आयकर अपीलीय अधिकरण "के" न्यायपीठ मुंबई में।

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

श्री राजेन्द्र सिंह, लेखा सदस्य एवं श्री विवेक वर्मा, न्यायिक सदस्य के समक्ष।
BEFORE SHRI RAJENDRA SINGH, ACCOUNTANT MEMBER AND SHRI VIVEK VARMA, JUDICIAL MEMBER

आयकर अपील सं. 7349/मुम/2012
ITA No. 7349/Mum/2012
निर्धारण वर्ष A.Y. 2008-09

कोडेक ईंडिंया प्रायवेट लिमिटेड, कल्यानिवाला और मिस्त्रि, आर्मि और नेवि बिल्डिग, तिसरा माला, 148, महातत्मा गाधी मार्ग, फोर्ट, मुंबई -400 020 Kodak India Pvt. Ltd., C/o. Kalyaniwalla & Mistry, Army & Navy Building, 3rd Floor, 148, Mahatma Gandhi Road, Fort, Mumbai -400 001 स्थयी लेखा सं.:PAN: **AAACK 2172 J**	बनाम Vs	Addl. Commissioner of Income Tax Officer 10(1), Aayakar Bhavan, 4th Floor, Room No. 460, मुंबई -400 020 Mumbai -400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
अपीलार्थी की ओर से Applicant by	:	श्री पि जे पारडिवाला, सिनियर वकिल Shri P.J. Pardiwala, Senior Adv.
प्रत्यर्थी की ओर से Respondent by	:	श्री आजित कुमार जैन Shri Ajeet Kumar Jain

सुनवाई की तारीख/ Date of Hearing : 12-04-2013
घोषणा की तारीख /Date of Pronouncement : 30-04-2013

आदेश
O R D E R

श्री विवेक वर्मा, न्या स:
PER VIVEK VARMA, JM:

The appeal has been filed by the assessee against the order under section 144C(13), passed by DRP, dated 05.09.2012.

2. The assessee has raised the following grounds of appeal:

> 1. *The Transfer Pricing Officer/AO (TPO/AO) erred in holding that the sale of the health imaging division of the appellant was an "international transaction" within the meaning of section 92B.*
> 2. *The TPO/AO erred in exceeding his jurisdiction in determining the Arm's Length Price of the transaction of sale of health imaging business.*
> 3. *The TPO/AO erred in making a Transfer Pricing adjustment to the tune of Rs. 79,96,60,415/- by:*
>   *a) Erroneously relying on conjectures and surmises.*
>   *b) Completely ignoring relevant material led before them.*
>   *c) Adopting an incorrect methodology to arrive at the Arm's Length Price.*
> 4. *Having regard to the facts and circumstances of the case, and the provisions of law, the appellant submits that the Transfer Pricing addition of Rs. 79,96,60,415/- is unjustified and is required to be deleted.*
> 5. *The AO erred in making a Transfer Pricing adjustment of Rs. 9,60,668/- in respect of expenses incurred by the appellant on behalf of its Associated Enterprises.*
> 6. *The AO erred in disallowing Rs. 16,28,733/- under section 14A. The appellant submits that the disallowance is unjustified and is required to be deleted."*

3. Ground no. 1 to 4 pertain to Transfer Pricing (TP) adjustment of Rs. 79,96,60,415/- computed by the Transfer Pricing Officer (TPO) and sustained by the Dispute Resolution Panel (DRP) in the impugned order.

4. Ground no. 5 pertain to reimbursement of expenses, which also has TP adjustment, computed by the TPO and sustained by the DRP, amounting to Rs. 9,60,668/-.

5. Ground no. 6 pertains to computation of disallowance of Rs. 16,28,733/- under section 14A under domestic provisions.

Grounds no. 1 to 4:

6. The facts as submitted by the AR and DR and discerned from the material placed on record, suggests that the assessee, i.e. Kodak India Private Ltd. sold its medical – imaging business to Carestream Health India Pvt. Ltd. for USD 13.543 million. Being domestic transaction, the assessee returned its income, disclosing the sale

transaction as a normal domestic transition. On perusal of the documents as called for by the AO and submitted by the assessee, the AO came to the conclusion that the sale transaction of imaging business by the assessee to Carestream Health India Ltd. was pursuant to a larger sale transaction, on global basis, wherein, holding company of Kodak India (assessee) sold its imaging business to Onex Healthcare Inc. (now Carestream Inc.) holding company of Carestream Health India Ltd. on global basis.

7. The AO, had made a reference to the TPO on another TP issue, but the TPO, came across the impugned transaction, wherein the assessee had sold its imaging segment to another Indian company. On getting the details, he proceeded on a premise, that the transaction was not merely a domestic transaction but the transaction was a consequential transaction, involving similar sale on global basis by Kodak Inc., holding company of the Kodak India to the Carestream Inc., holding company of Carestream India. He therefore, to examine the transaction between the two Indian companies, proceeded to lift the corporate veil and concluded that there was an element of international transaction, and an appropriate recourse would be to determine the ALP, in accordance with the provisions of Chapter X of the Income Tax Act. On *suo moto* assumption of jurisdiction over the impugned transaction, the TPO, proceeded to determine the ALP. Initially, an objection was raised before the DRP on the *suo moto* assumption of the jurisdiction with regard to the transaction of sale of imaging segment of the business to Carestream India, but considering the fact that there was an amendment, whereby the legislature had inserted section 92CA(2A), with effect from 01.06.2011, no objection was made by the assessee in the appeal before the ITAT.

8. The TPO called for complete details of transaction, which was duly submitted by the assessee. Taking into consideration the details

submitted by the assessee, the TPO determined the ALP, based on the worldwide revenue break up amongst countries and concluded that India accounted for 1.4% thereof, which came to USD 32.9 million as against USD 13.54 million shown by the assessee. He therefore, determined the ALP of the balance and made the adjustment in INR 79,96,60,415/-.

9. The assessee, approached the DRP against this order of the TPO, who sustained the findings of the TPO after going through the submissions, papers as placed before the Panel. Hence the instant appeal before the ITAT.

10. Before us, the Senior counsel, appearing before us, submitted that there was an agreement of Eastman Kodak Co., USA (EKC) for the sale of its medical business stream to Onex Healthcare Holdings Inc. on global basis (now Carestream Inc.) EKC has an Indian subsidiary, Kodak India (P) Ltd. (assessee) and Carestream Inc. has Indian subsidiary, Carestream Health India Private Ltd.

Eastman Kodak Co.	Onex Inc.
↓	↓
Kodak India Private Ltd. (EKC holds 97.7% shares)	Carestream Health India Private Ltd. (Carestream Inc. holds 99.9% shares)

Eastman Kodak sells its health imaging, i.e. medical business to Carestream Inc. on global basis for USD 23.5 billion. Pursuant to this agreement, Kodak India sells its imaging, i.e. medical business to Carestream India which is:

Eastman Kodak Co. USA —Sells→ (imaging segment) Onex Inc. (Now Carestream Inc.)

Kodak India Private Ltd. $\xrightarrow[\text{imaging segment}]{\text{Sells}}$ Carestream India Private Ltd.

11. The Senior Counsel, explained that though the sale transaction was pursuant to the Global agreement between the two holding companies, but the transaction in question was between two domestic companies, where, neither of the two companies were AEs and since the transaction in question was done within India, there was no element of international transaction. Since neither of them were non residents, no jurisdiction could have been imparted on the TPO for the computation of Arms Length Price (ALP). Hence, even the legitimate reference to the TPO, if all it would have been made, would have been incorrect, for the purposes of application of TP provisions, and were devoid of any merit.

12. To go to the root of the matter, it is essential to extract the relevant portions of the order of the TPO, under section 92CA(3) dated 31.10.2011, wherein, he has reproduced replies of the assessee and relevant portions of the Asset Purchase Agreement (APA),

> *3. Sale and Transfer of Assets. On the date hereof, on the terms and conditions set forth in this Agreement and the Purchase Agreement, Assignor hereby sells, conveys, transfers, assigns and delivers as a going concern to (and shall cause each of its Affiliates (other than the Transferred Subsidiaries), to, sell, convey, transfer, assign, endorse and deliver as a going concern to) Assignee, and Assignee hereby purchases from Assignor and its Affiliates (other than the Transferred Subsidiaries), free and clear of all Encumbrances (other than Permitted Encumbrances), all of Assignor's and each of its Affiliates' right, title and interest in and to all of the assets and properties of every kind Related to the Business, whether tangible or intangible, real, personal or mixed, except for (x) the applicable Excluded Assets and (y) any assets or properties of Assignor's Affiliates not located in or in transit to India (collectively, the "Transferred Assets"), including all of such right, title and interest in and to the following (in each case, except (i) to the extent included in the applicable Excluded Assets, (ii) with respect to the*

Transferred Subsidiary and (iii) any assets or properties of Assignor's Affiliates not located in or in transit to India);

(a) all accounts Receivable;
(b) Inventory;
(c) Contracts;
(d) Transferred Intellectual Property (as defined in the Purchase Agreement), including, without limitation, the Assigned Patents, Assigned pl, Assigned Works, Assigned Software and Assigned Trademarks (each as defined in the Intellectual Property Agreement);
(e) Business Books and Records and Transferred Employees' Records;
(f) Fixtures and Equipment;
(g) Leased Real Property;
(h) Goodwill;
(i) …
(j) …
(k) …
(l) …
(m) …
(n) …
(o) …
(p) ….
(q) …
(r) …

4. Assumption of Liabilities. Effective as of the date hereof, on the terms and subject to the conditions set forth in the Purchase Agreement, Assignee hereby assumes and agrees to discharge or perform when due, the Assumed Liabilities of the Assignor. For greater certainty, the parties hereto confirm that the Assumed Liabilities do not include the Excluded Liabilities.
5. Transferred Employees. …
6. Consideration. On the terms and subject to the conditions set forth in the Purchase Agreement, at the Closing, as consideration for all of the Transferred Assets covered by this Agreement, in addition to the assumption of the Assumed Liabilities by Assignee contemplated hereby, Assignee shall pay to the Assignor an aggregate amount in cash of US$ 13,543,332.5 in equivalent Indian Rupees ("Purchase Price") without deduction of any cost or charges other than those of the Assignee's bank. The Assignor agrees and confirms with the Assignee that the said consideration will be payable by the Assignee not later than 5th May, 2007."

13. In the submissions dated 26.09.2011 (APB 1165, at 1168), the Assessee clarified the contents of APA,

"*(b)….*

(c) Further, Eastman Kodak US ("Kodak US") decided globally to come out of Health Imaging business and directed companies to sell out this business.

However Kodak India has solely decided the terms and conditions of the sale of its Health Imaging business to Carestream India. Even the quantification of the value of Health Imaging business was done by Kodak India through its own independent valuers.

Further there was no prior agreement nor were the terms and conditions of sale of business decided by Kodak US.

Kodak US has not charged any amount to Kodak India as fees as regards for this sale transaction. Further the entire receipt from this sale of Health Imaging business was received by Kodak India and no amount has been transferred back to Kodak US.

Hence there was no payment by Kodak India to Kodak US as well as Kodak US has not charged to Kodak India in connection with this sale.

As, the terms and conditions of sale are not decided by the Associated enterprise (AE) and there was no prior agreement between Carestream India and Kodak US as required by sec 92B(2) for terming it as deemed international transaction as reproduced below:

d. Kodak India has independently obtained a report from Chartered accountant in Form 3CEA relating to computation of capital gains in case of sale of health imaging business to Carestream India. The certificate covers the valuation of health imaging business. Hence, Kodak India, on its independent capacity has valued the business and sold to the third party. Form 3CEA is attached as per Annexure 1.

Hence considering the above points, your goodself will agree that the sale of healthcare business is a domestic transaction of Kodak India."

14. The Senior Counsel, on reference to the above submissions made before the revenue authorities submitted that the entire case developed by the AO, TPO and DRP was on section 92B(2), wherein, the provision *deems* an AE transaction.

15. Senior Counsel referring to the definition of international transaction as per section 92B(1) and 92B(2)

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

to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

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

submitted that as per the definition, transaction can be an international transaction if:

– *Contracting parties are AEs*

– *Either the contracting party or both the AEs are non resident(s).*

Therefore, when admittedly both the contracting entities, neither being AE of each other, nor, being non resident, would not fall within the definition of international transaction.

16. The Senior Counsel submitted that even to invoke sub section (2) of section 92B, the legislature has used the words, *"for the purposes of sub section (1),* i.e. definition of international transaction, by which, either of the AEs had to be a non resident.

17. He, referred to Circular issued by CBDT, Circular no 14 of 2001, reported in 252 ITR 65 (ST) at page 103, para 55 specifies, *"one of the parties in a contract has to be a non resident", the extract of the Circular, in para 55.6 to 55.8 are,*

. *55. **<u>New legislation to curb tax avoidance by abuse of transfer pricing</u>***

55.6 The substituted new sections 92A and 92B provide meanings of the expressions "associated enterprise" and "international transaction" with reference to which the income is to be computed under the new section 92. While sub-section (1) of section 92A gives a general definition of associated enterprises, based on the concept of participation in management, control or capital, sub-section (2) specifies the circumstances under which the two enterprises shall be deemed to be associated enterprises.

55.7 Section 92B provides a broad definition of an international transaction, which is to be read with the definition of transaction given in section 92F. An international transaction is essentially a cross border transaction between associated enterprises in any sort of property, *whether tangible or intangible, or in the provision of services, lending of money, etc. At least one of the parties to the transaction must be a non-resident. The definition also covers a transaction between two non-residents, where for example, one of them has a permanent establishment whose income is taxable in India.*

55.8 Sub-section (2) of section 92B extends the scope of the definition of international transaction by providing that a transaction entered into with an unrelated person shall be deemed to be a transaction with an associated enterprise, if there exists a prior agreement in relation to the transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined by the associated enterprise. An illustration of such a transaction could be where the assessee, being an enterprise resident in India, exports goods to an unrelated person abroad, and there is a separate arrangement or agreement between the unrelated person and an associated enterprise which influences the price at which the goods are exported. In such a case the transaction with the unrelated enterprise will also be subject to transfer pricing regulation."

18. Referring to section 92B(2), the Senior Counsel submitted that even to invoke the deeming provision, with regard to the international transaction and also to fall within Chapter X of the Income Tax Act, three conditions are necessary, i.e.

a) there must be 2 AEs
b) one of them must be a non resident
c) there must be a sale of some property.

19. The Senior Counsel further submitted that when deeming fiction had to be tested, it must have a strict conduct and specifically in accordance with the context, which it is being factored. He, therefore, referred to the case of CIT vs C.P. Sarathy Mudaliar, reported in 83 ITR 170(SC) at 173, in the context of deemed dividend under section 2(6A)(e) now, under section 2(22)(e) *"for certain purposes, the legislature has deemed such a loan as dividend. Hence section 2(6A)(e) must necessarily receive a strict construction".*

20. He also referred to the case of CIT vs Mother India Refrigeration Industries P. Ltd., reported in 155 ITR 711 (SC) at pages 718 and 719, wherein it has been held by the Hon'ble Supreme Court that strict interpretation has to be made and scope of fiction to be confined to

purpose of fiction, held as under, *(the case pertained to carry forward and set off of carried forward depreciation)*

> *"It is true that proviso (b) to section 10(2)(vi) creates a legal fiction and under that fiction, unabsorbed depreciation either with or without current year's depreciation is deemed to be the current year's depreciation but it is well settled, as has been observed by this court in Bengal Immunity company Limited v. State of Bihar [1955] 2 SCR 603, 606; 6 STC 446, that the legal fictions are created only for some definite purpose and these must be limited to that purpose and should not be extended beyond that legitimate field. Clearly, the avowed purpose of the legal fiction created by the deeming provision contained in proviso (b) to section 10(2)(vi) is to make the unabsorbed carried forward depreciation partake of the same character as the current depreciation in the following year, so that it is available, unlike unabsorbed carried forward business loss, for being set off against other heads of income of that year. That this is so becomes clear from this court's observations in Jaipuria China Clay Mines (P.) Ltd's case [1966] 59 ITR 555, appearing at p. 561 of the report, which runs thus:*
> *"The unabsorbed depreciation allowance is carried forward under proviso (b) to section 10(2)(vi) and the method of carrying it forward is to add it to the amount of the allowance or depreciation in the following year and deeming it to be part that allowance; the effect of deeming it to be part of that allowance is that it falls in the following year within clause (vi) and has to be deducted as allowance".*
> *In CIT v. Ravi Industries [1963] 49 ITR 145 (Bom), the same position has been clarified by the Bombay High Court. The court has observed that the unabsorbed depreciation does not lose its character and attributes when it is carried forward to the following year; such unabsorbed depreciation of the earlier year, which is carried forward to the current year and which is deemed to be of the current year under proviso (b) of section 10(2)(vi) can be set off, unlike other business losses, against income under other heads. Such being the purpose for which the legal fiction is created, it is difficult to extend the same beyond its legitimate field and will have to be confined to that purpose".*

21. He, further, referred to the Special Bench case of Sumitomo Mitsui Banking Corp. vs Dy Director of Income Tax (SB), reported in 16 ITR 116 (Trib), *(reading from the headnote)*, he submitted, *"Deeming provision must be confined for its purpose only & not beyond the fiction".* The Senior Counsel submitted that in the context of the instant appeal, to import the deeming provisions of section 92B(2), the context was to examine the transaction entered into by the assessee or the other party with the AE, for the purposes of subsection (1), i.e. international transaction.

22. The Senior Counsel, therefore, submitted that the impugned transaction is a domestic transaction, wherein one Indian company takes over the ongoing business segment of another Indian company.

23. The Senior Counsel further submitted that even if the impugned transaction between the two Indian companies were a result of main agreement between the two holding companies, even then deeming fiction of section 92B(2) cannot be invoked, because, so far as the impugned transaction is concerned, neither of the non resident holding companies can be held to AE of the contracting Indian companies. He submits that at no stage the TPO has concluded that the instant contracting entities were through the AEs or either of them was a non resident, even if there was a prior agreement between the two holding companies. He submitted that at no stage, in accordance with the APA between the Indian companies, it could be inferred that, prior agreement had any influence over the impugned transaction. In this context, the Senior Counsel placed reliance on the Special Bench decision in the case of LG Electronics India (private) Ltd. vs ACIT, reported in (2013) 29 taxman.com 300 (Delhi SB), wherein, the SB has gone deep into the legislature to nectar the definition of International transaction page 60 para 11.3

> *"We are convinced with the submissions advanced on behalf of the assessee in this regard but only to the extent of not ignoring the legal character of the Indian AE simply because of the close relationship between the two enterprises. If we proceed with the presumption that since the foreign enterprise has influence over the economic behaviour of the assessee and hence the separate legal character of the Indian enterprise should be overlooked, then it would mean that the such separate legal character of the assessee will be lost not for one transaction but for all practical purposes. In that case only the foreign entity will survive as a taxable unit even under the Act. Probably it is not the case of the Revenue also as it is the Indian entity which has been subjected to the present assessment."*

and then in Para 14.19 at page 73, observed,

> *"In order to be covered under sub-sec. (2) of Sec. 92B for making a transaction with a third party as deemed international transaction, it is essential that the AE of the assessee should have influence over the*

third party in terms of determining the terms and conditions of such transaction. It is only in such a situation that the transaction with such third party is deemed to be an international transaction.
We are convinced with the submissions advanced on behalf of the assessee in this regard but only to the extent of not ignoring the legal character of the Indian AE simply because of the close relationship between the two enterprises. If we proceed with the presumption that since the foreign enterprise has influence over the economic behavior of the assessee and hence the separate legal character of the Indian enterprise should be overlooked, then it would mean that the such separate legal character of the assessee will be lost not for one transaction but for all practical purposes. In that case only the foreign entity will survive as a taxable unit even under the Act. Probably it is not the case of the Revenue also as it is the Indian entity which has been subjected to the present assessment".

24. The Senior Counsel submitted that under no case, the impugned transaction could be rendered as an international transaction, even if section 92B(2) were invoked.

25. Coming to the legality of the computation of ALP, the Senior Counsel submitted that the TPO and DRP have flouted the computation procedure. He submitted that ALP, in accordance with section 92C(1) could be determined in any of the following methods, i.e.

a) comparable uncontrolled price method;
b) resale price method;
c) cost plus method;
d) profit split method;
e) transactional net margin method;
f) such other method as may be prescribed by the Board.

and the most appropriate method shall be applied. The Senior Counsel submitted that in the case at hand, the TPO did not apply any of the above methods, but instead computed the ALP, prescribing his own method, i.e. *"ratio of revenue"*. According to the TPO, the revenue share of the assessee in the global consideration came at 1.4% of USD 23.5 billion, which came to USD 32.9 million. He, therefore, allocated further USD 19.36 million, being the difference of USD 32.9 million and USD 13.54 million, received by the assessee as the sale consideration, which amounted to an allocation of INR 79.96 crores towards the ALP.

26. According to the Senior Counsel, since the method(s) as prescribed by the Legislature has not been adopted by the TPO, no adjustment can be made. He submitted the entire provisions of section 92C have been infringed, and in such a circumstance, no adjustment is to be made. He placed reliance on the decision of Special Bench in the case of LG *(supra)*, wherein in Para 22.9 & 22.10, in crux, it has been held, *"such determination can be done only by way of the methods specified by the statute".*

27. The Senior Counsel, therefore, submitted that the TPO went beyond the prescribed legislation, which is barred by law and hence no TP adjustment is called for. Arguing further, the Senior Counsel submitted that if the initial legal argument on the foundation of ALP is not in favour of the assessee, then, on merits, he submitted that the transaction constituted the sale of a going concern, wherein 98% of the transfer pertained to inventories and debtors. According to him debtor are always outside the control of the assessee, the only thing left were inventories, only which could become cost plus, therefore, according to the Senior Counsel, the only appropriate method could have been the cost plus, as prescribed by the legislature. Since the TPO did not refer even this method to compute the ALP, provisions of section 92C went beyond the scope of the TPO. He submitted that the cost plus method could be tested by applying the same on inventories, would come to the mean of 14% on the last four years. The Senior Counsel further submitted that since there was no immovable asset which was transferred the cost plus method on current assets, in monetary terms would come to Rs. 4.44 crores, which is less then what has actually been charged by the assessee, which was at 5.89 crores (page 1189 APB).

28. He, therefore, submitted that from all angles, the transaction cannot be found to be eligible for TP regulations and hence no adjustment is required to be made.

29. After discerning the facts of the instant case, that the transaction entered into by the two Indian companies and such a transaction could not be held to be international transaction, the Senior Counsel placed reliance on the decision rendered by coordinate Bench at Hyderabad in the case of Swarnandhra IJMII Integrated Township Development Company Pvt. Ltd. vs DCIT, in ITA no. 2072/Hyd/2011, wherein there was a transaction between an Indian enterprise with an intermediary company which had an AE in a foreign country. After examining the entire facts, the coordinate Bench came to the conclusion that the transaction between Indian enterprise and Intermediary company would not be an international transaction even if the deeming provision of section 92B(2) is imported, as *unrelated* intermediary was *not* a non resident, and that the unrelated intermediary being an Indian entity.

30. The Senior Counsel, therefore, concluded that in the present set of circumstance, since the transaction was between two domestic companies, and there being transaction with neither of the two company's being AEs, the impugned transaction was purely a domestic transaction, therefore, provisions of section 92B(1) or 92B(2) does not apply and hence no TP adjustment is called for.

31. The DR, arguing on behalf of the department submitted that the assessee was at fault from the very beginning, because, it did not file TP report, which, the assessee is obliged to, when there is an international transaction and the case is referred to the TPO. On this basic objection, the DR submitted that the action of the TPO to

proceed on a method, other then the methods prescribed under section 92C(1). He further submitted that in case the method, as adopted by the TPO cannot be adopted, then the issue be restored to the TPO for fresh computation of ALP.

32. Furthering his arguments, he submitted that the provisions of section 92B(2) are clearly applicable. The DR argued that both the provisions of section 92B, i.e. subsection (1) & (2) are independent of each other. According to the written synopsis prepared and placed on record by the DR, the DR submitted that if a transaction clearly falls within the precinct of section 92B(1), it automatically ousts the provisions of section 92B(2). But in case there is a transaction between unrelated parties and there is a prior agreement between the AEs and the unrelated party in relation to the relevant transaction *or* the terms of the relevant transaction are determined in substance between such other person and the AE, such a transaction shall be deemed to be international transaction. To explain this point, the DR submitted that section 92B(2) nowhere prescribes that for invoking the provisions of 92B(2) one or both parties should be non resident. According to him transaction should be between two or more AEs and either or both of whom should be non resident and to further buttress the argument, DR submitted that section 92B(2) will come into play only when assessee is dealing with an unrelated party who may be in India or outside. He further argues that the decision of Special Bench in LG Electronics pertained only to section 92B(1) and it explained that how a transaction could be termed as international transaction and that the decision did not examine the circumstances under which provisions of section 92B(2) could be invoked.

33. The DR also submitted that the entire computation of the assessee needs a review because the transaction does not show any transfer of intangibles, like goodwill, because the transfer pertained to

the ongoing imaging business segment of the assessee. The DR referring to the accounts of the assessee submitted that goodwill does not appear anywhere, which, according to him were an integral part of the transaction.

34. The DR in his synopsis explained through diagrammatic illustrations how there existed AEs of both the contracting entities, who were non residents and how the transaction between the two foreign companies had influenced the impugned transaction between the assessee and the unrelated other entity or a non AE. The DR further drew the diagram to explain the transaction related in Swarnandhra *(supra),* rendered by coordinate Bench at Hyderabad and made a distinction that there was no prior agreement in that case and hence being distinguishable on facts, cannot be relied upon.

35. The DR further argued that legally also, the case of Swarnandhra could not be relied upon because the finding is contrary to, section 92B(2), because the deeming provision arises only when two enterprises are not AEs or deemed AEs and that it has to be read independently and not as an extension of 92B(1).

36. On these basic facts and interpretation of the relevant provisions the DR concluded that the orders of the revenue authorities were in tandem with the provisions of law, as laid down in section 92B(2) and thus the orders do not need to be disturbed and the appeal filed by the assessee be rejected.

37. The Senior Counsel in the rejoinder, rebutting the initial objection of the DR, that the assessee had not submitted its TP Report on the impugned transaction submitted that in so far as the assessee was concerned, the case did not involve any international transaction, which could have become the subject matter of TP regulations. Hence,

there was no need of TP report. It was the *suo moto* case of the revenue authorities, that the case involves international transaction, triggering TP regulations. In so far as the assessee is concerned, the case still pertains to a domestic transaction. He further argued and referred to the case of K.P. Varghese vs ITO reported in 131 ITR 597 (SC), wherein at pages 609 and 610, their Lordships explained the legitimacy of marginal notes. The relevant portion, reads as under :

> *"It is undoubtedly true that the marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section or, to use the words of Collins M.R. in Bushel v. Hammond 2 KB 563 (CA), to show what the section is dealing with. It cannot control the interpretation of the words of a section particularly when the language of the section is clear and unambiguous but, being part of the statute, it prima facie furnishes some clue as to the meaning and purpose of the section: vide Bengal Immunity Co. Ltd. v. State of Bihar 2 SCR 603; 6 STC 446. The marginal note to section 52, as it now stands, was originally a marginal note only to what is presently sub-section (1), and significantly enough, this marginal note remains unchanged even after the introduction of sub-section (2), suggesting clearly that it was meant by Parliament to apply to both sub-sections of section 52 and it must, therefore, be taken as indicating that, like sub-section (1), sub-section (2) is also intended to deal with cases where there is an understatement of the consideration in respect of the transfer.*
>
> *But apart from these considerations, the placement of sub-section (2) in section 52 does indicate in some small measure that Parliament intended that sub-section to apply only to cases where the consideration in respect of the transfer is understated by the assessee. It is not altogether without significance that the provision in sub-section (2) was enacted by Parliament not as a separate section, but as part of section 52 which, as it originally stood, dealt only with cases of understatement of consideration. If Parliament intended sub-section (2) to cover all cases where the condition of 15% difference is satisfied, irrespective of whether there is understatement of consideration or not, it is reasonable to assume that Parliament would have enacted that provision as a separate section and not pitchforked it into section 52 with a total stranger under an inappropriate marginal note. Moreover, there is inherent evidence in sub-section (2) which suggests that the thrust of that sub-section is directed against cases of understatement of consideration. The crucial and important words in sub-section (2) are: "the full value of the consideration declared by the assessee". The word "declared" is very eloquent and revealing. It clearly indicates that the focus of sub-section (2) is on the consideration declared or disclosed by the assessee as distinguished from the consideration actually received by him and it contemplates a case where the consideration received by the assessee in respect of the transfer is not truly declared or disclosed by him but is shown at a different figure. This of course is a very small factor and by itself is of little consequence but along with the other factors which we have discussed above, it assumes same significance as throwing light on the true intent of sub-section (2)".*

38. In continuation of this argument, the Senior Counsel submitted that the DR's suggestion that the issue be set aside to the TPO with the direction for applying the prescribed method to arrive at the ALP, cannot be allowed. He submitted that first the invocation of TP provisions itself is bad in law and even if it were correct, the TPO cannot be allowed to rectify the mistake that has been committed by him, giving him second innings. If at all the jurisdiction conferred on TPO was correct, it was incumbent upon him to follow the correct procedures and arrive at a correct inference.

39. The Senior Counsel further submitted that the argument of the DR that valuation of goodwill independently was also not relevant in the instant case, because, goodwill was part and parcel of the sale agreement (APA) and it was merged in the entire proceeds. Senior Counsel, reiterating his submissions on merits, emphasized that out of the six prescribed method for determination of the ALP, *"cost plus"* was the only relevant method, since, there were no transfer of immovable property. Since the transfer of assets, as such, were only limited to debtors, which already have the element of cost plus gross profit and the other asset was stocks, which were already at cost.

40. He, therefore, submitted that, in fact, the APA involved only the current assets and intangibles.

41. Closing his rejoinder, the Senior Counsel reiterated that section 92B(2), cannot be read independently, because, the section specifically talks about, *"for the purposes of sub-section (1)",* therefore, it would be incorrect to read the section independently. Besides that, the prior agreement if at all to be considered, it is between two independent foreign companies. Both these companies may be holding companies of contracting domestic companies, cannot be held to be AE of other enterprise in the instant contracting domestic companies.

42. We have heard both the parties at length, and have perused the orders of the revenue authorities and papers placed before the revenue authorities. We find that the assessee has filed APA, entered between Eastman Kodak Company and Onex Healthcare Holdings Inc., dated 09.01.2007 (APB 1 to 1090), *(holding companies of the Indian subsidiaries, i.e. Kodak India and Carestream India).*

43. It is undisputed that the transaction involve two domestic companies, who are individual and independent subsidiaries of their own and independent holding companies. This is also not in dispute that neither of the holding companies could be called the AE of the other contracting party. This is also not in dispute that, there is any transaction, involving a non resident company.

44. The case as developed by the TPO/DRP and the DR is that despite the fact that there is no foreign entity involved with an AE who is a non-resident but provisions of section 92B(2) can deem a transaction to be an international transaction and the TP provisions could consequentially be applied, has to examined by examining the definitions of:

Associated Enterprises
International Transaction

45. Section 92A defines AE and gives various instances.

Section 92A(1)

"(1) For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise—

(a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or

(b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

xxxxxxxxxxxxx

46. Section 92B(1) defines International transaction to mean,

> *"(1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.*
>
> *"(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise".*

when we read the two sections by inserting the meaning of expressions, used therein, into one another, a transaction could only become international transaction, if either of both the AEs or one of the AEs is a non-resident.

47. Since the entire foundation is on 92B(2), we must examine interpretation made by the DR, that the section talks of *"a transaction"* and not *"an international transaction"*, hence the expression in sub section (1) has to be read independently in sub section (2), cannot be accepted. We are dealing in *Chapter X* of the Income Tax Act, 1961, and the heading of the relevant provisions, which is being examined fall within the heading *"Meaning of International Transaction"* and even in the relevant sub section, i.e. 92B(2), prescribes, *"……the transaction between such other person and the associated enterprise, ….".* In our opinion, first, there has to be an *"AE", with whom there exists an international transaction,* only then it could be examined as to whether the international transaction with the *"such other person"* exists or not.

48. In the instant case there are two foreign companies and two Indian domestic companies. As admitted by both the sides the two foreign companies have independent agreement and the Indian domestic companies have independent agreement for sale of a segment of business.

49. Chapter X of the Income Tax Act, 1961, subscribes the computation of income from international transaction having regard to arm's length price. Section 92(1) begins with the expression, *"Any income arising from an international transaction……"*. It means that Chapter X gets its jurisdiction, *if there is an international transaction, between AEs.* In the instant case, the transactions as entered into by the holding foreign companies and subsidiary Indian companies are independent of each other :

$$A(FC) \xrightarrow{\text{ASA}} B(FC)$$

$$C(IC) \xrightarrow{\text{ASA}} D(IC)$$

(FC means Foreign Company and IC means Indian Company)

50. It is an undisputed fact that A is AE of C and B of is AE of D. To colour the transaction *as* international transaction, the DR could not establish that either C had any AE relation with B or D had any AE relation with A. It also seems that the TPO/AO did not peruse the contract entered into by the holding companies, wherein the effects of the transaction on its subsidiaries had been recited. It also seems, as matter of fact, that certain important submissions, placed in the written submissions dated 26.09.2011 (APB 1165 to 1170), point 2C on page 1168 has escaped attention of the TPO, wherein it states,

> *:(b)….*
>
> *(c) Further, Eastman Kodak US ("Kodak US") decided globally to come out of Health Imaging business and directed companies to sell out this business.*

However Kodak India has solely decided the terms and conditions of the sale of its Health Imaging business to Carestream India. Even the quantification of the value of Health Imaging business was done by Kodak India through its own independent valuers.

Further there was no prior agreement nor were the terms and conditions of sale of business decided by Kodak US.

Kodak US has not charged any amount to Kodak India as fees as regards for this sale transaction. Further the entire receipt from this sale of Health Imaging business was received by Kodak India and no amount has been transferred back to Kodak US.

Hence there was no payment by Kodak India to Kodak US as well as Kodak US has not charged to Kodak India in connection with this sale.

As, the terms and conditions of sale are not decided by the Associated enterprise (AE) and there was no prior agreement between Carestream India and Kodak US as required by sec 92B(2) for terming it as deemed international transaction as reproduced below:

d. Kodak India has independently obtained a report from Chartered accountant in Form 3CEA relating to computation of capital gains in case of sale of health imaging business to Carestream India. The certificate covers the valuation of health imaging business. Hence, Kodak India, on its independent capacity has valued the business and sold to the third party. Form 3CEA is attached as per Annexure 1.

Hence considering the above points, your goodself will agree that the sale of healthcare business is a domestic transaction of Kodak India."

51. When we peruse the various recitals of the APA between Eastman Kodak Co. and Onex Healthcare Holdings Inc.,

we find at (APB 11), the interpretations of :
"Affiliate" means, with respect to any Person, any Person directly or indirectly controlling, controlled by, or under common control with, such other Person as of the date on which, or at any time during the period for which, the determination of affiliation is being made. For the purposes of this definition, the term "control" (including the correlative meanings of the terms "controlled by" and "under common control with"), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of such Person, whether through the ownership of voting securities or by contract or otherwise. However, for purposes of section 5.3(e) and Section 5.3(f) (other than the first reference to the term Affiliate in Section 5.3(f)), the term "Affiliate" shall have meaning set forth in this definition, except that the term "control" (including the correlative meanings of the terms "controlled by" or "under common control with") shall mean only a relationship that would cause the "controlled" Person to be a Subsidiary of the "controlling" Person".
At (APB 49) "Section 3.3 Corporate Authorization. Seller has full corporate power and authority to execute and deliver this Agreement and each of the Ancillary Agreements to which it is a party, and to

perform its obligations hereunder and thereunder. The execution, delivery and performance by Seller of this Agreement and each of the Ancillary Agreements to which it is a party have been duly and validly authorized and no additional corporate or shareholder authorization or consent is required in connection with the execution, delivery and performance by Seller of this Agreement or any of the Ancillary Agreements to which it is a party. ***Each Affiliate of Seller has or prior to the Closing will have full corporate power and authority to execute and deliver each Ancillary Agreement or Closing document to which it is a party and to perform its obligations thereunder. The execution, delivery and performance by each Affiliate of Seller of each Ancillary Agreement or Closing document to which it is a party have been or prior to the Closing will have been duly and validly authorized, and no additional corporate or shareholder authorization or consent is or will be required in connection with the execution, delivery and performance by any Affiliate of Seller of the Ancillary Agreements or Closing documents to which such Affiliate is a party signatory".***

At (APB 70 and 71) " Commercially Reasonable Efforts : Section 5.3(f)" In the event that Buyer or any of its Affiliates enters into any transaction, or any contract to effect any transaction (including any merger or acquisition) (i) before the date of this Agreement that causes the representation and warranty contained in Section 4.11 to be inaccurate (assuming such representation and warranty is read without giving effect to the words "to the Knowledge of Buyer" contained therein) or (ii) between the date of this Agreement and the Closing that would cause the representation and warranty contained in section 4.11 to be inaccurate (assuming that such representation and warranty were made on the date of such contract or transaction and is read without giving effect to the words "to the knowledge of the Buyer" contained therein), and in either case entry into such transaction or contract materially delays or prevents the consummation of the Transaction under any antitrust, competition or trade regulation or law, Buyer agrees to, and to cause all of its Affiliates (excluding any Affiliate that controls Onex Corporation and any Affiliate, other than Onex Corporation, that has outstanding publicly-traded equity securities and the Subsidiaries of such Affiliates) to take any and all steps necessary to avoid or eliminate each and every impediment under any antitrust, competition or trade regulation Law that may be asserted as a result of such breach, so as to enable the parties hereto to close the Transaction as promptly as possible, including proposing, negotiating, committing to and effecting, by consent decree, hold separate orders, or otherwise, the sale, divestiture or deposition of such of its or its Affiliates' (excluding any Affiliate that controls Onex Corporation and any Affiliate, other than Onex Corporation, that has outstanding publicly-traded equity securities and the Subsidiaries of such Affiliates) assets, properties or businesses or of the Transferred Assets to be acquired by it pursuant hereto, and the entry into such other arrangements, as are necessary or reasonably advisable in order to avoid the entry of and the commencements of litigation seeking the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order or decision in any suit or proceeding, in each case, except as would (i) individually or in the aggregate result in a Material Adverse Effect or materially impair the benefits of the Transaction to be realized by Buyer or (ii) require Buyer to hold separate a material portion of the Business. In addition, Buyer shall use its reasonable efforts to defend through

> *litigation on the merits any claim asserted in court by any party in order to avoid entry of, or to have vacated or terminated, any decree, order or judgment (whether temporary, preliminary or permanent) that would prevent the Closing from occurring as promptly as practicable".*

clearly means that the affiliates have been left with full authorization to perform and take their own decisions with regard to the sale of the imaging segment to the buyer.

52. This vital submission lends the basis of the entire argument of the Senior Counsel, as to how, the global agreement did not have any role effect on the transactions of the two domestic companies. Therefore, even deeming provision of section 92B(2), in our opinion is not applicable on the impugned transaction.

53. We cannot accept the arguments of the TPO/DR to disregard the legal character of the assessee and the other enterprise, due to the influence of the agreement between foreign holding companies, because when we examine the instant case in the light of the decision of Vodafone International Holdings BV vs UOI, reported in 341 ITR 1 (SC), we find the *ratio decidendi* emerging is, if there are two separate but related entities, their separate legal character cannot be disregarded under normal circumstances. This can only be done where the revenue positively proves the factum of influence of foreign AE over the affairs of the domestic entity. We also find, as an undisputed fact by the revenue authorities that the funds received as sale consideration were entirely received by the assessee company. This fact, though extracted by the TPO in his order, has not been rebutted by him, along with other clauses of APA *(as reproduced in pre paras).* If we proceed on the presumption, as founded by the AO/TPO/DR that the instant transaction had a positive economic behavior by the foreign holding companies and therefore, the instant transaction should be held to be bad and sham (as the TPO talks about lifting the corporate veil), then, in that case, the instant transaction could never have taken

place. In that scenario, the global transaction shall only survive, without any tax implications under domestic laws.

54. This, we are sure, could never have been the intention of the revenue authorities.

55. When we examine the issue from the point of view of the decision of Swarnandhar *(supra),* we find that, in that case, the agreement was between the Indian PSU and the Indian subsidiary of two non resident companies, which become one company (as per the order of the Hyderabad ITAT and as per the synopsis submitted by the DR). The assessee was an off shoot company.

56. In the instant case, we find that it is a case of two independent sets of agreements, which are not linked with the each other.

57. In our opinion, even if we go on the theory of prior agreement between the two non resident companies having a consequential effect on the instant agreement, yet, we cannot ignore the fact as mentioned in APB 1168, which have been reproduced hereinabove, that the entire exercise of transfer of imaging segment was *independently done on its own terms by the assessee and the other party, i.e. Carestream India.* We also opine that though the instant transaction was a consequence of the global agreement entered by the holding companies, but there was no prior agreement and/or terms and conditions for sale, dictated by the non resident agreement *(as mentioned in APB 1168).*

58. Once again, when we deal with a deeming provision, we have to keep in mind, the purpose and purport to introduce that provision and to arrive at the result that the legislature intended to, i.e. the legislature intended to rope in those transactions which, though strictly not international transaction, but have the colour of the same.

But, when we read the relevant provision, the intention of the legislature has always been to define the international transaction, which in turn is within section 92B(1), which falls in Chapter X. It is imperative here to explain the meaning of a deeming fiction, as explained by the higher judicial fora. We take the example of other deeming provisions in the Income Tax Act, 1961, such as sections 68 to 69D, which do not fall under any basic head but operate independently. We have noted this distinction only to clarify that, in the instant case, the deeming provision finds itself accosted within the definitions of *international transaction* and *associated enterprise.* In these circumstances, the citations submitted by the Senior Counsel gathers relevance, i.e. CIT vs C.P. Sarathy Mudaliar, reported in 83 ITR 170 (SC, CIT vs Mother India Refrigeration Industries P Ltd., reported in 155 ITR 711 and the Special Bench decision in the case of Sumitomo Mitsui Banking Corp. vs Dy Director of Income Tax (SB) *(supra).*

59. When we read the deeming provision of section 92B(2), we cannot slip out of the definition of international transaction, that too, when the deeming provision, itself says, *"for the purposes of sub section (1)".* As observed by their Lordships, in the case of K.P. Varghese *(supra), "the Parliament would have enacted that provision as a separate section and not pitchforked it into section 52 with a total stranger under an appropriate marginal note".* The similar course could have been adopted by the legislature to place section 92B(2), independently, not under the heading of international transaction. Another important observation has to be made in this context is that the legislatures committed the deeming provision alongside section 92B(1) by using the expression, *"for the purposes of sub-section (1)".*

60. In our opinion, as observed by their Lordships, 92B(2) assumes same significance, i.e. to define international transaction as defined

under section 92B(1), to get to the true intent…", i.e. what is an international transaction.

61. This abundantly makes it clear that to come within the purview of section 92(1), 92A(1) the transaction must go through the needle hole definition provided in section 92B(1). This, transaction, cannot be presumed to be international transaction, even when the revenue authorities have tried to include it as the deemed transactions, as the case made out by the TPO/AO in the instant case.

62. We are, thus, unable to convince ourselves to approve the arguments and observations made by the DR.

63. In these circumstances, we hold that there was no international element involved in the sale of imaging segment by the assessee of its business to Carestream Health Ltd. and hold it was a purely a domestic transaction.

64. On the other legal issue that whether the TPO was correct to employ an alien method for arriving at the ALP. Once again, relevant section is very clear, which reads,

> *"The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe."*

65. It is important to take note of the word *"shall"* used in the section. No doubt that under the General Clauses Act, shall can be used as may or *vice versa*, but the Hon'ble Supreme Court of India in the case of CIT vs Anjum Mohamed Ghaswalla, reported in 252 ITR 1, sitting in Constitution Bench explained the exact premise of the word *"shall"*. The case was pertaining to the levy of interest under section

234B on Chapter XIXA of the Income Tax Act, i.e. Settlement Commission. In the decision, the Hon'ble Supreme Court held,

> *"Nextly, the Commission has elaborately discussed the object of introduction of Chapter XIX-A in the Act, the history behind the introduction and schematic rationalisation of the provisions of Chapter XIX-A brought about through Finance Act, 1987 to hold that in exercising its power under Chapter XIX-A it has almost an unbridled power to arrive at a settlement. This exercise of purposive interpretation by looking into the object and scheme of the Act and legislative intendment would arise, in our opinion, if the language of the Statute is either ambiguous or conflicting or gives a meaning leading to absurdity. We do not find any such problem in the provisions of the Act to which we have already referred to Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression "shall" used in the said Section cannot by any stretch of imagination be construed as "may". There are sufficient indications in the scheme of the Act to show that the expression "shall" used in Sections 234A, 234B and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as "may".*

66. By the use of the word *"shall",* for computing the ALP in one of the following methods, the legislature has cast an embargo that no seventh method could be adopted by the TPO for computing the ALP. Even the Special Bench of the ITAT in the case of LG Electronics India Private Limited, *(supra)*, in paras 22.10 and 22.11, pages 128 and 129, observes,

> *"As regards the contention that methods are tools for determining the ALP, we find that there is dispute that there is no dispute the main purpose of Chapter X is to determine the ALP of an international transaction, but such determination can be done only by way of the methods specified by the statute. When the legislature has specifically enshrined a provision under section 92C requiring the computation of ALP by any of the prescribed methods, it does not fall in the realm of the TPO or for that matter any other authority to breach such mandate and apply or direct to apply any other method. Going by the dictate of the provision as subsists under sub-section (1) of section 92C, there can be absolutely no doubt on adoption of any single method of those set out in section.*
>
> *Rule 10B has specified a set procedure to be followed for determining the ALP distinctly under the five methods. It is equally not permissible to invent a new procedure and try to fit such procedure within any of the existing procedures prescribed as per these methods. No one is authorized to add one ore more new steps in the prescribed procedure or to substitute any other mechanism with the prescribed under the rule. It is neither possible to invent a method nor to substitute a new methodology in place of the one prescribed in the rule."*

67. We cannot accept the arguments of the DR that the word *any* has been used in section 92C(1), which could give leeway to the TPO to ascribe to a non specific method. Word *any,* is founded on the suffix, *"of the following methods being the most appropriate method"*. Therefore, the ambit of the word *any* in section 92C(1) has been restricted within the precinct of the five specific methods. This gathers strength from the fact that even in the Rules, relevant Rule 10B provides with the similar wordings.

68. Taking into account the clear and unambiguous wordings of the provisions of the Income Tax Act and Rules and respectfully following the decision of the Special Bench in the case of LG *(supra),* we hold that even on this legal issue, the assessee succeeds.

69. We also cannot agree with the DR that the issue be restored to the TPO because the methods, as prescribed by the legislature are mandatory, not directory. When mandatory provision is either superseded or ignored, it straightaway affects the jurisdiction. In the instant case, we have to mention that it was a case of *suo moto* reference to the TPO and it is the case of the revenue authorities, to import the provisions of Chapter X. In this circumstance, since the TPO did not adhere to the prescribed methods consciously, another innings to rectify the mistake cannot be allowed, as the TPO infringed the relevant provision of the Income Tax Act and Rules.

70. We, therefore, negate and hold that the computation of ALP on *"purchase parity"* (APB 1191) is *void*.

71. The Senior Counsel submitted that even if the ALP is to be determined & profit on the same is to be computed, even then, the assessee's computation was most reasonable, because, according to him, in the transfer of business of imaging segment, *mean* of last four

years Gross Profit came at 14%, which in monetary terms came to Rs. 4.49 crores, as against which, the assessee had declared the GP at 5.98 crores, which according to us is quite reasonable and should not be disturbed.

72. On these observations, in our opinion the entire case both on legality and on facts, as developed by the AO/TPO/DRP were initiated on wrong footings and were *void* and without jurisdiction.

73. We, therefore, allow grounds no. 1, 2, 3 & 4, as filed by the assessee.

74. **Ground no. 5** pertains to TP adjustment of Rs. 9,60,668/- in respect of expenses incurred by the appellant on behalf of its AE.

75. The facts are that the assessee had incurred certain expenses on behalf of its AE amounting to Rs. 1,88,45,431/-. As the expenses were to be reimbursed to the assessee, the receipts on account of reimbursement was recovered on cost plus 10% mark up on the expenses pertaining to employee, advertisements, award sponsorship.

76. The TOP/AO proposed the markup @ 12.5% and made an adjustment accordingly.

77. Before the DRP assessee pleaded that the TPO/AO did not give any opportunity to the assessee to clarify the issue and cited certain case laws, including the case of Tin Box Co. vs CIT, reported in 249 ITR 216 that in absence of proper opportunity of being heard, the order lacks legal sanctity, as held by the Hon'ble Supreme Court of India.

78. On merits, the assessee argued before DRP that the assessee merely acted as a facilitator, wherein it made available to AEs services, and has earned only markup for facilitating the services. Cost of services is merely a pass through expenses for assessee where it recovers the cost and for functioning as facilitator it changes certain markup.

79. The assessee has already recovered 10% markup on employee, advertisement, award sponsorship cost from AE. Against this, the TPO/AO has considered 12.5%, which according to the proviso to section 92C(2) comes within the range of ± 5% and needed to be ignored as standard deduction.

80. The DRP, after considering the detailed submission of the assessee as filed along with Form no. 35A, sustained the adjustment.

81. Aggrieved, the assessee is before the ITAT.

82. Before us, the Senior Counsel stressed upon the proviso to section 92C(2) that the law itself has pointed the margin of ± 5% and since the adjustment sought to be made falls within the margin allowed by the legislature, the addition on account of adjustment should not be made.

83. The DR though supported the orders of the revenue authorities, but accepted that the adjustment being made is within the margin provided by the proviso.

84. After going through the facts and the relevant proviso, we find that the adjustment sought by the TPO and sustained by the DRP is falling within the margin provided by the proviso.

85. In, these circumstances, we are of the opinion that on facts, the addition/adjustment needs to be knocked down, as the adjustment has been made by applying 12.5% mark up as against 10% markup shown by the assessee.

86. We, therefore, set aside the orders of the DRP and TPO on this issue and direct the AO to delete the addition on account of adjustment suggested by the TPO at Rs. 9,60,668/-.

87. **Ground no. 6** is addition on account of disallowance of Rs. 16,28,733/- under section 14A under domestic provisions.

88. In the assessment proceedings, the AO noticed that the assessee has received Rs. 22.37 lacs as dividend and has claimed the same as exempt.

89. On being asked as to why the provisions of section 14A be not applied, the assessee vide submissions dated 26.08.2011 submitted that it has not attributed any expense against the exempt income. Since it is case of debt free company, no interest could be attributable towards the investments made by it from its own funds, from which it has generated the impugned exempt income, and hence, no disallowance is called for.

90. The AO, rejected the contention of the assessee and held,

> *"In this regard, the decision of Special Bench, ITAT, Mumbai in ITA no. 8057/Mum/03 dated 20.10.2008 in the case of M/s Daga Capital Management P Ltd and Others is relevant. In this case, it has been held that "We do not have an iota of doubt in our mind that the intention behind using the expression "in relation to" in section 14A is to encompass not only the direct but also the indirect expenditure which has any relation to the exempt income. We, therefore, hold that the direct and indirect expenses are disallowable under section 14A, which have any relation with the income not chargeable to tax under the Act". With this ruling the Special Bench has made it crystal clear that both direct and indirect expenses are to be allocated for the earning of income which are claimed as exempt income. It follows that the*

administrative expenses incurred by the assessee related to the earning of dividend income as well as a proportionate part of all other expenditure should be disallowed. Reliance is also placed on the Hon'ble Bombay High Court decision in the case of Godrej & Boyce Mfg. Co. Ltd. vs DCIT (ITA no. 626 of 2010) & Writ petition No. 758 of 2010 (Bom.).

Xxxxxxxxxxxxxxxxxxx

Sr No.	***Particulars***	***Amount***
3	*i. Average value of investments -* *Opening balance of investments + Closing balance of investments / 2* $\frac{300318000 + 351175000}{2}$ *= Rs. 325746500* *-8D (2)(iii)* *ii. Disallowance* *An amount equal to one half per cent of the average of the value of investment income from which does not or shall not form part of the total income as appearing in the balance sheet of the assessee on the first day and the last day of the previous year.* *iii. 0.5% of 325746500*	***16,28,733***
4	*Total disallowance*	***16,28,733***

Thus total disallowance as per Section 14A r.w. Rule 8D works out to Rs. 16,28,733/-".

91. Aggrieved, the assessee taking the DRP route, approached the DRP and submitted,

"Assessee has claimed dividend income from units of mutual funds aggregating to Rs.220.37 lacs as exempt from tax. During the course of assessment proceedings, the Assesses, vide letter dated 26th August, 2011, submitted that the assessee is a debt free company and therefore no interest expenditure can be attributed towards the exempt dividend income earned by the company. The Assesses has as a prudent business measure invested temporary surplus funds into mutual funds and thereby earned exempt dividend income The Assesses submitted that no expenditure has been incurred to earn dividend income because the expenses debited to the Assesses's Profit and Loss Account are those which have been incurred in relation to 'the manufacturing and trading activities of the assesses and which are allowable under section 37. No part of the expenditure is expenditure under section 57, which requires to be considered under section 14A. The dividend is directly credited to the bank account by ECS. Further, no monitoring is required of the Mutual Funds as that is done by the brokers who earn brokerage from the assessee".

"Assessee has also submitted alternative working of the disallowance. Reliance was on the following decisions:

Daga Capital Management P. Ltd.	*ITA no.8057/M/03 (Mum.)(SB)*
Godrej & Boyce Mfg. Co. Ltd.	*328 ITR 81 (Bom.)*
GIC Ltd.	*254 ITR 203 (Bom.)*

Central Bank of India	*264 ITR 522 (Bom.)*
Bombay High Court in GIC Ltd.	*203 ITR 203*

6.3 Discussion and decision:-

We have considered the AO's order and assessee's submissions. The decision of the Hon'ble Bombay High Court in the case dl Godrej & Boyce Mfg. Co. has set the controversy on applicability of Rule 8D at rest. Accordingly, once the AO does not accept the assessee's claim of no expenditure towards exempt income or its computation of disallowance in terms of Rule 8D, the Rule has to be mandatorily applied. In this case, the AO has found the assessee's claim of no expenditure unacceptable and accordingly, Rule 80 has mandatorily come into play. The disallowance is not arbitrary as it is backed up by AO's finding that some expenditure has been incurred. He has also considered the assessee's version and has found it untenable. looking into the business profile of the assessee and the volume of dividend income (22.37 lacs during the year). We agree with the AO that some expenditure has been obviously incurred to manage and monitor the investments yielding the dividend income. The application of Rule 80 is also fair and reasonable as the AO has only applied Rule 80(iii). Further, considering that Rule 8D is mandatory, the assessee's working is invalid. In view of these facts, we endorse the disallowance".

DRP rejected the contentions of the assessee and sustained the disallowance, as computed by the AO.

92. Aggrieved, the assessee is before the ITAT.

93. Before us, the Senior Counsel relied upon the submissions made before the revenue authorities and submitted that the revenue authorities have not cracked the test laid down in the relevant provisions i.e. section 14A(2), which gathers support from the order of the Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Ltd. vs JCIT reported in 328 ITR 81 (Bom).

94. He, therefore, submitted no disallowance is called for.

95. The DR relied upon the orders of the revenue authorities.

96. We have heard the arguments and have perused the material placed before us. The issue as carved out by the AR is with respect to the applicability of Rule 14A and computation of disallowance as per Rule 8D. The relevant portion read out by the AR from the decision in

the case of Godrej & Boyce Manufacturing Co. Ltd vs DCIT *(supra)* in Para 70 of the order pertains to the correctness of computation of disallowance and giving valid reasons for such computation. The crux of argument of AR is with reference to Section 14(2) which is as under:

> *"The AO shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if AO having regard to the accounts of assessee, is not satisfied with the correctness of the claim of assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act".*

97. The issue impugned before us has been examined by the coordinate Bench(s) at Mumbai and also by some of the Hon'ble High Courts at length. In the case of JK Investors (Bombay) Ltd. vs ACIT, ITA No. 7858 and 7851/Mum/2011, (*where one of us was the party, the case pertained to assessment year 2008-09)* to the decision, and have examined the words that need reference in the section are *"if AO having regard to the accounts of assessee, is not satisfied with the correctness of the claim…"*, means that before going to the computation, AO has to cross the barrier of the satisfaction with the correctness of the claim, then AO can be permitted to straightaway apply the computation under Rule 8D. In this case, the coordinate Bench was dealing with the objection taken by the AO on account of administrative expenses, allocated by the assessee against the investment of Rs. 202,25,40,632/-. This was the case where the AO did not refer to the accounts, but he did not give reasons and speaking order, for making the disallowance under section 14A read with Rule 8D.

98. Thus the issue in this appeal is with reference to invoking of provisions of section 14A(2) and Rule 8D. The Hon'ble Bombay High Court while upholding the constitutional validity of the section 14A and Rule 8D has this to observe with reference to sub section 2 & 3 of section 14A:

> "*Sub-sections (2) and (3) of section 14A were inserted by an amendment brought about by the Finance Act of 2006 with effect from April 1, 2007. Under sub-section (2), the AO is required to determine the amount of expenditure incurred by an assessee in relation to such income which does not form part of the total income under the Act in accordance with such method as may be prescribed. Sub-section (2) was inserted so as to provide a uniform method applicable where the AO is not satisfied with the correctness of the claim of the assessee. Parliament has provided an adequate safeguard to the invocation of the power to determine the expenditure incurred in relation to the earning of non-taxable income by adoption of the prescribed method. The invocation of the power is made conditional on the objective satisfaction of the AO in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. These safeguards which are implicit in the requirements of fairness and fair procedure under article 14 must be observed by the AO when he arrives at his satisfaction under sub-section (2) of section 14A. Sub-rule (1) of rule 8D of the Income-tax Rules, 1962, has also incorporated the essential requirements of sub-section (2) of section 14A before the AO proceeds to apply the method prescribed under sub-rule (2)"* **..** **(***emphasis supplied)*

99. In the case of JK Investors *(supra),* the observations made the Hon'ble Delhi High Court in the case of Maxopp Investment Ltd and Others vs CIT 247 CTR 162, have been incorporated. In that decision, reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT vs Walfort Share & Stock Brokers Pvt. Ltd 326 ITR 1 (SC) and the decision of the Hon'ble Bombay High Court in the case of Godrej and Boyce Company Ltd vs DCIT (328 ITR 81). The relevant portions of the judgment of Hon'ble Delhi High Court are as under:

> *29. Sub-section (2) of Section 14 A of the said Act provides the manner in which the AO is to determine the amount of expenditure incurred in relation to income which does not form part of the total income. However, if we examine the provision carefully, we would find that the AO is required to determine the amount of such expenditure only if the AO, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the said Act. In other words, the requirement of the AO embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the AO returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the AO entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the AO must record that he is not satisfied with the correctness of the claim of the*

assessee in respect of such expenditure. Sub-section (3) is nothing but an offshoot of sub-section (2) of Section 14A. Sub-section (3) applies to cases where the assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act. In other words, sub-section (2) deals with cases where the assessee specifies a positive amount of expenditure in relation to income which does not form part of the total income under the said Act and sub-section (3) applies to cases where the assessee asserts that no expenditure had been incurred in relation to exempt income. In both cases, the AO, if satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure, as the case may be, cannot embark upon a determination of the amount of expenditure in accordance with any prescribed method, as mentioned in sub-section (2) of Section 14A of the said Act. It is only if the AO is not satisfied with the correctness of the claim of the assessee, in both cases, that the AO gets jurisdiction to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the said Act in accordance with the prescribed method. The prescribed method being the method stipulated in Rule 8D of the said Rules. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the AO would have to indicate cogent reasons for the same.

Rule 8D.

30. As we have already noticed, sub-section (2) of Section 14A of the said Act refers to the method of determination of the amount of expenditure incurred in relation to exempt income. The expression used is - "such method as may be prescribed". We have already mentioned above that by virtue of Notification No.45/2008 dated 24/03/2008, the Central Board of Direct Taxes introduced Rule 8D in the said Rules. The said Rule 8D also makes it clear that where the AO, having regard to the accounts of the assessee of a previous year, is not satisfied with (a) the correctness of the claim of expenditure made by the assessee; or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year, the AO shall determine the amount of the expenditure in relation to such income in accordance with the provisions of sub-rule (2) of Rule 8D. We may observe that Rule 8D(1) places the provisions of Section 14A(2) and (3) in the correct perspective. As we have already seen, while discussing the provisions of Sub-sections (2) and (3) of Section 14A, the condition precedent for the AO to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the AO is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules.

31.It is, therefore, clear that determination of the amount of expenditure in relation to exempt income under Rule 8D would only come into play when the AO rejects the claim of the assessee in this *regard. If one examines sub-rule (2) of Rule 8D, we find that the method for determining the expenditure in relation to exempt income has three components. The first component being the amount of expenditure directly relating to income which does not form part of the total income. The second component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest [other than the amount of interest included in clause (i)] incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total income, to the average of the total assets of the assessee. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income, as appearing in the balance sheets of assessee, on the first day and the last day of the previous year, It is the aggregate of these three components which would constitute the expenditure in relation to exempt income and it is this amount of expenditure which would be disallowed under section 14A of the said Act. It is, therefore, clear that in terms of the said Rule, the amount of expenditure in relation to exempt income has two aspects – (a) direct and (b) indirect. The direct expenditure is straightaway taken into account by virtue of clause (i) of sub-rule (2) of Rule 8D. The indirect expenditure, where it is by way of interest, is computed through the principle of apportionment, as indicated above, and, in cases where the indirect expenditure is not by way of interest, a rule of thumb figure of one half percent of the average value of the investment, income from which does not or shall not form part of the total income, is taken.*

....

41. Sub-section (2) of section 14A, as we have seen, stipulates that the AO shall determine the amount of expenditure incurred in relation to income which does not form part of the total income "in accordance with such method as may be prescribed". of course, this determination can only be undertaken if the AO is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. This part of section 14A(2) which explicitly requires the fulfillment of a condition precedent is also implicit in section 14A(1) [as it now stands] as also in its initial avatar as section 14A. It is only the prescription with regard to the method of determining such expenditure which is new and which will operate prospectively. In other words, section 14A, even prior to the introduction of sub-sections (2) and (3) would require the AO to first reject the claim of the assessee with regard to the extent of such expenditure and such rejection must be for disclosed cogent reasons. It is then that the question of determination of such expenditure by the AO would arise. The requirement of adopting a specific method of determining such expenditure has been introduced by virtue of sub-section (2) of section 14A. Prior to that, the assessing was free to adopt any reasonable and acceptable method.

100. The Hon'ble Punjab & Haryana High Court in the case of CIT vs Hero Cycles Ltd 323 ITR 518 (P&H) has also held that disallowance under section 14A could not stand where it was found that for earning exempted income, no expenditure has been incurred.

101. The Coordinate Bench in the case of Justice Sam P Bharucha vs Addl. CIT in ITA No. 3889/Mum/2011 dated 25.07.2012 has analyzed similar issue and came to the following conclusion:

> *"5 We have considered the rival submissions as well as relevant material on record. Section 14A has within it implicit notion of apportionment in the cases where the expenditure is incurred for the composite/indivisible activities in which taxable and non-taxable income is received. But when it is possible to determine the actual expenditure in relation to the exempt income or when no expenditure has been incurred in relation to the exempt income, then principle of apportionment embedded in section 14 A has no application. The objective of section 14 A is not allowing to reduce tax payable on the normal exempt income by debiting the expenditure incurred to earn the exempt income. Thus, the expenses incurred to earn exempt income cannot be allowed and the expenses shall be allowed only to the extent they are related to the earning of taxable income. If there is expenditure directly or indirectly incurred in relation to exempt income, the same cannot be claimed against the income, which is taxable as it is held by the Hon'ble Supreme Court in case of Commissioner of Income-tax v Walfort Share and Stock Brokers P. Ltd. reported in 326 ITR 1 that for attracting the provisions of section 14A, there should be proximate cause for disallowance which as relationship with the tax exempt income.*
> *5.1 The expenditure incurred in relation to the income which does not form part of total income has to be disallowed. However, it should be proximate relationship between the expenditure and the income, which does not form part of total income. Once such proximity relationships exist, the disallowance is to be effected. In case the assessee had claimed that no expenditure has been incurred for earning the exempt income, it was for the AO to determine as to whether the assessee had incurred any expenditure in relation to income which did not form part of total income and if so to quantify the extent of disallowance. Thus, in order to disallow the expenditure under section 14A, there must be a live nexus between the expenditure incurred and the income not forming part of total income. No notional expenditure can be apportioned for the purpose of earning exempt income unless there is an actual expenditure in relation to earning the income not forming part of total income. If the expenditure is incurred with a view to earn taxable income and there is apparent dominant and immediate connection between the expenditure incurred and taxable income, then no disallowance can be made under section 14A merely because some tax exempt income is received by the assessee.*
>
> *5.2 Averting to the facts of the case in hand, the assessee had made a claim that no expenditure has been incurred or claimed for earning the exempt income.*

From the details of the expenditure, it is clear that the expenditure incurred and claimed by the assessee has direct nexus with the professional income of the assessee. It is not the case of the revenue that the assessee has used his official machinery and Establishment for earning the exempt income. The AO has not given any finding that any of the expenditure incurred and claimed by the assessee is attributable for earning the exempt income. In other words when the AO has not pointed out that certain expenditure is not incurred for earning the professional income; but are incurred in relation to dividend income or such expenditure is incurred for inseparable and indivisible activities comprising professional as well as the activities on which is exempt income has been earned by the assessee, then in the absence of any such instance of expenditure, finding of AO or any material to show that the expenditure incurred and claimed by the assessee against the taxable income has any relation for earning the exempt income, the provisions of section 14A cannot be applied.

102. Similar views were also expressed by the Coordinate Benches in the case of Relaxo Footwears Ltd, vs Addl. CIT (2012) 50 SOT 102 and Priya Exhibitors (P) Ltd vs ACIT (2012) 54 SOT 356. In the case of Relaxo Footwears Ltd, it was held as under:

"*The AO should have considered the claim of the assessee that no expenditure has been incurred in relation to earning the exempt income. If the claim was not found to be in consonance with the facts on record, it could have been rejected and disallowance could have been made as per rule 8D. However, it is found that the AO has not considered the claim of the assessee at all and he has straightway embarked upon computing disallowance under rule 8D. The Commissioner (Appeals) made an assumption that whenever exempt income is earned there will be some expenditure incurred in relation thereto. Such presumption cannot form the basis for making disallowance under rule 8D".*

103. Similar decision had been taken in the case of Priya Exhibitors (P) Ltd. ACIT (2012) 54 SOT 356.

104. After considering the principles laid down by various judgments, it is imperative that the AO can invoke Rule 8D only when he records satisfaction in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. The condition precedent for the AO entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the AO must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. While rejecting

the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the AO would have to indicate cogent reasons for the same. Therefore, it is all the more necessary that AO has to examine the accounts of assessee first and if, he is not satisfied with the correctness of the claim, only then he can invoke Rule 8D. No such examination was made or satisfaction was recorded by AO in this case. It was noticed that the AO has not considered the claim of the assessee at all and he has straightway embarked upon computing disallowance under Rule 8D. Disallowance under section 14A required, a finding, of incurring of expenditure, and where no expenditure had been incurred, disallowance under section 14A would depend upon the facts, evidenced by the assessee and examination of those facts by the AO.

105. In the instant case, the facts as mentioned in pre para is that the assessee had *not* attributed any expenditure towards the income claimed as exempt, and thus the facts are distinct from the case of JK Investors *(supra)*. But this is also a fact that the AO has not examined the reasons for not attributing any expenditure towards income claimed as exempt. Whereas, the DRP in the impugned order, has held that "*the disallowance as not arbitrary, and that some expenditure has obviously been incurred to manage and monitor the investments, yielding the dividend income*". The observation, *"that some expenditure has obviously been incurred to manage and monitor…"* made by the DRP, is *per se,* hypothetical.

106. In our opinion, Rule 8D is not automatic, it is for the AO to examine, at the outset, the correctness of the claim of the assessee, whether he has incurred any expenditure or not and has to give a definite finding, as to how the claim of the assessee is unacceptable. If, on examination, it is found that such expenditure is lower than the disallowance, as computed under Rule 8D, then actual expenditure, as estimated by the AO would have to be disallowed. If, on the other hand, the assessee is able to substantiate on facts, that the exempt income does not bear any cost/expenditure, in such cases, disallowance under section 14A, may become invalid.

107. As observed above, Rule 8D cannot be invoked directly and mechanically, i.e., without giving a detailed and speaking reasons. Bald statement, made by the AO that he has referred to the accounts, does not give him an automatic jurisdiction to invoke the provisions of section 14A read with Rule 8D. Disallowance, made on such basis is not permissible. In order to give quietus to the impugned issue, where no expenditure has been attributed to wards the exempt income by the assessee, we, restore the issue of disallowance to the AO for computing the disallowance in accordance with the provisions of section 14A(2), *if at all,* by giving detailed reasoning and speaking order, needless to say that the AO shall give adequate and reasonable opportunity to the assessee to present its case.

108. In these circumstances, we set aside the order of the DRP and direct the AO to compute the disallowance in accordance with the provisions of section 14A(2), as per our observations in the above para.

109. The ground of appeal is, thus, allowed for statistical purposes

110. In the result, the appeal filed by the assessee is allowed.

निर्धारिती अपील स्वीकृत की जाती है ।

Order announced in the open Court on this day of 30th April, 2013.

Sd/-	**Sd/-**
(राजेन्द्र सिंह /RAJENDRA SINGH)	**(विवेक वर्मा /VIVEK VARMA)**
लेखा सदस्य /ACCOUTANT MEMBER	**न्यायिक सदस्य /JUDICIAL MEMBER**

मुंबई: दिनांक 30 अप्रेल 2013 / Mumbai, Date: 30th April, 2013

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) The CIT (A)-Concerned ______/ Member, DRP 1, Mumbai.
4) आयकर आयुक्त -______मुंबई /The CIT –Concerned _______, Mumbai,

5) विभागीय प्रतिनिधि "के" , आयकर अपीलीय अधिकरण, मुंबई/
The D.R. "K" Bench, Mumbai.
6) गार्ड फाईल
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*****चव्हान** व.नि.स

***Chavan, Sr. PS**