

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

**BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**

**ITA No. 10/MUM/2009
Assessment Year: 2004-05**

ACIT CEN CI-43
6TH Floor, R.No. 659, Aayakar
Bhavan, M.K.Rd.
Mumbai 400 020
PAN No. AAACR 4974P
Appellant

RohaDyechem Pvt Ltd.,
Survoday Mill Compund,
M.P. Mills, Tardeo,
Mumbai-400 034
Vs.
Respondent

**ITA No. 4293, 4294, 4295/MUM/2009
Assessment Year: 2002-03, 2004-05, 2007-08**

ACIT CEN CI-43
6TH Floor, R.No. 659, Aayakar
Bhavan, M.K.Rd.
Mumbai 400 020
PAN No. AAACR 4974 P
Appellant

RohaDyechem Pvt Ltd.,
12, Abhishek BLDG,
303/307, Samual Street,
Mumbai - 3
Vs.
Respondent

**ITA No. 2861/MUM/2009
Assessment Year: 2005-06**

RohaDyechem Pvt Ltd.,
A 44-45, MIDC, 2nd Street, Marol,
Anderi (E), Mumbai- 400 092
PAN No. AAACR 4974 P
Appellant

ACIT CEN CI-43
6TH Floor, R.No. 659,
Aayakar Bhavan, M.K.Rd.
Mumbai 400 020
Vs.
Respondent

ITA No. 6015/MUM/2014
Assessment Year: 2009-10

RohaDyechem Pvt Ltd.,
Plot No. 2, MIDC Andheri (E)
Mumbai-400 093

PAN No. AAACR 4974 P
Appellant

ACIT CEN CI-43
6TH Floor, R.No. 659,
Aayakar Bhavan, M.K.Rd.
Mumbai 400 020

Respondent

ITA No. 5969/MUM/2014
Assessment Year: 2009-10

ACIT CEN CI-43
6TH Floor, R.No. 659, Aayakar
Bhavan, M.K.Rd.
Mumbai 400 020

PAN No. AAACR 4974 P
Appellant

RohaDyechem Pvt Ltd.,
12, Abhishek BLDG,
303/307, Samual Street,
Mumbai - 3

Respondent

ITA No. 2859, 2860, 2862, 2863/MUM/2009
Assessment Year: 2002-03, 2004-05, 2006-07, 2007-08

RohaDyechem Pvt Ltd.,
A 44-45, MIDC, 2nd Street, Marol,
Anderi (E), Mumbai- 400 092

PAN No. AAACR 4974 P
Appellant

ACIT CEN CI-43
6TH Floor, R.No. 659,
Aayakar Bhavan, M.K.Rd.
Mumbai 400 020

Respondent

ITA No.6401/MUM/2008
Assessment Year: 2004-05

RohaDyechem Pvt Ltd.,
A 44-45, MIDC, 2nd Street, Marol,
Andheri (E), Mumbai- 400 092

PAN No. AAACR 4974 P
Appellant

ACIT- 7(3), Aayakar
Bhavan, Mumbai-400
020

Respondent

Assessee by : Snehal J Shah
Revenue by : Dr. Yogesh Kamat, CIT DR/
Samruddhi D Hande, SR AR

Date of Hearing : 22/11/2022
Date of pronouncement : 30/11/2022

ORDER

PER BENCH OM PRAKASH KANT, AM

These cross appeals by the assessee and Revenue are directed against separate orders passed by the learned CIT(Appeals)-XXXII, Mumbai [in short, the Ld. CIT(A)] for assessment years from 2004-05 to 2009-10. As common grounds permeating from identical facts and circumstances are involved in these appeals and therefore same were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. In respect of the assessment year 2004-05, there are two set of cross appeals. First set being appeals against the in order of the Ld. CIT(A) in respect of order passed by the Assessing Officer under section 143(3) of the Income Tax Act,1961 (In short, the Act) i.e., regular assessment. Second set being appeals against the order of the Ld. CIT(A) in respect of order passed by the Assessing Officer under section 143 (3) read with section 153A of the Act.

2.1 First of all, we take up cross appeals for assessment year 2004-05 in respect of the regular assessment under section 143(3) of the Act as lead case. The grounds raised by the assessee in ITA No. 640/Mum/2008 are reproducedas under:

“I. 1.The Commissioner of Income tax (Appeals)-XXXII (“CIT(A)”) erred in confirming the Assessing officer’s action of excluding the export motives representing DEPB credit of Rs5,87,77,975/- relating to the

eligible unit frosts the eligible profits whilst computing the deduction u/s 80IB of the Act.

2.The Appellants prays that it be held that the export incentives DEPB of Rs 5,87,77,975/- cannot be excluded from the eligible profits while computing deduction us 80IB.

II. 1. The CIT(A) erred in confirming the Assessing officer's action of excluding the net interest received of Rs 40,89,210/- while computing deduction u/s 80IB.

2. The Appellant prays that it be held that net interest income is business income and consequently, should be included in the eligible profits while computing deduction u/s 80IB.

III. 1. The CIT(A) erred in directing the Assessing officer to exclude 90% of the net interest of Rs 40,89,209/- instead of the entire interest while computing deduction u/s 80HHC.

2. The Appellant prays that it be held that entire interest be considered while determining profits of the business for computing deduction u/s 80HHC.

IV.1. The CIT(A) erred in confirming the Assessing officer's action of making a reference to the Transfer pricing officer ('TPO'), which not in accordance with the provisions of Section 92CA(1) of the Act.

2. The Appellant prays that the proceedings initiated by the learned TPO under Section 92CA of the Act on the basis of the said reference by the AO be held as void ab initio and that the order passed by the learned TPO under Section 92CA(3) of the Act and consequent action of the AO and the CIT(A) be quashed.

V. 1.The CIT(A) and in upholding the Assessing officer of making the addition based on TPO's order without appreciating that none of the

conditions set out in section 92C(3) of the Act are satisfied in the facts of the Appellant's case.

2. *The Appellant prays that the addition of account of non charging of interest-be deleted.*

VI. 1. *The CIT(A) erred in confirming Assessing officer/TPO action in holding that non charging of interest is not at arm's length.*

2. *The appellant prays that it be held that providing interest free loan is a arm's length and the addition of Rs.5.04.505/- be deleted.*

VII 1. *The CIT(A) erred in confirming the Assessing officer's action of charging interest u/s 234B of the Act.*

2. *The Appellant prays that the interest charged u/s 234B be deleted.*

VIII 1. *The CIT(A) erred in confirming the Assessing Officer's action of charging interest u/s. 234C of the Act.*

2. *The Appellant prays that the interest charged u/s. 234C be deleted.*

The Appellant craves leave to add, alter, amend or withdraw all or any of above Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either or before the appeal hearing.”

3. The Grounds raised by the Revenue in ITA No. 10/MUM/2009 are reproduced as under:

“ (i) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the deduction u/s. 80IB of the I.T. ACT on the new industrial unit without considering the fact that the said unit was merely an expansion of the existing unit no.2.

(ii) On the facts and circumstances of the case and law, the Ld.CIT(A) has erred in directing the A.O. not to exclude form the eligible profit

has export incentives being duty drawback relating to eligible unit whilst computing the deduction u/s. 80IB of the I.T. Act.

(iii) On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs. 1,31,05,679/- made by the A.O. being the adjustment made by the T.P.O. on account of the Price difference while determining the Arm's Length Price.

(iv) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting to Rs. 5,04,505/- the adjustments made by the T.P.O on account of Arm's Length Price of interest."

4. Briefly stated facts of the case are that the assessee company was engaged in manufacturing and export of food colours, acid colours, dyes and intermediaries etc. For the year under consideration, the assessee filed return of income on 01/11/2004 declaring total income of ₹ 23, 88, 47, 545/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Act, were issued and complied with. In the assessment completed under section 143(3) of the Act on 28/12/2006, the Assessing Officer made various additions/disallowances. On further appeal, the Ld. CIT(A) allowed the appeal partly in favor of the assessee. Aggrieved, both the assessee and the Revenue are in appeal before the Income-Tax Appeal Tribunal (ITAT) by way of raising grounds as reproduced above.

5. Before us, the learned counsel of the assessee filed paperbook for various years including the year under consideration.

6.1 The ground No. one of the appeal of the assessee relates to excluding of DEPB credit while computing deduction under section 80 IB of the Act.

6.2 Before us, the learned counsel of the assessee submitted that issue in dispute is covered against the assessee by order of the ITAT in ITA no. 398/Mum/2010 for assessment year 2001-02, wherein the Tribunal has followed the decision of the Hon'ble Supreme Court in the case of Liberty India versus CIT 317 ITR 218.

The learned Departmental Representative (DR) concurred with the factual position pointed out by the learned counsel of the assessee.

6.3 We have heard submission of the parties on the issue in dispute and perused the relevant material including the orders relied upon by the assessee. We find that the Assessing Officer, relying on the decision of the Hon'ble Supreme Court in the case of **Sterling food (237 ITR 579)** held that DEPB benefits not being derived from the industrial undertaking, the deduction under section 80IB of the Act was not allowable. The Ld. CIT(A) also upheld the finding of the Assessing Officer following the finding of his predecessor for assessment year 2001-02 and 2002-03. The Tribunal(supra) has decided the issue against the assessee observing as under:

"2. Ground No. 1: After hearing both the parties, we find that AO had excluded export incentives representing duty draw backs and DEPB credit from the eligible profits while computing deduction u/s. 82IB. The action of the AO was confirmed by the ld. CIT(A) .

3. Both the parties were heard.

4. After considering the rival submissions, we find that this issue has recently been considered and decided in favor of the Revenue by the Hon'ble Supreme Court in the case of Liberty India vs. CIT [317 ITR 218]. In this case it was held as under:

"Sections 80I, 80IA provides for incentives in the form of deductions which are linked to profits and not investment. On analysis of sections 80-IA and 80-IB it becomes clear that any industrial undertaking, which becomes eligible on satisfying sub-section (2), would be entitled to deduction under sub-s. (1) only to the extent of profits derived from such industrial undertaking after specified date. Apart from eligibility, sub-section (1) purports to restrict the quantum of deduction to a

specified percentage of profits. This is the importance of the words “derived from industrial undertaking” as against “profits attributable to industrial undertaking.”

DEPB/Duty Drawback are incentives which flow from the Schemes framed by Central Government or from section 75 of the Customs Act, framed by Central Government or from profits derived from the eligible 1962. Incentives profits are not profits derived from the eligible business under section 80IB: they belong to the category of ancillary profits of such undertakings. Profits derived by way of incentives such as DEPB/Duty drawback, DEPB cannot be credited against the cost of manufacture of goods debited in the profit and loss account and they do not fall within the expression “profits derived from industrial undertaking” under section 80-u/s.80IB(10)”.

Respectfully following the above decision, we decide this issue against the assessee and in favor of the Revenue.”

- 6.4 The issue in dispute in the year under consideration is identical to the issue which was before the Tribunal in assessment year 2001-02, therefore respectfully following the finding of the Tribunal (supra), the issue in dispute raised in the ground No. one of the appeal of the assessee is dismissed.
- 7.1 The ground no. 2 (two) of the appeal of the assessee relates to excluding net interest receivable of ₹ 40, 89, 209/-while computing deduction under section 80IB of the Act.
- 7.2 The learned counsel of the assessee fairly submitted that issue in dispute is covered against the assessee by way of the order of the Tribunal in ITA No. 398/Mum/2010 for assessment year 2001-02. The learned DR also endorsed the factual position pointed out by the learned counsel of the assessee.

7.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Assessing Officer held that gross interest income of ₹ 1, 08, 52, 762/-was liable to be taxed under the head 'income from other sources' as same was not derived from the business of industrial undertaking. The Ld. CIT(A) following his predecessor upheld the finding of the learned Assessing Officer that that interest income or other similar receipt are not derived from the business of industrial undertaking, and hence not eligible for deduction under section 80IB of the Act. The Ld. CIT(A) also relied on the decision of the Hon'ble Supreme Court in the case of **Pandiyan chemicals Ltd (262 ITR 278)** and disallowed the claim of the assessee for deduction under section 80IB of the Act in respect of net interest income of ₹ 40, 89, 209/-. We find that Tribunal (supra) also following the decision of the Supreme Court in the case of Pandiyan chemical (supra) decided the issue against the assessee observing as under:

- "5. Ground No.2 : After hearing both the parties, we find that AO also excluded interest amounting to Rs. 2,70,63,065/- earned by the assessee from deposits like MIDC and MEPD etc. from business income and treated the same as income from other sources and denied deduction u/s. 80IB. The action of the AO was confirmed by the Ld. CIT(A).*
- 6. The Ld. Counsel of the assessee farily conceded that this issue is covered against the assessee by the decision of the Tribunal in the assessee's own case in ITA. Nos. 1046 & 1047/M/07.*
- 7. On the other hand, Ld. DR strongly supported the order of the CIT(A).*
- 8. After considering the rival submissions, we find that an identical issue came up before the Tribunal in earlier years in I.T.A. Nos. 1046 & 1047/MUM/2007 and the same was decided vide para-8 which is as under:*

"8. "We have considered the issue. As seen from the earlier order the interest income was excluded from the profit of business for the purpose of computing deductions under section 80I and 80IB and the issue was decided against the assessee following the earlier orders on the issue. As seen from the facts also there is a finding by the CIT(A) that the assessee has advanced amounts to the sister concern to the extent of Rs 26.15 crores and most of the interest earned was on surplus funds which cannot be considered as income from the undertaking eligible for deduction. Not only on the factual aspect, even on legal principles also the assessee is not eligible for deduction under section 80I and 80IB on interest income derived as the same is not derived from industrial undertaking. This issue is recently considered by the Hon'ble Madras High Court in the case of Shakti Footware vs. ACIT 317 ITR 194 wherein it was held that the deposits admittedly were made out of the profits of the industrial activity they were kept in bank for convenience of availing further facilities from the bank, therefore, interest on deposits made would not qualify for deduction under section 801B. Similar principles also apply here as the assessee has surplus funds advanced to sister concerns and earned substantial interest. The balance of the amount was also deposited with EEFC, Bank of India, MTNL, etc. In view of the above, both on facts and on law the asseesse is not eligible for deduction under section 80IB. It does not matter in this case, whether the interest is treated as interest from other sources or interest from business as both are consolidated under the head gross total income but the main contention is with reference to eligibility for deduction under section 80I and 80IB which cannot be

granted. In view of this, respectfully following the earlier orders on the issue assessee's grounds are rejected and the orders of the A.O and the CIT(A) are confirmed."

Further, in any case, the Hon'ble Supreme Court in the case of Pandian Chemicals vs. CIT [262 ITR 278] has also held that interest income received from the Electricity Board against security deposits, cannot be said to have been derived from the industrial undertaking. Though this decision was rendered u/s 80HH, but the principle of "derived from" remained same u/s 801B, because section u/s.801B also employs the expression "derived from". Following the above, we decide this issue against the assessee.

- 7.4 The issue in dispute being identical to what was before the Tribunal (supra), therefore respectfully following the finding of the Tribunal(supra) as reproduced above, the finding of the Ld. CIT(A) on the issue in dispute is upheld. The ground No. 2 (two) of the assessee is accordingly dismissed.
- 8.0 The Ground No. 3 three of the appeal of assessee relates to exclusion of 90% of net interest of ₹ 40, 89, 210/-instead of entire interest while computing deduction under section 80HHC of the Act.
- 8.1 The Ld. CIT(A) in para 8.12 of the impugned order has held that for the purpose of computation of profit and gains of the business for the purpose of deduction under section 80 HHC of the Act, 90% of the net interest of ₹ 40, 89, 209/- should be excluded as per the provisions of Explanation (baa) below section 80HHC of the Act.
- 8.2 Before us the learned counsel of the assessee submitted that entire net interest is part of the profit of the business and therefore no amount should be excluded for the purpose of the computation of profit and gains of the business while allowing deduction under section 80HHC of the Act. The Ld.DR on the other hand relied on the order of the Ld. CIT(A).

8.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. For the purpose of deduction under section 80HHC of the Act, legislature has provided 90% of the exclusion of receipt of the nature of interest rent etc. from the profit of and gains of the business. For ready reference, the relevant provision is reproduced as under:

“Profits of the business means the profits of the business as computed under the head “Profits and gains of business or profession” as reduced by –

(1) ninety per cent of any sum referred to in clauses (iiia), (iiib) [, (iiic), (iiid) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits ; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India:]”

8.5 In view of clear provision of the Act, for exclusion of 90% of the receipt in the nature of interest, rent etc. which have been included in income of business of the assessee, however same are not derived from the ‘export undertaking’ and therefore we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly uphold the same. The ground no. three of the appeal of the assessee is accordingly dismissed.

9.0 The ground Nos. 4 (four) and 5(five) of the appeal were not pressed by the learned counsel of the assessee, accordingly same are dismissed as infructuous.

10. The ground No. six of the appeal relates to transfer pricing adjustment. The assessee is aggrieved with the action of Ld. CIT(A) in confirming the action of the learned Transfer Pricing Officer in holding that non-charging of interest on loans is not at arm’s length.

10.1 The facts in brief qua the issue in dispute are that in view of international transactions of sale of finished goods and interest received reported by the assessee, the learned Assessing Officer referred the matter for determination of arm's length price of those transactions to the learned Transfer Pricing Officer (TPO). The learned TPO in his order dated 15/12/2006 proposed adjustment of ₹ 1, 31, 05, 679 - in respect of international transactions of sale of finished goods, whereas with regard to interest transactions, he observed that assessee had advanced loans to 9 Associated Enterprises (AEs), and charged interest in respect of the six AEs, but no interest was charged in respect of following three AEs:

<i>S1</i>	<i>AE</i>	<i>Opening balance as on 01-04-2003</i>	<i>Balance as on 31-03-2004 (Excluding Forex Fluctuation)</i>	<i>Interest Charged</i>
<i>1</i>	<i>RohaDyechem, Hongkong</i>	<i>96,63,000</i>	<i>96,63,000</i>	<i>Nil</i>
<i>2</i>	<i>RohaDyechem, Thailand</i>	<i>1,31,62,905</i>	<i>1,31,62,905</i>	<i>Nil</i>
<i>3</i>	<i>Roha SRL, Italy</i>	<i>1,49,70,360</i>	<i>1,49,70,360</i>	<i>Nil</i>

10.2 It was contended by the assessee that loans were given for the purpose of expanding the business of the assessee in territories where the AEs were operating. The learned TPO found that non-charging of interest was not at arm's length and therefore he, adopted the internal CUP (comparable uncontrolled price) as most appropriate method and took average rate of interest charged to other AEs, which was 5% to 8%, therefore he held average rate of

6.5% on the loan transactions at arm's length and accordingly computed the adjustment of ₹ 24, 56, 756 as under:

<i>S1.</i>	<i>AE</i>	<i>Amount (Rs.)</i>	<i>Interest at 6.5%</i>
<i>1</i>	<i>RohaDyechem, Honkong</i>	<i>96,63,000</i>	<i>6,28,095</i>
<i>2</i>	<i>RohaDyechem, Thailand</i>	<i>1,31,62,905</i>	<i>8,55,588</i>
<i>3</i>	<i>Roha SRL, Italy</i>	<i>1,49,70,360</i>	<i>9,73,756</i>
		<i>Total</i>	<i>24,56,756</i>

10.3 Regarding the adjustment of ₹ 24, 56, 756/- on account of interest not charge of loans to AEs, Ld. CIT(A) differed with Assessing Officer on the internal CUP applied for determination of arm's length price. According to him the loan transactions to AEs for which adjustment has been made are situated in countries different than the AEs which has been considered for comparison, therefore the conditions of country of receipt of loan being different, the internal CUP applied by the learned TPO was not justified. The Ld. CIT(A) was of the view that rate of interest at which, the assessee could have availed loan in currency of loan should be appropriate CUP and accordingly LIBOR + half percent or 1% was held appropriate, which was worked out to 2% to 2.5%. The Ld. CIT(A) accordingly restricted the adjustment to ₹ 5, 04, 505/-, The relevant finding of the Ld. CIT(A) is reproduced as under:

“10.11 The next issue (ground No.XIV) is in respect of the adjustment of Rs.24,56,756/- on account of interest not charged on loans given to three AEs (i.e. JVs). Against this adjustment made by TPO/AO, the appellant has argued that interest free loans were given to three JVs of HongKong. Italy and Thailand in accordance with the Joint Venture Agreement entered into with these AEs. It is further argued that charging of interest would

have resulted in increase of losses of the AEs and since the appellant is a major share holder, eventually the losses would have to be borne by it. Besides, under CUP, the adjustments are required to be made to the open market rates to arrive at arm's length price. In this regard it is stated that average rate of interest on foreign currency loan in India is 2% and not 6.5% which the AO has applied on the basis of average rate of interest charged by the appellant to other JVs in other countries.

10.12 *The appellant states that AO/TPO have not given any cogent reason for making the said addition. The TPO has not applied his mind to the issue whether the appellant was justified in giving interest free loans to JVs and hence the addition made is arbitrary. It is also stated that in the case of Roha SRL Italy the TPO/AO has taken the balance figure of Rs 1,49,70,360/ instead of the correct figure of Rs 23,99,364/ on which Interest @6.5% works out to R.2,26,421/- Instead of Rs.9,73,073/-*

10.13 *Further, during the course of appellate proceedings the A/R argued that chargeability of rate of Interest depends on a number of factors like local market conditions, contractual terms like credit terms etc. It also depends on paying capacity of the borrower and other Intangible properties associated with the transaction. These aspects have not been considered by the AO and he has straightway applied the average rate of Interest charged to other JVs. The rate of interest on loan would also depend on the realistic alternative available to the appellant to market its goods in these three countries where the conditions were totally different from other countries in terms of market competition, availability of products locally (and through Imports) as well as in terms of paying capacity of the joint venture in*

initial years. The AO has totally ignored these factors without giving any reason for the same. In effect the A/R argued that interest rate charged in one country cannot be compared to the Interest rate charged to a joint venture in another country. The appellant has tried to get best returns in respect of its investments by way of loans by earning profit from sales and Interest from loans so far as it was necessary. On the other hand it la argued that the TPO/AO have not carried out any FAR analysis, nor considered the arguments of the appellant in this regard. The order of TPO is completely silent in this respect. It is also stated by the A/R that in preceding A.Y. 2003-04, these loan transactions were examined by the AO in view of transfer pricing regulations, but no adjustments were made although the facts and circumstances were similar. Hence it was strongly pleaded that TPO/AO were not justified in making the said addition and the same should be deleted.

- 10.14 *After going through the arguments and facts highlighted by the A/R, I find force in them in as much as the TPO's order is completely silent on various aspects of transfer pricing adjustment made by him. He has not stated as to what was the logic In averaging out the interest rates charged to other JVs to apply the same to the three JVs under consideration specially when these JVs are located in different countries here market conditions are different. He has also not stated as to which method as per I.T. Act/Rules is the most appropriate method to determine arm's length price and which method has been followed by him as well as what adjustments should be made in view of FAR analysis. I am therefore of the view that AO's*

working of arm's length price of interest in respect of three JVs (of Hong Kong, Thailand and Italy) was not justified

10.15 *It is evident that for the purpose of determination of arm's length price in respect of three loan transactions with AEs the best method is the CUP method. However, on account of arguments and facts discussed above internal CUP method (i.e. comparison of rates of interest charged to other AEs/JVs) cannot be applied in different countries. The rates of interest prevailing in the three countries have also not been stated by the appellant as per details furnished in this regard. However since the appellant is also the major shareholder in these joint ventures and its own business interest is involved, the arm's length principle will be satisfied if the rate of interest adopted is that on which the appellant itself can avail a foreign currency loan. It is stated by the appellant that internationally interest rates are lower than that in India and even in India the interest rates are lower on exports and HSBC/City Bank have offered to give it loan at LOBOR rate plus 1/2% or 1% which would work out to 2% to 2.5%. In view of this and overall facts and circumstances, it is held that arm's length price of the said three loans should be worked out at the interest rate of 2% which is computed as under"*

S.No.	AE	Amount (Rs.)	Interest 2% (Rs.)
1	RohaDyechemHongKong	96,63,000	1,93,260
2	RohaDyechem Thailand	1,31,62,905	2,63,258
3	Roha SRL, Italy	23,99,364	47,987`
		Total	5,04,505

10.16 The arm's length price of the interest on the three loans is thus determined at Rs.5,04,505/ as against Rs.24,56,756/- computed by TPO. AO is directed to make adjustment to total income accordingly.”

10.4 Before us the learned counsel of the assessee submitted that the ‘Hong Kong(HK)’ JV came into existence only on 30/07/2001 and as per clauses of the JV agreement, the assessee was under a contractual obligation to provide interest-free funds for a period of five years, therefore charging of interest was not justified being as per contractual terms. It was further submitted that JV made losses in first year and second-year and for the first time during the year under consideration had made a nominal profit of ₹ 2, 82, 484/-, but still had accumulated losses of ₹ 64, 06, 628/-. He submitted that similarly “Roha Thailand’ and ‘Roha Italy’ both AEs had made losses during the year of ₹ 18, 36, 271/-and ₹ 28, 91, 252/- respectively and therefore no interest be charged in their case. The learnedcounsel submitted that it is the consistent stand of the Department that no interest could be charged on AE if it was making losses and no addition has been made in the order for assessment year 2005-06 by the Department in case where JVs have made losses.

10.5 The learnedcounsel further submitted that in view of huge losses made by the RohaThailand, the assessee had resolved vide resolution passed in the board meeting held on the 18/01/2004 to waive the interest chargeable for the year, and hence having regard to commercial exigency interest was waived. The learnedcounsel submitted that it is settled law that notional interest cannot be brought to tax and what is taxable is only the real income. According to the learnedcounsel, charging of interest would have resulted in increase of AEs losses and assessee being major shareholder eventually the losses would have to be borne by the assessee.

10.6 Without prejudice, the assessee submitted that rate be restricted to LIBOR + 3% as held by the ITAT in assessment year 2010-11.

10.7 On the other hand, the learned DR relied on the order of the lower authorities.

10.8 We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. As far as the contention of the learned counsel of the assessee that in view of the contractual agreement between the assessee and the AE noncharging of interest is at arm's length, we are of the opinion, that the 'contractual terms' cannot override the 'statutory provisions' of law. Further, it is irrelevant whether the assessee has waived charging of interest from the AEs. The transfer pricing provisions have been introduced to remove the effect of related party transactions between the assessee and AEs located in different tax jurisdiction. Under the CUP method of transfer pricing adjustment, the international transactions of the assessee with its AE is compared with the transactions between two independent enterprises. The contention of the assessee that notional interest cannot be brought to tax therefore not relevant, while determination of arm's length price of the international transactions.

10.9 The Hon'ble Delhi High Court in the case of **Cotton Natural India Private Limited in ITA no. 233/2014** for assessment year 2007-08 has held that in case of interest on receivables or on loan transactions the appropriate CUP would be the interest rate at LIBOR in currency of country of recipient of loan. The relevant finding of the Hon'ble High Court is reproduced as under:

"39. The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, in our considered opinion, must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be

repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable. The currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. Klaus Vogel on Double Taxation Conventions (Third Edition) under Article 11 in paragraph 115 states as under:-

“The existing differences in the levels of interest rates do not depend on any place but rather on the currency concerned. The rate of interest on a US \$ loan is the same in New York as in Frankfurt-at least within the framework of free capital markets (subject to the arbitrage). In regard to the question as to whether the level of interest rates in the lender's State or that in the borrower's is decisive, therefore, primarily depends on the currency agreed upon (BFH BSt.B1. II 725 (1994), re. 1 § AStG). A differentiation between debt-claims or debts in national currency and those in foreign currency is normally no use, because, for instance, a US \$ loan advanced by a US lender is to him a debt-claim in national currency whereas to a German borrower it is a foreign currency debt (the situation being different, however, when an agreement in a third currency is

involved). Moreover, a difference in interest levels frequently reflects no more than different expectations in regard to rates of exchange, rates of inflation and other aspects. Hence, the choice of one particular currency can be just as reasonable as that of another, despite different levels of interest rates. An economic criterion for one party may be that it wants, if possible, to avoid exchange risks (for example, by matching the currency of the loan with that of the funds anticipated to be available for debt service), such as taking out a US \$ loan if the proceeds in US \$ are expected to become available (say from exports). If an exchange risk were to prove incapable of being avoided (say, by forward rate fixing), the appropriate course would be to attribute it to the economically more powerful party. But, exactly where there is no special relationship', this will frequently not be possible in dealings with such party. Consequently, it will normally not be possible to review and adjust the interest rate to the extent that such rate depends on the currency involved. Moreover, it is questionable whether such an adjustment could be based on Art. 11 (6). For Art. 11(6), at least its wording, allows the authorities to eliminate hypothetically' the special relationships only in regard to the level of interest rates and not in regard to other circumstances, such as the choice of currency. If such other circumstances were to be included in the review, there would be doubts as to where the line should be drawn, i.e., whether an examination should be allowed of the question of whether in the absence of a special

relationship (i.e., financial power, strong position in the market, etc., of the foreign corporate group member) the borrowing company might not have completely refrained from making investment for which it borrowed the money.¶

40. *The aforesaid methodology recommended by Klaus Vogel appeals to us and appears to be the reasonable and proper parameter to decide upon the question of applicability of interest rate. The loan in question was given in foreign currency i.e. US \$ and was also to be repaid in the same currency i.e. US \$. Interest rate applicable to loans granted and to be returned in Indian Rupees would not be the relevant comparable. Even in India, interest rates on FCNR accounts maintained in foreign currency are different and dependent upon the currency in question. They are not dependent upon the PLR rate, which is applicable to loans in Indian Rupee. The PLR rate, therefore, would not be applicable and should not be applied for determining the interest rate in the extant case. PLR rates are not applicable to loans to be re-paid in foreign currency. The interest rates vary and are thus dependent on the foreign currency in which the repayment is to be made. The same principle should apply.*
41. *Counsel for the Revenue had made reference to Chapter 10 of the U.N. Transfer Pricing Manual, relevant portion of which reads:-*

*10.4.10. Financial Transactions 10.4.10.1.
Intercompany loans and guarantees are becoming
common international transactions between related
parties due to the management of cross-border funding*

within group entities of an MNE group. Transfer pricing of inter-company loans and guarantees are increasingly being considered some of the most complex transfer pricing issues in India. The Indian transfer pricing administration has followed a quite sophisticated methodology for pricing inter-company loans which revolves around: „

Examination of the loan agreement; „

A comparison of terms and conditions of loan agreements; „ The determination of credit ratings of lender and borrower; „ The identification of comparable third party loan agreements: and „ Suitable adjustments to enhance comparability. 10.4.10.2. The Indian transfer pricing administration has come across cases of outbound loan transactions where the Indian parent has advanced to its associated entities (AE) in a foreign jurisdiction either interest free loans or loans at LIBOR (London Interbank Offered Rate) or EURIBOR (Euro Interbank Offered Rate). The main issue before the transfer pricing administration is benchmarking of these loan transactions to arrive at the ALP of the rates of interest applicable on these loans. The Indian transfer pricing administration has determined that since the loans are advanced from India and Indian currency has been subsequently converted into the currency of the geographic location of the AE, the Prime Lending Rate (PLR) of the Indian banks should be applied as the external CUP and not the LIBOR or EURIBOR rate.

10.4.10.3. A further issue in financial transactions is credit guarantee fees. With the increase in outbound investments, the Indian transfer pricing administration has come across cases of corporate guarantees extended by Indian parents to its associated entities abroad, where the Indian parent as guarantor agrees to pay the entire amount due on a loan instrument on default by the borrower. The guarantee helps an associated entity of the Indian parent to secure a loan from the bank. The Indian transfer pricing administration generally determines the ALP of such guarantee under the Comparable Uncontrolled Price Method. In most cases, interest rates quotes and guarantee rate quotes available from banking companies are taken as the benchmark rate to arrive at the ALP. The Indian tax administration also uses the interest rate prevalent in the rupee bond markets in India for bonds of different credit ratings. The difference in the credit ratings between the parent in India and the foreign subsidiary is taken into account and the rate of interest specific to a credit rating of Indian bonds is also considered for determination of the arm's length price of such guarantees.

10.4.10.4. However, the Indian transfer pricing administration is facing a challenge due to non-availability of specialized databases and of comparable transfer prices for cases of complex inter- company loans as well as mergers and acquisitions that involve complex inter- company loan instruments as well as an

*implicit element of guarantee from the parent company
in securing debt.*²

42. *The first paragraph quoted above, rightly stipulates that inter-company loans would require examination of the loan agreement, comparison of the terms and conditions of loan agreements, the determination of credit rating of the lender and the borrower, identification of comparable third party loan agreements and suitable adjustments should be made. In addition to the aforesaid factors, the comparability analysis should also take into account the business relationship and the functions performed by the subsidiary AE for the parent company. In the present case, we are not concerned with paragraph 10.4.10.3 of the United Nations Transfer Pricing Manual. However, we are unable to agree with the position set out and asserted in paragraph 10.4.10.2 of the Manual. The reasoning given therein is contrary to the accepted international tax jurisprudence and the rules adopted and applied. There is no justification or a cogent reason for applying PLR for outbound loan transactions where the Indian parent has advanced loan to an AE abroad. Chapter 10 of the United Nations Practical Manual on Transfer Pricing relates to country practices. The said Chapter sets out 20 an individual country's view point and its experiences for the information of the readers. The said Chapter does not reflect the view of the Manual. Paragraph 10.1 of the United Nations Practical Manual on Transfer Pricing for Developing Countries reads:-*

10.1. Preamble by the Subcommittee on Transfer Pricing: Practical Aspects 10.1.1. In the first nine chapters of this Manual, the Subcommittee has sought

to provide practical guidance on the application of transfer pricing rules based on Article 9(1) of the UN Model Tax Convention and the arm's length principle embodied in that Article. With regard to chapters one through nine, the Subcommittee has discussed and debated the merits of the guidance that is provided and, while there may be some disagreement on certain points, for the most part the Subcommittee is in agreement that the guidance in those chapters reflects the application of the arm's length principle as embodied in the UN Model Tax Convention.

10.1.2. The Subcommittee recognizes that individual countries, particularly developing and emerging economies, struggle at times with the details of applying these treaty-based principles in a wide variety of practical situations. It therefore seemed appropriate to allow representatives of individual countries an opportunity to set out their individual country viewpoints and experiences for the information of readers. Those individual country views are contained in this chapter. It should be emphasized that it does not reflect a consistent or consensus view of the Subcommittee.

43. *Normally there would be a difference between the lending rate and borrowing rate in each country. Some authors and writers suggest that the average or mid-point between the two should be taken. However, others like Klaus Vogel, have suggested that economic purpose and substance of the debt-claim or debt for which granting of credit calls for the lending rate would be*

determinative. Thus, in case of a capital investment, the borrowing rate will apply, whereas in case of credit allowed to a customer on sale of goods, the lending rate would apply. We do not deem it necessary to enter into this controversy and express our view as regards the same."

10.10 The Tribunal in the case of the assessee for assessment year 2010-11 in ITA No. 1991/Mum/2016 on the issue of interest rate to be charged in case of international transactions of the loan, held as under:

"4.2 In appeal, the Ld. CIT(A) held as under:

"I have gone through the facts of the case. It is undisputed that the appellant has advanced loans to 8 of its Associate enterprises. Out of these 8, the AO has concluded that in 5 cases either no interest has been charged or low rate of interest has been charged. The AO has adopted the reasoning that no 3rd party would extend facility of Finance to these AEs without charging interest. The AO has thereby calculated the charging of the interest on the basis that the average domestic cost of borrowings for the assessee is 6% pa, adding to this the various risk factors and other processing costs etc. for which 3% mark up is required the cost of capital for the AEs should be at 9% pa interest rate. On the other hand, the appellant has submitted that it has given loans to the AEs for expansion and since they were all newly established, they were not able to earn sufficient profits to pay interest. It is further reasoned by the appellant that since the assessee is charging comparative sale rate in supplying of materials to AE and AE has to supply the materials in their territory of operations in comparative with the local manufacturers; AE could not generate sufficient profits. Given the present facts I

am of the considered view that the decision of the Hon'ble Delhi HC in the case of Cotton Naturals India P Ltd ITA no. 233/2014 AY 2007-08 Delhi High Court -taxsutra.com becomes the guiding decision wherein it was held that interest rate should be market determined and should be applicable to the currency in which the loan is borrowed/repaid. In the present case, loans are given as per dollar currency and there is merit in the argument of the AO that the AEs would not able to get access to capital in the open market without paying any interest. In this regard reference is also made to the decision of the Hon'ble ITAT, Mumbai K bench in ITA No 488/MUM/2015 in the case of Fire Star International P. Ltd announced on 31/07/2015 in the said decision it has been held that interest rate charged at LIBOR+300 bps is liable to be considered as an ALP rate of interest. The AO is accordingly directed to re- calculate the rate of interest accordingly instead of 9% that has been adopted. The above three grounds are accordingly decided.

4.3 *Before us, the Ld counsels of the assessee reiterated the submission made before the Ld CIT(A).*

4.4 *On the other hand, the Ld. DR supported the order passed by the Ld CIT(A).*

4.5 *We have heard the rival submissions and perused the relevant materials on record We find that there is no infirmity in the reference made to the TPO u/s 92CA(1). Accordingly, we dismiss the 3rd ground of appeal.*

4.6 *We find that in respect of the 4th and 5th ground of appeal the Ld CIT(A) has rightly held that interest rate be charged at*

LIBOR +300 bps as an ALP rate of interest. More reasonably, the Ld CIT(A) has directed the AO to recalculate the rate of interest accordingly instead of 9%. We do not find any basis to disturb such a reasonable view of the Ld. CIT(A) which is based on the decision in Cotton Naturals India P Ltd. (supra) and Fire Star International P. Ltd (supra). Accordingly, we uphold the order of the Ld. CIT(A) and dismiss the 4th and 5th ground of appeal.”

10.11 We find that the Tribunal (supra) has upheld the finding of the Ld. CIT(A) in A.Y 2010-11 following the decision of the Hon'ble Delhi High Court in the case of Cotton Naturals India Private Limited (supra). In view of above, respectfully following the finding of the Tribunal (supra), we direct the ld. AO/TPO to apply interest rate of LIBOR + 300 point basis and compute the transfer pricing adjustment accordingly. The ground no 6 of the appeal of the assessee is accordingly allowed partly for statistical purposes.

11.0 The ground No. 7(seven) of the appeal relates to charging of interest under section 234B of the Act, which being consequential in nature, is dismissed as infructuous.

12. Now we take up the appeal of the Revenue for assessment year 2004-05.

13. The ground No.1(one) of the Revenue relates to deduction allowed by the Ld. CIT(A) under section 80IB of the Act on the new industrial unit without considering that said unit was merely an extension of the existing unit No. II.

13.1 According to the Assessing Officer in the assessment proceeding for assessment year 1995-96 it was held that no standalone unit had been set up but only the existing capacity was enhanced. In view of the Assessing Officer, since the period of 10 years had elapsed during the relevant year, the assessee was not eligible to claim deduction under section 80IB of the Act, keeping in view the fact that department had preferred appeal against the order of the ITAT for

assessment year 1995-96 to 1997-98. The Ld. CIT(A) following the finding of the Tribunal (supra) in A.Y. 1995-96 to AY 1997-98, allowed the claim of the deduction of the assessee observing as under:

“3.3 I have considered the submissions of the appellant, facts of the case and the assessment order. The dispute is regarding the third unit which as claimed by the appellant came into existence in the period relevant to A.Y. 1995-96. The AO did not treat it as new unit in that year and held it to be an extension of second unit, thus disallowing deduction u/s. 80IA (now 80IB). However, my learned predecessor also examined the issue in the said A.Y. 1995-96 and held that a new unit has come into existence within the meaning of section 80IA, because all the conditions prescribed u/s. 80IA are being fulfilled by the assessee. He therefore allowed the appeal of the appellant on this issue. I also find that in subsequent years also, my predecessors have allowed the appeal of the assessee on this issue. Now, Hon’ble ITAT have been also given their judgment on this issue in A.Y. 1995-96, 1996-97, 1997,98 and 1998-99 in favour of the appellant. In their order on this issue for A.Y. 1995-96 to 1997-98, the matter was discussed thread bare and all the details as well as facts were considered. Hence there is no scope any more to interfere with the order of Hon’ble ITAT and my learned predecessors on this issue. Therefore, respectfully agreeing with their orders, I direct the AO to allow the claim of the appellant u/s. 80IB of the Act.”

13.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In our opinion, the Ld. CIT(A) has followed a binding precedent on the issue in dispute in the case of the assessee

itself, therefore we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly we uphold the same. The ground No. one of the appeal of the revenue is accordingly dismissed.

14. The ground No. 2 (two) of the appeal of the Revenue relates to allowing duty drawback amount for the purpose of deduction under section 80IB of the Act by the Ld. CIT(A).

14.1 The Assessing Officer treated the duty drawback analogous to import entitlements and invoking decision of the Hon'ble Supreme Court in the case of sterling food (supra), denied deduction of duty drawback under section 80IB of the Act. The Ld. CIT(A) however, allowed the claim of the assessee of deduction under section 80IB of the Act of observing as under:

*“From the above it is evident that duty drawback stands on a completely different footing as compared to other export incentives. Duty drawback has a direct nexus with the manufacturing process because it is available only on those imported or excisable raw material which are utilized to manufacture goods which are exported. Above judgments support his position, and the judgment cited by the AO and my learned predecessors are not applicable in respect of incentive of duty drawback. I therefore hold that duty drawback is part of profits and gains derived from the industrial undertaking and **the appellant is entitled to deduction u/s. 80IB on duty drawback. AO is directed accordingly.**”*

14.2 Before us the learned DR submitted that issue in dispute is decided against the assessee in its own case for assessment year 2001-02 by the Tribunal following the Supreme Court decision in the case of liberty India (317 ITR 218). The learned counsel of the assessee fairly accepted the position on the issue in dispute.

- 14.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that Tribunal in ITA No. 398/Mum/2010 for assessment year 2001-02, while adjudicating the issue of DEPB credit also denied deduction under section 80IB on the duty drawback. The relevant finding of the Tribunal has already been reproduced by us while adjudicating the ground no. one of the appeal of the assessee and therefore we are not repeating the same here. Therefore, respectfully following the finding of the Tribunal (supra), the order of the Ld. CIT(A) on the issue in dispute is set aside and the Assessing Officer is directed to disallow the claim of the assessee of deduction under section 80IB of the Act on the amount of drawback shown in the profit and loss account. The ground no. 2 of the appeal of the Revenue is accordingly allowed.
15. The ground no.3 (three) of the appeal of the Revenue relates to deletion of the addition of ₹ 1, 31, 05, 679/-made by the Assessing Officer for transfer pricing adjustment in relation to international transactions of sale of finished goods.
- 15.1 The learned TPO observed the assessee adopted Comparable Uncontrolled Price (CUP) method as most appropriate method for determining arm's-length price of its international transactions of sale of finished goods to its Associated Enterprises. The assessee submitted segmental profit and loss account in respect of sales to joint venture AEs, direct export and export to its branches. The net profit earned was shown at 42.93% in respect of joint venture AEs Sales, 25.27% in respect of direct export sales, and 40.05% in respect of export sales to branches. Accordingly, the assessee contended that international transactions with AEs was at arm's-length.
- 15.2 The learned TPO after considering submission of the assessee, proposed transfer pricing adjustment of ₹ 1, 31, 05, 679 37 in respect of transactions of 10 products applying CUP method as under:

“4.2 The submissions of the assessee have been considered

The cup method is the most appropriate method in these types of transactions. The CUP method requires a high degree of product similarity. As such the item wise sale rate comparison, rather than the net margin analysis, would be the most appropriate basis.

Accordingly, The analysis will be done on the basis of the item wise sale rate.

The assessee, in its submission dated 02-06-2006 has attqched thereto a table chart listing therein the various products sold giving the comparative sales to the AE's, export customers and local customers. The details of local sales is not relevant for this purpose, and so, only the comparison of the sales made to the AE's vis-a-vis sales made to export customers will be compared to determine the arms length price.

The chart contains 27 product types.

On analysis thereof, it is seen that in 16 product types, the assessee has sold to its AE at rates greater than the rates sold to the export customers. As such these transactions have been at arm's length.

In respect of the remaining 11 product types, on computation of the arm's length price and analysis thereof, it is seen that in the case of F04-Erythrosine the recorded value of transactions is covered under the -5% allowance to the arm's length price allowable under the proviso to section 92C(2). Hence it is excluded.

In respect of the remaining 10 product types, the details and analysis are as under:

		Export to AE's	Export to third party customers		
--	--	----------------	---------------------------------	--	--

	Product	Product Name	Quantity	FOB Value	Avg. Rate	Qauntity	Avg. Rate	ALP	Difference
1	D02	Quinoline yellow WS	9725	12494545	1284	956	2058	20014050	7519505
2	F02	Brilliant blue FCF	16275	15451245	949	22366	1072	17446800	1995555
3	F06	Indigo carmine	9980	9185403	920	4529	1029	102694	1084017
4	F79	Sunset yellow CS	9025	2258733	250	250	316	2851900	593167
5	F80	Certifiable FD&C Yellow5	18802	3982574	211	5026	252	4738104	755530
6	G04	Erythrosine Granular	820	1484049	1809	125	2065	1693300	209251
7	G09	Tartrazine Granular	10400	2332223	224	14975	240	2496000	163777
8	L13	Lake Pea Green FCF	100	97992	979	760	1150	115000	17008
9	L42	Lake Brilliant blue FCF	2150	2152364	1001	530	1217	2616550	464186
10	L49	Lake Tartrazine	4100	1762717	429	5795	504	2066400	303683
			81377			55312			13105679

The arm's length price of the above respective items have been arrived at by adopting the rate sold to the third parties which is at higher rate than at what the assessee has sold to its AEs. Thus the difference of Rs. 1,31,05,679/- is due to the international transactions of the sale of the above items to the AE's of not having been at arm's length. The arm's length prices of the respective items have been determined as per the table abovep [ALP column]."

15.3 The Id. CIT(A) deleted the above transfer pricing adjustment of observingas under:

"10.8 I agree with the appellant that the comparison made by the TPO for determination of arm's length price does not stand on

a sound footing because such factors as discussed above have not been taken into account. There is no dispute regarding the most suitable method being CUP method which the TPO/AO have also adopted in view of section 92C(1) read with Rule 10B(1). However, the TPO's comparison of rates to AEs with the rates to direct customers is wrong on account of two factors i.e. (i) the TPO ignored that supplies to AEs have been made in bulk quantities as against supplies made to direct customers in nominal quantities; the direct customers are consumers of the products where as the AEs are doing marketing of these products on behalf of the appellant and (ii) the AEs are located in different countries and markets other than the countries and markets in which direct customers are located. If at all the TPO desired to compare the two he should have made required adjustments, like traders' margin should have been reduced from the prices charged to direct customers as the AEs are performing a function which is different from the direct customers who are consumers of a such products. The AEs are basically traders of appellant's products. As per rule 10B(1) the CUP method has to be applied as under:-

“(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 (1) is taken to be an ALP in respect of the property transferred or services provided in the international transactions"

10.9 *The TPO as is quite evident from above has not applied the CUP method properly and has not carried out requisite adjustment as suggested in clause (ii) above of the said rule. Without such adjustments the comparison made by the TPO/AO cannot be upheld. As per OECD guidelines, if there are differences between controlled and uncontrolled transactions that would affect price, adjustments should be made to the prices of uncontrolled transactions according to and in view of following factors :-*

(i) Quality of the product,

(ii) Contractual terms, (e.g. scope and terms of warranties provided, sales or purchase volume, credit terms, transport terms);

(iii) Level of the market (le. wholesale, retail, etc.);

(iv) Geographic market in which the transaction takes place;

(v) Date of the transaction;

(vi)Intangible property associated with the sale;

(vii) Foreign currency risks; and

(viii) Alternatives realistically available to the buyer and seller.

10.10 *Without such adjustment the two rates cannot be compared. In the alternative, the appellant has also stated that its rates could have been compared with the rates prevailing in the countries in which the JVs are located. It is stated that the*

*appellant has charged higher rates to JVs than the market rate prevailing in those countries. Such comparative market rates have been furnished as per submissions in the form of the paper book. I therefore agree with the appellant that the adjustment made by the TPO/AO to the total income is not justified. Firstly, the quantities supplied to JVs in respect of products are in bulk as compared to direct customers (40,522 kgs to JVs as against 6987 kgs to direct customers) and hence on account of functional text the two prices cannot be compared because JVs perform the function of traders and direct customers are themselves the consumers of the goods. Secondly the two prices cannot be compared because market conditions are also different. The rates charged to JVs by the appellant are higher than the rates prevailing in the respective countries and hence TPO's conclusion that the prices are not at arm's length is incorrect. Since the prices charged by the appellant to JVs are higher than the market prices for these goods, I hold that appellant's transactions with AEs (or JVs) are at arm's length. It may also be added that appellant's International transactions were examined in A.Y.2003-04 also by the AO in view of new transfer pricing regulation and the facts in that year were also identical. However in A.Y 2003-04, no adjustment towards arm's length price was made by the AO, although the circumstances were similar. **Therefore the adjustment of Rs.1,31,05,679/- on account of price charged to AEs is deleted.***

15.4 The learned Departmental Representative submitted that if internal CUP applied by the learned TPO suffers from minor differences only, then for which proper adjustment can be made for arriving at arm's-length price. She further

submitted that if the transactions with its AEs are not comparable with the direct sales to their customers, then the comparison of profit margin by the assessee is also not in accordance with any established method of transfer pricing. Accordingly, she submitted that issue in dispute may be restored back to the learned TPO.

15.5 Before us the learned counsel of the assessee submitted as under:

- “1. Appellant is a major exporter of food colours. Total Turnover – Rs. 131.42 crores and export turnover Rs. 107.42 crores. Therefore, Export turnover constitutes almost 81% of Total Turnover.*
- 2. It has established 14 JVs in various countries. Exports to such countries are only through such JVs & no direct sales are made to consumer. AE's are basically distributors of appellant's*
- 3. CUP method adopted for determining arms length price by using internal comparable.*
- 4. TPO/AO has not disputed CUP method. But has adopted the rate charged to export customer viz the rate charged to AE's*
- 5. Accordingly in respect of 10 products the diff has been worked out at Rs. 13105679/-.*
- 6. Except for adopting the rate charged to export customers no other reason has been provided by the TPO in his order.*
- 7. Infact, as is evident from the Asst order detailed submissions were made during the course of asst proceedings to explain why the basis adopted by the TPO is erroneous. However, without giving reason or applying his mind the AO confirmed the addition made by TPO (Asst. order)*

8. *As per the profitability chart attached it can be seen the profitability of 42.93% is highest in case of sales to AE's as compared to sales made to consumer and Branch.*
9. *The appellant had also provided the rate of competitors selling such 10 products in the countries where AEs are located. Comparison of rates between the supply made to AEs by the appellant viz a viz the rates at which the competitors products are sold is given. As can be seen the appellants rates are lower than that of the competitors.*
10. *Further profitability chart of each AE is given which clearly shows that the AEs are making losses or marginal profit which clearly proves that the goods are supplied at arms length prices. Summary of GP and NP ratios of AE's is attached. Comparison between the average rate at which sales made to all AE's viz a viz Export Customers is also attached.*
11. *The TPO & AO have considered the average rate of sales made to export customers without taking into consideration the foll: (i) Export sales include sales to all customers throughout the world without taking into consideration the geographical differences. No comparison can be made between rates charged to actual consumers and dealers. (ii) Sales to consumers are in small qyt whereas sales to AEs are in bulk. It is universally accepted that rates to wholesaler & consumers cannot be the same. Thus appropriate adjustments to the rates should have been made. (iii) AEs have to incur additional cost such as admin, selling, storage cost which has to be factored in which fact has not been considered by TPO/AO. (iv) Clause (ii) of rule 10(B) clearly provides that in case of CUP method, prices have to be adjusted to account for differences if any between the international transactions & the comparable uncontrolled transactions which could materially*

affect the prices in the open market. (v) Only such adjusted prices should be taken as the arms length price.

- 12. It is evident that neither the TPO or the AO has made any adjustment for the volume differences, functional differences, locational cost, local market conditions, risk factor etc. Neither the TPO or the AO has done any FAR (Function, asset & risk analysis to determine the correct arms length price.*
- 13. Though the appellant had provided competition rates, the same has not been considered by the TPO/AO. To have meaningful comparison under CUP method what is required is comparison between the rates charged to AE & the rates charged by the competitor in the same country.*
- 14. Without prejudice, Your Honour's attention is invited to circular no. 14 of 2001. The intention behind introducing Transfer pricing regulation was to ensure that profits taxable in India are not understated or losses overstated so as to deprive the country its legitimate taxes.*
- 15. In the appellants case, all the AEs are either making huge losses or marginal profits. They have huge accumulated losses whereas Indian operations are hugely profitable. Thus it is clear that the appellant is making profit at the cost of AE.s*
- 16. Without prejudice, the appellant is exporting almost 80-90% of its turnover. Thus, it is entitled to benefit u/s 80HHC and also 80IA. Because of which the effective tax rate for it is hardly 10%. Thus it makes no business on commercial sense to retain the profits outside the country.*
- 17. Without prejudice the appellants have adopted the CUP method in the past as well as subsequent year. No such adjustments have been made in any of the year except this year. Having regard to the*

principle of consistency which has been laid down in catena of decisions the additions need to be deleted. Principle of Consistency has been upheld in the foll cases; CIT v Darius pandole (330 ITR 485 Bom), Gopal Purohit V JCIT (2009 122 TTJ Mum 87), Radhasaomi Satsang V CIT (193 ITR 321), CIT V Neopolypack P Ltd (245 ITR 492).

18. *Rule 108 provides for determination of arms length price u/s 92C by any of the methods prescribed therein One of the methods prescribed under clause (a) of Rule 10B is CUP method & sub rule (1) of rule 10B prescribes the manner how the CUP method is applied. Now sub clause (ii) of Rule 10B clearly provides that under CUP method also the price charged or paid is required to be adjusted to account for differences if any between the international transaction & the comparable uncontrolled transaction which could materially affect the prices in the open market & as per clause iii of Rule 10B only such adjusted price is taken to be the arms length price. Further sub rule 2 of 10B provides that the comparability of an international transaction with an uncontrolled transaction shall be judged after taking into consideration the foll. (a) specific characteristics of the property transferred. (b) the functions performed taking into accounts assets employed & the risks assumed by the respective parties to the transactions. (c) the contractual terms of the transfer which lay down explicitly or implicit has the responsibility, risk & benefits are to be divided between the parties to the transaction. (d) Conditions prevailing in the markets in which the respective parties operate including geographical location size of markets etc FAR analysis is very important before deciding the ALP. Apparently no such exercise has been carried on by the TPO. Reliance is placed on the Mumbai ITAT Decision in the case of M/s Intervet India Private Limited (2010-T10L-740 wherein the ITAT held that CUP method is to be applied only*

if reasonable and accurate adjustments on account of economic and market difference can be arrived to determine arms length. Copy of the said decision is attached.”

15.6 We have considered rival submission of the parties on the issue in dispute and perused the relevant material on record. The main contention of the assessee that AEs of the assessee are distributor of the product of the assessee and transactions having large volumes as compared to direct sales made to individual customers and therefore price of direct sales to customers cannot be compared with the sales made to AEs. In view of the decisions relied upon, this contention of the learned counsel of the assessee is justified. Under the Comparable Uncontrolled Price (CUP) method, the international transactions carried out by the assessee with its AE has to be compared with other transactions between two independent enterprises under similar conditions of volume, quality, geography, period of transactions etc and if there are minor differences, then prices have to be adjusted to account for those differences. Since no such process has been carried out by the learned TPO as per the rules for comparing under CUP Method, therefore we feel it appropriate to restore the issue back to the learned TPO for deciding the issue of determination of arm's length price of international transactions of sale of finished goods by the assessee to its AEs. The ground no. 3 of the appeal of the Revenue is accordingly allowed for statistical purposes.

16. In ground No. 4 , the revenue is aggrieved with the transfer pricing adjustment of interest, restricted by the Ld. CIT(A) at ₹ 5, 04, 505/-.

16.1 We find that issue of transfer pricing adjustment in respect of the interest, has already been adjudicated by us while deciding the ground No. 6 Of the appeal of the assessee, wherein we have directed to apply the rate of interest at LIBOR + 300% point, following the decision of the Tribunal (supra) in assessment year 2010-11. Therefore, no separate adjudication for this ground of the Revenue is

required. The ground of the Revenue of the appeal is also accordingly allowed partly for statistical purposes.

17. Now, we take up the appeals of the assessee for assessment year 2004-05, arising from the assessment order passed under section 143(3) read with section 153A of the Act.
18. The grounds of the appeal of the assessee (ITA No. 2860/Mum/2009) are reproduced as under:

“I. 1. The Commissioner of Income tax (Appeals)-XXXII (“CIT(A)”) erred in confirming the Assessing Officer’s action of excluding the export incentive representing DEPB credit of Rs. 5,87,77,975/- relating to the eligible unit from the eligible profits whilst computing the deduction u/s. 80IB of the Act.

2. The Appellants prays that it be held that the export incentives DEPB of Rs. 5,87,77,975/- cannot be excluded from the eligible profits while computing deduction u/s. 80IB.

II.1. The CIT(A) erred in confirming the Assessing Officer’s action of excluding the net interest received of Rs. 40,89,210/- while computing deduction u/s. 80IB.

2. The Appellant prays that it be held that net interest income is business income and consequently, should be included in the eligible profits while computing deduction u/s 80IB.

III. 1. The CIT(A) erred in directing the Assessing Officer to exclude 90% of the net interest of Rs. 49,89,210/- instead of the entire interest while computing deduction u/s. 80HHC.

2. The Appellant prays that it be held that entire interest be considered while determining profits of the business for computing deduction u/s. 80HHC.

IV1. *The CIT(A) erred in confirming the Assessing Officer's action of making a reference to the Transfer Pricing Officer('TPO'), which is not in accordance with the provisions of Section 92CA(1) of the Act.*

2. *The Appellant prays that the proceedings initiated by the learned TPO under Section 92CA of the Act on the basis of the said reference by the AO be held as void ab initio and that the order passed by the learned TPO under Section 92CA(3) of the Act consequent action of the AO and the CIT(A) be quashed.*

V 1. *The CIT(A) erred in upholding the Assessing Officer of making the addition based on TPO's order without appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the facts of the Appellant's case.*

2. *The Appellant prays that the addition on account of non charging of interest-be deleted.*

VI. 1. *The CIT(A) erred in confirming Assessing Officer/TPO action in holding that non charging of interest is not at arm's length.*

2. *The appellant prays that it be held that providing interest free loan is at arm's length and the addition of Rs. 5,04,505/- be deleted.*

VII. 1. *The CIT(A) erred in confirming the Assessing Officer's action of charging interest u/s. 234B of the Act.*

2. *The Appellant prays that the interest charged u/s. 234B be deleted.*

VII 1. *The CIT(A) erred in confirming the Assessing Officer's action of charging interest u/s. 234C of the Act.*

2. *The Appellant prays that the interest charged u/s. 234C be deleted."*

19. The grounds of the appeal of Revenue (ITA No. 4294/Mum/2009) are reproduced as under:

“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing to allow deduction u/s. 80HHC of the Act of the assessee without reducing the deduction allowed u/s 80IB from the eligible profits u/s. 80HHC.

The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.

The appellant craves leave to amend or alter any ground and/or new grounds which may be necessary.”

20. We find that grounds raised in both these appeals, are exactly identical to grounds in appeals arising from the regular assessment order for assessment year 2004-05, which we have adjudicated above. Therefore, respectfully following our finding, the grounds raised in these two appeals are decided mutatis mutandis.

21. Now we take up the appeal of the assessee and Revenue for assessment year 2002-03, arising from the order passed by the AO under section 143(3) read with section 153A of the Act i.e. search assessment.

22. The grounds raised by the assessee in ITA No. 2859/Mum/2009 for A.Y. 2002-03 are reproduced as under:

“I. 1.The Commissioner of Income tax (Appeals)-XXXII (“CIT(A)”) erred in confirming the Assessing Officer’s action of excluding the export incentive representing DEPB credit relating to the eligible unit from the eligible unit from the eligible profits whilst computing the deduction u/s. 80IB of the Act.

2. The Appellants prays that it be held that the export incentives DEPB cannot be excluded from the eligible profits while computing deduction u/s. 80IB.

- II. 1. *The CIT(A) erred in confirming the Assessing Officer's action of excluding the net interest received of Rs. 2,52,95,231/- while computing deduction u/s. 80IB.*
2. *The Appellant prays that it be held that net interest income is business income and consequently, should be included in the eligible profits while computing deduction u/s 80IB.*
- III. 1. *The CIT(A) erred in directing the Assessing Officer to exclude 90% of the net interest of Rs. 2,65,22,832/- instead of the entire interest while computing deduction u/s. 80HHC.*
2. *The Appellant prays that it be held that entire interest be considered while determining profits of the business for computing deduction u/s. 80HHC.*
- IV 1. *The CIT(A) erred in confirming the reduction of 90% of development assistance of Rs.1,64,080/- while determining the "profits of the business" for computing deduction u/s. 80HHC.*
2. *The appellant prays that it be held that market development assistance will not fall within the receipts included under clause (baa) to sub sec 4B of sec 80HHC.*
- V 1. *The CIT(A) erred in confirming the Assessing Officer's action of not allowing carry forward of loss of Rs. 4,02,591/- by invoking the provisions of Section 94(7).*
2. *The Appellant prays that its claim for carry forward of loss of Rs.4,02,591/- be allowed.*
- VI. 1. *The CIT(A) erred in confirming Assessing Officer's action of making a reference to the Transfer Pricing Officer ("TPO"). Which is not in accordance with the provisions of Section 92CA of the Act.*

2. *The Appellant prays that the proceedings initiated by the learned TPO under Section 92CA of the Act on the basis of the said reference by the AO be held as void ab initio and that the order passed by the learned TPO under Section 92CA(3) of the Act and consequent action of the AO and the CIT(A) be quashed..*

VII. 1. *The CIT(A) erred in upholding the Assessing Officer of making the addition based on TPO's order without appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the facts of the Appellant's case.*

2. *The Appellant prays that the addition on account of non charging of interest be deleted.*

VII 1. *The CIT(A) erred in confirming the Assessing Officer/TPO action in holding that non charging of interest is not at arm's length.*

2. *The appellant prays that it be held that providing interest free loan is at arm's length and the addition on account of non charging of interest be deleted.*

IX 1. *The CIT(A) erred in confirming the Assessing Officer's action of charging interest u/s. 234B of the Act.*

2. *The Appellant prays that the interest charged u/s. 234B be deleted.*

X 1. *The CIT(A) erred in confirming the Assessing Officer's action of charging interest u/s. 234C of the Act.*

2. *The Appellant prays that the interest charged u/s. 234C be deleted."*

23. The grounds raised by the revenue in ITA No. 4293/Mum/2009 for A.Y. 2002-03 are reproduced as under:

"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in directing the AO not to exclude from the eligible

profit the export incentives being duty drawback relating to eligible unit while computing the deduction u/s. 80IB of the I.T. Act.

2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in directing the A.O. to allow deduction u/s. 80HHC of the Act to the assessee without reducing the deduction allowed u/s. 80IB from the eligible profits u/s. 80HHC.*

3. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in holding that the arms length price of the loan should be worked out at the interest rate of 2% as against the interest rate of 9% followed by the AO on the basis of the order under section 92CA(4) of the I.T. Act passed by the Transfer Pricing Officer.*

The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.

The appellant craves leave to amend or alter any ground and/or new grounds which may be necessary.”

24. We find that ground Nos. one, two and three of the appeal of the assessee in year under consideration are identical to ground Nos 1 to 3 raised in the appeal of assessee for assessment year 2004-05 (ITA No. 6401/Mum/2008) , which we have already adjudicated above, therefore to have consistency in our decision, following our finding in assessment year 2004-05, the ground Nos. 1 to 3 of the appeal for the year under consideration are decided mutatis mutandis. The ground Nos. 1 to 3 of the appeal are accordingly dismissed.

25. The ground No. 4 (four) of the appeal of the assessee relates to reduction of 90% of development assistance of Rs. 16,45, 080/-while determining the profitable business for computing deduction under section 80HHC of the Act.

25.1 Before us the learned counsel of the assessee submitted that identical issue in assessment year 2001-02, has been set aside to the file of the ld. Assessing Officer.

25.2 We have heard rival submissions on the issue in dispute. We find that issue of exclusion of 90% of development assistance for the purpose of computing profit of the business while giving deduction under section 80HHC of the Act, has been set aside by the Tribunal (supra) in assessment year 2001-02 observing as under:

- “13. Ground No.4: After hearing both the parties, we find that AO reduced 90% of the development assistance received by the assessee amounting to Rs. 2,04,997/-, while computing the business profits for the purpose of deduction u/s. 80HHC. The action of the AO was confirmed by the ld. CIT(A).
14. Before us, Ld. Counsel of the assessee submitted that development assistance was in the nature of reimbursement expenses incurred mainly on travelling for participation in the trade fair etc. and, therefore, same should not have been reduced from the business profits.
15. On the other hand, ld. DR strongly supported the order of the CIT(A).
16. After considering the rival submissions, we find that the AO had not discussed this issue in detail as to the nature of reimbursement given by the government. Therefore, in the interests of justice, we set aside the order of the ld. CIT(A) and remit the matter back to the file of the AO with a direction to re-examine the issue after discussing the nature of the scheme of the government.”

- 25.3 The issue in dispute in the year under consideration being identical, respectfully following the finding of the Tribunal(supra), same is restored to the file of the ld. Assessing Officer for deciding afresh after providing adequate opportunity of being heard to the assessee. The ground No. 4 (four) of the appeal of the assessee is accordingly allowed for statistical purposes.
26. The ground no. 5 (five) of the appeal relate to not allowing carryforward of loss of Rs. 04, 02, 591 by invoking the provisions of section 94(7) of the Act.
- 26.1 The facts in brief qua the issue in dispute are that in the return of income assessee claimed short-term capital loss of ₹ 27, 09, 992 after setting off short-term capital gain and dividend income amounting to ₹ 407, 91, 692/ which was claimed as exempt. The said loss was claimed to be carryforward after setting off short-term capital gain of ₹ 2, 07, 818/-. The said loss was not allowed in absence of supporting details like record date of dividend. The assessee was asked to furnish details acquisition of units/shares, record date and sale of the script against which loss was claimed. Out of total loss from the in units in mutual fund, the assessee could not furnish the supporting details in respect of loss of rupees for, 04,02,591/- and therefore, same was disallowed for carryforward. The Ld. CIT(A) also upheld the disallowance of carryforward of loss in view of the provisions of section 94(7) of the Act.
- 26.2 Before us the learned counsel of the assessee though prayed for restoring the issue back to the file of the learned Assessing Officer for deciding afresh, however, in all fairness, he submitted that no such details are available with the assessee. In the circumstances, no fruitful purpose will be served by way of restoring matter back to the Assessing Officer and therefore, accordingly we uphold the finding of the Ld. CIT(A) on the issue in dispute. The ground of the appeal of the assessee is accordingly dismissed.
27. The ground Nos. six and seven of the appeal were not pressed by the ld.counsel of the assessee and accordingly same are dismissed as infructuous.

28. The ground no. 8 of the appeal of the assessee relates to transfer pricing adjustment of interest, wherein the Ld. CIT(A) has upheld the action of the TPO in holding non-charging of the interest as not at arm's length.
- 28.1 In the year under consideration, the assessee repeated arguments which were made in relation to the appeal for assessment year 2004-05. Without prejudice, the assessee also submitted that instead of taking the average rate for charging of interest, the interest should be calculated from the date of actual giving of loan. According to the assessee loan of ₹ 19, 18,021 on 14/12/2001 and further loan of ₹ 29, 19,000 has been given on 28/02/2002.
- 28.2 We find that the identical issue of transfer pricing adjustment in respect of the loans granted to the Associated Enterprises has been considered in assessment year 2004-05, wherein the ld AO/TPO has been directed to apply interest rate of LIBOR + 300% point. The issue in dispute in the year under consideration being identical, we direct the ld. AO/TPO to follow direction on the issue in dispute in assessment year 2004-05 and also consider without prejudice claim of the assessee for charging of the interest for the period of the loan. The ground of the appeal of the assessee is accordingly allowed partly for statistical purposes.
29. The ground no. 9 of the appeal relates to charging of interest under section 234B of the Act, which being a consequential ground, same is dismissed as infructuous.
30. The ground No. 10 of the appeal of the assessee relates to charging of interest under section 234C of the Act.
- 30.1 It is the contention of the assessee before us that interest under section 234C of the Act is to be computed on the basis of the return of income and not on the assessed income. The assessee contended that in absence of any shortfall in payment of advance tax installments after taking into consideration the returned income, no interest is chargeable under section 234C of the Act.

- 30.2 We have heard rival submissions of the parties and perused the relevant material on record. On plane reading of the section 234C of the Act during relevant period, it is evident that short fall in advance tax is to be calculated taking into consideration returned income, which has been defined in Explanation-1 below the section. Accordingly, we restore this issue of charging interest u/s. 234C of the Act to the file of the Assessing Officer for verification and charge interest accordingly to the provision of law: The ground no. 10 of the appeal of the assessee is allowed for statistical purpose.
31. The ground No. one of the appeal of the Revenue relates to excluding duty drawback while computing deduction under section 80IB of the Act.
- 31.1 The brief facts qua the issue in dispute are that in original assessment passed under section 143(3) of the Act, the Assessing Officer excluded the export incentives including the drawback while computing deduction under section 80IB of the Act relying on the decision of the Hon'ble Supreme Court in the case of sterling foods (supra). In the assessment order passed under section 143(3) read with section 153A dated 30/12/2008 the Assessing Officer repeated the same addition. The Ld. CIT(A) however held that duty drawback is part of profit and gains derived from the industrial undertaking and therefore assessee was entitled for deduction under section 80 IB of the Act.
- 31.2 Before us the learned Department Representative submitted that identical ground has been raised by the Revenue in the appeal for assessment year 2004-05 arising from regular assessment order.
- 31.3 The learnedcounsel of the assessee concurred with the statement of the learned department representative.
- 31.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that identical issue questioning the eligibility of the duty drawback for deduction under section 80IB of the Act has been adjudicated by us. We have, following the decision of

the ITAT in the case of the assessee for assessment year 2001-02 in ITA No. 398/Mum/2010 has set aside the finding of the Ld. CIT(A) and allowed the ground of the appeal of the Revenue. To maintain consistency in our decision, the decision of the Ld. CIT(A) in the year under consideration is also set aside and the order of the Assessing Officer is restored. This ground of the appeal of the Revenue is accordingly allowed.

32. In ground No. two of the appeal, the Revenue is aggrieved by way of allowing of deduction under section 80HHC of the Act without reducing the deduction under section 80IB of the Act from the eligible profit under section 80 HHC of the Act.

32.1 The learned Assessing Officer in para 12.6 of the impugned assessment order reduced the deduction under section 80HHC of the Act observing as under:

“12.6 The assessee was asked why the claim of deduction u/s. under section 80 HHC shall not be reduced by the amount of deduction u/s. section 80IB of Rs. 2,25,49,953/- by invoking provision of section 80 HHC 4(B) which says “For the purpose of computing the total income under sub section (1) or sub section (IA), any income not charged to tax under this act shall be excluded (IA), any income not charged to tax under this act shall be excluded”. In reply to this, the assessee submitted that section 80 HHC 4(B) is not applicable in the case of assessee as it applies to income not charged to tax, therefore claim under section 80HHC should be allowed in full. The contention of the assessee is not acceptable, therefore deduction under section 80 HHC is accordingly reduced to Rs. 12,65,60,271/- i.e. (Rs. 17,91,10,224 - Rs.6,25,49,953/-).”

32.2 The Ld. CIT(A) observed that deduction under section 80HHC has to be computed independent of deduction under section 80IB, subject to overall ceiling of hundred percent profit of the undertaking. He further observed that

object of insertion of section 80IA(9A) [now section 80IA(9)] was not to prevent claim of deduction under more than one section under chapter VI-A, where the assessee satisfies the conditions of those actions, but only to ensure that sum total of deduction so claimed by the assessee does not exceed 100% of profit and gains of the undertaking in respect of which deduction is available. The Ld. CIT(A) following the decision cited by the assessee, directed Assessing Officer to allow deduction under section 80HHC of the Act without reducing the deduction under section 80IB from the eligible profit under section 80HHC of the Act.

32.3 Before us the learned DR relied on the order of the Assessing Officer, whereas learned counsel of the assessee submitted that the Tribunal in miscellaneous application No. 73/Mum/2011 arising from ITA No. 398/Mum/2010 for assessment year 2001-02 has allowed the issue in favour of the assessee observing as under:

“4. After considering the rival submissions, we find that the issue raised in ground No.3 regarding reduction of deduction u/s.80HHC while computing the deduction u/s.80IB(10) in view of provisions of sec.80IB(13) r.w.s. 80IA(9). The Tribunal decided the issue against the assessee by following the decision of 5 Members Special Bench of the Tribunal in the case of ACIT vs. Hindustan Mint & Agro Products Pvt. Ltd. [supra]. We further find that when this issue came up for consideration of the Hon'ble Bombay High Court in the case of Associated Capsules Pvt. Ltd. vs. DCIT [supra], the decision of 5 Members of the Special Bench was reversed and the issue was decided by the Hon'ble High Court vide para-39 as under:

“39. In the result, we hold that Section 80IA(9) does not affect the computability of deduction under various provisions under heading ‘C’ of Chapter VIA, but it affects the

allowability of deductions computed under various provisions under heading 'C' of Chapter VIA, so that the aggregate deduction under Section 80IA and other provisions under heading 'C' of Chapter VIA do not exceed 100% of the profits of the business of the assessee. Our above view is also supported by the C.B.D.T. Circular No.772 dated 23121998, wherein it is stated that Section 80IA(9) has been introduced with a view to prevent the taxpayers from claiming repeated deductions in respect of the same amount of eligible income and that too in excess of the eligible profits. Thus, the object of Section 80IA(9) being not to curtail the deductions computable under various provisions under heading 'C' of Chapter, it is reasonable to hold that Section 80IA(9) affects allowability of deduction and not computation of deduction. To illustrate, if Rs.100/is the profits of the business of the undertaking, Rs.30/is the profits allowed as deduction under Section 80IA(1) and the deduction computed as per Section 80HHC is Rs.80/, then, in view of Section 80IA(9), the deduction under Section 80HHC would be restricted to Rs.70/, so that the aggregate deduction does not exceed the profits of the business."

Therefore, a mistake has crept into the order of the Tribunal and, accordingly, we substitute the para Nos.9 to 12 by the following:

"9. Ground No.3: After hearing both the parties, we find that the AO reduced deduction u/s.80HHC, while computing deduction u/s.80IB(10) in view of the provisions of section 80IB(13) r.w.s. 80IA(9). The

action of the AO has been confirmed by the ld. CIT[A].

10. *The Ld. Counsel of the assessee submitted that this issue is covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in the case of Associated Capsules Pvt. Ltd. vs. DCIT in I.T.Appeal No.3036 of 2010, dated 10th January, 2011.*

11. *On the other hand, ld. DR relied on the order of the CIT[A].*

12. *After considering the rival submissions, we find that the Hon'ble Bombay High Court in the case of Associated Capsules Pvt. Ltd. vs. DCIT [supra], has decided the issue vide para-39 which reads as under:*

“39. In the result, we hold that Section 80IA(9) does not affect the computability of deduction under various provisions under heading ‘C’ of Chapter VIA, but it affects the allowability of deductions computed under various provisions under heading ‘C’ of Chapter VIA, so that the aggregate deduction under Section 80IA and other provisions under heading ‘C’ of Chapter VIA do not exceed 100% of the profits of the business of the assessee. Our above view is also supported by the C.B.D.T. Circular No.772 dated 23/12/1998, wherein it is stated that Section 80IA(9) has been introduced with a

view to prevent the taxpayers from claiming repeated deductions in respect of the same amount of eligible income and that too in excess of the eligible profits. Thus, the object of Section 80IA(9) being not to curtail the deductions computable under various provisions under heading 'C' of Chapter, it is reasonable to hold that Section 80IA(9) affects allowability of deduction and not computation of deduction. To illustrate, if Rs.100/is the profits of the business of the undertaking, Rs.30/is the profits allowed as deduction under Section 80IA(1) and the deduction computed as per Section 80HHC is Rs.80/, then, in view of Section 80IA(9), the deduction under Section 80HHC would be restricted to Rs.70/, so that the aggregate deduction does not exceed the profits of the business."

Respectfully following the said decision, we decide the issue in favour of the assessee and direct the Assessing Officer to compute the deduction as held by the Hon'ble Bombay High Court in para-39 above."

32.4 The learnedcounsel further submitted that issue in dispute has been decided by Hon'ble Bombay High Court in ITA No. 1442/2013 related to assessment year 2003-04 ,in favour of the assessee. The relevant finding of the Hon'ble High Court is reproduced as under:

"2. The appellant has formulated the following question of law for our consideration:-

“Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law to direct the Assessing Officer to recomputed the quantum of deduction under Section 80HHC of the Income Tax Act without deducting the deduction under Section 80IB of the Act while ignoring the clear provisions of Section 80IB of the Act.”

3. *By the impugned order the Tribunal has allowed the respondent assessee’s appeal by following the decision of this Court in Associate Capsules Pvt. Ltd v/s Deputy Commissioner of Income Tax, reported in 333 I.T.R. 42 (Bom.) The impugned order also relies upon the fact that the respondent assessee’s own case for the assessment year 2001-02 it had by an order dated 20 May 2011 on identical issue, allowed respondent assessee’s appeal by following the decision of this court in Associate Capsules Pvt. Ltd. (supra). The Revenue has not pointed out any distinguishing features in the present case warranting a view different from that taken by this Court in Associate Capsules Pvt. Ltd. (supra) and in the assessee’s own case.”*

32.5 We have heard rival submission of the parties on the issue in dispute. In view of the decision of the Tribunal in miscellaneous application (supra) and decision of the Hon’ble Bombay High Court (supra), we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly we uphold the same. The ground No. two of the appeal of the Revenue is accordingly dismissed.

33. The ground No. three of the appeal of the revenue relates to transfer pricing adjustment of interest, wherein the Ld. CIT(A) has upheld interest rate of 2% as against interest rate of 9% applied by the Assessing Officer.

33.1 We find that issue in dispute is connected to the ground No. eight of the appeal of the assessee in ITA No. 2859/Mum/2009 for assessment year 2002-03,

where we have directed the Assessing Officer/TPO to apply the interest rate at the rate of LIBOR + 300 % for computing transfer pricing adjustment of interest to the international transactions of loans to associated enterprises. The issue being identical, it is decided mutatis mutandis. The ground of the appeal of the revenue is accordingly allowed party for statistical purposes.

34 Now, we take up the appeal of the assessee in ITA No.2861/Mum/2009 for assessment year 2005-06 arising from assessment order passed by the Assessing Officer under section 143(3) read with section 153A of the Act i.e search assessment. The grounds raised by the assessee are reproduced as under:

- I. 1. The CIT(A) erred in confirming the Assessing Officer's action of making a reference to the Transfer pricing officer ('TPO'), which is not in accordance with the provisions of Section 92CA(1) of the Act.*
- 2. The Appellant prays that the proceedings initiated by the learned TPO under Section 92CA of the Act on the basis of the said reference by the AO be held as void ab initio and that the order passed by the learned TPO under Section 92CA(3) of the Act and consequent action of the AO and the CIT(A) be quashed.*
- II 1. The CIT(A) erred in upholding the Assessing Officer of making the addition based on TPO's order without appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the facts of the Appellant's case.*
- 2. The Appellant prays that the addition be deleted.*
- III 1. The CIT(A) erred in confirming Assessing Officer/TPO action in holding that non charging of interest is not at arm's length.*
- 2. The appellant prays that it be held that providing interest free loan is at arm's length and the addition be deleted.*

The Appellant craves leave to add, alter, amend or withdraw all or any of the above Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.”

35. The ground Nos. one and two of the appeal were not pressed by the learnedcounsel of the assessee and accordingly same are dismissed as infructuous.
36. The ground no 3 (three) of the appeal relates to finding of the Ld. CIT(A) in holding that non-charging of interest is not arm's length.
- 36.1 This issue of transfer pricing adjustment to the international transactions of interest on loan to associated enterprises has already been adjudicated by us in the appeal of the assessee in ITA No. 6401/Mum/2009 for assessment year 2004-05,. Following our finding in assessment year 2004-05 (supra), the ld. AO/TPO is directed to determine transfer pricing adjustment to the international transactions of interest on loan given to associated enterprises. The ground of the appeal of the assessee is accordingly allowed for statistical purposes.
37. Now, we take up the appeal of the assessee in ITA No. 2862/Mum/2009 for assessment year 2006-07 arising from the assessment order passed by the Assessing Officer under section 143(3) read with section 153A of the Act i.e. search assessment.

The grounds of the appeal are reproduced as under:

- “I. 1.The CIT(A) erred in confirming the Assessing Officer's action of making a reference to the Transfer pricing officer ('TPO'), which is not in accordance with the provisions of Section 92CA(1) of the Act.*
- 2. The Appellants prays that the proceedings initiated by the learned TPO under Section 92CA of the Act on the basis of the said reference*

by the AO be held as void ab initio and that the order passed by the learned TPO under Section 92CA(3) of the Act and consequent action of the AO and the CIT(A) be quashed.

II. 1. *The CIT(A) erred in upholding the Assessing Officer of making the addition based on TPO's order without appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the facts of the Appellant's case.*

2. *The Appellant prays that the addition be deleted.*

III. 1. *The CIT(A) erred in confirming Assessing Officer/TPO action in holding that non charging of interest is not an arm's length.*

2. *The Appellant prays that it be held that providing interest free loan is at arm's length and the addition be deleted.*

IV 1. *The CIT(A) erred in confirming the Assessing Officer's action of charging interest u/s. 234C of the Act.*

2. *The appellant prays that the interest charged u/s. 234C be deleted.*

The Appellant craves leave to add, alter, amend, or withdraw all or any of the above Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

38. The grounds raised by the assessee in the present appeal are identical to grounds raised in ITA No. 2861/Mum/2009 for assessment year 2005-06 and therefore the grounds of the present appeal are decided mutasis mutandis. The ground No. one and two of the appeal are accordingly dismissed as not pressed and ground three of the appeal is allowed party for statistical purposes.

40. Now, we take up the cross appeal of the assessee and the Revenue for assessment year 2007-08, arising from the order of the Assessing Officer

passed under section 143(3) read with section 153A of the Act. The grounds of appeal of the assessee in ITA No. 2863/Mum/2009 are reproduced as under:

- I. 1. The CIT(A) erred in confirming the Assessing Officer's action of making a reference to the Transfer pricing officer ('TPO'), which is not in accordance with the provisions of Section 92CA(1) of the Act.*
- 2. The Appellants prays that the proceedings initiated by the learned TPO under Section 92CA of the Act on the basis of the said reference by the AO be held as void ab initio and that the order passed by the learned TPO under Section 92CA(3) of the Act and consequent action of the AO and the CIT(A) be quashed.*
- II. 1. The CIT(A) erred in upholding the Assessing Officer of making the addition based on TPO's order without appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the facts of the Appellant's case.*
- 2. The Appellant prays that the addition be deleted.*
- III. 1. The CIT(A) erred in confirming Assessing Officer/TPO action in holding that non charging of interest is not an arm's length.*
- 2. The Appellant prays that it be held that providing interest free loan is at arm's length and the addition be deleted.*
- IV 1. The CIT(A) erred in confirming the Assessing Officer's action of charging interest u/s. 234C of the Act.*
- 2. The appellant prays that the interest charged u/s. 234B be deleted.*

The Appellant craves leave to add, alter, amend, or withdraw all or any of the above Grounds of Appeal and to submit such statements, documents

and papers as may be considered necessary either at or before the appeal hearing.”

41. The grounds of appeal of the Revenue in ITA No. 4295/Mum/2009 are reproduced as under:

“ 1. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in holding that the assessee was entitled to claim depreciation on the windmills though the AO had found that the said windmills were not commissioned before 31/03/2007.

2. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in holding that the arms length price of the loan should be worked out at the interest rate of 2% as against the rate of interest 6.5% followed by the AO on the basis of the order under section 92CA(4) of the I.T.Act passed by the Transfer Pricing Officer.

The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.

The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary.”

42. The ground No. one and two of the appeal were not pressed before us by the learned counsel of the assessee, therefore seem a dismissed as infructuous.

43. The ground No. three of the appeal of the assessee and ground No. two of the appeal of the revenue are connected and relates to transfer pricing adjustment to the international transactions of interest on loans to Associated Enterprises. The identical ground have been adjudicated by us in the appeal of the assessee in ITA No. 6401/Mum/2009 for assessment year 2004-05,. Following the

same, the Ld AO/TPO are directed to compute transfer pricing adjustment to the international transactions of interest on loan to associated enterprises. The ground Nos. three of the appeal of the assessee and ground No. two of the appeal of the revenue are accordingly partly allowed for statistical purposes.

- 43.1 In groundNo. one of the appeal, the Revenue is aggrieved with the finding of the Ld. CIT(A) that windmills were commissioned on 31/03/2007 and therefore assessee is eligible for depreciation on those windmill as per law.
- 43.2 The brief facts qua the issue in dispute are that during the year under consideration the assessee claimed to have installed 5 windmills of 1500 kW each at village Narsewadi, Distt. Sangli (Maharashtra). The project of installation and commissioning of aforesaid windmills was executed by M/s Suzlon Group entities. According to the assessee, 4 (four) windmills were installed, commissioned and commenced generation of power on 25/03/2007 and one windmill was commissioned and begin generating power on 29/03/2007. According to the assessee windmill had started generating power and therefore the assessee claimed depreciation in the rate of 40% being 50% of normal depreciation in the rate of the 80%, amounting to ₹ 17, 08, 56, 866/-.
- 43.3 According to the Assessing Officer, the windmills were not commissioned as on 31/03/2007 and therefore assessee was not eligible for claiming depreciation on the same. For verification of commissioning and generation of power by those windmills, the investigation wing, Mumbai issued commission to Assistant Director of Income-tax (investigation), (ADIT) Kolhapur for examining the officers of the Maharashtra State electricity distribution Company Limited (MSEDCL). The ld ADIT(Inv), Kolhapur, recorded statements of five officers of MSEDCL namely Sh VD Kumbhar(EXECUTIVE engineer, Vita Division), Sh PJ Jedhe(Executive engineer, Circle office MSEDCL, Sangli), Sh SD Dabade(Asstt engineer, Vita Division , Sangli), The report of the Assistant director of Income tax (investigation), Kolhapur , highlighted following observations:

- (i) for the metre readings at individual windmill level, no basic records of those readings was available with those executive engineers of MSEDCL.
- (ii) In the statement, the Executive engineer of MSEDCL stated that time required for completing the construction of 33 KV line from Narsewadi (the place of installation of windmills) to Common Metering point of Electricity Grid at Village Karve (Sub Station Vita) was approximately three Months.
- (iii) The approval for construction of 33 KV line for connecting from windmill to common metering point of electricity grid was granted by the director-operation, MSEDCL to SUZLON energy Ltd vide letter dated 23/03/2007 and therefore construction of 33 KV line cannot be completed within 11 days from the date of said approval to 31/03/2007.

43.3 Before the Assessing Officer, the assessee submitted that installation and commissioning of windmills was a long-drawn process of more than 2 to 3 years involving permissions from various government authorities and regulatory procedures. Sometimes works were executed but approval/permissions on paper were sought only at the fag end of completion of the work. The assessee provided entire detail of assigning of installation and commissioning to Suzlon energy Ltd as a turnkey project, installation of transmission line to evacuate the power generated by the windmill to electricity substation, installation and final commissioning of windmill etc.

43.4 The learnedcounsel further submitted that the assessee vide letter dated 23/03/2007, informed the concerned unit of investigation wing Mumbai, about commissioning of windmills and requested the authorities to remain presentat the time of commissioning. This information was given in compliance with the

directive issued by the team of investigation wing on 14/03/2007. However, nobody from the Income-tax department turned up for verification of commissioning of the windmills.

43.5 This was submitted that during the commissioning of the windmills of officials of the MSECDL were present and recorded the controller reading as under:

<u>Machine No</u>	<u>Units Generated</u>	<u>Date of Commissioning</u>	<u>Time of Commissioning</u>
N-276	136 KWH	25-03-2007	20.15 Hrs
N-277	127 KWH	25-03-2007	20.31 Hrs
N-278	116 KWH	25-03-2007	20.43 Hrs
N-279	107 KWH	25-03-2007	20.48 Hrs
N-282	179 KWH	29-03-2007	20.30 Hrs

43.6 According to the assessee above facts proved beyond doubt that authorities had initially taken the individual reading of the windmills.

43.7 Before the Assessing Officer the assessee filed entire details in respect of the windmills from installation to commissioning and generation of electricity. The assessee also sought cross-examination of the witnesses relied upon by the Assessing Officer.

43.8 The Assessing Officer made further inquiries from Suzlon energy Ltd, MSECDL, under section 133(6) of the Act for verifying installation of transmission line from the windmill to electric substation. In view of the information gathered, the Assessing Officer observed as under:

“16. The contention of the assessee is not tenable, if the following points analyze chronologically:-

1. Executive Engineer, MSEDCL in reply to the query no. f(ii) tentative period of construction of line, distance there of/ it was stated that distance 12.4 KM construction of the work required approx. 1 month. And Superintendent Engineer,

sangli has informed to M/s. Suzlone infrastructure Ltd. To obtain permission from our corporate office,Mumbai vide letter no. 1422 dated 15-2-2007.

- 2. Assistant Engineer, MSEBO & M, Vita, submitted Estimate before Executive Engineer on 08.03.2007.*
- 3. Executive Engineer, Vita, submitted estimate before Superintendent Engineer (SC) for action on 08.03.2007.*
- 4. Based on proposal of the EE, Chief Engineer (KOPZ), Kolhapur, forward the same to the Chief Engineer (Dist), Bandra, on 12.03.2007 for approval.*
- 5. Director (Operation) vide letter dated 20.03.2007 has communicated their no objection to M/s. Suzlon Energy Ltd.,*
- 6. On 22.03.2007 M/s. Suzlon has deposited the requisite fees on 22.03.2007.*

From the correspondence summarized above, it is seen administrative approval was communicated to M/s. Suzlon on 20.03.2007. Therefore, the work cannot be completed within 11 days i.e. from the date of communication to the end of 31.03.2007.”

43.9 The Assessing Officer in view of the correspondence, statement of MSECDL officials on evidence collected, held that claiming of installation of windmills by the MSECDL was contradictory and cannot be relied upon. He accordingly rejected the claim of commencement of windmills on the before 31/03/2007 and accordingly disallowed the claim of the depreciation of the assessee.

43.10 On further appeal, the Ld. CIT(A) deleted the disallowance observing as under;

“4.11 I have considered the AO's observations as per the assessment order and submissions of the appellant. It is observed that during the courses of such, documents were found which indicated that the appellant had calculated the advance tax for the quarter ended 31-3-2007 after taking into account the depreciation of RS. 17 crore to be allowed on the five windmills scheduled to commence production before 31-3 2007. The appellant during the course of search stated that:

"As the wind mill are yet under installation, the company is making payment of advance without accounting depreciation on wind mill. How ever depreciation shall be claimed on windmills by the company on commencement of production from the windmills. The company shall make adequate arrangement for inspection by the personal of DDIT at the time of commencement of production and the commencement of production shall be done in the presence of personal from DDIT. The appellant, on 23-3-2007 intimated the DDIT about the date of commissioning of the windmills resulting in commercial production vide letter dated 23-3-2007 duly acknowledged by the offices of Addl. DIT/DDIT. However, despite the request made by the appellant, no one from the investigation wing tried the site to witness the commissioning of windmills. The windmills were commissioned on 25/03/07 & 29/03/07 as per schedule and produced power which were directly evacuated to the main grid of MSEB through the transmission line.

- 4.12 *In the month of July/Aug 2007, DDIT recorded the statement of some of the officers MSEDIL related to Wind Mills commissioned in the month of March 2007. These statements were also forwarded to the A.O. Some of the extracts of the statement found relevant by the assessing officer were sent to the appellant for their comment. The appellant summarily stated that these statements connected to construction/installation of transmission line have been misinterpreted and accordingly erroneous inferences have been drawn by the A.O. However it was also clear from the relevant parts of these statements that none of the officers have denied the mining of wind mill before 31-3-2007. The appellant also requested for cross examination of these officers, in case the statement were used against the appellant. However, no opportunity for cross-examination was given by the A.O.*
- 4.13 *The assessing officer went ahead and in order to cross verify the authenticity of the above statements he collected further information from MSEB and Suzlon Infrastructure Ltd., by issuing notice under section 133(6). The information provided by both agencies also confirmed the commissioning of wind mills. The A.O, however, without recording any substantive reason disallowed the claim of depreciation by not accepting the commissioning certificates.*
- 4.14 *I have also gone through the statement of MEDC authorities and find that none of the officers have denied commissioning of the windmills. The reasons for disallowance of depreciation, recorded by the AO were as under:*

a. Non-completion of transmission line, to evacuate the power generated by the wind mills (this reason is incorrect because the transmission line was actually completed through 132KV Tower line instead of RSJ Pole line as originally planned).

b. Basic records pertaining to noting of the initial meter reading at the time commissioning of the wind mill as well as record of individual meter reading thereafter were not made available.

4.15 *In this regard, it is seen that originally the construct the 33 Kv DC transmission line using RSJ Pole structure was granted on 16th Sep 2006. However, later on Suzlon Infrastructure Ltd. vide its letter dt. 9th Nov. 2006, written to the Superintendent, MSEDCL Ltd. Sangli, informed them about their intention to use 132 Kv Towerline methodology instead of RSJ Pole methodology, as proposed earlier. In this letter, Suzlon had also requested the department for inspection of construction activity. On 15th Feb. 2007, MSEDCL, Circle Office, Sangli had ratified the above said modification, while observing an under.*

“It is observed that you have already started the work of 33 KV double circuit line (emphasis supplied) with 132 KV towers. The cost of evacuation by construction of 33KV double circuit line with 132KV towers will increase than 33KV double circuit line with RSJ supports.”

4.16 *On this subject, MSEDCL, “Prakashgad”, Bandra, Mumbai office, also had given its technical no objection to the use of 133 Kv*

Tower Line, instead of RSJ Pole in constructing 33Kv DC transmission line, while observing as under”

Para 2

“In this regard we understand that you used (emphasis supplied) 32 Tower structure for construction of 33kv D/C line in order to reduce ROW Problems.”

Para 3

"Also we understand that with the usage of Tower Line, the maintenance will reduce and the may be used for evacuation at 132kv level in future if required making changes.”

Para 4

“Under the circumstance, this office has no objection in giving permission to you to use 132 kV Tower structure instead of RSJ Pole structure for construction of 33 Kv D/C line from Narsewadi to 220/33 kV ENV S/SM at Vita, DistSangli.

It is also seen that, approval for use of 133 Kv Tower Line, instead of RSJ Pole

4.17 On 20th March 2007, Suzlon Infrastructure Ltd. had requested the Electrical Inspector, Miraj for inspection of already completed work of 33KV D/C line on 132kV Town Line. Therefore, on 23rd March 2007, Electrical Inspector, Miraj, after due Inspection of the 33 kvD/C, line on 132 Kv Tower line had granted permanent permission to Suzlon Infrastructure Ltd for charging the

transmission line referred above Parallely, on 23 March, 2007, Electrical Inspector. Miraj, after due inspection 33 Kv D/C, line on 132 kV Tower Line, had also granted permanent permission to the appellant for each of the five wind mills. From the combined reading of above correspondence it is evident that Transmission line was completed and inspected us 23-3-2007.

4.18 *As regards individual meter reading, it is seen that, as a matter of policy. Maharashtra State Electricity Board (MSEB), decided to take joint mater reading instead of taking reading of individual wind mill. In the entire issue, it is seen that, letters dt.15-02-2007 and dt. 20-03-2007 issued by MSEDCL authorities, in connection with construction of 133Kv transmission line and the statement on the basis of which A.O has formed his opinion to disallow the depreciation plays a vital a role in deciding the issue. In view of this, it is essential to properly interpret the above said letters and the statement of MDSL officers in interest of equity and justice Same is discussed as under:*

- *From the relevant portion of the letter dated 15-3-2007 from the Superintendent Engineer, MSEDCL Ltd, Sangli, which has been reproduced above, it can be easily inferred that, construction work of 133 Kv double circuit line had already started, with 132 Kv towers. However on the basis of this lenses the Assessing officer has inferred that the construction of Transmission line was not complete, when this letter is in the nature of post-dated technical ratification for using Towers instead of RSJ poles. This is amply evident from the said letter.*

- *From the letter dated 20-3-2007 issued by the Director operations MSEDCL and heavily relied upon by the Assessing officer it is amply clear that the construction of the transmission line was complete and the aforesaid approval was more of a technical ratification for using "**Towers**" instead of "**RSJ poles**". This correspondence clearly establishes the fact, beyond any doubt that the transmission line was completed in all respects by 20-3-2007. The A.O blindly relied on incorrect interpretation of the letter dt. 20-03-2007 by the investigation wing.*
- *It is also a fact that, inspite of repeated requests from the appellant, the appellant was not given opportunity to cross examine the officers of MSEDCL, whose statements were recorded on the back of the appellant, and were used against the appellant. This amounts to denying natural justice to the appellant.*
- *Further, it is also true that, the appellant vide its letter dated 23rd March 2007, had specifically intimated the department, to depute its representative to personally verify the commissioning of the wind mill. It is also submitted by the appellant that, the said direction was given to the appellant during the course of action. U/s. 132 of the Act. The appellant had discharged its onus to substantiate its claim of depreciation; however the*

department did not respond to this request of the appellant.

- The AO has not brought on record, any concrete evidence to substantiate his decision of disallowing the depreciation, except for the wrong inferences drawn from out of the statements recorded of the officers of MSEDCL. As against this, the appellant has submitted a series of documents issued by various authorities located at various places, to substantiate its claim that the WTGs were commissioned before 31/03/07*
- The decision in the case of Omkar Textile Mills (supra) delivered by Abemadabad ITAT, on similar facts where the commissioning certificate issued by the state electricity board authorities has been held to be sufficient evidence to prove the commissioning of the wind mill, also supports the case of the appellant.*

4.19 I am therefore of the view that the appellant is entitled to claim of depreciation on the said 5 windmills and the A.O. was not justified in disallowing the same.”

43.11 The learned department representative relied on the order of the Assessing Officer and submitted that by appreciation of overall evidences, it cannot be established that windmills were commissioned on the before 31/03/2007 and therefore Ld. CIT(A) is not justified in deleting the disallowance of depreciation.

43.12 The learned counsel of the assessee on the other hand rebutted the finding of the Assessing Officer and filed written submissions.

43.13 We have heard rival submission of the parties and perused the material relevant to the issue in dispute.

43.13.1 Firstly, as regards the issue that meter reading of electricity generation shown by the windmills is not reliable , we find that that out of the officials of MCEDCL who were present at the time of the commissioning of windmills, only one official MrDabade said that he had not taken the reading, whereas others confirmed the fact of recording meter readings, therefore relying upon one official, it cannot be concluded that reading of commissioning of windmills were not recorded by the MSECCL officials. As regard to the statements of those officials is concerned, the assessee sought cross-examination however the Assessing Officer did not provide any opportunity of cross-examination. In absence of cross-examination, statement of those persons cannot be used as evidence against the assessee as held by the Hon'ble Supreme Court in the case of **M/s Andman Timber industries vs Commissioner of Central Excise (2015) 62 taxmann.com 23 (SC)**.

43.13.2 The assessee further submitted that entire procedure of recording generation of the electricity by windmills is technology controlled. The relevant process of recording generation of electricity has been explained by the assessee before us as under:

“20. As regards recording of the readings of the meter is concerned the appellant submits that all the WTG are very sophisticated machines equipped with the latest technology and software. The rotor blades of the WTG are connected to the nacelle. The entire operation of the WTC is controlled and monitored through an SCS controller one of which is placed in the hub and directly linked to the other embedded in the panel installed at the foot of the WTG. SCS controlled is a Micro Processor based Programmable controller for continuous monitoring and operational control of WTG. It senses speed,

wind direction and many other parameters and decides optimal operating of the WTG by continuously adjusting pitch, yaw and various devise. The controller uses Bachmann Controller M1 and at its heart is a state of the art 32 bit Pentium III processor operating at 400 MHZ for faster processing speed and greater capacities. The units generated are first recorded in the controller installed in the hub of the WTG which is via the cable transmitted directly to the controller embedded in the panel installed at the foot of the WTG. From the controller the readings are directly transmitted through optical fibre network to the Central Monitoring system and from there directly uploaded on the website maintained by Suzlon. This is also corroborated by the Daily Power Generation report for 5 windmills”

43.13.3 Secondly, regarding the doubt of learned Assessing Officer on the period of commissioning of transmission line for connecting the windmills to feeder electric substation of MSECDL, the assessee has submitted date wise sequence of events in written submission. For ready reference said part of submission is produced as under:

“ 12. As regard, the allegation of the AO that the construction of Line for distance of 12.4km which required approximately 1 month could not completed within 11 days from the date of communication as the permission was obtained vide letter dated 15/02/2007 and administrator approval was communicated only on 20/03/2007. The appellant submits that as stated hereinabove the power industry is a highly regulated industry and requires approval/permissions at every stage from different authorities for installation and

commissioning of the wind mills which is evident from the major chronological events listed below:

13. List of Chronological Events of installation of Windmill

<i>Dates</i>	<i>Events</i>	<i>Page of Compilation</i>
7-02-06	<i>Application by Suzlon to MEDA for granting permission to grid connectivity for evacuating 40MW of power</i>	240
28-02-06	<i>MEDA forwards the application of Suzlon to MSEDCL, Mumbai for approval.</i>	241-242
16-06-06	<i>Director(Operation) Mahavitaran, directing to approach chief Engineer, Transmission planning of MSETCL for grid connectivity and construction of 33KV bay at Vita Substation.</i>	243
16-9-06	<i>Permission granted for construction of 33KV bay at vita Sub station</i>	244
9-11-06	<i>Letter by Suzlon to Superintendent Engineer MSEDCL, Sangli informing starting of construction of</i>	245-246

	<i>132KV tower line from Vita Substation to Windfarm</i>	
<i>29/01/17</i>	<i>Clearance certificate issued by MEDA for setting up of 7.5 MV windmill power project.</i>	<i>247-248</i>
<i>15-02-07</i>	<i>Technical ratification of the Superintendent Engineer of MSEDCL, Sangli for using of 132KV instead of double circuit line with RSJ Pole Support.</i>	<i>249-251</i>
<i>07/03/07</i>	<i>Spot verification by project executive officer, MEDA, Sangli, of the transmission Line.</i>	<i>252-267</i>
<i>12-03-07</i>	<i>MSEDCL intimates payment of the supervision charges</i>	<i>268-271</i>
<i>20/03/07</i>	<i>MSEDC grants permission to Suzlon to use 132KV power structure</i>	<i>272</i>
<i>20/03/07</i>	<i>Suzlon letter to Electrical Inspector IE and L department, Miraj for inspection of already</i>	<i>273</i>

	<i>completed 33 KV double circuit line.</i>	
<i>21-3-07</i>	<i>Suzlon makes payment of supervision charges to MSEDCL for supervising the construction of transmission line.</i>	<i>274-275</i>
<i>22-03-07</i>	<i>Application by Suzlon to Superintendent Engineer, MSEDCL Ltd. Sangli for charging 132KV tower line.</i>	<i>276</i>
<i>23/3/07</i>	<i>Electrical Inspector granting permanent permission to charge the transmission line.</i>	<i>277-291</i>
<i>23/3/07</i>	<i>Electrical Inspector, Miraj permitting use of generator sets.</i>	
<i>23/03/2007</i>	<i>Intimation vide appellant's letter dated 23/03/2007, to the unit of investigation wing, Mumbai about the commissioning of the windmills and requesting their presence.</i>	<i>292</i>
<i>25/03/07</i>	<i>Commissioning 4</i>	<i>293-296</i>

	<i>windmills N276, N 278 and N 279 in the presence of Executive Engineer, O & M Vita Division, Executive Engineer (ADM) C.O Sangli, Assistant Eng. Sub Div Vita, Deputy Executive Engineer, Engineer testing unit, Sangli</i>	
<i>29-03-07</i>	<i>Remaining 1 unit of windmill N282 commissioned in the presence of above officer</i>	
	<i>Individual machine wise record of power generation</i>	<i>299-303</i>
<i>4/4/2007</i>	<i>Letter by MSEDCL for Joint Meter Reading for the month of March, 2007</i>	<i>304</i>
<i>5/4/2007</i>	<i>Letter of Suzlon giving developer vide Wind Energy Breakup Sheet</i>	<i>305-311</i>
	<i>Copy of bills raised on MSEDCL by Appellant</i>	<i>312-313</i>

43.13.4 The learnedcounsel of the assessee has further submitted that in view of the following transmission line was completed in all respect by 20/03/2007:

- “17. On 7-3-2007 the project executive officer, Maharashtra Energy development agency Sangli MEDA, vide his check list dated 7/3/2007 had conducted on spot verification cum inspection of the Wind Mill set up and its transmission line which was ready for commissioning, in response to letters dt 3/02/07 19/02/0, written by Suzlon. It is the routine procedure of MEDA, that, during the course of Final inspection, a photo is taken with the current newspaper in hand. In this photograph, a photo is taken with the SUZLON, are appearing. Enclosed copy of check list dt. 1th March, 2007 as well as copy of photos of the concerned officials holding Times of India newspaper of same date (Refer to page 249-267 of the compilation).
18. On 20/3/07 SIL wrote to the Electrical Inspector, IE & L Dept, Miraj, for inspection of the already completed 33kv Double Circuit Line on 132kv Tower Structure from Narsewadi to Vita. It is specifically mentioned in the letter that, the line under reference is complete in all respect and request is made for the early inspection of the line and issue of necessary approval cum certificate.(Refer to page 273 of the compilation).
19. On 23-03-07 Electrical Inspector, granted permanent permission to charge and grid the above referred transmission line vide letter no. 558 dated 23/3/07 Copy of letter 558, issued by Electrical Inspector, granting permission to charge and grid there referred transmission line. Details of the verification and inspection made by the authority are given in the said letter (Refer to page 276 to 291 of the compilation).

The above clearly establishes beyond any doubt that the transmission line was completed in all respects by 20/03/2007.

This is also corroborated from the following:

- *Invoice nos. 736,745,774,791 ad 786 with covering letter of Suzlon for completing of installation of power Transmission Lines.*
- *Application made by the Suzlon to the Electrical Inspector Miraj vide letter dated 20-3-2007 for inspection of the tower line and issue of necessary certificate.*
- *Simultaneously, Suzlon made an application to the Superintendent Engineer Sangli for charging the line on 23/3/2007.*
- *The Electrical Inspector Miraj Division, after inspection vide letter dated 23/3/2007 permitting to use the Generating Sets.*
- *Clearance Certificates for commissioning issued by the Director General of MEDA.*

43.13.5 The learned DR could not controvert these factual finding referred by the ld.counsel of the assessee.

43.13.6 Thirdly, the Superintending Engineer, Sangli issued Commissioning Certificate on 29/03/2007 and thereafter on 01/04/2007, confirming commissioning of four windmills on 25/03/2007 and one windmill on 29/03/2007. The said certificates also provided units of power generated by each windmill at the time of the commissioning. The revenue cannot discard the certificates without any evidence to the contrary.

43.13.6 Fourthly, the assessee has raised invoice on the MSECDL for generation of 1,26,135.90 KiloWatt(KW) of power by four windmills for the month of March

2007, amounting to Rs.4, 41, 447/-and invoice for generation of 10,817.30 KW of power by one windmill for the month of March 2007, amounting to ₹ 37, 860/-. These invoices have been approved by the concerned officials of MSECDL and the assessee has received payments against those invoices also.

43.13.7 Fifthly, despite advancing the message to the investigation unit of Income-tax department Mumbai regarding commissioning of windmills on 23/03/2007, none attended for witnessing the said commissioning. The sending of letter by the assessee intimating such commissioning in itself establish the fact of commissioning.

43.13.8 The coordinate bench of the Tribunal ,Ahmedabad in the case of **Omkar Textiles Mills Private Limited Vs ITO (2008) 115 TTJ 716**,allowed the claim of the depreciation on the windmills commission on 27/03/1995 observing as under:

“On perusal of the facts, we find that the WTGD was commissioned on 27th March, 1995 and trail run was also undertaken which is evident from the certificate of Gujarat Energy Department Agency for the share of power certifying that 11.9 kw were supplied to the Gujarat Electricity Board in the month of March, 1995. Sales-tax exemption certificate with effective date as 27th March, 1995, the eligibility certificate issued by the Commissioner commissioning certificate by GEDA, quick test report issued by the GEDA letter of NEPC-MICON for successful commissioning and all certifying that the WTGS was commissioned on 27th March, 1995. In view of these facts in our opinion, there remains no doubt that the WTGS was commissioned only on 27th March, 1995 and therefore, the assessee is entitled to depreciation in respect thereof in accordance with law. The AO is directed to allow the claim of the assessee.”

43.13.10 In the case of **C Dinesh & Co. Vs Income-tax department (ITA No. 3394/Ahd/2009)** , the Tribunal held that even if the windmills are commissioned on the last day of the month of the March of the relevant previous year, the assessee is entitled to claim of depreciation on the basis of commissioning certificate issued by the relevant authority. In the said case, the claim for depreciation on the windmill was rejected by the Department on the ground that individual meter reading was not recorded and erection of the transmission line was also doubted, but the Tribunal allowed the claim of the assessee holding that since the concerned authority had certified the commissioning of the windmill and the invoice of ₹ 98 was raised for 29 units of electricity generated on the last day of the relevant previous year.

43.13.11 In the instant case before us commissioning certificates have been issued by the concerned authorities, meter readings have been approved by the concerned official and invoices raised of rupees 04,41,475/- and ₹ 37, 860/-for generation of 01, 26, 135.90 kw and 10, 817.30 kw of power respectively have been raised and payments against those have also been received by the assessee.

44.14 In view above facts and circumstances and relying on the decision of the coordinate bench of the Tribunal in the case of C Dinesh and Co. (supra), we uphold the finding of the Ld. CIT(A) on the issue in dispute of deleting the disallowance of depreciation, which was made by the Assessing Officer.

45. The ground of No. 1 of the appeal of revenue is accordingly dismissed.

46. Now, we take up the cross appeals of the assessee and revenue for assessment year 2009-10, arising out of assessment order passed under section 143(3) of the Act i.e. regular assessment. The grounds of appeal raised by the assessee in ITA No. 6015/Mum/2014 are reproduced as under:

“I. 1. The commissioner of Income Tax (Appeal)-15 (“CIT(A)”) erred in confirming the disallowance u/s. 14A of Rs. 9,32,781/-.

2. *The appellant prays that the disallowance u/s. 14A be deleted.*

II 1. *The CIT(A) erred in confirming the Assessing Officer's action of making adhoc disallowance of Rs. 13,87,682/- under the head foreign travelling expenses.*

2. *The appellant prays that the adhoc disallowance under the head foreign travelling expenses be deleted.*

Without prejudice the appellant prays that the disallowance be appropriately reduced.

III. 1. *The CIT(A) erred in making disallowance of Rs. 1,41,190/- treating the same as prior period expenses.*

2. *The appellant prays that the disallowance of Rs. 1,41,190/- be deleted.*

IV 1. *The CIT(A) erred in confirming the Assessing Officer's (AO) action of making a reference to the Transfer pricing Officer ('TPO'), which is bad in law.*

2. *The appellants prays that the order passed by the learned TPO u/s. 92CA(3) of the Act be quashed as bad in law.*

V. 1. *The CIT(A) erred in confirming the AO/TPO action in holding that non charging of interest on loan is not at arm's length.*

2. *The appellant prays that that addition of Rs. 83,49,076/- be deleted.*

Without prejudice, the appellant prays that effect be given to the proviso to section 92C(2) in computing the arms length price.

Without prejudice the appellant prays that the addition be appropriately reduced.

VI. 1. *The CIT(A) erred in confirming the Assessing Officers's action of charging interest u/s. 234B and 234C of the Act.*

2. *The appellant prays that the interest charged u/s. 234B and 234C be deleted."*

47. The grounds of appeal raised by the revenue in ITA No.5969/Mum/2014 are reproduced as under:

"on the facts and circumstances of the case and in law, the CIT(A) erred in deleting the addition made on administrative charges by holding that the assessee is not engaged in the business of giving loans or banking, without appreciating the fact that the assessee, though not a banker, would actually incur costs while advancing/providing the loan and also on various documents."

48. The ground no. 1 one of the appeal of the assessee, relates to disallowance under section 14A amounting to ₹ 9, 32, 781-.

48.1 The brief facts qua the issue in dispute are that on verification of statement, the Assessing Officer found that assessee derived income of ₹ 2, 97, 328 from dividend which was claimed as exempt under section 10(34) of the Act, however no expenses attributable to such exempt income was suo-moto disallowed by the assessee, therefore, following due procedure of law, the Assessing Officer invoked rule 8D of Income-tax rules, 1962 and made disallowance of Rs.7,79,466/- for indirect interest expenses [under rule 8D(2)(ii)] and ₹ 1, 53, 315/-towards administrative expenses [under rule 8D(2)(iii)] totaling toRs.09, 32, 781/-.

48.2 On further appeal, the Ld. CIT(A) following the finding of his predecessor in assessment year 2008-09, upheld the disallowance observing as under:

"4.3 I have considered the facts of the case, submission of the appellant as against the findings/observations of the AO in his

order u/s. 143(3) of the I.T. Act. The contentions and submissions of the appellant are being discussed and decided here in under:

i. An identical issue had come up in appellant's own case for A.Y. 2008-09 herein vide my order dated 12.12.2013, I have decided the issue as under:

i. The appellant contended that the AO has worked out disallowance u/s. 14A rws 8D in the mechanical manner without application of mind. In this regard it is mentioned that in Para 4 of the assessment order, the AO has disclosed the reason for making disallowance and has thus recorded his satisfaction before proceeding in the matter. This contention of the appellant being factually incorrect is not acceptable.

*ii. The appellant further contended that loans were taken by the business purpose and AO could not prove nexus between borrowed funds and tax free investments. In this regards, it is mentioned that neither during assessment proceedings non during appellate proceedings the appellant has filed any cash flow statement and hence application of funds to be wholly and exclusively for purpose of business other than investments has not been proved by the appellant. Further, Hon'ble ITAT Panaji bench in the case of **Goav. Joe Marcelinho Mathias [2013] 34 taxmann.com 129** have held that where Assessing Officer had disallowed some expenses incurred by assessee by applying section 14A, onus lay on assessee to prove that he had not incurred any expenses relating to*

income not forming part of total income. Accordingly, contention of the appellant is not acceptable.

- iii. *The appellant contended that it was having interest free funds in the form of capital and reserves and hence no interest was to be disallowed. In this regard it is mentioned that the appellant has made investment of Rs. 43.98 crores, income from which is exempt. The investment has increased during the year as compared to preceding year. Similarly loans have increased from 20 crores in the preceding year to 73 crores during the year. Thus as per balance sheet it may be inferred that the amount borrowed has been utilized for making investments during the year. Since cash flow statement has not been produced by the appellant either during assessment or appellate proceedings. In a recent judgement in the case of **Pavak Securities (P.) Ltd. [2013] 38 taxmann.com 387** it was held by Hon'ble ITAT Mumbai that where assessee failed to produce any cash flow statement or any other material which could establish that borrowed funds had not been utilized for earning of exempt income, disallowance under section 14A was justified.*
- iv. *The appellant further contended that only net interest should have been disallowed. In this regard, it is stated that the interest income received by the appellant is taxable interest income received by the appellant and has been offered for taxes under the head business income and hence netting of the same with the interest paid relatable to the exempt dividend income is not*

*allowed. Further in the case of **Commissioner of Income-tax v. Deepak Agarwal**[2013] 35 taxmann.com 293, Hon'ble Allahabad High Court held that where assessee was not engaged in business of investment in shares, interest bearing funds invested in shares of related company to extend financial support, could not be said to be utilization for business purposes, and proportionate interest was liable to be disallowed.*

*v. The appellant also stated that the dividend income received during the year is much more than the income earned by it and hence no disallowance under section 14A is called for. In this regard reliance is placed on the judgement of Hon'ble ITAT special bench Delhi in the case of **Cheminvest Ltd 124 TTJ 577** wherein the Hon'ble Court held that disallowance under section 14A can be made even when no exempt was received during the year. Furtehr the appellant placed reliance on judgment of Hon. Chadigarh ITAT in the case of Punjab State Coooperative and Marketing (supra). However, on perusal of this judgement it is noted that the same relates to AY 2005-06 for which the provisions of rule 8D were held as not to be applicable by Bombay High Court in the case of Godrej & Boyce Mfg. Co, Ltd. Accordingly this contention of the appellant is not acceptable.*

*vi. This ground of appeal is therefore **dismissed**.*

*ii. As there is no change in facts, observations of the AO and submissions of the appellant, following the above this ground of appeal is **dismissed**"*

48.3 Before us, the learned counsel of the assessee submitted that identical issue has been decided in favour of the assessee by the Tribunal in assessment year 2010-11. The learned DR on the other hand relied on the order of the lower authorities.

48.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Assessing Officer has firstly, disallowed interest in proportion of the investment made in shares/securities yielding exempted income to the total investment under rule 8D(2)(ii) amounting to ₹ 7, 79, 466/-. Secondly, the Assessing Officer are disallowed amount of ₹ 1, 53, 315/-for incurring administrative charges as computed under rule 8D(2)(iii) of rules. The Tribunal in ITA No.1991/Mum/2016 for assessment year 2010-11 upheld the disallowance for administrative expenses under rule 8D(2)(iii), however deleted the disallowance of proportionate interest under rule 8D(2)(ii) of the rules on the ground that investment in tax-free securities was coming out of assessee's own funds relying on the decision of the Hon'ble Bombay court in the case of **Reliance utilities and Power Ltd (supra)**. The relevant finding of the Tribunal(supra) is reproduced as under:

"2.5 We have heard the rival submissions and perused the relevant materials on record. We find from the balance sheet of the assessee-company as at 31st March 2010 that its own funds was Rs.2,894,197,392/-. The investment as at 31st March 2010 was Rs.868,635,071/-

In HDFC Bank Ltd. vs. DCIT [2016] 67 taxmann.com 42 (Bom), the Hon'ble Bombay High Court referring to the decision in CIT vs. HDFC Bank Ltd. [2014] 366 ITR 505 (Bom) and CIT v. Reliance Utilities & Power Ltd. [2009] 313 ITR 340 (Bom) held as under :

“RohaDyechem Pvt. Ltd. 3 ITA No. 1991/Mum/2016 "15. It is clear that for the first time in the case of HDFC Bank Ltd. (supra) that this Court took a view that the presumption which has been laid down in Reliance Utilities & Power Ltd. (supra) with regard to investment in tax free securities coming out of assessee's own funds in case the same are in excess of the investments made in the securities (notwithstanding the fact that the assessee concerned may also have taken some funds on interest) applies, when applying Section 14A of the Act. Thus, the decision of this Court in HDFC Bank Ltd. (supra) for the first time on 23rd July, 2014 has settled the issue by holding that the test of presumption as held by this Court in Reliance Utilities and Power Ltd. (supra) while considering Section 36(1)(iii) of the Act would apply while considering the application of Section 14A of the Act. The aforesaid decision of this Court in HDFC Bank Ltd. (supra) on the above issue has also been accepted by the Revenue in as much as even though they have filed an appeal to the Supreme Court against that order on the other issue therein viz. broken period interest, no appeal has been preferred by the Revenue on the issue of invoking the principles laid down in Reliance Utilities & Power Ltd. (supra) in its application to Section 14A of the Act.”

In view of the above, we delete the disallowance of Rs.8,67,592/- made by the AO under Rule 8D (2)(ii).

2.5.1 In Godrej & Boyce Mfg. Co. Ltd. vs. Dy. CIT (2010) 194 Taxman 203 (Bom.) the Hon'ble Bombay High Court has explained Rule 8D as under : "As regard Rule 8D(2)(iii), it had been submitted that some mechanism or formula had to be adopted for attributing part of the administrative / managerial

expenses to tax-exempt investment income. The administrative expenses attributable to tax-free investment income have a fixed component and a variable component. A view was taken that the disallowance should also be linked to the value of the investment rather than the amount of exempt income. Under Portfolio Management Schemes (PMS), the fee RohaDyechem Pvt. Ltd. 4 ITA No. 1991/Mum/2016 charged ranges between 2 and 2.5 per cent of the portfolio value which would be inclusive of a profit element for the portfolio manager. RohaDyechemP.Ltd, Mumbai vs Acit Cen Cir 43, Mumbai on 27 October, 2017 Indian Kanoon - <http://indiankanoon.org/doc/25542750/> 2 While the fixed administrative expenses were excluded on the ground that in the case of a large corporate taxpayer they would be spread over a large number of voluminous activities, the variable expenses were computed at one-half per cent of the value of the investment."

Accordingly, we confirm the disallowance of Rs.1,58,760/- made by the AO under Rule 8D(2)(iii).

- 48.5 Respectfully following the finding of the Tribunal (supra) on the issue in dispute, the disallowance for administrative expenses under rule 8D (2)(iii) is upheld. As regard to disallowance under rule 8D(2))ii) for proportionate interest disallowance is concerned, the Assessing Officer need verification of sufficiency of fund for investment in shares and securities eligible for yielding tax-free income, as held in the case of Reliance securities and Power Ltd(supra), therefore, we feel it appropriate to restore this issue to the file of the learned Assessing Officer for deciding in accordance with law. The ground No. one of the appeal of the assessee is accordingly partly allowed for statistical purposes.

49. The ground No. two of the appeal of the assessee relates to disallowance of ₹13, 87, 682/-under the head foreign travelling expenses.

49.1 The learned Assessing Officer disallowed the 20% of the expenses on trip expenses of ₹ 69, 38, 412/-out of the total foreign travelling expenses of ₹ 1, 25, 49, 574/-due to failure on the part of the assessee in producing supporting vouchers. The relevant finding of the Assessing Officer is reproduced as under:

“4. Foreign Travelling Expenses :-

It is seen that assessee had debited an amount of Rs. 1,25,49,574/- which is consisting of Rs. 69,38,412/- of Trip expenses and Rs. 48,55,137/- of ticket expenses. The trip expenses are relating to lodging and boardings and transport. The assessee was asked to produce the supporting vouchers for same. However, the assessee could not produce supporting vouchers for transportation. For claiming any expense, the onus is on the assessee to prove that the expenses are incurred for the purpose of business and should be supported by relevant vouchers. In the case of the assessee; even after giving opportunity to the assessee; it has failed to produce supporting vouchers. Hence, for want for proof and check and also considering the involvement of expenses of personal nature an adhoc disallowance of 20% is hereby made. An addition of Rs. 13,87,682/- is made to the total income of the assessee on this account. Penalty u/s. 271 (1)(c) is hereby initiated for concealment/ furnishing of inaccurate particulars.”

49.2 The Ld. CIT(A) uphold the disallowance observing as under:

“5.3 I have considered the facts of the case, submission of the appellant as against the findings/observations of the AO in his order u/s. 143(3) of the I.T. Act. The contentions and submissions of the appellant are being discussed and decided here in under:

- i. The Assessing Officer noted that despite having been given opportunity to produce supporting vouchers for transportation, the same could not be produced during the assessment proceedings. During the course of the appellate proceedings only a chart showing the details has been give. As there is no change in facts, I have no reason to deviate with the findings given by the AO. Consequently, the disallowance made by the AO is upheld.*
- ii. Accordingly this ground of appeal is **dismissed**.”*

49.3 Before us the learnedcounsel of the assessee submitted that disallowance has been made on ad-hoc basis and on the allegation that the assessee could not produce supporting vouchers for transportation expenses, whereas actually no transportation expenses have been claimed therefore ad-hoc disallowance by the Assessing Officer is not justified. It was further submitted that assessee having nearly 18 locations worldwide and 75 to 80% of its turnover as export, the travelling expenses of ₹ 1.25 crore is very reasonable. The travelling expenses incurred by the directors and employees of the company only for the purpose of the business. The learnedcounsel further submitted that trip expenses are nothing but lodging and boarding expenses incurred in the trip and without pointing out any specific instance of personal expenses, no disallowance should be made.

49.4 The learnedDR on the other hand submitted that in absence of any vouchers produced for the trip expenses, there was no alternative with the Assessing Officer other than to disallow the said expenses. According to her the Assessing Officer was the too liberal and he only disallowed 20% of the expenses towards trip.

- 49.5 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. No doubt, the assessee failed to produce supporting document for transport expenses being part of Trip expenses. Before us the learnedcounsel of the assessee has claimed that no transport expenses were incurred, however he did not provideledger account of the trip expenses and without which,this claim cannot be verified. At the same time, we find that Assessing Officer has presumed personal use of the expenses of 20% of the expenses for disallowance. In our opinion, restriction of quantification of disallowance for personal use to the extent of 10% of the trip expenses would be reasonable in view of the total amount as compared to the export turnover of the company. The disallowance of ₹ 6, 93, 8 41 /- is accordingly deleted. The ground no two of the appeal of the assessee is accordingly partly allowed.
50. The ground No. three of the appeal of the assessee relate to disallowance of expenses of ₹ 1, 41, 190/ for prior expenses. This ground of the appeal was not pressed by the learnedcounsel of the assessee and therefore accordingly it is dismissed as infructuous.
51. The ground No. four of the appeal was also not pressed by the learnedcounsel of the assessee and therefore accordingly dismissed as infructuous.
52. The ground No. five of the appeal of the assessee relates to transfer pricing adjustment to the international transactions of interest on loans to associated enterprises. The identical issue has already been adjudicated in the case of the assessee for assessment year 2004-05 while adjudicating ITA No. 6401/Mum/2009,. Accordingly, following the same, the computation of the transfer pricing adjustment to the international transactions of the interest on loan to associated enterprises is restored back to the file of the ld AO/TPO for deciding in accordance with our finding in ITA No. 6401/Mum/2009 for assessment year 2004-05. The ground of the appeal of the assessee is accordingly allowed partly for statistical purposes.

53. The sole ground raised by the Revenue relates to deletion of adjustment made to the international transactions for administrative expenses.
54. The relevant finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

“xiii. The arguments of the assessee were not acceptable to the TPO, observing that while giving loans, banks charge certain fee, typically referred to as administrative charges. Though the assessee is not a banker, the assessee would actually incur costs while advancing/providing the loan and also on various documentation. Therefore the argument of the assessee that no amount should be charged is not correct. Therefore the argument of the assessee that no amount should be charged is not correct. In the given facts and circumstances, considering the issue, an ALP rate of 1% per annum was considered reasonable at the loan given to AEs. In view of this, the adjustment on account of administrative charges was calculated by the TPO as under:

		01.04.20 08	31.03.20 09	Avg amt of loan	Admn/adjustm ents 1%
1	M/s Roha Caleb (UK) Ltd	1,79,11,2 50	27,25,03 9	1031814 4.5	103181
2	M/s Roha Europe SL	1,26,62,0 00	1,34,45,2 80	1305364 0	130536
3	M/s RohaFiance , SARL	2,02,59,2 00	2,15,12,4 48	2088582 4	208858
5	TDACOL	0	3,04,38,0	3043800	304380

	<i>Food Colors S.A. DE C. V. Mexico</i>		<i>00</i>	<i>0</i>	
6	<i>M/S RohaDyech em (Thailand) Ltd</i>	<i>92,18,40 0</i>	<i>1,11,60,6 00</i>	<i>1018950 0</i>	<i>101895</i>
7	<i>M/s Roha SRL, Italy</i>	<i>7,72,38,2 00</i>	<i>7,69,74,2 28</i>	<i>7710621 4</i>	<i>771062</i>
8	<i>M/s RohaDyech em LLC Russia</i>	<i>57,11,40 0</i>	<i>72,29,02 5</i>	<i>6470212</i>	<i>64702</i>
				<i>Total</i>	<i>2034084</i>

xiv. Accordingly an adjustment on account of administrative of charges was proposed at Rs. 20,34,084/-.

xv. In the view of the above, the summary of the adjustments on account of interest and administrative charges was given by TPO in his order as under:

<i>S. NO.</i>	<i>Transaction</i>	<i>Adjustment</i>
	<i>Interest charged on loan granted to AEs</i>	<i>8349076</i>
	<i>Administrative Charges</i>	<i>2034084</i>
	<i>Total</i>	<i>10383160</i>

55. We find that addition in dispute is only ₹ 20,34,084/- , which is covered under the tax effect for not filing appeal by the Department before the Tribunal as under by the CBDT circular No. 17/2019. Therefore, the appeal being liable for dismissal on the ground of the low tax effect, the sole ground raised by the assessee, is dismissed.
56. In the result, all the appeals of the assessee and revenue except ITA No. 5969/Mum/2014 , are allowed partly for statistical purpose. The appeal of Revenue in ITA No. 5969/Mum/2014 is dismissed.

**Order pronounced under Rule 34(4) of the ITAT Rules,
1963 on 30/11/2022.**

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 30/11/2022

Dragon Legal/ Uday Mugal (Stenographer).

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)

ITA No. 10,4293, 4294, 4295,2859, 2860, 2861, 2862,2863/MUM/2009,
6015, 5969/MUM/2014,6401/MUM/2008
A.Y. 2002-03, 2004-05, 2005-06, 2006-07, 2007-08, 2009-10

ITAT, Mumbai