

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH KOLKATA

**BEFORE SHRI SONJOY SARMA, JUDICIAL MEMBER
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

ITA No. 372/KOL/2021

Assessment Years: 2014-15

&

ITA No. 373/KOL/2021

Assessment Years: 2015-16

Tata Consumer Products Limited, (erstwhile Tata Global Beverages Ltd.) 1, Bishop Lefroy Rd., Kolkata - 700020 (PAN: AABCT0602K)	Vs	The Deputy Commissioner of Income Tax, Circle-4(1), Kolkata - 700069
(Appellant)		(Respondent)

Present for:

Appellant by : Sriram Sasdhari, AR
Respondent by : Rakesh Kumar Das, CIT, DR
Manoj Kumar Pati, Addl. CIT

Date of Hearing : 20.06.2024

Date of Pronouncement : 17.09.2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

These appeals filed by the assessee are against the two separate orders both dated 30/07/2021 of the Ld. Commissioner of Income Tax (Appeals), Kolkata-22 [hereinafter referred to as “the Ld. CIT(A)”] passed

u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for AYs 2014-15 and 2015-16. As both the appeals involve a common issue, the same were heard together and are being disposed of vide this common order for the sake of brevity and convenience.

2. The grounds of appeal raised by the assessee in ITA No. 372/Kol/2021 are as under:

“1.0 That on facts and circumstances of the case, the order passed by the Ld. CIT(Appeals) is bad both in the eyes of law and on facts.

2.0 On the facts and circumstances of the case & in law, the Ld. AO/TPO grossly erred in making an adjustment of Rs. 1,44,77,042/- to the income of the Appellant on account of corporate guarantee fee and in doing so, the Ld. AO/TPO grossly erred in:

2.1 disregarding the fact that the transaction of corporate guarantee extended by the Appellant to its AEs does not fall within the definition of "International transaction" under section 928 of the Act.

2.2 disregarding the fact that the provision of corporate guarantee to the AEs was for the purpose of furtherance of business by the Appellant, and consequently the guarantee was in the nature of shareholder services and thus a guarantee fee is not warranted.

2.3 disregarding the fact that the Appellant had been irrevocably and unconditionally indemnified by Tata Global Beverages Investment Ltd. ("TGBIL"), being the parent and controlling company of Kahutara Holdings Limited (KHL), for any liability arising on account of bank guarantee and thus not exposed to risk.

2.4 disregarding the legal relevance of counter guarantee and misstating that as neither the appellant nor TGBIL are directly holding companies of KHL, there is no potency and efficiency of this indemnity if it ever come to encashing it in case of default by KHL.

2.5 disregarding the fact that the counter guarantee provided by TGBIL and the guarantee provided by the appellant to the bank are one international transaction and need to be analyzed together.

2.6 disregarding the detailed and proper comparability analysis submitted by the Appellant, on a without prejudice basis, following the 'interest saved' approach for both the corporate guarantee and the counter guarantee.

2.7 making an ad-hoc adjustment of 200 basis points on the outstanding loan amount as corporate guarantee commission without any scientific basis.

3.0 On the facts and circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as Ld. CIT(A)] erred in upholding the action of the Ld. Assessing Officer (AO) in re-computing Long-Term Capital Gain (LTCG) at Rs. 206.30 crores as per provisions of Section 50C of the Act.

4.0 On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the invoking of the provisions of section 50C, without appreciating that stamp duty value of INR 231.06 crs did not represent the correct market value of property and the actual sale consideration was arrived at based on independent valuer report.

5.0 On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the action of Ld. AO in doing an addition u/s Section 50C without mandatorily referring the matter to the DVO (Departmental Valuation Officer) as per procedure laid down under section 50C(2) of the Act, inspite of specific request made by the appellant, and therefore such action of the AO is grossly invalid and unjustifiable and the entire proceeding taken in pursuance thereof is liable to be quashed being without jurisdiction.

6.0 On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the action of the Ld. AO in applying provisions of Section 50C and computing Long-Term Capital Gain (LTCG) on sale of both land and building without appreciating that the building formed part of block of assets and hence as per provisions of Section 43(6) only 'moneys payable" in respect of such building was required to be reduced from the relevant block of assets.

6.1 On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in not appreciating that the appellant company had reduced the actual sale consideration on building from the relevant block of assets in the return of income itself and hence no additional claim in respect of the same was made for the first time before the CIT(A).

7.0 That on the facts and in the circumstances of the case and without prejudice to above, the Ld. CIT(A) grossly erred in not appreciating that variance between the stamp duty value and actual sale consideration of land was within the acceptable variation range of (+/-)15% and hence provisions of Section 50C was not applicable.

8.0 On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not admitting the additional claim made for allowing education cess and secondary higher education cess as a business expenditure u/s 37(1) without following the decision of the Supreme Court in the case of National Thermal Power Co. Ltd. reported in 229 ITR 383

8.1 On the facts and circumstances of the case and in law, in any event, the Ld. CIT(A)/AO ought to have allowed deduction of education cess and secondary higher education cess and dividend distribution tax during the subject financial year as a business expenditure under section 37(1) of the Act.

9.0 That the appellant craves leave to add, amend, modify, rescind, supplement or alter any of the grounds stated hereinabove either before or at the time of hearing the appeal. The above grounds are without prejudice to each other.

The above grounds are without prejudice to each other."

2.1 The grounds of appeal raised by the assessee in ITA No. 373/Kol/2021 are as under:

“1.0 On the facts and circumstances of the case & in law, the Ld. AO/TPO grossly erred in making an adjustment of Rs. 80,39,807/- to the income of the Appellant on account of corporate guarantee fee and in doing so, the Ld. AO/TPO grossly erred in:

1.1. disregarding the fact that the transaction of corporate guarantee extended by the Appellant to its AE does not fall within the definition of "International transaction" under section 928 of the Act.

1.2. disregarding the fact that the provision of corporate guarantee to the AEs was for the purpose of furtherance of business by the Appellant, and consequently the guarantee was in the nature of shareholder services and thus a guarantee fee is not warranted.

1.3. making an ad-hoc adjustment of 200 basis points on the outstanding loan amount as corporate guarantee commission without any scientific basis.

2.0 On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not admitting the additional claim made for allowing education cess and secondary higher education cess as a business expenditure u/s 37(1) without following the decision of the Supreme Court in the case of National Thermal Power Co. Ltd. reported in 229 ITR 383.

2.1 On the facts and circumstances of the case and in law, in any event, the Ld. CIT(A)/AO ought to have allowed deduction of education cess and secondary higher education cess and dividend distribution tax during the subject financial year as a business expenditure under section 37(1) of the Act.

3.0 That the appellant craves leave to add, amend, modify, rescind, supplement or alter any of the grounds stated hereinabove either before or at the time of hearing the appeal.

The above grounds are without prejudice to each other.”

I. ITA No. 372/Kol/20121(Assessment Year: 2014-15):

We would first take up appeal for the Assessment Year 2014-15 which has been preferred by the assessee challenging the order, dated 30.07.2021, passed by the Ld. CIT(A) whereby, inter alia, the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order dated 20.12.2017, passed under Section 143(3)/144C of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’).

3. Brief facts of the case as filed before the Ld. CIT(A) are that the appellant is a widely held domestic company engaged in the business of, inter alia, cultivation, manufacture and sale of tea, blending and sale of tea; manufacturing and exporting of instant tea, purchase and sale of tea

and other goods; process and sale of strawberries, and other beverages business. For the previous year relevant to the assessment year under consideration, the appellant filed its return of income on 30th November 2014 declaring total income of Rs. 5,38,31,63,150/- under normal provisions and Rs. 5,86,43,95,036/- under the provisions of Section 115JB of the Act and claiming a refund of Rs. 46,91,630/-. During the relevant year under consideration, the company got amalgamated with 'Mount Everest Mineral Water Limited' (hereinafter referred to as MEMW) pursuant to a scheme of amalgamation u/s 391 to 394 of the Companies Act, 1956 effective from 18 May 2015. To give effect to the amalgamation, a revised return was filed on 26th November 2015 declaring total income of Rs. 4,62,27,29,010/- under normal provisions and Rs. 6,07,14,22,413/- under the provisions of Section 115JB of the Act and claiming a refund of Rs. 11,91,19,230/-. Further, an APA has been signed between the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India and TGBL on 29th August 2016 which applies to the year under consideration. Pursuant to signing of the APA, the appellant filed a modified return u/s 92CD on 25th November 2016 declaring total income of 4,63,86,13,234/- under normal provisions and Rs. 6,07,14,22,413/- under the provisions of Section 115JB of the Act and claiming a refund of Rs. 11,91,19,231/-. The appellant's case was selected for scrutiny and notice u/s 143(2) of the Act, dated 28 August 2015 was received by the appellant on 3 September 2015. In response to the notices u/s 143(2) of the Act, the appellant filed relevant details and/ or particulars as had been requisitioned by the Ld. Assessing Officer “the Ld. AO”) from time to time.

3.1 During the course of the assessment proceedings, the Ld. AO made a reference under section 92CA of the Act to the Deputy Commissioner of Income-tax, TPO, Range 2, Kolkata (“the Ld. TPO”). Thereafter, in

response to the notice issued by the Ld. TPO under section 92CA(2) of the Act, the information and documents (as prescribed under section 92D of the Act read with Rule 10D of the Rules) maintained by the appellant were submitted to the Ld. TPO and the authorized representatives of the appellant appeared before the Ld. TPO from time to time.

3.2 All the international transactions and specified domestic transactions, except for corporate guarantee provided to its subsidiaries, were accepted to be at the arm's length. The Ld. TPO disregarded the contentions of the appellant and the benchmarking analysis carried out by the appellant and determined the arm's length corporate guarantee fees at 2% and enhanced the income of the appellant by Rs. 1,44,77,042/- vide his order dated 24 October 2017. Another addition was made by invoking the provisions of section 50C of the Act for the property sold during the year besides other additions and the total income was assessed at Rs. 501,90,06,080/-.

3.3 Aggrieved with the order of the Ld. AO, the assessee filed an appeal before the Ld. CIT(A) who partly allowed the appeal. Aggrieved with the order of the Ld. CIT(A), the assessee has filed this appeal before the Tribunal. During the course of the appeal, detailed arguments were made by the Ld. AR, rival contentions were heard, and the documents and submissions filed were also examined.

4. Ground Nos. 1 and 9 are general in nature and do not require any separate adjudication.

5. Ground Nos. 8.0 and 8.1 relating to Education Cess, Secondary Higher Education Cess and Dividends Distribution Tax being claimed as business expenditures under section 37(1) of the Act were not pressed during the course of the appeal. This issue is no longer *rest integra* and Education cess claimed by the assessee-company as deduction under section

37(1) was to be disallowed since as per Explanation 3 to provision of section 40(a)(ii) inserted by Finance Act, 2022 with effect from 1-4-2005, surcharge or cess forms a part of 'tax'. Further, Hon'ble Supreme Court in the case of **Joint Commissioner of Income-tax v. Chambal Fertilisers & Chemicals Ltd. [2022] 145 taxmann.com 420 (SC)** have held in para 3 that *in view of the statement made, we direct that the Education cess paid by the respondent-assessee would not be allowed as an expenditure under section 37 read with 40(a)(ii) of the Income-tax Act, 1961*. Hence, these grounds of appeal are dismissed.

6. Ground Nos. 2 and 2.1 to 2.7 relate to the transfer pricing adjustment of Rs. 1,44,77,042/- made by the Ld. AO. The Ld. AO has made the addition/adjustment mentioned in the assessment order as under:

2. International Transaction

During the year under consideration, the assessee entered into specified domestic and international transaction with its associated enterprises. Accordingly, the matter was referred to concerned Transfer Pricing Officer (TPO) for determination of Arm's Length Price (A.L.P.). Vide order u/s.92CA(3) of the Act dated 24-10-2017, the DCIT (Transfer Pricing)-II, Kolkata had stated the assessee provided corporate guarantee to M/s. Kahutara Holding Limited and the amount of such corporate guarantee as on 03-2014 was 28,93,89,000/-. The Transfer Pricing Officer also observed that considering the guarantee provided by assessee and the risk associated with it certain amount of guarantee commission was receivable by assessee. He worked out the A.L.P. at ₹1,44,77,042/- and concluded that since the assessee has not charged any guarantee fee, total income of the assessee should be upwardly adjusted by an amount of ₹1,44,77,042/-.

In the light of the above observation, a sum of ₹1,44,77,042/- is added back in computation. Penalty proceeding u/s.271(1)(c) of the Income Tax Act, 1961 is initiated for furnishing inaccurate particulars of income.

[Addition: 1,44,77,042/-]

6.1 The Ld. TPO had proposed the adjustment at 200 bps after detailed analysis of the Transfer Pricing Study Report filed by the assessee before him and such other documents as were required together with detailed submissions to justify the arm's length price computed in respect of the international and domestic transactions. The assessee had been a guarantor to a loan provided by RABO Bank to M/s Kahatura Holdings Ltd. as part of shareholder service and hence no consideration was said to have been received. The Ld. TPO pointed out to the assessee that a guarantee transaction constitutes an international transaction u/s 92B of the Act and should be benchmarked as such and the assessee had neither included this transaction in the form No. 3CEB nor had benchmarked this transaction. The assessee submitted that corporate guarantee was provided in respect of the holding company as it wanted to expand and grow its portfolio by making acquisition in Russia and to fund the said acquisition, Tata Global Beverages Investments Ltd (TGBIL) leveraged on the assessee's long association with RABO Bank which granted a loan of USD 13.35 million to KHL, which was utilised by KHL to make acquisitions in Russia and KHL acquired Suntyco Holdings Ltd and its group companies during the said assessment year. The assessee provided a guarantee to RABO Bank and for the same guarantee, the assessee had been indemnified unconditionally and irrevocably by TGBIL through a counter guarantee. The cash assets of the company were significantly higher than the loan amount. The objective of the transaction was to leverage from the assessee's existing working relationship with Rabo Bank, which was a mere shareholder support. Since the assessee and TGBIL belonged to the same investment-grade and as such no benefit had been accrued to KHL from the provision of guarantee by the assessee, as the objective of the entire arrangement was to leverage from the assessee's relationship with Rabo Bank, which is a mere shareholder support.

Further the credit standing of the assessee and TGBIL being the same, the objective was not the same as a conventional guarantee arrangement which merited adjustment. The assessee argued that the corporate guarantee provided was not an international transaction, the assessee had been given counter guarantee, the guarantee given was in the nature of shareholder services and for this the assessee relied on guidance from OECD and the guidance from UN by arguing that the arrangement was made by the assessee solely because of ownership interest in its own benefit, the need for the guarantee stemmed from decisions made by the group, the assessee provided a guarantee for the benefit of the acquisition and relied upon the decision of Hon'ble Kolkata Tribunal in the case of M/s. Tega Industries Ltd. Vs DCIT (TS-780-ITAT-2016(Kol)-TP in support of the claim that the guarantee was a shareholder activity, and no TP adjustment on account of corporate guarantee should be required and the addition proposed may be deleted. Further arguments were made on a without prejudice basis to the assessee's contention that it was a shareholder activity; the assessee argued that benchmarking analysis should consider interest saved approach which follows a three-pronged process of estimating the creditworthiness of the characters, arriving at the arm's-length interest-rate by referring to publicly disclosed rates paid by independent companies with comparable creditworthiness, and analysing the relative benefits conferred by the guarantee upon the borrower in terms of reduction in the lending rate. It was further argued that the assessee had been released of this corporate guarantee and argued that in view of the Honourable Bombay Bench of the ITAT's decision in the case of ACIT vs Asian Paints Ltd [TS-633-ITAT-2011 (Mum)], guarantee fee should be in the range of 0.25% to 0.35% and in such a scenario the guarantee fee rates as 0.25% may be considered. Further submission made were also considered by the TPO. The TPO examined the documents submitted by

the assessee and noted that the facility was advanced to KHL and was subject to various stringent conditions. He was also of the view that the corporate guarantee of the nature described constitutes an international transaction within the meaning of section 92B of the Act as with the insertion of the Explanation to section 92B with retrospective effect from 01.04.2002, this issue was of academic interest only. However, even when the Explanation was not there, a guarantee of the nature described in the case of the assessee was covered under section 92B as per the definition of 'international transaction' defined in section 92B(1) of the Act. This was to be read with the definition of the term 'transaction' provided in clause (v) of section 92F. The TPO also examined as to what would have been the actual price of the loan if charged by a bank/lender from similar enterprises having similar creditworthiness/credit ratings without any guarantee behind it. The fact that the lender required a guarantee to be put in place may in and of itself demonstrate that value exists in the guarantee. The recipient of the guarantee had benefited financially from the arrangement and the benefit was considered to be equivalent to the enhancement of credit rating of the recipient due to its association with the AE which had provided the guarantee when compared with its standalone rating. After considering various aspects of pricing of loans in the international market, the TPO arrived at the benefit to the recipient on account of the guarantee at 600 bps and consequently the arm's-length price of the service provider with assessee to its AEs by way of corporate guarantee provided to the bank was computed at 200 bps per annum on a conservative basis of the amount of credit availed by the subsidiary and applying the arm's-length corporate guarantee fee of 2%, the arm's-length price of the total guarantee commission was worked out at Rs.1,44,77,042. As assessee had not charged any guarantee fee,

accordingly the total income of the assessee was upwardly adjusted by this amount by the Ld. AO.

6.2 The Assessee contested the addition before the Ld. CIT(A) who upheld the adjustment. The Ld. CIT(A) has held in this regard as under:

This issue has to do with the corporate guarantee extended by the appellant (TGBL) to one Kahutara Holdings Ltd (KHL) and to Zhejiang Tata Tea Extraction Company Ltd (ZTTECL). The facts are that the appellant is part of a group of companies in which there is an investment company called Tata Global Beverages Investments Ltd. UK (TGBIL)- registered in UK. It is TGBIL that makes the investments in various group concerns. The appellant is the head of the group of these companies.

At the very beginning, it may be stated that the appellant's contention is that the said transaction of providing of guarantees is not an international transaction at all. The reasons for this contention have been listed above.

The first issue, therefore, that needs to be resolved is whether corporate guarantee issued by an entity on behalf of either its AE, or some other such entity, comes within the definition of international transaction before insertion of Explanation to Sec. 92B of the Act, by the Finance Act, 2012. No doubt the Finance Act, 2012 has inserted Explanation to Sec. 92B with retrospective effect from 01 April 2002 to include the term guarantee within the definition of international transaction. But various Benches of the Tribunal have taken a view that insertion of explanation to Sec. 92B by the Finance Act, 2012 is considered to be prospective in nature therefore, held that corporate guarantee issued by an entity on behalf of its AE is not an international transaction and accordingly no need to compute ALP of said transactions. However, I find that the Hon'ble Bombay High Court in the case of CIT VS Everest Kanto Cylinder Ltd reported in 2015) 58 taxmann.com 254 (Bom.) has considered identical issues in the light of provision of Sec. 92B and Explanation to come to the conclusion that guarantee issued by an entity in such circumstances is an international transaction. However, while benchmarking the rate of commission, no comparison can be made between guarantee issued by a Commercial Bank as against corporate guarantee issued by a holding company for benefit of its AE subsidiary company for computing ALP of guarantee commission. The relevant observations of the Court are extracted below:-

"The adjustment made by the TPO was based on instances to the commercial banks providing guarantees and did not contemplate the issue of corporate guarantee. No doubt, these are contracts of guarantee, however, when they are commercial banks that issue bank guarantees which are treated as the blood of commerce being easily encashable in the event of default, and if the bank guarantee had to be obtained from commercial banks, the higher commission could have been justified. In the present case, it is assessee-company that is issuing corporate guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which apply for issuance of a corporate guarantee are distinct and separate from that of bank guarantee and, accordingly commission charged cannot be called in

question, in the manner TPO has done. The comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a corporate guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion, appeal does not raise any substantial question of law and it is dismissed."

5.4 In another case, the ITAT, Mumbai Bench in the case of DCIT vs Rolta India Ltd. (101 taxmann.com 40) had taken a similar view in the light of the judgment of the Hon'ble Bombay High Court in IL & FS Technology Limited the case of CIT vs Everest Kanto Cylinder Ltd. and held that guarantee issued on behalf of AE subsidiary is an international transaction however no comparison can be made between guarantee issued by a commercial bank and a corporate guarantee issued by an entity on behalf of its AE subsidiary company while benchmarking the ALP transaction.

The matter is now settled in the light of the catena of judgements that are now extant, it is settled clear that a guarantee of the kind that has been issued in the instant case is an international transaction.

Coming to the transactions themselves, I find that in addition to the above stated transactions of providing of guarantees to KHL and ZTTECL, the appellant has been indemnified by another of his group concerns, TGBIL against possible risks arising out of providing the above stated guarantees by the appellant.

The appellant himself, during proceedings before the TPO, as well as in the appeal, has argued that the guarantee provided by the appellant in the case of loan to Kahutara has been indemnified by another company of the same group - TGBIL and therefore all the three transactions - the loan, the guarantee and the indemnity should be taken to be part of a single transaction set. This matter has been discussed at length by the TPO in his order. It is found that the loan and guarantee documents are completely independent of the indemnity documents. The fact of TGBIL indemnifying the appellant against possible risks to the latter from possible defaults by the subsidiaries, leading to financial repercussions to the appellant on account of the guarantee provided by the appellant to these subsidiaries, finds no mention either in the loan document nor indeed in the guarantee documentation. The TPO has held the two set of transactions, viz., the loan to the AEs accompanied by the guarantees from the appellant, on the one hand, and the indemnity provided by TGBIL, to the appellant on the other, to be two distinct transactions. I can find no infirmity in this view. It is TGBIL, as a matter of fact, being a group company and indeed the investment company of the appellant's group that is acting as an agent to reduce the risks in the said transaction to the appellant thereby providing greater cover to the appellant because of the inherently risky venture entered into by the appellant company the providing of guarantee that involves considerable risks in the instant circumstances

*It must be understood clearly that neither the appellant, nor indeed TGBIL are directly the holding companies of KHL, as has been suggested by the appellant both before the TPO and in appeal, therefore there is no question of the indemnity provided by TGBIL being on behalf of KHL. **In fact it is not even clear as to the potency and efficiency of this indemnity if it ever came to encashing it in case of default by KHL, since the indemnity provider, TGBIL, is in fact wholly held by the appellant. How can a wholly held company reduce the risk of its parent company is not very clear. These observations, in any case are without prejudice to the fact that the providing of indemnity***

is a distinct and independent transaction from the loan guarantee transaction. {emphasis supplied}

A perusal of the submissions made by the appellant, the loan documents as well as the order of the TPO, clearly brings to fore the fact that these loans were risky propositions from the beginning. Loans are granted on the basis of the risk perception of the lending agency of the loan money utilisation proposition of the borrower. In this case, the loans were to be utilised in two countries, Russia and China, where the risk perceptions have been high during the early parts of the decade of 2010s, the period in which the appellant decided to go in for expansion of its operations within these two countries. In fact, it is admitted by the appellant himself that in the sanction of these loans the appellant as well as TGBIL had to leverage their long standing relationships with the banks. As a matter of fact, after the initial grant of loan in the case of ZTTECL, there was a slump in business with deteriorating revenues and rising costs being witnessed. This resulted in an insistence by the lending banks upon an increased level of assurance from the stronger companies of the group, mainly the appellant. A similar situation exists in the case of loan to KHL from Rabo bank, where the appellant, admittedly had to leverage its relationship with Rabo Bank to obtain the loans for KHL. Despite this leveraging, the appellant had to provide a guarantee for this loan - a guarantee that was to be and was renewed every year because the bank needed to get frequent appraisals of the health of the guarantor, the loans being so risky. Even this arrangement was not considered sufficient and the risk perception was such that TGBIL, UK had to step in to indemnify the risks indulged in by the appellant in the providing of this guarantee.

In similar situations, various Tribunals, including the cases relied upon by the appellant, have held that the providing of guarantee even in conditions where the situation is that the guarantee provider is a company that directly is a 100% holding company of the AE on whose behalf the guarantee has been given the instant situation being materially different - this activity qualifies as an activity for which the appropriate ALP needs calculation. In those situations, existing in the citations, the nexus between the providing of guarantee and the safeguarding of shareholder's interests is very strong because of the direct holding and a legal connection within corporate law, despite which the providing of guarantee has been held to be an activity where ALP needs to be calculated. The instant case is materially different. There is no direct share holding by the appellant, or indeed even by TGBIL of either of the two AEs. For the purposes of Transfer pricing issues, of course they do qualify as AEs, however, for the purposes of corporate law, there is no direct nexus between the working of KHL and the appellant. The purposes of the two provisions of law the TP provisions and Corporate law provisions are very different from each other and one cannot be read into the other. The appellant, by virtue of its holdings in TGBIL, through to Campestres Holdings Ltd, which in tum holds KHL, can at best leverage its position in the overall workings of KHL, but there is no form of direct lawful control with the appellant, or with TGBIL over KHL. In these circumstances the argument of protecting shareholder's interests, though not altogether evaporating, does get materially diluted when compared to the earlier discussed scenario of direct 100% holdings. This argument of protecting shareholder's interests, further gets diluted upon the providing of indemnity by another company - TGBIL, another company in the chain of holding companies to the appellant. The risks involved for the appellant have become materially diminished in this case, albeit due to the entirely different transaction of the providing

of this indemnity from a stranger to the transaction of providing of guarantee to the Bank on account of loan given to the borrower. If anything, therefore, the fact that the provisions of determination of an appropriate ALP would be applicable in all such cases of providing of guarantees on behalf of AEs, would be even more forcefully applicable in this case. The discussions entered into in this connection are equally applicable to the case of both the guarantees provided by the appellant.

Upon perusal of various case laws in this context, I find that with time there have been a number of cases in which the Hon'ble Tribunals have, while maintaining that the providing of Guarantee to an AE is an international transaction and that it is subject to ALP adjustments even when no guarantee commission had been charged by the guarantor, by virtue of the fact that upon taking an Arm's length equitable view of these transactions, it is to be held that a certain amount of guarantee commission could be deemed to be chargeable by the guarantor. This has been held in a large number of decisions of the Kolkata Tribunal itself, as well Tribunals all over the country. From among these, a few are being cited here:

- 1. Everest Kanto Ltd Vs CIT [2015] 58 taxmann.com 254 (Bombay HC)*
- 2. Everest Kanto Ltd Vs DCIT [2013] 34 taxmann.com 19 (Mum Trib)*
- 3. Everest Kanto Ltd Vs Asstt CIT [2014] 52 taxmann.com 395 (Mum Trib)*
- 4. Glenmark Pharmaceuticals Ltd Vs Adds CIT [2014] 43 taxmann.com 191/62 SOT 79 (Mum Trib) (URO)*
- 5. Godrej Household products Ltd Vs Adds CIT (2014) 41 taxmann.com 386 (Mum Trib)*
- 6. Asstt CIT Vs Nimbus Communications Ltd [2013], 34 taxman.com 298/ 145 ITD 583 (Mum Trib)*
- 7. Electrosteel Castings Ltd Vs DCIT (2017)] 88 taxman.com 862 (KolTrib)*
- 8. Apar Industries Ltd Vs DCIT [2019] 102 taxman.com (Mum Trib)*

It is instructive to see what the Hon'ble Members have discussed in the case of Electrosteel Castings Ltd, cited supra, since this is the jurisdictional Tribunal for this case. The Hon'ble Members, in para 84C have discussed the case of Everest Kanto Cylinder Ltd while considering the determination of the most reasonable rate of guarantee commission that can be taken by the TPO while determining the ALP under conditions of guarantee being provided by an assessee to its AE. In the ensuing discussions, the Hon'ble Members have quoted from the order of Everest Kanto Cylinders cited supra and observed that in that case, the Hon'ble Members had observed,

"The universal application of rate of 3 percent for guarantee commission cannot be upheld in every case as it is largely dependent upon the terms and conditions on which loan has been given, risk undertaken, relationship between bank and the client, economic conditions and business interests are some of the major factors which has to be taken into consideration."

The Hon'ble Members further go on to quote,

"...the rate of 3 percent by tasking external comparable by the TPO cannot be sustained in facts of the present case. We also find that in an independent transaction the assessee has paid 0.6 percent guarantee commission to ICICI bank India for its credit arrangement. This could be a very good parameter and a

comparable for taking it as internal CUP and comparing the same with the transaction with associate enterprise.”

Based upon this reasoning embedded in the facts of the case as they were present in that case, the Hon'ble Mumbai Tribunal arrived at a rate of 0.5 percent that they thought would meet the ends of justice. Various other Tribunals, following this reasoning and the circumstances therein, have also adjudicated upon an acceptable rate of 0.5 percent for such a commission

Let us see how the reasoning reproduced above applies to the instant appeal. We find that as per the rulings cited above, the major factors that go into the determination of Arm length commission chargeable in such situations are

- 1. terms and conditions on which loan has been given*
- 2. risk undertaken*
- 3. relationship between bank and the client*
- 4. economic conditions*
- 5. business interests*

When we apply these parameters to the present case, we find that there are very important differences between the instant case and the facts of the other cases cited above. We find that in the instant case the appellant per his own admissions and common knowledge, was entering, emerging, though more unstable markets. In both the cases of guarantee, we find that the AE that was actually entering the markets was unable to do so because it had been suffering setback after setback for some years. This had, as per the appellant's own admission, made the banks reluctant to provide loans to the said AEs and it was only after the appellant had "leveraged" its relationship with the said banks that the latter finally decided to extend the loans. Even after this, the Banks insisted upon very stringent conditions and as per the submissions of the appellant, monitored the arrangements very closely often insisting upon providing extra guarantees for the outstanding credits. In fact, such was the risk perception with the bank that it insisted upon the guarantee terminating and getting renewed annually in order to keep a tab on the guarantee giving capacity of the appellant.

Going a step beyond the view of the banks in this case, a matter which can be excused since the banks are independent loan providing agencies; we find that after the appellant provided a guarantee against the loans, the appellant itself, upon appraisal of the risks involved, decided to get this guarantee indemnified by another company of the group -TGBIL, against any possible risks that it might incur upon defaults by the borrower AE. This is an extreme position to take, in terms of appraisal of risks undertaken by the appellant, especially in view of the fact that the appellant, throughout has been insisting that it is the appellant, as head of this group, who has been, de facto, calling the shots in all affairs of the AE.

The situation becomes slightly more strange when we realise that the appellant has been indemnified by another company of which he himself is the holding company. It is quite apparent, that this arrangement has been carefully structured merely to alleviate the financial apprehensions of banks that had entered into a loan arrangement in potentially very risky ventures.

Further, we find that though the loans have been continuing, the terms and the arrangement have been changing from year to year. We find that several companies have been stepping into the shoes of previous parties to these arrangements for no ostensible reason at all. The entire arrangement clearly indicates a very nervous bank that, as per the appellant's own admissions, had been leveraged into extending this facility, which as per its own estimates was a risky venture, and now who was trying its utmost to continue to cover its risks.

We find the major parameters listed above, the first two involve a more than ordinary level of risk, both in terms of the loan transaction itself, as also reflected in the actual operation of the loan arrangement.

Coming to the relationship of the borrower with bank, we find that there is admittedly no relationship between the two and it is only the appellant that enjoys an amount of leverage with it. Therefore, in this case, it is obvious that the risk assessment of the borrowing would not depend upon the borrower but upon the guarantor. If in this case, the AE would have been closely related to the appellant, in terms of being directly wholly owned, as discussed above, then the risks could have been assumed to have been reduced, both in terms of the assurance to the bank that the funds advanced would be judiciously utilised in the direct supervision of the guarantor, and also in terms of their being a greater amount of accountability of an entity when it is in closer relationship in terms of company law, with the AE. In evaluating the risk associated with the loan, the Bank would translate the stability of appellant to a greater degree in the case of an AE that was directly a 100% held company than in the case of an AE that was held only far down the line in a chain of holdings.

Finally, coming to the actual economic scenario factor and the business interest, we find that the economic factors in financing ventures in unstable markets would be a riskier proposition for any financing agency then extending credits to entities that are operating in more stable markets. The instability, both, of the economic scenario, as well as the business efficacy of the borrower in this case was in any case unequivocally reflected in the admitted fact that the borrowers were experiencing grave financial difficulties in various preceding years. In fact the appellant, during appeal, has cited this as one of the reasons for the banks being reluctant to extend credit to the AEs and for the necessity of the appellant "leveraging" with the bank.

The above discussion clearly brings forth the stark differences in the conditions under which guarantees were provided by the guarantors in the above cited cases and this particular case. Further, the Hon'ble members, in the above cited case of Everest Kanto Cylinders Ltd were also in possession of the rate of commission of 0.6% paid by the then assessee to the ICICI Bank India. This benchmark was also one of the factors that points to towards a value of 0.5% as an Arm's length rate of the commission in those cases. This situation has not arisen in the instant case. Therefore a closer look at the risks involved in the present transactions is needed.

The natural question that would arise while determining the rate at which guarantee commission's ALP should be fixed in this particular case is what would be deemed to be guarantee commission in a case which was materially different in important parameters from those cases where such guarantee commission was estimated at 0.5%. We have seen that in the best case scenarios, with reasonable risks, stable markets, non-nervous banks that, in the words of the appellant himself, had not been leveraged into extending credit to admittedly underperforming

entities that were in fact directly held by the guarantor and which had a much lesser abysmal track record than the borrowers in the instant case, the bank guarantees so provided could have been judged to have charged an ALP rate of 0.5% for the guarantee so-provided. Therefore it is reasonable to assume that 0.5% rate would serve as a sort of baseline rate of ALP reasonably sound scenario. We find that none of the reasonable assumptions that exist in the above citations are satisfied in this case. In these conditions, I find that there would be no justification for adhering to the base rate of 0.5% in this case. The deemed commission in the instant case would be much higher on account of the much higher risks in providing this guarantee. The TPO, on the other hand, has given a sound analysis for the assumption of the guarantee commission as an ALP. The arguments of the TPO have nowhere been refuted by the appellant in terms of facts and risks involved. In this situation, therefore I find myself unable to differ from the assessment of guarantee commission made by the TPO and the same stands confirmed.

6.3 Rival contentions were heard in this regard and the submissions made and the documents filed were also examined. The assessee made submissions before us, which are summarised as under in this regard:

The Appellant had extended Corporate Guarantee in respect of the loan provided by RABO Bank to M/s Kahutara Holdings Ltd ('KHL') to enable KHL to acquire Sunttyco Holdings Limited in Russia. This acquisition was to further the business objective of the Appellant of expanding its global footprint by way of increasing its reach in various countries. The Appellant, by furnishing the Corporate Guarantee, acted in the capacity of a shareholder and therefore, no consideration was charged by the Appellant for such guarantee.

Moreover, the Appellant had been irrevocably and unconditionally indemnified by Tata Global Beverages Investment Limited ('TGBIL'), being the parent and controlling company of KHL for any liability arising on execution by the bank, through a counter guarantee. Therefore, the Appellant contended that since the furnishing of the said corporate guarantee did not have any bearing on the profits, income, losses, or assets of the Appellant company, the said transaction being in the nature of a shareholder service, could not be considered as an International Transaction u/s 92B of the Income Tax Act, 1961 ('Act').

TPO Order [as upheld by the CIT(A)]

a. The TPO held that the said guarantee provided by the Appellant which provides a benefit to AE is in the nature of service to AE and constitute international transaction; and that it needs to be shown in actual practice by the bank/lender that it has charged similar rates on credit facilities to similar enterprises having similar credit worthiness/credit ratings without any guarantee behind it. [Page 863-864 of PB]. Reliance was placed on the decision of M/s Everest Kanto Cylinder Lad wherein it was held that guarantee is an international transaction. [Page 870 of PB]

b. CUP method is the most appropriate method to benchmark the transaction. [Page 866 of PB].

As regards the determination of the guarantee fee, it was held that KHL cannot be rated higher than "CC" on the S&P scale as only 4 companies in India were considered to have higher rating above India's sovereign rating. [Page 881 of PB]. Loan

to independent entity with BB+ rating was awarded loan at Libor+700 bps, hence a company like KHL with CC rating could only get loan at Libor 1100 bps. The benefit to the recipient on account of guarantee was computed at 600 bps. Consequently, the arm's length price of the service provided by the Appellant to its AEs by way of corporate guarantee provided to the bank should be computed at 200 bps on a conservative basis. [Page 882 of PB].

The CIT(A) confirmed the order of the TPO [Pg 102 of the Appeal Set]

Appellant's Contentions:

- *The Appellant humbly submits that the said issue, in relation to the same guarantee transaction, was considered by the coordinate bench of this Hon'ble Tribunal for AY 2013-14 and 2013-14. The Hon'ble Tribunal partly allowed the issue in favour of the Appellant, vide a Common Order for AY 12-13 (ITA No. 1854/Kol/2016) and AY 13-14 in 1899/Kol/2017, dated 13.02.2023.*
- *The Appellant humbly submits that this issue, in relation to the same guarantee transaction, was under dispute before the Hon'ble Tribunal, for AY 12-13 and 13-14, and the same was scrutinised by the Coordinate Bench of this Hon'ble Tribunal in detail. Basis the same, the Hon'ble Tribunal held as follows:*
 - *The Appellant's transaction of providing corporate guarantee constitutes an international transaction under the Act and is therefore subject to the applicable transfer pricing provisions.*
 - *However, the Hon'ble Tribunal fixed the said guarantee fee of 0.5% of the outstanding loan.*
- *In light of the above, the Appellant humbly submits that the said issue for the Impugned AY, in relation to the same transaction, is squarely covered by the order of this Hon'ble Tribunal dated 13.02.2023, in the Appellant's own case, for AY 2012-13 and AY 2013-14 (ITA No. 1854/Kol/ 2016 and 1899/Kol/2017 respectively), wherein it was held that the corporate guarantee fee should be restricted to 0.5%. The relevant extracts of the order are reproduced below:*

"Pare 11, Pg. 22 of the Order: "We, therefore, are of the considered view that the said transaction comes under the purview of international transaction and which thus calls for the calculation of upward adjustment towards corporate guarantee fee."

Para 13. Pg. 29 of the Order: "We, therefore, taking a consistent view as has been taken by the Coordinate Bench of Guwahati in the case of Greenply Industries Limited (supra) direct Ld. AO to compute the corporate guarantee fee @ 0.5% of the outstanding loan at the year end as against 2% charged in the assessment proceedings."

- *The Appellant further relies upon the decision of the decision of the Hon'ble Bombay High Court in the case of Glenmark Pharmaceuticals Ltd. [398 ITR 439], which referred to and applied the decision of the Hon'ble Court in the case of Everest Kanto Cylinders Ltd. [378 ITR 57]. Further, the SLP filed by the Revenue against the decision in the case of Glenmark (supra) was considered and dismissed by the Hon'ble Supreme Court [265 Taxman 297].*
- *The Appellant therefore prays that this Hon'ble Tribunal apply the said ruling for the Impugned AY, thereby restricting the adjustment towards the corporate guarantee fee to 0.5%.*

6.4 The Ld. DR on the other hand relied upon the order of the Ld. CIT(A) and the Ld. AO and emphasised that since detailed discussion had been made by the Ld. CIT(A), therefore, corporate guarantee commission being an international transaction, the corporate guarantee fee of 2% applied by the Ld. AO and upheld by the Ld. CIT(A) may be upheld.

This issue also came up before the Tribunal in the case of the assessee in AYs 2012-13 and AY 2013-14, the relevant extract of the order in the case of M/s Tata Global Beverages Limited in I.T.A. No.: 1854/Kol/2016 Assessment Year: 2012-13 I.T.A. No.: 1899/Kol/2017 Assessment Year: 2013-14 is as under:

10. A regards the first contention is concerned, we observe that international transaction has been defined in Section 92B(1) of the Act and the same reads as follows:

“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.”

11. Now, on examining the facts and circumstances of the case under the above extracted definition, we observe that the assessee company is located in India and its wholly-owned subsidiary is located at U.K. and its step-down subsidiaries are located in other parts of the world. Since the assessee company has given a corporate guarantee for one of its step-down subsidiaries i.e. an associate enterprises there is prima facie an international transaction and now to complete the same it has been contended that there has to be a bearing on the profits, income, losses or assets of such enterprise. In our considered view, the counter guarantee taken by the assessee company to cover up the possible cost of giving the guarantee seems to mere formality because ‘TGBIL’, U.K. is a wholly-owned subsidiary of the assessee company and any cost which may arise for the default in the repayment of loan by ‘KHL’ to RABO Bank will ultimately affect the assessee company only. In case of any default by ‘KHL’ regarding repayment of loan to RABO Bank the first/direct impact will be on the assessee and that can end up a cost on the assessee and similarly if there is a gain arising out of the said

corporate guarantee by way of deduction in interest rates, which will thus, increase the profits of the step-down subsidiaries, will have a positive impact on the profits of the assessee company and therefore, in our considered view there is a direct bearing on the profits/ losses of the assessee company for the said transaction entered on behalf of its associate enterprises. So far as the effect of counter guarantee by 'TGBIL' to 'TGBL' is concerned, the same can be examined only after the first impact comes to the assessee and one cannot ignore the fact that 'TGBIL' is wholly owned subsidiary of 'TGBL'. We, therefore, are of the considered view that the said transaction comes under the purview of international transaction and which thus calls for the calculation of upward adjustment towards corporate guarantee fee.

12. Now, so far as the computation of corporate guarantee fee is concerned, ld. Transfer Pricing Officer applied 2% rate and on the other hand, the assessee has given an alternate submission applying 0.25% rate. We, however, find that under similar set of facts and circumstances of the case, we have sustained the addition for corporate guarantee fee applying 0.5% rate. We draw support from the decision of coordinate Bench, Guwahati in the case of Greenply Industries Limited vs. ACIT in ITA No. 232/GAU/2019 order dated 21.06.2022 wherein the issue has been examined at length and Arm's Length fee has been restricted @ 0.5%.

After reproducing the relevant extract from the order, it is concluded in para 13 as under:

13. We, therefore, taking a consistent view as has been taken by the Coordinate Bench of Guwahati in the case of Greenply Industries Limited (supra) direct ld. AO to compute the corporate guarantee fee @ 0.5% of the outstanding loan at the year end as against 2% charged in the assessment proceedings. Thus, ground no. 2 raised by the assessee is partly allowed. 13. We, therefore, taking a consistent view as has been taken by the Coordinate Bench of Guwahati in the case of Greenply Industries Limited (supra) direct ld. AO to compute the corporate guarantee fee @ 0.5% of the outstanding loan at the year end as against 2% charged in the assessment proceedings. Thus, ground no. 2 raised by the assessee is partly allowed. 13. We, therefore, taking a consistent view as has been taken by the Coordinate Bench of Guwahati in the case of Greenply Industries Limited (supra) direct ld. AO to compute the corporate guarantee fee @ 0.5% of the outstanding loan at the year end as against 2% charged in the assessment proceedings. Thus, ground no. 2 raised by the assessee is partly allowed.

6.5 Although the Ld. TPO as well as the Ld. CIT(A) have highlighted the higher risks were involved in the case of the assessee which required application of corporate guarantee fee @2%, however, since in the assessee's own case in the earlier year, corporate guarantee fee @0.5% has been applied on the same guarantee, hence, respectfully following the order of the coordinate Bench of the Tribunal in the assessee's own case for AY

2012-13, we direct the Ld. AO to apply corporate guarantee fee @0.5% of the loan outstanding at the year end as against 2% charged during the assessment proceedings. Hence, Ground Nos. 2.0 to 2.7 in relation to corporate guarantee fee are partly allowed.

7. Ground Nos. 3.0 to 7.0 relate to application of section 50C without mandatorily referring the matter to the DVO. The Ld. AO noted that the assessee had shown long-term capital gain of Rs. 169,42,00,000/- arising out of transfer of immovable assets in Bangalore. On perusal of records, it was found that the consideration received on transfer of the immovable property as adopted by the registering authority for the purpose of amalgamation adjustment valuation was Rs. 231,05,82,470/-, which fact was also reflected in Column 17 of the auditor's report in Form No. 3CD, in the letter dated 08.11.2017 of the assessee as well as in details on page 4 of Form No. 26AS. A specific query was raised in this regard and the assessee was asked to explain why the provisions of section 50C should not be applied. The assessee submitted a reply which was not accepted. The Ld. AO referred to the provisions of section 50C and also of sub-section (2) thereof and was of the view that the reference to the DVO was discretionary. Relying upon the decision of the Hon'ble Supreme Court in the case of CIT v Orissa State Warehousing Corporation 237 ITR 589 (SC) and the use of the word 'may' in place of 'shall', he was of the view that such reference was not mandatory. Applying the provisions of section 50C, he re-computed the capital gains at Rs. 206.30 Cr. In the appeal before the Ld. CIT(A), the assessee could not succeed. The Ld. CIT(A) has observed as under in the order while confirming the Ld. AO's action:

"Grounds 3 and 4

This ground is against the application of provisions of section 50C of the Act by the AO and the consequential enhancement of the deemed consideration for the sale transaction. The facts that have been brought on record are that the appellant had shown sale consideration of Rs 195 crore and offered, after

adjustments, Rs 169.42 crore this amount for taxation as capital gains, on account of the transfer of immovable assets (Land and Building) in Bangalore. The AO, upon perusal of records, found that the value adopted by registering authority, for the purpose of amalgamation adjustment valuation had been shown to be Rs 231,05,82,470/-. This fact had been mentioned in Auditor's report in column 17 of the said report in Form 3CD and also, in a letter dated 08.11.17 of the appellant. These facts are not in dispute.

The dispute arises from the action of the AO of adopting the value of consideration as the value shown by the registering authority through the invocation of the provisions of section 50C of the Act.

I have examined the entire gamut of submissions of the appellant before me. The appellant has contested this addition on various alternate counts. The first is that the difference in the registration value and the value declared by the appellant lies within a 15% margin of error. It must be understood that this provision does not exist within the statute and has been stipulated by various judicial authorities only as a measure of reasonableness of possible variations in sale consideration that might exist on account of market conditions peculiar for that particular sale. The sale considerations with respect to which such stipulations have been made, in any case are very small when compared to the instant case, running into only about Rs 10 lakh. Further, the peculiar market conditions have to be brought on record by the party that is justifying this difference stipulated by law. The appellant has gone to great lengths in bringing on record the process followed by the directors and the controllers of the organisation in completion of this sale. But nowhere is there even a whisper of the conditions that could possibly have led to a depletion in the market value of the immovable asset that would have led to a non-consideration of the value of the registering authority. Much ado has been made about the condition of the building without bringing on record any material evidence to establish the claimed depleted value of the building or the land. I find that the variation between the declared value and the 50C value of the asset is in the region of about 36 crore. The scale of the transaction itself prohibits the application of the 15% tolerance limit, which in any case was stipulated for transactions undertaken in special conditions - conditions that have nothing in common with the conditions in the present transaction. In any case, the appellant has not brought on record any reasons as to why he perhaps was not offered a higher price in the market. In these circumstances I cannot find support for his stand stated herein. The cases relied upon are cases of individuals with limited means of getting a good market value (with sale considerations around 10 lakh), while the appellant is a large international group with global access to purchasers and financial power to carry it through. Even in this case the variation is still only a little more than 15%.

Coming to the appellant's objection that the value stipulated by the registering authority would not be applicable in this case because of a number of reasons like the situation of the property, the proximity to the roads etc. I find that the appellant has once again indulged in giving broad principles and theories, without offering any concrete reasons that could be applicable in the instant case, which would lead to the formation of an impression, applicable to the said property, that value of the said property would be less than the value stipulated by the registering authorities. It must be remembered that section 50C has been introduced by the legislature for just such a purpose as exists in the instant case. Both buyers and sellers in order to evade tax offer several reasons, without the

production of any evidence whatsoever, for declaring a very low consideration during the transfer of immovable property. Section 50C has stipulated the consideration to be that fixed by Government authorities that are in-charge of dealing with land issue. These authorities have a huge amount of reference data running across innumerable registries and transfers of properties. The circle rates are fixed on the basis of reasonable estimates of transfers of property and are different for different localities only to ensure that they reflect the actual expectation of consideration upon transfer of property of a particular kind in a particular area. The data relied upon by the registering authorities is enormous and primary data gathered not only from its own records, but also from the socio-economic and commercial conditions prevalent in various circles. In a landmark decision of the coordinate bench of the Mumbai Tribunal in the case of Kinetic Honda Motors Ltd Vs. JCIT (77 ITD 393) a basic principle of legal views that are to be taken when any government agency conducts an exercise based upon scientific principles and reasonable evaluation of prevalent market conditions was enunciated. The proposition underlined by the Hon'ble Bench is that when payments are approved by one wing of the Government, there is no question of such payments being treated as excessive or unreasonable. This basic principle can be applied to the functioning of any government department. It is of course open to the appellant to show how the considerations fixed by the registering authorities were unreasonable or inappropriate in this case. This has to be done using tangible evidence and reasoning. The rebuttal of the findings of the government registering authority cannot be lightly brushed aside using only broad principles of the kind proposed by the appellant. The appellant's agitation in this regard does not have any material basis based on either on sound tangible reasoning or concrete evidence and cannot be accepted.

Coming to the question of reference to the DVO, I have gone through the submissions of the appellant as well as the citations relied upon by him, in this regard. The appellant has relied upon the jurisdictional High Court of Calcutta in the case of Sunil Kumar Agarwal Vs CIT [2015] 372 ITR 83 (Calcutta) in which a similar issue has been dealt with albeit the scales of consideration differed by more than 660 times! The surrounding conditions and the various market factors would, correspondingly vary. However, the basic principles of legal reasoning enunciated by the Hon'ble Court would nevertheless apply and are discussed here. The contention of the assessed in that case was that he was offered the highest price of Rs 10 lakhs in the market. I have earlier discussed and commented upon the difference in the two cases in terms of the capacity of the seller to access markets. Which is the cited cases the seller's capacity is very limited and therefore a reference to the DVO becomes appropriate, in the case of the appellant this is not the case. In these conditions the Hon'ble Court opined that the AO should have given the option to the assessed to have the matter referred to the DVO. In the instant case, the AO has taken the stand that the word used in the text of section 50C is "may" when talking about the reference that "may" be made to the DVO in case the FMV is found to be lower than the value as per stamp valuation authorities. The limitations upon the use of the word "may" in the said section becomes even stringent, when we note that in the very same section, the legislature has opted to use the word "shall" just a little after the use of the word "may". This distinctive use of the two words, implying a differential amount of mandate upon the AO, within the same section, clearly indicates the intent of the legislature in using the word "may" in this connection and in this respect the reliance of the AO upon the verdict of the Supreme Court in the case of CIT Vs Orissa

State Warehousing Corporation [237 ITR 589] is aptly placed where it has been stipulated that fiscal statute is to be used on the basis of the language used therein and not de hors the same. The Apex Court has stated that only the language used ought to be considered so as to ascertain the proper meaning and intent of the legislature. The Hon'ble Court further stipulated that the court is to ascribe ordinary and natural meaning to the words used by the legislature. Also, the court's impressions ought not to be substituted for the actual words signifying the legislative intent. I cannot therefore disagree with the action of the AO, since the AO had before him (as per the submissions of the appellant himself) the suggested values submitted by the appellant himself, had, after due consideration rejected the reasons and suggestions of these values provided by the appellant.

Coming to the alternate plea of the appellant in this regard, that since the said transferred assets formed part of the WDV of the appellant and involved the provisions of section 43(6)(c) read with section 32 of the Act, therefore the provisions of section 50C would not be applicable in this case.

It has to be understood that this is not a stand that the appellant had taken before the AO and is new at this juncture and to be treated as an additional ground (though alternate in nature). It is clear that this involves no further adducing of additional evidence, but suffers from the major defect that it is not based on facts. It has never been the case of the appellant that the income arising from the said transfer was not in the nature of capital gains. In the case of the Hon'ble Kolkata Tribunal of Everready Industries India Ltd Vs PCIT [2020] 181 ITD 528 (Kol Trib), upon which the appellant has placed very heavy reliance, it has been unequivocally stated in para 39, that "The Ld AR however pointed out that the issue of stamp duty valuation of the immovable property would have been relevant only if income arising out of sale of fixed assets of packed Tea factory was assessed under the head Capital Gains". Therefore it was accepted by the Hon'ble Tribunal that if the income arising from the sale of fixed assets had been assessed as Capital Gain, then stamp duty valuation would have played a role and section 50C would have been applicable. In the instant case the appellant has himself treated the entire transaction as giving rise to long term capital gains of Rs 169.42 crore. Once it is settled that this is the transfer of a capital asset. It would naturally give rise to capital gains, an approach that the appellant himself has taken after due deliberations. And once this approach has been accepted and the capital gains have arisen, it is mandated by the legislature that provisions of section 50C would become applicable in this case. The facts of the citations of the appellate can clearly be found to be different from this case on account of the discussions above and unequivocal findings of the Hon'ble Tribunal that no capital gains had been assessed in those cases and therefore, section 50C, a deeming provision, which had to be construed strictly, could not be made to apply in this case.

In view of the discussions above, I cannot find myself disagreeing with the findings of the AO and his action in this respect stands confirmed."

7.1 In the written submissions filed by the assessee, it is stated that during the previous year relevant to assessment year under consideration, the company transferred a property constituting land and building to TRIL Constructions Limited for a total sales consideration of Rs. 195 Cr

(194.18 Cr towards land and Rs. 0.84 Cr towards building) under the sales deed, representing the FMV of the property. The said FMV was arrived after considering valuation report of independent valuers and series of deliberations with interested party. The Ld. AO, without considering the facts of the case and submission made by the company, recomputed capital gain considering stamp duty value of Rs. 231.06 Cr (Rs.220.43 Cr towards land and Rs.10.63 Cr towards building) as full value of consideration by applying provisions of Section 50C and thereby made addition of Rs. 36.88 Cr. While making such disallowance, the AO rejected the appellant's request to refer the matter to the Department Valuation Officer ('DVO') as per the mandatory procedure laid down u/s 50C. It is stated that the building is forming part of the block of assets and therefore, actual sales consideration of building of INR 0.82 Cr has been reduced from the block of building in the ROI. The actual consideration on sale of land of Rs.194.18 has been taken for computing CG.

The Ld. CIT(A) upheld the order passed by the Ld. AO contending the following-

(a) The CIT(A) observed that no concrete reason has been provided by the appellant to suggest that value of the said property would be less than the value stipulated by the registering authorities.

(b) The CIT(A) has treated this contention of non-applicability of 50C on building as an additional ground and observed that since gain on sale of building is offered as capital gain, the provision of Section 50C would be applicable.

(e) The Ld. CIT(A) uphold the action of the AO of not referring the matter to the DVO.

(f) The Ld. CIT(A) held that the acceptable variation range of (+/-) 15% does not exist within the statute and has been stipulated by judicial authorities only as a measure of reasonableness, that might exist on account of peculiar market condition.

In the submissions on technical ground, it is stated that:

A. The order is invalid as Ld. AO made addition u/s 50C, without mandatorily referring to the DVO as per procedures u/s 50C(2) of the Act, in spite of specific request of the appellant. During the assessment proceedings, the appellant has objected before the Assessing Officer that value adopted by stamp valuation authority under section 50C(1) exceeds fair market value of property on date of transfer and has requested the AO to make the reference to DVO. However, instead of referring the matter to the DVO, the AO proceeded to make adjustment u/s 50C by holding that reference to DVO is discretionary on the part of the AO. In this regard it is also submitted that as per provision of Section 50C(2), the Assessing officer is required to refer to the DVO, if the assessee has claimed before the AO that SDV exceeds FMV of property on date of transfer and the SDV has not been disputed in any appeal, revision or before any authority or high court. In the instant case, the SDV has not been disputed in any appeal, revision or before any authority or high court and further, the appellant had also raised objections during the course of assessment proceedings. Since both the conditions of Section 50C(2) are fulfilled in the given case, the AO was mandatorily required to refer to DVO. Hence the action of the AO of making addition u/s 50C without referring to the DVO is grossly unjustified and without jurisdiction. The very purpose of the Legislature behind the provisions laid down under sub-section (2) of section 50C of the Act is that a valuation officer is an expert of the subject for such valuation and is certainly in a better position than the Assessing Officer to determine the valuation. Thus, non-compliance with the provisions laid down under sub-section (2) by the Assessing Officer cannot be held valid and justified.

Reliance has been placed by the assessee on the decision of the Hon'ble Calcutta High Court in the case of Sunil Kumar Agarwal vs CIT [2015] 372 ITR 83 (Calcutta) where the Hon'ble High court held that where the assessee disputed higher valuation made by Stamp valuation authority, the Assessing Officer should have referred matter to Valuation Officer as contemplated under section 50C. Further, reliance in this regard is placed on the ruling of the Hon'ble Allahabad High Court in the case of CIT vs. Chandra Narain Chaudhri [2014] 271 CTR 80 (Allahabad) (MAG.) wherein the Hon'ble High court held that where assessee objects before Assessing Officer that value adopted by stamp valuation authority under section 50C(1) exceeds fair market value of property on date of transfer, Assessing Officer may either accept valuation of property on basis of report of approved valuer filed by assessee or he may refer question of valuation of capital asset to DVO in accordance with section 55A. Further, in S Muthuraja vs CIT (2013) 37 Taxmann.com 35a (Mad HC), Hon'ble Madras High Court has held that where the assessee objects to the adoption of stamp duty valuation as deemed sale consideration during the assessment proceedings, the AD is duty-bound to make a reference to the DVO to determine the value of the property as per section 50C(2) of the Act.

The courts in the context of section 50C have held that as per the procedure laid down in Section 50C(2), the AO was mandatorily required to refer the matter to Valuation Officer in all cases where the assessee raised objection on the stamp duty valuation. Further, it was also held that the revenue cannot be allowed a second inning by sending the matter back to the Assessing Officer to prove before the Assessing Officer that the sale consideration was the fair market value of the property purchased by the assessee when the assessee was all along disputing valuation of the property and the revenue miserably failed to find out the correct value of the property both at assessment stage as well as at first appellate stage. It was therefore held that non-compliance of the said provision of Section 50C cannot be held valid and justified and the addition is required to be deleted. The decisions referred to above squarely applies to the facts of the appellant's case. Reliance in this regard is also placed on the following decisions-

ITO-vs.-Aditya Narain Verma (HUF) [2017] 57 (TR(T) 449 (Delhi-Trib.)

Hari Om Garg -vs- ITO (ITA 342/Agra/2017 dated 31 May 2019) (Agra Trib.)

Dev Brat Sharma-vs.- ITO (ITA 493/Asr/2018) (Amritsar Trib.)

ACIT-vs.-Tarun Agarwal [2018] 97 taxmann.com 346 (Agra-Trib.)

ACIT-vs- Lalitha Karan (ITA no. 1130/Hyd/2015 dated 4 January 2017) ITO-vs.- Shri Ramesh Chandra (ITA no. 228/Agra/2018 dt. 10 October 2018) Dr. Sanjay Chobey (HUF) -vs.-ACTT (TA no. 140/Agra/2018 dt. a July 2018

In the context of other sections wherein a procedure has been prescribed in law, like in Section 144C, it was held vide several judicial precedents that it is a trite proposition that if there is a defect of jurisdictional nature and if there is an error of jurisdiction or limitation, then same cannot be validated or cured and the order itself was void ab initio for want of following the correct procedure of law, thus orders passed contrary to Section 144C have been held as null and void

ACIT vs. Oracle India (P.) Ltd [2018] 93 taxmann.com 8 (Delhi-Trib.) [13-04-2018]

North Shore Technologies (P.) Ltd vs. ITO [2020] 118 taxmann.com 624 (Delhi Trib.) [13-02-2020]

International Air Transport Association-vs-DCIT [2016] 241 Taxman 249 (Mumbai HC) ESPN Star Sports Mauritius S.N.C. ET Compagnie -vs- Union of India [2016] 388 ITR 383 (Delhi HC)

It is also stated that it is a settled principle that when an authority under the provisions of law is required to exercise powers or to do an act in a particular manner, then that power has to be exercised and the act has to be performed in that manner alone and not in any other manner and in absence of following the said process, the entire proceedings are invalid and void-ab-initio. In support, reliance is placed on the following decisions:

Dr. Shashi Kant Garg v. CIT [2006] 152 Taxman 308/285 ITR 158 (All.)

DCIT vs. Rohtas Projects Ltd [2006] 100 ITD 113 (Lucknow) (Third Member) CIT v. Anjum M.H. Ghaswala [2001] 119 Taxman 352/252 ITR 1 (SC)

Dy. CIT v. Mahi Valley Hotels & Resorts [2006] 287 ITR 360 (Guj.)

Reference is also drawn to the decision of Hon'ble Delhi Tribunal (Third Member) Bench in the case of ACIT vs. Anima Investment Ltd. [2000] 73 ITD 125 (Delhi) (TM) [18-01-2000] wherein it was discussed whether the AO should be given a second opportunity by setting aside matters, wherein the Third Member Bench held as under-

"The powers of the Tribunal in the matter of setting aside an assessment are large and wide, but these cannot be exercised to allow the AO an opportunity to patch up the weak part of his case and to fill up the omission. In my opinion, a party guilty of remissness und gross negligence is not entitled to indulgence being shown. In this context, I would like to make a reference to a decision of the Chennai Bench of the Tribunal in the case of Tatin Skyline & Health Farms Ltd. v. Asstt. CIT [2000] 66 TTJ (Chennai) 203 (1999) 70 ITD 387 Chennai). In this decision, on the assessee's request that the case be sent back to the AO for another round of enquiry and fresh assessment in accordance with law, the Bench, rejecting the assessee's request has held that the remand order should be made in very rare and exceptional case, for example, if at original stage, patently grave error was committed by the original authority or that the order was made in haste owing to the limitation or that the first appellate authority had violated the rules of natural justice. Nothing like this has happened on the present case. The Bench has further observed that the Courts have also cautioned the Appellate Authorities by holding that remand should be made only in those cases where the original authorities have not passed orders in accordance with law but in no case, remand should be made only in those cases where the original authorities have not passed orders in accordance with law but in no case, remand should be made to enable an assessee to fill in the blanks or lacuna in the case which remains present. What applies to the assessee, would equally apply to the AO. Likewise, in the case of Smt. Neena Syal v. Asstt. CTT L19991 20. ITD 62 (Chd.), the Chandigarh Bench of the Tribunal has observed that it is not the function of the Tribunal to allow further opportunity to the AO to cover up legal lapses made by him, by restoring the matter back to his file.

Reference is also drawn to the case of Raj Kumar Jain, reported as 50 ITD 0001 (ITAT, Allahabad), wherein Ch. G. Krishnamurthy, the then President of ITAT, as a Third Member also observed in the context of remand of matter to the AO, held as follows-

"The Tribunal acting as an appellate authority has to see whether the assessment framed by the Assessing Officer and whether the appellate order appealed against was according to law and properly framed on facts and whether there was sufficient material to support it. When there is no material to support it and when as observed by the learned Accountant Member the additions made by the Assessing Officer could not be sustained, it is not for the Tribunal to start investigations suo-moto and supply the evidence for the Department. If the additions are not supported by evidence, the only course open to the Tribunal is to delete the additions pointing out how the additions made could not be sustained for want of adequate supporting material. It is for the Department to gather the material and make proper assessments and the Tribunal is not in that fashion an IT authority. Under the IT authorities stipulated under the IT Act, the Tribunal is not one of them. It is purely an appellate authority. Therefore, the object of the appeal

before the Tribunal is whether the addition or disallowance sustained was in accordance with law and supported by material. If there is no sufficient material, the addition must be deleted. The Tribunal cannot order further enquiry with a view to sustain the addition. This will amount to taking sides with the parties which is not the function of a judicial authority like the Tribunal."

Thus, in view of the above judicial precedents, it is abundantly clear that reference to DVO u/s 50C(2) of the Act is mandatory and not discretionary. The AO ought to have mandatorily followed the procedure laid down under the provisions of Section 50C(1) and (2) and hence, was required to refer the matter to the DVO. The revenue cannot be allowed a second inning by sending the matter back to the Assessing Officer enabling the revenue to fill the lacunae and shortcomings and putting the assessee virtually to face a re-trial (sic) for no fault of him and to again prove before the Assessing Officer that the sale consideration was the fair market value of the property purchased by him.

Thus, in view of the principle upheld vide above judicial precedents, the addition made u/s 50C is void, illegal and requires to be deleted without allowing a second opportunity to the AO.

B. The AO did not dispute any of the reasons given by the appellant and passed a non-speaking order in a cryptic manner, thus violating the concept of natural justice

It may be noted that the appellant had filed a detailed submission citing several reasons why the SDV does not represent the fair market value of the property and that the appellant did not receive any consideration over and above INR 195 Crs. However, the AO without disputing any of the reasons given by the appellant stated that the SDV exceeds the actual consideration and therefore made the addition under section SOC in a cryptic manner.

The order as passed by the AO is epitome of a non-speaking order which itself cannot be appreciated in law. In the light of facts submitted by the appellant that had impacted the fair market value of the property sold if the AO intended to go ahead with the proposed action of substituting the value as provided under section 50C, he is duty bound to have demonstrated with reasons, evidences and legal position as to how the facts as stated by the appellant are unbelievable or calls for rejection. In the matter of valuation, law is fairly well settled that value mentioned in the registered document can be substituted by following the process prescribed under the law. The appellant has a statutory right and is fully entitled to know the reason for disagreement on the detailed submissions filed during the course of assessment proceedings before the AO. Judicial consideration of the issue by the AO in the light of the submission made by appellant is necessary. Passing of a reasoned order is all the more necessary where there is provision for contesting it in appeal. In a case like the one on hand where the AO has virtually given no reasons, the right of appeal will be devoid of any substance.

This concept has been made an essential component of the concept of natural justice as no justice can be said to have been dispensed with, if the reasons for

the decisions reached are not mentioned and apparent in the order passed. Further, it is only a speaking order that can indicate whether the decision maker has acted lawfully and in just and fair manner. This requirement derives its authority from the maxim that justice should not only be done but also be seen to be done. Thus, the impugned order passed by the Assessing Officer does not meet the requirement of law and cannot be allowed to stand.

In the present case, as the AO not only passed a cryptic order without disputing any of the grounds of dispute raised by the appellant but also failed to follow the procedure prescribed in law i.e. making of a reference to the DVO as mandated by section 50C(2), the addition made by the Assessing Officer cannot be approved. The Assessing Officer neither discussed the contentions of the assessee for taking actual consideration as fair market value of the property sold nor referred the matter to the DVO as was required under section 50C(2). The Assessing Officer has also not found or alleged that the assessee received any excess amount over the sale consideration mentioned in the deeds.

It is also a very settled position that the Assessing Officer should not be allowed to cover up the deficiency in its case where a procedure mandatorily prescribed in law is not followed. In support, reliance is placed on the following decisions:

IIO v. Pawan Kumar Gupta [2011] 43 SOT 32 (Delhi) (URO); Asstt. CIT v. Anima Investment Ltd. [2003] 73 ITD 125 (Delhi)(TM) Dy. CIT v. Rohtas Projects Ltd. (2006) 100 ITD 113 (Luck) (TM)

Raj Kumar Jain v. Asstt. CIT [1994] 50 FTD (All.) (TM)

Thus, in view of the above judicial precedents, it is abundantly clear that the AO ought to have given reasons for disputing the submission made by the appellant and mandatorily followed the procedure laid down under the provisions of Section 50C(1) and (2), i.e. he was required to refer the matter to the DVO. In absence of such reference, the above judicial pronouncements are squarely applicable and the addition made u/s 50C is void, illegal and requires to be deleted.

Submissions on merits

C. Without prejudice to the above, provision of Section 50C is not applicable as SDV does not represent the correct FMV and actual sales consideration was arrived after considering independent valuer reports

It is humbly submitted that the Ld. CIT(A) & AO has erred in invoking the provision of Sec 50C without considering the relevant facts and reason, evidencing that the market value of the said property is less than the value stipulated by the registering authorities. The reason/fact submitted before the said authorities is produced herein

(a) The consideration of 195 crores was commercially agreed and arrived at, based on detailed evaluation of valuation report, various proposals from interested buyers and after series of deliberation with interested parties. Copy of independent valuer report is enclosed as Pg 248-288 of PB and Pg 346- 357 of P'B.

(b) The company undertook a valuation of the property from an independent valuer which initially arrived at the FMV of the property at Rs. 149.5 crores.

(c) *The company also considered a proposal from Cushman and Wakefield ("C&W") to assist the company in identifying potential buyers for outright sale/Joint Development of the property wherein the sale price was estimated to be between Rs. 187.75 crores to Rs. 197.48 crores and a fee @1% of selling price was to be charged by C&W. Copy of proposal is enclosed as Pg 289-328 of PB.*

(d) *SDV of building of Rs. 10.63 Crs did not consider various attributes like the subject buildings being very old (49 years old), the structures having lost their viability and the utility of buildings being very low, as considered by independent valuer in its valuation report for building enclosed in Pg 346-357 of PB.*

(e) *SDV of land of Rs. 220.43 Crs had not considered various attributes associated with the property which were considered in valuation report viz. location, infrastructure, linkage, frontage, price of similar property in the vicinity etc.*

On perusal of the aforesaid facts/reason, it is evident that the actual consideration of Rs. 195 Crs represents the fair market value of the property and the SDV is based on guidance value which does not consider various commercial factors. Hence, it is humbly submitted that the SDV does not represent the fair market value of the property.

In this regard, it is pertinent to note that the provision of Section 50C was introduced with the intention to curb black money and not for the genuine transactions. Considering the intent of introduction of Section 50C, since the appellant had provided various reasons justifying the actual sales consideration of Rs. 195 crores and in absence of any consideration over and above Rs. 195 crores received by the company, the provisions of Section 50C are not applicable to the instant case and the action of the AO in applying Section 50C was not justified.

D. Even otherwise, Section 50C should not apply on sale of building, being a depreciable asset forming part of block of assets

At the outset, it may be noted that the Ld. AO has computed CG using SDV of building of INR 10.69 by applying the provisions of Section 50C of the Act. Since the building forms part of the tax block of assets, CG cannot be computed as per Section 48 on building. The actual sales consideration of building received by the appellant of INR 0.82 crs, should be reduced from the block of assets, as already done by the appellant.

In this regard, as per the provisions of S. 43(6)(c) read with Explanation 4 to S. 43(6) and also Explanation below S. 41(4), when an asset is sold, the block of assets shall stand reduced by 'moneys payable in respect of the asset sold. The expression moneys payable refers to the price at which it is sold'. Hence, what really matters is the price at which the asset is sold and not its fair market value. Thus, the provisions of Section 43(6)(c) read with Section 41(4) of the Act, does not

allow to substitute the actual price at which the building was sold with the notional market value determined by the stamp duty authority.

Erroneous observation of CIT(A) by treating the ground as an additional ground-

It is humbly submitted that while passing its order, Ld. CIT(A) has erroneously observed that the appellant has offered the gain on transfer of both land and building under the head Capital Gain. Further, CIT(A) has observed in the order that the appellant has taken an additional ground before CIT(A) that the transferred assets formed part of the WDV of the appellant and involved the provisions of Section 43(6)(c) read with Section 32 of the Act, therefore Section 50C is not applicable (Refer Page 99-100 of the CIT(A) order)

In this regard, it is pertinent to note that the appellant has only computed the capital gain on land whereas the sale consideration of building was reduced from block of assets in accordance with the provisions of Section 43(6)(c). The same is evident from Clause 18 of tax audit report and Schedule DOA of the ITR for the relevant assessment year, forming part of the paper book (Refer Pg 48 of the PB, Pg 82 of the PB showing extract of fixed assets deletion exhibit to the TAR wherein INR 0.82 crs has been shown as deletion from block of building and Pg 112 of PB respectively).

-Further, the CG calculation on land was submitted during the course of assessment proceedings (Refer Pg 363 of the PB submitting calculation of CG on land after reducing proceeds from building)

Therefore, the appellant has not raised any additional ground before CIT(A). It has duly reduced the actual sales consideration of the building from the relevant block of asset in the return of income itself and computed CG only on sale of land as per the provisions of the Act. Thus, the CIT(A) has grossly misunderstood the facts and given an erroneous judgement in this regard.

In support of its contention that building formed part of the WDV of the appellant, and therefore sale consideration from building should be reduced from block of assets as per the provisions of Section 43(6)(c) read with Section 32 of the Act, and therefore Section 50C is not applicable, reliance in this regard is placed on the following-

-Decision of the jurisdictional Tribunal in the case of Eveready Industries India Ltd. -vs.- PCIT (2020) 181 ITD 528 (Kolkata Trib.) wherein the Hon'ble ITAT has held that while computing the WDV in terms of Section 43(6)(c) of the Act, the Act did not permit the AO to reduce the stamp duty value of the property from the opening WDV. In terms of Section 43(6)(c), the AO was permitted to reduce from the WDV of the block only the "monies payable." As per the explanation under sub section (4) of Section 41, the said expression means, "the price for which asset is sold". Therefore, the assessee's transaction involving sale of factory building being a depreciable asset was governed by specific provisions of section 43(6) read with Explanation to section 41(4) and valuation of property sold by assessee could not be done as per provision of section 50C

- Decision of Hon'ble Delhi ITAT in *Futurz next service (P) Ltd -vs. DCIT (2020) 80 ITR 58 (Delhi Trib)* wherein the Hon'ble ITAT held that the provisions of section 50C cannot be incorporated in the computation of block of the assets as Sec 50C substitutes the full value of the consideration received or accruing as a result of transfer for the purposes of section 48 only. The Hon'ble ITAT held that, for the purpose of computing depreciation u/s. 32, it is only 'actual sale consideration' of the property transferred that should be reduced from the block of assets and not the stamp duty value of the asset u/s. 50C. Decision of Hon'ble Mumbai Tribunal in the case of *Bhaidas Curxondas & Company -vs- ACIT [2015] 154 ITD 531 (Mumbai - Trib.)* wherein has held that the deeming provisions of section 50C is for the limited purpose for computing the capital gains u/s. 45 r/w.s. 48 on the assets and not to determine the written down value of asset. The WDV would have to be necessarily computed in terms of section 43(6), and for which section 50C has no application. Further, while passing the aforesaid ruling, the Hon'ble Mumbai tribunal considered the judgement of Hon'ble Special bench in *ITO vs. United Marine Academy (2011) 130 ITD 13 (Mumbai) (SB)* and observed that the said ruling does not apply to the fact of the case i.e., where Sec 50 is not applicable.

-Similar view has been held in the case of *Raptakos Brett & Co. Limited-vs. ACIT (I.T.A. No. 578/Mum/2015) (Date of Order: 23-02-2017)*

In the given case, the block of asset of building does not cease to exist and the consideration received from sale of building of INR 0.82 crs is not more than the WDV of the block, thus the applicability of deeming provision of Section 50 does not arise. The instant case continues to be governed by Section 43(6) read with Explanation to section 41(4) and therefore, the valuation of building sold by assessee could not be done as per provision of section 50C. In view of the above, it is humbly prayed that the capital gain should not be computed on sale of building and the actual consideration of INR 0.82 crs should be reduced from the block of asset, as already done by the appellant. Therefore, sales consideration of INR 10.63 crs being SDV of building, considered for computing CG may please be deleted.

E. Even otherwise, Section 50C should not apply on sale of land, as the difference between the SDV and actual sale consideration of land was within the acceptable variation range of (+/-15%).

It is humbly submitted that the appellant has sold its land for Rs.194.18 Crs while the stamp duty value has been determined by the registering authorities at Rs. 220.43 Crs. Since the variance between the SDV and sales consideration is within the acceptable range of (+/-15%), the disallowance u/s 50C for land, by Ld. AO is incorrect.

Reliance in this regard is placed on the decision of Hon'ble SC in the case of *C.B. Gautam v. Union of India [1993] 199 ITR 530*, wherein the Apex Court had recognized a tolerance limit for pre-emptive purchase of property under Chapter XXC, at 15% of variation, even though no such tolerance band was prescribed in the statute.

Based on the said principle, the Courts and Tribunals have been consistently taking an approach that where the difference between the value adopted by the assessee and the value adopted by the DVO is marginal and within the tolerance limit, addition u/s 50C is not required. Reliance is placed on the following decisions -

Smt. Sita Bai Khetan-vs.- ITO (ITA no. 823/JP/2013 dt. 27 July 2016

Rahul Constructions-vs.- DCIT [2010] 38 DTR 0019

ACIT-us.-Harpreet Hotels (P) Ltd (ITA no. 1156-1160/Pn/2000)

John Fowler (India) Pvt. Ltd-us.- DCIT (ITA no. 7545/Mum/2014 dt. 25 Jan 2017

In the instant case, the deviation between stamp duty value and sale consideration received on land is less than 15%. Hence, relying on the above ruling of Hon'ble Apex Court and other case laws stated above the addition made u/s 50C for land should be deleted.

7.2 We have considered the order of the Ld. CIT(A) and the written submissions filed by the assessee and also heard the Ld. DR. A translation of the last page of the sale deed written in Kannada and translated by Google Translate reads as under:

Section 20(1) of Schedule to Stamp Duty of Karnataka Stamp Act, 1957 for the total value of the schedule property (land and buildings) of Rs.231,05,82,470/- in the written deed (deed) in question based on the value of the above property in the guide price list published by the Government. Stamp duty of Rs.11,55,29,150/- at the rate of (5%) and a cess of 10% on this total amount of Rs.1,15,52,915/- and surcharge of 2% on the total amount of stamp duty. The fee amount of Rs.23,10,583/- inclusive of fee (11,55,29,150+1,15,52,915+23,10,583) 51.12,93,92,648/-1 is ordered to be paid to the said writ as it is subject to exemption.

7.3 Thus, stamp duty is payable as per the Stamp Duty of Karnataka Stamp Act, 1957 as per the guide price list published by the Government and cannot be said to be arbitrary. The assessee had filed two valuation reports with huge difference which were prepared by the same agency which is not a registered valuer nor the valuation had any basis of the rates adopted, which the registered valuers in their reports adopt from the CPWD or PWD schedules of rates for valuation purposes. The property was situated in India and was not valued by any registered valuer but by

an overseas valuation agency. The buyer and the seller belong to the same group of companies. Even the consideration which was agreed upon was not paid in cash but was comprising of part cash, part by the issue of shares of the buyer and part by purchase of property to be constructed along with car parking area and to be purchased by the assessee for a price agreed upon. Thus, in this peculiar case, even the sale consideration agreed upon was not being paid in cash but partly in kind. In the second valuation, the valuer himself agreed to search for a buyer but the two proposed buyers mentioned were both from Tata group of companies, and were not independent third party buyers. Since it was a case of amalgamation, and not purchase by a third party, therefore even the sale consideration mentioned was not entirely in cash and the fair market value claimed to be the agreed price paid, does not turn out to be the fair market value but an agreed-upon value for the group concerns. That being so, neither the valuation, one of which was on the basis of average of the discounted cash flow method and fair market value, and not as per the valuation on the basis of inspection of the property, had any sanctity nor the Ld. AO had any other option but to resort to the provisions of section 50C of the Act and therefore, the only course available for resorting to for ascertaining the capital gains was the value adopted by the government authority for the purpose of stamp duty. The assessee on the one hand has attempted to demonstrate that there were certain shortcomings with the land on the basis of location etc. but what both the valuers have highlighted are many positive aspects which justify that the valuation adopted by the Stamp Valuation Authority was a better valuation. The building was also not valued appropriately as arbitrary rate was applied on which the depreciation was applied and the depreciated value of the building was claimed to be the fair market value for the purpose of capital gains. The stamp duty valuation authority has given building wise

valuation and applied different rates for warehouses and office spaces on the basis of the actual condition of the building and the same is as good as the valuation done by the DVO. The assessee contends that for the purpose of section 43(6), actual sale consideration should be taken. However, the valuation done by the assessee's valuer was a composite valuation and specific amount for the building which was paid has not been mentioned. The assessee has taken his own value for the building, which if included in the block of assets, has to be reduced from the same. But that does not imply that section 50C will not be applicable on the same. The Ld. CIT(A) has given ample justification for concurring with the views of the Ld. AO and there does not appear any reason to disagree with the same. Since after the sale, some construction was to be carried out, therefore, at this stage valuation cannot be carried out by the DVO. The same would have been justified had the assessee furnished valuation reports from the Registered Valuer as the valuer himself has given several disclaimers in the report.

7.4 There is another anomaly in the dates which in respect of some buildings is claimed to be 1954 while the same is shown as 1964 in the sale deed. It is hard to believe that the assessee, which belongs to Tata group of companies, which have a brand image and endeavour to maintain the same, would keep its properties in dilapidated state, more so when the office was functioning and the warehouses were used for storage of its product which will spoil if proper ambient conditions are not maintained. Regular repairs and maintenance are normally carried out and it has not been demonstrated that the buildings were not in regular use. Most of the contentions raised in the written submission have been duly addressed by the Ld. CIT(A) and there is no reason to disagree with the same. Thus, viewed in totality and in view of the peculiar facts of the case as highlighted in the preceding paras, there is no reason to disagree with the

findings of the Ld. CIT(A) which are upheld. Thus, Ground Nos. 3.0 to 6.1 of the appeal are dismissed. Ground Nos. 6.0 and 6.1 are dismissed also for the reason that the building was not paid for separately in the scheme of amalgamation and the assessee can reduce the value claimed to be the sale consideration from the WDV and take the same for the purpose of section 43(6). However, as far as calculation of capital gains is concerned, which the assessee had shown itself, the same would be computed as per the provisions of section 50C and there is no conflict between the two sections.

8. As regards margin of 15%, the provisions of section 50C are reproduced below:

Special provision for full value of consideration in certain cases.

50C. (1) *Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer :*

Provided *that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer:*

Provided further *that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, on or before the date of the agreement for transfer:*

Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and **ten per cent** of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration.

Thus, w.e.f. AY 2019-20, a margin of 5% was permissible which has been enhanced to 10% w.e.f. 01.04.2021 and is not applicable for the impugned AYs. Hence, Ground No. 7.0 is also rejected.

9. In the result, the appeal for AY 2014-15 is partly allowed.

10. As regards the appeal for AY 2015-16, in view of the finding in para 6.5, the appeal for AY 2015-16 is also partly allowed and the Ld. AO is directed to apply 0.5% as the corporate guarantee fee in place of 2% applied by him. As regards Ground Nos. 2.0 and 2.2, the same are dismissed as not pressed, more so in view of the finding in para 5 above.

11. In the result, both the appeals for AY 2014-15 and 2015-16 are partly allowed.

Order pronounced in the open court on 17th September, 2024.

Sd/-
(Sonjoy Sarma)
Judicial Member

Sd/-
(Rakesh Mishra)
Accountant Member

Dated: 17th September, 2024

AK, PS

Copy to:

1. The Assessee
2. The Respondent.
3. CIT(A), NFAC, Delhi
4. The CIT,
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata