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

[Coram: Justice P P Bhatt (President)
and Pramod Kumar (Vice President)]

ITA Nos: 7523/Mum/2014, 5827/Mum/2015, and 484/Mum/2017
Assessment years: 2010-11, 2011-12 and 2012-13

Bennett Coleman & Co Ltd ……………….**Appellant**
(As successor to Times Infotainment Media Limited)
The Times of India Building, Dr D N Road,
Mumbai 400 001 [PAN: AACB4373Q]

Vs

Deputy Commissioner of Income Tax
Circle 1(3), Mumbai ..……………**Respondent**

Appearances by
J D Mistry, Sr Advocate *along-with*
Hiten Chande and Pratima D'Souza *for the appellant*
Anand Mohan, Commissioner (DR), *for the respondent*

Date of concluding the hearing : August 11 and 18, 2021
Date of pronouncement of the order : August 30, 2021

O R D E R

Per bench:

1. These three appeals pertain to the same assessee, involve some common issues and were heard together. As a matter of convenience, therefore, both of these appeals are being disposed of by way of this consolidated order.

2. So far as the appeal for the assessment year 2010-11, which is directed against the order dated 31 October 2014 passed by the Assessing Officer in the assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act 1961 for the assessment year 2010-11 is concerned, grievances raised in this appeal are as follows:

> **Based on the facts and in the circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the Assistant Commissioner of Income-tax- 1(3), Mumbai ['Learned AO'], under Section 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 (Act) ('Assessment order'), in pursuance of the**

directions issued by Dispute Resolution Panel -Il ('Hon'ble DRP), Mumbai, on the following grounds:

On the facts and in the circumstances of the case and in law, the learned AO/ Transfer Pricing Officer (TPO) has:

General ground challenging the transfer pricing adjustment

1. erred in determining the total income of the Appellant at Rs. 44,01,17,420/- as against loss of Rs. 34,41,181/- as reported in the revised Return of Income filed by the Appellant.

Transfer pricing adjustment on the funds provided to TIML Global Limited (hereinafter referred as 'AE')

2. erred in computing the arm's length interest with respect to the alleged international transaction of provision of loan to the AE resulting in an addition of Rs.44,35,58,600/- to the total income of the Appellant.

No income arising from the alleged loan transaction

3. erred in not considering the fact that no income has been derived from the alleged loan transaction and accordingly transfer pricing regulations cannot be applicable to the said transaction.

Transaction akin to stewardship activity

4. erred in not appreciating the fact that the alleged loan was given for the purpose of acquiring a controlling stake in company outside India, which was in the same business of the Appellant, and hence the transaction was akin to stewardship activity which does not require any benchmarking analysis.

5. erred in not appreciating the fact that the impugned loan transaction was entered into purely out of commercial expediency and hence the intent of giving loan to the AE should be taken into consideration.

Funds to AE are quasi-equity

6. erred in not accepting the fact the funds provided by the Appellant to its AE a nature and hence the question of charging any interest on the same does not arise

Funds provided to the AE out of funds received from holding company

7. erred in not considering the fact that the Appellant has remitted funds to its AE out of the funds received from its holding company.

Arm's Length analysis not possible

8. erred in not appreciating the fact that the subject transaction of provision of funds by the Appellant to its AE cannot be compared to a simpliciter loan transaction between a financial 1nstitution and its client and accordingly, arm's length analysis using CUP is not possible.

No shifting of profits outside India

9. erred in concluding that there has been shifting of profits outside India.

Incorrect reliance on Thin Capitalization rules

10. erred in law and in facts while applying the 'Thin Capitalisation' concept to the Appellant' s case.

Arm's length computation

11. erred in law and in facts in considering 7% being State Bank FD rate plus risk premium of 3.5% ie 10.5% as the arm's length interest rate for imputation of notional interest on the alleged loan transaction.

12. erred by not appreciating that the arm's length interest rate in the present facts of the case should be Nil.

13. without prejudice to the above, erred in not appreciating the fact that certain adjustments would be required to be made before applying commercial Bank FD rates.

14. without prejudice to the above, erred in further adjusting Bank FD rate with risk premium.

15. without prejudice to the above, erred in rejecting the LIBOR rates as the arm's length interest rate for benchmarking of the alleged loan transaction as the said loan was given in foreign currency.

16. erred in considering, on a without prejudice basis, EURO LIBOR instead of the GBP LIBOR which was available.

17. erred in adopting ad-hoc 400 basis points over EURO LIBOR as LIBOR plus rate.

18. erred in law and in facts by concluding that LIBOR should be further adjusted for additional ‘Transaction Cost' of 3% per annum referring to certain Reserve Bank of India norms for forward contracts which are not applicable to the Appellant's case.

19. erred in concluding that the LIBOR should be further adjusted by 100 basis points towards ‘Adjustment for Security'.

Levy of interest under section 234B of the Act.

20. erred in levying interest under section 234B of the Act.

Initiation of penalty proceedings under section 271(1)(c) of the Act

21. erred in initiating penalty proceedings under section 271(1)(c) of the act.

3. While ground nos 1, 20 and 21 are general in nature and, as fairly accepted by the learned counsel, do not require any specific adjudication by us, all the remaining grounds of appeal, i.e. ground nos. 2 to 19, are essentially arguments in support of the core grievance that an interest-free debt funding of an overseas company in the nature of a special purpose vehicle (SPV), with a corresponding obligation to use it for the purpose of acquisition of a target company abroad, can not be compared with a loan simpliciter, and be, subjected to an

arm's length price adjustment, on the basis of Comparable Uncontrolled Price (CUP) method accordingly. The issue in dispute is an ALP adjustment of Rs 43.89 crores on account of notional interest on a loan stated to be of this nature by the assessee company to its fully owned foreign subsidiary, which is used as an SPV for overseas acquisitions.

4. Coming to the appeal for the assessment year 2011-12, which is directed against the order dated 26th November 2015 passed by the Assessing Officer in the assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act 1961 for the assessment year 2011-12, grievances raised in this appeal are as follows:

> **Based on the facts and in the circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the Deputy Commissioner of Income-tax 1(3)(2) (learned AO), under Section 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 (Act') ('Assessment order'), in pursuance of the directions issued by Dispute Resolution Panel -II Hon'ble DRP), Mumbai, on the following grounds:**
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> **On the facts and in the circumstances of the case and in law, the learned AO based on directions of Hon'ble DRP has:**
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> **General ground challenging the transfer pricing adjustment**
>
> **1. erred in determining the total income of the Appellant at Rs. 18,34,74,701/- as against income of Rs.13,22,608/- as reported in the Return of Income filed by the Appellant.**
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> **Transfer pricing adjustment on the funds provided to TIML Global Limited (hereinafter referred as 'AE'**
>
> **2. erred in not considering the fact that no income has been received or accrued from the alleged loan transaction and accordingly, no transfer pricing regulations can be made applicable to the same. Consequently, the learned AO's reference of the Appellant's case to the learned transfer pricing officer ('learned TPO') and the consequential transfer pricing adjustment, of interest on funds provided by the Appellant to its Associated Enterprise ('AE'), of Rs 18,21,52,093/- made to the total income of the Assessee for AY 2011-12 is not in accordance with the transfer pricing regulations.**
>
> **No income arising from the alleged loan transaction**
>
> **3. erred in not considering the fact that no income has been received or accrued from the alleged loan transaction and accordingly, transfer pricing regulations cannot be applicable to the said transaction.**
>
> **Transaction akin to parent support/ stewardship activity**
>
> **4. erred in not appreciating the fact that the alleged loan was given to the AE for the purpose of acquiring a controlling stake in company outside India, which was in the same business of the Appellant, and hence the transaction was akin to stewardship activity which does not require any benchmarking analysis.**

5. erred in not appreciating the fact that the funds were provided by the Appellant to its AE to fulfil its own obligation and the sole purpose of setting up the AE was for effecting the acquisition.

6. erred in not appreciating the fact that the impugned loan transaction was entered into purely out or Commercial expediency and hence the intent of giving loan to the AE should be taken into consideration.

Funds to AE are quasi-equity

7. erred in not accepting the fact the funds provided by the Appellant to its AE are quasi-equity in nature and hence the question of charging any interest on the same does not arise.

Funds provided to the AE out of funds received from holding company

8. erred in not considering the fact that the Appellant has remitted funds to its AE out of the interest free funds received from its holding company.

Arm's Length analysis not possible

9. erred in not appreciating the fact that formation of Special Purpose Vehicles ('SPVs) always happens between related parties and therefore comparing the arrangements between the parent and its SPV vis-à-vis a third party arrangements is not logical and accordingly, arm's length analysis using Comparable Uncontrolled Price (CUP') Method is not possible.

10. erred in not appreciating the fact that the subject transaction cannot be compared to a simpliciter loan transaction between a financial institution and its client.

No shifting of profits outside India

11. erred in concluding that there has been shitting of profits outside India.

Incorrect reliance on Thin Capitalization rules

12. erred in law and in facts while applying the "Thin Capitalization' concept to the Appellant's case

Arm's length computation

13. erred by not appreciating that the arm's length interest rate in the pres ent facts of the case should be Nil.

14. Without prejudice to the above, erred in adopting ad-hoc 300 basis points (bps') over LIBOR as arm's length rate interest rate for the purpose of calculation of notional interest.

15. Without prejudice to the above, erred in applying the interest rate LIBOR + 300 bps on INR value of the funds provided instead of the GBP value of the funds.

Levy of interest under section 234B and 234D of the Act.

16. erred in levying interest under section 234B and 234Dof the Act.

Non receipt of Refund of Rs. 1,48,480/-

17. erred in stating in the computation of income (I.T.N.S-150A) that a refund of Rs. 148,480/- has been issued but the Appellant had received no such refund order.

Initiation of penalty proceedings under section 271(1)(c) of the Act

18. erred in initiating penalty proceedings under section 271(1)(c) of the act.

5. Coming to the appeal for the assessment year 2012-13, which is directed against the order dated 22nd December 2016 passed by the Assessing Officer in the assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act 1961 for the assessment year 2011-12, grievances raised in this appeal are as follows:

Based on the facts and in the circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the Income Tax Officer - 1(3)(3) (learned AO') under Section 143(3) read with Section 144C(13) of the Income-tax Act, 1961 (Act') (Assessment order) issued subsequent to the directions issued by the Honourable Dispute Resolution Panel 1 (Hon'ble DRP'), Mumbai, on the following grounds:

On the facts and in the circumstances of the case and in law, the learned AO based on directions of the DRP:

Ground challenging the jurisdiction of the learned AO

1. erred in passing the order since pursuant to the merger of Times Infotainment Media Limited (TIML India') with Bennett Coleman and Company Limited ('BCCL') the learned AO did not have jurisdiction on the Appellant.

General ground challenging the transfer pricing adjustment

2. erred in determining the total income of the Appellant at Rs. 15,27,06,230 as against loss of Rs. 8,89,388 as reported in the Return of Income filed by the Appellant.

Transfer Pricing Adjustment on share application monies pending allotment and interest-free funds provided to TIML Global Limited (hereinafter referred to as the 'AE')

3. erred in not considering the fact that no income has been received or accrued from the alleged international transactions entered into by the Appellant and accordingly, transfer pricing regulations cannot be made applicable in the Appellant's case. Accordingly, the learned A0's reference of the Appellant's case to the Joint Commissioner of Income Tax - Transfer Pricing 4(2), Mumbai ('learned TPO') and the consequential transfer pricing adjustment Rs. 15,35,95,617 made to the total income of the Appellant for AY 2012-13 is not in accordance with the transfer pricing regulations.

Adjustment made with respect to the funds provided by way of preference/equity share capital and of outstanding funds into preference/equity share capital

Re-characterization of a transaction is bad in law

4. erred in re-characterizing the transaction of preference/ equity share capital as a deemed loan transaction for such period that shares were not allotted against preference/ equity share application monies.

5. erred by making an adjustment to the total income of the Appellant, since the determination of ALP in respect of the equity/ preference share application monies pending allotment is bad in law and should be quashed.

No income arising from funds provided by way of preference/equity share capital and conversion of outstanding funds into preference/equity share capital

6. erred in not considering the fact that no income has been received or accrued from the transaction of preference/ equity capital and transfer pricing regulations cannot be applied to the said transaction.

Incorrect reliance on MCA Notification

7. erred in relying on the Ministry of Company Affairs (CMCA') notification for determination of a reasonable period for allotment of shares i.e. 60 days and failed to appreciate that the said MCA notification is only applicable to Indian companies and not to a UK based company (i.e. TIML Global).

8. without prejudice to grounds above, erred in not granting a benefit of 60 days to the Appellant while computing notional interest for delay in issue of equity or preference shares, as the learned AO/ TPO himself had relied on the MCA circular which provides a period of 60 days for allotment of shares and based on which he treated such delayed allotment beyond 60 days as deemed loan.

Adjustment made in respect to notional interest on outstanding deposits

No income arising from the alleged loan transaction

9. erred in not considering the fact that no income has been received or accrued from the alleged loan amounting to INR 1,38,40,43,509 and accordingly, transfer pricing regulations cannot be applicable to the said transaction.

Transaction akin to parent support/ stewardship activity

10. erred in not appreciating the fact that the alleged loan was given to the AE for the purpose of acquiring a controlling stake in company outside India, which was in the same business of the Appellant, and hence the transaction was akin to stewardship activity which does not require any benchmarking analysis.

11. erred in not appreciating the fact that the funds, not being in the nature of loan, were provided by the Appellant to its AE to (i) fulfill its own obligation and the purpose of setting up the AE in the UK was for effecting the acquisition; and (ii) by not considering the fact that post acquisition of Virgin Radio, additional funds/ deposits were provided to the AE to meet s

Working capital needs, as bad economic conditions prevailed and the AE incurred losses.

12. erred in not appreciating the fact that the alleged loan transaction was entered into purely out of commercial expediency and hence the intent of giving loan to the AE should be taken into consideration.

Funds to AE are quasi-equity

13. erred in not accepting the fact that the funds/ deposits provided by the Appellant to its AE are quasi-equity in nature and hence, the question of charging any interest does not arise.

Funds provided to the AE out of funds received from holding company

14. erred in not considering the fact that TIML India has remitted funds to its AE out of interest- free funds received from its holding company.

No shifting of profits outside India

15. erred in not appreciating the fact that there was no intention of shifting of profits outside India.

Analysis undertaken to arrive at the transfer pricing adjustment on share application monies pending allotment and interest-free funds provided to TIML Global Limited

Arm's Length analysis not possible

16. erred in not appreciating the fact that formation of Special Purpose Vehicles ('SPVs') always happens between related parties and therefore comparing the arrangements between the parent and its SPV vis-à-vis a third party arrangements is not logical and accordingly, arm's length analysis is not possible.

17. erred in not appreciating the fact that the subject transaction cannot be compared to a simpliciter loan transaction between a financial institution and its client.

Computation undertaken to compute the transfer pricing adjustment by the learned AO

18. erred by not appreciating that the arm' s length interest rate in the present facts of the case should be Nil.

19. erred in not appreciating that in the event the Appellant had appointed a third party to undertake the said acquisition, such third party would not have paid interest for facilitating a transaction on behalf of the Appellant. On the contrary, the third party would have charged a fee for helping the Appellant execute its business expansion plan and put in place a contractual business structure to protect the Appellant from UK Libel laws.

20. erred by not considering the submissions made by the Appellant against the generic search applied by the learned TPO without providing an opportunity to the Appellant to examine the same, for arriving at the LIBOR plus spread as arm's length interest rate.

21. without prejudice to grounds above, erred in not considering the search provided by

Appellant for arriving at the LIBOR plus spread.

22. without prejudice to grounds above, erred in not applying the parameters for arriving at a LIBOR plus arm's length spread for charging notional interest.

23. without prejudice to grounds above, erred in applying LIBOR of 1.39% and 1.213% for determining the interest rate for FY 2010-11 and FY 2011-12 respectively instead of the actual LIBOR rate of 0.578% and 0.687% for the respective years.

24. without prejudice to grounds above, erred in computing interest on the deposits outstanding as on 1 April 2011 by considering CUP rate for FY 2010-11 i.e. 4.81% instead of 4.36% determined for FY 2011-12.

Incorrect amounts considered for determination of notional interest adjustment

25. without prejudice to grounds above, erred in considering the INR value of the funds provided for the purpose of calculation of interest without appreciating the fact that LIBOR rates are to be applied to the foreign currency denominated value of funds. In doing so the learned TPO has disregarded the transactions as appearing in the Appellant's books of account which is contrary to the provisions of the law.

26. without prejudice to grounds above, erred in not following the directions of the Hon'ble DRP, to rework the interest chargeable on the alleged loan after taking into consideration the effect of the foreign exchange gain/loss amounting to Rs. 70,59,75,503 as accounted by the Appellant in its books of accounts.

Other Grounds

27. on the facts and in the circumstances of the case and in law, erred in not considering the submission of the Appellant claiming the amount of loan written off (of INR 5 crores), which was given to its wholly owned subsidiary, as business expenditure in computing the Appellant's total income for AY 2012-13.

Levy of interest under Sections 234A, 234B and 234D of the Act

28. erred in levying interest under Sections 234A, 234B and 234D of the Act.

6. While ground nos. 1, 2 and 28 are general in nature, and ground nos. 27 is with respect to additional claim for consideration- which we will deal with separately , all the remaining grounds of appeal are essentially challenging the ALP adjustment in respect of interest-free debt funding of the SPV of the assessee.

7. While ground nos. 1 and 18 are general in nature, and ground nos. 16 and 17 are not pressed before us, all the remaining grounds of appeal are essentially challenging the ALP adjustment in respect of interest-free debt funding of the SPV of the assessee. Learned representatives fairly agree that whatever we decide in the assessee's appeal for the assessment year 2009-10, which is heard along with this appeal, will apply *mutatis mutandis* in this appeal as well.

8. Vide our order of even date, for the assessment year 2009-10, we have decided the above issue in favour of the assessee, and, while doing so, observed as follows:

2. The core issue requiring our adjudication, in this case, is whether an interest-free debt funding of an overseas company in the nature of a special purpose vehicle (SPV), with a corresponding obligation to use it for the purpose of acquisition of a target company abroad, can be compared with a loan simpliciter, and be, subjected to an arm's length price adjustment, on the basis of Comparable Uncontrolled Price (CUP) method accordingly,. The issue in dispute is an ALP adjustment of Rs 44.26 crores on account of notional interest on a loan stated to be of this nature by the assessee company to its fully owned foreign subsidiary, which is used as an SPV for overseas acquisitions.

*3. To adjudicate on this issue, a few material facts, as discernible from material on record, need to be stated. The assessee before us is a company now merged in Bennett Coleman & Co Ltd, the flagship company of a well-known Indian media group- commonly known as 'Times Group'. At the relevant point of time, the assessee company, then known as Times Infotainment Media Ltd (**TIML-India**, in short), was a fully owned subsidiary of Bennett Coleman & Co Ltd and was engaged, inter alia, in the radio broadcasting business. When the Times Group decided to expand its wings in the radio broadcasting business and acquire overseas companies engaged in this line of business, as is stated, it was considered commercially expedient to make these investments through the assessee company. A public listed company in the United Kingdom, by the name of Scottish Media Group plc (**SMG-UK**, in short), wanted to disinvest in its radio broadcasting business, and that is the reason it put to auction its entire shareholding in Virgin Radio Holdings Limited, UK, (**Virgin Radio**, in short) which was held through SMG's wholly-owned subsidiary Ginger Media Group Ltd, UK. (**Ginger-UK**, in short). TIML-India was one of the successful bidders in this auction. The assessee was then invited to participate in the 'final proposal' phase of this disinvestment deal. A final proposal dated 19th March 2008 was submitted by the TIML-India. This offer, at point no. 5, specifically stated, under title 'Identity of the shareholders (with immediate and ultimate ownership)' that the purchasing company will be "an SPV formed specifically for the purpose of acquiring Virgin Radio", which is "100% owned by TIML" and that "the immediate and ultimate shareholder of TIML is Bennett Coleman & Co Ltd". In point no. 6, it was further stated that "the transaction will be 100% equity-financed from internal resources of TIML/BCCL" and that "no further financing is required given the size of this transaction relative to the TIML/BCCL group". What followed is an exclusivity agreement dated 3rd April 2008 with respect to possible sale by Ginger Media Group Ltd, one of SMG plc's wholly-owned subsidiaries to TIML-India "the entire share capital of Virgin Radio Holdings Ltd", which ultimately culminated in, on 30th May 2008, a sale agreement was entered into between Ginger UK, SMG-UK, TIML-India and a company by the name of TML Golden Square Ltd, UK (**TIML Golden**, in short). The TIML Golden was thus evidently the SPV (special purpose vehicle company) for the purpose of acquiring Virgin Radio. TIML was initially incorporated by a third party, Huntsmoor Nominees Limited, with a paid-up capital of £ 1, on 22nd May 2008, and it was subsequently acquired by TIML, on 30th May 2008, by purchasing the £ 1 share. Subsequently, one more UK based SPV came into the picture as the assessee acquired another TIML Global Limited (**TIML Global**, in short), a company incorporated with a £ 1 paid-up capital by Huntsmoor Nominees Limited, on 13th June 2008. This company was acquired by TIML-India, by purchased the £ 1 share on 16th June 2008. On acquisition of TIML Global, and with a view to make TIML Golden a step down subsidiary, the only £ 1 share of TIML Golden, which was held by TIML-India, was transferred to TIML Global. TIML Golden and TIML Global, at this point of time, were typical £ 1 companies without substance- which were to be used special purpose vehicles for the acquisition of Virgin Radios. This transaction also took place on 16th June 2008 itself. As a result of these transactions, TIML Golden became a wholly-owned subsidiary of TIML Global, TIML Global became a wholly-owned subsidiary of TIML, and, TIML anyway was already a wholly-owned subsidiary of BCCL. With this structure in place and the deal having*

been finalized, the flow of funds started to complete the transaction. TIML received Rs 388.85 crores as interest-free deposits from its holding company, i.e. BCCL, and Rs 100 crores as a subscription for 1% non-cumulative preference shares. TIML-India then remitted UK £ 56,824,316 (UK £ 1.2 million for equity, and balance UK £ 55.824 million as an interest-free loan to TIML-Global on 27th June 2008. Once this amount of UK £ 56.82 million was received by TIML-Global, it paid UK £ 53.51 million, on that day itself, on behalf of TIML-Golden, for the acquisition of Virgin Radio shares, and the balance amount of TIML-Golden for other acquisition-related costs. The acquisition of shares in Virgin Radios by TIML-Golden was completed on 30th June 2008. A further payment of UK £ 3,75,000, as an interest-free loan, was made by TIML India to TIML Global for the working capital costs. It was in this backdrop that form 3CEB filed by the assessee company disclosed the following transaction with its AE: "Amount remitted Rs 477,10,41,750".

4. When the aforesaid transaction came up for scrutiny before the Transfer Pricing Officer, as a result of the reference under section 92CA(1) having been made to him, the Transfer Pricing Officer was of the considered view that the amount has been as a loan by the assessee in its annual return, and, therefore, the benchmarking of this loan transaction is required to be done as "an independent entity would have charged interest on such a transaction". The plea of the assessee that this activity was in the nature of the stewardship activity was rejected. The claim of the assessee that the loan was in the nature of quasi-equity and as it was for the purpose of making strategic investments for and on behalf of TIML India and the Times Group, and, therefore, the arm's length price adjustment for the interest was not warranted. This plea did not find favour with the TPO. He was of the view that once the transaction is characterized as a loan, in an arm's length situation, interest will have to be charged for the same and that any non-charging of interest, in such a situation, will invite ALP adjustment. As for the claim that the assessee had received interest-free funds from its parent company and paid over the same to its wholly-owned subsidiary, for the purposes of making a strategic investment on behalf of the Group, while the Transfer Pricing Officer noted that the assessee had paid only Rs 13,80,991 as interest during the entire year, he observed that in an arm's length scenario. "not only the would the loaning party meet the cost of serving its loan, it would build a profit element into the rate to be received". As regards the reliance on Reserve Bank of India's approval for the character of remittance, the Transfer Pricing Officer was of the view that the "RBI's approval does not put a seal of approval on the true character of the transaction from the perspective of transfer pricing regulations". The Transfer Pricing Officer also rejected the plea that since the funds were given for a specific purpose, no interest can be attributed to the same even in an arm's length situation. The TPO was of the view that "(a) the assessee has provided loan to its subsidiary without adequate arm's length compensation; (b) the loan is unsecured as the borrower did not provide any security; (c) lending or borrowing is not main business of the assessee; and (d) in an uncontrolled transaction like this between the unrelated parties, interest would have been charged taking into account creditworthiness of the subsidiary, risks, security or any other consideration relevant for deciding financial solvency of the borrower". The TPO then proceeded to adopt the "CUP method" for determining the arm's length price. It was also observed that "it can be reasonably concluded that the interest rates prevalent in India are relevant for benchmarking outbound foreign currency loan is extended by the assessee to its AE, mainly for the reason that source of loan is Rupees, and Rupees are then converted into GBP the time of advancing a loan and the benchmarking is for the loan advanced and not for conversion of loan from Rupees to GBPs". As for the applicability of LIBOR rate, the stand of the TPO was that "LIBOR does not apply to the transactions originating in currencies, such as INR, i.e. a currency which is not the LIBOR basket. The discussions about the rate at which benchmarking of interest is done, not being relevant for the present purposes, is not being referred to. Suffice to say that the Transfer Pricing Officer thus proceeded to

benchmark this loan transaction as a transaction of unsecured loan, and taking the arm's length interest @ 13% on the remittance of Rs 477.10 crores, and the TPO computed the arm's length interest at Rs 47,20,68,074. When this disallowance was proposed by the Assessing Officer, the assessee raised the objections before the Dispute Resolution Panel, but without any success. Learned DRP confirmed the action of the authorities below in principle but reduced the quantum of ALP adjustment by altering the benchmarking rate to 12.25% and correcting the period for which the loan was given. While doing so, the DRP observed as follows:

> *3.4.1 Brief fact of the case is that the assesses M/s. TIML India is a company having investment in companies engaged in private FM radio broadcastings. It also has investment in film entertainment business and event management and experiential marketing business through investment in its subsidiary. During the period under consideration, the assessee made maiden entry in the international media business through participation in an auction m March, 2008 for its radio business in the UK. The proposed acquisition of Virgin Radio was for and by TIML India. Therefore, the assessee claimed that the potential sales of Virgin Radio was strictly between SMG Plc and TIML India, though the same got executed through SPV created for effecting the acquisition. The assessee contended that since a direct acquisition by TIML India would have imposed additional legal obligation in the UK on TIML -India, It was decided to effect the acquisition through SPV which are 100% equity financed from the international resources of TIML India / BCCL.*
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> *3.4.2 On the other hand, the Ld. TPO has given the fund flow chart of the assessee at Pg. 5 para 6.2 of his order which demonstrates that the assessee has given interest free loan to its AEs. In response to the show cause given by the TPO the assessee reiterated his submissions to the effect that TIML made investment in Virgin Radio via TIGL and TIML Golden for expanding its presence in the UK radio market. It further submitted that FEMA, 1999 permits an Indian company to make an investment in its overseas WOS through a mix of equity loan and provision of guarantee. The loan provided by the parent is merely an arrangement enabling the subsidiary to avail funding through debt rather than shareholders equity and therefore the same partakes the character of quasi equity. The assessee claimed that the debt equity ratio of the wholly owned subsidiary and adequacy of capitalization is determined by the parent. Since the subsidiary capital structure is factually and economically controlled by the parent, any action taken by the parent to supplement or strengthen the creditworthiness are integral part of equity support which parent provides to the subsidiary.*
>
> *3.4.3 Thus, there seems to be no dispute regarding the treatment of fund in this case of the TPO and the assessee. The only point of dispute is that the Ld. TPO has obtained that though the assessee's stated intention was to invest in the equity, the actual mode adopted by it is that of loan. Once it is accepted by the assessee that it has given loan to the AE, the only possible treatment for the transaction has to be to treat it as a loan to the AE. The Ld. TPO has also pointed out that the assessee itself has referred this transaction as loan in its annual report. In the opinion of the ld. TPO, any independent entity would have charged interest on such transactions.*
>
> *3.4.4 Thus, it is seen that, both the assessee and the TPO have accepted the fund to be a loan. However, the assessee has contended that significantly the fund is equity in nature. In our considered opinion, there is no need to look beyond the proximate nature of funding and the purported nature of the same while doing the transfer*

pricing study. It is not material whether the asssessee could have contributed to the AE in any farm other than the loan. It is stated position that the assessee advanced the loan to the AE for which it did not charge any interest. As long as the fund stood as loan in the AE's books and the assessee's books, the law not only permitted but required the TPO to undertake transfer pricing adjustment in respect of the transaction treating the same as loan. The ld. TPO has further differentiated the risk reward matrix of loan and equity transaction at para 6.5.2 to conclude the transaction as the loan transaction. Under thee circumstances, we are of the considered opinion that the Ld. TPO and AO have correctly treated the transactions as loan and conducted the TP study based on this finding.

3.5 This brings us further to the issue of quantification of the adjustment on this account. The assessee has contended before the TPO and now again before the DRP that LIBOR rates should be considered for benchmarking outbound loans from India. During the course of hearing the assessee was required to submit the working of the L1BOR rate along with an appropriate spread. It was stated that TIML India funded its AE TIML Global with GBP 55,999,316 on 27/6/2008. Average rate of six months of GBP LIBOR for the period June, 2008 to March, 2009 was 4.515%. As regards the premium over LIBOR, the assessee relied on ECB search. The arithmetic mean of the spread worked out to 102 basis point. Accordingly, it was claimed that LIBOR plus for this tranche worked out to 5.535%.

3.5.1 As regards the funding of GBP 375,000 on 19/9/2008, the six months GBP LIBOR for the period September, 2003 to March, 2009 was 3.861%. ECB search yielded 102 basis points as premium. Accordingly, the LIBOR plus for this tranche worked out to 4.881%.

3.5.2 This working given by the Ld. AR of the appellant is in contradiction to the working furnished by the Ld. TPO at para 6.5.7 to 6.5.11. There is substance in Ld. TPO's contention that the assessee has provided loans to its AE without adequate arm's length compensation. Subsidiary has not given any security. If it was an uncontrolled transaction between unrelated parties, interest would have been charged taking into account creditworthiness of the subsidiary and associate risks and securities.

3.5.3 As regards interest rate, the TPO has considered the rate of 10% p.a., which is also the rate paid to BCCL for a short term borrowing. He further added risk premium of 3% to cover risk on international transaction including risk from foreign exchange fluctuation. Accordingly, the TPO has charged interest at the rate of 13% p. a. In this connection, the assessee submitted without prejudice that the notional interest should not be charged on the outstanding dues, that even if the interest is to be charged, it should be charged at the LIBOR rate.

3.5.4 As regards premium of 3% the assesses has submitted that between Group entities so there is no credit collection risk. It is stated that as for the year under consideration, there is foreign exchange gain amounting to INR 55,883,891 and in fact no loss, the risk on account of foreign exchange fluctuation is irrelevant.

3.5.5 The TPO has applied 10% p.a. rate which is also the rate of interest paid by the assessee on other loans plus Risk premium of 3% amounting to 13% for charging interest. However, it is seen that the SBI PLR rate for the relevant period is 12.25%. There cannot be a justification for the gross interest rate exceeding the SBI PLR

rate. The assessee's argument is not acceptable as the LIBOR is the rate prevailing for lending or borrowings made by the banks where as when persons other than banks borrow, LIBOR has to be increased by a mark up. The mark up on LIBOR depends upon the credit rating and securities offered by the borrower. The assessee has not furnished any particulars relevant to its AE's credit worthiness. Therefore, application of LIBOR plus rate is not possible. Even if the credit worthiness particulars are provided the assessee has to provide comparable instances of 3rd party with similar credit worthiness procuring loan at LIBOR plus rate. In the absence of any such comparable instances, the LIBOR plus rate as contended by the assessee cannot be applied. As regards application of SBI PLR, it is the rate at which persons other than banks can lend / borrow in India. Further, it is also seen that as per the safe harbor norms recently notified, the rate of interest to be charged on loans is SBI PLR. Though safe harbor norms are not applicable in this year, the same shows the legislative recognition given to the PLR for the purpose of ALP determination. Therefore, the action of the AO for charging interest exceeding that rate cannot be approved. Accordingly, the AO is directed to re-compute the adjustment by applying the rate of 12.25%.

4. The assessee's contention in ground of objection No.10 is correct in so far as it has pointed out that though TIML India provided funds in two tranches to its AE, the Ld. TPO erred in considering the period of loan for the second tranche of GBP 375,000 from 27/6/08 instead of 19/9/08. The Ld. TPO / AO will cause necessary corrections in this regard besides carrying out the directions in respect of percentage of 12.25% to be applied for working out the interest component.

5. Accordingly, the ALP adjustment was recomputed by the Assessing Officer at Rs 44,26,61,264 and added to the income of the assessee. So aggrieved, the assessee is in appeal before us, and has raised the following grievances so far as the above issue is concerned:

On the facts and in the circumstances of the case and in law, the learned AO based on directions of Hon'ble DRP has:

Transfer pricing adjustment on the funds provided to TIML Global Limited (hereinafter referred as 'AE')

2. erred in computing the arm's length interest with respect to the alleged international transaction of provision of loan to the AE resulting in an addition of Rs. 44,26,61,264 to the total income of the Assessee.

Transaction akin to stewardship activity

3. erred in not appreciating the fact that the alleged loan transaction was given for the purpose of acquiring a controlling stake in company outside India, which was in the same business of the Assessee and hence the transaction was akin to stewardship activity which does not require any benchmarking analysis.

4. erred in not appreciating the impugned loan transaction was entered into purely out of commercial expediency and hence the intent of giving loan to the AE should be taken into consideration.

Funds to AE are quasi-equity

5. erred in not accepting the fact the funds provided by the Assessee to its AE are quasi-equity in nature and hence the question of charging any interest on the same does not arise.

Funds provided to the AE do not bear any cost

6. erred in not considering the fact that Assessee has remitted funds to its AE out of the funds received from its holding company, which have been provided to the Assessee free of cost for the purposes of acquisition.

Arm's length interest rate

7. erred in law and in facts in considering the SBI Prime Lending Rate (PLR) of 12.25% p.a. as the arm's length interest rate for imputation of notional interest on the alleged loan transaction.

8. without prejudice to the above, erred in not appreciating the fact that certain adjustments would be required to the SBI PLR rate considered for arriving at the arm's length interest rate, considering the fact that the impugned loan transaction involved minimal risk in respect of repayment, complete transparency of the transaction and control over the AE's activities.

9. without prejudice to the above, erred in not considering the LIBOR rates as the arm's length interest rate for benchmarking of the alleged loan transaction as the said loan was given in foreign currency.

6. We have heard the rival contentions at considerable length, perused the material on record and duly considered facts of the case in the light of the applicable legal position. The basic plea of the assessee, on which we are deciding this appeal, is the limited scope of application of the CUP method, and whether any commercial interest can be attributed, as an ALP adjustment, to such interest-free debt funding on the peculiar facts of this case. There have been considerable arguments on judicial precedents on the broad proposition that there can not be any arm's length price adjustments, under the transfer pricing legislation, on the interest-free debt funding to the SPVs, but, for the reasons we will set out in a short while, it is not really required to deal with that aspect of the matter. Learned counsel for the assessee has highlighted the peculiar nature of this transaction, emphasized that no interest can be attributed to such funding, particularly when the funds advanced are to be used only in the manner specified and in furtherance of the commercial interests of the assessee rather than the SPV, and submitted that, in any case, it could not be compared with loans simpliciter – as has been done by the authorities below. He has painstakingly taken us through the orders of the authorities below, including the Transfer Pricing Officer and the Dispute Resolution Panel, and made an effort to demonstrate glaring fallacies in the application of CUP method. He has also taken us through a large number of judicial precedents, but then, as we are deciding the matter on the first principles, and none of the judicial precedents come in the way of that exercise, we see no need to deal with all these judicial precedents at this stage. Learned Departmental Representative's basic argument has been that since such funding of SPV is required to be treated as an international transaction, it is required to be benchmarked anyway. On the question of application of CUP on the facts of this case, his plea has been that since the funding is admittedly in the nature of, and described in the books of accounts, as a loan, the interest imputation is inevitable. When learned Departmental Representative was confronted with, what appeared to us, infirmities in the application of CUP method, it was his submission that even if there are some shortcomings in the

determination of the arm's length price, though he maintains that there are no such infirmities in substance, the matter may be remitted at the assessment stage for fresh adjudication on the determination of arm's length price. He fairly submits that if Indian PLR is not good enough as a benchmark for this loan, in all fairness, at least LIBOR is a good enough benchmarking tool for GBP denominated loan. Learned counsel reiterates his submissions, submits that this transaction is shown as a loan in the books of accounts as that is the only way in which it can shown, under the legal requirements, but then nothing really turns on how the transaction is treated for accounting purposes. Learned counsel for the assessee has vehemently opposed this suggestion and submitted that what is before this Tribunal is an adjudication on the arm's length price adjustment made and confirmed by the authorities below; if this arm's length price adjustment is incorrect, the Tribunal has to delete the same. As for what other remedies are available to the authorities below to correct their mistakes, it is not for the Tribunal to do anything parallel or to override the same. He thus reminds us, in his inimitable subtle way, of our role as a neutral forum and our limitation of not being able to supplement or improve the case of the Assessing Officer and the Transfer Pricing Officer. In addition to these arguments, many other facets of the matter have been argued before us, but then, in our considered view, it is not really necessary to deal with those facets.

7. On a conceptual note, the determination of arm's length price is essentially an effort to neutralize the impact of intra- AE relationship in a transaction between two associated enterprises as also the impact of controlled conditions in such a transaction. In other words, the entire ALP ascertainment exercise is to determine if a hypothetical or real but same or materially similar transaction was to take place between two independent enterprises in uncontrolled conditions, whether such a hypothetical transaction would have been any different vis-à-vis the subject transaction entered into two associated enterprises, and, if so, to quantify the impact of such variations.

*8. While Section 92(1) that any income arising from an international transaction, which essentially refers to the transactions with associated enterprises- under section 92B, shall be computed "**having regard to the arm's length price**", Section 92 F (ii) provides that "**arm's length price means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions**". It could thus be a historical price, which is applied in a transaction in the uncontrolled transaction, or a hypothetical price "proposed" to be applied in a transaction which is yet to take place or a transaction which is purely hypothetical, or even an entirely imaginary, formula-based, price- as is inherent in the scheme of the computation of ALP by methods permitted under section 92C- which includes indirect methods as well. We will come back to this aspect a little later.*

9. It is interesting to take note of the expression "uncontrolled conditions" in Section 92F(ii), and that is in addition to the transaction being "between persons other than associated enterprises". One way of looking at the impact of expression "controlled conditions" could be that any conditions restricting the plain vanilla nature of that transaction are required to be ignored for the purpose of the ascertainment of the arm's length price. That would mean that not only that we have to assume that the arm's length price has to be a real, hypothetical and imaginary price of the same or similar transaction between independent enterprises but also the price of a transaction in which the 'controlled conditions do not exist. Of course, there could be another school of thought that the expression 'control conditions' essentially refers to a situation in which the parties to the transactions have no control on each other in the sense the parties are not the associated enterprises under section 92 A, and that the fact of the parties to a transaction being associated enterprises, by implication, renders it a transaction in controlled conditions

inasmuch Section 92A(1) and (2) recognizes various situations in which such control or influence would vitiate the purely commercial nature of the transactions. That only incongruity in that approach, incongruity if it is, will be that the expression 'controlled conditions' will then be rendered infructuous, unless viewed as a measure of abundant caution (ex abundanti cautela), inasmuch as Section 92F(ii) specifically refers to the situations in which the transactions are between persons other than associated enterprises. Be that as it may, given the facts of this case in which CUP method is applied, which specifically does not refer to the transaction between independent enterprises separately, and uses the expression ***'uncontrolled transaction'****, rather than* ***'transaction between persons other than associated enterprises*** *(i.e. independent enterprises)* ***in the uncontrolled conditions'****, and the expression 'uncontrolled transaction' on a standalone basis, can reasonably refer to the transaction simply being between independent enterprises, the issue regarding the impact of neutralizing other 'controlled conditions', even if that expression is seen independent of Section 92A, may not really arise, and we need not, therefore, be drawn into this aspect of the matter any further.*

10. Then comes the mechanism through which this arm's length price is to be arrived at. Section 92C(1) lays down the manner in which arm's length price is computed, by providing that ***"the arm's length price in relation to an international transaction shall be determined by any of the following method, being the most appropriate method having regard to the nature of transaction, class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely (a) comparable uncontrolled price method; (b) resale price method; (c) cost plus method; (d) profit split method; (e) transactional net margin method; or (f) such other method as may be prescribed by the Board****". The methodology of computing the arm's length price in this case, as adopted by the TPO, is Comparable Uncontrolled Price (CUP) method, which is explained by rule 10B(1)(a) as follows: "* ***comparable uncontrolled price method, by which,—(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified; (ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market; (iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction 92****."*

11. The destination is thus arm's length price as defined in section 92F(ii), and the means to reach that destination are ser out in the methods of determining arm's length price under section 92C(1), and the path chosen by the Assessing Officer, which is in challenge before us, is CUP method which is defined under rule 10B(1)(a) of the Income Tax Rules, 1962. It is in this light we have to address the issue before us. To ascertain the arm's length price in this case, therefore, the starting point of this exercise is to understand, in the right commercial perspective, the nature of the transaction itself, and then find out the terms of the materially similar transaction in an uncontrolled situation, in the sense it should be between the independent enterprise, and visualize the terms of the materially similar transaction in an uncontrolled situation.

12. It is important to understand the true nature of this transaction because everything hinges on what is the true nature of the transaction in question. The transaction is a remittance of Rs 477.10 crores to a wholly-owned subsidiary for making further payment of the cost of acquisition of a target company in the name of a step-down subsidiary which is fully owned by this fully owned subsidiary of the assessee company. Let us not forget the fact

*that the assessee company was one of the successful bidders in the purchase of the entire equity capital of Virgin Radios, which was held by Ginger Group plc UK- a wholly-owned subsidiary of the Scottish Media Group plc. Upon carrying the due diligence, and completion of other prerequisite steps, the assessee makes a final proposal, on 10th March 2008, with respect to the acquisition of Virgin Radios from Ginger Group plc UK, when TIML Global UK was not even in existence. TIML Global, the AE to which the remittance in question is made, was incorporated on 13th June 2008 in the UK and acquired by the assessee on 18th June 2008. Yet this final offer states that an SPV is formed especially for the purpose of acquiring Virgin Radios, and this SPV will be entirely funded from internal resources of the assessee company and its Indian parent company. Clearly, therefore, the agreement to acquire the Virgin Radios was reached much before the AE in question, i.e. TIML-Global, even came into existence, and the AE in question, i.e. TIML-Global, was used as a medium to acquire Virgin Radios. It is not thus a loan simpliciter to TIML-Global, but it is in the nature of an advance to TIML-Global with a corresponding obligation to use the funds advanced in the manner specified. The entire funds so remitted to the TIML-Global UK were spent by TIML-Global UK on the acquisition of Virgin Radios UK for TIML-Golden UK, a step-down subsidiary, and this end-use of funds remitted was essentially an integral part of the entire transaction. The role of the assessee company, though technically described as 'purchaser's guarantor in the agreement dated 30th May 2008, is so foundational and critical that the said agreement, in paragraph 22.1, states that "**In consideration of the seller entering into this agreement, …(the TIML-India), as primary obligor and not merely as surety, unconditionally and irrevocably guarantees to the seller the proper and punctual performance of the purchaser's obligations under this agreement and the transaction documents, including, without limitation, due and punctual payment of any sum which the purchaser is liable to pay**". The assessee company is into the radio broadcasting business, and, much before even the AE came into existence, the assessee company had bid for, and successfully bid for, the target company, which was eventually acquired by its wholly-owned step-down subsidiary. The acquisition of the target company was thus at the instance of, in furtherance of business interests of the assessee company, and structured by the assessee company. The remittance of funds to TIML-Global was for this limited and controlled purpose, and sequence events and the material on record unambiguously confirm this factual situation- and that is not even called into question by the revenue authorities. The transaction of remittance to TIML-Global cannot, therefore, be considered on a standalone basis and can only be viewed in conjunction with the restricted use of these funds, for the strictly limited purposes, by the TIML-Global.*

13. If at all, therefore, this transaction can be compared with any other transaction, such other transaction can only be for the purpose of making remittance to an independent enterprise with the corresponding obligation to use the funds so remitted for acquiring a target company already selected by, and on the terms already finalized by, the entity remitting the funds. The essence of the transaction is a targeted acquisition and providing enabling funds for that purpose. Such a transaction, in our humble understanding, cannot be equated with providing funds to another enterprise as a loan simpliciter, on a commercial basis, which essentially implies that such a borrower can use the funds so received in such manner, even if subject to broad guidelines for purpose test, in furtherance of borrower's business interests. Ironically, however, that is precisely what the Transfer Pricing Officer has done and has been approved by the Dispute Resolution Panel as well.

14. It is also an admitted position that TIML-Global is a special purpose vehicle. A special purpose vehicle, or SPV as it is commonly called, is an entity that is set up for a special purpose or a special project. SPVs are often used by the promoters of a project or business to isolate the financial or legal risk associated with the project or activity for which

the SPV was set up or because sometimes the activity or project in question requires an entity registered in a specific jurisdiction or specific jurisdictions. The business structuring through SPVs, particularly SPVs structured abroad, could be warranted on account of a variety of commercial and legal considerations, ranging from the comfort level of the outside parties dealing with entities incorporated in certain jurisdictions to the legal framework within which such entities operate, as also to cushion owners of these structures from financial, commercial or legal risk exposures emanating from the transactions that are undertaken through these SPVs. These SPVs are typical, to use transfer pricing terminology, "capital-rich low function entity".

15. As a matter of fact, its difficult to visualize an SPV in isolation with the owner of that structure, as these SPVs carry no financial and other risks, and such risks are assumed by the owner of that structure. It is important to bear in mind the fact that there is a dichotomy in the SPV structure business model in the sense that while risks of a SPV investments are assumed by the owner of the SPV, all the rewards, in whatever form, go to the SPV itself. There is, as such, a clear gap between the entity assuming the risks and the entity getting the rewards of this risk. It is this gap or, to borrow Prof John Prebble QC's terminology-'ectopia', in tax laws that gives rise to the possibilities of profit shifting. As Prof Prebble puts it, in one of his published papers, "Not surprisingly, the greatest opportunities for tax avoidance occur where the ectopia of tax law is most apparent". There has been an effort, consciously or subliminally, to address this ectopia in tax laws in several ways.

16. Of late, in certain jurisdictions and subject to certain conditions, the profits of the SPVs are taxed with the profits of the owner of that structure. Rule 8(1) of the Nigerian Income Tax (Transfer Pricing) Regulations 2018, for example, provides that "A Capital-rich, low-function company, that does not control the financial risks associated with its funding activities, for tax purposes, shall not be allocated the profits associated with those risks and will be entitled to no more than a risk-free return. The profits or losses associated with the financial risks would be allocated to the entity (or entities) that manage those risks and have the capacity to bear them".

17. What this provision does support, as its foundational basis, is the fact that capital-rich low function companies, which SPVs inherently are, despite their legal independence, are not seen in isolation with the companies bearing the related risks, that is, owners of these structures. The transactions between the owner of SPV and the SPV are, in that sense, belong to a genus different from the transactions between lenders and borrowers.

18. There are three fundamental questions that arise in this context- first, whether there can be such a funding transaction between the parties which are not associated enterprises, or, to put it differently, whether there can be valid comparables, under the CUP method, for such a transaction of SPV funding; second, whether if such a transaction is hypothetically possible, what could be the rate of interest in such financing is done in an uncontrolled situation; and, third- if interest is not the arm's length consideration for such funding, what could constitute an arm's length price of such financing.

19. As for the first question, the answer is obvious. Once we have held that transactions between the owner of SPV and the SPV belong to a genus different from the transactions between lenders and borrowers, such transactions between an SPV and the entity creating such an SPV, as long as it is for a specific transaction structured by the owner entity- as in this case, is inherently incapable of taking place between independent enterprise. The moment this kind of funding is done, the relationship between the entity funding the SPV and the SPV will be rendered as of 'associated enterprise' within the meanings of Section 92A(1) as also

92A(2). It is also elementary that the transactions between associated enterprises, even if held to be arm's length in character, cease to be valid comparable under the CUP method. Such a controlled end use of the monies is possible when the lender has functional control over the borrower, and that very control vitiates the arm's length situation. Section 92F(ii), as we have noted earlier, defines arm's length price as a real or hypothetical price in the same or materially similar transaction ***"between persons other than associated enterprises, in uncontrolled conditions****". In the first place, an enterprise and its SPV are inherently associated enterprises. The definition of 'associated enterprises' under section 92A(1) covers "an enterprise which participates, directly or through one or more intermediaries, in the management or control or capital of the other enterprise". An SPV is entirely managed, entirely controlled and entirely owned by the enterprise which sets up the SPV. So far as section 92A(2) is concerned, SPVs are covered by more than one clause as the entire voting power (clause a) and entire share capital (clause b) of the SPV is held by the owner of that SPV, but loan advanced, if the remittance is to be treated as a loan to the SPV, by the owner of the SPV is clearly more than 50% of the book value of the assets owned by the SPV (clause c) at each stage. That is one thing. The other aspect of the matter is that not only the transaction has to be between independent enterprises but also in uncontrolled conditions. When a strict condition about end-use, and that too end-use being decided by the owner of the SPV so much in advance that the SPV was not even in existence when the end-use decision was taken, is an inherent part of the transaction of funds being remitted, this is anything but an uncontrolled condition. Viewed thus, there could indeed be a valid school of thought that the requirement of arm's length standards can, therefore, never be met, under the CUP method, so far as the nature of the present transaction is concerned.*

20. As for the second question, even if one proceeds on the basis that one can assume or hypothesize a transaction similar to SPV funding in a non-AE relationship situation and fiduciary in nature- and such a hypothesis may also have some merits, it is important to bear in mind the fact that interest is compensation for the time value of money in the sense that when lender puts the money at the disposal of the borrower for a certain period, the interest that the borrower pays the lender is compensation for placing the money at the disposal of the borrower for borrower's use during this period. In a situation in which a borrower has sufficient opportunities to gainfully use the funds so placed at his disposal, and the gains from such use are high, interest rates are also high, and when there are no gains from such funds placed at the borrower's disposal, or when the gains from such funds are low or minimal, the interest rate also correspondingly travel south. In a situation, therefore, when the borrower has no discretion of using the funds gainfully, the commercial interest rates do not come into play at all.

21. That brings us to the third question, academic as it may sound at this stage, as to what, hypothetically speaking, could be a reasonable compensation under the CUP method, in an arm's length situation or, to borrow the terminology used in rule 10B(1)(a), 'comparable uncontrolled transaction', for making remittance to another corporate entity, even a special purpose vehicle, when the remitter decides the end-use of these funds in the strictest possible manner. Let us assume, for this analysis, that there is no intra-AE relationship between the two entities (i.e. Indian entity and the overseas entity set up for a particular purpose or project), and these entities are independent of each other. In our humble understanding, when the overseas entity is, from a commercial perspective, a de facto non-entity and it has come into legal existence only for the furtherance of the interests of the company providing the wherewithal, all the gains that such an overseas entity belongs to the Indian company. The SPV in such a situation is no more than a conduit entity. In an arm's length situation, when an SPV is created for some specific project or purpose, therefore, the net gains of that project or purpose must go to the person(s) sponsoring the SPV. The next

logical question then would be as to how does this principle translate into actionable reality. We find inputs from transfer pricing legislation in a developing economy in the African continent. Rule 8(1) of the Nigerian Income Tax (Transfer Pricing) Regulations 2018, which we have referred to and reproduced earlier in this order, throws important light on this aspect. What this rule holds, in plain words, is that an SPV, which does not control the financial risks associated with its funding activities, shall not be allocated the profits associated with those risks, and the profits or losses associated with such risks would be allocated to the owner(s) of the SPV. This approach addresses the dichotomy in the SPV structure business model in the sense that while risks of an SPV investment are assumed by the owner(s) of the SPV, all the rewards, in whatever form, go to the SPV itself, by removing the gap, or ectopia in tax law, between the assumption of risks and the taxation of rewards thereof. It proceeds on the hypothesis that in an arm's length situation, the risks and rewards for the risks go hand in hand, and when someone assumes particular risks, the rewards for that risk cannot be assigned to someone else. The hypothesis underlying such an approach appeals to us, and, in our humble understanding, perhaps it truly reflects the arm's length compensation for the role played by the owner of the SPV in providing all the requisite wherewithal to the SPV to achieve its objectives. Therefore, when the CUP method is to be adopted for ascertaining arm's length price of providing wherewithal to the SPV, for achieving its objectives and purpose, the arm's length consideration thereof could at best be the corresponding gain to the SPV concerned- whether directly or indirectly.

22. To sum up, there cannot be a transaction, between the independent enterprises, of interest-free debt funding of an overseas SPV by its sponsorer; if such a transaction between independent enterprises is at all hypothetically possible, the arm's length interest on such funding will be 'nil'; and, if there has to be an arm's length consideration under the CUP method, other than interest, for such funding, it has to be net effective gains- direct and indirect, attributable to the risks assumed by the sponsorer of the SPV, to the SPV in question.

23. So far as the arm's length consideration for SPV funding, for consideration other than interest is concerned, it is academic in the present case because the entire case of the revenue proceeds on the basis that interest was leviable on this funding, and benchmarking the same on CUP basis. In any event, that aspect of the matter would be wholly academic because, in the present case, the consolidated financial statements of the TIML-Global, which takes into account the financial affairs of its step-down subsidiary TIML-Golden as well, reflect a loss figure. In other words, there is no economic gain to the SPV in the relevant financial period, and, therefore, even going by this theory, the arm's length price of providing funds to the SPV, under the CUP method, would be 'nil'. Except for this arm's length price imputation- if all it can be so imputed under the CUP method, no amount of commercial interest, as in a borrowing simpliciter- whether LIBOR based or PLR based, can be attributed to the funding to the SPVs. The action of the authorities below on this point, thus, is unsustainable in law. Ground nos 2 to 9 are thus allowed in the terms indicated above.

24. As we part with this aspect of the matter, we, however, make it clear that as we deal with the question as to whether the ALP adjustment for interest-free debt funding to the SPV abroad is concerned, we are only concerned about its application under the CUP method as in this case. That cannot be an authority for the proposition that ALP adjustment cannot be made, under any other permissible method under the transfer pricing legislation, in respect of interest-free debt funding to the overseas SPV. The arm's length price is not something which is always from a world of a reality inasmuch as even a price of a hypothetical independent transaction, which will also be a hypothetical price in nature, is taken as arm's length price, and when comparable price based method, or traditional methods- as these are termed,

cannot be pressed into service, transactional profit methods, of computing arm's length price, are pressed into service. Thus, when one is unable to find a comparable independent transaction, real or hypothetical, that is not the end of the road, and there is an arm's length price determination nevertheless, and that is where indirect methods or transactional profit methods such as TNMM (transactional net margin method) and PSM (profit split method), may actually have a critical role to play. The tested party, as is by and large a settled legal position, need not be the assessee and even its AE, when it is least complex party, can be a tested party. There could thus be several ways in which the SVP funding can be benchmarked, and we are not inclined to adjudicate whether or not such a benchmarking is possible. It is so for the reason that, in our considered view, such an adjudication is not really warranted on the facts of this case. In the present case, we are only concerned about the application of the CUP method on the facts of this case. The limited question before us was whether such an adjustment could be made, under the CUP method and on the given facts, in respect to the interest-free debt funding to the SPV. The observations should not, therefore, be construed as an authority for the proposition that no ALP adjustments can be made in respect of the interest-free debt funding to the SPVs under the transfer pricing legislation at all. Similarly, there have been many other facets of the arguments of the learned counsel for the assessee, which may need to be adjudicated in a fit case, but we have not dealt with those arguments because we have decided this issue on a short issue on which both the parties have been heard at length anyway. All these issues thus remain open for adjudication as and when really required.

25. In view of the above discussions, and bearing in mind the entirety of the case, we are of the considered view that the arm' length price, under the CUP method and on the facts of this case, of funding of the SPVs by the assessee company, or providing them with the wherewithal to achieve objectives of the SPVs- which were determined by the commercial exigencies of the assessee company, is 'nil'. We, therefore, delete the impugned ALP adjustment of Rs 44,26,61,264. The assessee gets the relief accordingly.

9. We see no reasons to take any other view of the matter than the view so taken by us in assessee's own case for immediately preceding assessment year. For the sake of completeness, however, we may add that a part of the ALP adjustment here is on account of interest imputation on exchange difference on account of conversion of GBP denominated interest-free funding remittance in INR, and notional adjustment of the subsequent conversions in equity, by converting from GBP to INR. When the base transactions are in GBP, balances reflected on account of exchange difference for such notional conversions cannot be treated as outstanding dues, and, for this reason also, the ALP adjustments on account of interest attributable to resultant exchange difference must stand deleted. In any event, as the very conceptual basis for ALP adjustment for interest, under the CUP method, does not meet our approval and the entire addition stands deleted for this reason also. Respectfully following the order for the assessment year 2009-10, we uphold the plea of the assessee and delete the impugned ALP adjustment of Rs 43,89,25,593, Rs 18,21,52,093 and Rs 15,35,95,617 for the assessment years 2010-11, 2011-12 and 2012-13 respectively. The assessee gets the relief accordingly,

10. That takes us to ground no. 26 in appeal for the assessment year 2012-13, and that is with respect to denial of admission for an additional claim at the stage of DRP on the ground

that such a plea could only be raised by way of a revised return. Learned representatives fairly agree that the issue in covered in favour of the assessee inasmuch as the Tribunal undisputedly has the powers to admit any new issue, whether or not the same is raised before the authorities below. We, therefore, admit the claim with respect to loss of Rs 5 written off by the assessee, and remit the issue to the file of the Assessing Officer for adjudication on merits. That is precisely what the assessee is praying for. The assessee succeeds on this point as well.

11. In the result, all the three appeal are allowed in the terms indicated above. Pronounced in the open court today on the 30th day of August 2021.

Sd/-	**Sd/-**
Justice P P Bhatt	**Pramod Kumar**
(President)	(Vice President)

Mumbai, dated the 30th day of August, 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai