022-23. Further, as mentioned hereinabove, at page 187 of the order of ld.CIT(A), it is clearly mentioned that the assessee has not substantiated the credit period of 90 days. In our view, the onus is on the assessee to prove that the delayed credit period of more than 60 days is permissible in the Pharmaceutical industry. As mentioned hereinabove, we had consistently followed and granted the credit period of 60 days which we have also done in the case of M/s Aurobindo Pharma Ltd. Vs ACIT, Central Circle-1(2), Hyderabad in ITA No:485/Hyd/2022 dated 27.04.2023 wherein we have also granted the credit period of 60 days, which is also in the same of line of business. No special treatment can be given to the assessee. Furthermore, once the assessee failed to justify and substantiate the credit period of 90 days before the lower authorities, it is preposterous to claim 180 days credit period before the Tribunal. Hence, we do not agree with the contention of the assessee. With respect to the submission that assessee has not charged any interest from the non-AE and therefore, the non-AE should be considered as an internal comparable. This contention of the assessee is without any basis and the assessee failed to establish that the assessee has not charged any interest from its non-AE before the lower authorities and further, the assessee failed to prove that the non-AE were operating in the same segment,

product, region and with the same terms and conditions of sale and purchase of Pharmaceutical products.

12.11 **In the light of above, the grounds 5 to 7 with respect to outstanding trade receivables raised by the Revenue are partly allowed and the grounds relating to this issue i.e., 4(a) to 4(d) raised by the assessee in ITA No.312/Hyd/2023 for A.Y. 2017-18 are dismissed.**

GROUNDS 8 AND 9

13. **Grounds 8 and 9 are with respect to inclusion of M/s. Sun Pharma Laboratories and M/s. Macleods Pharmaceuticals Ltd by the ld.CIT(A) as comparable.**

131. The ld.DR has drawn our attention to Page 196 and 197 of the order of ld.CIT(A), which is to the following effect :

> ***"Related Party Transaction (RPT) filter:***
>
> *Further, it is seen that the TPO has applied 25% RPT filter in the search process under TNMM, wherein companies with related party transactions more than 25% were rejected. The applicability of this fifty is not disputed by the appellant.*
>
> *However, it is noticed that from the accept/reject matrix of search process carried out by the TPO, the following companies were rejected as comparables based on 25% RPT filter:*
>
> *(i). Sun Pharma Laboratories Ltd.*
>
> *(ii). Macleods Pharmaceuticals Ltd.*
>
> *On the contrary, based on the information and data available in the above companies' Annual Reports and Prowess database for F.Y. 2016-17, it can be seen from the following table that these companies qualify25% RPT filter for the current year:*

Si No	Name of the Company	RPT%
		FT16-17
1	Sun Pharma Laboratories Ltd.	7.71%
2	Macleods Pharmaceuticals Ltd.	14.79%

The above companies also qualify 25% export filter, manufacturing sales > 75% Revenue filter applied by the TPO and turnover filter of greater than Rs.100 crores, as can be seen from the table below:-

SI No	Name of the Company	Export to Turnover %	Turnover for the FYI6-17(Rs. Cr)	Manufacturing Sales > 75% Revenue FY
	1	FY16-17		
1	Sun Pharma laboratories Ltd.	> 25% (as per TPO order, failed only RPT filter and not export filter)	5323.16	5322.89 (99.99%)
2	Macleods Pharmaceuticals Ltd.	32.99%	5134.43	3928.43 (76.51%)

Thus, since the above two companies are qualifying the 25% RPT filter, 25% export filter, manufacturing sales > 75% Revenue filter, turnover filter of greater than Rs.100 crones and all other filters applied by the TPO and are also engaged in manufacturing of generic pharmaceutical formulations, these companies are to be considered as comparable companies.

13.2 On the other hand, Ld. AR submitted that the submission of the Revenue is correct and therefore, the assessee has no objection to decide the issue with respect to the inclusion of M/s. Sun Pharma Laboratories and M/s. Macleods Pharmaceuticals Ltd by the ld.CIT(A) as comparables.

14. We have heard the rival submissions and perused the material on record.

14.1 The assessee in the T.P Report has given the details of units, which are eligible for different deductions. (The table under page 189)

Sr. No.	Name of the Unit	Section under which Deduction/Exemption	Amount of Deduction/	OP/OC	OP/OR
1	Unit V - (SEZ Jedcharla)	Sec. 10AA	26,21,39,692	14.06%	12.33%
2	Unit VA - (SEZ Jedcharla)	Sec. 10AA	75,54,69,091	67.60%	**40.33%**
3	Unit IX -	Sec. 10AA	2,41,02,756	15.27%	13.25%
	(SEZ Nakkapally)				
4	Unit IV - Baddi	Sec 80IC	28,74,27,849	34.61%	**25 71%**

14.1.1. Out of 4 units, the TPO noted that the Unit No.2 & 4 are showing the higher profit (OP/OR) at 40.33% and 25.71% respectively. The appellant had chosen itself as a testing party and applied TNMM as the most appropriate method. The TPO has found that the method conducted by the assessee was not appropriate. Therefore, the TPO has conducted its own study by adopting TNMM as MAM and by applying the following filters :

(a) Use of current year data.
(b) Companies having different financial year ending (i.e. not March 31, 2017) or data of the company Which does not fall within 12-month period i.e. 01-042016 to 31-03-2017, were rejected
(c) Companies having negative net worth were excluded
(d) Companies having persistent loss were excluded
(e) Companies whose manufacturing sales is less than 75% of its total sales were excluded
(f) Companies who have more than 25% related party transactions of the sales were excluded

(g) Companies whose Net Sale was less than Rs.1 Crore were excluded

(h) Companies who have export sales income less than 25% of the sales were excluded.

14.2 Based on the above filter, the TPO has found out 19 comparables which are to the following effect :

S. No.	Company Name	Total OR In Millions (Rs.)	Total OC In Millions (Rs.)	Total OP In Millions (Rs.)	Wt. Avg OP/OR (%)	Turnover for AY 2017-18 (in Crores)
1	Medico Remedies Ltd.	1826	1743	82	4.51	57.19
2	R P G Life Sciences Ltd.	8732	8217	515	5.9	306.81
3	Bharat Parenterals Ltd.	3968	3641	327	8.23	122.14
4	Lee Pharma Ltd.	5647	5135	512	9.07	205.07
5	Cadila Pharmaceuticals Ltd.	46273	42029	4244	9.17	1604.07
6	Bajaj Healthcare Ltd.	6768	6058	710	10.48	230.67
7	& Organics Ltd.	8415	7473	941	11.19	
8	Celon Laboratories Pvt. Ltd.	2626	2329	297	11.31	107.38
9	Kopran Ltd.	7448	6571	877	11.77	181.66

10	Indoco Remedies Ltd.	30183	26339	3844	12.74	1094.06
11	Lincoln Pharmaceuticals Ltd.	8701	7591	1110	12.76	308.06
12	Cipla Ltd.	339890	287315	52575	15.47	10637.08
13	Granules India Ltd.	40005	33709	.6296	15.74	1374.16
14	Shree Ganesh Remedies Ltd.	539	454	85	15.86	20.00
15	VasudhaPharmaChem Ltd.	16417	13678	2739	16.68	601.77
16	Malladi Drugs 86 Pharmaceuticals Ltd.	8997	7437	;1560	17.34	330.80
17	Micro Labs Ltd.	81643	66981	14662	17.96	2598.76
18	Centaur Pharmaceuticals Pvt. Ltd.	15832	12913	‘ 2919	18.44	553.38
19	Unichem Laboratories Ltd.	38310	27773	10537	27.5	1413.85

14.3. Based on the above comparables, the TPO computed the ALP of the specified domestic transaction at 12.74%.

14.4 Feeling aggrieved with the same, assessee filed appeal before the ld.CIT(A), who examined the filters and found that the filters applied by the TPO for calculating Arm’s length price of specified domestic transactions and however applying the turnover filter of greater than Rs.1 crore was inappropriate. However, it was observed that the assessee has requested 1/10 to 10 times turnover filter. Based on the above said filters, the ld.CIT(A) had found that following 17 comparables have qualified for 1/10th turnover of more than 100 crores. (17 comparables list page 193).

S. No.	Company Name	Turnover for FY 16-17 (Rs Cr)
1	Cadila Pharmaceuticals Ltd	1604.07
2	Iridoco Remedies Ltd	1094.06
3	C !pia Ltd	10637.08
4	Granules India Ltd	1374.16
5	VasudhaPharmaChem Ltd	601.77
6	Micro Labs Ltd	2598.76
7	Centaur Pharmaceuticals Pizt. Ltd	553.38
8	Unichem Laboratories Ltd	1413.85
9	Bajaj Healthcare Ltd.	230.67
10	Bharat Parenterals Ltd.	122.14
11	Celon Laboratories Pvt. Ltd.	107.38
12	K2pran Ltd.	181.66
13	Lee Pharma Ltd.	205.07
14	Lincoln Pharmaceuticals Ltd.	308.06
15	Malladi Drugs & Pharmaceuticals Ltd.	330.80
16	Mangalam Drugs & Organics Ltd.	312.67
17	R P G Life Sciences Ltd.	306.81

14.5. The ld.CIT(A) while deciding the above observed that the company by name Medico Remedies Limited and Shree Ganesh Remedies Limited has not qualified to export turnover filter and the ld.CIT(A) has deleted the same. The ld.CIT(A) had applied RPT filter and found that the TPO has rejected M/s. Sun Pharma Laboratories and M/s. Macleods Pharmaceuticals Ltd. However, the ld.CIT(A) on examination found that these two comparables have fulfilled the RPT filters and have included these comparables as suitable comparables. So the final list of comparables found by the ld.CIT(A) were mentioned at page 198 of the order, which are to the following effect :

S. No.	Company Name	Turnover for FY 16-17 (Rs Cr)	Remarks
1	Cadila Pharmaceuticals Ltd	1604.07	TPO's Comparable
2	Indoco Remedies Ltd	1094.06	TPO's Comparable
3	Cipla Ltd	10637.08	TPO's Comparable
4	Granules India Ltd	1374.16	TPO's Comparable
5	VasudhaPharmaChem Ltd	601.77	TPO's Comparable
6	Micro Labs Ltd	2598.76	TPO s Comparable
7	Centaur Pharmaceuticals Pvt. Ltd	553.38	TPO's Comparable
8	Unichem Laboratories Ltd	1413.85	TPO's Comparable
9	Bajaj Healthcare Ltd.	230.67	TPO's Comparable
10	Bharat Parenterals Ltd.	122.14	TPO's Comparable
11	Celon Laboratories Pvt. Ltd.	107.38	TPO's Comparable
12	Kopran Ltd.	181.66	TPO's Comparable
13	Lee Pharma Ltd.	205.07	TPO's Comparable
14	Lincoln Pharmaceuticals Ltd.	308.06	TPO's Comparable
15	Malladi Drugs & Pharmaceuticals Ltd.	330.80	TPO's Comparable
16	R P G Life Sciences Ltd.	306.81	TPO's Comparable
17	Ajanta Pharma Ltd	1822.71	Assessee's comparable
18	Divi'S Laboratories Ltd	4066.80	Assessee's comparable
19	NatcoPharma. Ltd	2018.60	Assessee's comparable
20	Sun Pharma Laboratories Ltd	5323.16	Assessee's comparable
21	Macleods ‘I tic Pharmaceuals Ltd	5134.43	Assessee's comparable

14.6 The Revenue is in appeal for wrong inclusion of the above said two companies namely M/s. Sun Pharma Laboratories and M/s. Macleods Pharmaceuticals Ltd in ground nos.8 and 9 before us on the pretext that these two companies fall on RPT filters. The ld. DR contended that on examination of annual reports of these companies, we may know that these companies had been wrongly included.

14.7 In response thereto, the ld. AR for the assessee has submitted that the assessee has no objection if these companies are excluded

from the list of comparables. As both the parties have agreed for exclusion of these two companies namely, M/s. Sun Pharma Laboratories and M/s. Macleods Pharmaceuticals Ltd and therefore, we direct the TPO / Assessing Officer to exclude these two comparables. **Accordingly, we allow the grounds of Revenue.**

GROUNDS 10 TO 15.

15. Grounds 10 to 15 are inter-connected and are with respect to R & D Expenses, Head Office & Marketing Office Expenses while computing the PLI of the comparable companies.

15.1 The ld.DR for the Revenue had submitted that the TPO, while computing the arms-length price of the specified domestic transaction with respect to 4 units, had computed the ALP at 12.74%. As against the above, the unit-wise margin of the eligible units are as under : (75 of the TPO order)

> *"19.5 Computation of Arm's Length Price:*
>
> *i) The median of the Profit Level indicators is taken as the arm's length margin.*
>
> *Based on this, the arm's length price of the specified domestic transactions(inter unit transfer of goods) is computed adopting the ALP as under:*
>
> *In view of the above, the arm's length margin is computed as under:*

Arms length margin is 12.74%

Unit wise margins of the eligible units are as under:

Sr. No.	Name of the Unit	Section under which Deduction/Exemption claimed	Amount of Deduction/Exemption	OP/OC	OP/OR
1	Unit V — (SEZ Jedcharla)	Sec. 10AA	26,21,39,692	14.06%	12.33%
2	Unit VA - (SEZ Jedcharla)	Sec. 10AA	75,54,69,391	67.60%	**40.33%**
3	Unit IX - (SEZ Nakkapally)	Sec. 10AA	2,41,02,756	15.27%	13.25%
4	Unit IV — Baddi	Sec.80IC	28,74,27,849	34.61%	**25.71%**

As seen from the above, Unit VA — (SEZ Jedcharla) and Unit IV Baddi are showing more than ordinary profits. The two eligible units which are showing more than ordinary profits are having purchase transactions with the non eligible units. Therefore, the TPO has chosen OP/OR as the PLI and the exempt units as the tested parties and compared the margins of the each unit with the margins of the external comparables."

15.2 It was submitted that as clear from the table above, the unit VA-SEZ – Jedcharia had OP / OR (operating cost / operating revenue) at 40.33% and whereas Unit IV Baddi was having OP/OR at 25.71%. It was noted by the TPO that these two companies are showing more than the ordinary profit as they were having purchase transactions with non-eligible units. Therefore, the TPO made the adjustments towards the unit VA-SEZ – Jedcharia @ Rs.112.61 crore and Unit IV Baddi @ Rs.51.95 crore u/s 92CA(3) of the Act for specified domestic transaction.

15.3 The assessee preferred the appeal before the ld.CIT(A). The ld.CIT(A) at page 198 had noted down as under :

"Final set of comparables :

In view of the above discussion, after applying turnover filter of greater than Rs.100 crores, export filter > 25%, RPT filter < 25%, manufacturing sales > 75% of Revenue along with other filters selected by the TPO, the final comparables that need to be considered to the appellant company for specified domestic transactions are as under:

S. No.	Company Name	Turnover for FY 16-17 (Rs Cr)	Remarks
1	Cadila Pharmaceuticals Ltd	1604.07	TPO's Comparable
2	Indoco Remedies Ltd	1094.06	TPO's Comparable
3	Cipla Ltd	10637.08	TPO's Comparable
4	Granules India Ltd	1374.16	TPO's Comparable
5	VasudhaPharmaChem Ltd	601.77	TPO's Comparable
6	Micro Labs Ltd	2598.76	TPO s Comparable
7	Centaur Pharmaceuticals Pvt. Ltd	553.38	TPO's Comparable
8	Unichem Laboratories Ltd	1413.85	TPO's Comparable
9	Bajaj Healthcare Ltd.	230.67	TPO's Comparable
10	Bharat Parenterals Ltd.	122.14	TPO's Comparable
11	Celon Laboratories Pvt. Ltd.	107	TPO's Comparable
12	Kopran Ltd.	181.66	TPO's Comparable
13	Lee Pharma Ltd.	205.07	TPO's Comparable
14	Lincoln Pharmaceuticals Ltd.	308.06	TPO's Comparable
15	Malladi Drugs & Pharmaceuticals Ltd.	330.80	TPO's Comparable
16	R P G Life Sciences Ltd.	306.81	TPO's Comparable
17	Ajanta Pharma Ltd	1822.71	Assessee's comparable
18	Divi'S Laboratories Ltd	4066.80	Assessee's comparable
19	NatcoPharma. Ltd	2018.60	Assessee's comparable
20	Sun Pharma Laboratories Ltd	5323.16	Assessee's comparable
21	Macleods ' I tic Pharmaceuals Ltd	5134.43	Assessee's comparable

Computation of Profit Level Indicator (PM):

The next step after finding perfect comparables is computation of PLI.

To calculate the PLI (OP/OR), the PLI of the appellant company should be compared with PLI of comparable companies at unit level. However, it is seen that the TPO has compared the unit level PLI of the appellant company with entity level PLI of comparable companies while computing the PLI which is not correct as there are other expenses which need to be attributed which has been done by the appellant entity and not explicitly apportioned to the unit but are attributable to the unit.

The TPO considered the unit level PLI for the two eligible units of the appellant company as under:-

Si. No	Description	Unit V A, Jadcherla	Unit IV, Baddi
1	Operating Revenues	408.10	400.52
2	Operating Cost	243.49	297.54
3	Operating Profit	164.61	102.98
4	Margin (OP/ OR)	40.33%	25.71%

The above financials of the eligible units were based on audited financial statements submitted by the appellant. However, the following expenditures were not allocated by the appellant to these units, while preparing the financial statements of these units:-

i) R&D Expenditure - Rs.54,89,45,332/-

ii) Head Office & Marketing Office Expenses - Rs.251,09,12,940/-

Therefore, as per above submissions, the computation of PLI at the unit (enterprise) level of the appellant doesn't include major expenses towards R&D, Head Office and Marketing Office, whereas the comparable companies' margins were computed after considering these expenses (already debited in their profit & loss account) while computing the PLI at the entity level.

It can be seen from the audited financials of the comparable companies that these companies report R&D expenses and marketing expenses under separate heads, but don't show head office expenses as a separate head. Therefore, only R&D and marketing expenses are to be allocated and nok

head office expenses while computing margins of the units of the appellant company.

In view of the above, to maintain consistency, the comparison of PLI should be made at same level of comparable companies with the appellant company, so that comparison of profitability is proper. Based on the information available in annual reports of the comparable companies, the PLIs of the final 21 comparable companies computed before interest, tax, R&D expenses and marketing expenses, are as under:

S. No.	Name of the Company	Total Income for FY 16-17 (Rs Cr)	Total OR for 3 Yrs (Rs. Cr)	Total OC For 3 Yrs (Rs. Cr)	Total OP for 3 Yrs (Rs. Cr)	Wt. Avg OP/OR (%)
1	R P G Life Sciences Ltd.	306.81	844.17	809.45	34.72	4.11%
2	Bharat Parenterals Ltd.	122.14	390.20	363.36	26.84	6.88%
3	Kopran Ltd.	181.66	703.97	647.10	56.87	8.08%
4	Celon Laboratories Pvt. Ltd.	107.38	254.07	232.86	21.21	8.35%
5	Bajaj Healthcare Ltd.	230.67	671.82	610.38	61.44	9.15%
6	Lincoln Pharmaceuticals Ltd.	308.06	851.06	757.07	93.99	11.04%
7	Lee Pharma Ltd.	205.07	559.49	483.70	75.79	13.55%
8	Malladi Drugs & Pharmaceuticals Ltd.	330. 80	878.74	737.17	141.57	16.11%
9	Sun Pharma Laboratories Ltd.	5,323.16	14,427.07	11,983.76	2,443.31	16.94%
10	VasudhaPharmaChern Ltd.	555.91	1,620.17	1,341.74	278.43	17.19%
11	Cadila Pharmaceuticals Ltd.	1,656.04	4,563.96	3,748.25	815.71	17.87%
12	Micro Labs Ltd. \	2,630.63	7,633.50	6,259.25	1,374.25	18.00%
13	Unichem Laboratories Ltd.	577.02	2,912.12	2,305.88	606.24	20.82%
14	Granules India Ltd.	1,374.17	3,977.50	3,114.83	862.67	21.69%
15	Indoco Remedies Ltd. '	1,082.31	2,942.02	2,249.52	692.50	23.54%
16	Centaur Pharmaceuticals Pvt. Ltd.	582.85	1,570.80	1,153.17	417.63	26.59%
17	Cipla Ltd. ;	10,976.18	33,323.10	24,406.84	8,916.26	26.76%
18	Macleods Pharmaceuticals	5,134.43	12,841.36	9,158.53	3,682.83	28.68%
19	Divi'S Laboratories Ltd.	4,066.80	10,929.93	6,986.47	3,943.46	36.08%
20	Natco Pharma Ltd.	2,018.60	3,804.77	2,246.50	1,558.27	40.96%
21	Ajanta Pharma Ltd.	1,822.71	4,762.70	2,435.71	2,326.99	48.86%
35th **Percentile (8th Rank)**						**16.11%**
65th Percentile (14th Rank)						**21.69%**
Median (11th Rank)						**17.87%**

Therefore, the Arm's length price of the specified domestic transactions of the appellant company is calculated at 17.87%, instead of 12.74% as calculated by the TPO. Since ALP is calculated at 17.87% and Unit VA, Jedcherla and Unit IV, Baddi have shown more than ordinary profits of 40.33% and 25.71% respectively, and also have transactions with non eligible units, therefore, the said exempted units are taken as tested parties and the margin of each unit will be compared with the margins of external comparables.

Proportionate Transfer Pricing Adjustment:

Further, it is seen that while arriving at Arm's Length Price (ALP) of Specified Domestic Transactions (SDT), the TPO has considered the following financials:-

Description	*Unit VA, Jadcherla*		*. Unit IV, Baddi*	
	Amount (Rs Crore)	*Percentage of total purchases*	*Amount (Rs. Crore)*	*Percentage of total*
SDT Purchases	*31.28*	***11.28%***	*113.76*	***40.42%***
Other purchases	*246.14*	*88.72%*	*167.69*	*59.58%*
Total Purchases	*277.42*	*100%*	*281.45*	*100%*

The TPO made transfer pricing adjustment under TNMM at the enterprise (unit/undertaking) level of the appellant company, without considering the above fact that all purchases of the eligible units were not made from associated enterprises. As can be seen from above, the SDT purchases constituted only about 11.28% in Unit VA, Jadcherla and 40.42% in Unit IV, Baddi. So, at best only 11.28% and 40.42% of the operating profit of the respective units can be attributed to raw material acquired from appellant's associated units / enterprises. However, the TPO has calculated the operating profit on the entire sales of the appellant's eligible units, which is incorrect, when it is admitted position that only 11.28% and 40.42% per cent of raw material has been acquired by the appellant from its associate concerns / units for the purpose of manufacturing items.

Further, whenever TNMM is to be applied at entity level or enterprise (unit) level, the arm's length price (ALP) of international transactions or specified domestic transactions needs to be determined proportionately i.e. taking into account revenues or costs corresponding to international transactions on a proportionate basis on the costs or revenues, as the case may be This principle was followed in the decision of ***Hon'ble ITAT, Mumbai in the case of Hindustan Unilever Limited Vs. Ada. CIT [ITA No.7868/Mum/2010 dated 10.12.20121,*** *the relevant extract of the said decision is reproduced as under:*

....The said working submitted by the learned Sr. Counsel has already been reproduced in the foregoing paragraph no.18. We have to examine firstly, as to whether the bench marking should be done at A.B. transaction only or for the entire transactions (including A.B. as well as Non A.B.) and secondly, whether the adjustment in ALP by the TPO falls within the safe harbour range of +7- 5%.

30. Provisions of section 92 provides that 'any income arising from an international transaction shall be computed having regard to the ALP". Thus, the ALP has to be on international transaction and not in relation to assessee's entire sales or turnover. The second proviso to section 92C, Hindustan Unilever Limited 27 though brought in statute by the Finance Act, 2009, w.e.f 1st October 2009, provides that 'if the variation between ALP so determined and the price at which international transaction has actually been undertaken shall be deemed to be the ALP", however, the same is indicative of the preposition that the ALP is to be determined only on international transaction. This, inter-alia, means that the statute itself provides that the adjustment arising out of ALP should be with regard to international transaction and not on the entire turnover of the assessee. The transfer pricing mechanism revolves around international transaction where it has to be seen whether such transactions are at arm's length price or not. The presumption is that transactions with the independent parties are always at arm's length price, however, it is with regard to related parties i.e., A.Es, only one has to see whether such a transaction is at arm's length. The profit margin from the international transaction with the A.E. has to be seen in relation to the uncontrolled transaction with the independent parties. What is to be compared is the international transactions of the assessee with its related parties and not for its entire transaction with non-related parties also. Therefore, ALP has to be seen only with regard to international transaction with A.Bs and not on the entire turnover / sales. We, thus, agree with the contentions of the learned Sr. Counsel that bench marking should be done only on A.E. transactions and not for the entire turnover."

The Department has filed against the said decision of ITAT, Mumbai in High Court. While adjudicating the same appeal, the Bombay High Court in the case of CIT Vs. Hindustan Unilever Ltd (ITA No.1873 of 2013 Dated 26.07.2016) also supported the said view of ITAT.

Even the matter is now res integra as SLP filed by the Department in the case of CIT Vs. Hindustan Unilever Ltd. (SLP(C) No.22381 of 2017 Dated 29.10.2018), against the said decision of Bombay High Court was dismissed by the Hon'ble Supreme Court. In view of the above Supreme Court Decision, the Arm's length price of specified domestic transactions between the appellant and its AEs is determined by adhering the proportionality principle i.e. restrict the calculation of ALP to value of SDT instead of value of all the other transactions as under:

Description / Amount (Rs Cr)	Unit VA, Jadcherla	Unit IV, Baddi	Total
Value of SDT (Purchases)	**31.28**	**113.794**	**145.07**
Value of Other Purchases	246.14	167.66	
% of SDT Purchases	**11.28%**	**40.42%**	
Operating Revenues	408.10	400.52	
Proportionate revenues	**46.03**	**161.89**	
Arm's Length Margin to be considered (OP/OR)	**17.87%**	**17.87%**	
ALP of SDT Purchases	**37.80**	**132.96**	
TP Adjustment that should have been made	**6.52**	**19.17**	**25.69**
Actual TP adjustment made by the TPO	**112.61**	**51.95**	**164.56**

Accordingly, the transfer pricing adjustments for specified domestic transactions for Unit VA, Jadcherla and Unit IV, Baddi are calculated as Rs.6.52crores and Rs.19.17crores respectively instead of Rs.112.61 crores and Rs.51.95 crores respectively as determined by the TPO. Therefore, the total transfer pricing adjustment u/s 92CA for specified domestic transactions of the appellant company is revised at Rs.25.69 crores from Rs.164.56 crores as determined by the TPO.

15.4. The written submissions filed by the Revenue with respect to ground nos.10 to 15 read as under :

> *"The taxpayer contended that while computing PLI at unit level of the taxpayer major expenses towards R&D, Head Office and Marketing offices are not included, whereas the comparable companies' margins are computed after considering these expenses (already debited in their P & L Account) while computing the PLI at the entity level. However, the TPO has compared the unit level PLI of the taxpayer with entity level PLI of comparable companies while computing the PLI.*
>
> *The CIT(A) observed that from the audited financials of the comparable companies, R&D expenses and marketing expenses are reported separately, but, doesn't show head office expenses as a separate head. In view of this, the CIT(A) held that only R&D and marketing expenses are to be allocated while computing margins of the units of the taxpayer / comparable companies. To maintain consistency, the comparison of PLI should be made at same level of comparable companies with the taxpayer, so that comparison of profitability is proper.*

The decision of the CIT(A) is not acceptable for the following reason that Section 10AA clearly mandates the 'profits and gains derived from the export of such article or thing'. Since these expenses were not included in the Profit & Loss Account of these units for the purpose of working of 'profits and gains derived from the export of such article or things it is clear that none of these expenses are attributable to these units. Had it been the case that these expenses are attributable for these eligible units claiming deduction u/s. 10AA, then the assessee should have included these expenses also in the respective P & L Account and claims the balancing figure only as deduction. Hence, there is no need for exclusion of these expenses from the comparable companies for working of PLI.

It is further submitted that at the entity level there are R&D and Marketing expenses in the case of taxpayer company as well as comparable companies. Further, as discussed in preceding para, no such expenses are attributable to the eligible units of the taxpayer as the taxpayer has maintained separate books of accounts for eligible units as mandated u/s.10AA and has not claimed these expenses. Thus, the Ld.CIT(A) is not justified in directing to exclude R&D expenses and Marketing expenses for all comparable companies without analyzing / identifying whether comparable companies are also having similar units as that of taxpayer or not, which do not claim any R&D expenses at Unit level.

Further, it is pertinent to mention here that the TPO has rejected such claim of the taxpayer in the order u/s.92CA(3) for the following reasons :

"Further, the taxpayer requested to consider removal of R&D expenses and HO & Marketing Office Expenses as they are considered at entity level and the margins of the units were being bench marked. However, the taxpayer has not substantiated its request with proper documentary evidence. Though the taxpayer has given a revised list of comparables by computing the PLI before interest, R&D expenses and Marketing Expenses, the some was not supported with individual workings and also from the annual reports of these corn parables. Further, the taxpayer adopted the corresponding amounts of its units to arrive at the ALP However, even these amounts could not be verified by TPO for want the relevant information of the concerned units. Therefore, the TPO proceeds to benchmark the said transaction as stated above without considering the requests made by the taxpayer."

However, in the appellate order the Ld.CIT(A) simply stated that in the audited financial statements of the comparable companies only R&D expenses and Marketing expenses reported under separate heads, but has not reported head office expenses

separately. Accordingly, the Ld.CIT(A) directed to exclude R&D expenses and Marketing expenses from the comparable companies workings stating to maintain consistency. However, the Ld.CIT(A) ought to have called for a remand report as no such individual workings were provided before TPO which is in contravention of Rule 46A of the Income Tax Rules."

15.4. Per contra, the ld.AR for the assessee had made the oral submissions as well as filed the following written submissions before us :

"Before proceeding further, the Department understood the facts contrary to the assessee's submissions and the way the Ld. CIT(A) determined this issue in his order at pages 185 to 187. The submission of the assessee before CIT(A) is also clear from pages 130 to 134 of the order of Ld. CIT(A). It is also very pertinent to mention here that neither the assessee nor the Ld. CIT(A) allocated any R&D and Marketing expenses to eligible units of the assessee. Further, what is benchmarked under transfer pricing is profitability results of the undertakings or units as submitted by the assessee for the eligible units based on audited financials of these undertakings.

The TPO considered the unit level PLI for the two units of the assessee company as under:-

Sl. No	***Description***	***Unit V A, Jadcherla***	***Unit IV, Baddi***
1	*Operating Revenues*	*420*	*385.21*
2	*Operating Cost*	*326.93*	*267.75*
3	*Operating Profit*	*93.07*	*117.46*
4	*Margin (OP/OR)*	*22.16%*	*30.49%*

The above financials are based on audited financial statements submitted for the above two units. However, it was brought to the notice of the Ld. CIT(A) that the following expenditure is not allocated by the assessee to these units, while preparing the financial statements of these units:-

i) R&D Expenditure – Rs. 80.37 cr

ii) Head Office & Marketing Office Expenses - Rs. 121.19 cr

As admitted by the Department, the above expenditure is not allocated to the units and also Ld. CIT(A) did not allocate such expenses to these units. The same is accepted by the Department

over the years and not controverted by the assessee before the Ld. CIT(A) either.

Only that the computation of PLI at the unit (enterprise) level of the assessee don't include major expenses towards R&D, Head Office and Marketing Office, whereas the comparable companies' margins are computed after considering these expenses (already debited in their profit & loss account) while computing the PLI at the entity level. However, while benchmarking transactions under TNMM, the PLI has to be computed same level, so that comparison of profitability is proper. The same is ignored by the TPO.

OCED Transfer Pricing Guidelines, 2017 say –

> ***"B.3.1 The comparability standard to be applied to the transactional net margin method***
>
> ***.....***
>
> ***2.81 Another important aspect of comparability is measurement consistency. The net profit indicators must be measured consistently between the associated enterprise and the independent enterprise. In addition, there may be differences in the treatment across enterprises of operating expenses and non-operating expenses affecting the net profits such as depreciation and reserves or provisions that would need to be accounted for in order to achieve reliable comparability."***

There must be consistency while computing the PLI between the units of the assessee and comparable companies, which is not followed by the TPO as R&D, HO and Marketing expenses are excluded while computing the PLI of the assessee's units (enterprises), whereas the same were included while computing the PLIs of the comparable companies. The TPO failed to compute net margins at the same level for the units of the assessee and comparable companies.

While raising the above grounds, the Department should realise that under TNMM, what is compared is the margin of the eligible unit of the assessee company as disclosed in the audited financial statement of the assessee and not the entity level profit of the assessee company, with that of the comparable companies at the entity level, which are available in the public domain.

Further, in pharmaceutical industry, expenditure on R&D activities and marketing activities are substantial and have an impact on net profit margin of the comparable companies. In the case of assessee,

the above R&D expenses and Head Office & Marketing Expenses contribute around 1.2% and 1.85% respectively of assessee's turnover of Rs 6,567 Crores at the entity level. As these expenses have material impact on margins of the comparable companies as well and in view of Rule 10B(1)(e), which says that the net profit margin arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market. Thus, the Ld. CIT(A) has correctly recomputed the margins of the comparable companies after excluding R&D Expenses and Marketing expenses as these differences between the eligible unit of the assessee company and comparable companies materially effecting the net profit margin of the comparable companies.

It is once again reiterated that the Ld. CIT(A) neither disturbed or reconstituted the profit margin disclosed by the assessee in respect of its eligible units not allocated R&D expenses and Marketing expenses to the eligible unit. The Department accepted such contention of the assessee over the years. What is disturbed by the Ld. CIT(A) is only computation of margins of the comparable companies as their margins were computed by the TPO after considering R&D expenses and marketing expenses, whereas no such expenses are incurred by the eligible units or in other way, no such R&D and marketing functions were carried out by the eligible units, whereas the comparable companies carrying out such functions due to which the net margins are affected substantially.

15.5. In this regard, the assessee at page 555 of the paper book had stated the following two specified domestic transactions :

1) Purchase of material – During the year, the eligible units have purchased material from the other business units of the assessee. These materials were used for manufacture of API etc and finished products are sold in open market.
2) Sale of material – The eligible units had sold material to the other business units of the Hetero. These materials are used

in the manufacturing of API / bulk drugs etc and are sold in open market.

3) The assessee had given the details of the specified domestic transactions between the eligible and other units.

15.6 The assessee in its reply dt.10.12.2020 and 06.11.2021 has mentioned the details of sale of its two units as under:

> *"In the case of two units (Unit VA-Jadcherla and Unit IV- Baddi) for which TP adjustments are proposed the transfer of goods by the eligible units are entirely either exports or to the domestic third parties. Hence, all the sales from the two units are at Arm's Length.*
>
> *As regard purchase :*

SDT Purchases	113.76 crore
Other purchases	167.69 crore
Total Purchases	281.45 crore

It was also mentioned that the assessee was having similar transaction with the third parties and accordingly, the assessee adopted internal comparables by taking itself as a tested party and had applied TNMM as most appropriate method and adapted OP/OR as PLI. Further, the assessee has given the details of product-wise SDT purchases from other business of the company.

15.7 The assessee has concluded that the transactions of purchase of raw materials and sale of materials were at arms length.

The learned TPO mentioned the case of the assessee at page 55 as under :

Name of the Associated enterprise	Nature of Specified Domestic Transactions	Method selected	Hetero Labs limited (Tested Party)		Comparable Data		
			Transfer Price (INR)	Rate/ Margin	Type of comparable data	Arm's Length price / Margin	Difference between transfer price and ALP
Goods held for the purpose of any other business carried on by Hetero are transferred to the eligible business	Purchase of raw materials	CUP Method / TNMM	647,13,78,934	TNMM OP/OR 24.10%	Indian companies engaged in providing similar business	TNMM OP/OR 24.90%	NA
Goods held for the purpose of the eligible business are transferred to any other business carried on by Hetero	Sale of materials	CUP Method / TNMM	894,06,98,331	TNMM OP/OR 24.10%	Indian companies engaged in providing similar business	TNMM OP/OR 24.90%	NA

15.8 The TPO was not satisfied with the submissions of the assessee and asked the assessee to furnish segmental accounts of the exempt and non-exempt units in respect of the following 4 eligible units at page 57 of the TPO order.

Sr. No.	***Name of the Unit***	***Section under which Deduction/Exemption claimed***	***Amount of Deduction/Exemption***	***OP/OC***	***OP/OR***
1	*Unit V- (SEZ Jedcharla)*	*Sec. 10/TA*	*26,21,39,692*	*14.06%*	*12.33%*
	Unit VA -				

2	*(SEZ Jedcharla)*	*Sec 10A.4*	*75,54,69,091*	*67.60%*	***40.33%***
3	*Unit D C -*	*Sec. 10.4.1*	*2,41,02,756*	*15.27%*	*13.25%*
	(SEZ Nakkapally)				
4	*Unit IV - Baddi*	*Sec. 801C*	*28,74,27,849*	*34.61%*	25.71%

15.9 The TPO noted down at page 56 of the order that the assessee has not furnished the segmental accounts of the non-exempt units despite the opportunity granted.

16. The TPO rejected the TP Study of the assessee for the reasons mentioned in the order by the TPO. Thereafter, the TPO has selected various comparables after applying following filters :

(i) Use of current year data.

(j) Companies having different financial year ending (i.e. not March 31, 2017) or data of the company Which does not fall within 12-month period i.e. 01-042016 to 31-03-2017, were rejected

(k) Companies having negative net worth were excluded

(l) Companies having persistent loss were excluded

(m) Companies whose manufacturing sales is less than 75% of its total sales were excluded

(n) Companies who have more than 25% related party transactions of the sales were excluded

(o) Companies whose Net Sale was less than Rs.1 Crore were excluded

(p) Companies who have export sales income less than 25% of the sales were excluded.

16.1. After Applying the above filters, 60 companies remained in the Prowess data base and on examination of the annual report,

finally 19 companies were found to be functionally similar with the assessee and the TPO proposed these 19 companies as comparable companies. After selecting the 19 comparables, the TPO) had issued a show cause notice to the assessee and in the show cause notice, the 19 comparable with their OP / OR were mentioned at page 64.

S. No.	Company Name	Total OR In Millions (Rs.)	Total OC In Millions (Rs.)	Total OP In Millions (Rs.)	Wt. Avg OP/OR (%)	Turnover for AY 2017-18 (in Crores)
1	Medico Remedies Ltd.	1826	1743	82	4.51	57.19
2	R P G Life Sciences Ltd.	8732	8217	515	5.9	306.81
3	Bharat Parenterals Ltd.	3968	3641	327	8.23	122.14
4	Lee Pharma Ltd.	5647	5135	512	9.07	205.07
5	Cadila Pharmaceuticals Ltd. • •	46273	42029	4244	9.17	1604.07
6	Bajaj Healthcare Ltd.	6768	6058	710	10.48	230.67
7	& Organics Ltd.	8415	Mangalam Drugs 31267 7473	941	11.19	
8	Celon Laboratories Pvt. Ltd.	2626	2329	297	11.31	107.38
9	Kopran Ltd.	7448	6571	877	11.77	181.66

10	Indoco Remedies Ltd.	30183	26339	3844	12.74	1094.06
11	Lincoln Pharmaceuticals Ltd.	8701	7591	1110	12.76	308.06
12	Cipla Ltd.	339890	287315	52575	15.47	10637.08
13	Granules India Ltd.	40005	33709	.6296	15.74	1374.16
14	Shree Ganesh Remedies Ltd.	539	454	85	15.86	20.00
15	VasudhaPharmaChem Ltd.	16417	13678	2739	16.68	601.77
16	Malladi Drugs 86 Pharmaceuticals Ltd.	8997	7437	;1560	17.34	330.80
17	Micro Labs Ltd.	81643	66981	14662	17.96	2598.76
18	Centaur Pharmaceuticals Pvt. Ltd.	15832	12913	‘ 2919	18.44	553.38
19	Unichem Laboratories Ltd.	38310	27773	10537	27.5	1413.85

16.2 The TPO has computed median of the PLI of these comparable and arrived at 12.74%. The TPO has noted down that the OP/ OR of the following four units :

Sr. No.	***Name of the Unit***	***Section under which Deduction/Exemption claimed***	***Amount of Deduction/Exemption***	***OP/OC***	***OP/OR***
1	*Unit V- (SEZ Jedcharla)*	*Sec. 10/TA*	*26,21,39,692*	*14.06%*	*12.33%*
2	*Unit VA - (SEZ Jedcharla)*	*Sec 10A.4*	*75,54,69,091*	*67.60%*	***40.33%***
3	*Unit D C - (SEZ Nakkapally)*	*Sec. 10.4.1*	*2,41,02,756*	*15.27%*	*13.25%*
4	*Unit IV - Baddi*	*Sec. 801C*	*28,74,27,849*	*34.61%*	25.71%

16.3. Thereafter, the TPO had sought to make adjustment in respect of Unit VA – (SEZ Jedcharla) for an amount of Rs.112.61 crore and Unit IV Baddi for an amount of Rs.51.95 crore on account of specified domestic transaction between the assessee and its

related parties. The TPO issued a show cause notice to the assessee on 21.12. 2020, asking the assessee as to why the margin of 12.74% should not be considered for benchmarking the domestic specified transaction and also why the adjustment of 12.74% should not be made under section 92CA(3) of the Act.

16.4. The assessee filed reply and raised objections which are captured by the TPO. In the reply dt.06.01.2021, the assessee had categorically submitted as under : (Para 18 of TPO order – Page 71)

> *"18. The taxpayer submitted that with regard to Unit VA Jedcharla, sales from the Unit are Rs. 408.11 Crores out of which sale of Aripiprazole contributed Rs. 93.36 Crores. The taxpayer claimed that major profits were attributable to this product as it was out of patent regime for the first time in US and the company was awarded the status of next innovative for a period of six months, this period of exclusivity expired in the month of May, 2016. During this two months exclusivity period goods to the tune of Rs. 60.35 Crores were exported out of 93.36 Crores for the entire year. The taxpayer further mentioned the details of purchases as under:*

Unit VA Jedcharla

SDT Purchases (from Unit-1, Khazipally)	31.28 crore
Other purchases	246.14 crore
Total Purchases	277.42 crore

Unit V Baddi

SDT Purchases	113.76 crore
Other Purchases	167.69 crore
Total Purchases	281.45 crore

2. Further, with regard to the Baddi Unit IV, the taxpayer has furnished some sample copies of invoices for the products evidencing the prices charged by other business of the company to Baddi Unit and the prices charged to the third parties and claimed that the products are sold by the other businesses of the company to third parties during the year are at similar or nearest prices (considering the volumes). The taxpayer requested to consider CUP method for benchmarking the transactions with Baddi Unit."

16.5 However, the TPO was not agreeing with the objections raised by the assessee and the TPO rejected the objections of the assessee and proposed the addition of Rs.164.56 crore under section 92 CA(3) of the Act in respect to specified domestic transaction.

16.5.1 Feeling aggrieved, the assessee preferred the appeal before the ld.CIT(A). The ld.CIT(A) at page 191 of his order had mentioned the list of filters applied and the list of final set of comparable by the TPO, which are reproduced above. The ld.CIT(A) noted that 17 comparable companies out of 19 comparable companies qualified the turnover filter were greater than Rs.100 crore and two companies namely, Medico Remedies Limited and Shree Ganesh Remedies Limited both qualified for the turnover filter.

16.6. The ld.CIT(A) further noted down that one comparable namely Mangalam Drugs and Organics Limited having the turnover of 312.67 crore having RPT% of 0.15% (0.05%) which is less than the export turnover filter of 25% and therefore, the ld.CIT(A) considered that Mangalam Drugs and Organics Limited cannot be considered as good comparable. The ld.CIT(A) has also mentioned at page 195 of his order that the TPO has rejected the following companies namely i) Divis Laboratories, ii) Natco Pharma Limited and iii) Ajanta Pharma Limited despite the fact that they export less than 25% of the export turnover and therefore, has found that these three companies as good comparable.

16.6.1 However, the ld.CIT(A) has directed the TPO to include Sun Pharma Laboratories Ltd., and Macleods Pharmaceuticals Limited despite the fact that the TPO has rejected these comparable on the pretext that they may fail on RPT filter.

16.7 As discussed hereinabove, while discussing grounds 8 and 9, these two companies were excluded from the list of comparable by our order. The ld.CIT(A) had excluded i) Medico Remedies Limited, ii) Shree Ganesh Remedies Limited and iii) Mangalam Drugs and Organics Limited and included i) Divis Laboratories, ii) Natco Pharma Limited and iii) Ajanta Pharma Limited iv) Sun Pharma Laboratories Ltd., and v) Macleods Pharmaceuticals Limited.

16.8 The revenue has already challenged the inclusion of two companies namely, i) Sun Pharma Laboratories Ltd., and ii) Macleods Pharmaceuticals Limited which we had already directed to exclude.

16.9 The Revenue is in appeal before us on the grounds reproduced hereinabove. The ld.CIT(A) had made the proportionate adjustment with respect to the both these transactions, without calling any report\comments from the Assessing Officer. It was held at page 202 of his order as under:

"Proportionate Transfer Pricing Adjustment:

Further, it is seen that while arriving at Arm's Length Price (ALP) of Specified Domestic Transactions (SDT), the TPO has considered the following financials:-

Description	Unit VA, Jadcherla		Unit IV, Baddi	
	Amount (Rs Crore)	Percentage of total purchases	Amount (Rs. Crore)	Percentage of total
SDT Purchases	31.28	**11.28%**	113.76	**40.42%**
Other purchases	246.14	88.72%	167.69	59.58%
Total Purchases	277.42	100%	281.45	100%

The TPO made transfer pricing adjustment under TNMM at the enterprise (unit/undertaking) level of the appellant company, without considering the above fact that all purchases of the eligible units were not made from associated enterprises. As can be seen from above, the SDT purchases constituted only about 11.28% in Unit VA, Jadcherla and 40.42% in Unit IV, Baddi. So, at best only 11.28% and 40.42% of the operating profit of the respective units can be attributed to raw material acquired from appellant's associated units / enterprises. However, the TPO has cakulated the operating profit on the entire sales of the appellant's eligible units, which is incorrect, when it is admitted position that only 11.28% and 40.42% per cent of raw material has been acquired by the appellant from its associate concerns / units for the purpose of manufacturing items.

Further, whenever TNMM is to be applied at entity level or enterprise (unit) level, the arm's length price (ALP) of international transactions or specified domestic tiansactions needs to be determined proportionately i.e. taking into account revenues or costs corresponding to international transactions on a

proportionate basis on the costs or revenues, as the case may be This principle was followed in the decision of Hon'ble ITAT, Mumbai in the case of Hindustan Unilever Limited Vs. Ada. CIT [ITA No.7868/Mum/2010 dated 10.12.20121, the relevant extract of the said decision is reproduced as under:.

……."

The Department has filed against the said decision of ITAT, Mumbai in High Court. While adjudicating the same appeal, ***the Bombay High Court in the case of CIT Vs. Hindustan Unilever Ltd (ITA No.1873 of 2013 Dated 26.07.2016)*** *also supported the said view of ITAT.*

Even the matter is now res integra as SLP filed by the Department in the case of ***CIT Vs. Hindustan Unilever Ltd. (SLP(C) No.22381 of 2017 Dated 29.10.2018),*** *against the said decision of Bombay High Court was dismissed by the Hon'ble Supreme Court. In view of the above Supreme Court Decision, the Arm's length price of specified domestic transactions between the appellant and its AEs is determined by adhering the proportionality principle i.e. restrict the calculation of ALP to value of SDT instead of value of all the other transactions as under:*

Description / Amount (Rs Cr)	*Unit VA, Jadcherla*	*Unit IV, Baddi*	*Total*
Value of SDT (Purchases)	***31.28***	***113.794***	***145.07***
Value of Other Purchases	*246.14*	*167.66*	
% of SDT Purchases	***11.28%***	***40.42%***	
Operating Revenues	*408.10*	*400.52*	
Proportionate revenues	***46.03***	***161.89***	
Arm's Length Margin to be considered (OP/OR)	***17.87%***	***17.87%***	
ALP of SDT Purchases	***37.80***	***132.96***	
TP Adjustment that should have been made	***6.52***	***19.17***	***25.69***
Actual TP adjustment made by the TPO	***112.61***	***51.95***	***164.56***

Accordingly, the transfer pricing adjustments for specified domestic transactions for Unit VA, Jadcherla and Unit IV, Baddi are calculated as Rs.6.52crores and Rs.19.17crores respectively instead of Rs.112.61 crores and Rs.51.95 crores respectively as determined by the TPO. Therefore, the total transfer pricing adjustment u/s 92CA for specified domestic transactions of the appellant company is revised at Rs.25.69 crores from Rs.164.56 crores as determined by the TPO."

16.10 The ld.CIT(A) had determined the ALP of the 21 companies at 17.87% (OP/OR%) instead of 12.74% as calculated by the TPO, after excluding interest, tax, R & D expenditure, Head Office

and Marketing Office Expenses without affording any opportunity to the Assessing Officer/TPO and the without confronting the annual report of the comparable, which is in violation of Rule 46A of the Income Tax Act.

16.11 In our view, the grievance of the Revenue before us is that the ld.CIT(A) while excluding R & D expenses, Head Office and Marketing Office Expenses had not given the opportunity to the AO while computing the margins of the comparables after excluding the R & D expenditure, Head Office and Marketing Office Expenses. In our view, the law requires the ld.CIT(A) to grant the opportunity to the Assessing Officer/TPO before making any adjustment on account of excluding R & D expenses, Head Office and Marketing Office Expenses in the financials of the comparable. The ld.CIT(A), has not done the same and has thus violated the principle of natural justice under 46A of I.T. Rules.

16.12 In the light of the above we deem it appropriate to remand back the entire issue of TP adjustment with respect to both the eligible specified domestic transaction to the file of the Assessing Officer/TPO for passing a fresh order after affording the opportunity of hearing to the assessee. We further direct the assessee to provide the segmental accounts of the non-exempt units, more particularly, the assessee's transaction with its eligible undertaking and with the other non-related parties so that the ld TPO can benchmark the specified domestic transactions accurately. The ld Assessing Officer/TPO shall consider any other documents as may be filed by the assessee in accordance with law. In the light of the above, the

ground No.10 to 15 of the Revenue appeal are allowed for statistical purposes.

17. In the result, the appeal of Revenue in ITA No.348/Hyd/2023 for A.Y. 2017-18 is partly allowed and the appeal of assessee in ITA No.312/Hyd/2023 for A.Y. 2017-18 is dismissed.

18. Coming to Revenue and assessee's appeals for A.Y. 2018-19 i.e., ITA Nos.349/Hyd/2023 and ITA No.313/Hyd/2023, respectively, which are identical to the facts and issues raised by both the parties in their appeals for A.Y. 2017-18, we hold that our decision would apply mutatis and mutandis, to these appeals also.

18.1. In the result, the appeal of Revenue in ITA No.349/Hyd/2023 for A.Y. 2018-19 is partly allowed and the appeal of assessee in ITA No.313/Hyd/2023 for A.Y. 2018-19 is dismissed.

19. In the combined result, both the appeals of Revenue are partly allowed and both the appeals of assessee are dismissed.

Order pronounced in the Open Court on 21st May 2024.

Sd/- Sd/-

(R.K. PANDA)	**(LALIET KUMAR)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Hyderabad, dated 21st May, 2024.
TYNM/PVV SPS

Copy to:

S.No	Addresses
1	Hetero Labs Limited, Hyderabad, 7-2-A2, Hetero Corporate, Industrial Estate, Sanathnagar, Hyderabad - 500018, Telangana.
2	The Assistant Commissioner of Income Tax, Central Circle – 3(4), Hyderabad.
3	Pr.CIT (Central), Hyderabad.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order