**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI I BENCH, NEW DELHI**

[Coram : Pramod Kumar AM and Rajpal Yadav JM]

I.T.A. No.: 5816/Del/2012
Assessment year: 2008-09

Bharti Airtel Limited ***…………………Appellant***
Bharti Crescent
1 Nelson Mandela Road, New Delhi 11070
[PAN: AAACB2894G]

Vs.

Additional Commissioner of Income Tax
Range 2, New Delhi ***…………………Respondent***

Appearances by:
Ajay Vohra *along with* Neeraj Jain, Rohit Jain, Anshul Sachar, ***for the appellant***
Yogesh Kumar Verma, ***for the respondent***

Dates of hearing of appeals : December 23 and 24, 2013
Date of pronouncing the order : March 11, 2014

O R D E R

Per Pramod Kumar:

1. This appeal challenges correctness of the order dated 31st October 2012, passed by the Additional Commissioner of Income Tax, Range 2, New Delhi (hereinafter referred to as 'the Assessing Officer') under section 143(3) r.w.s. 144C(13) of the Income Tax Act 1961 (hereinafter referred to as 'the Act'), for the assessment year 2008-09.

2. While most of the grievances raised in this appeal are covered, one way or the other, by our order of even date in assessee's own case for the assessment year 2007-08, there are some new issues which require adjudication on merits and on the first principles. We will take up these issues, and the transfer pricing issues, to begin with.

3. The first such issue is whether or not addition of Rs 5,739.60 crores (Rs 5739,60,05,089) made by the Assessing Officer with respect to the disallowance of loss on transfer of telecom infrastructure is justified, tenable in law and on the facts of this case. The related grievances, as set out in the memorandum of appeal, are as follows:

> ***10 That the assessing officer erred on facts and in law in disallowing loss of Rs.5739,60,05,089 debited to the profit and loss account on account of transfer of infrastructure business while computing income under the normal provisions, disregarding the fact that the said amount was already added back by the appellant suo-moto in the return of income for the assessment year under consideration and that learned AO proceeded to frame the assessment not the basis of profit disclosed in the Profit & Loss Account but went on computing the income on the basis of computation of income as was furnished by the assessee company.***
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> ***10.1. That the assessing officer has thus failed to appreciate that disallowance of Rs.5739,60,05,089 once again made by AO while computing normal income, had resulted in double disallowance of the very same amount which had already been disallowed and added back by the appellant suo-motu in the computation of income for the assessment year under consideration.***
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> ***10.2 That the assessing officer erred on facts and in law in linking the aforesaid addition of Rs.5739,60,05,089 with the separate/ independent claim of reduction of identical amount withdrawn from the Business restructuring reserves created under the Scheme of Arrangement approved by the Hon'ble High Court of Delhi under Section 391 and 394 and credited to the profit and loss account. That in assuming so, the assessing officer failed to appreciate that the corresponding amount credited to the profit and loss account on account of withdrawal from reserves, consequently resulting in enhanced book profits had to be independently reduced to determine the correct taxable income under the provisions of the Act.***
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> ***10.3 Without prejudice, that the assessing officer erred on facts and in law in passing the impugned assessment order in haste, without waiting for the clarification sought by the appellant from the DRP.***

4. Briefly stated, the relevant material facts are like this. The assessee before us is a company engaged in the business of telecommunication services. On 30th September 2008, the assessee filed an income tax return disclosing taxable income of Rs 1,608.58 crores (Rs 1608,58,05,679). In its computation of

taxable income, the starting point was the profit as per profit and loss account. In the course of scrutiny assessment proceedings, the Assessing Officer noted that "the assessee has booked an expenditure of Rs 5739,60,05,089 on account of loss on transfer of telecom infrastructure to Bharti Infratel Limited as a reduction in WDV *(i.e. written down value)* of fixed assets" and that "the same is disallowable from the profit and loss account, as per provisions of the Income Tax Act, as it is clearly a capital loss". It was explained by the assessee that the reflecting the loss in the profit and loss account did not have any impact on the profits as the debit, by way of loss on transfer of telecom infrastructure, was squared by corresponding credit from the 'business restructuring reserve', and thus there was no debit to the profit and loss account. The amounts were only in the inner columns and there was no net debit by way of entry in the outer column. It was explained that "the loss on sale of telecom infrastructure to BIL is corresponding to the amount credited to business restructuring reserve" and that "if this amount is not withdrawn from the said reserve, the profit of assessee company is lowered by Rs 5,739 crores for the year under consideration". None of these submissions impressed the Assessing Officer and, in the draft assessment order, the Assessing Officer proposed an addition of Rs 5739,60,05,089 in respect of the above loss. An objection was taken up by the assessee before the Dispute Resolution Panel as well and the same is reproduced below:

> **The assessee objects to the proposed action of the Assessing Officer in not reducing from the computation of income, the credit of Rs 5739,60,05,089 to the profit and loss account of the amount withdrawn from the Reserve for Business Restructuring, ignoring the fact that loss of Rs 5739,60,05,089, which had been debited to the profit and loss account, had been added to the computation of income.**
>
> **The Assessing Officer has erred in not understanding the reason for deduction from the computation of income of Rs 5739,60,05,089 which was a consequence of the adding back of similar amount being loss on transfer of telecom infrastructure *(from assessee to Bharti Infratel Ltd)* which had been debited to the profit and loss account.**

5. In the course of proceedings before the Dispute Resolution Panel, a grievance was raised against the proposed addition of Rs 5739,60,05,089. The Dispute Resolution Panel took note of the submissions made by the assessee as follows:

> ***3.9.2 The assessee against this proposed action of the AO (adding Rs.5739,60,05,089 under normal computation provisions) has submitted before DRP as under :***
>
> > ***"The company had during the year transferred a telecom passive infrastructure to Bharti Infratel Limited at Nil value pursuant to the Scheme of Arrangement approved by the Delhi High Court. The loss arising out of such transfer was debited to the Profit & Loss Account under the head 'Loss on transfer of telecom infrastructure of Bharti Infratel Limited'. Pursuant to the Scheme of Arrangement Reserve of Business Restructuring had been created by debiting 'Value of investment and crediting the "Reserve for Business Restructuring". An amount equivalent to the Profit & Loss Account as explained above was transferred from the Reserve for Business Restructuring to the credit of the Profit & Loss Account thereby having a Nil consequence on the profit as per profit & Loss Account. As both the debit and credit appeared in the Profit & Loss Account, in the Computation of Income, the loss had to be added back to the profit which was done and the transfer from the Reserve had to be reduced from the Computation of Income so as to determine the correct assessable income. The assessee company had accordingly done so which has not been understood by the AO. Whereas the AO has accepted the add back of the loss as explained above but has not accepted the reduction of the transfer from Reserve thereby incorrectly increasing the assessable income by Rs.5739,60,05,089"***
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> ***3.9.2.1It has been further clarified before DRP as under :***
>
> > ***"4. A perusal of the Profit & Loss Account at Page 242 will show that the profit before tax amounting to Rs.69,72,54,23,000 i.e. the figure which was starting of the computation of income at Page 3. Further perusal will show that a sum of Rs.5739,60,06,000 has been shown in the inner column as loss on transfer of telecom infrastructure and credited to Rs.5739,60,05,000 has been shown as a reduction on account of amount withdrawn from reserve for business restructuring. The net effect of these two entries is Nil. Therefore is does not have any impact in the Profit & Loss Account. The AO has added a sum of Rs.5739,60,05,000 to the figure of Profit and Loss Account but has not reduced the equivalent sum of Rs.5739,60,05,000/- from the computation of income.***

> ***5. It therefore submit that the computation of income assessed at Rs.1,53,72,70,00,713 is incorrect and therefore need to be reduced by the figure of Rs.5739,60,05,000 ."***

6. Having noted these objections, however, the DRP proceeded to reject the same by making following brief, or rather cryptic, observations:

> ***3.9.3 We have considered the facts of the case. Submission of assessee has also been gone through. The disallowance of Rs.5739,60,05,000 by the AO in normal computation provisions as capital loss representing loss on transfer of Telecom Infrastructure to Bharti Infratel Limited is held as perfectly in order. Therefore, as for as disallowance is concerned, no interference is called for. However, as regards the claim of assessee of not reducing the equivalent sum from the computation of income, it is noted that it is a matter of pure verification. The AO is directed, to verify the claim of the assessee from the records and take necessary action."***

7. In the final assessment order, passed as a result of the above DRP directions, the Assessing Officer made the impugned additions. The Assessing Officer noted that the " from the directions of Hon'ble DRP, it is abundantly clear that the DRP has categorically held that the disallowance of Rs 5739,60,05,089 by the Assessing Officer represents capital loss on transfer of telecom infrastructure to Bharti Infratel Limited in the computation as per normal provisions of the Act was perfectly in order and no interference was called for", and "therefore, the contention of the assessee company that there is double addition of the above sum, is incorrect". As for the DRP's directions to the Assessing Officer to make verifications with respect to "not reducing the claim of assessee of not reducing the equivalent sum from the computation of income", the Assessing Officer noted that "after verifications, it is ascertained that these are the same documents and papers which were available before the Assessing Officer during the course of assessment proceedings leading to draft assessment order" and that "there are no fresh or additional documents except the written submissions". The Assessing Officer then took note of the fact that in the computation of income attached to the return of income, the assessee has first added Rs 5739,60,05,089 as "Loss on transfer of telecom infrastructure to Bharti Infratel Limited" and then reduced Rs 5739,60,05,089 as "amount

withdrawn from Reserve for Business Restructuring". Effectively thus, according to the Assessing Officer, there was a debit and credit of the same amount and he was justified in adding back the loss of transfer of telecom infrastructure debited to the profit and loss account. He thus concluded that "in view of the above and consequent upon verification of facts as directed by the learned DRP, the finding for addition of Rs 5739,60,05,089 in the computation of income by the Assessing Officer under the normal provisions of the Act is found to be correct for the assessment year under consideration". The assessee is aggrieved and is in appeal before us.

8. When this issue came up in hearing before us, learned counsel for the assessee submitted that it is a case of frivolous double addition on deliberate misconception of the facts. He took us through the year-end financial statements of the assessee and its computation of income to demonstrate that the impugned addition made by the Assessing Officer amounted to making an addition for loss on transfer of telecom assets whereas no deduction in respect of such loss was claimed by the assessee. He invited our attention to the observations made in the stay order to the effect that it is a case of "prima facie" double addition and it was also submitted that at the stage of hearing of stay petition in this case, the Assessing Office himself has accepted that it is a case of double addition. Learned Departmental Representative, on the other hand, dutifully placed his rather bland reliance on the stand of the Assessing Officer and the Dispute Resolution Panel. It was in this backdrop that we called for personal appearance of the Assessing Officer concerned. When the Assessing Officer appeared before us, and we asked him to justify this addition of Rs 5,739.60 crores, whereas, for all practical purposes, the assessee has not even claimed deduction of the same in the computation of business income, he had nothing to say. When he was asked why DRP's directions about verifications were not complied with, he stated that, as stated in the assessment order itself, there was no fresh material at that stage over and above what was produced in the original assessment proceedings, and thus it was not open to the Assessing Officer to take any other view of the matter than the view originally taken. The Assessing Officer

submitted that the loss on sale of assets could not be allowed as a deduction but that does not justify the addition on merits, because the assessee has not challenged this proposition at any stage and has merely contended that no such disallowance is warranted on the facts of this case as the said amount has not been debited to the profit and loss account at all. In effect thus, we are dealing with a situation that here is a Rs 5,739.60 crore addition, which has been made by the Assessing Officer and sustained by the Dispute Resolution Panel, and effectively there is no argument to defend it.

9. It is not an uncommon sight that even the most distinguished and learned Departmental Representatives, as also other revenue authorities appearing before us, simply place their bland reliance on the impugned orders- as in this case, rather than dealing with specific justification for the additions or disallowances made therein and with the arguments advanced by the taxpayer's representatives. By such a conduct, any transparent debate about correctness or otherwise of such additions impugned in appeal is pre-empted. Of course, such an exercise does render our adjudication process a one way street but, as long as legal and factual position warrants due relief to the assessee and as long as impugned additions are so frivolous, there is nothing wrong in it. However, if an action of the Assessing Officer is so blatantly unreasonable that such seasoned senior officers well versed with functioning of judicial forums, as the learned Departmental Representatives are, cannot even go through the convincing motions of defending the same before us, such unreasonable conduct of the Assessing Officer deserves to be scrutinized seriously. At a time when evolving societal pressures demand greater degree of accountability in the governance also, it does no good to the judicial institutions to watch such situations as helpless spectators. If it is indeed a case of frivolous addition, someone should be accountable for the resultant undue hardship to the taxpayer -rather than being allowed to walk away with a subtle, though easily discernable, admission to the effect that yes it was a frivolous addition, and, if it is not a frivolous addition, there has to be reasonable defence, before us, for such an addition. The case before us, for the reasons we will set out now,

appears to be in the category of a wholly frivolous, and simply indefensible, addition to the income returned by the assessee.

10. Let us take a look at the related entry, as per the profit and loss account of the assessee, related note to the accounts and the treatment given by the assessee in the computation of income, which are reproduced below:

Particulars	Schedule No.		For the year ended March 31, 2008 (Rs. '000)
INCOME			
Service Revenue			256,647,513
Sale of Goods			387,583
			257,035,096
EXPENDITURE			
Access Charges			40,385,333
Network Operating	13		33,004,746
Cost of Goods Sold	14		338,502
Personnel	15		13,341,852
Sales and Marketing	16		17,849,080
Administrative and Other expenditure	17		19,429,499
Total Expenditure			**124,349,012**
Profit before Licence Fee, Other Income, Finance Expense (Net), Depreciation, Amortisation, Charity and Donation and Taxation			**132,686,084**
Licence fee & Spectrum charges (revenue share)			25,838,212
Profit before Other Income, Finance Expense (Net), Depreciation, Amortisation, Charity and Donation and Taxation			**106,847,872**
Other Income	18		2,358,581
Finance Expense (net)	19		4,837,080
Depreciation			31,665,825
Amortisation			2,660,709
Charity and Donation			317,416
Loss on Transfer of Telecom Infrastructure to Bharti Infratel Limited (Refer Note 2(b) on Schedule 21)		57,396,005	
Less : Amount withdrawn from Reserve for Business Restructuring (Refer Note 2(b) on Schedule 21)		(57,396,005)	-
Profit before Tax			**69,725,423**
MAT credit [Includes MAT credit of Rs. 241,767 thousand for earlier years (March 31, 2007 Rs. Nil)]			(241,767)
Tax Expense			
- Current Tax [Includes Tax of Rs. 959,169 thousand for earlier years (March 31,2007 Rs. 13,593 thousand)]			8,835,340
- Deferred Tax (Refer Note 14 on Schedule 20 and Note 27 on Schedule 21)			(1,682,365)
- Fringe Benefit Tax			372,293
Profit after Tax			**62,441,922**
Transferred from Debenture Redemption Reserve			413,623
			62,855,545
Profit brought forward			55,339,252
Profit carried to Balance Sheet			**118,194,797**

Note 2 (b) to Schedule 21 of the annual accounts

Scheme of arrangement for Transfer of Telecom Infrastructure

The scheme of arrangement ("the Scheme") between Bharti Airtel Limited and Bharti Infratel Limited ('BIL') for transfer of assets and liabilities of passive telecom infrastructure undertaking, as defined in the Scheme ('the Telecom Infrastructure'), from Bharti Airtel to BIL was approved by the Hon'ble High Court of Delhi vide order dated November 26, 2007 and filed with the Registrar of Companies, Delhi and Haryana on January 31, 2008 i.e. the Effective Date of the Scheme. The Scheme has, accordingly, been given effect to in these financial statements and pursuant to the terms of the Scheme; (i) the Company has transferred the Telecom Infrastructure worth Rs. 57,396,005 thousand to BIL at Nil value (ii) the Company has revalued its investments in BIL and recorded the same at its fair value of Rs. 82,181,203 thousand. The Reserve for Business Restructuring arising there on net of (i) above stands at Rs. 24,785,198 thousand in the Balance Sheet as of March 31, 2008 and the above treatment has been followed in accordance with the treatment prescribed in the Scheme sanctioned by the Hon'ble High Court and there is no impact of it in the Profit & Loss Account, as per the Scheme.

Extracts from the computation of income filed by the assessee (as reproduced from page 84 of the assessment order)

Particulars	Amount	Amount
Profit as per profit and loss account		6972,54,21,461
Add:		
XXXX	XXXX	
XXXX	XXXX	
Loss on transfer of telecom infrastructure to Bharti Airtel Limited	5739,60,05,089	
Less:		
XXXX	XXXX	
XXXX	XXXX	
Amount withdrawn from Reserve for Business Restructuring	5739,60,05,089	
Income from Business and Profession		7161,63,56,718

11. A plain look at the above material shows that there was no effective debit to the profit and loss account as the amount of Rs 5739,60,05,089 reflected in the "Loss on transfer of telecom infrastructure to Bharti Airtel Limited" was squared up against the credit amount of Rs 5739,60,05,089 representing "Amount withdrawn from Reserve for Business Structuring" in the inner column

of the profit and loss account. These entries were absolutely profit neutral so far as the profit as per profit and loss account is concerned, and since it is this profit which is starting point for computation of business income, effectively no adjustments thereto were required. Even if no adjustment was carried out in the computation of income, the resultant income would have been the same, but the adjustments, if at all required for the sake of completeness and transparency, were required for both the entries, i.e. loss on transfer of assets as also amount withdrawn from business restructuring. This is precisely what the assessee has done. As much as the loss on transfer of assets is not a tax deductible item, the amount transferred from reserves is also not a taxable item. The assessee thus reversed both these entries, as depicted above, in the computation of income. The Assessing Officer has taken note of the fact that in the computation of income attached to the return of income, the assessee has first added Rs 5739,60,05,089 as "Loss on transfer of telecom infrastructure to Bharti Infratel Limited" and then reduced Rs 5739,60,05,089 as "amount withdrawn from Reserve for Business Restructuring", but then, instead of taking note of the unambiguous fact that these two distinct entries representing two facets duly reflected in the profit and loss account, the Assessing Officer assumes that since debit and credit of the same amount, resulting in neutralizing each other, he is justified in adding the loss of transfer of telecom infrastructure to the profit as per profit and loss account. Neither there was an effective debit to the profit and loss account, since the loss was squared up by transfer from reserve rather than by debit to profit and loss account, nor was it open to the Assessing Officer to take into account loss on transfer of assets, though reflected in the inner column, without taking into account another inner column item reflecting transfer from reserves to square up this loss. Whichever way one looks at these entries, the inescapable conclusion is that the addition made by the Assessing Officer is wholly erroneous and devoid of any legally sustainable merits. In this case, the Dispute Resolution Panel has also been somewhat superficial in its approach in confirming the addition by observing that, "***the disallowance of Rs.5739,60,05,000 by the AO in normal computation provisions as capital loss representing loss on transfer of Telecom Infrastructure to***

Bharti Infratel Limited is held as perfectly in order" because the grievance raised by the assessee was specifically against the erroneous approach of the Assessing Officer in not taking a holistic view of the accounting entries. There is no, and there was never, any dispute on whether such a loss is tax deductible or not. The dispute was confined to the question whether, on the given facts, the Assessing Officer could have made an addition for this amount to the income returned by the assessee. The contention of the assessee was that no such addition was justified because the assessee has, on his own, made appropriate adjustments in the computation of taxable income and an addition by the Assessing Officer will result in double disallowance of the said amount. No doubt, the Dispute Resolution Panel did mention that, "***as regards the claim of assessee of not reducing the equivalent sum from the computation of income, it is noted that it is a matter of pure verification"*** and directed the Assessing Officer ***"to verify the claim of the assessee from the records and take necessary action"***, but then it was the inaction and inability of the Assessing Officer in correctly doing so that the objection was raised before the Dispute Resolution Panel and all the related facts, including accounting entries and treatment given in the computation of taxable income, were placed before the Dispute Resolution Panel. The fact that even such purely factual issues are not adequately dealt with by the DRPs raises a big question mark on the efficacy of the very institution of Dispute Resolution Panel. One can perhaps understand, even if not condone, such frivolous additions being made by the Assessing Officers, who are relatively younger officers with limited exposure and experience, but the Dispute Resolution Panels, manned by very distinguished and senior Commissioners of eminence, will lose all their relevance, if, irrespective of their heavy work load and demanding schedules, these forums do not rise to the occasion and donot deal with the objections raised before them in a comprehensive and effective manner. While we delete the impugned addition of Rs 5739,60,05,089, we also place on record our dissatisfaction with the way and manner in which this issue has been handled at the assessment stage. Let us not forget that the majesty of law is as much damaged by not rendering justice to the conduct which cannot be faulted as much it is damaged by a wrongdoer going unpunished; not giving relief in deserving cases is as much of a disservice to the cause of justice and the cause of nation as much a disservice it is, to these causes, by granting undue reliefs. The time has come that a strong institutional check is put in place for dealing with such eventualities and de-incentivizing this kind of a conduct. With these observations, the impugned addition of Rs 5739,60,05,089 is deleted. The assessee gets the relief accordingly.

12. Ground No. 10 is thus allowed.

13. In ground no. 11, the assessee has raised the following grievances:

> **11.** ***That the assessing officer erred on facts and in law in not allowing deduction of Rs.112,16,53,391 in respect of profit derived from Karnataka (B&T) circle under section 80IA of the Act.***
>
> ***11.1 That the assessing officer erred on facts and in law in holding that the appellant did not furnish report in Form No. 10CCB in support of claim of deduction of profit from Karnataka (B&T) circle despite the fact the same was furnished before him when identical reports in respect of other 11 circles were furnished.***

14. Learned representatives submitted that this issue is required to be remitted to the file of the Assessing Officer for grant of deduction under section 80 IA in the light of assessed gross total income, as has been directed by the Dispute Resolution Panel, and that no further adjudication is required on merits. The matter thus stands restored to the file of the Assessing Officer for fresh adjudication in the light of the above observations.

15. Ground no. 11 is allowed for statistical purposes.

16. In ground no. 12, the assessee has raised the following grievance:

> ***12. That the assessing officer erred on facts and in law in making aggregate addition/adjustments of Rs.20,10,71,123 to the arm's length price of the 'international transactions' pertaining to provision of Corporate Guarantee to Associated Enterprise ('AE'), provision of***

Loans to AEs and advancement of Share Application money to AEs on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing officer ('TPO').

17. Ground No. 12 is general in nature and it does not require any specific adjudication inasmuch the ALP adjustments referred to therein are subject matter of specific grounds of appeal against each of the ALP adjustment.

18. Ground no. 12 is thus dismissed in the terms indicated above.

19. In ground no. 13, the assessee has raised the following grievances:

13. That the assessing officer/TPO erred on facts and in law in enhancing the income of the Appellant by Rs.33,10,161 on the ground that the commission suo-motu disallowed/offered to tax by the appellant @ 0.65 % to cover the corporate guarantee to lender bank (Deutsche Bank) on behalf of its AE [M/s. Bharti Airtel Lanka (P) Limited] does not satisfy the arm's length principle envisaged under the Act.

13.1 That the assessing officer/TPO erred on facts and in law in disregarding the fact that:

(a) corporate guarantee been advanced by the appellant as a matter of commercial prudence primarily to protect the business interest of the group by fulfilling the shareholder's obligation as any financial incapacitation of the subsidiary would jeopardise the investment of Bharti Airtel Limited;

(b) in the absence of corporate guarantee, the appellant being the holding company would have provided the funds to the subsidiary by increasing the share capital, hence provision of corporate guarantee does not lead to any additional risk for the appellant warranting a compensation;

(c) misinterpreting the concept of shareholder services contained in the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations released by the Organisation for Economic Cooperation and Development (OECD Guidelines)

(d) suo-moto adjustment was made by the appellant on a without prejudice basis to cover the corporate guarantee provided to lender

bank on the basis of specific quotation received from the lender bank itself, which constituted valid CUP data;

13.2 That the assessing officer/TPO erred on facts and in law in imputing commission @ 2.68% plus a mark-up of 200 basis points, on the basis of data allegedly obtained from various banks under section 133(6) of the Act without appreciating that the same did not constitute valid CUP data.

13.3 Without prejudice, that the assessing officer/TPO erred on facts and in law in making ad-hoc adjustment of 200 basis points to the average rate of commission charged by the domestic banks for which data was obtained from various banks u/s 133(6) of the Act, without appreciating that such information was not available in the public domain and therefore, could not have been relied upon for the purpose of determining the arm's length price.

13.4 Without prejudice, that the transfer pricing adjustment made by the assessing officer/TPO by applying an incomparable rate of 4.68% which is not only too high but is applicable in the case of commercial banks whose function, asset and risk ('FAR') profile is significantly different from the FAR of the appellant and furthermore does not take into account the borrowing capacity or the benefit derived by the borrower.

13.5 That the assessing officer/TPO erred on facts and in law by disregarding established judicial pronouncements in India in making the Transfer Pricing adjustment.

20. So far as this ground of appeal is concerned, only a few material facts need to be taken note of. The assessee has, during the relevant previous year, issued a corporate guarantee to Deutsche Bank, New Delhi Branch. This corporate guarantee is issued on behalf of its associated enterprise, Bharti Airtel (Lanka) Pvt. Ltd., and it guarantees repayment for working capital facility not exceeding Euro 3.6 million. The assessee's contention was that since the assessee had had not incurred any costs or expenses on account of issue of such guarantee, and the guarantee was issued as a part of the shareholder activity, the same was issued for NIL consideration. However, based on market quote of such corporate guarantee the appellant in it transfer pricing study determined arm's length commission for issuing such guarantee @ 0.65% p.a. of the guarantee amount and accordingly offered to tax Rs. 5,33,897. The TPO while

benchmarking the international transaction of issue of corporate guarantee has relied on Para 7.13 of the OECD guidelines which state that "but an intra-group service would usually exist where the higher credit rating were due to a guarantee by another group member". The TPO observed that by issuing the corporate guarantee, the appellant has benefitted its associated enterprise by increasing its credit rating. The TPO held that such transactions being independent transactions held to be benchmarked applying CUP method, and, accordingly, determined arm's length price of the guarantee commission income @ 2.68% plus a mark-up of 200 basis points on the basis of data obtained from various banks under section 133(6) of the Act. A reference was also mad3 to the decision of the Tax Court of Canada in the case of GE Capital Canada Inc Vs The Queen (2009 TCC 563). Accordingly, an ALP adjustment of Rs 33,10,161 was made.

21. Aggrieved by the consequent ALP adjustment proposed to be made by the Assessing Officer, assessee raised an objection before the DRP but without any success. One of the argument raised before the DRP was that "this transaction does not attract transfer pricing provisions" but this argument was rejected on the short ground that the issue will have to be decided in light of the amendment to Section 92 B and that "retrospective amendment to Section 92B by the Finance Act 2012 makes this *(issuance of a corporate guarantee)* an international transaction so the controversy is settled". A reference was also made to the decision of a coordinate bench in the case of Mahindra & Mahindra Ltd Vs DCIT (2012 TII 70 ITAT MUM TP). For our purposes, and for the reasons we will set out in a short while, it is not necessary to go further into the findings by the authorities below. Suffice to note that in the above backdrop the Assessing Officer made an addition in respect of ALP adjustment for guarantee commission issued by the assessee in respect of its subsidiaries. The assessee is aggrieved and is in appeal before us.

22. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case in the light of the applicable legal position.

23. During the course of arguments before, as was the position before the DRP as well, one of the arguments raised was that in the cases of transactions into with, or on behalf of the, associated enterprise, where no costs are involved, the transfer pricing provisions are not attracted. It is contended that only when a transaction has a cost attached thereto, the arm's length price adjustment can be made. Elaborate arguments are made on various legal propositions in support of this propositions and our attention is also invited to various judicial precedents, including in the cases of CIT Vs A Raman & Co (67 ITR 11), Union of India Vs Azadi Bachao Andolan (263 ITR 706), Dana Corporation In Re (321 ITR 178), but we need not deal with the same in great detail at this stage. Learned Departmental Representative, on the other hand, vehemently argues against this proposition and contends that this plea goes against the very fundamentals of the transfer pricing legislation as it seeks to determine the profits that the assessee would have made if the transactions were AEs were entered into at an arm's length price with a rank outsider. Our attention was also invited to some rulings by the coordinate benches when similar arguments were said to have been rejected by the coordinate benches. It was also contended that as regards the proposition that issuance of guarantees could be outside the ambit of scope of 'international transaction' itself, there were large number of judicial precedents from the coordinate benches upholding ALP adjustments in respect of corporate guarantees issued as also from foreign judicial forums, such as Tax Court of Canada, referred to in the transfer pricing order itself . Learned counsel for the assessee submitted that there is no judicial ruling, in the context of Indian transfer pricing legislation, which specifically holds that even in respect of the corporate guarantees issued for the benefit of the AEs, which do not cost the assessee anything, ALP adjustment can be made. This issue has not been raised or decided in the cases in which ALP adjustments have been upheld and, therefore, those decisions can

not be put against the assessee. As for the decisions from the Court of Canada, learned counsel submitted that the issue here is an issue which is to be decided in the light of the domestic legal provisions, with respect to income tax law, and our jurisprudence which need not be in *pari materia* with Canadian tax laws.

24. In the light of the above discussions, we consider it appropriate to begin by dealing with the fundamental question as to whether issuance of corporate guarantees, which donot involve any costs to the assessee, can indeed be subjected to the arm's length price adjustment. We find that Section 92(1) provides that, "(a)ny income arising from an international transaction shall be computed having regard to the arm's length price". In order to attract the arm's length price adjustment, therefore, a transaction has to be an 'international transaction'. Section 92 B, which defines 'international transaction' for the purpose of transfer pricing legislation, is as set out below:

92 B - Meaning of international transaction

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

(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.

Explanation[1] —*For the removal of doubts, it is hereby clarified that—*

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

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

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

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

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

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

(ii) the expression "intangible property" shall include—

(a) marketing related intangible assets, such as, trademarks, trade names, brand names, logos;

(b) technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how;

(c) artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;

(d) data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;

(e) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation;

(f) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;

(g) contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements;

(h) human capital related intangible assets, such as, trained and organised work force, employment agreements, union contracts;

(i) location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;

(j) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;

(k) methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;

(l) any other similar item that derives its value from its intellectual content rather than its physical attributes.'.

[[1]Inserted by the Finance Act 2012 with retrospective effect from 1st April 2002]

25. An analysis of this definition of 'international transaction' under Section 92 B, as it stood at the relevant point of time, and its break up in plain words, shows the following:

1. An international transaction can be between two or more AEs, at least one of which should be a non-resident.

2. An international transaction can be a transaction of the following types:

    a. in the nature of purchase, sale or lease of tangible or intangible property,

    b. in the nature of provision of services,

    c. in the nature of lending or borrowing money, or

d. in the nature of any other transaction having a bearing on the profits, income, losses or assets of such enterprises

3. An international transaction shall include 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.

4. Section 92B (2), covering a deeming fiction, provides that even a transaction with non AE in a situation in which such a transaction is *de facto* controlled by prior agreement with AE or by the terms agreed with the AE.

26. Let us now deal with the Explanation, inserted with retrospective effect from 1st April 2002 i.e. right from the time of the inception of transfer pricing legislation in India, which was brought on the statute vide Finance Act, 2012.

27. This Explanation states that it is merely clarificatory in nature inasmuch as it is 'for the removal of doubts', and, therefore, one has to proceed on the basis that it does not alter the basic character of definition of 'international transaction' under Section 92 B. Clearly, therefore, this Explanation is to be read in conjunction with the main provisions, and in harmony with the scheme of the provisions, under Section 92 B. Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'.

28. The first two categories of transactions, which are stated to be included in the scope of expression 'international transactions' by the virtue of clause (a) and (b) of Explanation to Section 92 B, are transactions with regard to purchase, sale, transfer, lease or use of tangible and intangible properties. These transactions were anyway covered by 2 (a) above which covered transactions 'in the nature of purchase, sale or lease of tangible or intangible property'. The only additional expression in the clarification is 'use' as also

illustrative and inclusive descriptions of tangible and intangible assets. Similarly, clause (d) deals with the " provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service" which are anyway covered by 2(b) and 3 above in "provision for services" and "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". That leaves us with two clauses in the Explanation to Section 92 B which are not covered by any of the three categories discussed above or by other specific segments covered by Section 92 B, namely borrowing or lending money.

29. The remaining two items in the Explanation to Section 92 B are set out in clause (c) and (e) thereto, dealing with (a) capital financing and (b) business restructuring or reorganization. These items can only be covered in the residual clause of definition in international transactions, as in Section 92 B(1), which covers "any other transaction having a bearing on profits, incomes, losses, or assets of such enterprises".

30. It is, therefore, essential that in order to be covered by clause (c) and (e) of Explanation to Section 92 B, the transactions should be such as to have beating on profits, incomes, losses or assets of such enterprise. In other words, in a situation in which a transaction has no bearing on profits, incomes, losses or assets of such enterprise, the transaction will be outside the ambit of expression 'international transaction'. This aspect of the matter is further highlighted in clause (e) of the Explanation dealing with restructuring and reorganization, wherein it is acknowledged that such an impact could be immediate or in future as evident from the words "irrespective of the fact that it *(i.e. restructuring or reorganization)* has bearing on the profit, income, losses or assets of such enterprise at the time of transaction or on a future date". What

is implicit in this statutory provision is that while impact on "profit, income, losses or assets" is *sine qua non*, the mere fact that impact is not immediate, but on a future date, would not take the transaction outside the ambit of 'international transaction'. It is also important to bear in mind that, as it appears on a plain reading of the provision, this exclusion clause is not for "contingent" impact on profit, income, losses or assets but on "future" impact on profit, income, losses or assets of the enterprise. The important distinction between these two categories is that while latter is a certainty, and only its crystallization may take place on a future date, there is no such certainty in the former case. In the case before us, it is an undisputed position that corporate guarantees issued by the assessee to the Deutsche Bank did not even have any such implication because no borrowings were resorted to by the subsidiary from this bank.

31. In this light now, let us revert to the provisions of clause (c) of Explanation to Section 92 B which provides that the expression 'international transaction' shall include "**capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business**". In view of the discussions above, the scope of these transactions, as could be covered under Explanation to Section 92 B read with Section 92B(1), is restricted to such capital financing transactions, including *inter alia* any guarantee, deferred payment or receivable or any other debt during the course of business, as will have "a bearing on the profits, income , losses or assets or such enterprise". This pre-condition about impact on profits, income, losses or assets of such enterprises is a pre-condition embedded in Section 92B(1) and the only relaxation from this condition precedent is set out in clause (e) of the Explanation which provides that the bearing on profits, income, losses or assets could be immediate or on a future date. The contents of the Explanation fortifies, rather than mitigates, the significance of expression ' having a bearing on profits, income, losses or assets' appearing in Section 92 B(1).

32. There can be number of situations in which an item may fall within the description set out in clause (c) of Explanation to Section 92 B, and yet it may not constitute an international transaction as the condition precedent with regard to the 'bearing on profit, income, losses or assets' set out in Section 92B(1) may not be fulfilled. For example, an enterprise may extend guarantees for performance of financial obligations by its associated enterprises. These guarantees donot cost anything to the enterprise issuing the guarantees and yet they provide certain comfort levels to the parties doing dealings with the associated enterprise. These guarantees thus donot have any impact on income, profits, losses or assets of the assessee. There can be a hypothetical situation in which a guarantee default takes place and, therefore, the enterprise may have to pay the guarantee amounts but such a situation, even if that be so, is only a hypothetical situation, which are, as discussed above, excluded. One may have also have a situation in which there is a receivable or any other debt during the course of business and yet these receivables may not have any bearing on its profits, income, losses or assets, for example, when these receivables are out of cost free funds and these debit balances donot cost anything to the person allowing such use of funds. The situations can be endless, but the common thread is that when an assessee extends an assistance to the associated enterprise, which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under section 92B (1) of the Act.

33. In any event, the onus is on the revenue authorities to demonstrate that the transaction is of such a nature as to have "bearing on profits, income, losses or assets" of the enterprise, and there was not even an effort to discharge this onus. Such an impact on profits, income, losses or assets has to be on real basis, even if in present or in future, and not on contingent or hypothetical basis, and there has to be some material on record to indicate, even if not to establish it to

hilt, that an intra AE international transaction has some impact on profits, income, losses or assets. Clearly, these conditions are not satisfied on the facts of this case.

34. There is one more aspect of the matter. The Explanation to Section 92 B has been brought on the statute by the Finance Act 2012. If one is to proceed on the basis that the provisions of Explanation to Section 92 B enlarge the scope of Section 92 B itself, even as it is modestly described as 'clarificatory' in nature, it is an issue to be examined whether an enhancement of scope of this anti avoidance provision can be implemented with retrospective effect. Undoubtedly, the scope of a charging provision can be enlarged with retrospective effect, but an anti-avoidance measure, that the transfer pricing legislation inherently is, is not primarily a source of revenue as it mainly seeks compliant behaviour from the assessee vis-à-vis certain norms, and these norms cannot be given effect from a date earlier than the date norms are being introduced. However, as we have decided the issue in favour of the assessee on merits and even after taking into account the amendments brought about by Finance Act 2012, we need not deal with this aspect of the matter in greater detail.

35. When it was put to the learned Departmental Representative that there could be a view that issuance of guarantees could be outside the ambit of scope of 'international transaction' itself, he submitted that there are large number of decisions in India and abroad, notably in Canada, dealing with the determination of arm's length price of guarantees. His argument seemed to be that even such a view is to be upheld, entire transfer pricing jurisprudence will be turned upside down. There does not seem to be any legally sustainable merits in this argument either. As for the decisions dealing with quantum of ALP adjustments in the guarantee charges, in none of these cases the scope of 'international transactions' under section 92B(1) has come up for examination. A judicial precedent cannot be an authority for dealing with a question which has not even come up for consideration in that case. It is only elementary that, as was also held by Hon'ble Bombay High Court in the case of CIT Vs Sudhir

Jayantilal Mulji (214 ITR 154), that a judicial precedent is an authority for what it actually decides and not what may what come to follow from some observations made therein. As observed by Hon'ble Supreme Court in the case of CIT vs. Sun Engineering Works P. Ltd. (198 ITR 297) a " judgement must be read as a whole and the observations from the judgement have to be considered in the light of the question which were before …… court" and that "a decision …….. takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision ………and not to pick out words or sentences from the judgement, divorced from the context of the questions under consideration by this court, to support their reasoning." It would, therefore, be wholly inappropriate to use those judicial precedents, dealing with ALP of guarantee commission, to decide a question which was not even before those judicial forums. Coming to the foreign decisions on the issue of ALP adjustments in guarantee commission, we have noted that in the case of GE Capital Canada Inc Vs The Queen (2009 TCC 563), the Tax Court of Canada has indeed dealt with ALP determination of the guarantee fees but then it was done in the light of their domestic law provisions which are quite at variance with the Indian transfer pricing legislation. Unlike elaborate wordings of Section 92 B of the Indian Income Tax Act, 1961 defining 'international transaction', Section 247 of the Canadian Income Tax Act only gives an inclusive definition which does not even really attempt to define the expression 'transaction'. It is nobody's case that the relevant legal provisions are in *pari materia.* We need not, therefore, deal with those foreign judicial precedents. Suffice to say that we have reached our conclusions on the basis of the legal provisions under section 92 B and no judicial precedent, contrary to our understanding of these legal provisions, has been cited before us. There is a decision of the co-ordinate bench in the case of Mahindra & Mahindra *(supra)*, referred to in the DRP order, but that decision does not deal with the scope of amended section 92 B and leaves the issue open by stating that post insertion of Explanation to Section 92 B, the matter will have to be examined in the light of the amended law. We have held that even after the amendment in Section 92 B, by amending Explanation to Section 92 B, a corporate guarantee issued for the benefit of the AEs, which does not involve any costs to the assessee, does not have any bearing on profits, income, losses or assets of the enterprise and, therefore, it is outside the ambit of 'international transaction' to which ALP adjustment can be made. As we have decided the matter in favour of the assessee on this short issue, we see no need to address ourselves to other legal issues raised by the assessee and the judicial precedents cited before us.

36. For the reasons set out above, and as we have held that the issuance of corporate guarantees in question did not constitute 'international transaction' within meanings thereof under section 92B, we uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned ALP adjustment of Rs 33,10,161. The assessee gets the relief accordingly.

37. Ground No. 13 is thus allowed.

38. In ground no. 14, the assessee has raised the following grievances:

> ***14. That the assessing officer/ TPO erred on facts and in law in making addition/adjustment of Rs.62,15,019 on account of difference in interest charged on loan advanced to associated enterprises by applying interest rate of 17.26% p.a. as against interest rate of 7.33% p.a. charged by the appellant.***
>
> ***14.1 That the assessing officer/TPO erred on facts and in law in not appreciating the objective and FAR of the appellant with respect to the loan transactions that the loans have been advanced to AEs for growth of telecom business and not an investment for earning financing income, thereby making an improper comparison by:***
>
> ***(a) Considering rate of interest suggested by rating agency and banks to general investor which are subject to various conditions like credit rating, loan, tenure, etc. and ignoring the fact that such rates can vary according to these variables;***
>
> ***(b) Undertaking a flawed analysis by comparing the rate of interest charged by the appellant for the foreign currency loans given to its AEs outside India with the rate of interest used in relation to Indian currency loan given in India, thereby completely ignoring the***

difference in the, economic environment and geographical conditions prevalent in India and overseas jurisdictions;

(c) alleging that the financial health of the associated enterprises was weak and further in determining the credit rating of the associated enterprises as ranging between BB to D, being high risk category, without providing any cogent or germane reason for the same;

(d) making additional arbitrary and adhoc adjustments to the rate of interest on account of security and single customer and transaction cost, thereby completely ignoring the on-ground reality of the inter-company transaction that there is no significant risk in advancing loans to 100% subsidiary companies and demonstrating an intention to arrive at a very high interest rate of 17.26% p.a. with the single-minded intention of making an addition to the returned income of the appellant.

14.2 That the assessing officer/TPO erred on facts and in law in rejecting the Transfer Pricing ('TP') documentation maintained by the Appellant under section 92D of the Act and Rule 10D of the Rules and disregarding the Arm's Length Price ('ALP') as determined by the appellant in the TP documentation and further not appreciating that the rate of interest charged by the appellant was at arm's length in view of the fact that the interest received from its AEs was higher than rate of return on investments in fixed deposits and corporate bonds.

14.3 That the assessing officer/TPO erred on facts and in law in rejecting the alternate analyses, arguments, explanations, evidences, etc. submitted by the appellant in the form of internal CUP i.e. rates charged for the foreign currency loans taken by the appellant from unrelated parties and Transactional Net Margin Method ('TNMM') analysis, in support of the arm's length nature of its inter-company transaction of advancement of loans, without providing any cogent reasons for the same.

14.4 That the assessing officer/TPO erred in relying upon the rate of interest charged by various domestic banks on advancement of foreign currency loans obtained by the TPO under section 133(6) of the Act, without affording opportunity to the appellant to rebut the same, in violation of principles of natural justice.

14.5 That the assessing officer/TPO erred in relying upon the information obtained under section 133(6) of the Act, without appreciating that such information was not available in the public domain and therefore, could not have been relied upon for the purpose of determining the arm's length price.

> ***14.6 That the assessing officer/TPO erred on facts and in law in disregarding the fact that amounts had been advanced by the appellant to its AE(s) as a matter of commercial prudence to further its business interests as a shareholder as any financial incapacitation of the subsidiaries would jeopardise the investments of Bharti Airtel Limited.***
>
> ***14.7 That the assessing officer/TPO erred on facts and in law by disregarding established judicial pronouncements in India in making the Transfer Pricing adjustment.***

39. Learned representatives submit that an identical issue has come up for adjudication before us in the immediately preceding assessment year, i.e. 2007-08, and whatever we decide in that assessment year will apply *mutatis mutandis* to this assessment year as well.

40. Vide our order of even date, and dealing with the assessment year 2007-08, we have held as follows:

> *56. The relevant material facts, so far as this grievance of the assessee is concerned, are like this. The assessee has advanced following loans to its associated enterprises:*

Name of AE	***Loan Currency***	***Amount in I Rs***	***Rate of interest***
Bharti Airtel USA	***USD***	***4,35,90,000***	***7.33%***
Bharti Airtel UK	***GBP***	***42,27,000***	***7.33% .***
Bharti Airtel Canada	***CAD***	***28,15,000***	***7.33% .***

> *57. The assessee's claim that the loans have been advanced at an arm's length price as, according to CUP method and on the basis of external comparables, the arm's length interest rate in such situations is LIBOR plus 160 points which works out to 6.82% whereas the assessee has charged interest @ 7.33%. The Transfer Pricing Officer was not impressed by this claim. He was of the view that, "**…..the arm's length interest is to be determined by following CUP method wherein the interest rate is determined under the circumstances in which the taxpayer and the subsidiaries are operating, i.e. what is the interest rate that would have been earned if such loans are given from surplus funds to unrelated parties under similar situations as that of the subsidiaries**" and that, " **since the tested party is taxpayer, the prevalent interest***

that could be earned by the taxpayer by advancing loan to an unrelated party in India with the same weak financial health as that of the taxpayer's subsidiaries is considered". *It was in this backdrop, and after an elaborate survey of Indian financial market, that the TPO opined that a rate of interest of 14% could be considered reasonable and representative of market after considering corporate bond market and financial health of the subsidiary. When it was put to the assessee, the assessee objected to the same, inter alia, on the ground that the loans were in foreign currencies, and therefore interest rate on rupee loans have no relevance, that interest has been charged from the subsidiaries over and above the costs of borrowings and in accordance with the international market standards, and that comparison with BBB grade bonds, as was done by the TPO, was not warranted as the advances were to assessee's subsidiaries. None of these submissions impressed the TPO. He was of the view that costs of borrowings were wholly irrelevant for the purpose of deciding ALP of the borrowing costs, that the risks for a single transaction is much more than the risks taken by banks in multiple client situation, that the additional costs are liable to be incurred for forward exchange contracts to hedge the position and that rate adjustments are also required to be done for the absence of any security. He also referred to the CRISIL information regarding interest to BBB grade bonds which was 15.13% in the relevant period. However, he adopted the rate of 14% as ALP of the intra AE borrowings by observing as follows:*

> ***CUP rate is arrived at as under:***
>
> | | |
> |---|---|
> | ***Basic interest rate for the credit rating of AE*** | ***LIBOR + 400 basis points*** |
> | ***Add: Transaction cost**** | ***300 basis points*** |
> | ***CUP rate*** | ***LIBOR + 700 basis points*** |
>
> ***Thus the CUP rate is arrived at as under:***
>
> | | |
> |---|---|
> | ***CUP rate*** | ***LIBOR + 700 basis points***
= 5.224% + 7%
= 12.224% |
>
> ***Keeping in view that no security is offered by the subsidiary and also that the taxpayer is not into lending and borrowing money, I consider a reasonable interest of 14%.***

58. When this ALP adjustment was proposed by the Assessing Officer, the assessee did raise objection before the Dispute Resolution Panel. It was also contended by the assessee that interest charged is comparable based upon the rates charged by the foreign financial institution on foreign loans taken by the assessee company. The DRP rejected the objections and, inter alia, stated as follows:

> ***As regards the comparability, the DRP has considered the arguments of the assessee and has examined the findings of***

> ***the TPO in his order dated 12.10.2010. The assessee has used the CUP which is LIBOR +1.60%. The TPO has noted that the loans have been given in Indian currency and the same have been benchmarked using LIBOR which was not found to be in accordance with the comparability principles established by the TPO. The TPO also noted that the assessee company has taken loans from unrelated parties. The TPO was of the view that the loans given by the assessee company cannot be benchmarked using LIBOR as a CUP.***
>
> ***Having considered the arguments of the assessee and the findings of the TPO, the DRP is of the view that the TPO has rightly rejected the CUP used by the assessee. The rate of 14% charged by the TPO as a CUP is found to be based on sound methodology and needs no interference.***

59. It was in this backdrop that the Assessing Officer made an ALP adjustment of Rs 10,11,786 to the interest charged from the AEs in respect of loans given to them. The assessee is aggrieved and is in appeal before us.

60. We have heard the rival contentions, perused the material on record, including elaborate written submissions filed by the assessee, and duly considered factual matrix of the case as also the applicable legal position.

61. We have noted, as has been noted in the assessment order, DRP order and TPO orders as well, that the advances to subsidiaries are in foreign currencies i.e. in British Pounds, US Dollars and Canadian Dollars. In these circumstances, the interest rates on rupee bonds and debts, which has been extensively referred to in the order of the TPO, have no relevance at all. It is only elementary that interest is nothing but time value of money and when inflation pressure on a currency is lower, as is the case with most strong currencies, the time value of money, i.e. interest, tends to be lower too. Therefore, comparing interest rate on rupee loans cannot at all be compared with interest rates on strong currencies like GBP, USD and CAD. All these erudite discussions about Indian bond market and interest rate are thus wholly irrelevant. As for TPO's observation to the effect that the tested party being the assessee before us, i.e. lender, the prevalent interest that could be earned by the taxpayer by advancing loan to an unrelated party in India, we can only point out that the interest rate on foreign currency loans being qualitatively different, even if we have to see the interest that the assessee would have earned, we have to see the interest that the assessee would have earned on foreign currency loans and not rupee denominated loans.

Having said that, we are alive to the fact, as we have noted earlier in this order, the TPO has computed the ALP on the basis of LIBOR as well, but the variations in LIBOR based CUP as per assessee's computations and LIBOR based CUP as per TPO's computations are on account of following factors:

> ***a. The assessee has taken interest rate at LIBOR plus 160 points whereas the TPO has taken LIBOR plus 400 points.***
>
> ***b. The TPO has made an adjustment of 300 points in LIBOR rate for transaction cost being the cost of forward exchange contract to hedge the position.***
>
> ***c. The TPO has made another adjustment of 177.60 points, as balancing figure, towards lack of security and lender not being in the business of borrowing and lending money.***

62. As far as the first adjustment is concerned, while the TPO has adopted the rate as 4% over LIBOR rate, he has not set out the specific basis of this rate. He has mentioned about some information gathered from websites of financial institutions which, according to him, states that, "for the foreign currency denominated term loans, the maximum rate of interest is 4% over 6 months LIBOR", and then proceeded to adopt this maximum interest rate as a fair basis for his computing the arm's length price. On the other hand, the assessee has taken two specific comparables of USD borrowings, i.e. L&T and Seri Infrastructure, on the interest rate of LIBOR + 150 bps and 1.4% to 1.7% band over LIBOR respectively. There is no material whatsoever, save and except for vague observations about weak financials of the subsidiaries – which are not supported by any specific facts and proceed on sweeping generalizations and assumptions, to reject the comparables taken by the assessee. When a Transfer Pricing Officer rejects comparables taken by the assessee, he has to set out specific, cogent and legally sustainable reasons for doing so. On this point, therefore, the stand of the Assessing Officer cannot be accepted.

63. As for the second adjustment of 300 points for transaction cost, this adjustment is sought to be justified by the following observations of the TPO:

> ***7.9 Transaction Cost***
>
> ***The company, which is considering a foreign currency loan, has to bear an additional transaction cost in each year.***

> ***This is because under Reserve bank of India norms, it is mandatory for borrowers to buy such forward contracts and thus banks insist that the borrower must book a forward dollar contract to hedge the position. Forward cover is assort of insurance against currency fluctuations. If the borrower does not take such cover and the rupee depreciates against the dollar, costs will go up substantially as it would need to buy dollars from the market for repaying the loan.***
>
> ***During the FY 2006-07, the forward premia increased reflecting growing interest rate differential in view of the increased domestic interest rates. In March, 2007, three month forward premium was at 5.12% p.a., from a low of less than one percent per annum in July, 2006. Thus on an average, the 3-month forward premium can be considered as 3% p.a. for the FY 2006-07. Thus a company availing foreign currency loan has to bear additional cost of 3% p.a. towards premium payable on entering into forward contracts of 3-months tenure.***

64. However, what the TPO overlooks is the fact that such a transaction cost is relevant only to the domestic borrower who borrows in foreign currency from outside India. It has nothing to do with the arm's length interest rate for foreign currency borrowing by an overseas subsidiary. In any event, the interest rate is independent of incidental costs, and since TPO has taken lender as the tested party, the transaction cost to the borrower is wholly irrelevant. This adjustment is, therefore, devoid of any legally sustainable basis.

65. That leaves us with third point of difference between the assessee and the TPO and that is with regard to adjustment of 177.60 points, as balancing figure, towards lack of security and lender not being in the business of borrowing and lending money. This adjustment is justified by the TPO on the following ground:

> ***7.10 Adjustment between a banker and non-banker***
>
> ***As the taxpayer is not in the business of lending and borrowing money, his risk is higher in advancing loan to a single customer than a bank, which spreads its risk among its various customers. Thus, the difference between banker and non-banker is to be kept in mind while arriving at the arm's length CUP rate based on bank rates.***
>
> ***7.11 Adjustment for security***

> ***Usually, bankers extending loans in foreign currency also insist on sufficient security. In this case, no security is offered by the AE. Keeping in view the financial health of the subsidiary, it may not be in a position to offer security. Thus an adjustment is required to be made for not offering a security. This may be computed as the difference between the interest rates prevailing for the bonds of equivalent credit rating of the AE and sovereign government bonds in the country in which the AE is located. This can also be considered as the guarantee cost payable to the taxpayer for giving guarantee for equivalent amount of loan given to the AE i.e. the rate differential for the difference in interest spread between the credit rating of the taxpayer and the AE. Thus after the above analysis, the equivalent interest rate is the interest rate including the transaction cost for a foreign currency loan, if given to the AE for its credit standing / rating.***

66. We see no substance in this adjustment either. The TPO has taken the lender as the tested party, and yet made adjustments for higher risks on account of assumed lack of security and increased risk of single party dealing. This approach overlooks the fact that the assessee has advanced monies to its subsidiaries which are under its management and control- a factor which substantially reduces the risk rather than increasing it. On these facts, it is difficult to understand, much less approve, any rationale for adjustment on account of higher risks. On this point also, we see no merits in the stand of the TPO.

67. We have taken note of the fact that the assessee's claim is that his borrowings in the same or similar currencies are at much lower costs. Such a rate, as is noted by a coordinate bench in the case of VVF Limited Vs DCIT (2010 TII 04 ITAT MUM TP), constitutes acceptable internal CUP. While holding so, the co-ordinate bench has, inter alia, observed as follows:

> ***On the given facts, in our considered view, it would be appropriate to accept internal CUP, i.e. the rate at which the assessee has resorted to foreign exchange borrowings from the ICICI, as arm's length price under CUP method. The fact, as painstaking brought on record by the authorities below that this loan from ICICI bank was not used for the purposes of remittance to subsidiaries as interest free loans has no bearing for the purposes of computing ALP of interest free loan. The financial position and credit rating of the subsidiaries will be broadly the same as the holding company, and, therefore, the precise rate at which the ICICI Bank has advanced the foreign currency loans to the***

assessee company can be adopted at arm's length price of interest free loans advanced by the assessee company to its foreign subsidiaries.

68. Undoubtedly, the proposition that the credit rating of the parent company and subsidiary company will be the same is not of universal application but it is certainly a good indicator, in the absence of anything else to the contrary, of the credit rating of the subsidiary as well. Viewed thus, when parent company is able to raise foreign exchange borrowings at a certain rate, it is reasonable to assume that such rates can constitute valid comparable for similarly placed borrowings by the subsidiary as well – more so when subsidiaries are under management and control of the lender parent company, and the business risk is thus much lower. From this perspective also, and bearing in mind the fact that the borrowing costs by the parent company for similar foreign currency loans were admittedly much lower than the rate on which advances have been given to the subsidiaries, the impugned ALP adjustments to interest rate for loans to subsidiaries are not warranted.

69. In view of the above discussions, as also bearing in mind entirety of the case, we delete the impugned ALP adjustment of Rs 10,11,786 as well. The assessee gets the relief accordingly.

41. We see no reasons to take any other view of the matter than the view so taken by us for the immediately preceding assessment year. Following this judicial precedent, we uphold the grievance of the assessee and delete the impugned ALP of Rs 62,15,019. The assessee gets the relief accordingly.

42. Ground No. 14 is thus allowed.

43. In ground no. 15, the assessee has raised the following grievance:

15. That the assessing officer/TPO erred on facts and in law in making addition of Rs.19,15,45,943 on account of notional interest calculated @ 17.26% p.a. on the amount of share application money advanced by the appellant to its AEs.

15.1 That the assessing officer/TPO erred on facts and in law in not appreciating that the transaction of advancement of share application money was not in the nature of "international transaction" as defined in section 92B and hence was outside the purview and scope of Chapter X of the Act.

15.2 That the assessing officer/TPO erred on facts and in law in treating the amount of investments made by the appellant in its associated enterprises in the form of share application money for allotment of shares as interest free loans and consequently, applying transfer pricing provisions to the said transaction(s) and while doing so making an improper comparison by:

(a) Considering rate of interest suggested by rating agency and banks to general investor which are subject to various conditions like credit rating, loan, tenure, etc. and ignoring the fact that such rates can vary according to these variables;

(b) Undertaking a flawed analysis by applying the rate of interest used in relation to - Indian currency loan given in India to an inter-company transaction of advancement of money outside of India, thereby completely ignoring the difference in the, economic environment and geographical conditions prevalent in India and overseas jurisdictions;

(c) alleging that the financial health of the associated enterprises was weak and further in determining the credit rating of the associated enterprises as ranging between BB to D, being high risk category, without providing any cogent or germane reason for the same;

(d) making additional arbitrary and adhoc adjustments to the rate of interest on account of security and single customer and transaction cost, thereby completely ignoring the on-ground reality of the inter--company transaction that there is no significant risk in advancing loans to 100% subsidiary companies and demonstrating an intention to arrive at a very high interest rate of 17.26% p.a. with the single-minded intention of making an addition to the returned income of the appellant.

15.3 That the assessing officer/TPO erred in relying upon the rate of interest charged by various domestic banks on advancement of foreign currency loans obtained by the TPO under section 133(6) of the Act, without affording opportunity to the appellant to rebut the same, in violation of principles of natural justice.

15.4 That the assessing officer/TPO erred in relying upon the information obtained under section 133(6) of the Act, without appreciating that such information was not available in the public domain and therefore, could not have been relied upon for the purpose of determining the arm's length price.

15.5 Without prejudice, that the assessing officer/TPO erred in computing the amount of interest at Rs.19,15,45,943, by applying rate of interest of 17.26% p.a. for the whole year on the consolidated amount of share application money, without considering the monthly balance of share application money.

15.6 That the assessing officer/TPO erred on facts and in law by disregarding established judicial pronouncements in India in making the Transfer Pricing adjustment.

44. So far as this grievance of the assessee is concerned, the relevant material facts, to the extent necessary for our adjudication, are as follows. It is not in dispute that during the relevant previous year the assessee has made following payments towards share application money in its foreign subsidiaries:

Name of associated enterprises	**Amount of advance (Rs.)**	**Date of share application**	**Date of issue of shares**
Bharti Airtel (U.S.A.) Ltd.	40,45,14,1 09	29.11.2007	31.03.2009
Bharti Airtel (U.K.) Ltd.	3,17,72,666	31.01.2008	12.03.2009
Bharti Airtel (Singapore) Ltd.	2,01,39,150	24,09.2007	1.04.2009
Bharti Airtel (Hongkong) Ltd.	1,81,48,200	24.09.2007	10.12.2008
Bharti Airtel (Lanka) Ltd.	63,51,93,795	Various dates	31.07.2008
Total	**110,97,67,920**		

45. These transactions were not benchmarked as, according to the assessee, these were in the nature of share application money payments. While the TPO did not question the character of payment, he noted that "from the information on record, it is seen that these amounts were extended by the AE which have not been converted into equity for quite a long time after the initial advancement". It was also noted that time taken in actual allotment of shares has taken place as much as 13, 16 and 14 months in the cases of UK, US and Hong Kong based subsidiaries, and that the assessee has not earned any interest for this long period. The TPO was of the view that "any independent entity would not have left the amount in the hands of another entity without the same being converted into equity within a reasonable period or receiving interest on the same". It was in this backdrop that the TPO proceeded to treat these amounts as interest free

loans extended to the AEs. He then referred to the provisions of Section 92 B, in the light of which, according to the TPO, lending or borrowing of the money comes within the ambit of 'international transactions'. He thus justified determination of arm's length price of the transaction of, what he termed, as interest loans to the AEs. Reliance was placed on the decisions of the coordinate benches in the cases of VVF Ltd Vs DCIT (2010 TIOL 55 ITAT MUM TP) and Perot Systems TSI India Ltd Vs DCIT (2010 TII 3 ITAT TEL TP). The TPO then proceeded to determine ALP of the deemed interest free loans to the AE, but, for the reasons we will set out in a short while, it is not really necessary to deal with facts relating to ALP determination part. When assessee raised the objection before the DRP on this issue, it was rejected by observing that," we agree with the TPO that capital locked up for want of transfer of shares for reasonably long period would partake the nature of loan". It was in this backdrop that payments for share application money were treated as interest free loans given to the AEs and ALP adjustment was made for interest thereon. Aggrieved, assessee is in appeal before us.

46. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case in the light of the applicable legal position.

47. We find that in the present case the TPO has not disputed that the impugned transactions were in the nature of payments for share application money, and thus, of capital contributions. The TPO has not made any adjustment with regard to the ALP of the capital contribution. He has, however, treated these transactions partly as of an interest free loan, for the period between the dates of payment till the date on which shares were actually allotted, and partly as capital contribution, i.e. after the subscribed shares were allotted by the subsidiaries in which capital contributions were made. No doubt, if these transactions are treated as in the nature of lending or borrowing, the transactions can be subjected to ALP adjustments, and the ALP so computed can be the basis of computing taxable business profits of the assessee, but the core

issue before us is whether such a deeming fiction is envisaged under the scheme of the transfer pricing legislation or on the facts of this case. We donot find so. We donot find any provision in law enabling such deeming fiction. What is before us is a transaction of capital subscription, its character as such is not in dispute and yet it has been treated as partly of the nature of interest free loan on the ground that there has been a delay in allotment of shares. On facts of this case also, there is no finding about what is the reasonable and permissible time period for allotment of shares, and even if one was to assume that there was an unreasonable delay in allotment of shares, the capital contribution could have, at best, been treated as an interest free loan for such a period of 'inordinate delay' and not the entire period between the date of making the payment and date of allotment of shares. Even if ALP determination was to be done in respect of such deemed interest free loan on allotment of shares under the CUP method, as has been claimed to have been done in this case, it was to be done on the basis as to what would have been interest payable to an unrelated share applicant if, despite having made the payment of share application money, the applicant is not allotted the shares. That aspect of the matter is determined by the relevant statute. This situation is not in *pari materia* with an interest free loan on commercial basis between the share applicant and the company to which capital contribution is being made. On these facts, it was unreasonable and inappropriate to treat the transaction as partly in the nature of interest free loan to the AE. Since the TPO has not brought on record anything to show that an unrelated share applicant was to be paid any interest for the period between making the share application payment and allotment of shares, the very foundation of impugned ALP adjustment is devoid of legally sustainable merits.

48. Let us also deal with two judicial precedents which have been heavily relied upon by the TPO, as also by the learned Departmental Representative, on which their case rests. None of these decisions, however, deal with the core issue before us i.e. whether a capital contribution can be deemed to be partly an interest free loan, for the period till the shares were actually allotted, and partly as capital contribution, after the subscribed shares were issued by the

subsidiary in which capital contribution was made. In the case of Perot Systems TSI India Ltd Vs. DCIT *(supra),* a coordinate bench of this Tribunal had an occasion to deal with the arm’s length price adjustment with regard to interest free advances to the subsidiaries. That was a case in which the assessee, an Indian company, advanced interest-free loans to its 100% foreign subsidiaries. The subsidiaries used those funds to make investments in other step- down subsidiaries. On the question whether notional interest on the said loans could be assessed in the hands of the assessee under the transfer pricing provisions of Chapter X, the assessee argued that the said "loans" were in fact "quasi - equity" and made out of commercial expediency. It was also argued that notional income could not be assessed to tax. However, both of these arguments were rejected by a coordinate bench of this Tribunal. While doing so, the coordinate bench observed that there was no material on record to establish that the loans were in reality not loans but were quasi-capital and that there is also no reason why the loans were not contributed as capital if they were actually meant to be a capital contribution. It was observed that, "It is not the case that there was any technical problem that the loan could not have been contributed as capital originally, if it was meant to be a capital contribution". The argument of loan being in the nature of quasi capital was thus rejected on facts. It was not even a case of quasi capital, and, therefore, this case has no bearing on the question before us i.e. whether ALP adjustments can be made in respect of payments towards share application money in a situation in which the shares have been issued several months after the payments for share application money have been made. Similarly, in VVF's case *(supra)*, the transaction was admittedly in the nature of interest free loan between AEs and the commercial expediency in advancing interest free loans was on account of ownership and control of subsidiary being in the hands of the assessee, which was recognized as a significant factor for commercial expediency. However, as we have seen in the earlier discussions, such commercial expediency of granting interest free loans is wholly irrelevant because it is the impact of this interrelationship, on account of management, capital and control, which is sought to be neutralized by arm's length price adjustments. This was also not a case in which a capital contribution was deemed to be partly an interest free loan (i.e. for the period till the shares were actually allotted) and partly as capital contribution (i.e. when the subscribed shares were allotted by the subsidiary). Revenue, therefore, does not derive any advantage from these judicial precedents either.

49. In any event, it is not open to the revenue authorities to recharacterize the transaction unless it is found to be a sham or bogus transaction. While there are no specific powers vested in the TPO to recharacterize the transaction, even under the judge made law, such rechracterization can be done by the revenue authorities when the transactions are found to be substantially at variance with the stated form. In the present case, there cannot even a suggestion to hold that this is a bogus transaction because admittedly the subscribed shares capital has indeed been allotted to the assessee. The transaction is thus accepted to be genuine in effect.

50. In view of these discussions, as also bearing in mind entirety of the case, we are of the considered view that the authorities below were in error in treating the payment of share application money, as partly in the nature of interest free loans to the AEs, and, accordingly, ALP adjustment based on that hypothesis was indeed devoid of legally sustainable merits. We delete the impugned adjustment of Rs.19,15,45,943. The assessee gets the relief accordingly. As we have decided this ground of appeal on the fundamental issue that the payment of share application money could not be partly treated as interest free loan to AE, we see no need to deal with other aspects of the matter.

51. Ground No. 15 is thus allowed.

52. We now turn to other grounds of appeal in this appeal. In ground no.1, 2 and 3, the assessee has taken up the following grievances:

> ***"1. That the Assessing Officer [AO] erred on facts and in law in completing the impugned assessment vide order dated 30.10.2012 under section 143(3) read with section 144C of the Income-tax Act***

("the Act") at an income of Rs.7819,34,10,408 as against income of Rs.1998,06,29,257 declared by the appellant.

2. That in framing the assessment the learned AO has erred in making the following additions and disallowances:

Disallowance of interest paid to ABN Amro Bank u/s 40(a)(i)	***115,34,26,441***
Variable Licence Fee u/s 35ABB	***1273,12,48,120***
Disallowance of ESOP expenses	***7,22,89,010***
Disallowance of free airtime to distributors u/s 40(a)(ia)	***866,59,50,444***
Disallowance of roaming charges u/s	***3,19,19,586***
Lease Charges to IBM & Nortel treated as Finance Lease	***182,22,28,069***
On account of an amount debited to Profit & Loss Account but not claimed as deduction (Loss on Transfer of telecom infrastructure business to Bharti Infratel)	***5739,60,05,089***

3. That the learned AO has further erred in making an aggregate addition of Rs.20,10,71,123/- on account of transfer pricing adjustments in respect of international transactions including purported international transactions.

53. Learned counsel for the assessee fairly accepts that these grounds of appeal are general in nature and do not require any adjudication particularly as the grievances regarding additions/disallowances mentioned above are specifically raised in the subsequent grounds of appeal.

54. Ground nos.1, 2 and 3 are accordingly dismissed.

55. In ground no.4, the assessee has raised the following grievances :-

4. That the assessing officer erred on facts and in law in disallowing interest expense of Rs.115,34,26,441 under section 40(a)(i) of the Act paid to ABN AMRO Bank, Stockholm, outside India.

4.1. That the assessing officer failed to appreciate that the interest paid to ABN AMRO Bank, Stockholm, outside India was not chargeable to tax under the provisions of the Act read with the overriding provisions of Article 11 of the applicable DTAA and therefore, there was no default in not deducting tax at source.

4.2. Without prejudice, that the assessing officer further failed to appreciate that disallowance under section 40(a)(i) of the Act was, in any case, not warranted, since: (a) no amount out of the interest expense under consideration was payable as on the last date of the previous year; and (b) non-deduction of tax at source was on account of bona fide view taken by the appellant.

4.3 Without prejudice, the assessing officer erred on facts and in law in not appreciating that the interest paid on loans taken by the appellant from ABN Amro, which were subsequently novated by ABN Amro in favour of third parties ("the new lenders"), who were tax residents of the respective countries, was not liable to tax in India in terms of Article 11 of the respective Tax Treaty and consequently therefore, there was no default in not deducting tax at source.

56. This issue also came up before us for adjudication in the immediately preceding Assessment Year i.e. 2007-08 and vide our order of even date we have remitted the matter to the file of the A.O. for fresh adjudication in the light of the directions set out therein. Learned representatives fairly agreed that whatever is decided in the said Assessment Year i.e. 2007-08 will equally apply for the present year also. In this view of the matter and respectfully following our decision for the Assessment Year 2007-08, we remit the matter to the file of A.O. for adjudication *de novo* in the light of directions set out in our order for Assessment Year 2007-08 which are reproduced below for ready reference:-

"24. We find that so far as assessee's dealings with ABN-S are concerned, these are to be examined in accordance with the provisions of the India Netherlands Double Taxation Avoidance Agreement, rather than India Sweden Double Taxation Avoidance Agreement, for the reason that the ABN Amro Bank is a tax resident of the Netherlands and ABN Amro Bank's Stockholm branch is an integral part of the AB Amro Bank NV. ABN-S's taxability in Sweden is confined to the taxability of its profits in Sweden, whereas under Article 4(1) of Indo Swedish tax treaty, an enterprise can be treated as resident of Sweden only when, inter alia, such a person "under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature".

Clearly, the mere fact that such profits of an enterprise are taxable in Sweden cannot lead to the conclusion that the enterprise is tax resident of Sweden. Elaborating upon the scope of expression 'liable to tax by the reason of domicile, residence, place of management or any other criterion of similar nature', a coordinate bench of this Tribunal, in the case of DCIT Vs General Electric Co plc [71 TTJ 973 (2001)] and speaking through one of us (i.e. the Accountant Member), has observed as follows:

> ***16. Art. 4(1) of the Indo-Dutch DTAA clearly provides that "for the purpose of this Convention, the term 'resident of one of the states' means any person who, under the laws of that state, is liable to taxation therein by reasons of his domicile, residence, place of management or any other criterion of a similar nature". The requirements for fiscal domicile cannot be satisfied by mere liability to tax in that country, but as clearly provided by art. 4(1) of the Indo-Dutch DTAA, such a liability to taxation has to be on account of domicile, residence, place of management or any other criterion of a similar nature. The question, then, is as to what are the connotations of these terms and whether source taxability of dividend income per se can generate 'treaty entitlements' of the country in which such taxes on dividends have been paid. The wordings of art. 4(1) leave no doubt about the fact that merely because a person is tax-payer in one of the countries which are party to the Indo-Dutch DTAA, i.e. in India or in Netherlands, such a person cannot be treated as 'resident of one of the states' for the purposes of the DTAA. Coming to specific tests laid down in the DTAA, as far as 'domicile test' is concerned, in common law, 'domicile' has a somewhat restricted meaning, denoting a fixed and lasting attachment to a country or state with its own separate legal system—one only in each case—which initially is acquired by birth ('domicile by origin'), and capable of being altered later by a personal decision ('domicile by choice'). In the case before us, the assessee-companies were incorporated in United Kingdom and there is nothing on record to even remotely suggest that the assessee-company was domiciled in the Netherlands. Since there can only be one country of domicile and since the assessee-companies are already domiciled in United Kingdom by the virtue of its incorporation in that country, the assessee-companies cannot be said to be domiciled in the Netherlands. Coming to the 'residence test', it is admittedly not the assessee's case that the assessee-companies are residents of Netherlands. Similarly, it is also not in dispute that 'place of effective management' is United Kingdom and the case of the assessee-companies cannot even be covered by this criterion. That leaves us only with 'any other criterion of similar nature'. It may be useful to first refer to the principle of 'ejusdem generis' in interpretation of statutes.***

Simply stated, the principle of ejusdem generis is that where there are general words following particular and specific words, the general words will have restricted meaning which will be confined to the things of the same kind as specified. In other words, the general expression is to be read as 'comprehending only things of the same kind as that designated by preceding particular expressions, unless there is something to show that wider sense was intended. In the case before us, the principle of ejusdem generis have been incorporated in the text of the treaty provision itself, 'any other criterion' referred to in the treaty has to be restricted to the genus of three earlier expressions i.e. domicile, residence and place of effective management. The key question, therefore, is whether 'earning of dividends earned from the Netherlands' can be said to belong to the same genus to which 'domicile, residence and place of effective management' belong ? No. doubt, as observed by Dr. Klaus Vogel in his Commentary to the Double Taxation Conventions, the term 'other criterion of similar nature' makes clear that the enumerated criterion of domestic law which attracts tax liability are no more than examples for the rule, but Dr. Vogel has further stated that, "The term should be understood to mean any locality-related attachment that attracts residence-type taxation." An illustration given in this commentary refers to "statutory seat which, under German law, serves as an alternative point of attachment in the absence of a place of management within the domestic territory." We are in considered agreement with Dr. Vogel's observation that 'any other criterion of similar nature' should be understood to mean any locality related attachment that attracts residence type taxation. In the light of these discussions, it is clear that only 'locality related attachment' ('locality related' being the genus to which expressions 'domicile' 'residence' and 'place of effective management' belong) can be covered by the scope of expressions 'any other criterion of similar nature' in terms of art. 4(1) of the Indo-Netherlands DTAA. We are also of the considered view that cases before us clearly fail on this test.

25. In view of the above discussions and bearing in mind the fact that ABN- S did not have any locality related attachment in Sweden which could lead to residence type taxation on global basis, in our considered view, ABN-S cannot be treated as tax resident of Indo Swedish tax treaty. Accordingly, the benefit of Article 11 (3) of Indo Swedish tax treaty cannot be applicable on the ground that the interest remittances are made to ABN-S. However, for the reasons we will now set out, the mere fact that the interest has been remitted to ABN-S and that the benefit of Article 11(3) of Indo Swedish tax treaty or benefit of Article 11(3) of the Indo Dutch tax *treaty are not available in respect of these remittances, does not imply that the amounts so paid are taxable in India.*

26. We find that there is no dispute about the fact that the ABN- S, was arranger of the loan and there were also other financial institutions termed as 'original lenders' who had actually financed this transaction. The role of the ABN-S, except to the extent of financing of its own funds in this arrangement, was confined to that of a facilitator. We have also noted that it is an undisputed position that subsequently these loan agreements were novated and the original lenders came into direct agreements with the assessee. Under these circumstances, in our considered view, the interest received by the ABN-S, except to the extent received for the financing done by itself, was not entirely in his own right but merely as a conduit for making onwards payments to identified original lenders in a transparent manner. As we take note of these facts, it is also important to bear in mind the fact that the liability under section 201(1) r.w.s. 195, which has been invoked in this case for non deduction of tax at source from payments to ABN-S – which is the bedrock of disallowance impugned in this appeal, is based on taxability of ABN Amro Bank @ 10% (before grossing up) under Article 11(2) of the Indo- Dutch tax treaty and by thus treating ABN Amro Bank as beneficial owner of the interest. It may be noted that under Article 11 of the Indo Dutch tax treaty, interest arising in one of the States and paid to a resident of the other State may be taxed in that other State. Article 11(2), however, provides that such interest may also be taxed in the State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 10 per cent of the gross amount, amongst other, in the cases of the interest on loans made or guaranteed by a bank or other financial institution carrying on bona fide banking or financing business. It is thus beyond doubt that the taxation of interest, even according to the revenue authorities, is being done in the hands of the beneficial owner. In these circumstances, the authorities below were clearly in error in treating ABN Amro Bank as recipient and as beneficial owner of the entire interest paid by the assessee remitted to ABN-S In our considered view, even though such interest is remitted to ABN-S, since ABN -S has mainly acted as a conduit, it is to be treated as having been paid to the beneficial owners of such interest i.e. original lenders under the financing arrangement – though through the ABN-S. The taxability of interest is to be examined in the light of factual findings to be so arrived at, and in the light of the applicable legal position as per the relevant provisions of the tax treaties that India has with the jurisdictions in which original lenders are resident in. Once again, we have to acknowledge the fact that learned counsel for the assessee has filed elaborate documentation in support of their stand about tax residency status of beneficial owners of the interest paid by the assessee and has also addressed the arguments on merits, but, in the absence of this aspect of the matter having been examined by the authorities below, we are not inclined *to deal with the matter on merits. In our considered view, the right course of action is to identify the factual aspects to be looked into, set out the legal principles, and remit the matter to the file of the Assessing Officer for adjudication de novo by way of a speaking order, in accordance with the law and after giving yet another fair and reasonable opportunity of hearing to the assessee. While doing so, the Assessing Officer shall specifically deal with all the contentions of the assessee as the assessee may raise before him. We order so.*

27. Learned counsel has also raised some arguments, said to be supported by some judicial precedents, on the question whether disallowance under section 40(a)(i) can be made in a situation in which even if the foreign remittance had tax withholding obligations under section 195 but the assessee had bonafide reasons to believe that there were no tax with withholding obligations. However, as we have remitted the matter to the file of the Assessing Officer for adjudication on the basic question as to whether there were tax withholding obligations, this aspect of the matter is academic at this stage. However, in the event of the Assessing Officer coming to the conclusion that there was indeed tax withholding obligation, whether in part or in full, in respect of interest payments, this aspect of the matter will also have to be adjudicated upon. The assessee is at liberty to take up this aspect of the matter also, if so advised, before the Assessing Officer.

57. In the result, ground no.4 is allowed for statistical purposes in the terms indicated above.

58. In ground no.5, the assessee has raised the following grievances :-

5. That the assessing officer erred on facts and in law in disallowing variable license fees to the extent of Rs.1273,12,48,120 out of total expenditure of Rs.1734,40,32,623, by amortizing the same under section 35ABB of the Act instead of allowing the entire expense as deduction under section 37(1) of the Act.

5.1. That the assessing officer failed to appreciate that the license fee being recurring expenditure, paid as fixed percentage of gross revenues was allowable in its entirety as revenue deduction.

5.2. That the assessing officer erred on facts and in law in not following the binding decisions of the Tribunal in the appellant's own case for the earlier assessment years 2000-01, 2001-02 and 2002-03, in gross violation of principles of judicial discipline.

59. This issue also came up for adjudication before us for the Assessment Year 2007-08 and vide our order of even date we have deleted the disallowance by inter alia observing as follows :-

> *"5. As learned representatives fairly agree, the issue is now covered, in favour of the assessee, by Hon'ble Delhi High Court's judgment dated 19th December 2013, in assessee's own case. In this judgment, Their Lordships have, inter alia, held as follows:*
>
> > ***47. In view of the aforesaid findings, the substantial questions mentioned above ….. are answered as follows:***
> >
> > ***(i) The expenditure incurred towards licence fee is partly revenue and partly capital. Licence fee payable upto 31st July 1999 should be treated as capital expenditure, and licence fee on revenue sharing basis, after 1st August 1999, should be treated as revenue expenditure.***
> >
> > ***(ii) Capital expenditure will qualify for deduction as per section 35 ABB of the Act.***
>
> *6. In the case before us, it is not in dispute that the licence fee in question is on revenue sharing basis and pertains to period post 1st August 1999. In this view of the matter, and in due deference to the esteemed views of Hon'ble jurisdictional High Court, we hold that the impugned disallowance deserves to be deleted and that the entire amount of licence fees is allowable as revenue deduction. The assessee gets the relief accordingly.*
>
> *7. Ground No. 1 is thus allowed."*

60. We see no reasons to take any other view than the view taken by us in the immediately preceding year. Respectfully following the same we uphold the grievance of the assessee and direct the A.O. to delete the impugned disallowance.

61. Ground no.5 is thus allowed.

62. In ground no.6 the assessee has raised the following grievances :-

6. That the assessing officer erred on facts and in law in disallowing employee compensation expense of Rs.7,22,89,010 incurred on account of actual issuance of shares to employees under the Employee Stock Option Plane(s) ('ESOP') and claimed as deduction under section 37(1) of the Act, holding the same to be capital in nature.

6.1 That the assessing officer failed to appreciate that the appellant claimed the aforesaid employee compensation expense only on actual exercise of option(s) and issuance of shares to the employees.

6.2 That the assessing officer further failed to appreciate that since grant of option and issuance of shares was merely in the nature of employee compensation/welfare expense, the same was allowable as revenue deduction.

6.3 That the assessing officer further failed to appreciate that since Fringe Benefit Tax was paid by the appellant on such compensation provided to the employees in the form of issuance of shares under the ESOP, the same was allowable as revenue deduction, even on that account.

63. This issue also came up for adjudication before us for the Assessment Year 2007-08 and vide our order of even date we have deleted the disallowance by inter alia observing as follows :-

"13. Having heard the rival contentions, and having perused the material before us, we find that the issue is now covered in favour of the assessee by a Special Bench decision in the case of ***Biocon Ltd Vs DCIT (144 ITD SB 21)*** *wherein the Tribunal has, inter alia, held as follows:*

11.3. We, therefore, sum up the position that the discount under ESOP is in the nature of employees cost and is hence deductible during the vesting period w.r.t. the market price of shares at the time of grant of options to the employees. The amount of discount claimed as deduction during the vesting period is required to be reversed in relation to the unvesting/lapsing options at the appropriate time. However, an adjustment to the income is called for at the time of exercise of option by the amount of difference in the amount of discount calculated with reference the market price at the time of grant of option and the market price at the time of exercise of option. No accounting principle can be determinative in the matter of computation of total income under the Act. The question before the special bench is thus answered in affirmative by holding that discount

on issue of Employee Stock Options is allowable as deduction in computing the income under the head `Profits and gains of business or profession'.

14. We have also noted that it is an undisputed position, as evident from the computations reproduced in the assessment order itself, that the amounts claimed as a deduction represent the actual exercise of options. In this view of the matter, and in view of the principles laid down in Special Bench decision in the case of Biocon Ltd (supra), we uphold the grievance of the assessee. The disallowance of Rs 11,96,23,407 must also, therefore, be deleted. We order so."

64. We see no reasons to take any other view than the view taken by us in the immediately preceding year. Respectfully following the same we uphold the grievance of the assessee and direct the A.O. to delete the impugned disallowance.

65. Ground no.6 is thus allowed.

66. In ground no.7 the assessee has raised the following grievances :-

"7. That the assessing officer erred on facts and in law in disallowing a sum of Rs.866,59,50,444 representing free airtime given as discount/trade margin to the distributors on retail price of prepaid coupons under section 40(a)(ia) of the Act.

7.1. That the assessing officer erred on facts and in law in holding that discount/trade margin given to the distributors on retail price of the prepaid products was in the nature of commission expense on which tax was required to be deducted at source under section 194H of the Act.

7.2. That the assessing officer erred on facts and in law in holding that the business relationship between the appellant and distributors of prepaid products was in the nature of agency as against actual relationship of principal to principal, which does not fall within the purview of section 194H of the Act.

7.3. Without prejudice, that the disallowance under section 40(a)(ia) of the Act should have been restricted only to transactions where no tax has been deducted at source at all.

7.4. Further, without prejudice, that the assessing officer further failed to appreciate that disallowance under section 40(a)(ia) of the Act was, in any case, not warranted, since non-deduction of tax at source was on account of bona fide view taken by the appellant.

7.5. Further, without prejudice, that the assessing officer further failed to appreciate that disallowance under section 40(a)(ia) of the Act should have, if at all, been restricted to the amount remaining as payable as on the last date of the relevant previous year.

7.6 Further without prejudice the Assessing Officer has erred both on facts and in law in applying the provisions of Section 40(a)(ia) of the Act ignoring the fact that the distributor has declared income in respect of the transactions of prepaid products and thus such income would have been subject to payment of income tax and the assessee would not be deemed to be an assessee in default under the proviso to sub-section (l) of Section 201."

67. This issue also came up for adjudication before us for the Assessment Year 2007-08 and vide our order of even date we have rejected the grievances of the assessee by inter alia observing as follows :-

"31. Having heard the rival contentions and having perused the material on record, and having noted that the issue is covered against the assessee by Hon'ble High Court decisions in the case of Idea Cellular Ltd (supra) as in assessee's own case, we see no reasons to interfere in the matter. Learned counsel for the assessee has pointed out that there is no element of agency, that talk time is traded and distributed, that it's a principal to principal relationship that the assessee has with his distributors, that flow of payment is in the reverse direction which is contrary to the concept of commission payment and that the assessee had a bonafide belief that section 40(a)(ia) will not come into play as the distributors have honoured their tax liability. However, as the issue is covered against the assessee by direct decision of Hon'ble jurisdictional High Court, we are not inclined to deal with all these arguments. Respectfully following the esteemed views of Hon'ble jurisdictional High Court, We hold that the assessee was required to deduct tax at source from the commission so allowed by the assessee, and, accordingly, his failure to do so is to be visited with the consequence of disallowance under section 40(a)(ia) r.w.s. 194 H. The disallowance is thus confirmed."

68. We see no reasons to take any other view than the view taken by us in the immediately preceding year. Respectfully following the same we reject the grievances of the assessee.

69. Ground no.7 is thus dismissed.

70. In ground no.8 the assessee has raised the following grievances :-

> ***"8. That the assessing officer erred on facts and in law in disallowing roaming charges of Rs.3,19,19,586 paid to other telecom operators under section 40(a)(ia) of the Act.***
>
> ***8.1. That the assessing officer has erred on facts and in law in holding that roaming charges paid by the appellant were on account of technical services provided by other telecom operators on which tax was required to be deducted at source under section 194J of the Act.***
>
> ***8.2. Without prejudice, that the assessing officer failed to appreciate that services, if any, were being rendered by other telecom operators directly to the subscribers of the appellant and the appellant's role was only restricted to collecting such roaming charges from its subscribers and making payment to the telecom operators on their behalf, which, in any case, did not involve rendering of any technical services.***
>
> ***8.3. Without prejudice, that the assessing officer failed to appreciate that the telecom operators were only sharing their revenue in relation to use of their gateway/networks, which did not constitute 'technical service' within the meaning of section 194J of the Act.***
>
> ***8.4 Without prejudice, that the assessing officer further failed to appreciate that disallowance under section 40(a)(ia) of the Act was, in any case, not warranted, since non-deduction of tax at source was on account of bona fide view taken by the appellant.***
>
> ***8.5 Without prejudice, that the assessing officer further failed to appreciate that disallowance under section 40(a)(ia) of the Act should have, if at all, been restricted to the amount remaining as payable as on the last date of the relevant previous year.***
>
> ***8.6 Further without prejudice the Assessing Officer has erred both on facts and in law in applying the provisions of Section 40(a)(ia) of the Act ignoring the fact that the other telecom service providers have declared income in respect of the transactions of telecom roaming and***

thus such income would have been subject to payment of income tax and the assessee would not be deemed to be an assessee in default under the proviso to sub-section (1) of Section 201."

71. This issue also came up before us for adjudication in the immediately preceding Assessment Year i.e. 2007-08 and vide our order of even date we have remitted the matter to the file of the A.O. for fresh adjudication in the light of the directions set out therein which are reproduced as follows :-

"34. It is important to take note of the fact that the issue as to whether the amounts paid for roaming charges will attract tax deduction at source under section 194 J was before Hon'ble Supreme Court in assessee's own case, reported as CIT Vs Bharti Cellular Limited (330 ITR 239), and the issue was decided against the assessee in principle but the matter was remanded to the Assessing Officer (TDS) with certain directions for de novo adjudication. When this was pointed out to the learned counsel for the assessee, he invited our attention to the following observations made by Their Lordships in this judgment:

> ***8. There is one more aspect that requires to be gone into. It is the contention of respondent No. 1 herein that interconnect agreement between, let us say, M/s Bharti Cellular Ltd. and BSNL in these cases is based on obligations and counter obligations, which is called a "revenue sharing contract". According to respondent No. 1, s. 194J of the Act is not attracted in the case of "revenue sharing contract". <u>According to respondent No. 1, in such contracts there is only sharing of revenue and, therefore, payments by revenue sharing cannot constitute "fees" under s. 194J of the Act</u>. This submission is not accepted by the Department. <u>We leave it there because this submission has not been examined by the Tribunal.</u>***

(Emphasis by underlining supplied by us)

35. Learned counsel for the assessee then made elaborate submissions on the proposition that the payment of roaming charges to the other operators is a revenue sharing contract. He begun by pointing out that the roaming services are rendered to assessee's subscriber and not the assessee, and the assessee only shares a part of the charges recovered from the subscriber, and proceeded to argue the matter at length on merits. However, as the authorities below have not examined this matter at any of the stages nor this specific argument was taken before them, we are not inclined to take *up this plea for adjudication on merits for the first time directly before this Tribunal. It is purely a factual matter which needs to be examined in detail. In our considered view, in such a situation, the matter deserves to be remitted back to the file of the Assessing Officer for fresh adjudication in the course of which the Assessing Officer will also give specific finding, by way of a speaking order, on assessee's plea to the effect that the payment of roaming charges is a revenue sharing arrangement. While doing so the Assessing Officer shall give due and fair opportunity of hearing to the assessee, decide the matter in accordance with the law and by way of a speaking order dealing specifically with all such contentions as the assessee may raise. We order so.*

72. We see no reasons to take any other view than the view taken by us in the immediately preceding year i.e. 2007-08. In this view of the matter and respectfully following our decision for the Assessment Year 2007-08, we remit the matter to the file of A.O. for adjudication *de novo.*

73. In the result, ground no.8 is allowed for statistical purposes in the terms indicated above.

74. In ground no.9 the assessee has raised the following grievances :-

"9. That the assessing officer erred on facts and in law in disallowing lease charges aggregating to Rs.182,22,28,069 paid to M/s. IBM India and M/s. Nortel Networks India (P) Limited.

9.1. That the assessing officer erred on facts and in law in alleging that the transaction entered into by the appellant fell in the category of a disguised purchase, by relying upon similar finding given in the assessment order for assessment year 2006-07.

9.2 That the assessing officer failed to appreciate that the mere fact that the transactions entered into by the appellant were treated as finance lease in the books of accounts as per the binding Accounting Standard on "Finance Lease", such treatment in books of accounts was not relevant for determining the nature of the transaction and allowability of the claim under the provisions of the Act.

9.3 Further, without prejudice, that the assessing officer erred on facts and in law in allowing deprecation as claimed in the books of

> ***accounts rather than allowing depreciation at rates prescribed under the Act.***
>
> ***9.4 Further, without prejudice, that assessing officer erred on facts and in law in not allowing depreciation on lease rentals disallowed in the earlier assessment year(s) consistent with the finding given in the said assessments that the transaction entered into by the appellant was in the nature of finance lease on which depreciation was allowable under the provisions of the Act."***

75. This issue also came up before us for adjudication in the immediately preceding Assessment Year i.e. 2007-08 and vide our order of even date we have remitted the matter to the file of the A.O. for fresh adjudication in the light of the directions set out therein which are reproduced as follows :-

> *19. Even as learned representatives have argued the matter at length on merits, we are not inclined to go into merits of the case for the simple reason that the Assessing Officer has not given any adjudication on merits and nor has he dealt with the contentions of the assessee by way of a speaking order. The Assessing Officer and the DRP have simply followed the order of the earlier years, and the matter for that year stands restored to the file of the Assessing Officer. In our considered view, in such a situation, it will be inappropriate for us to deal with the matter on merits. We, therefore, deem it fit and proper to remit the matter to the file of the Assessing Officer for adjudication on merits, by way of a speaking order specifically dealing with contentions of the assessee and after giving yet another opportunity of hearing to the assessee. We also make it clear that the assessee shall have the liberty to take up all the related issues, as the assessee may deem fit, and the Assessing Officer will be required to deal with all these contentions. We remit the matter to the file of the Assessing Officer with these directions.*

76. We see no reasons to take any other view than the view taken by us in the immediately preceding year i.e. 2007-08. In this view of the matter and respectfully following our decision for the Assessment Year 2007-08, we remit the matter to the file of A.O. for adjudication *de novo.*

77. In the result, ground no.9 is allowed for statistical purposes in the terms indicated above.

78. The assessee has moved an application for admission of additional ground which is reproduced below for ready reference:

> ***The applicant craves leave to raise the following by way of additional ground of appeal:***
>
> ***"That in the facts and Circumstances of the case and in law, the assessee ought to be allowed deduction of liability borne by the assessee in pursuance of order(s) passed under section 201 (1) of the Income Tax Act, 1961 ('the Act')."***
>
> ***Tax demands under section 201(1) of the Act has been raised against the applicant for various assessment years, for alleged default in deduction of tax at source under the provisions of the Act, in respect of the following transactions :***
>
> ***(a) Discount allowed to distributors on sale of pre-paid products - Alleged non-deduction of tax under section 194H of the Act;***
> ***(b) Roaming charges paid to other cellular service providers - Alleged non-deduction of tax under section 194J of the Act;***
> ***(c) Interest payments made to ABN Amro Bank, Netherlands - Alleged non- deduction of tax under section 195 of the Act.***
>
> ***The issue whether tax was actually deductible at source on the aforesaid transactions is, it is submitted, still under dispute, which is pending adjudication before various appellate authorities and no finality has been reached on the issues as yet. However, in pursuance of proceedings initiated under section 201 of the Act, the applicant, in order to safeguard its business interests and to prevent any coercive action by the Department resulting in obstruction/damage to its business, has, in various assessment years, deposited '<u>under protest</u>', certain amounts of tax demands raised in pursuance of the orders under that section.***
>
> ***The amount of tax liability borne by the applicant, in pursuance of order(s) passed under section 201(1), has, however, not been considered for allowance as deduction while computing business income under the provisions of the Act.***
>
> ***The applicant in this regard, respectfully submits that the tax liability has been borne 'under protest' and the legal issue of deductibility of tax at source on the specified transactions is pending adjudication before various appellate authorities. Further, part of the amount of tax demanded pursuant to orders passed under section 201 of the Act has, it is submitted, been paid by the applicant in various assessment years, without any admission of the liability to deduct tax at source, in***

the larger business interest, strictly in the capacity as a trader, in order to avoid any forceful/coercive steps by the Department.

In the aforesaid circumstances, the applicant should be held entitled to deduction of the demands crystallized and/or paid during the year under consideration pursuant to orders passed under section 201 of the Act.

In view of the aforesaid, it is respectfully prayed, that the amount of tax liability accrued/borne by the applicant in pursuance of the orders passed under section 201 (1), should be directed to be considered for allowance as business deduction under sections 28/37 of the Act.

Prayer:

The aforesaid issue of allowability of payment of tax liability accrued/borne in pursuance of orders passed under section 201(1) of the Act is, it is submitted, purely a legal issue, and facts in relation to the same are already available on record. The additional ground of appeal is being raised on the applicant being recently advised of the correct legal position and the omission to raise the aforesaid additional ground of appeal earlier is neither willful nor deliberate.

The additional ground of appeal calls for being admitted and adjudicated on merits in view of the discretion vested in your Honour under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 and the decision of the Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT : 229 ITR 383.

79. Having heard the rival contentions on this petition, we are inclined to admit the additional ground of appeal as it is purely a legal issue as to whether or not the liability borne by the assessee, under section 201 and which is not recovered from the recipients of payments without deduction of tax at source, is deductible in computation of assessee's income. However, as it involves factual verifications, we are not inclined to deal with the same, on merits, at this stage. We, therefore, deem it fit and proper to remit this issue to the file of the Assessing Officer to adjudication de novo, by way of a speaking order, in accordance with the law and after giving a fair and reasonable opportunity of hearing to the assessee. The assessee is directed to make all such legal and factual submissions on this aspect, as he may deem appropriate, and the

Assessing Officer shall adjudicate on the same by specifically dealing with the same by way of a speaking order. We direct so.

80. The additional ground of appeal, as set out above, is thus admitted in principle but remitted to the file of the Assessing Officer for adjudication on merits.

81. In the result, the appeal is partly allowed in the terms above. Pronounced in the open court today on 11th day of March, 2014.

Sd/xx	***Sd/xx***
Rajpal Yadav	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

New Delhi, the 11th day of March, 2014

Copies to : *(1) The appellant*
(2) The respondent
(3) D R P
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi