IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “K”, MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No.3406/Mum/2014
(Assessment Year 2008-09)

Zee Entertainment Enterprises Ltd.,
135, Continental Building,
Dr.A.B.Road, Worli,
Mumbai 400 020
PAN:AAACZ 0243R ...... Appellant

Vs.

The Addl. Commissioner of
Income Tax, Range -11(1),
4th Floor, Room No.434,
Aaykar Bhavan,M.K.Road,
Mumbai – 400 020 .... Respondent

Appellant by	:	Shri Vijay Mehta
Respondent by	:	S/Shri N.K.Chand & Shahi Sanjay Kumar

Date of hearing	:	10/02/2017
Date of pronouncement	:	05/05/2017

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the assessee pertaining to assessment year 2008-09 is directed against an order passed by CIT(A)-15, Mumbai dated 27/02/2014, which in turn, arises out of an order passed by the Assessing Officer under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (in short ‘the Act’) dated 15/02/2012.

2. The Grounds of appeal raised by the assessee read as under:-

*"1. **Addition on account of Arm's Length Price by TPO Rs. 24,91,59,200/-***

(i) The Ld. CIT (A) erred in law and facts in upholding rejection of TNM Method consistently followed by the assessee and accepted by dept. in earlier years as well as subsequent years and adopting Resale Price Method (RPM) as MAM even when there is no resale of Programmes by AE. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(ii) The Ld. CIT (A) erred in law and facts in upholding selection of AE as tested party to workout ALP applying RPM method. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(iii) The Ld. CIT (A) erred in law and facts in upholding addition of Rs. 24,91,59,200/- on account of alleged difference in ALP calculated as per RPM taking AE as tested party in relation to sales made to Associated Enterprises. The reasons given by him for doing so are wrong, contrary to the facts of the case and against provisions of law.

(iv) The observations made by the Ld. Transfer Pricing Officer (TPO) for rejecting TNM Method and adopting RPM Method as MAM and recommending adjustment to income and confirming the same by the Ld. CIT (A) are misplaced, wrong, contrary to the facts of the case and based on assumptions, presumptions and surmises.

(v) The Ld. CIT (A)/TPO/AO erred in law and facts in treating the telecasting of Programmes & Films and distribution of TV channels through its local distributors as Resale of Programmes by AE and applying RPM without considering the facts of the case, documents and substance of the transaction.

(vi) Without prejudice to above contentions, even if PLI of AE being 42.29% as worked out by TPO is accepted as comparable as per TNMM, the PLI of assessee is 56%. Hence, the adjustment to ALP is unwarranted and wrong.

(vii) The Ld CIT (A)/AO failed to appreciate that:

a) The assessee produce or purchase Hindi or Regional language TV Programs & film rights for telecast on its channels in India and export their limited rights to its AE, simultaneously or immediately thereafter, for telecast in specified territory and channels and none of the Programs are sold by assessee without telecast in India.

b) *The Programs rights once telecast on Zee Network it cannot be telecast on competing channels in India and abroad hence it has no universal saleability.*

c) *The program rights exported are Hindi & Regional language TV programs and are viewed mainly by limited Indian ethnic population abroad and have limited viewership and market for these programs.*

d) *The AE is mainly in broadcasting and telecasting business for about 18 years and in broadcasting business in UK & USA for more than 10 years. It acquired rights of Hindi & Indian Regional language programs & films each territories separately.*

e) *The absolute ownership rights of the programs remains with the assessee and the AE get only limited telecast right on its TV channels in specified territory and has no right to sub licence or sale these programs.*

f) *The program cost amortisation policy does not have any relation or relevance to price of limited rights sold by assessee.*

g) *The programs are produced or purchased by assessee as per the taste of Indian public and with the object telecasting on its channels in India and not for sale and program & films rights are sold to AE & others are additional revenue and has no cost.*

2. ***Addition on account of Corporate Guarantee for AE by TPO - Rs. 1,63,16,370/-***

(i) The Ld. CIT (A) erred in law and facts in upholding addition of Rs. 1,63,16,370/- to income taking 3% as arm's length fees for corporate guarantee (collateral) given for borrowings by Associated Enterprises without considering the evidences and documents submitted. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(ii) The Ld. CIT (A)/TPO/AO ought to have appreciated that in the facts & circumstances of the case no guarantee was required by AE to take the loan and having given guarantee the assessee carrying no risk nor the AE is benefited by the guarantee issued to the bank hence no guarantee commission is chargeable nor Transfer Pricing adjustment warranted.

(iii) The Ld. CIT (A)/TPO/AO ought to have accepted the facts that issuance of corporate guarantees by assessee to lender bank for its AE, does not involve any costs to the assessee, does not have any bearing on profits, income, losses

or assets of assessee hence outside the ambit of expression 'international transaction'.

3. ***Disallowance u/s 14 A - Rs. 69,94,985/-***

(i) The Ld. CIT (A)/AO erred in law and facts in disallowing Rs. 41,44,060/- out of interest and Rs. 28,50,925/- out of expenses u/s 14 A of the Act. The reasons given by them for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(ii) The Ld. CIT(A)/AO erred in law and facts in disallowing interest relating it to investments made during the year and earlier years, already proved to have been made out of internal accruals / interest free funds and no borrowed funds are utilised for earning exempt income. The reasons given by them for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(iii) The Ld. CIT(A)/ A.O. failed to appreciate that the assessee had far more internal accruals and interest free funds than these investments hence disallowance of interest u/s 14A of the Act is unwarranted.

(iv) Without prejudice to above grounds, the Ld. CIT (A)/ AO erred in law and facts in disallowing interest u/s 14A with reference to total interest expense without excluding interest expense relevant to specific business and sources of income.

(v) The Ld. CIT (A)/ AO erred in law and facts in disallowing Rs. 28,50,925/- out of expenses u/s 14 A of the Act. The reasons given by them for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(vi) The Ld. CIT (A)/AO erred in law and facts in disallowing expenses mechanically calculated as provided u/r 8D, without proving any nexus and relation to earning exempt income or the expenses incurred for non-business purposes.

4. ***BCCI advance Written off - Rs. 33,54,01,600/-***

(i) The Ld. CIT (A) erred in law and facts in upholding disallowance of Rs. 33,54,01,600/- being trade advance for telecasting cricket matches, given to BCCI not recoverable/ written off during the year. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law. ,

(ii) The Ld. CIT (A) ought to have allowed, the trade advances given to BCCI for the purposes of business and written off during the year being not recoverable, as revenue expenses u/s 37(1) of the Act.

5. ***Structured Interest Swap Loss treated as Speculation Loss & Disallowed Rs.26,17,93,000/-***

(i) The Ld. CIT (A) erred in law and facts in upholding disallowance of crystalised loss of Rs.26,17,93,000/-, on account of structured interest swap transaction entered by the assessee to hedge the increasing interest cost in the normal course of business, treating the same as speculation transaction covered u/s 43 (5) of the Act. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(ii) The Ld. CIT (A) ought to have allowed the crystallized & paid interest rate swap transaction loss in the normal course of business being expenditure of revenue in nature incurred for the business of the company allowable u/s 36 /37 of the Act.

(iii) The Ld. CIT (A) wrongly relied on the Bombay HC decision in the case of Bharat Ruia Ltd (337 ITR 452), facts of which totally distinguishable as it is neither mark to market loss nor the loss on account of currency exchange fluctuation and interest rate swap is neither commodity nor it is purchase or sale of commodity or shares & securities settled otherwise than delivery.

6. The Ld. CIT (A) grossly erred in law and facts in dismissing the appeal by repeating the order of the TPO/ AO without considering & applying mind to the submissions of the assessee and denying justice to the appellant, thereby acted against the principles of natural justice."

3. Before we proceed to adjudicate the respective Grounds of appeal, a brief background of the case can be summarized as follows. The appellant is a company incorporated under the provisions of the Companies Act, 1956, and is, inter-alia, engaged in the business of broadcasting and distribution of TV Channels. For the assessment year under consideration, it filed a return of income on 26/09/2008 declaring a total income of Rs.459,60,84,672/-, which was subsequently revised to Rs.471,34,52,865/-. The return of income so filed was subject to a scrutiny assessment and in an order passed under section 143(3) r.w.s. 144C of the Act dated 15/02/2012, the total income has been assessed at Rs.604,99,46,420/-, which has subsequently been rectified to Rs.558,28,18,020/-. The additions and disallowances made by the Assessing

Officer were carried before the CIT(A) by way of an appeal, which has since been dismissed. The assessee is in further appeal before us on the aforestated Grounds of appeal, which we shall deal hereinafter in seriatim.

4. The first substantive dispute in this appeal is with respect to an addition of Rs.24,91,59,200/- made by the Assessing Officer, based on the determination of arm's length price by the Transfer Pricing Officer, with respect to the international transaction of sale of TV Programmes and films to associated enterprise. The relevant facts in this regard are as follows. The appellant had undertaken certain international transactions within the meaning of section 92B of the Act with its associated enterprises, which inter-alia, included sale of TV Programmes and films to Asia Today Ltd., Mauritius (in short 'ATL') for a stated consideration of Rs.79,35,27,132/-. The Transfer Pricing Officer, on a reference under section 92CA(1) of the Act has passed an order under section 92CA(3) of the Act dated 31/10/2011 computing the arm's length price of the international transaction, which was in variance with the stated value of such transactions. Before the Transfer Pricing Officer, assessee pointed out that it was purchasing as well as producing in-house general entertainment programmes, current affairs and films for telecasting on its channels in India. After exhibiting and telecasting its programmes on Indian channels, assessee sold the telecasting rights of such programmes and films to its associated enterprise, ATL for telecasting on its channels in UK, USA, Africa, Middle East, etc. at pre-determined prices. It was explained that the predetermined price was as per a tariff card, which was a percentage of cost based price for each territory. The assessee had also pointed out that such programmes were also sold to others as syndicated sales based on negotiated prices. ATL, the associated enterprise had in-turn entered

into agreements with Zee TV, USA and Asia TV, USA for distribution of programmes on channels via satellite and cable networks, for a fixed fee. Before the Transfer Pricing Officer, assessee pointed out that sale of TV programmes and films to the associated enterprise was benchmarked by applying the Transaction Net Margin Method (TNMM), and the Profit Level Indicator(PLI) was determined at 56.36% based on the formulae of Operating Profit/Operating Cost (OP/OC). It was asserted that since the margin of the selected comparables was 0.13%, the stated value of the international transaction of sale of T.V programmes and films was at an arm's length price. After considering the submissions and evidences relied upon by the assessee, the Transfer Pricing Officer has differed with the assessee on the determination of the arm's length price. Firstly, the Transfer Pricing Officer rejected the TNM Method selected by the assessee and instead he has selected the Resale Price Method (RPM) as most appropriate method in order to benchmark the international transaction of sale of programmes and films. Secondly, the Transfer Pricing Officer selected ATL, Mauritius as the tested party and computed the gross profit earned by ATL, Mauritius and attributed 90% of such profits to the assessee company and in this manner an addition of Rs.24,91,59,200/- was computed in order to determine the arm's length price of the international transaction of sale of TV Programmes and films. The CIT(A) has affirmed the stand of the Assessing Officer, which is in conformity with the addition determined by the Transfer Pricing Officer.

5. Before us, the Ld. Representative for the assessee has made varied arguments in order to assail the aforesaid addition. Firstly, it is pointed out that the selection of RPM as the most appropriate method by the Transfer

Pricing Officer is inherently incorrect, inasmuch as, the associated enterprise i.e. ATL has not made any further sale of the TV Programmes and films but has only transacted in giving telecasting rights to Zee USA & Asia TV UK, which are mere distribution companies; they are being remunerated on commission basis; and, that there is no sale of TV Programmes and films by ATL, Mauritius to Zee TV- USA and Asia TV, UK unlike the transaction between assessee and ATL. Secondly, it is emphasized that even if the transactions of ATL with Zee TV- USA and Asian TV UK are to be understood as that of sale, yet it cannot justify adoption of the RPM because such transactions are between related parties. It was pointed out that ATL-Mauritius, Zee TV- USA and Asian TV-UK are related parties. It was therefore, contended that under these circumstances adoption of the RPM is not feasible. Thirdly, it has been vehemently pointed out that under identical circumstances the TNM Method has been adopted by the assessee in other assessment years right from assessment year 2005-06 to 2007-08 and, thereafter from assessment year 2009-10 to 2012-13 and the same has been accepted by the Transfer Pricing Officer also. It was, therefore, contended that even on the principles of consistency the stand of the Transfer Pricing Officer is untenable in this year. Apart from the aforesaid, the Ld. Representative for the assessee has taken us through the order of the Transfer Pricing Officer and pointed out that there are glaring mistakes inasmuch as certain observations have been made, which are devoid of any factual support. In this context, he has made a specific reference to an observation made by the Transfer Pricing Officer in para 6.5 of the order that "*the assessee has sold its programme at a throwaway price to its associated enterprise compared to the actual price of the product.*" It is contended that the said observation of the Transfer Pricing Officer is wrong and is in-fact contrary to the facts brought to his notice. It has been explained that the observation of the Transfer Pricing Officer is based on sales instances tabulated by him at the end of para 6.4 of his order. It is pointed out that the Transfer Pricing Officer has wrongly assumed that the instances of such sales are to the associated enterprises, whereas the correct position is that these are instances of sales made to the non-associated enterprises. The Ld. Representative for the assessee pointed out that even before the Transfer Pricing Officer, vide communication dated 14/10/2011, copy of which has been placed in the Paper Book at pages 115 to 126 it has been explained that if the Sale Price of the goods sold to non-associated enterprise is seen, then the Sale Price of the goods sold to associated enterprises is found to be higher. In this context, the Ld. Representative for the assessee referred to page 119 of the Paper Book to demonstrate that the Tabulation prepared by the Transfer Pricing Officer is wrong inasmuch as these are instances of sales to non-associated enterprises. Under these circumstances, it was pointed out that the Transfer Pricing Officer has misdirected himself in rejecting the comparability analysis undertaken by the assessee. Apart therefrom, the Ld. Representative for the assessee pointed out that the average margin of the peer companies in the same industry is lower than the margin of the assessee over the years. In this context, it is sought to be pointed out that the average margin of the industry-peers right from assessment year 2005-06 to assessment year 2012-13, shows that the margin of the assessee is higher and, therefore, even on a macro level no adjustment is called for in the tested value of the international transactions.

6. On the other hand, the Ld. Departmental Representative appearing for the Revenue primarily reiterated the stand of the Transfer Pricing Officer. It is

sought to be pointed out that the Transfer Pricing Officer had called for the stock inventory of all the programmes indicating their cost, unamortized amount on the date of sale, selling price, difference between book value and selling price, etc. which were not furnished. It was pointed out that the Transfer Pricing Officer had concluded that assessee had failed to establish that it has kept and maintained the information and the documents required in term of Rule 10D(1) of the Income-tax rules, 1962. The Ld. Departmental Representative appearing for the Revenue has referred to para 6.9 of the order of the Transfer Pricing Officer, wherein it is observed that assessee has not filed a detailed Transfer Pricing study and for the said reason the Transfer Pricing Officer did not accept the selection of TNM method as most appropriate method. The emphasis of Ld. Departmental Representative appearing for the Revenue is that in the absence of any information about the cost of goods sold and for want of adequate documentation as required by Rule 10D(1) of the Rules, the profit margin computed by the assessee for the purposes of comparability was not reliable and the rejection of TNM method has been sought to be justified.

7. We have carefully considered the rival submissions. Before we proceed to deal with the specific dispute, it would be appropriate to briefly recapitulate the relevant fact-situation. The assessee purchases as well as carries out an in-house production of general entertainment programmes, current affairs and film rights for telecasting on its channels in India. Subsequent to such exploitation on Indian channels, assessee company exports/sells limited telecasting rights of such programme and films to its associated enterprise, ATL Mauritius for enabling the telecast of such products on the channels of its associated enterprise in the territories of UK, USA, Africa, Middle East, etc. The

said transaction has been entered in terms of a Memorandum of Understanding dated 01/10/2005, copy of which has been placed in the Paper Book at pages 63 to 66. Thus, assessee has entered into an 'international transaction' within the meaning of section 92B of the Act with the its associated enterprise ATL Mauritius, for sale of rights of TV programmes and films, which were already exhibited on its TV channels in India. During the year under consideration, assessee has received a sum of Rs.79,35,25,132/- as proceeds against the export/sale of TV programmes and films to ATL Mauritius. At this stage, we may also refer to the associated enterprise (ATL) and as per the material on record it transpires that the said concern is operating TV channels in various countries like, UK, USA, Middle East, South Africa, etc. The channels are managed and distributed by its subsidiaries in UK and USA. It is also emerging from record that ATL Mauritius had entered into a distribution agreement with its subsidiaries, namely Zee, TV –USA and Asia TV-UK. The programmes and films acquired from assessee are supplied by ATL, Mauritius to the subsidiaries, who are the channel operators in the respective territories. At the time of hearing, it was explained that the associated enterprise supplies the programmes and films acquired from assessee to the actual channel operating subsidiaries in a telecast mode in FPC format through its transmission systems.

7.1 The Transfer Pricing Officer has selected RPM as most appropriate method for determining the arm's length price of the transaction of sale of programmes and film rights to ATL in contrast to the TNM method selected by the assessee. The first controversy is as to whether the Transfer Pricing Officer was justified in selecting the RPM as most appropriate method. Section 92(1) of the Act provides that the arm's length price in relation to the international transaction shall be determined by any of the methods prescribed therein, being the most appropriate method. Notably, the phraseology of section 92C(1) of the Act makes it clear that the selection of the most appropriate method is to be made "*having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors...................*". Further, Rule 10B of the Rules enumerates the various methods to determine the arm's length price of an international transaction and for the present purpose, what is relevant is clause(b) of Rule 10B(1) of the Rules, which prescribes the manner in which the RPM is to be effectuated, and it reads as under:-

> *"(i) the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified;*
>
> *(ii) such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;*
>
> *(iii) the price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;*
>
> *(iv) the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction 55a[or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;*
>
> *(v) the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise;"*

7.2 The first attack set-up by the appellant against the selection of RPM is that the same has been inappropriately applied by the Transfer Pricing Officer inasmuch as the transactions of ATL with Zee TV-USA and Asia TV-UK are not between unrelated entities. The said proposition is being supported by the phraseology of Sub-clause(i) of clause(b) of Rule 10B (1) of the Rules . Quite clearly, the RPM, at the threshold, refers to the price at which the property purchased by the enterprise from an associated enterprise is re-sold or provided to an 'unrelated enterprise' or in other words an independent entity. In the present case, it is undeniable that Zee TV- USA and Asia TV-UK are entities which are 100% owned by ATL-Mauritius and, therefore, the transactions amongst them cannot be considered as between unrelated entities, and the same are not uncontrolled transactions. Therefore, on this singular aspect the action of the Transfer Pricing Officer in selecting RPM as the most appropriate method is wholly inappropriate and wrong. So however, we find that the Transfer Pricing Officer was conscious of such a situation and has sought to counter the aforesaid by observing as under:-

> *"Further even OECD guidelines, in similar situation permits, looking at the controlled transactions as a guide to determining ALP of the transactions if the said tested transactions appear to be of dubious nature with an intention to shift profit......."*

7.3 The aforesaid reveals the mind of the Transfer Pricing Officer, as according to him, even controlled transactions can be a good data to determine the arm's length price, if the tested transactions appears to be of 'dubious nature' carried out with an intention to 'shift profit'. Though we are unable to find any statutory backing for the aforesaid stand of the Transfer Pricing Officer, but even going by the factual matrix of the present case, there is no material to say that the transaction in question is of 'dubious nature', as our subsequent discussion would show.

7.4 Firstly, it is to be noted that the impugned international transaction of sale of TV programme and films is not specific to the year under consideration and rather, it has been entered in terms of an Memorandum of Understanding dated 01/10/2005, which shows that similar transactions have been entered by the assessee in the past years also. In fact, at the time of hearing, it has been emphasized that such transactions have been entered in the past as well as in the subsequent years and in none of the years upto assessment year 2012-13, the transactions have been viewed as dubious by the assessing authority. Therefore, in this background, the stand of the Transfer Pricing Officer in the instant year becomes suspect, and, in any case, it lends a heavy burden on the Transfer Pricing Officer to demonstrate the 'dubious' nature of the transactions. The moot point is whether such a burden has been discharged by the Transfer Pricing Officer? The discussion in the order of Transfer Pricing Officer reveals two reasons which have weighed with him to conclude that the transactions are dubious. Firstly, according to him, the programmes have been sold at 'throwaway prices' to the associated enterprise as compared to the actual cost of production. For this purpose, he has tabulated the Sale Price of certain T.V. Programmes in para 6.4 of his order. At the time of hearing, Ld. Representative for the assessee pointed out that the reference to such values was a misnomer, because they are prices at which TV programmes and films have been sold to non-associated enterprises. In support, he has referred to page 119 of the Paper Book which brings out that the sale rates are for sales made to non-associated enterprises. It is seen that such a point was raised by the assessee even before the CIT(A) but the same has been merely brushed aside; and, even before us there is no repudiation to the same. Thus, it becomes quite clear that the stand of the Transfer Pricing Officer is based on a misconception, and is devoid of any factual support. The second reason advanced by the Transfer Pricing Officer is that the Sale Prices determined by the assessee in consultation with ATL is in "*disregard of the actual cost incurred by the assessee*." On this point, reference has been made to a communication dated 14/10/2011 addressed to the Transfer Pricing Officer, a copy of which is placed at pages 115 to 126 of the Paper Book. In this communication, assessee explained the basis on which the prices have been charged from the associated enterprises. Assessee has explained the policy of amortization of cost of programmes and the manner in which the prices have been determined for sale to ATL. As per the assessee, it was following the policy of amortization of its cost of programmes over three years, whereby its writes-off 80% of programme's acquired cost in the first year of telecast, and 10% each in the subsequent two years. Further, if on evaluation, it is found that the realizable value of the programme at the year end is less than unamortized cost, then there is an additional write-off or full write-off of the programme cost. It has been emphasized that such amortization policy of writing-off the cost in 3 years is being consistently followed, and has not been disputed by the Revenue in any of the assessment years. It was explained that in terms of the said policy, the major cost of the programme is written-off once it is telecast in India and the balance 20% is written-off in the subsequent two years. In this background, assessee explained that in terms of its Memorandum of understanding with associate enterprises, the pricing formula is based on grading the programmes on acquisition cost and the price charged is more than 20% of the average programme cost. From the pricing policy canvassed by the assessee it is quite evident that the programmes are sold to the associate enterprises only after it is commercially exploited/telecast in India. The policy also shows that the revenues generated from the sale to associated enterprise would result in profits, since almost 80% or more of the cost stands written-off in the first year itself against the revenues generated from the telecast in India. Thus, in our considered opinion, the Transfer Pricing Officer has not discharged his burden to demonstrate how the transaction with associate enterprise be considered as dubious.

7.5 The unsustainability of the approach of the Transfer Pricing Officer in selecting the RPM can also be gauged if one takes into consideration the provisions of Rule 10C of the Rules. As noted earlier, the computation of arm's length price under section 92C(1) of the Act is required to be made in terms of the most appropriate method prescribed therein. Sub-section (1) of section 92C of the Act also enumerates the methods prescribed and Rule 10C(1) of the Rules postulates that the most appropriate method shall be the method which is "*best suited to the facts and circumstances of each particular international transaction*", and which provides the "*most reliable measure*" of an arm's length price in relation to the international transaction . Sub-rule(2) of Rule 10C provides the factors which shall be taken into consideration while selecting the most appropriate method. Quite clearly, the entire discussion in the order of the Transfer Pricing Officer does not reflect any justifiable factors for selecting the RPM method in preference to the TNM method selected by the assessee as the most appropriate method. Moreover, it is factually evident that assessee has undertaken similar international transactions of sale of television programmes and film rights to its associated enterprises in the past as well as in subsequent years and the same were benchmarked by considering the TNM method as most appropriate method; and, such position has been accepted by the assessing authority in the respective years. No doubt, the principles of *res judicata* are not strictly applicable to the income-tax proceedings, so however, if a qualitatively comparable situation exists in more than one assessment year, then the rules of consistency cannot be given a go by. In the instant case, we find that the impugned international transaction of sale to the associated enterprise, ATL Mauritius is effected in terms of Memorandum of Understanding dated 01/10/2005, which clearly shows that qualitatively similar transactions have been undertaken by the assessee in the past year, wherein benchmarking done by selecting the TNM method as the most appropriate method stands accepted. In the course of hearing, the Ld. Representative for the assessee had asserted that similar fact-situation prevails in the subsequent assessment years also, and such assertion has not been controverted by the Revenue before us. Even otherwise, we find that the Transfer Pricing Officer has not brought out any justifiable reasons to depart from adopting the TNM method, which has otherwise been found to be applicable in the assessments of past as well as subsequent assessment years upto to the assessment year 2012-13, as stated before us by the Ld. Representative for the assessee before us. Therefore, on the principle of consistency also, we are unable to uphold the selection of RPM method as the most appropriate method by the Transfer Pricing Officer in preference to the TNM method selected by the assessee.

7.6 Before parting, we may now refer to the point raised by the Ld. Departmental Representative to the effect that assessee had failed to show before the Transfer Pricing Officer that it had kept and maintained the information and documents required in terms of Rule 10D(1) of the Rules. Therefore, according to Ld. Departmental Representative, the Transfer Pricing Officer was justified in rejecting the TNM method selected by the assessee. On this count, the Ld. Representative for the assessee pointed out that the observations of the Transfer Pricing Officer in this regard are contrary to the fact-situation. It is pointed out that assessee has maintained its documentation contemporaneously before the due date of filing of return of income as required as per Rule 10D(2) of the Rules and the prescribed report has also been certified by the Accountant in form No.3CEB. The Ld. Representative for the assessee explained that in the course of proceedings before the Transfer Pricing Officer there was certain delay in furnishing the requisite information, including the documentation and information required to be maintained as per Rule 10D(1) of the Rules, but the delay by itself cannot be interpreted to mean that the requisite information or documentation was not contemporaneously maintained. In this context, the Ld. Representative for the assessee has also referred to the Paper Book filed, wherein the requisite information, material and documentation required under Rule 10D(1) of the Rules has been placed. We find that the said material was very much before the Transfer Pricing Officer and, therefore, in our considered opinion, the stand of the Revenue is quite misplaced.

7.7 Another aspect argued by the Ld. Departmental Representative was to the effect that in case the action of the Transfer Pricing Officer in selecting the RPM is not upheld, then the matter be remanded back to the Transfer Pricing Officer for appropriately verifying the comparability analysis undertaken by the assessee by applying the TNM method. On this point, the Ld. Representative for the assessee referred to the Paper Book to point out that the following workings/explanations were furnished in the course of proceedings before the Transfer Pricing Officer with regard to the application of TNM:- (i) submission of Form No.3CEB and FAR analysis vide communication dated 25/10/2011, copies of which are placed in the Paper Book at pages 136 and 153; (ii) explanation regarding accept/reject matrix of comparables and analysis of the

Profit Level Indicator(PLI) of the assessee vis-à-vis comparable concerns vide communication dated 27/05/2011, copies of which have been placed at pages 95, 98 to 105 of the Paper Book; (iii) working of methodology adopted for searching comparables furnished to the Transfer Pricing Officer, copy of which has been placed in the Paper Book at pages 106 and 107; (iv) TNM method working for the last three years submitted to the Transfer Pricing Officer vide letter dated 07/10/2011, placed at pages 110 of the Paper Book. The Ld. Representative for the assessee pointed out that the above information was submitted at the instance of the Transfer Pricing Officer himself, which clearly demonstrates that the TNM method workings have been examined by the Transfer Pricing Officer and no adverse inference has been drawn by him. For the said reasons, he has opposed the plea of the Ld. DR to remand the matter back to the file of the Assessing Officer/Transfer Pricing Officer. On this aspect, we find that it would be inappropriate to factually conclude that the Transfer Pricing Officer has not verified the TNM method applied by the assessee company . In fact, in terms of page 108 of the Paper Book, wherein is placed a copy of assessee's communication to Transfer Pricing Officer dated 07/10/2011, the assessee had submitted a working to demonstrate that even if the concerns which were selected by the Transfer Pricing Officer for assessment year 2007-08 are taken as comparables for the instant year also, the transactions with ATL-Mauritius would still to be at arm's length price. All this goes to show that the Transfer Pricing Officer was fully aware of the manner in which the TNM method was applied by the assessee company and there is no adverse observations in this regard. The material on record, in our view, clearly belies the averment of the Revenue that the matter be restored back to the file of Transfer Pricing Officer for verifying the application of TNM method. Rather, in our view, the fact-situation clearly points to the contrary inasmuch as the assessee had fully explained its position in the course of proceedings before the Transfer Pricing Officer and no justifiable fault has been pointed out by the Transfer Pricing Officer; and, even before us the same position continues on behalf of the Revenue. Under these circumstances, in our view, the plea of the Ld. Departmental Representative is untenable and is hereby rejected.

7.8 In the final analysis, it is held that the action of the Transfer Pricing Officer in determining the transfer pricing adjustment of Rs.24,91,59,200/- with regard to the sale of television programmes and film rights to ATL-Mauritius deserves to be set-aside. We hold so. Thus, in so far as Ground No.1 is concerned, assessee succeeds.

8. The next substantive dispute in this appeal is on account of an addition of Rs.1,63,16,370/- made by the Assessing Officer on account of arm's length fee for corporate guarantee given by the assessee to the bank on behalf of its associated enterprise , ATL-Mauritius for the loan facility availed by it from the bank.

8.1 Briefly put, the relevant facts are that the Transfer Pricing Officer noticed that the associated enterprise, ATL-Mauritius had availed credit facilities from the Barclays Bank, which inter-alia, included a loan of 30 million US dollars. The actual amount of loan outstanding as on 31/03/2008 was to the tune of US dollar 129,35,000. The Transfer Pricing Officer noticed that assessee did not charge any fee or commission for providing corporate guarantee as a collateral for the aforesaid borrowing to Barclays Bank on behalf of its associated enterprise. The preliminary stand of the assessee was that providing of the corporate guarantee was not an 'international transaction' within the meaning of section 92B of the Act, and that it was an activity which was incidental to the business. Without prejudice to the above, the alternate plea of the assessee was that if arm's length rate of such fee/commission was to be evaluated, it may be estimated at 0.25% of the outstanding loan liability. The Transfer Pricing Officer held that providing of a corporate guarantee to the bank on behalf of the associated enterprise was an 'international transaction' within the meaning of section 92B of the Act and, therefore, it was required to be benchmarked as per Indian Transfer Pricing Regulations. The Transfer Pricing Officer took into consideration the information received from banks and determined a rate of 3% as an arm's length rate to estimate the income by way of guarantee commission/fee. On this basis, the Transfer Pricing Officer worked out an addition of Rs.1,63,16,370/-, being 3% of the average amount of loan outstanding during the year. The Assessing Officer made an addition of Rs.1,63,16,370/- to the returned income accordingly. Before the CIT(A), assessee assailed the stand of the assessing authority and contended that the Transfer Pricing Officer had erred in law and on facts in making an addition on account of commission/fee on corporate guarantee given to the associated enterprise. As per the assessee, considering the facts and circumstances of the case, and the financial capacity and net worth of the associated enterprise there was no risk assumed by the assessee in providing corporate guarantee to the bank for the loan taken by the associated enterprise. Alternatively, assessee contended that even if an adjustment was to be made, the arm's length rate would not exceed 1%, which was the rate charged by Barclays Bank to the associated enterprise, ATL-Mauritius for providing guarantee by way of letter of credit in assessment year 2005-06. However, the CIT(A) disagreed with the assessee and, he has affirmed the action of the Transfer Pricing Officer and accordingly, assessee is in further appeal before us.

8.2 Notably, as the orders of the lower authorities reveal, the principal plea of the assessee was that furnishing of a corporate guarantee on behalf of the associated enterprise is not to be construed as an 'international transaction' within the meaning of section 92B of the Act. Before us, the Ld. Representative for the assessee has not laid any emphasis on the aforesaid primary plea, but has assailed the rate of 3% adopted by the income tax authorities to determine arm's length rate of the impugned international transaction of providing corporate guarantee to the bank on behalf of the associated enterprise. Therefore, we are confining our discussion to the efficacy of the rate of 3%, which has been considered to be arm's length rate for corporate guarantee fee/commission. In this context, the Ld. Representative for the assessee referred to the judgement of the Hon'ble Bombay High Court in the case of CIT vs. Everest Kanto Cylinders Ltd., 378 ITR 57(Bom), wherein the arm's length rate of 0.50% has been approved in respect of corporate guarantee fee/commission. According to him, the rate of 0.50% was approved in the case of Everest Kanto Cylinders Ltd. (supra) because the same was suo-moto applied by the assessee , whereas in the present case, the facts and circumstances are such that the arm's length rate of corporate guarantee fee/commission ought to be determined at a lower rate. In order to justify the lower rate, the Ld. Representative for the assessee pointed out that the loan raised by the associated enterprise was fully secured by the assets owned by the associated enterprise and it was pointed out that net worth of the associated enterprise as on 31/03/2008 was around Rs.800 crores and profit after tax for the year ending 31/03/2008 is to the tune of Rs.48 crores. It was sought to be pointed out that the associated enterprise was in a good financial health to borrow monies from bank on its own account; that the loan was only to the extent of 30 million US dollars, which was quite insignificant considering the net worth of the associated enterprise. Secondly, it was also explained that assessee was in possession of about Rs.183.30 crores of interest-free funds belonging to the associated enterprise as on 31/3/2008 and considering all these aspects, there was no risk of the guarantee devolving on the assessee for payment. For all the said reasons, it is sought to be pointed out that the adjustment, if any, be restricted to a rate even lower than 0.50%.

8.4 On the other hand, Ld. Departmental Representative appearing for the Revenue has reiterated that the transaction of providing corporate guarantee is an 'international transaction' within the meaning of section 92B of the Act and it has to be benchmarked separately based on the relevant FAR analysis. According to him, in the present case, assessee had itself made an alternate plea before the CIT(A) of 1% guarantee fee being charged by the bank and, therefore, the same may be treated as arm's length rate for the international transaction in question.

8.5 We have carefully considered the rival submissions. As observed by us earlier, the limited issue before us relates to the efficacy of the arm's length rate of 3% determined by income tax authorities on account of fee/commission for corporate guarantee provided on behalf of the associated enterprise. Factually speaking, in the present case, assessee company has issued corporate guarantee on behalf of its associated enterprise for the loan facility availed by it from the bank. The determination of arm's length commission/corporate guarantee fee @ 3% by the Transfer Pricing Officer is based on the fees charged by the banks. Quite clearly, the aforesaid approach of the income-tax authorities is inconsistent with the judgment of the Hon'ble Bombay High Court in the case of Everest Kanto Cylinders Ltd.(supra). As per Hon'ble Bombay High Court, the instance of a commercial bank issuing bank guarantee is incomparable to a situation where a corporate entity issues guarantee to the bank that if the subsidiary/associated enterprise does not repay a loan, the same would be made good by such corporate entity. Therefore, following the ratio of the judgment of the Hon'ble Bombay High Court in the case of Everest Kanto Cylinders Ltd.(supra), the rate of 3% deserves to be rejected. So however, the addition is required to be sustained on the basis of an arm's length rate and in this regard a reference has also been made to the decision of the Mumbai Tribunal in the case Thomas Cook (India) Limited in ITA No.859/Mum/2014 dated 29/04/2016, wherein a rate of 0.5% has been adopted for the purposes of determining the arm's length rate of corporate guarantee/fee. The Ld. Representative for the assessee has canvassed for adoption of a lower rate, whereas the Ld. Departmental Representative appearing for the Revenue has referred to the alternate plea of the assessee itself, which was raised before the CIT(A) that such rate be taken as 1%. In our view, the arguments of the Ld. Departmental Representative appearing for the Revenue with reference to the rate of 1% canvassed by the assessee before the CIT(A) cannot be accepted because such a rate was canvassed based on the rate charged by the Barclays Bank from the associated enterprise. Ostensibly, the adoption of such a rate would militate against the ratio laid down by the Hon'ble Bombay High Court in the case of Everest Kanto Cylinders Ltd.(supra). At the same time, the plea of the Ld. Representative for the assessee that a rate lower than 0.5% be adopted is also not justified. In sum and substance, the plea of the assessee is that the loan raised by the associated enterprise has adequate primary security in the shape of the net worth of the associated enterprise itself and, therefore, the risk of devolvement of the guarantee given by the assessee is minimal. In our considered opinion, the said feature cannot be considered as a peculiar situation so as to warrant a rate lower than 0.50%, which has been approved in a number of decisions of the Mumbai bench of Tribunal, namely:-

(1) M/s.Everest Kanto Cylinders Ltd. vs. DCIT,ITA No.542/Mum/2012 order dated 23/11/2012.
(2) Aditya Birla Minacs Worldwide Ltd. vs. DCIT, 56 taxman.com 317 (Mum-Trib)
(3) M/s. Godrej Household Products Ltd. vs. Addl. CIT, ITA No.7369/Mum/2010 order dated 22/11/2013
(4) ACIT vs. Nimbus Communications Ltd., ITA No.3664/Mum/2010 dated 12/06/2013.

8.6 Therefore, considering the entirety of facts and circumstances, we are inclined to uphold the rate of 0.5% for the purposes of determining arm's length rate of the corporate guarantee commission/fee. Thus, on this aspect, we set-aside the order of CIT(A) and direct the Assessing Officer to recompute the addition as per our aforesaid direction. Thus, on this aspect assessee partly succeeds.

9. The next ground of appeal is in respect of disallowance of Rs.69,94,985/- sustained by the CIT(A) under section 14A of the Act. In this context, the

relevant facts are that during the course of assessment proceedings, the Assessing Officer noted that assessee had made substantial investments in the shares of subsidiary companies and has also earned dividend income of Rs.1,09,82,154/-, which was claimed as exempt income under the Act. Under these circumstances, the Assessing Officer show caused the assessee as to why expenses incurred in relation to the earning of the exempt income not be disallowed under section 14A of the Act. Before the Assessing Officer, assessee made detailed submissions which have been reproduced by the Assessing Officer in para 4 of his order. The assessee raised various pleas, namely, that the fresh investments made during the year were not out of interest bearing funds but out of internal accruals; that the investments made in earlier years were out of non-interest bearing funds and have been duly verified; and, therefore, no interest expenditure could be attributable to such investments. Further, it was also canvassed that surplus non-interest bearing funds available with the assessee are in excess of the value of investments made and reliance was also placed on the judgment of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd.,313 ITR 340(Bom) to say that the investments are presumed to be made out of interest-free funds. Thus, no disallowance could be made out of interest expenditure. It was also canvassed that the investments in sister-concerns and subsidiaries were out of business exigencies, and thus the same are out of the purview of Section 14A of the Act. With regard to the disallowance out of overheads, it was also canvassed that no expenditure has been incurred to earn the exempt income and, therefore, no disallowance was required to be made out of either interest or other overhead expenses. The Assessing Officer disagreed with the assessee and computed the disallowance under Section 14A of the Act of

Rs.69,94,985/- by applying the formula contained in Rule 8D(2) of the Rules. The said action of the Assessing Officer has since been affirmed by the CIT(A) also. Before us, the Ld. Representative for the assessee has primarily reiterated the submissions, which have been made before the lower authorities.

9.1 On the other hand, the Ld. Departmental Representative appearing for the Revenue contended that the plea of the assessee that disallowance under section 14A is not merited in respect of strategic investments made in subsidiary/sister concern has not been examined and, therefore, the matter may be set-aside to the file of the Assessing Officer.

9.2 We have carefully considered the rival submissions. A perusal of the assessment order reveals that the pertinent plea of the assessee was that no interest expenditure is liable to be disallowed under section 14A of the Act since assessee had sufficient owned funds to cover the investments and for this proposition reliance was placed on the judgment of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd.(supra). The submissions of the assessee, which have been reproduced in the assessment order, also clearly establish that the owned interest-free funds of the assessee comprised of Share Capital and Reserves & Surplus amounting to Rs.2128.24 crores, whereas the investments are to the tune of Rs.60.12 crores. Even in the course of hearing before us, the Ld. Representative for the assessee has referred to the Paper Book to justify the aforesaid figures. There is no repudiation of the said factual matrix either before us or in the assessment proceedings and, therefore, following the ratio of the Hon'ble Bombay High

Court in the case of Reliance Utilities & Power Ltd.(supra) it has to be presumed that the investments are out of own interest free funds. The said proposition is also applicable in the context of section 14A of the Act as held by the Hon'ble Bombay High Court in the case of HDFC Bank Ltd. vs. DCIT, 366 ITR 505(Bom). Therefore, considering the aforesaid fact-situation, we find no reason to uphold the disallowance made under section 14A of the Act on account of interest expenditure.

9.3 So far as the disallowance out of overhead expenses is concerned, the Ld. Representative for the assessee pointed out that the disallowance has been calculated by applying Rule 8D(2)(iii) of the Rules and that there was no justification for the same. It was also pointed out that in the assessment year 2007-08, 5% of the dividend income was disallowed on account of the overhead expenses incurred towards administrative expenses. On this aspect, we find that the Assessing Officer has adequately brought out that during the year assessee has undertaken activities, which involve taking investment decisions and, therefore, some amount of management/administrative costs are liable to be attributed to such activity. Considering the entirety of circumstances, in our view , in so far as the administrative expenses is concerned, the application of Rule 8D(2)(iii) of the Rules to compute disallowance under section 14A of the Act is quite justified. Thus, on this aspect, we hereby affirm the stand of the Revenue.

9.4 In the result, in so far as Ground of appeal No.3 is concerned, assessee succeeds partly.

10. The next Ground of appeal relates to the action of CIT(A) in upholding the disallowance of Rs.33,54,01,600/- which represented write off of advance given to the Board of Control for Cricket in India (BCCI). In relation to the said issue, the relevant facts can be summarized as follows. The assessee-company had acquired media rights from BCCI for a 5-year period of 1.4.2006 to 31.3.2011. In terms of the Media Rights Agreement dated 12.4.2006, media rights acquired by the assessee comprised of Television rights, Radio rights and Broadband internet rights in respect of overseas matches to be played by the Indian cricket team during the aforesaid 5-year period. In terms of the said agreement, assessee paid US dollars 17,540,000 out of which a sum of USD 10,080,000 was debited to the Profit & Loss Account for the year ending 31.3.2007 on account of the first two matches played on 18th & 19th April, 2006, and the balance of US dollars 7,460,000 was to be kept as a deposit, which was to be adjusted against the payment due for the last series in the 5th year of agreement. In terms of the agreement, assessee-company was also required to furnish a bank guarantee of US dollars 60 million and accordingly, assessee had provided a bank guarantee of the aforesaid value, which was expiring on 12.4.2007. The agreement envisaged that the bank guarantee was renewable on a yearly basis during the first four years of the agreement. During the year under consideration, a dispute arose between the assessee and the BCCI and assessee did not renew the bank guarantee which expired on 12.4.2007. As a consequence, the BCCI terminated the agreement vide communication dated 31.5.2007 and 22.6.2007 and forfeited the advance deposit of US dollars 7,460,000 and replaced the assessee and granted media rights to a new broadcaster. The appellant-company considered the forfeited amount as irrecoverable and wrote-off the amount of advance of

Rs.33,54,01,600/- (i.e. USD 7,460,000) and claimed the same as an allowable revenue expenditure u/s 37(1) of the Act. The claim of assessee was on the ground that the said advance to BCCI was a business (trade) advance made in the ordinary course of business and hence its irrecoverability entitled the assessee to claim it as an allowable deduction u/s 37(1) of the Act.

10.1 On being show caused by the Assessing Officer to justify the claim, assessee pointed out that subsequent to entering of agreement dated 12.4.2006, two significant and materially adverse events took place, primarily on account of statutory regulations, which would have caused substantial loss to the assessee; firstly, it was pointed out that the TRAI stipulated ceiling on subscription fees payable by the subscribers of the T.V channels w.e.f. 1.1.2007. According to the assessee, in sports channels, subscription revenue is a significant source as the cost of programming is high. Secondly, assessee pointed out that the Government of India promulgated an Ordinance in February, 2007 which mandated the private broadcasters, owning exclusive rights to cover sports events of national importance, to compulsorily share their live-feed with the public broadcaster, Prasar Bharati. In view of these developments, assessee sought re-negotiation of the terms of agreement because the aforesaid developments would have severely impacted the revenues of assessee. Awaiting re-negotiations, assessee did not renew the bank guarantee, which had expired on 12.4.2007 and as a consequence, BCCI invoked clause (8) of the agreement dated 12.4.2006 and terminated the arrangement and forfeited the advance of US dollars 7,460,000. Assessee pointed out that it had filed a legal case for recovery of the amount forfeited by BCCI, which was pending and with no signs of recovery, the advance forfeited was written-off in the instant year and claimed as a deduction. The Assessing Officer noted that clause 7.1 of agreement gave a right to the assessee-company to re-negotiate for a reasonable reduction in compensation. The Assessing Officer also noted that in terms of clause 9.1(d) of agreement, BCCI was obligated to return to the assessee all properties within its possession upon termination of the agreement. Therefore, according to Assessing Officer, writing-off of the amount was premature and that the assessee has written-off the amount without exploring the possibility of its recovery. The Assessing Officer also noticed that assessee had initiated arbitration proceedings, which were continuing and, therefore, it could not be said that the loss had actually crystallised during the year itself. The Assessing Officer also observed that the advance deposit in question was for acquiring media rights, which is in the nature of a 'capital asset' and, therefore, non-recovery of such a deposit is a capital loss. The Assessing Officer also observed that the impugned advance was not a trade advance so as to be treated as a business loss. Accordingly, the Assessing Officer disallowed the claim of assessee and made an addition of Rs.33,54,01,600/- to the returned income. The CIT(A) has sustained the addition for the reasons taken by the Assessing Officer. In addition, the CIT(A) observed that the write-off was approved by the Board of Directors of the assessee-company vide resolution dated 16.6.2008, a date which corresponds to the subsequent assessment year and, therefore, on this ground also the aforesaid claim of assessee was not allowable in the instant assessment year.

10.2 Against such a decision of the lower authorities, assessee is in further appeal before us. Before us, the learned representative for the assessee pointed out that in terms of clause 7.1 of agreement with BCCI, assessee had a right to re-negotiate the terms of the agreement in good faith in the light of any external developments and, therefore, in view of the change in governmental regulations, assessee had invoked the said clause. The assessee had an obligation to renew the bank guarantee expiring on 12.4.2007 which was not done and the same was not taken lightly by the BCCI, who invoked clause 8.1(ii) of the agreement and terminated the agreement with the assessee vide communication dated 31.5.2007. The learned representative pointed out that clause 7.1 of the agreement gave a right to the assessee to terminate if the revised terms were not in the interests of the assessee, so however, because of default of assessee in not renewing the bank guarantee, BCCI terminated the contract. The learned representative pointed out that in view of the two subsequent developments, the agreement would not have been profitable to the assessee and, therefore, assessee had requested for reduction in the amounts payable as per the agreement. It was explained that assessee had sought refund of the deposit of USD 7,460,000 from BCCI, which request was not even responded by the BCCI and instead, BCCI sought to claim damages for breach committed by assessee as is evident from the communications of BCCI dated 31.5.2007 and 22.6.2007, copies of which have been placed in the Paper Book at pages 269 to 272. Considering the entirety of circumstances, as there was no response from the BCCI and the legal case filed for recovery of above advance was still pending, assessee, as a prudent businessman, wrote-off the amount in its books of account.

10.3 On this aspect, the Ld. CIT-DR has relied upon the reasoning of the lower authorities, which we have already noted in the earlier paras and are not being repeated for the sake of brevity.

10.4 We have carefully considered the rival submissions. The fact-situation regarding the allowability of the write-off of Rs.33,54,01,600/- has already been succinctly noted by us in the earlier paras and is not being repeated for the sake of brevity. So however, in order to briefly recapitulate, it would suffice to note that the appellant, which is engaged in the business of broadcasting and distribution of Television serials had acquired media rights from BCCI for a five year period vide agreement dated 12/04/2006. The media rights were in respect of the overseas matches to be played by the Indian Cricket team during the period 01/04/2006 to 31/03/2011. The assessee paid US dollars 1,75,40,000 for acquiring the media rights and a sum of US dollars 1,00,80,000 was charged to the Profit & Loss account for the year ending 31/03/2007 on account of the two matches having been played on 18th and 19th April, 2006. The balance amount of US dollars 74,60,000 was to be adjusted against the payment due for the last series in the fifth year of agreement. It transpires that BCCI terminated the arrangement vide communications dated 31/05/2007 and/or dated 22/06/2007 and the advance of Rs.33,54,01,600/- was forfeited. Assessee company considered such forfeited amount of Rs.33,54,01,600/- as an irrecoverable 'trade advance' made in the ordinary course of business and, thus, sought its deductibility in terms of section 37(1) of the Act. The Assessing Officer as well as CIT(A) have disallowed the claim on various counts. Firstly, as per the Assessing Officer the write-off was premature as assessee had not fully explored the possibility of its recovery. The Assessing Officer noted that Arbitration proceedings were initiated by the assessee, which were continuing and, therefore, it could not be said that the loss had actually crystallized during the year under consideration. Secondly, as per the Assessing Officer, the payment was for acquiring media rights, which was in the nature of a 'capital asset' and, therefore, non-recovery of the dues was a capital loss. The CIT(A) further, noted that the decision of the Board of Directors approving the write-off was dated 16/06/2008, which was a date falling in the next assessment year and, therefore, even on this count the said claim of loss was premature in this year.

10.5 In the above background, the first point which deserves to be appreciated is that the agreement with BCCI for acquiring the media rights was in pursuance to a normal business activity of the assessee, which is the business of broadcasting and distribution of television programmes, therefore, factually, it cannot be denied that the impugned arrangement was transacted by the assessee in its regular course of business. At this point, it would also be relevant to observe that assessee has been consistently asserting since the assessment stage that the cost on television rights of US dollars 1,00,80,000 for the two matches played during the year 01/04/2006 to 31/03/2007 (corresponding to the immediately preceding assessment year 2007-08) was charged to the Profit & Loss account as a revenue expenditure. It has also been asserted by the assessee that the income received by the assessee for telecasting the matches in the form of advertisement and subscription was also offered to tax. These two aspects for assessment year 2007-08, which emanate from the very same media rights agreement dated 12/04/2006 under consideration before us, have not been controverted by the Revenue at any stage. In the present year, the moot point is as to whether the balance amount of US dollars 74,60,000 corresponding to Rs.33,54,01,600/- is deductible while computing the total income. The circumstances, which prevailed with the assessee to write-off the said amount has been explained in detail. According to the assessee, the viability of the media rights agreement dated 12/04/2006 was jeopardized due to reasons beyond its control, namely, stipulations by the TRAI putting restriction on fees to be paid by subscribers of the television channels w.e.f. 01/01/2007; and, promulgation of ordinance by the Government of India in February, 2007 prescribing compulsory sharing of live-feed of sports events by the private broadcasters with Prasar Bharati, the public broadcaster. Because of such developments, assessee took a business decision to seek renegotiation of the terms and conditions of the media rights with BCCI as according to the assessee such developments would have impacted its income from the arrangement. It transpires that in terms of the requirement of media right agreement dated 12/04/2006, assessee was required to provide bank guarantee of US dollars 60 million to the BCCI, which was renewable on the yearly basis. Pending renegotiation, assessee did not renew the bank guarantee, which expired on 12/04/2007. BCCI viewed such non-renewal of the bank guarantee as a violation of the terms and conditions of the agreement and accordingly, invoked the termination clause and terminated the agreement and granted media rights to new broadcaster. BCCI also forfeited the advance of US dollars 74,60,000 lying with it. Assessee approached the BCCI, filed a legal case for recovery and also initiated arbitration proceedings, so however, assessee did not visualize any sign of recovery and, therefore, it wrote-off the forfeited amount (i.e. Rs.33,54,01,600/-) and claimed it as a deduction. Factually speaking, the loss of Rs.33,54,01,600/- suffered by the assessee is not in dispute inasmuch as there is no averment by the Revenue that there has been any recovery on this count on a later date. The Assessing Officer and the CIT(A) have emphasized that assessee did not explore the possibility of recovery in full and, therefore, the write-off is premature. In our considered opinion, it is the judgement of the assessee as a businessman, which is relevant to examine as to whether or not the loss has taken place. In the present case, the efforts as well as communication of the assessee with the BCCI, which have been noted by the lower authorities, and has also been placed in the Paper Book reveal that the chances of recovery were remote and in any case, it is factually evident that such amount has not been recovered. In fact, in terms of the communications dated 31/05/2007 and 22/06/2007, BCCI has not only refused to entertain the request for refund, but also referred to its rights to claim damages and disqualify the assessee from participating in any tenders floated by BCCI as a consequence of the termination of the agreement. Furthermore, the discussion in the orders of the authorities below as well as the arguments of the Revenue before us do not reveal that the bonafides of the non-recovery of the impugned amount is disputed. Therefore, considering the fact that the bonafides of the claims are not in doubt and further that the amounts were paid to BCCI in the normal course of business, the claim for deduction of the impugned irrecoverable amount could not have been lightly brushed aside by the lower authorities. In so far as the plea of the Revenue that the issue was still pending with the Arbitrator and, therefore, the claim was premature is no ground to disallow the claim. The factum of the assessee having formed a belief that the amount forfeited by the BCCI has indeed resulted in loss has not been found to be based on any non-bonafide considerations, and such a belief is rather supported by subsequent non-recovery, therefore, in our view, it is not appropriate for the Revenue to canvass that the impugned claim is premature. Another aspect canvassed by the Revenue is to the effect that the acquisition of media right is a 'capital asset' and, therefore, the loss on non-recovery of the impugned sum was a 'capital loss'. On this aspect of the matter, the Ld. Representative for the assessee pointed out that the payments of similar nature regarding advances for development of musical album which was abandoned was not considered by the Tribunal to be a capital loss in assessment year 1998-99 vide its order in ITA No.2233/Mum/2010 dated 23/12/2011. Similarly, reliance has also been placed on the decision of the Tribunal in the assessee's sister concern, M/s. Zee Media Corporation Ltd. in ITA No.1590/Mum/2015 dated 12/08/2015, wherein also similar payments have been considered on revenue account and not capital in nature. In our considered opinion, the aforesaid precedents support the case of the assessee that the impugned loss was not capital in nature. Moreover, it is pertinent to observe that in the assessment year 2007-08 assessee has asserted that part of the amount paid to BCCI has been debited in the Profit and Loss account and there is no dispute on this count. In this background, in our view, the plea of the Assessing Officer to say that the impugned loss was capital in nature is not tenable. At this stage, it may also be relevant to mention that the Assessing Officer has only made a bald assertion and not given reason to justify as to why the acquisition of media rights in terms of the agreement dated 12/04/2006 has to be treated as capital in nature. Therefore, considering the entirety of the facts and circum stances of the case, in our view, the assessee made no mistake in treating the amount forfeited by BCCI as a deduction allowable while computing the income for the year under consideration. Thus, on this aspect assessee succeeds.

11. The last Ground in this appeal relates to the action of the income tax authorities in treating structured interest swap loss of Rs.26,17,93,000/- as a speculation loss as against business loss treated by the assessee. In this context, brief facts are that the assessee had claimed loss of Rs.26,17,93,000/- on account of interest swap transactions entered by it with Standard Chartered Bank in order to hedge its increasing interest cost. The Assessing Officer show-caused the assessee to explain why the same be not treated as a speculation loss since it arose from a speculative transaction covered within the meaning of section 43(5) of the Act.

11.1 In response, assessee explained that it had issued 10000, 0.5% Foreign Currency Convertible Bonds (FCCB) of US$ 10,000 each aggregating to US dollars 100 million, redeemable on 29/04/2009 at 116.24% of their principal amount. The said FCCBs were convertible at an initial conversion price of Rs.197.235 per share, with a fixed rate of exchange on conversion of Rs.43.88 per USD. Notably, in this connection assessee had a pre-existing liability to pay interest at a fixed rate of 0.5% per annum to the bond holders. In order to convert the existing fixed rate interest cash outflow to interest payment based on floating rate, assessee entered into an interest rate swap with the Standard Chartered Bank. The modus operandi of the said transaction has been explained by the assessee which reads as under:-

> *"Standard Chartered Bank was to pay interest at fixed rate @ 0.5% p.a. on a notional principal of USD 50,000,000*
>
> *The above receipt from Standard Chartered Bank would be used to discharge the Appellant's liability in respect of fixed interest payments to bondholders*

In return, the Appellant was to pay Standard Chartered Bank interest based on 1 month USD Libor rate on date of settlement on a notional principal of USD 50,000,000

Further, the Appellant and the Bank agreed that if there was an appreciation on dollar beyond the agreed exchange rate of USD/EURO 1.361, the Appellant would benefit by a reduction of 0.1% in the Libor rate while if there was an appreciation in Euro beyond the agreed exchange ratio, the Appellant would pay additional interest".

In effect, what the assessee did was to change its exposure from fixed interest cash outflow in USD to floating interest cash outflow and also intended to benefit from favourable movement in the price of dollar. On the monthly basis, the interest cash flows receivable and payable were netted of between the assessee and the bank and such arrangement was to continue until the discharge of bond liability. Neither party to the arrangement had a right to receive or an obligation to pay the aforestated notional principal, which was only a means to calculate interest outflows on each settlement date. In the previous year relevant to the assessment year under consideration, on account of adverse movements in Libor and/or USD/Euro exchange rates, assessee incurred a loss of Rs.26,16,92,712/-. In this background, assessee submitted that the said loss arising on account of adverse movement of Libor/USD/Euro exchange rates is not a transaction falling within the meaning of section 43(5) of the Act so as to be treated as speculative in nature. Additionally, assessee also canvassed before the Assessing Officer that the impugned loss was a foreign currency derivative loss and since the expression "commodity" does not include currency, such transaction could not be treated as a speculative transaction within the meaning of section 43(5) of the Act. The Assessing Officer did not accept the stand of the assessee and instead held that the impugned transaction of interest rate swap was a derivative falling within the definition of commodity as per the judgment of the Hon'ble Bombay High

Court in the case of CIT vs. Bharat R. Ruia(HUF), 337 ITR 452(Bom) and, therefore, the said loss was a speculation loss within the meaning of section 43(5) of the Act. Accordingly, he disallowed the said loss. The CIT(A) has also affirmed the stand of the Assessing Officer and accordingly assessee is in further appeal before us.

11.2 Before us the plea of the assessee is that the lower authorities have erroneously not allowed a crystallized and paid interest rate swap transaction loss as a normal business loss allowable in terms of section 37(1) of the Act. As per Ld. Representative for the assessee, the aforesaid loss of Rs.26,73,93,000/- was not in the nature of 'speculation' as envisaged under section 43(5) of the Act. Accordingly to him, provisions of section 43(5) of the Act are attracted only to transactions which, inter-alia, involve a contract for purchase and sale of commodity, including stocks and shares, which are periodically or ultimately settled otherwise than by actual delivery or transfer of the relevant commodity or scrips. It is vehemently pointed out that interest rate swap would not come within the meaning of the term 'commodity' as understood for the purposes of section 43(5) of the Act, since it was not a tradable commodity. In this context, reference has also been made to the definition of the expressions 'securities' and 'derivatives' prescribed in the Securities Contracts (Regulation) Act, 1956 to say that the same does not include interest rate swap as a 'security' or 'derivative'.

11.3 On the other hand, the Ld. CIT-DR appearing for the Revenue has defended the action of the lower authorities and re-emphasized that the judgment of the Hon'ble Bombay High Court in the case of Bharat R. Ruia(HUF) (supra) supports the case of the Revenue that even transaction of interest rate swap fall within the purview of section 43(5) of the Act. The Ld. CIT-DR emphasized that whereas the Hon'ble High Court was dealing with the Exchange-Traded-Derivatives (ETD), the impugned arrangement of interest rate swap is in the nature of Over-The- Counter (OTC) derivatives, which are traded directly between the parties. According to him, the trading in OTC derivatives is permitted by the respective Regulatory bodies and in this context, contended that such trading in OTC mode has been permitted by the Reserve Bank of India, which is the relevant Regulatory Authority in this regard. It was, therefore, explained that the ratio of the judgment of the Hon'ble Bombay High Court in the case of Bharat R. Ruia(HUF)(supra) is fully attracted even to such transactions because primarily the transactions are not based on actual delivery and, therefore, the same are speculative in nature.

11.4 We have carefully considered the rival submissions. In so far as factual aspect is concerned, we are dealing with the transaction of interest rate swap, which essentially is an interest rate agreement with the bank, in which the two parties agree to exchange interest rate cash flows based on a specific notional amount, from a fixed rate to a floating rate or vice-versa. Undoubtedly, the present arrangement between assessee and the bank does envisage a forward contract, which has been entered by the assessee in order to manage or hedge the risks associated with volatile interest rate and currency exchange rate, etc. The claim of the Revenue before us is that the interest rate swap transaction is a speculative transaction covered within the meaning of section 43(5) of the Act, whereas the stand of the assessee is that the instant interest rate swap is not a ‘product’ or ‘commodity’ specified under section 43(5) of the Act and, therefore, the instant loss suffered by the assessee cannot be considered as speculation loss within the meaning of section 43(5) of the Act.

11.5 In this background, we may, at the outset refer to section 43(5), which reads as under:-

"(5) "speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

Provided that for the purposes of this clause—

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; or

(d) an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange; or

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognised association 6a[, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),]

shall not be deemed to be a speculative transaction.

Explanation 1.—For the purposes of clause (d), the expressions—

(i) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognised stock exchange; and

(B) which is supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A) and permanent account number allotted under this Act;

(ii) "recognised stock exchange" means a recognised stock exchange as referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified7 by the Central Government for this purpose;

Explanation 2.—For the purposes of clause (e), the expressions—

(i) "commodity derivative" shall have the meaning as assigned to it in Chapter VII of the Finance Act, 2013;

(ii) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through member or an intermediary, registered under the bye-laws, rules and regulations of the recognised association for trading in commodity derivative in accordance with the provisions of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and the rules, regulations or bye-laws made or directions issued under that Act on a recognised association; and

(B) which is supported by a time stamped contract note issued by such member or intermediary to every client indicating in the contract note, the unique client identity number allotted under the Act, rules, regulations or bye-laws referred to in sub-clause (A), unique trade number and permanent account number allotted under this Act;

(iii) "recognised association" means a recognised association as referred to in clause (j) of section 2 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and which fulfils such conditions as may be prescribed7a and is notified by the Central Government for this purpose;"

11.6 Section 43(5) of the Act defines the expression speculative transaction to mean a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. Quite clearly, the short controversy before us is as to whether interest rate swap is liable to be understood as a 'commodity' for the purposes of section 43(5) of the Act. To put it differently, in the present case, what is of relevance is to examine whether the transaction in interest rate swap entered by the assessee with the Standard Charted Bank constitutes a transaction for the purchase or sale of any commodity within the meaning of section 43(5) of the Act. In this context, reference may be made to the judgment of the Hon'ble Bombay High Court in the case of Bharat R. Ruia(HUF)(supra), which was a case where assessee had entered into futures contract for purchase of shares of certain companies at specified future date and at a specified price, which were to be settled in cash without actual delivery of the shares. The issue before the Hon'ble Bombay High Court was whether such a contract constituted a contract for the purchase of commodity within the meaning of section 43(5) of the Act. As per the Hon'ble Bombay High Court the future contract being articles of trade and commerce, which are legally permitted to be traded on the stock exchange would be a transaction in a commodity as contemplated under section 43(5) of the Act. Therefore, the loss incurred in such a transaction was held to be falling for consideration as a speculative transaction within the meaning of section 43(5) of the Act. In coming to such conclusion, the Hon'ble High Court noted that the transaction involved trading in underlying security/derivates, which was tradable on the stock exchange. Thus, coming back to the instant case, in order to treat the impugned interest rate swap arrangement to be 'speculative' in terms of section 43(5) of the Act, the Revenue would have to demonstrate that an interest rate swap arrangement was a tradable commodity. This crucial aspect has not been addressed by the lower authorities and infact the assessee has been consistently arguing that instant arrangement do not qualify to be a commodity for the purposes of section 43(5) of the Act. No doubt, before us the Ld. CIT-DR has attempted to show that interest rate swap arrangements are akin to. tradable derivates, but no such aspect is emerging from the respective orders of the lower authorities. Infact, the order of the Assessing Officer is quite inconsistent because at one place he says that *"the present transactions are not derivative transactions*", while at other place he says that the "*transaction of interest rate swap is a derivative falling within the meaning*

......". Thus, in our view, the said issue requires to be revisited by the Assessing Officer to bring out why the impugned transaction falls for consideration as a speculative transaction for the purposes of section 43(5) of the Act so that the assessee can meet the point in an appropriate manner. Therefore, we set-aside the order of the CIT(A) on this aspect and restore the issue back to the file of the Assessing Officer for a *de novo* consideration. Needless to say, the assessee-company shall be allowed an appropriate opportunity of being heard and only thereafter the Assessing Officer shall pass an order afresh on this limited aspect as per law. Thus, on this aspect assessee succeeds for statistical purposes.

12. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 05/05/2017

Sd/-	Sd/-
(RAVISH SOOD)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOCUNTANT MEMBER

Mumbai, Dated 05/05/2017
Vm, Sr. PS
<u>Copy of the Order forwarded to</u> :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai