आयकर अपीलीय अधीकरण, न्यायपीठ – "C" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
(समक्ष)Before **श्री जे. सुधाकर रेड्डी**, लेखा सदस्य **एवं/and श्री ऐ. टी. वर्की,** न्यायीक सदस्य)
[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 629/Kol/2013
Assessment Year: 2009-10

Deputy Commissioner of Income-tax, Circle-8, Kolkata.	Vs.	M/s. Russell Credit Limited (PAN: AABCR3494H)
Appellant		Respondent

&

I.T.A. No. 674/Kol/2013
Assessment Year: 2009-10

M/s. Russell Credit Limited (PAN: AABCR3494H)	Vs.	Joint Commissioner of Income-tax (OSD), Circle-8, Kolkata.
Appellant		Respondent

Date of Hearing	14.02.2018
Date of Pronouncement	11.04.2018
For the Revenue	S/Shri Sanjay Paul & Saurabh Kumar, Addl. CIT, Sr. DR
For the Assessee	Shri J. P. Khaitan, Sr. Advocate

ORDER

Per Shri A.T.Varkey, JM

These are cross appeals filed by the revenue and assessee which are against the order of Ld. CIT(A)-VIII, Kolkata dated 20.12.2012 for AY 2009-10. Since both the appeals have been heard together, we dispose of the same by this consolidated order for the sake of brevity.

2. The grounds of appeal raised by the assessee are as under:

"1. Transfer Pricing Adjustment: (Rs.17,68,175 - Rs.15,75,444)= Rs. 1,92,731/-

For that the learned CIT(Appeals) was not justified in ignoring the provisions of section 92C for computation of arm's length price and the relevant CBDT circulars on the subject.

For that the learned CIT(Appeals) erred in not considering the Accountant's Report under section 92E and Form 3CEB wherein the detailed analysis and justification was given for the application of the CUP method in determining the arm's length notional interest income.

For that the learned CIT(Appeals) was not justified in arbitrarily applying 10% rate without considering the provisions of the Income Tax Law.

Relief Prayed: The addition of Rs.1 ,92,731/- should be deleted.

2. Proportionate Management Expenses under section 14A: (Rs. 1,22,79,861 - Rs. 33,472)= Rs.1,22,46,389/-

For that the learned CIT(Appeals) erred in applying the formula under rule 80, restricted to the extent of the net expenditure claimed, ignoring the decisions of the Appellate Authorities in respect of the appellant company for the earlier years.

For that the learned CIT(Appeals) was not justified in disallowing the entire amount of expenditure (net) claimed, although the appellant company was involved in various financing 1 investment activities and had taxable business income like profit/loss on stock-in-trade, lease rental, interest, brokerage etc ..

For that the learned CIT(Appeals) erred in making the said disallowance although no specific / direct expense had been incurred for earning the exempt income and the appellant company had computed a disallowance in line with the principles laid down by the Appellate Authorities.

Relief Prayed: The addition of Rs.1 ,22,46,389/- should be deleted."

The assessee has also taken additional ground of appeal (2A), which reads as under:

"*(2A) for that further and in any event and without prejudice to the aforesaid, the Assessing Officer while applying rule 8D(2)(iii) should have excluded the value of strategic investments not made for earning dividend income as also investments which had not given rise to any exempt income.* "

The grounds of appeal raised by the revenue are as under:

"1. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to allow Long Term Capital Gain (Loss) carried forward at Rs. 4,56,14,076/- against the amount of Rs.3,75,80,707/- computed by the AO as per the provision of section 46,section 48 and section 49 of the ITAct.'61 whereas the CIT(A) has failed to consider all these provisions of the IT Act. 1961 in directing AO .

2. That, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that for the purpose of computation of long term capital gain (loss) the indexation of cost of acquisition has to be done from the original date when the shares were acquired by the first previous owner in contravention of the explanation below section 49(1) of the income tax Act, 1961 that the expression 'previous owner of the property' in relation to any capital asset owned by an assessee means the fast previous owner of the capital asset.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in giving a direction to the AO on wrong presumption of law which makes the order of the CIT(A) erroneous and liable to be quashed and order of the AO be restored.

4. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to restrict the disallowance u/s. 14A of the IT Act. 1961 read with rule 8D of the IT rules 1962 to the amount of expenditure claimed by the assessee company during the year, whereas, no such restriction is provided either in the provisions of section 14A of the IT Act. 1961 or rule-8D of the IT Rules1962."

3. First of all we will decide the transfer pricing issue of assessee's appeal. Brief facts of the issue are that the assessee company during the AY 2008-09 had given an interest free loan of AUD 5,00,000 to its associated enterprise (AE) Technico Pty. Ltd., Australia (TPL). For the purpose of determining the arm's length nature of the transaction, the assessee adopted CUP method and took the arm's length rate of interest @ 8.91% as was prevailing in Australia during the year 2008. The assessee thus computed the arm's length interest of AUD 44,550 which was converted into Indian currency i.e. Rs.15,75,444/- using the exchange rate as on 31.03.2009. During the assessment proceedings, the assessee filed before the AO copy of the loan agreement and written submission towards justification of arm's length interest computed by the assessee. But the AO did not agree with the interest rate of 8.91% adopted by the assessee and according to him, 10% interest rate would be reasonable and held as under:

"4.3. In the light of the above discussion, it is held that the interest rate of 8.91% adopted by the assessee cannot be the arm's length interest rate in an uncontrolled environment and the same is accordingly rejected. Taking into account the totality of facts of the case, it is deemed reasonable to take the arm's length interest rate at 10% and thus the amount of interest payable is worked out at 5,00,000 x 10% x Rs.35.3635 = Rs.17,68,175/-. Since the assessee has already offered arm's length adjustment of Rs.15,75,444/-, the balance of Rs.1,92,731/- is now added back as further transfer pricing adjustment."

On appeal, the Ld. CIT(A) while dismissing the assessee's appeal has held as under:

"I have carefully considered the submission and argument put forth on behalf of the appellant, perused the facts of the case including the observation of the AO, the various clauses in the Loan Agreement and other materials brought on record. I do not find any merit in the argument advanced on behalf of the appellant simply because as to why the appellant

itself offered the notional interest @ 8.91 % on the amount of borrowed fund given to the subsidiary company even though no interest is receivable as per the normal clause of the Loan Agreement in normal situation and the interest is chargeable only in exceptional circumstances, as claimed by the appellant. On the other hand, the action of the AO is found to be justified as he has calculated the notional interest on the basis of the rate mentioned in the penal clause of the Loan Agreement. Under this circumstances and perusing the facts of the case, I am of the view that the action of the AO in computing the chargeable interest @ 10% and thereby making the addition of Rs. 1,92,731/- is justified and hence the same is hereby upheld. Thus, this ground of appeal is dismissed."

Aggrieved, the assessee is in appeal before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee has granted an interest free loan of AUD 5,00,000 to its AE Technico Pty. Ltd. during the FY ended on 31.03.2008. For the purpose of determining the arm's length nature of the transaction, the assessee considered the same from the perspective of the TPL. According to the assessee, the objective to do so was to determine the rate of interest at which the same amount could have been borrowed by the AE which is an Australian company from an Australian Bank at the same point of time. The arms length rate of interest was determined using the average rate of interest which was the borrowing rate applicable to corporate's which prevailed in Australia during the current year 2008. The assessee extracted the information from the International Monetary Fund (IMF) data base and the arm's length rate of interest for the current year 2008 mentioned was 8.91% and the assessee computed the amount of arm's length interest denominated in AUD by applying the arm's length interest rate to the amount of loan. Thereafter, the assessee added the arm's length value of interest to its income and offered it to tax thereon. The assessee calculated amount of interest as per AUD came to AUD 44,550 which was converted into Indian currency using the exchange rate applicable as on 31.03.2009 i.e. AUD is equal to Rs.35.3635 which was not acceptable to the AO though the AO agreed to the CUP method. According to AO, the loan agreement vide clauses 3 and 5 reveals that as soon as the AE ceases to be a wholly owned subsidiary of the assessee interest shall be charged @ 1% over the prevailing bank rate and the borrower shall pay the lender interest at 10% per annum or 1% over the prevailing bank rate whichever is higher for the period of delay beyond the due date i.e. 24.08.2010. According to AO, the expression bank rate noted in the agreement does not expressly specifies whether it refers to the bank rate prevailing in India or

Australia. Therefore, he has adopted the bank rates in India and was of the opinion that 10% interest need to be computed for the amount given to the AE and thereafter, made an addition of Rs.1,92,731/-. We note that the clauses referred to i.e. 3 and 5 in the agreement is only in cases of default of non-payment which will arise only not before the due date i.e. on 24.08.2010 and has got no relevance in the assessment year under consideration. On perusal of the Promissory Note given by the borrower AE which is placed at page 34 of the paper book reveals as under:

PROMSSORY NOTE

AUD 500,000

In consideration of the loan of AUD 500,000 (Australian Dollars Five hundred Thousand only) advanced to us by Russell Credit Limited, a company incorporated under the Companies Act 1956 and having its registered office at Virginia House, 37 Chowringhee, Kolkata-700 071 in terms of the loan agreement dated 24th August, 2007, we Technico Pty Limited ACN 063 602 782, a company incorporated under the laws of Australia and having its registered office at C/- PKF, Level 10, Margaret Street, Sydney NSW 2000, Australia, promise to repay to Russell Credit Limited on or before 22nd August, 2010 the said loan amount of AUD 500,000 together with interest, if any payable, under the aforesaid loan agreement dated 24th August, 2007.

Sd/-

David Charles McDonald
Managing Director & Company Secretary
Technico Pty Limited CAN 063 602 782"

5. From a perusal of the aforesaid Promissory Note reveals that the loan amount has been given in AUD 500,000 by the assessee and in terms of the loan agreement dated 24.08.2007 and the AE Technico Pty. Ltd. a company incorporated under the law of Australia promised to repay the assessee company on or before 22nd August, 2010 the said loan amount of AUD 500,000 together with interest which clearly reveals that the assessee has given loan of AUD 500,000 to Technico Pty. Ltd. and the said loan amount of AUD 500,000 together with interest, if any need to be paid back to the assessee in AUD 500,000. So, the loan amount given and have to be repaid is in AUD 500,000. We note that the assessee for the purpose of determining the arm's length nature of the transaction has taken the rate of interest of the same amount if it had been borrowed by the Australian company from an Australian bank at the said point of time and has adopted interest rate of 8.91%. The issue which is before us as to the rate of interest in such a scenario is no longer res

integra. The Hon'ble Delhi High Court in CIT Vs. Cotton Naturals (I) (P) Ltd. (2015) 55 taxmann.com 523 (Del) at para 39 and 40 has answered this question as under:

> *"39. The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, in our considered opinion, must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable. The currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. Klaus Vogel on Double Taxation Conventions (Third Edition) under Article 11 in paragraph 115 states as under:- —*
>
> > *"The existing differences in the levels of interest rates do not depend on any place but rather on the currency concerned. The rate of interest on a US $ loan is the same in New York as in Frankfurt-at least within the framework of free capital markets (subject to the arbitrage). In regard to the question as to whether http://www.itatonline.org ITA No. 233/2014 Page 29 of 34 the level of interest rates in the lender's State or that in the borrower's is decisive, therefore, primarily depends on the currency agreed upon (BFH BSt.B1. II 725 (1994), re. 1 § AStG). A differentiation between debt-claims or debts in national currency and those in foreign currency is normally no use, because, for instance, a US $ loan advanced by a US lender is to him a debt-claim in national currency whereas to a German borrower it is a foreign currency debt (the situation being different, however, when an agreement in a third currency is involved). Moreover, a difference in interest levels frequently reflects no more than different expectations in regard to rates of exchange, rates of inflation and other aspects. Hence, the choice of one particular currency can be just as reasonable as that of another, despite different levels of interest rates. An economic criterion for one party may be that it wants, if possible, to avoid exchange risks (for example, by matching the currency of the loan with that of the funds anticipated to be available for debt service), such as taking out a US $ loan if the proceeds in US $ are expected to become available (say from exports). If an exchange risk were to prove incapable of being avoided (say, by forward rate fixing), the appropriate course would be to attribute it to the economically more powerful party. But, exactly where there is no _special relationship', this will frequently not be possible in dealings with such party. Consequently, it will normally not be possible to review and adjust the interest rate to the extent that such rate depends on the currency involved. Moreover, it is questionable whether such an adjustment could be based on Art. 11 (6). For Art. 11(6), at least its wording, allows the authorities to _eliminate hypothetically' the special relationships only in regard to the level of interest rates and not in regard to other circumstances, such as the choice of currency. If such other circumstances were to be included in the review, there would be doubts as to where the line should be drawn, i.e., whether an examination should be allowed of the question of whether in the absence of a special relationship (i.e., financial power, strong position in the market, etc., of the foreign corporate group member) the borrowing company might*

not have completely refrained from making investment for which it borrowed the money."

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

Likewise, the Hon'ble High Court of Bombay in CIT Vs. the Great Eastern Shipping Co. Ltd. in ITA No. 1455 of 2014 dated 28.06.2017 has upheld the action of the Tribunal wherein it was held that arm's length price in the case of loans advanced to AE would be determined on the basis of rate of interest being charged in the country where the loan is received/consumed. In the light of the aforesaid decisions of the Hon'ble Delhi High Court as well as Hon'ble Bombay High Court, the action of the assessee in adopting the bank rate prevailing in Australia is correct and the AO erred in adopting the Indian bank rate. The loan amount was given in Australian currency and as per the promissory note the AE has to return the amount in Australian Dollar. Therefore, applying the ratio laid by the Hon'ble High Courts discussed above, we hold that there was no necessity of any arm's length adjustment in this case and, therefore, we direct the deletion of the addition made on this count. Ground of appeal of assessee in respect to Transfer Pricing raised by it is allowed.

6. The second ground of assessee's appeal and ground no. 4 of revenue's appeal (Cross appeal) are against the disallowance made by the AO u/s. 14A of the Act read with Rule 8D. Brief facts of the issue are that the AO at the time of assessment proceedings observed that the assessee earned tax free dividend income from shares/mutual funds of Rs.22,99,44,794/- and also earned exempt Long term capital gains of Rs.2,10,48,497/- i.e. total exempt income of Rs.25,00,93,591/-. Since the assessee on its own did not disallow any expenses u/s. 14A of the Act for earning such exempt income, the AO being dissatisfied with the accounts of the assessee computed the disallowable expenses by applying rule 8D of the Rules and made addition of Rs.3,29,05,581/-. On appeal, Ld. CIT(A) directed the AO to restrict the

disallowance u/s. 14A of the Act to the net amount of expenditure claimed Rs.1,22,79,861/- as against the disallowance made at Rs.3,29,39,053/- by the AO. Aggrieved by the decision of Ld. CIT(A), both the parties are in appeals before us.

7. We have heard rival submissions and gone through facts and circumstances of the case. We note that the assessee company has earned exempt dividend income of Rs.22,99,44,794/- and exempt long term capital gain of Rs.2,01,48,797/-. According to the assessee, no specific/direct expenses were incurred in relation to exempt income. However, the assessee company had determined the disallowance u/s. 14A of the Act of Rs.33,472/-. However, the AO did not accept the said stand of the assessee and disallowed proportionate management expenses under Rule 8D of the Rules of an amount of Rs.3,29,39,053/- which resulted in a net disallowance of Rs.3,29,05,581/-. On appeal, the Ld. CIT(A) gave partial relief to the assessee and restricted the disallowance u/s. 14A of the Act to the net amount of expenditure claimed by the assessee to the tune of Rs.1,22,79,861/-. Aggrieved by the addition of Rs.1,22,79,861/- the assessee is before us and the revenue has preferred an appeal by ground no. 4 against the partial relief granted to the assessee. The Ld. Sr. counsel drew out attention to page no. 14 where the P&L Account of the assessee is placed from which he drew our attention to the fact that there were several streams of income which the assessee received in this assessment year. We note that the assessee had income from interest on loans to the tune of Rs.26,65,724/-, dividend income of Rs.22,99,44,794/-, brokerage income of Rs.3,56,91,207/-, profit on sale of long term investment Rs.2,72,69,784/-, Lease and other rentals Rs.2,65,00,110/-, therefore, according to the Ld. Sr. Counsel, the assessee is in receipt of approximately Rs.30 cr. from different schemes and, therefore, the expenditure of Rs.1,22,79,861/- must have been incurred for earning of the aforesaid income also and according to him, the entire expenditure incurred cannot be disallowed as done by the Ld. CIT(A). He also pointed out that as per ground no. 2A i.e. additional ground the assessee had also raised grounds stating that while adopting Rule 8D(2)(iii) the investments by the assessee for strategic investments should be excluded. We note that the assessee has filed a statement showing details of investments held during the FY 2008-09 which it claims to be the strategic investment which is reproduced as under:

ement showing details of investments held during the FY 2008-09

Investments which are not capable of yielding exempt income:	Amount (Rs.) 31/03/2008	Amount (Rs.) 31/03/2009
Class 'G' Shares of Lotus Court Limited [These shares entitle ownership of immovable property - no dividend is declared; and capital gains, if any, arising on sale of immovable property is fully taxable]	23,400,000	23,400,000
Equity Shares of Adyar Property Holding Company Private Limited [These shares entitle ownership of immovable property - no dividend is declared; and capital gains, if any, arising on sale of immovable property is fully taxable]	438,650,000	438,650,000
Ordinary Shares if Technico Pty Limited (foreign subsidiary company) [dividend declared by foreign company is fully taxable; and capital gains, if any, arising on transfer/ sale of shares is fully taxable and not exempt u/s 10(38)]	1,036,389,332	1,087,241,115
Total (A)	1,498,439,332	1,549,291,115

Strategic Investments made by the Company in shares of subsidiary/associate companies - which also did not yield any exempt income during FY 2008-09	Amount (Rs.) 31/03/2008	Amount (Rs.) 31/03/2009
Equity Shares of Greenacre Holdings Limited (subsidiary)	331,033,674	331,033,674
Equity Shares of Wimco Limited	550,265,126	550,265,126
Equity Shares of Maharaja Heritage Resorts Limited (associate)	-	9,000,000
Equity Shares of Russell Investments Limited (associate)	42,756,850	42,756,850
Equity Shares of Minota Aquatech Limited (associate)	1,480,000	-
Equity Shares of Classic Infrastructure & Development Limited (associate)	37,688,280	37,688,280
Equity Shares of Divya Management Limited (associate)	69,307,630	69,307,630
Equity Shares of Antrang Finance Limited (associate)	43,956,071	43,956,071
Equity Shares of Hotel Leelaventure Limited	-	311,788,593
Total (B)	1,076,487,631	1,395,796,224

Statement showing details of investments held during the FY 2008-09 (Contd.)

C.	Strategic Investments made by the Company in shares of subsidiary/associate companies - which yielded exempt income during FY 2008-09	Amount (Rs.) 31/03/2008	Amount (Rs.) 31/03/2009
	Equity Shares of International Travel House Limited (associate)	212,158,031	212,158,031
	5% Preference Shares of WIMCO Limited	600,000,000	550,000,000
	Equity Shares of VST Industries Limited	365,820,092	365,820,092
	Equity Shares of EIH Limited	2,006,433,539	2,156,958,306
	Total (C)	3,184,411,662	3,284,936,429

D.	Investments made by the Company in shares of other companies which did not yield dividend income during FY 2008-09	Amount (Rs.) 31/03/2008	Amount (Rs.) 31/03/2009
	Equity Shares of Agro Tech Foods Limited	537,282,700	537,282,700
	Total (D)	537,282,700	537,282,700

E.	Investments made by the Company in shares of companies (other than strategic investments included in (C) which yielded exempt income during FY 2008-09	Amount (Rs.) 31/03/2008	Amount (Rs.) 31/03/2009
	Equity Shares of Ballarpur Industries Limited	55,846,701	55,846,701
	Total (E)	55,846,701	55,846,701
	Total (A + B + C + D + E)	6,352,468,026	6,823,153,169

The additional ground raised in this respect raises a question of fact and law which has not been dealt with by the AO which needs to be verified and ascertained and we note that during the intervening period between the date on which the appeals were heard and judgment reserved, the Hon'ble Supreme Court in the case of CIT vs Maxopp Investment Ltd 91 taxmann.com 154 (SC) has decided on the question of applicability of provision of section 14A with reference to strategic investment, therefore the AO to decide the issue after affording an opportunity to the assessee. Coming to the discussion u/s. 14A read with Rule 8D(2)(iii) the settled position as on date is that only while computing Rule 8D(2)(iii) investments which have yielded dividend should only be taken into account while making the computation under Rule 8D(2)(iii) i.e. investment in dividend bearing scrips only to be taken into for consideration. Therefore, we remand the matter back to the file of AO to decide this issue afresh keeping in mind the aforesaid observation of ours and in accordance to law. The assessee is at liberty to file evidence to substantiate its case as regards the additional ground of strategic investment is concerned. The AO is directed to pass a speaking order after hearing the assessee afresh on facts and law regarding the same.

Therefore, the grounds of appeal filed by the assessee as well as by the revenue are allowed for statistical purposes.

8. Now coming to the revenue's appeal. We note that the major grievance of the revenue is against the action of the Ld. CIT(A) in directing the AO to allow Long Term Capital Gain/loss carry forward at Rs.4,56,14,076/- against the amount of Rs.3,75,80,707/- computed by the AO as per the provisions of sections 46, 48 and 49 of the Act.

9. Brief facts of the case are that the assessee is a finance and investment company and wholly owned subsidiary of ITC Ltd. The assessee filed return of income electronically on 29.09.2009 showing total income of Rs.2,09,16,511/- and revised return was filed on 28.03.2011 showing the revised total income of Rs.2,27,45,583/-. According to AO, in the return of income assessee claimed long term capital loss amounting to Rs.4,84,27,143/-. When asked to give details of assets for which the said loss was computed and the computation thereof the assessee in response, filed the details along with explanatory notes. The AO noted that out of the said loss, long term capital loss amounting to Rs.28,13,067/- was on account of redemption at par of preference shares of Wimco Ltd. and the balance amount of Rs.4,56,14,076/- was on account of share of Minota Aquatech Ltd., which went into liquidation in the year 2008-09 and in both cases the assessee availed the benefit of indexation to compute the losses. The AO accepted the claim of the assessee for long term capital loss in respect to Wimco Ltd. but in respect of long term capital loss on account of shares of Minota Aquatech Ltd. the assessee's method of computation was found to be incorrect for which reason has been given by the AO in his order at para 3.2 to 3.5 of his order. In view of the said discussion stated therein, the total long term capital loss was recomputed at Rs.4,03,93,774/- instead of Rs.4,56,14,076/- as claimed by the assessee. On appeal, the Ld. CIT(A) has accepted the stand of the assessee and allowed the claim on this issue and aggrieved by the order of Ld. CIT(A) the Revenue is before us.

10. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO accepted the fact of long term capital loss in respect of Minolta Aquatech Ltd. which went into liquidation in FY 2008-09. However, he considered the indexation of the cost with effect from the date of amalgamation of the companies i.e. M/s.

Sage Investments Ltd. and M/s. Sumit Investments Ltd. with the assessee company (Russel Credit Ltd.) on 01.02.1999 (FY 1998-99) resulting in long term capital loss of Rs.3,75,84,707/-. The claim of the assessee was that as per the provision of section 2(42A) of the Act read in conjunction with sec. 46(2), 47, 48 and 49, the indexation cost has to be taken from the original date, when the shares were first acquired by the first previous owner and when computed accordingly the LTCG/loss is of Rs.4,56,14,076/- and AO by recomputing erred in reducing the carry forward loss to the tune of Rs.80,33,369/-. We note that the in the relevant assessment year, the assessee company realized as liquidation proceeds Rs.32,26,400/- on account of 14,80,000 equity shares of M/s. Minota Aquatech Ltd. (MAL) which went into liquidation in the year under consideration. According to the assessee, the shares of M/s. MAL were acquired through the process of amalgamation of two other subsidiaries i.e. M/s. Sage Investments Ltd. (Sage) and M/s. Summit Investments Ltd. (SIL) on 01.0-2.1999 (FY 1998-99). It was brought to our notice that M/s. Sage Investment Ltd. had directly purchased 222,000 shares and 5,92,000 shares of M/s. MAL in the FY 1993-94 and 1997-98 respectively. Further, another 2,96,000 shares of MAL were acquired by M/s. Sage Investments Ltd. by way of merger of another subsidiary of ITC Ltd. i.e. M/s. Pinnacle Investments Ltd. (PIL) with the assessee. It was brought to our notice that M/s. Pinnacle Investment Ltd. have acquired the said shares of M/s. MAL in the FY 1993-94 and that M/s. Sage Investments Ltd. has directly purchased 3,70,000 shares of MAL in the FY 1993-94. In the light of the aforesaid history, the indexation cost was adopted by the assessee from the original date when the shares were first acquired by the first previous owner and, therefore, in the return of income the assessee claimed LTCG amounting to Rs.4,84,27,143/-. The AO asked the assessee to give details of the loss claimed by the assessee in which the assessee brought to the notice of the AO that the long term capital loss amounting to Rs.2,81,306/- was on account of two transactions (i) redemption at par of preference share of M/s. Wimco Ltd. which was accepted by the AO and there is no dispute regarding this fact and (ii) transaction i.e., the assessee's claim that an amount of Rs.4,56,14,076/- was the long term capital loss on account of the fact that it received only Rs.32,26,400/- as liquidation proceeds on account of M/s. Minota Aquatech Ltd. going into liquidation in the financial year 2008-09 was not accepted by the AO. We note that the assessee had availed of the benefit of indexation which was not accepted by the AO in

respect of the long term capital loss on account of shares of Minota Aquatech Ltd. In the previous year 2008-09 M/s. MAL was liquidated and the assessee company received a sum of Rs.32,26,400/- as liquidation proceeds on 24.03.2009. We note that the assessee computed the long term capital loss of Rs.4,56,14,076/- after taking the liquidation proceeds as full value of consideration and Rs.2,46,10,472/- as the cost of acquisition to be further increased by indexation. The assessee worked out the indexed cost by taking the cost of inflation index for the first year in which the asset was held by the previous owners. The AO took note of the sec. 49(1)(iii)(e) and observed that the cost of acquisition is deemed to be the case for which the previous owner acquired an asset and the explanations below the section which provides the definition of the expression previous owner of the property means the last previous owner and according to AO not any previous owner of the last previous owner. Therefore, the AO was of the opinion that in the instant case the M/s. SIL was the last previous owner for the assessee and since M/s. PIL was last previous owner of M/s. SIL so, M/s. PIL cannot be treated as last previous owner of the assessee and, therefore, he computed the long term capital loss at Rs.3,75,80,707/- by holding as under:

> *"3.4 Adverting to the facts of the case all over again, the assessee held 14,80,000 shares of MAL with effect from 01.02.1999 by virtue of amalgamation of SIL and SMIL with it. The company MAL was liquidated in the previous year 2008-09 and the assessee as a shareholder received liquidation proceeds amounting to Rs.32,26,400/- on 24.03.2009. A liquidation per se will not amount to transfer within the meaning of section 2(47). But section 46(2) provides a deeming fiction stipulating that where a shareholder on the liquidation of a company receives any money or other assets from the company, he shall be chargeable to income-tax under the head "capital gains". Also the money so received shall be deemed to the full value of the consideration for the purposes of section 48. Therefore, keeping in view the provisions of sections 46, 48, 49 and in view of the discussion made in para 3.3 above, the long term capital loss arising on account of liquidation of MAL is assessed at Rs.3,75,80,707/-."*

11. On appeal the Ld. CIT(A) relying on the Tribunal's decision in the case of Smt. Mina Deogun Vs. ITO reported in (2008) 117 TTJ 121 (Kol) as well as the decision of the ITAT Special Bench in the case of DCIT Vs. Manjula J Shah 318 ITR 417 which was later upheld by the Hon'ble Bombay High Court has decided in favour of the assessee and directed the AO to adopt the figure of long term capital loss to be carried forward to the next year at Rs.4,56,14,076/- instead of Rs.3,75,80,707/-. We note that sec. 49 of the Act deals with the manner of computation of the cost of acquisition of capital asset. Sec. 49(1)(iii)(e) of the Act specifically states that where the capital asset has become the property of the assessee

by virtue of transfer referred to in clause (vi) of sec. 47 of the Act, the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it (and increased by the cost of any improvement of the assets incurred or borne by the "*previous owner*" or the assessee, as the case may be). The first explanation to sec. 49(1) of the Act reads as under:

> *"Explanation – In this (sub-section) the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause (i) or clause (ii) or clause (iii) [or clause (iv)] of this [sub-section].*"

12. This explanation is for this sub-section i.e. sec. 49(1) and defines the expression "*previous owner*" of the capital asset. According to the definition for the purpose of sec. 49(1) is that in the other mode of transfer by which capital asset have been acquired (other than the mode of transfer referred to it clause (i) to clause (iv) of sec. 49(1) then the previous owner of the property in relation to any capital asset owned by an assessee means the last previous owner of the capital asset. Meaning thereby if the mode of transfer of capital asset is by way of clause (i) to (iv) then the last previous owner would not be the previous owner if the capital asset became the property of the assessee by the mode of acquisition given in clause (i) to (iv) i.e. when the capital asset became the property of the assessee on any distribution of assets on the total or partial partition of (i) a Hindu undivided family; (ii) under a gift or will; (iii)(a) by succession, inheritance or devolution or (b) on any distribution of assets on the dissolution of firm, body of individuals, or other association of persons, where such dissolution had taken place at any time before the 1st day of April, 1987, or (c) on any distribution of assets on the liquidation of a company, or (d) under a transfer to a revocable or an irrevocable trust, or (e) under any such transfer as is referred to in clause (iv) or clause (v) or clause (vi) or clause (via) or clause (viaa) or or clause (vica) or clause (vicb) or clause (xiii) or clause (xiiib) or clause (xiv) of sec. 47 of the Act. Then such assessee being a Hindu undivided family, by the mode referred to in sub-section (2) of section 64 at any time after the 31st day of December, 1969. So, where the capital asset became the property of an assessee by any of the modes i.e. stated above, then the cost of the acquisition of the asset shall be deemed to be the cost for which the first previous owner of the property who acquired it and as per the explanation given the '*previous owner*' would

not be the last previous owner of the capital asset as held by AO. This decision of ours has been consistently taken by this Tribunal in the case of Smt. Mina Deogun (supra) and Manjula J. Shah, (supra) which has been upheld by the Hon'ble Bombay High Court from which decision it is clear that the indexation of cost has to be done from the original date when the shares were first acquired by the first previous owner. Therefore, following the ratio of the Hon'ble Bombay High Court and the Special bench decision of this Tribunal and the coordinate bench of this tribunal, the Ld. CIT(A) has rightly adjudicated the issue and has given relief to the assessee, which does not call for any interference from our part and so, we confirm the same. This ground of appeal of Revenue is, therefore, dismissed.

13. In the result, both the appeals of revenue as well as assessee is partly allowed for statistical purposes.

Order is pronounced in the open court on 11.04.2018

Sd/-	Sd/-
(J. Sudhakar Reddy)	(Aby. T. Varkey)
Accountant Member	Judicial Member

Dated : 11th April, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – DCIT/JCIT(OSD), Circle-8, Kolkata.
2. Respondent – M/s. Russell Credit Ltd., 37, J. L. Nehru Road, Kolkata-700 071
3. The CIT(A) Kolkata
4. CIT Kolkata
5. DR, ITAT, Kolkata.

/True Copy, By order,

Sr. Pvt. Secretary