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

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND MISS PADMAVATHY S., ACCOUNTANT MEMBER

ITA 1195/Mum/2015
(Assessment year : 2010-11)

TATA INTERNATIONAL LIMITED, **7th Floor, Trent House, C-60, Block-G, Bandra Kurla Complex, Bandra (East) Mumbai-400 051** **PAN :AAACT3198F**	**vs**	**DCIT RG 14(3)(1)** **AAYAKAR BHAVAN, 4TH FLOOR,** **R.NO.474 M.K.MARG, MUMBAI-400 020**
APPELLANT		**RESPONDENT**

Assessee by	:	Shri Nitesh Joshi a/w Ninad Patade, Ms Hetal Sangani
Respondent by	:	Ms. Dhivya Ruth SR.DR
Date of hearing	:	16/05/2024
Date of pronouncement	:	28/05/2024

O R D E R

PER ANIKESH BANERJEE, J.M:

Instant appeal of the Assessee was preferred against the final assessment order of the Deputy Commissioner of Income-tax 14(3)(2), Mumbai order passed U/s 143(3) r.w.s. 144(1)of the Income-tax Act, 1961 (in short, 'the Act') date of order 29/12/2014 in pursuance to the direction of the Dispute Resolution Panel-2, Mumbai (in short, 'DRP') passed U/s144C(5) of the Act, date of direction 14.11.2014.

2. The assessee raised the following grounds: -

"1.1 The transfer pricing adjustment made by the Ld AO / Hon'ble DRP is bad in law, illegal and unsustainable on the basis of the following grounds, taken singly or cumulatively.

1.2 The conditions stipulated in section 92CA(1) of the Act are mandatory and the learned AO is expected to record his satisfaction in that respect before making the reference to the learned TPO.

1.3 Further, the learned Transfer Pricing Officer ("TPO") has failed to prove that any of the conditions laid down in section 92CA(1) of the Act had been satisfied, which made out a case for tax evasion.

1.4 On the facts and in the circumstances of the case, a transfer pricing adjustment cannot be made without arriving at the finding that the intention of the Appellant was to evade tax and shift profits outside of India. Further, such finding of tax evasion and of shifting of profits constitutes a condition precedent for making the transfer pricing adjustment.

1.5 The transfer pricing adjustment made by the Ld AO / Hon'ble DRP is bad in law, illegal, without jurisdiction and contrary to and / or beyond and in excess of the express statutory provisions of the Act including sections 4, 5, 9, 92, 92C, 92CA, etc. The approval of the CIT under section 92CA(1) is also not in accordance with law and hence the adjustment must be quashed.

Erroneous adjustment on account of non-recovery of commission on issue of Letters of Comfort ("LOC")

1.6 The Ld AO / Hon'ble DRP erred on facts and in law in making an addition of Rs.11,03,91,750/- to the total income returned by the Appellant in respect of the non-recovery by the Appellant from its concerned associated enterprises ("AEs" or "AH") of fees or commission allegedly payable by such AEs to the Appellant for issue of letter of comfort to the bankers of such AEs.

1.7 The Ld AO / Hon'ble DRP erred on facts and in law in disregarding the fact that:

i.) Issuance of LOCs is not an international transaction, as the same does not have a bearing on the profit, income or losses, as the Appellant did not incur any cost or expenditure for issuing the LOG nor does it have a bearing on the assets, as the Appellant did not employ any assets for issue of the LOC.

ii.) Issuance of LOCs cannot be equated to a corporate guarantee, as the LOCs issued by the- Appellant does not represent any binding legal obligation or a contractual commitment. LOG i neither akin to guarantee nor possess any legal obligation as observed in case of a guarantee ani hence not an international transaction.

1.8 The Ld AO / Hon'ble DRP has erred in law and in fact in upholding the method adopted by Ld. AO/TP(for determining the ALP of LOC @ 1.5% on the amount of loan covered by its LOC, although the sai< method adopted by the Ld AO / TPO is not in accordance with the first proviso to section 92C(2) of T Act,1961 and Rule -10B(l)(a) of IT Rules,1962.

1.9 The Ld AO / Hon'ble DRP erred on facts and in law in disregarding the fact that, in financial world interest charges are computed on the limits actually utilized. Therefore, the "commission" determined b} the Ld AO / Hon'ble DRP as recoverable by the Appellant from its concerned AEs ought to have beer computed, —

(i) not with reference to the value of the relevant LOC;

(ii) but with reference to the sanctioned credit limit <u>actually utilized</u> by the concerned AEs; and

(iii) in any event, at least with reference to the sanctioned credit limit.

1.10 The Ld AO / Hon'ble DRP erred on facts and in law by disregarding established judicial pronouncements in India in making the Transfer Pricing adjustment.

1.11 The Ld AO / Hon'ble DRP erred on facts and in law in disregarding the fact that:

(i) if the dividend paid to the Appellant by the concerned AE was equal to or in excess of the value of any benefit(s) allegedly enjoyed by such AE consequent to

the issue by the Appellant to the Bankers of such AE of any LoC(s), no such transfer pricing adjustment ought to be made; and

(ii) if the dividend paid to the Appellant by the concerned AE was less than the value of any such alleged benefit(s), then it is only the excess of such alleged benefit(s) over such dividend which ought to be determined as the transfer pricing adjustment.

1.12 The Ld AO / Hon'ble DRP erred in disregarding the fact that this issue is no longer res-integra, and resolved in favour of the Appellant by Hon'ble Commissioner of Income Tax (Appeals) for AY 2005-06, AY 2006-07 and AY 2007-08.

Erroneous adjustment on account of rate of interest chargeable in respect of extended period for remittance by AEs of export sales proceeds

1.13 The Ld AO / Hon'ble DRP erred on facts and in law in making an addition of Rs.2,39,940/- on account of notional interest on perceived delay in collection of receivables from the AEs.

1.14 The Ld AO / Hon'ble DRP erred on facts and in law in disregarding the fact that,

i) interest on receivables beyond a stipulated credit period is not an international transaction and, thus, does not warrant an imputed charge.

ii) transfer pricing adjustment cannot be made on hypothetical and notional basis, unless there was some material on record that there had been under charging of such interest or real income.

1.15 The Ld AO / Hon'ble DRP erred in making an adjustment on the entire tenure for which amount receivable was outstanding, rather than making adjustment only on the excessive credit period.

1.16 The Ld AO / Hon'ble DRP erred on facts and in law in disregarding the fact that, the Appellant has upfront charged interest @10% on outstanding receivables from its AEs and has not charged any interest on delayed payments from its unrelated customers, and therefore, non-charging of interest to AEs would be considered to be at arm's length.

1.17 The Ld AO / Hon'ble DRP has erred in Jaw and in fact in upholding the method adopted by AO/TPO for determining the ALP of interest @13.10% on the outstanding dues receivable from its AE although the said method adopted by the AO/TPO is not in accordance with the first proviso to section 92C(2) of IT Act,1961 and Rule -10B(l)(a) of IT Rules,1962.

1.18 The Ld AO / Hon'ble DRP erred on facts and in law in disregarding the fact that, even if the adjustment is required to be made, such rate —

(i) ought to be charged from the perspective of the persons availing the credit (viz., the said AEs); and

(ii) ought to be based on rates applicable to the currency in which the credit was extended [e.g., the London Inter-Bank Offered Rate ("LIBOR")] and not on the weighted average cost of domestic borrowing of the Appellant.

<u>Erroneous adjustment on account of notional interest chargeable in respect of interest free shareholder loan to AEs</u>

2.1. The Ld AO / Hon'ble DRP erred in law and in fact in making an addition of Rs.26,84,253/- being notional interest in respect of advance to foreign subsidiaries, though, however it was contended that, advances granted to subsidiary company was quasi-equity in nature and provided due to business and commercial exigencies and regulatory requirements prevailing in AEs country. Hence, no interest could be imputed in respect of the same.

2.2. The Ld AO/ Hon'ble DRP erred in law and in fact in determining the arm's length interest rate;

(i) by not conducting any benchmarking analysis and failing to identify any comparable uncontrollable transaction for determining the arm's length interest;

(ii) by considering the interest rate prevailing in lender's country rather than borrower's country;

(iii) by not considering the impugned interest on interest free loans by relying upon the RBI's circular in respect of External Commercial Borrowings (ECB); and

(iv) by applying the weighted average cost of borrowing ("WACB") instead of LIBOR for the purpose of computing the adjustment towards non-recovery of interest on shareholder loan.

2.3. The Ld. AO-DRP erred on facts and in law in disregarding the fact that, there was no nexus between the funds borrowed and the funds lent by way of advances to subsidiary, as the advances have been made out of own funds of the assesse. Hence, no interest in respect of the borrowings by the appellant could be attributed to such advances and no disallowance should be made thereof U/s. 36(l)(iii) of the Act.

2.4. The Ld. AO-DRP erred on facts and in law in disregarding the fact that, even if any part of interest in respect of borrowings were to be construed, having been incurred towards such advances, the same is considered to be allowable expenditure U/s. 36(l)(iii) of the Act, as has been held by the Hon'ble Supreme Court in the matter of S. A. Builders Ltd., vs. Commissioner of Income Tax (Appeals) and Another (2007) 288ITR1.

Erroneous adjustment on account of disallowance of expenditure of interest paid on borrowed capital

*3.1 On the facts and in the circumstances of the case and in law, the learned Assessing Officer and / or the Learned Dispute Resolutionpanel (hereinafter referred as **"AO-DRP")** has erred in disallowing a sum of Rs.,73,87,000 out of the aggregate interest of Rs.12,98,29,264 paid by appellant in respect of capital borrowed by the appellant for the purpose of its business hence claimed by the appellant as deductible under section 36(l)(iii)."*

*3.2 **Without prejudice** to the generality of the foregoing ground, the Appellant submits that the learned AO-DRP, not having controverted the evidence on record to the effect that the Appellant's entire Borrowings had been utilised for the purposes of the Appellant's export business and that no part of such Borrowings had been utilised for making any of its investments, erred in disallowing the said sum of Rs.1,73,87,000 out of the aggregate Interest expenditure of Rs. 12,98,29,264.*

3.3 ***Without prejudice*** *to the foregoing grounds, the Appellant submits that the learned AO-DRP erred in not allowing the Appellant's claim that, having regard to —*

(i) the fact that the Investments were made from a mixed fund comprising both — the

Appellant's Own Funds as well as its borrowed funds and

(ii) the fact that the Appellant's Own Funds (Rs.419.67 crores) were far in excess of the Appellant's total Investments in shares (Rs.l20.17crores), the AO-DRP ought to have held -

(a) that such Investments had been made from the Appellant's Own Funds and not from any part of the Appellant's borrowed funds,

(b) that, therefore, the borrowed funds had been utilised, not for the purpose of making investment in shares, but for the other purposes of the Appellant's business and

(c) that, accordingly, the Interest of Rs.1,73,87,000 was allowable under Section 36(l)(iii).

3.4 ***Without prejudice*** *to the foregoing grounds, the Appellant submits that, in making their determinations in respect of the disallowance under Section 14-A, the learned AO-DRP erred in the following respects :*

3.4.1 The learned AO-DRP erred in holding that the amount disallowed under Section 14-A was not allowable under Section 36(l)(iii).

3.4.2 The learned AO-DRP erred in holding that a part of the Appellant's borrowed funds had been used for the purpose of making investments in shares, particularly in view of the fact thattheAppellant's Own Funds 419.67crores) were far in excess of the Appellant's Total Investments (• 120.17crores).

3.4.3 The learned AO-DRP erred in holding that a part of the Appellant's borrowed funds had been used forthe purpose of making investments in shares, for the reason also that the learned

AO-DRP has not brought on record any material establishing any nexus between any part of the Appellant's borrowed funds and the funds utilized by the Appellant to make such investments.

3.4.4 The learned AO-DRP erred in rejecting the Appellant's alternative claim to the effect that the amount disallowed under Section 14-A was allowable under Section 37(1).

3.4.5 The learned AO-DRP erred in rejecting the Appellant's ***alternative claim*** *to the effect that the amount disallowed under Section 14-A was allowable under Section 57(iii).*

3.4.6 The learned AO-DRP erred to appreciate that Section 14-A does not contain a non-obstante clause and neither of the section 36(1)(iii), 37(1) and 57(iii) are subject to the provisions of Section 14-A.

3.4.7 The learned AO-DRP erred in holding that a part of the aggregate interest of Rs. 12,98,29,264 paid by the Appellant in respect of capital borrowed by the Appellant for the purposes of its business was disallowable under Section 14-A.

3.4.8 The learned Commissioner(Appeals) erred in rejecting the Appellant's alternative claim to the effect that, if at all any amount was disallowable under Section 14-A, an amount of Rs. 4,80,055, representing the interest apportionable to the exempt income in the same proportion that the gross exempt income by way of dividends received bore to the total gross revenue of the Appellant, ought to have been adopted, having regard to the fact that such manner of apportionment had received the seal of approval of the Supreme Court in ***Consolidated Coffee Ltd v State of Karnataka (2001) 9 SCC 720.***

3.5 ***Without prejudice*** *to the foregoing grounds, the Appellant submits that the learned AO-DRP erred in applying Rule 8-D to the Appellant's case, without having been dissatisfied with the correctness of the claim of the Appellant in respect of its expenditure by way of Interest in relation to income which did not form part of the total income under the Income-tax Act, 1961.*

3.6 ***Without prejudice*** *to the foregoing grounds, the Appellant submits that, assuming (whilst denying) that the provisions of Rule 8-D were properly applied to its case, the learned AO-DRP erred in the following respects in such application, viz. :*

3.6.1 The learned AO-DRP erred in rejecting the Appellant's alternative claim to the effect that the learned AO-DRP ought to have excluded the average cost of such of the Appellant's investments as were made on or before 31SIMarch, 1999 ("Old Investments").

3.6.2 The learned AO-DRP erred in rejecting the Appellant's further alternative claim to the effect that the learned AO-DRP ought to have excluded the average cost of such of the Appellant's investments as had not yielded any dividends during the year under consideration ("Non Dividend-Yielding Investments").

Erroneous adjustment on account of disallowance of professional fees paid to Deloitte Touche Tohmatsu

4.1 On the Facts & circumstances of the case, the Ld AO-DRP has erred in law and in fact in upholding AO's action in disallowing expenditure amounting to Rs.16,66,520/- by way of professional charges paid toDeloitte Touche Tohmatsu for the purpose of market research and survey incurred wholly andexclusively for the purpose of the present business.

4.2 ***Without prejudice*** *to the above, the Ld AO-DRP erred in Jaw and in fact in holding that the expenditure has no direct nexus to the income earned and not incurred for the purpose of the business.*

4.3 ***Without prejudice*** *to the above, the Ld AO-DRP erred in making disallowance in respect of out of pocket expenses of Rs.1,22,320 and expenditure on Transfer Pricing study Report of rs.2,20,600 which are in the nature of routine business expenditure and hence disallowance, whilst denying made should be restricted to Rs. 13,23,600 (Rs. 16,66,520-Rs.l,22,320).*

Erroneous adjustment on account of disallowance of professional fees paid to Vaishnavi Corporate Communications Pvt Ltd

5. On the Facts & circumstances of the case, the Ld AO-DKP has erred in law and in fact in upholding AO's action in disallowing expenditure amounting to Rs.38,76,282/- by way of professional charges paid to Vaishnavi Corporate Communications Pvt Ltd for the purpose of media and public relationship services incurred wholly and exclusively for the purpose of the present business.

6. On the facts and in the circumstances of the case and in law, the learned AO has erred in charging interest u/s 234D of the Income Tax Act. The learned AO be directed to delete/ reduce the interest u/s 234D accordingly.

7. On the facts and in the circumstances of the case and in law, the learned AO has erred in charging interest u/s 244A of the Income Tax Act. The learned AO be directed to delete/ reduce the interest u/s 244Aaccordingly.

8. The learned AO erred in initiating penalty u/s 271(l)(c) of the Income Tax Act as all the facts and details were disclosed in return of Income and its annexure and Report under Section 92E of the Act.

The appellant reserves the right to add, alter, amend or delete any of the ground/ s before or during the course of hearing."

3. Brief fact of the case is that the assessee is a trading house engaged in exporting variety of products including automobile spares, steel, engineering items, chemicals and leather products, etc. During the impugned assessment year, the transfer pricing adjustment was conducted. The addition was made in different heads like disallowance under section 14A, disallowance of expenditure of interest paid on borrowed capital, and addition of professional charges paid to professionals. The assessee filed an objection in DRP, but the DRP upheld the observation of the ld. TPO. Finally, the final order was passed by the ld.AO with additions under different heads. Being aggrieved, assessee filed an appeal before us.

4. The ld.AR for the assessee filed a written submission (in short APB), which are kept in the record. The ld.AR submitted a chart and summarized the ground of the assessee and argued accordingly.We follow the grounds mentioned in chart as per the request of the ld. AR. The ground-wise argument and adjudication are as follows: -

Ground nos. 1.1 to 1.12

5. During the impugned assessment year the assessee has issued 9 letter of comfort (in short LOC)aggregating to an amount of Rs. 735,94,50,000/- .Considering the direction of DRP for earlier years, @1.5 is directed to adopt on ALP of the transaction. The Ld.AR invited our attention in order of the TPO page 7, para 5.4. The relevant paragraph is reproduced as below:-

> *"5.4. The submissions of the assessee on the issue of letter of comfort have been examined and considered. The facts are similar to AY 2009-10. Thus, for the purpose of continuity the issue is being dealt in line with AY 2009-10. The assessee in its submissions has mentioned that the letter of Comfort is not a contract, banks cannot proceed against assessee in case of default of repayment by the AE and the letter of comfort has been given in the business interest. It has also mentioned that the banks to whom the letters of comfort have been given are not the AEs of the assessee."*

5.1 The Ld.AR further argued that the issue is squarely covered by the order of the co-ordinate bench of **ITAT, Mumbai** bearing **ITA No.537/Mum/2013**, date of pronouncement **06/02/2024** in assessee's own case for A.Y. 2008-09. The Ld.AR drew our attention in the relevant paragraph which is reproduced as below:-

> "13. This issue is covered in favour of the Appellant by the decision of the Hon'ble ITAT in its own case for the A.Y. 2005-06 (bearing ITA No. 4376/Mum/2010 dated 29 January 2020). A copy of the said decision was submitted before the Bench during the course of hearing on 24 January 2024 (refer para Nos. 19 to 24 on page nos. 31 to 36 of the order) and is enclosed herewith at page 21 to 38 for ease of reference. The relevant extracts of the said decision are reproduced hereunder:
>
> "The Id. CIT()A) after considering the submission of assessee concluded that by issuing Letter of Comfort to the Bankers of AE, the assessee did not incurred any cost. The issuance of Letter of Comfort by assessee have no bearing on the profit, income or loss as the assessee did not incur any cost or expenditure for issuing such Letter of Comfort and it does not constitute international transaction under section 92B of the Act. The Id. CIT (A) concluded that there is a fundamental gap between guarantee and Letter of Comfort Guarantee is a legally enforceable; however, Letter of Comfort is not. We have noted that Hon'ble Karnataka High Court in United Braveries

(Holding) Ltd. vs. Karnataka State Industrial Investment and Development Corporation (supra) held that Letter of Comfort merely indicates the appellant's assurance that respondent would comply with the term of financial transaction without guaranteeing performance in the event of default. The coordinate bench of Tribunal in India Hotels Co. Ltd. (supra) on similar ground of appeal by following the decision of Hon'ble Karnataka High Court held that Letter of Comfort does not constitute international transaction. So far as contention of Id. DR for the revenue that after amendment in Explanation to section 92B is concerned, we have noted that coordinate bench in SIRO Clinpharm P. Ltd. (supra) held that amendment in Explanation to section 92B by Finance Act, effective from 01.04.2012 is to be treated as effective at the best from A.Y. 2013-14. Thus, in view of the aforesaid discussion, we do not find any illegality or infirmity in the order passed by Id. CIT (A). In the result, Ground No. 6 to 9 (additional ground) of assessee's appeals are allowed and consequently the grounds of appeal raised by revenue are dismissed."

14. Similar view has been taken by the coordinate bench again in the Appellant's own case for the A.Y. 2007- 08 vide Order dated 30 November 2023 (bearing ITA No. 6753/Mum/2012). A copy of the said decision was also handed over to the Bench during the course of hearing on 24 January 2024 (refer para Nos. 11 to 13 on page nos. 07 to 11 of the order) reproduced herein below as under:

"11. The brief facts are that the Assessing Officer has made addition of Rs.5,75,38,800/- on account of transfer pricing adjustment in respect of non-recovery by the assessee from its AE and the issue of letter of credit holding that assessee has not charged any commission from the AE. The ld. CIT (A) has deleted the said adjustment after observing and holding as under:- 9.4 I have considered the facts of the case and written submissions and oral arguments of the appellant advanced during the course of the appeal as against the observations/findings of the TPO/AO in their orders. The contention of the appellant are being discussed and decided as under:

i. The international transactions of the appellant were analyzed by the TPO during proceedings. The TPO examined in detail the international transactions of the appellant referred to by the AO and proposed no further adjustment to the value of arm's length price of international transactions benchmarked by the appellant in its TP documentation. In respect of the LOCs issued by the appellant to its AEs, the TPO selected Comparable Uncontrolled Price method ("CUP") as the most appropriate method for determining the arm's length price of this transaction and in determining the price, the TPO mentioned that Indian bank charged a fee ranging from 0.25% to 15% of the value of guarantee given to its customers depending upon the risk involved.

The TPO proceeded to determine the arm's length commission to be 50% of 1.5% at 0.75%. Based on this the TPO proposed an adjustment of Rs. 5, 75, 38,800/- be made to the total income of the appellant. The adjustment was computed on the value of the LOCs issued by the appellant to its AE's as against the actual draw down of funds from the bank by the AE's.

ii. The AO under Section 143(3) of the Act passed the assessment order in conformity with the addition proposed by the TPO incorporating the proposed addition of Rs. 5,75,38,800/- to the returned income of the appellant.

iii. The appellant has filed detailed submissions distinguishing a letter of comfort with intra-group credit guarantees together with other related issues.

iv. In view of the facts of the case and position of letter of comfort 1 am not inclined to treat letter of comfort (LOC) at par with intra-group credit guarantees or equivalent to guarantees as averred by the TPO. The reasons for this are summarized as under:-

a) the LOC is a unilateral letter issued by the appellant and does not constitute an agreement or contract It is not accepted by the Banker to whom it has been issued,

b) it is not enforceable by law as in an event where the AE were to default in respect of the loan given to it by its Banker, the Banker has no legal recourse to the appellant in respect of the LOC issued;

c) again if the appellant were to dispose of its shares in the AE(s) without first obtaining the consent of the Banker or having ensured that the AE's liability to the bank is discharged in full no legal recourse is available to the banker against such dilution or disposal; and

d) as the very title of the LOC suggests, the LOC merely provides comfort to the Bank as to the AE's ability / willingness to perform its obligations and neither creates nor is intended to create any kind of binding recourse which the Banker may have on the appellant.

v. Moreover, it is an incidental benefit arising merely from passive association with the group and are therefore not regarded as giving rise to arrangements subject to remuneration. Para 7.13 of OECD Guidelines, July 2011 deal with the issue which is reproduced hereunder: “Similarly, an associated enterprise should not be considered to receive an intragroup service when it obtains incidental benefits attributable solely to its being part of a larger concern, and not to any specific activity being performed. For example no service would be received where an associated enterprise by reason of its affiliation alone has a credit-rating

higher than it would if it were unaffiliated, but an intra-group service would usually exist where the higher credit rating were due to guarantee by another group member, or where the enterprise benefited from the group's reputation deriving from global marketing and public relations campaigns. In this respect, passive association should be distinguished from active promotion of the MNE group's attributes that positively enhances the profit-making potential of particular members of the group. Each case must be determined according to its own facts and circumstances."

vi. Appellant vide its letter dated 23.08.2012 has submitted that it does not press ground No. 6C(ii) which is in respect of comparable data for benchmarking and accordingly the appellant would not like to press ground No. 6C(ii) of appeal However in view of the position above such letter filed by the appellant becomes in consequential

vii. In view of the facts of the case, discussion herein above and consistent with the decision taken by my predecessor for A.Y. 2005-06 and by me for A.Y 2006-07 in the appellant's case, the adjustment of Rs. 5,75,38,800/- is therefore deleted.

viii Thus, this ground of appeal is allowed.

12. We find that the Tribunal in A.Y.2005-06 has decided this issue in favour of the assessee after observing as under:-

Ground No.6 to 9 relates to Transfer Pricing Adjustment with respect to issuance of "Letter of Comfort". This issue is interconnected with the grounds of appeal raised by revenue in its cross appeal. The Id. AR of the assessee submits that Id. CIT (A) deleted the adjustment against which the revenue has filed its cross appeal. The Id. AR of the assessee submits that the assessee issued Letter of Comfort to Bankers of Associated Enterprises (AE) of assessee. The assessee not reported this transaction (issuance of Letter of Comfort) in its Transfer Pricing Study Report (TPSR). The Assessing Officer made reference to Transfer Pricing Officer (TPO) for computation of Arms Length Price (ALP) of transaction reported by assessee with its AE in its report furnished under Form 3CEB. The TPO noted that the assessee has not reported about issuance of Letter of Comfort to the Banker of AE. The TPO issued show cause notice for determination of ALP with regard to issuance of Letter of Comfort. The assessee filed its reply vide reply dated 07.01.2008 & 18.01.2008. In 14 ITA No. 537/Mum/2013 TATA INTERNATIONAL LTD. reply to the show-cause, the assessee submitted that no adjustment is ought to be made as Letter of Comfort would not represent international transaction within the meaning of section 92B (1). It was further stated that merely an unequivocal statement of intention expressed by assessee not being bilateral, is not a transaction and letter is a private affair between the assessee and the lender/banker (non

associate and is not a transaction between two associate). The contention of assessee was not accepted by TPO by taking view that transaction relating to provision for Letter of Comfort and payment of commission for the services by AE to the assessee would fall within the definition in term of international transaction 92B of the Act. The TPO made adjustment of Rs. 8.70 crore on account of issuance of Letter of Comfort. The Id. CIT (A) after appreciating the contention of assessee concluded that issuance of Letter of Comfort does not constitute an international transaction. The Id. CIT (A) appreciated the difference between corporate guarantee and Letter of Comfort. The Ld. AR further submits that there is a basic difference between corporate guarantee and Letter of Comfort. In a Letter of Comfort, the party issues only a letter that a subsidiary or group company would comply term of financial transaction and have no obligation to indemnify, however, in case of corporate guarantee, the party issuing guarantee is under obligation to the lender. The Ld. AR further submits that in fact this ground of appeal is also covered by the decision of Tribunal in case of The India Hotel Company Ltd. vs. DCIT in ITA No. 9087/Mum/2010 dated 06.09.2019, wherein similar ground of appeal was considered and by following the decision of earlier years in that assessee and decision of Hon'ble Karnataka High Court in United Braveries Holding Ltd. Karnataka State Industrial Investment and Development Corporation Ltd. (M.F.A. No. 4234 of 2007 (SFC), wherein it was held that Letter of Comfort merely indicates the parties assurance that respondent would comply with the term of financial transaction without guaranteeing performance in the event of default.

13. since in the earlier year this precise issue has been decided in favour of the assessee, therefore, as precedence, following the aforesaid decision, we uphold the order of the ld. CIT (A) and consequently grounds raised by the Revenue are dismissed. 15. Since in the earlier assessment years namely 2005-06, 2006-07 and 2007-08 issue has been discussed and examined by the Coordinate Benches and revenue is not able to bring anything adverse on record to deviate from the earlier views, we respectfully follow the decisions of Coordinate Benches in earlier years and allow the ground taken by the assessee. In the result, AO is directed to delete the addition made on this count.*"*

15. Since in the earlier assessment years namely 2005-06, 2006-07 and 2007-08 issue has been discussed and examined by the Coordinate Benches and revenue is not able to bring anything adverse on record to deviate from the earlier views, we respectfully follow the decisions of Coordinate Benches in earlier years and allow the ground taken by the assessee. **In the result, AO is directed to delete the addition made on this count."**

6. The Ld.DR vehemently argued and invited our attention in the 'Letter of Comfort' in APB page 35-36. The Ld.DR also placed that the issue should be rejected and as the assessee has not received the interest / commission from the AE, so the assessment order should be upheld.

7. We heard the rival submissions and considered the documents available on the record. In our considered view, the issue is squarely covered by the order of co-ordinate bench in assessee's own case for A.Y. 2008-09. Further, the LOC is continuing from earlier years. The coordinate benches of earlier years are decided in favour of assessee. In earlier years the same addition are fully deleted. We cannot circumvent the orders of coordinate bench. The DRP directed @1.5% adopt on ALP.During the hearing the Ld.DR was unable to submit any contrary judgement against the order of ITAT. We relied on the order of the co-ordinate bench of ITAT Mumbai. The addition is directed to be deleted.Accordingly, the ground of the assessee succeeds.

In the result**, ground nos. 1.1 to 1.12** are allowed**.**

Ground nos.1.13 and 1.18

8. On this issue, the ld.AR placed that the interest is charged on outstanding receivable from AEs. The assessee itself charged the interest on outstanding @6% to 10% without allowing any credit period. The TPO determined interest @13.10%. But the DRP held prime lending rate to be charged. The ld.AR invited our attention in order of DRP pages 2-3. The relevant paragraph is reproduced as below:-

"2.1……..The assessee is an Indian entity and in an uncontrolled scenario, any Indian entity would charge interest for the credit period to another unrelated party as per the rates prevalent in Indian financial market. As the range of BPLR for the month of March 2009 was 11% to 12%, for an unsecured loan of more than Rs.2lakhs. The interest chargeable on the outstanding balances by the assessee was estimated at 13.10%, which would adequately take care of the fair market rate of interest that is chargeable by assessee in an arm's length situation and also the currency risks and other risk exposure taken by the assessee.

2.2 The Authorised Representative submitted that the Assessee had realized interest on the sales outstanding balances recoverable from the AEs on account of delayed payment, for which the assessee has charged interest @ 6% and @ 10% per annum for the period of delay in receiving the payment. The Assessee is not engaged in the business of banking or money-lending and, accordingly, in extending credit to its buyers, its primary purpose is not to earn interest but to secure business which, were it to deny the credit, it might not secure. Further, the cost of funds blocked in the credit period was also inbuilt in the sale price. Thus, the presumption of TPO, that the Assessee has allowed its export proceeds to be received in India, belatedly, thereby denying itself the appropriate return on the money which it should have earned had the money come in time in India fetching interest at the prevalent market rates of India ought to be disregarded. The arm's length price of the credit extended by the Assessee to its AEs outside India is the rate of interest prevailing outside India. PLR primarily relates to the lending transactions in Indian Rupees and cannot be applied to transactions of lending in foreign currency such as US Dollars. Accordingly, if an Indian enterprise is providing any funding to an overseas enterprise, the interest rate would need to be based on the currency of the loan (for e.g. LIBOR). Thus, no adjustment ought to be made under Section 92-CA(4) of the Act, in respect of the interest charged by the Assessee on the outstanding balances of export sale proceeds receivable from its AEs.

2.3 Directions of DRP:-*The arguments have been considered. As noted by TPO if assessee had received these proceeds in time, it would not have had to borrow such funds from banks and its interest liability would have been that much less or it could have deployed funds in the domestic market and earned return. Therefore, assessee has to be compensated appropriately by the AEs. Bank PLR is deemed appropriate. The TPO is directed to restrict the adjustment accordingly."*

8.1 The Ld.AR placed that the issue is squarely covered by the order of ITAT, Mumbai Bench in assessee's own case in **ITA No.537/Mum/2013**date of pronouncement **06/02/2024**, for A.Y. 2008-09. The relevant paragraphs 16-17 are reproduced as below:-

> *"16. Ground No. 4, Transfer Pricing adjustments in respect of interest of Rs. 20, 70,633/- on delayed realisation of sales proceeds from its AEs. This ground relates to the transfer pricing adjustment vis-à-vis imputing interest on delayed realisation of sale proceeds from its AEs. The Appellant charged interest at the rate of 6% on the realisation of sale proceeds from its AEs for the entire credit period extended to the AEs of 150/180 days. The TPO held that interest chargeable by the Appellant on the outstanding balances should be at par with the Prime Lending Rate ('PLR') in India which according to him was 12.25% prevalent in the month of March 2008. The Ld. DRP confirms the view of TPO on the ground that the transaction originates in India and therefore the TPO has correctly applied the PLR of SBI.*
> *17. As per assessee, Interest rate should be computed based on the interest rate applicable to the currency in which loan has to be repaid. Reliance in this regard is placed on the decision of the Delhi High Court in the case of CIT v/s. Cotton Naturals India Pvt. Ltd. (2015) 231 Taxman 401 (Delhi), a copy whereof is enclosed herewith at Page 100 to 117. The PLR considered by the TPO primarily relates to lending in Indian currency and cannot be applied to amounts outstanding in foreign currency. The average LIBOR rate for the captioned year considered by the Appellant works out to 4.74% (refer page Nos. 18 to 31 of the paperbook-volume 2 filed on 15 November 2023) and the rate of interest charged by the Appellant is 6%, which is higher than the said LIBOR rate."*

9. The Ld.DR argued vehemently and placed that the assessee has charged excess interest and fully relied on the order of revenue authorities.

10. We heard the rival submissions and considered the documents available in the record. The interest is charged on delayed receivable from AEs. Further, the issue is squarely covered by the order of co-ordinate bench of ITAT in assessee's own case in **ITA No.537/Mum/2013**(supra). The average LIBOR rate for the year

under consideration submitted by the ld. AR is less than the interest charged by the assessee. Therefore, we cannot circumvent the order of coordinate bench and no further adjustment is required in this regard. Accordingly, the TP adjustment is deleted.

In the result**, the ground nos. 1.13 & 1.18** are allowed.

Groundno. 2

11. The assessee granted loan to Tata West Asia FZE (wholly owned subsidiary of the assessee). During the financial year 2008-09, the interest free loan was granted. An addition was made on non-recovery of interest in respect of loan to AEs amount to Rs. 26,84,253/-. Ld.AR placed that no new loan has been granted during the year. The Ld.AR submitted the following working to substantiate that own funds are more than the loan granted.

Share capital	Rs.2,000 lakhs
Reserves & Surplus	Rs.31,581 lakhs
Total	Rs.33,581 lakhs

The ld. AR claimed that the own funds were utilized for interest free loans to the subsidiary. The Ld.AR also placed the submission which was submitted before the DRP contending that the loan was given for the purpose of business. The relevant paragraphs are reproduced as below: -

> *"Facts of the case*
> *The assessee had, in the. course of its business, advanced interest free loan to its wholly owned foreign subsidiary TWA located at Jebel Ali Free Zone - Debai of USD 5,50,000 (Rs.280.49lacs).*

During the year, TWA could not recover a debt of USD 4,84.000 from a Usha Ispat Limited – a debtor, since Usha Ispat Limited became a sick company and no assets were available for recovery of loan of TWA. This resulted in net assets of TWA falling below 75% of share capital. As per Jebel All Free Zone Rules (Implementing Regulations No. 1/92 of November 1992) JAFZA rules (copy enclosed at Annexure 1) the net assets need to be maintained at 75% of share capital and if there is a shortfall funds need to be infused to remedy the same. The relevant extract of rules is reproduced as under:

> *"if the net assets of a Free Zone Establishment fall below 75% of its share capital the Director(s) shall, not lo.ter than 15 days from the earliest day on which that fact is known to a director, duly notify the FZE Department and the Owner which shall, within 7 days of such notification to it, take such steps as may be appropriate to remedy the situation so as to ensure that the net assets of such Free Zone Establishment are restored to at least 75% of its share capital as soon as reasonably practicable"*

As a parent company of its wholly owned subsidiary — TWA, the assessee was required to infuse funds to bridge the gap and for protecting its own investments in TWA, This is also evidenced by Board Resolution passed by the assessee at the time of granting the interest free loan to TWA (copy enclosed at Annexure 2). The resolution clearly mentions that the loan was made in view of requirements of JA.F7.A Rules. Based on the aforesaid factual background, the submissions of the assessee on benchmarking of interest is as under:"

12. The Ld.AR relied on the order of **Hon'ble Apex Court** in the case of **S.A. Builders Ltd 288 ITR 1 (SC)**. The relevant paragraph is reproduced below:-

"34. We agree with the view taken by the Delhi High Court in CITv. Dalmia Cement (Bharat) Ltd. [2002] '. ITR 377 that once it is established that there was nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case, businessman can be compelled to maximize its profit. The income tax authorities must put themselves in-shoes of the assessee and see how a prudent businessman would act. The authorities must not look at; matter from their own view point but that of a prudent businessman. As already stated above, we have to the transfer of the

borrowed funds to a sister concern from the point of view of commercial expediency i not from the point of view whether the amount was advanced for earning profits.

35. We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of respective case. For instance, if the Directors of the sister concern utilize the amount advanced to it by assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure commercial expediency. However, money can be said to be advanced to a sister concern for cornmercial expediency in many other circumstances (which need not be enumerated here). However, where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advanced borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans.
36. In view of the above, we allow these appeals and set aside the impugned judgments of the High Court, /, Tribunals and other authorities and remand the matter to the Tribunal for a fresh decision, in accordance with law and in the light of the observations made above.

37. We also make it clear that we are not setting aside the order of the Tribunal or other income-authorities in relation to the other points dealt with by these authorities, except the point of deduction interest on the borrowed funds."

13. The Ld.DR vehemently argued and fully relied on the orders of Revenue Authorities. The Ld.DR was unable to submit any contrary judgement against the submission of the assessee.

14. We heard the parties and perused the material on record. We notice that the assessee had granted loan to TATA West Asia FZE (wholly owned subsidiary of the assessee) during the financial year 2008-09 & that no new loan has been granted during the year under consideration. Attention was invited to Schedule F(v) of the Audited Financials at Page 22 of APB. Further, since the assessee's own funds (Rs.33,581 lakhs) were far in excess of loan granted (Rs.280 lakhs), it

should be held that loan was granted from own funds and not from borrowings [page 16 of APB.].

14.1. It is noticed that Tata West Asia FZE (wholly owned subsidiary of the assessee) is located in Jabel Ali Free Zone (JAFZA). As per JAFZA rules, APB, page 56A, if the net assets of entity in free zone falls below 75% of its share capital the owner shall restore the net assets to at least 75% of its share capital. The AE incurred a bad debt due to which its Net Assets fell below 75% of its share capital and hence money was advanced by the appellant to comply with JAFZA rules as quasi equity. Therefore, such loan / advances shall not attract any interest. Attention is invited to Board Resolution placed at Page 58 of APB. From the above it is clear that the loan was given for the purpose of business and therefore, in our view, no interest should be disallowed keeping in view the decision of Hon'ble **Supreme Court** in the case of **S.A.Builders Ltd**(supra). There is also merit in the submissions of the assessee that even otherwise, the loan was granted from interest free funds i.e. receipts from the maturity of mutual funds APB pages 62 and 67. Considering these facts, non-recovery of interest from interest free loan, the addition of interest amount Rs.26,84,253/- is quashed.

In the result,**theground no. 2** is allowed.

Ground no. 3:

15. The Ld.AR placed that the issue is related to disallowance of exemption claimed by the assessee under section 14A of the Act. The Ld.AR invited out attention to assessment order page 18, para 4 which is as under: -

> ***"4 Disallowance u/s 14A:***
> *4.1 In return of income filed, the assesses has not offered any amount for disallowance u/s. 14A, in spite of the fact that it has claimed domestic dividends aggregating Rs. 2,71,70,877/- to be wholly exempt u/s. 10(34) (Rs.2,00,55,466) and 10(35) (Rs.71,15,411). Therefore, the A.R. of the*

assessee was required to explain as to why disallowance u/s 14 should not be made in your case. In this regard, the assessee made detailed submissions through Annexure No. 1 submitted vide their letter dated 26.09.2013, which is reproduced as under-(.1) (i)

The provisions of sec. 14A have no application to the assessee's case, for the following reasons:

The assessee has not, during or for the year under consideration, incurred any expenditure in relation to exempt income, whether by way of interest or otherwise.

(ii) The entire effective Borrowed Funds of the assessee, constituted of Export Packing Credit of Rs. 172.27 crores and term loan of Rs 20.17 Crs, was utilised for the purposes of the assessee'sexport business and capacity expansion project for the purchase of plant & machinery no part of such funds could have been utilised by the assessee for any other purpose, much less for making any investments, since the Reserve Bank of India's regulations prohibit the use of those funds for any other purpose.

(2) Without prejudice to the submission at (1) above, the provisions of sec. 14A(2) and rule 8D have no application to the assessee's case, since no part of the interest expenditure of Rs. 12,98,29,264 can be disallowed under those provisions, inasmuch as—

(i) the fact that the assessee's funds constitute a mixed fund, comprising both, the assessee's own funds as well as its borrowed funds, and

(ii) the fact that the assessee's own funds of Rs.434.29 crores were far in excess of its investments of Rs. 236.61 crores,

a presumption arises that such investments were made from the assessee's own funds [In making this submission, the assessee has relied on the I.T.A.T's order dated 08.06.2012 in its own case for the A.Y.s 2000-01 to 2002-03].

(3) However, even if rule 8D is held applicable, the amount disallowsble under that rule, on the assessee'sbasis, is Rs.42,43,000 as computed by the assessee on a without prejudice basis (Annexure-1, filed with letter dated 26.09,2013).

4.2 In view of the foregoing, the assesses was required to furnish the computation of the amount disallowable u/s. 14A in the manner prescribed in rule 8D and on the basis adopted in the assessment for A.Y. 2009-10. The assessee has duly furnished such computation on a "without prejudice" basis, vide Annexure-1 dated 12.01.2014. According to this computation, the amount disallowable u/s.14A r.w. rule 8D works out to Rs.1,73,87,000/- (after excluding the values of Debt Instruments on the

first and last days of the year and investment in foreign subsidiaries, on the reasoning that they yield taxable income).”

The Ld.AR placed that for the purpose of section 14A, cost of only those investments have to be considered which have yielded exempt income during the year. The ld. AR placed that investment was made from assessee’s own fund. The statement showing breakup and analysis of investment is enclosed by the ld. AR in APB page 125. The statement is reproduced as below: -

Page 1

TATA International Limited
Statement Showing Breakup and analysis of Investments
Assessment Year 2010-11

Sr No.	Particulars	Rupees in Lacs 31 Mar 09	31 Mar 10
	Value of ALL Investment	24,364.21	23,661.37
Less:			
(A)	Value of Investments, Income from which Forms, or Shall Form, Part of the Total Income (Foreign Investments and Debntures) (allowed by AO)		
	Tata South-East Asia Limited, Hong Kong	125.01	125.01
	Tata West Asia FZE, United Arab Emirates	339.10	339.10
	Tata Africa Holdings (SA) (Proprietary) Limited, South Africa	4,221.31	4,221.31
	Tata Inegrational (Australia) Proprietary Limited, Australia	0.48	0.48
	Tata Industries Limited (6.75% Non-Convertible Debentures)	23.46	23.46
	(A)	4,709.36	4,709.36
(B)	Increase on account of Revaluation of Investments which became the Assessee's Investments on April 1, 2004, consequent to the merger of the erstwhile Cameo Investment and Finance Limited with the Assessee: (Allowed by AO)		
	TATA Consultancy Services limited	564.95	564.95
	TATA Sons Limited	11,080.37	11,080.37
	(B)	11,645.32	11,645.32
(C)	Investements on which no exempt income is earned during the year		
	Dewas Tanneries Pvt Ltd. (**)	-	-
	Tata Ceramics Ltd (**)	-	-
	Tata Ceramics Ltd (11% redeemable Non Cumulative Preferences Shares)	751.87	751.87
	Oriental Floratech India Ltd (**)	-	-
	Tata Precision Industries (India) Limited (*)	-	-
	Tata Precision Industries (India) Limited 6% Non Cumulative Reedeemable Preference Shares (*)	-	-
	Tata Precision Industries (India) Limited 6% Non Cumulative Reedeemable Preference Shares Acquired on 16/11/2006	150.00	150.00
	Drive India Com	32.50	32.50
	Tata International DLT Pvt. Ltd.	534.00	534.00
	Tata Industries Ltd	3,481.34	3,481.34
	Tata Services Ltd	1.98	1.98
	Tata Employees Consumers Co-op.Soc.Ltd	0.05	0.05
	PAN Agro Services Ltd (*)	-	-
	Pran Agro Services Private Ltd (5% Non-Cumulative Redeemable Preference Shares)	0.50	0.50
	Virendra Garments Manufacturers Limited (*)	-	-
	Surat Diamond Industries Ltd (**)	-	-
	Graziella Shoes Limited	450.85	450.85
	(C)	5,403.09	5,403.09
	(TOTAL INVETSMENT LESS (A) , (B) and (C))	2,606.44	1,903.60
(*)	Balance less than Rs. 500		
(**)	These Investments have been considered in provision for dimunition in value.		

15.1. The Ld.AR placed that the disallowance under section 14A was made Rs.1,73,87,000/- during the impugned assessment year. The Ld.AR, in his alternate argument placed that interest expenses of Rs.1298.29 lakhs includes interest aggregating to Rs.1003.71 lakhs which is in relation to EPC export credit and true shipment credit in foreign currency incurred for the purpose of export / import business of the assessee. Hence, such interest has to be excluded. Accordingly, the disallowance under rule 8D(2)(iii) restricted to 0.5% of only those investments which have yielding income amount to Rs.2255.02 lakhs which works out to Rs.11.28 lakhs.

The Ld.AR respectfully relied on the following order.

15.2.**South Indian Bank Ltd vs CIT 438 ITR 1 (SC)**

"28. *The above conclusion is reached because nexus has not been established between expenditure disallowed and earning of exempt income. The respondents as earlier noted, have failed to substantiate their argument that assessee was required to maintain separate accounts. Their reliance on Honda Siel (supra) to project such an obligation on the assessee, is already negated. The learned counsel for the revenue has failed to refer to any statutory provision which obligate the assessee to maintain separate accounts which might justify proportionate disallowance.*

29. *In the above context, the following saying of Adam Smith in his seminal work - The Wealth of Nations may aptly be quoted:*

"The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid ought all to be clear and plain to the contributor and to every other person."

Echoing what was said by the 18th century economist, it needs to be observed here that in taxation regime, there is no room for presumption and nothing can be taken to be implied. The tax an individual or a corporate is required to pay, is a matter of planning for a taxpayer and the Government should endeavour to keep it convenient and simple to achieve maximization of compliance. Just as the Government does not wish for avoidance of tax equally it is the responsibility of the regime to design a tax system for which a subject can budget and plan. If proper balance is achieved between these, unnecessary litigation can be avoided without compromising on generation of revenue.

30. *In view of the forgoing discussion, the issue framed in these appeals is answered against the Revenue and in favour of the assessee. The appeals by the Assessees are accordingly allowed with no order on costs.''*

15.3. With regards to contention of the ld. DR that explanation to Section 14A, the ld. AR has placed reliance respectfully on the order of the **Hon'ble Delhi High Court** in the case of **PCIT, Central vs Ira Infrastructure India Ltd (2022) 141 taxmann.com 289 (Delhi)**. The relevant paragraphs are reproduced as below: -

''7. The aforesaid proposition of law has been reiterated by the Supreme Court in MM. Aqua Technologies v.CIT [2021] 129 taxmann.com 145/282 Taxman 281/436 ITR 582. The relevant portion of the said judgment is reproduced hereinbelow: -

> *"22. Second, a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as earlier stood. This was stated in Sedco Forex International Drill Inc. v. CIT, (2005) 12 SCC 717 as follows:*

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the t law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. C [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up ; ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of UP., (1981) 2 SCC 585]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24; Brij Mohan Das Laxman Das v. CIT(1997) 1 SCC 352; CITv. Podar Cement (P.) Ltd., (1997) 5 SCC 482]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of section 9(1)(//). It includes salaries in tl total income of an assessee if the assessee has earned it in

India. The word "earned" had been judicial! defined in SG. Pgnatale[(1980) 124 ITR 391 (Guj.)] by the High Court of Gujarat, in our vie\ correctly, to mean as income "arising or accruing in India". The amendment to the section by way of a Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect . from 1979, "income payable for service rendered in India". 19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about change effectively in the existing law and in addition is slated to come into force with effect from afuture date, there is no principle of interpretation which would justify reading the Explanation as opera tin, retrospectively." (emphasis supplied)

8. Consequently, this Court is of the view that the am en dine lit of section 14A, which is "for removal o doubts" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.

Though the judgment of this Court has been challenged and is pending adjudication before die Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgments passed by tl Supreme Court in Kunhayammedv Slate of Kerala [2000] 113 Tax man 470/245 1TR 360 and Shn Chamundi Mopeds Ltd. v. Church of South Indict Trust Association [1992] 3 SCC 1, the present appeal dismissed being covered by the judgment passed by the learned predecessor Division Bench in IL &FS Energy Development Co. Ltd. (supra) and Cheminvest Ltd. v. CIT [2015] 61 taxmann.com 118/234 Taxm; 761/378 ITR 33 (Delhi).

10. Accordingly, the appeal and application are dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the SLP filed in the case of IL &FS Energy Development Co. Ltd. (supra).''

16. The Ld.DR vehemently argued and fully relied on the order of revenue authorities. The Ld.DR invited our attention to amendment of Finance Act, 2021, effective from 1st April, 2022 in respect to Section 14A of the Actand prayed for upholding the addition.

17. We heard the rival submissions and considered the documents available on the record. From the calculation of capital, the investment was made from assessee's own funds. The Ld.DR in argument asked to implement Finance Bill, 2021 in relation to amendment under section 14A. But in contrary, the Ld.AR relied on the judgement of **Ira Infrastructure India Ltd** (supra). Accordingly, this particular amendment is not effective for the impugned appeal. Related to Section 14A we respectfully follow the order of **South Indian Bank Ltd**(supra). We respectfully follow the orders of Hon'ble Apex Court and Hon'ble Delhi High Court. In our considered view, the addition should be restricted to @.5%, only those investments which have yielding income amount to Rs.2255.02 lakhs. The Ld.DR has not circumvented the offer made by the assessee. Accordingly, the entire addition U/s 14Ais directed to restrictamount to Rs.11.28 lakhs.
In the result**, the ground no. 3** is allowed**.**

Ground no. 4:

18. In this issue, the assessee incurred expenditure by way of professional charges paid to Deloitte Touche Tohmatsu amount of Rs.16,66,520/-. The Ld.AR in argument placed that one of the business segments of the appellant is manufacturing of leather and leather products for export. The assessee has tried to explore the sales of leather goods in the domestic market. Accordingly, the consultant was appointed and paid to work in opportunities in the market related to leather goods. So, the consultancy fees was paid after deducting.But entire consultancy feeswas added back with the total income.

19. Ld.DR vehemently argued and relied on the assessment order. The pages 21 & 22of final assessment order are read. Said pages arereproduced asbelow: -

*"6. Legal &**Professional fees paid to Deloitte Touche Tohmatsu***

6.1 It is also noticed that assessee has paid an amount of Rs. 16,66,520/-to M/s Deloitte Touche Tohmastsu. The assessee was asked why the amount paid to DHS should be treated as revenue expenditure. In this respect assessee submitted the detailed reply vide letter dated 31.12.2013 wherein the assessee provided the detailed break up of the expenses and submittedthat :-

"Assessee company being one of the largest Export Houses in the country, is a leading manufacturer and exporter of finished leather and leather footwear in the country. Further assessee company is also active in the global export market for leather footwear and manufacturer of leather footwear to major global brands like Hush Puppies, Zara, Marks and Spencer, etc. with annual footwear exports of over Rs. 150 crores. Accordingly assessee company has engaged the services of DHS for carrying out the market study for footwear business in India and their scope of work broadly classified as follows:

a) Market opportunity Assessment of the Indian Footwear market.

b) Assessment of Segment wise growth potential in India.

c) Consumer preference Assessment.

Thus based on the scope of the activity carried out by DHS and nature of the assessee business it is dear that these expenses are not incurred for exploring the market of a new product rather expenses are incurred to enable the assessee for extension of footwear business and to conduct its existing business more efficiently as market study gives an assessee a better knowledge of market and the assessee may employ profit making apparatus to a better advantage w/Yrt the knowledge derived from market survey as consumer behavior towards fashion industry consistently changing and there may be possibility that the brand and design which consumer willing to purchase today may not use or accept tomorrow therefore in a dynamic environment where fashion, choices changing very fast it is very unlikely that the assessee will derive any enduring benefit from the market survey. Accordingly your goodself stand to treat these market survey expenditure as capital in nature is unjustifiable as same expenditure are incurred neither for the purpose of creating any capital assets and neither any capital assets created from the same and should be a/towed to assessee as revenue expenditure.

Without prejudice to above assessee submitted that even if your goodself would like to treat the amount paid to DHS related to market study/survey as capital

only the amount to the extent of Rs.13,23,600 out of total amount of Rs. 16,66,520 relates to market opportunity study for footwear business in India and balance relates to the out of pocket expenses and TP study report which is an yearly activity and related to the business as a whole and required to be submitted annually to TP officer for TP assessment."

6.2 It is apparent from the above stand of the assessee that the payment made on a/c of market opportunity are for a future business intended by the assessee and not incurred on the existing business, therefore these expenses are held to be not incurred exclusively for the purpose of the present business of the assessee. Thus these cannot be allowed as revenue expenditure. More over these expenses has no direct nexus to the incomes reported by the assessee. Hence these expenses are held to be non business and are disallowed & added to the income of the assessee. <u>The directions of the DRP</u>

Since the assessee company has not contested this ground of appeal before the DRP-II, the addition made by the AO remains intact."

20. The Ld.AR respectfully relied on the order of Hon'ble **Apex Court** in the case of

Alembic Chemical Works Co. Ltd vs. CIT, 177 ITR 377 (SC)

"14. *It appears to us that the answer to the questions referred should be on the basis that the financial outlay under the agreement was for the better conduct and improvement of the existing business and should, therefore, be held to be a revenue expenditure. Reference may also be made to the observations of this Court in CIT v. Ciba of India Ltd. [1968] 2 SCR 696 at p. 705.*

There is also no single definite criterion which by itself, is determinative whether a particular outlay is capital or revenue. The 'once for all' payment test is also inconclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a common-sense way having regard to the business realities. In a given case, the test of 'enduring benefit' might break down. In CIT v. Associated Cement Co. Ltd. JT 282 (2) 287 this Court said:

". . .As observed by the Supreme Court in the decision in Empire Jute Co. Ltd. v. CIT [1980] 124 ITR 1 (SC) *that there may be cases where expenditure, even if incurred for obtaining an*

advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principles laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. . . ." (p. 290)

15. *In the result, for the foregoing reasons the appeal succeeds and is allowed and the question of law referred to the High Court for its opinion in ITR 78 of 1970 is answered in the affirmative and against the revenue. The judgment under appeal is set aside.*

Likewise, the supplementary question of law raised in IT Appeal No. 24 of 1971 before the High Court and now constituting the subject-matter of the supplementary reference made by the Tribunal to this Court is answered in the negative and against the revenue.

The appeal is, accordingly, allowed, but with no order as to costs."

20.1. Further respectfully relied on order of ITAT Mumbai Bench-K in the case of **Asian Paints vs ACIT 160 taxmann.com 356 (ITAT-Mum).**The relevant part is as follows:-

"19. *From the summary of expenditure incurred by the assessee, we further find that the assessee also incurred expenditure on exploring the decorative paints market in Turkey and Indonesia, since the assessee wishes to expand its geographical presence worldwide and wants to develop its operational understanding of the decorative paints market in Turkey and Indonesia. From the perusal of the agreement in respect of the aforesaid market survey, forming part of the supplementary factual paper book from pages 67-87, we find that the same includes mapping and trends of the coating market and decorative paints market in Turkey and Indonesia, understanding pricing scheme of decorative paints, market and product segments, major market players and understanding the channel structure of decorative paints and commercial aspects of distribution. Thus, from the agreements, it is sufficiently evident that the scope of the market survey is in line with the existing business of the assessee of manufacturing paints and enamels. Therefore, we are of the considered view that the expenditure incurred on exploring the decorative paints market in Turkey and Indonesia is for the extension of the existing line of*

business of the assessee and thus is in the nature of revenue expenditure. Accordingly, the AO is directed to delete the addition in respect of this expenditure."

21. We heard the rival submission and followed the orders of Hon'ble Apex court and coordinate bench of ITAT-Mumbai.Further the assessee company is also active in the global export market for leather footwear and manufacturer of leather footwear to major global brands like Hush Puppies, Zara, Marks and Spencer, etc. with annual footwear exports of over Rs. 150 crores. So, the expenses to DHS for exploring local market is well acceptable before the bench.We respectfully follow the order of honourable apex court in the case of**Alembic Chemical Works Co. Ltd** (supra) and we follow the order of coordinate bench of ITAT Mumbai, **Asian Paints**(supra). The ld. DR was unable to place any contrary judgment against the submission of the AR. We set aside the appeal order in this ground. We can't circumvent both theorders of Hon'ble Apex Court and Coordinate bench. So, the addition amount to Rs. 16,66,520/- is quashed.

In the result**, the ground no. 4** is allowed**.**

Ground no. 5:

22. In this case, the Ld.AR placed that professional charges paid to Vaishnavi Corporate Communications Pvt Ltd amount to Rs.38,76,282/-. The issue already decided against the assessee in assessee's own case by the co-ordinate bench of ITAT-Mumbai in **ITA No.537/Mum/2013**date of pronouncement **06/02/2024**.

The relevant paragraph is reproduced as follows:-

"30. We have gone through the submissions of the assesseealongwith the findings of AO and Ld. DRP. It is found that assessee is substantially failed to adduce any evidence of services rendered in the category of professional fee. We have gone through the contents of agreement also

reproduced (supra), nowhere it looks like an agreement for rendering professional services. Assessee's argument that for earlier 2 years, the same expense was allowed and they are relying on the decision of Hon'ble Supreme Court in the case of Radhasoami Satsang (supra) is not applicable here based on the facts of the case. Principle of consistency should have been followed as far as possible and permitted by thefacts of the case, but as the concept of res-judicata is also there, to be considered before any adjudication. Hence, in the present situation we also asked the AR of the assessee to substantiate the claim by placing on record any cogent evidence which confirms delivery of service by M/s. VCCPL. But at this stage also, assessee is substantially failed to substantiate its claim."

Accordingly, the Ld.AR accepted the dismissal of the grounds.

23. The Ld.DR relied on the order of Revenue Authorities and accepted the submission of assessee.

24. In our considered view, the issue is already decided against the assessee and matter is pending before the Hon'ble jurisdictional High Court. Accordingly, we follow the order of our co-ordinate bench, **ITA No.537/Mum/2013**(supra), and the ground of the assessee is dismissed.

In the result**, the ground no. 5** is dismissed**.**

25. The assessee filed the additional grounds before the bench but never pressed it. Accordingly, the additional grounds of assessee are dismissed as not pressed.

26. In the result, appeal of the assessee bearing **ITA No. 1195/Mum/2015 is partly allowed.**

Order pronounced in the open court on 28th day of May, 2024.

Sd/-	sd/-
(PADMAVATHY S.)	(ANIKESH BANERJEE)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai,दिनांक/Dated: 28/05/2024
Pavanan

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar), **ITAT, Mumbai**