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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "I-2" : DELHI

BEFORE SHRI BHAVNESH SAINI, J.M. AND SHRI L.P. SAHU, A.M.

ITA.No.1148/Del./2017
Assessment Year 2012-2013

M/s. Aamby Valley Ltd., Hotel Sahara Star, Opposite Domestic Airport, Ville Parle (East), Mumbai – 400 099. PAN AAGCA0045C	vs.	The ACIT, Central Circle-1, Room No.334, E-2, Ara Centre, Jhandewalan Extn., New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Percy Pardiwala, Sr. Advocate, Shri Vijay Mehta, C.A. Shri Pratap Gupta, C.A. Shri Varun Chaturvedi & Shri JJ Malhotra, Advocates.
For Revenue :	Shri H.K. Choudhry, CIT-D.R. Shri N.C. Roy, DCIT. & Shri BKS Pandya, Pr. CIT

Date of Hearing :	07.12.2018
Date of Pronouncement :	22.02.2019

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the assessment order of the AO under section 143(3)

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/142(2A) read with Sec.144C(5) of the Income Tax Act, 1961, Dated 25.01.2017, for the A.Y. 2012-2013 passed by ACIT, Central Circle-1, New Delhi, on the following grounds:

"Order is bad in law :

1. *The learned AO has erred in law and on facts in passing the order u/s. 143(3)/142(2A) r.w.s. 144C(5) of the Act dated 25.01.2017 which is bad in law and void ab initio.*

Invalid reference to TPO :

2. *The learned AO has erred in law and on facts in making reference to TPO u/s. 92CA of the Act which is invalid and bad in law.*

Determining of total income at Rs.48,085.79 crores :

3. *The learned AO/DRP/TPO has erred in law and on facts in determining the total income of the assessee at Rs.27564.72,01.290 which has been subsequently enhanced by the DRP to Rs. 48085,79,36,072.*

   Increase in general reserve of Rs.46,999.38 crores considered as Income :

4. *On the facts and in the circumstances of the case and*

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in law, the learned AO/DRP has erred in making an addition u/s 28(iv) of the Income Tax Act. 1961 (herein referred to as 'Act') of Rs.46999,38,00,000 on account of increase in general reserve on transaction related to the Composite Scheme of Arrangement and Amalgamation.

Investment received on Composite Scheme of Arrangement and Amalgamation considered as income amounting to Rs.26,197.67 crores.

5. *On the facts and in the circumstances of the case and in law, the learned AO/DRP has erred in making an addition under section 56(2)(viia) of the Act of Rs.26197.67,80,998 on account of transaction related to the Composite Scheme of Arrangement and Amalgamation.*

Foreign exchange gain on loan considered as income amounting to Rs.507.75 crores :

6. *On the facts and in the circumstances of the case and in law. the learned AO/ DRP has erred in making an addition of Rs.507,75.75.010 on account of foreign*

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exchange gain on loan given to 100% foreign subsidiary.

Disallowance of Rs.240.13 crores u/s.14 A :

7. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making disallowance of Rs.240,13,43,296/- u/s.14A of the Act.*

Disallowance of interest considered for demerged entities amounting to Rs.114.77 crores :

8. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making disallowance of interest expenditure of Rs.114,77,60,413 on the ground that the said interest pertained to entities demerged under Composite Scheme of Arrangement and Amalgamation.*

Transfer Pricing adjustment of interest amounting to Rs.43.17 crores :

9. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making an upward Transfer Pricing adjustment under Section 92CA of the Act of Rs.43,17,02,728 on account of*

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interest on loan given to Associated Enterprise.

Reversal of various provisions considered as income amounting to Rs.84.05 crores :

10. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making an addition of Rs.84,05,69,987 on account of reversal of provision for sale of land, provision for obsolete store and provision of cost of sale.*

Entry passed in books of accounts considered as income amounting to Rs.13.40 crores :

11. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making disallowance of Rs. 13.40,21.740 on account of ledger entry made in books of accounts in the name of June Allocation.*

12. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making disallowance of Rs.12,66,63,005 out of Rs.19,30,25,000/- of consultancy charges paid to Siva Ventures Limited.*

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Advance from customers considered as income amounting to Rs.9.33 crores :

13. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making an addition of Rs.9,33,75,452/- on account of advance from customers in respect of lands/plots.*

Revenue Expenditure of repairs of Rs.8.75 crores considered as capital expenditure :

14. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in makinga disallowance of Rs.8,75,33,790/- on ground that the same is capital expenditure.*

TDS credit not granted amounting to Rs.1.92 crores :

15. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in not allowing the TDS credit of Rs.1,92,20,596/-.*

Sundry balances written off considered as income amounting to Rs.0.93 crores :

16. . *On the facts and in the circumstances of the case*

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and in law. the learned AO./DRP has erred in making a disallowance of Rs.93,68,989/- on account of sundry balances written off.

Disallowance of expenses amounting to Rs.0.79 crore on non-deduction of TDS :

17. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making disallowance of Rs.79,19.474 on account of non-deduction of TDS. Further, learned AO /DRP has erred in not allowing the amount of Rs.79.19,474 in subsequent year as the parties have paid their taxes in subsequent year.*

Reduction of CWIP amounting to Rs.0.39 crores u/s.40A(3) :

18. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making a reduction of Rs.39,58,925 of CWIP by applying the provision of section 40A(3) of the Act.*

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Disallowance of expenses of Rs.0.13 crores u/s.40A(3) :

19. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making a disallowance of Rs. 13,55,918 by applying the provision of section 40A(3) of the Act.*

Addition on account of notional interest amounting to Rs.6.24 crores :

20. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making additions of Rs.6,24,00.000 on account of notional interest @ 12% on the advance of Rs.52,00,00,000 paid to M/s Chitra City Homes Jaunpur Pvt. Ltd.,*

Addition on account of notional interest amounting to Rs.0.04 crores :

21. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making addition of Rs.4.14,944 on account of notional interest @ 12% on the advance of Rs.34,57,864 to*

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various parties.

Disallowance of interest expenditure amounting to Rs.0.90 crores :

22. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making a disallowance of interest expenditure of Rs.90,13,188/- on account of alleged transfer to group company i.e., Sahara Adventure Sports Limited.*

Disallowance of various expenditure amounting to Rs.15.83 crores :

23. *On the facts and in the circumstances of the case and in law. the learned AO./DRP has erred in making disallowance of various expenditure as under :*

Sr.No.	Natureof expenditure	Amount	Reason for disallowance
a.	Development charges	6,38,30,357	Being 50% of disallowance on account of excess expenditure.
b.	Business and administration expenditure	6,20,30,371	Lack of proper documentary evidences.
c.	Commission and brokerage	1,13,81,000	(a)Rs.1.10 crore considered as incurred for earning rental income. (b) Rs.0.03 crores disallowed due to lack of proper justification.
d.	Advertisement and sales promotion	1,08,81,770	(a) 30.19% of Rs.3.08 crores of expenditures disallowed in the ratio of assets transferred to demerged entities. (b) Adhoc 50% of Rs.0.31 crores disallowed considering for

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			hospitably business SPV
e.	*Prior period expenditure*	*39,66,711*	*Prior period expenditure*
f.	*Property tax*	*29,66,510*	*Property tax invoice in the name of Sahara India Commercial Corporation Ltd. i.e., demerged company of 2007.*
g.	*Business and administration expenditure*	*18,18,684*	*Lack of proper documentary evidences.*
h.	*Interest on statutory dues*	*5,86,819*	*Interest on late payment of service tax considered as interest on late payment of TDS.*
i.	*Consultancy charges*	*5,51,500*	*Disallowed considering for Airport business SPV.*
j.	*Professional charges*	*3,00,000*	*Defending the criminal case against its employee not considered as business expenses.*
	TOTAL	***15,83,13,722***	

2. We have heard the Learned Representatives of both the parties, gone through the material on record and perused the impugned Orders. Both the parties have also filed their written submissions which are placed on record and taken into consideration.

3. Briefly the facts of the case are that the Assessee Company belongs to Sahara Group of companies. The assessee company filed original return of Income on 30.11.2012 declaring income of Rs. Nil after adjusting the brought forward losses to the tune of Rs. 14,86,97,478/- against the profit earned during the year. The assessee also

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filed revised return without any change. The case was selected for scrutiny. The assessee filed the required details on record and also produced the books of account which were test-checked. The assessee-company was engaged in the business of construction, as developers, colonizers and contractors in the field of residential & commercial complexes, townships together with all allied infrastructure. The assessee is also engaged in the business of running of resorts and other hospitality services etc. During the year assessee had reported "Receipt of Interest" of Rs.145,83,47,065/- on loan granted to its Wholly Owned Foreign Subsidiary Company M/s Aamby Valley Mauritius Limited ("AVML"). The loan of 480 million (mn) GBP i.e Rs.3524,51,61,000/- was granted in the previous financial year i.e., 2010-2011. The another transactions reported was reimbursement of expenses to AEs of Rs.7,69,787.48/-. Being the assessee involved in international transaction, the matter was referred to TPO to determine the arm's length price under section 92CA(3) vide letter Dated : 04.03.2015. After examination of books of accounts, it was found the

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books of account are not only voluminous but also very complex and difficult to interpret as there are various transactions between the sister concern. During the year under consideration, a composite scheme of amalgamation and demerger was approved by the Hon'ble High Court of Bombay w.e.f 01.04.2011. The effective date of the demerger was 20.03.2012. The objective of the scheme was to transfer several business verticals namely real estate, golf course, airport, adventure sports, retail, entertainment and hospitality with a view to achieve benefits like simplified and transparent business structure and more focused management to improve the performance of individual business. The restructuring also involved amalgamation of Aamby Valley "V" Ventures Pvt. Ltd. with Aamby Valley Ltd. (Assessee). The assessee was asked to explain as to why its account should not be audited under section 142(2A) of the I.T.Act. After giving opportunity of being heard to the assessee and upon approval of Pr. CIT, Central-1, the assessee was directed to get accounts for the assessment year under appeal be audited by M/s. T.R. Chaddha & Co.

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New Delhi. The assessee-company accordingly filed Special Audit Report on 27.09.2015. The Order of TPO dated 20.01.2016 under section 92CA(3) was received by the AO and a copy of the same was served on the assessee. As per this order, the transfer pricing officer has recommended to enhance the income of the assessee-company by Rs.322,83,54,184/- on account of cumulative adjustment under section 92CA of the I.T. Act, 1961. The draft assessment order dated 30.03.2016 was sent to assessee requiring him to follow the procedure as per section (2) of sub-section 144C and file its acceptance or file objection if any, with Dispute Resolution Panel ("DRP"). The assessee had filed objection against the draft assessment order with the Dispute Resolution Panel-1, New Delhi, who have issued its directions on 30.12.2016. The AO accordingly, after hearing the assessee, passed the impugned assessment order dated 25.01.2017. The assessee challenged the aforesaid impugned assessment order on various grounds of appeals mentioned hereinabove in the present appeal.

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4. The Learned Counsel for the Assessee submitted that Grounds 1, 2 and 3 are general in nature and do not require any adjudication.

Ground No.6 :

5. On this ground, assessee was show cause on perusal of the balance-sheet, it was observed that the Company has opening balance of Rs.91,17,97,139/- on account of foreign currency monetary item transaction reserve wherein additions has been made during the year amounting to Rs.483,64,47,400/- from foreign currency monetary item transaction whereas the Company has amortized to the extent of Rs.67,06,69,129/- and offered the same for tax. According to Judgment of Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India Pvt. Ltd 294 ITR 451 (SC) has explained the accrual concept under mercantile system of accounting and has observed the foreign exchange fluctuation is not a notional or contingent income/expense. The Board vide notification

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No.33/2015 dated 31.03.2015 has clarified that foreign exchange gain in respect of monetary items has to be recognized as 'Income' for that particular year. The assessee was, therefore, show caused why the foreign exchange gain of Rs.416,57,77,871/- should not be considered as taxable income and added to the income. It was also observed that calculation done for amortization of Rs.67,60,69,129/- is not correct as per AS-11. The actual amount of amortization worked-out to Rs.85,70,70,715/-. Accordingly, the income have been short-booked to the extent of Rs.18,10,01,586/- for assessment year under appeal. The assessee was also show caused why the amount of Rs.18,10,01,586/- should not be added while computing the book profit under MAT as per Section 115JB of the I.T. Act, 1961.

5.1. The assessee submitted that it has advanced loan to Aamby Valley Mauritius Ltd. ("AVML") a wholly owned foreign subsidiary in the current year as well as preceding assessment years. The said loan is shown as an "Asset" under the Head "Long Term Loans and Advances" in

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financial statement of the assessee. Further, the loan is provided in foreign currency and the repayment of the said loan by AVML also takes place in foreign currency. Thus, due to the above transactions with AVML, there is a foreign exchange gain/loss arising to the assessee either on the balance-sheet date or on every repayment of loan by the AVML. Hence, the assessee revises value of the said land in its balance-sheet on account of any gain/loss arise or accrued on forex fluctuations. This treatment followed by the assessee is in accordance with the provisions of Accounting Standard-11 which specify that in case of a capital asset, any gain or loss arising on account of forex is to be added or deducted from the cost of the asset. Hence, loan given by the assessee being a capital asset for the assessee, any loss/gain on account of forex is added/ subtracted to the loan. The assessee drew the attention to Para-46A of AS-11. The said para states that any exchange differences arising on reporting of long term foreign currency monetary items can be accumulated in a "Foreign Currency Monetary Item Transaction Difference Account",

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in the enterprise's financial statements and amortized over the balance period of such long term asset which is reproduced in the impugned order. The loan given by the assessee is for a period greater than 12 months and hence qualifies for long term monetary asset which is supported by announcement made by ICAI on 29.12.2011. In the present case, the forex gain had arisen to the assessee on the capital asset. In this case, the assessee has landed its funds to its subsidiary with the primary intention of assisting its subsidiary in its expansion of business activities. With such assistance, the subsidiary will be in a position to earn more profits and since assessee is its 100% holding company, the assessee would be benefitted and can earn higher profits from its subsidiary as well. The said loan advanced is in the nature of investment by assessee in its subsidiary company and thus, it is of capital nature. Further, it was submitted that as per Loan Agreement it was agreed between the parties that the outstanding loan may be converted into preference shares at mutually agreed term and conditions between the parties at any time before

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or expiry of the loan term. Thus, the above facts give it the essence of capital nature and nowhere can it be substantiate that the said loan advance is stock-in-trade or any kind of Revenue assets. Therefore, the loan given to AVML is a capital asset which helps in earning interest income. Further, it is also pertinent to note that the loan given by the assessee is its long term asset as per Accounting Standard as benefit arises on the said loan is more than 12 months. Thus, the assessee has rightly given the treatment of forex gain. The assessee relied upon decision of Hon'ble Supreme Court in the case of Sutlez Cotton Mills Ltd., vs. CIT 116 ITR 1 (SC) in which it was ruled that any foreign exchange gain or loss on capital asset will be adjusted with the value of such asset. As per the above decision, the loan given is a capital asset/long term assets of the assessee and thus, foreign gain exchange on loan is capital profit of the assessee and therefore, the treatment given by the assessee is correct. The amortization of forex gain is not taxable and assessee reserve right to withdraw it. It cannot be taxed under the Act. It was

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submitted that Special Auditor has completely misunderstood the case Law and the provisions of Section 145 of the I.T. Act, 1961. The accounting concept is also explained by the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India Pvt. Ltd., (supra) citing the example of the valuation of the closing stock. As per Accounting Standard-11, the assessee has amortized the same throughout the life of the long term asset. Thus, the assessee is correct in creating reserve and offering only the amortized amount to tax. However, the said amortized amount should also be not offered to the tax as being of capital nature under consideration. The Special Auditor has referred to emergence of ICDS, the concept of monetary assets would also be applied to the Income Tax provisions, as per CBDT Notification No.33/2015 Dated 31.03.2015 mentioned by the Special Auditor which would be applicable for subsequent A.Y. 2016-2017. No hypothetical or notional income can be brought to tax under the Income Tax Act. As regards justification as to why the amount of Rs.18,10,01,586/- is not amortized during the year under

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consideration and as to show cause as to why the same should not be added while calculating the book profit under MAT as per Section 115JB of the I.T. Act, 1961, the assessee submitted that earlier the assessee had closed the books on 30th June. However, the assessee has followed para 46A of AS-11 to provide the treatment of foreign exchange gain/loss on monetary assets. Para-46 was only applicable to the 31.03.2011. Further, vide notification GSR 378(E) dated 11.05.2011, it was notified that the words and figure "46. In respect of the accounting period commencing on or after 07.12.2006 and ending on or before 31.03.2012", The following shall be substituted namely – *"46 in respect of accounting period commencing on or after 07.12.2006 and ending on or before 31.03.2012".* Thus, as per the said notification, the assessee has continued followed para-46 of AS-11 and closed its financials on 30.06.2011. Subsequently on 29.12.2011 the 'Government of India, Ministry of Corporate Affairs' had issued the notification and notified the new para-46A in the AS-11 which was effected from 01.04.2011. However, the assessee had

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already finalized its financials till June, 2011, and therefore, the assessee has opted from the July, 2011. Subsequently, the assessee had also changed its accounting period from 30th June to 31st March and finalized its financials for the period of 09 months. Thus, the assessee has made the calculation of amortization for the period of 275 days. The calculation on the same is reproduced in the impugned Order. It was, therefore, submitted that assessee has rightly followed the provisions of AS-11 and no addition could be made according to that under section 115JB of the I.T. Act. The AO however, proposed addition of Rs.507,75,75,010/- on account of foreign exchange gain lying in Foreign Exchange Monetary Item Translation Difference account under the Head "Reserves and Surplus". The DRP has however, decided the issue against the assessee and rejected the objection of the assessee and made the addition accordingly of Rs.507,75,75,010/-.

6. The Learned Counsel for the Assessee reiterated the submissions made before the authorities below and

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submitted that assessee has given loan to its subsidiary. PB-347 is the Loan Agreement with AVML Dated 13.12.2010, according to which, loan was given initially for 90 days, subject to interest for a specified period and thereafter, Addendum Agreement Dated 14.01.2011 was also executed between the parties (PB-364) and tenure to loan be extended to 07 years subject to the reduced interest. He has, therefore, submitted that Loan Agreement was for advancing loan out of the capital on which interest was earned. PB-23 is the details of Loans and Advances in the financial statements of assessee to the above subsidiary AVML shown in the assets on the assets side. Its re-schedule on increase in value due to foreign fluctuations. PB-32 + PB-14 are the fluctuations on loan/capital. Learned Counsel for the Assessee referred to decision of the Hon'ble Supreme Court in the case of CIT vs. Woodward Governer India Pvt. Ltd., 312 ITR 254 (SC) in which the issue was of difference arising in foreign currency on revenue items. The loss suffered by the assessee on account of fluctuation in the rate of foreign exchange as on the date

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of balance-sheet was found to be an item of expenditure under section 37(1) of the I.T. Act. However, in the case of the assessee, it was of capital account. He has relied upon decision of the Hon'ble Supreme Court in the case of Sutlez Cotton Mills Ltd., vs. CIT 116 ITR 1 in which Judgment of Hon'ble Supreme Court in the case of CIT vs. Canara Bank Ltd., (1967) 63 ITR 328 (SC) have been referred to in which it was held *"since the sum of Rs.3,97,221/- was, on the finding of fact reached by the revenue authorities, held of capital account and not as part of the circulating capital embarked in the business of Banking, it was held by this Court that the profit arising to the assessee on remittance of this amount on account of alteration in the rate of exchange was not a trading profit, but a capital accretion".* The Hon'ble Supreme Court, therefore, in the case of Sutlez Cotton Mills Ltd., vs. CIT, West Bengal 116 ITR 1 (SC) held as under :

> *"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading*

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> *profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."*

6.1. Learned Counsel for the Assessee also relied upon the decision of Hon'ble Bombay High Court in the case of Homi Mehta & Sons Pvt. Ltd., vs. CIT 222 ITR 528 (Bom.) in which it was held as under :

> *"Held that the profit had accrued to the assessee not in the course of any trading activity or on money held for the purpose of trade but on account of appreciation in the value of the amount which was held for the purpose of investment. Hence, this accretion was capital in nature."*

6.2. He has also relied upon the Order of ITAT, Mumbai Bench in the case of Siemens Nixdorf Informationsysteme GmBH vs. Deputy Director of Income Tax (International Taxation)-2(1), Mumbai (2016) 158 ITD 480 (Mum.) (Tribunal) in which it was held *"advance given by the assessee to wholly owned subsidiary is a property in the sense, it is an interest which a person can hold and enjoy, and since it is a property and it is not covered by the exclusion clause set-out in Section 2(14), it is required to be*

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treated as a "capital asset", and if any loss arise on sale of said asset, it would be treated as short term capital loss". Learned Counsel for the Assessee, therefore, submitted that since the amount in question was given as loan and advances to the subsidiary company, therefore, it was on account of capital asset. So on fluctuation, it is on account of capital and as such the same is not taxable. He has submitted that ultimately, interest have been offered to tax by the assessee.

7. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that foreign exchange gain accrued to the assessee and as per report of the Special Auditor assessee has amortized the income. However, income accrued on mercantile system and the foreign gain accrued to the assessee. The Ld. D.R. relied upon decision of the Hon'ble Supreme Court in the case of Woodward Governor India Pvt. Ltd., (supra).

8. We have considered the rival submissions. The Hon'ble Supreme Court in the case of Sutlez Cotton Mills

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Ltd., (supra) has held that any foreign exchange gain or loss on capital asset will be adjusted with the value of such asset. It was further held that *"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."*

8.1. In the present case, assessee has entered into the loan agreement with its subsidiary AVML of which assessee is 100% holding company. The loan was given for a particular period, subject to interest. It was further extended by an Addendum Agreement Dated 14.12.2011 and loan was subject to reduced interest for longer period. The assessee, therefore, has landed its funds to its subsidiary with a primary intention of assisting its

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subsidiary in its expansion of business activities. The assessee, therefore, rightly contended that with such assistance, subsidiary will be in a position to earn more profits and since the assessee is its 100% holding company, the assessee would be benefitted and can earn higher profits from its subsidiary as well. It is, therefore, clear that the said loan advance is in the nature of investment by assessee in its subsidiary company and thus, it was of capital nature. The assessee further explained that as per the loan agreement, it was agreed between the parties that the outstanding loan may be converted into preferential shares on mutually agreed terms and conditions between the parties at any time or before expiry of the loan terms. Thus, these facts clearly prove that the loan was of capital in nature and as such, it would not prove that loan advanced was connected with any revenue item. Therefore, the loan given to AVML is a capital asset which helps in earning incidental interest income, which is also offered for taxation. Since the loan advanced was its long term asset i.e., on account of capital asset and not as part of

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circulating capital, therefore, foreign fluctuation gain on account of alteration in the rates of exchange would be a capital accretion. The loan is shown as asset under the Head "Long Term Loan and Advance" in accounts. The assessee, thus, rightly followed Accounting Standard-11 as explained above. Hence, the loan given by the assessee being a capital asset of the assessee, any loss/gain on account of forex was to be added/subtracted to the loan. Thus, there was no justification for the authorities below to make the addition. The case law relied upon by the Learned Counsel for the Assessee squarely apply to the facts and circumstances of the case. There was, thus, no justification for the authorities below to make the addition against the assessee. We, accordingly, set aside the Orders of the authorities below and delete the entire addition. The Ground No.6 of appeal of assessee is allowed. It may also be stated here that assessee has also raised Additional Ground of Appeal Dated 08.10.2018 connected with this ground amounting to Rs.67,06,69,129/- already amortized and offered to tax. Since we have allowed this ground of appeal

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of assessee, therefore, there is no need to adjudicate separately on the additional ground of appeal. A.O. is directed to take into consideration findings on this issue while giving effect to the appellate order. Additional Ground of Appeal is also disposed off accordingly.

Ground No.7 :

9. This ground relates to disallowance under section 14A of the I.T. Act of Rs.240.13 crores. In the show cause notice to the assessee, it was observed that assessee has made investments which are capable of earning exempt income and have also incurred financial expenses which are not directly attributable to any particular income. Circular No.5/2014 dated 11.02.2014 issued by the CBDT has clarified that the disallowance of expenses under section 14A of the Act is required to be made even in case there is no exempt income earned by the assessee in a particular year. The assessee was required to prove whether any borrowed funds have been utilised for making investments which are eligible for earning exempt income under the Act. The assessee submitted that disallowance under section

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14A is not warranted because it is stated in the show cause notice itself that assessee made investments in assessment year under appeal which were capable of earning exempt income. Further, assessee has also incurred financial expenses which are not directly attributable to any particular income. It was submitted that assessee had several business verticals namely Real Estate, Golf Course, Airport, Adventure Sports etc. The nature of risk and returns involved in each of these businesses is distinct from others and consequently each business or undertaking is capable of attracting different set of investors, strategic partners, lenders and other shareholders. The assessee company is engaged in the business of Hospitality, Resorts, Construction etc. During the year under consideration, assessee company has entered into a scheme of arrangement under sections 391 to 394 of the Companies Act. Thus, the assessee company invested in different business verticals (now the subsidiaries) as part of its investment strategy, thus, leading to commercial expediency. The moot idea thus was to make AVL a

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marquee company in the real estate sector. Accordingly, the investment of the company was made for the strategic and corporate model reasons. The assessee had not earned any amount of dividend as the investment in the subsidiaries were made only for the sole purpose of further advancement of the business of the assessee-company and not for earning dividends. The break-up of the investment is given in the impugned order, according to which, assessee had made investments in foreign company i.e., Aamby Valley (Mauritius) Limited ("AVML") and foreign dividend is not exempt as per Section 10(34) of the I.T. Act, 1961. As the income of assessee is taxable, therefore, no disallowance under section 14A could be made. Further, relating to the investments made in Sahara International Airport Pvt. Ltd., Sahara School Holding Ltd., and Sahara Adventure Sports Ltd., it was submitted that the said investments only existed in the last year i.e., A.Y. 2011-2012. As there is no addition or deletion made in such investments, the nature of the investments remain same, therefore, no disallowance under section 14A could be made. It was submitted that

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Aamby Valley "V" Venture Ltd., ("AVVVL") is a 100% subsidiary of assessee had investments in different business verticals i.e., real estate, adventure, retail business etc. The said investments were carried at cost in the balance-sheet of the subsidiary. Copy of the balance sheet of the AVVVL for A.Y. 2011-2012 was filed. However, pursuant to the scheme of arrangement, AVVVL got merged into assessee-company ("AVL") and all the assets and liabilities of the amalgamating company were transferred to the resultant assessee company. As per the scheme, the said investments are reflected in the balance sheet of the assessee company at respective fair market values. Hence, it can be seen from the above that only investments are converted from cost to FMV pursuant to scheme and therefore, no borrowings are involved for investments showing in assessee's balance-sheet. As no borrowings are made by the assessee company for the investments, there can not be any payout in the nature of interest i.e., no borrowing cost. Therefore, no disallowance could be made under section 14A of the I.T. Act, 1961. The assessee relied

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upon Order in the case of CIT vs. Oriental Structural Engineers Pvt. Ltd., wherein the facts of the case were similar to the assessee-company's case and it was held that investments made in subsidiary companies were attributable to commercial expediency and thus, no expense and interest attributable to the investments can be disallowed under section 14A of the I.T. Act. Since assessee made strategic investments and also no dividend has been earned during the year under consideration, no disallowance on account of Section 14A is called for. The assessee relied upon the decision of Hon'ble Delhi High Court in the case of Chemivest Ltd., vs. CIT 378 ITR 33 in which it was held that *"in case assessee does not earn any exempt income, disallowance under section 14A shall not be made".* The assessee raised objections before DRP on the same line. However, the DRP directed to make addition of Rs.240.13 crores under section 14A of the I.T. Act.

10. Learned Counsel for the Assessee, reiterated the submissions made before the authorities below.

10(1). On the other hand, Ld. D.R. relied upon the

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Orders of the authorities below.

11. After considering the rival submissions, we are of the view that addition is not called for on account of disallowance under section 14A of the I.T. Act. It is an admitted fact that assessee did not earn exempt income in assessment year under appeal. Therefore, the issue is covered in favour of the assessee by the judgment of Hon'ble Delhi High Court in the case of Chemivest Ltd., (supra) in which it was held that *"in case assessee does not earn any exempted income, disallowance under section 14A shall not be made.* In the present case, in the show cause notice itself it was observed that assessee has made investments which are capable of earning exempt income and have also incurred financial expenses which are not directly attributable to any particular income. It is, thus, clear that even the authorities below were specific in their finding of the fact that assessee has not earned any exempt income during the assessment year under appeal. Nothing have been specified in the orders of the authorities below if

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assessee earned any exempt income. Further, the assessee made investments in subsidiary for commercial expediency. It was also explained by assessee that no borrowings were specifically made for the purpose of making investments. Therefore, there is no question of disallowing any expenditure. Considering the above discussion and considering the fact that assessee did not earn any exempt income in assessment year under appeal, therefore, no disallowance under section 14A of the I.T. Act can be made against the assessee. We, accordingly, set aside the Orders of the authorities below and delete the addition. Ground No.7 of the appeal of assessee is allowed.

Ground No.8 :

12. Ground No.8 relates to disallowance of interest considered for demerged entity amounting to Rs.114.77 crores.

13. It is noted in the show cause notice that the Company has incurred interest expenditure of Rs.174,91,01,514/- which seems to be common in nature i.e., incurred for entire Aamby Valley City - (1) Interest on

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loan from Sahara India Commercial Corporation (SICCL) Rs.89,73,79,829/- (2) Interest on debentures issued to Sahara Housing Investments Corporation Ltd., (SHICL), Rs.72 crores and (3) Interest on Term Loan from UCO Bank and PNB Bank Rs.13,17,21,685 (Total= Rs. 174,91,01,514). It is noted that the aforesaid interest expenditure pertains to loans and debentures which were obtained when all the business undertakings were part of the company. The assessee was, therefore, required to justify the allowability of interest expenditure considering the fact that majority of the business has been transferred to Business SPVs ("Special Purpose Vehicles") and substantiate the claim by producing one-to-one correlation in respect of utilization of interest bearing funds. In absence of the justification and correlation, explain why proportionate interest amounting to Rs.114.77 crores may not be disallowed as attributable to other Business SPVs.

13.1. The assessee submitted that Special Auditor's audited report under section 142(2A) have not passed any adverse comments. It is stated in the notice that the

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interest expenditure is incurred for the entire Aamby Valley City. Therefore, the same can be construed as allowable expenditure under the Head "Business/Profession". However, the Special Auditors categorically stated that the submission of the assessee is more generic in nature and in the absence of any proper justification, the said interest expenditure should be allocated to its business SPVs in the ratio of net assets transferred to them on account of demerger. The assessee submitted that loan from SICCL as on 01.04.2011 was Rs.579.00 crores and as on 31.03.2012 it increased to Rs.747.81 crores. However, in the case of debentures issued to SHICL was Rs.800 crores and it remained the same at the end of the year. The assessee had entered into a scheme of arrangement under Companies Act. Thus, pursuant to the said Composite Scheme, various undertakings of the assessee had been transferred to the various separate companies w.e.f. 31.03.2011 (Appointed Date) on a going concern basis. Pursuant to the scheme of demerger, the liabilities outstanding in the books of the assessee-company i.e., AVL during the financial year were

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that the assessee incurred an interest expenditure of loan from SICCL as noted above. There was an increase of loan in case of SICCL of Rs.168.80 crore as compared to previous year. The same pertains towards the interest accrued on loan amount outstanding from SICCL which the assessee had incurred but not paid in the previous year i.e., A.Y. 2011-2012. The said amount is depicted under the Head “Interest Accrued and Due on Borrowings” in the Note-8 i.e., “Other Current Liabilities”. But, there has been no increase in the amount of debentures issued to SHICL. During the assessment year under appeal, the term loan from UCO Bank and Punjab National Bank amounting to Rs.400 crore was acquired for the purpose of financial assistance for completing the assessee’s project. The same were also repaid by the assessee out of the sizeable advances received from customers against purchase of flats during the year under consideration. It was submitted that the Hon’ble Bombay High Court had not given any direction to allocate the said loan to other SPVs and therefore, as per the approved order of the Hon’ble Bombay High Court, the

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said liability remains with the assessee. The interest allocation can be done only when its respective liability is also transferred. Thus, the disallowance on proportionate interest is unjustified. Thus, in the absence of loan transferred, the said liabilities vest in the hands of assessee-company. Since the liabilities vest in the books of account of the assessee-company, the aforesaid amount of interest expenditure incurred on the said loans have been claimed by the assessee company only. Therefore, question of allocation of the said interest expenditure in the ratio of net assets transferred would not arise. It is well settled position that one who incurs or bears the liability will be one who will be entitled to deduction of the expenses related to the said liability. Therefore, since the assessee is one who is liable to pay the said loan amount, therefore, assessee would be the one who would be entitled to claim the deduction of the interest. As per the approved scheme of demerger, all the infrastructure cost is lying with the assessee. It may be appreciated in this case that in any real estate business, infrastructure has to be constructed first.

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Thus, the loan appearing in the financials of the assessee has to be first utilised against the cost of the infrastructure. Further, the assessee has also kept the real estate inventory for the sale after the demerger. The details are produced in the impugned order to show total liability was of Rs.1379 crores and the assets were of Rs.1471.75 crores. It was, therefore, crystal clear that the assets lying with the assessee-company is significantly more than the loan amount and from the same it can easily be substantiated that the said loan fund was used for construction of the assets which are lying with the assessee after demerger. The assets which belongs to the assessee were built from the aforesaid loan. Therefore, interest on the same should be allowed to the assessee. It was further submitted that assessee has obtained loan from the UCO Bank and Punjab Bank and the loan was repaid in the year itself. Therefore, there is no question of allocation of interest to other entities. The assessee raised the objection before the DRP. The explanation of assessee was not accepted. The AO also noted that the entire capital on which interest has been

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claimed has not been used for assessee's own business. Therefore, on proportionate basis, the disallowance of interest was made in a sum of Rs.114.77 crores.

13.2. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that entire liability of loan was taken by the assessee, so, interest is allowable in the hands of the assessee. When the borrowings took place which was for business purposes and consequent to demerger the liability remains with the assessee as per Section 2(19AA)(ii) of Explanation (2). Therefore, interest is allowable in favour of the assessee. Learned Counsel for the Assessee relied upon decision of the Hon'ble Supreme Court in the case of Sassoon J. David & Co. Pvt. Ltd., vs. CIT (1979) 1 Taxman 485 (SC) in which it was held as under :

> *3. The expression 'wholly and exclusively' used in section 10(2)(xv) does not mean 'necessarily'. Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incur red for*

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promoting the business and to earn profits, the assessee is entitled to deduction even though there was no compelling necessity to incur such expenditure. The fact that some body other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction under section 10(2)(xv) if it satisfies otherwise the test laid down by law."

13.3. The Learned Counsel for the Assessee also relied upon the decision of Hon'ble Supreme Court in the case of S.A. Builders Ltd., vs. Commissioner of Income Tax (Appeals) & Another (2007) 288 ITR 1 (SC) in which it was held as under :

"Interest on borrowed funds cannot be disallowed if the assessee has advanced interest-free loan to a sister-concern as a measure of commercial expediency; what is to be seen is "business purpose" and what the sister-concern did with the money advanced."

14. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that it is not a case of demerger. There is no interest free advance given.

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So decision in the case of S.A. Builders Ltd., vs. CIT(A) & Another (2007) 288 ITR 1 (SC) would not apply.

15. We have considered the rival submissions and perused the material available on record. The AO in the show cause notice accepted that the aforesaid interest expenditure pertains to loans and debentures which were obtained when all the business undertakings were part of the assessee-company. The assessee-company explained that even the Special Auditor has not adversely commented on the explanation of assessee and in case loan amount from SICCL has increased in the assessment year under appeal but in case of debentures issued to SHICL amount remains the same. According to Composite Scheme under the Companies Act as approved by the Hon'ble Bombay High Court all the liabilities remains with the assessee. The bank loans were obtained for the purpose of business which were paid in assessment year under appeal itself. Since in the books of account of assessee, the liability of the loans remains the same, therefore, assessee was under an

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obligation to pay interest on the same as well. The assessee further explained that total liability as shown in the books of account on which interest have been paid was lesser as compared to the assets mentioned in the books of account of the assessee. It was, therefore, supports the explanation of assessee that assets lying with the assessee-company were significantly more than the loan amount and from the same it is proved that the loan funds were used for the purpose of business even after demerger. The AO without any justification has observed that the entire capital on which interest has been claimed has not been used for the purpose of business rather the facts and show cause notice itself shows that entire loan amount have been used for the purpose of business of the assessee. The assessee also explained that loan was taken for the purpose of business and it is later on only when some business have been transferred to SPVs of the assessee, the aforesaid issue have been raised for disallowance of interest. But the fact remains that the entire amount of loan have been taken for the business purpose of the assessee and the liabilities

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vests in the books of account of the assessee. Therefore, assessee were liable to pay interest on the same loan. The assessee also explained that all the infrastructure cost was lying with the assessee and that the assessee remain in the business of real estate and for that, the borrowed loan shown in the financials of the assessee has to be first utilised against the cost of the infrastructure. These facts, therefore, clearly prove that assessee utilised the borrowed funds in question for the purpose of business. Therefore, interest paid thereon are allowable deduction in the hands of the assessee under section 36(1)(iii) of the I.T. Act. We, accordingly, set aside the Orders of the authorities below and delete the entire addition. Accordingly, ground No.8 of the appeal of assessee is allowed.

16. In the result, Ground No.8 of appeal of assessee is allowed.

Ground No.9 :

17. This ground relates to addition on account of interest. The assessee has entered into international

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transaction. Therefore, the matter was forwarded to the TPO. On the basis of the enquiry made by TPO, documents furnished by the assessee, the TPO framed the Order under section 92CA(3) of the I.T. Act on 20.01.2016 which was communicated to the AO which was ultimately communicated to the assessee. The assessee was asked to furnish the comments. The assessee furnished reply objecting enhancement of interest on loan as determined by the TPO. The assessee briefly submitted that its comments were sought on adjustment to the income amounting to Rs.322,83,54,184/- on account of interest receivable on loan given to Associated Enterprise ("AE"). as per Order passed by the TPO. During the preceding A.Y. 2011-2012, the assessee-company has given loan amounting to Rs.3524,51,61,000/- to it's A.E. Aamby Valley (Mauritius) Limited ("AVML") pursuant to the Agreement Dated 13.12.2010 and Addendum Agreement Dated 14.01.2011 for an annual interest rate of LIBOR + 300 bps to be paid on the loan amount applicable from 14.04.2011 till 07 years the effective date up-to 12.12.2017. The TPO raised a

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query as to why SBI Base Rate + 300 bps should not be applied while calculating interest on the said loan funds. The TPO rejected the contention of the assessee-company of charging rate of interest as LIBOR + 300 bps on the grounds that (i) assessee-company is a tested party and hence, LIBOR is not relevant in this case. (ii) In Indian scenario, LIBOR is not applicable where the currency of the origin country of loan is not a currency year in which the loan is extended. (iii) The assessee did not correctly assess the risk associated with international transaction of lending the money. (iv) The assessee's cost of borrowing is not relevant for determining the arm's length interest to be charged by the assessee. (v) The concept of Quasi Capital in the context of transfer pricing is not relevant in ascertainment of Arm's Length Price. (vi) The assessee should have used the standard of the return that it would have earned in India if money was lent here to company with an economic status as weak as the subsidiary. (vii) Since the cost of capital of company was 10.57%, the money needs to be advanced by levying the suitable mark-

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up on same. (viii) Search conducted by the assessee to arrive comparable rate of interest available in public domain is not applicable as it is not within the purview of provisions of Rule 10D(3). (ix) SBI base rate as suggested in Safe Harbour Rules should be adopted as a basis of benchmarking interest on loan.

17.1. The assessee however submitted that when the transaction is of lending money, in foreign currencies, to its foreign subsidiaries i.e., A.E's, the comparable transaction thereof should be of foreign currency lent by unrelated parties and not of interest rates charged by the Indian Banks on lending money. When the international transaction entered between A.E. is in foreign currency, then the domestic base rate should have no applicability and the international rate fixed being LIBOR has to be considered. The assessee submitted that SBI is a Bank who is in the business of lending of funds to third parties. The assessee is not a Bank or a financial institution, therefore, the methodology of advancing loan of Bank/Financial Institutions cannot be called an un-controlled method of

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application of CUP method. The advancing of loan in commercial circles to advance to A.Es. own business in foreign countries and *inter se* A.E's transactions cannot be akin to Bank/Financial Institutions. Hence, SBI Base Rate is a wholly inapplicable comparable model applied which leads to distorted results. Further, as per T.P. study report, as mentioned in search process, the ALP rate of interest is LIBOR+285 bps which is less than that charged by the assessee-company i.e., LIBOR+ 300 bps which substantiate that the international transaction entered into by the assessee-company is at arms length. The LIBOR rate is internationally recognized and have to be accepted which is also approved by various judicial pronouncements, details of same are noted at page-38 of the assessment order. The AO in view of findings of TPO agreed with the findings of the TPO in determining the interest to be charged on loan given to AVML @ 12.6%. Accordingly, addition of Rs.322,83,54,184/- was proposed to be made to the total income of assessee in the draft order. The assessee objected to the findings of the same before DRP. The DRP has issued

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directions in this case and after giving effect to the same and final calculation, DRP has directed the AO to enhance income of the tax-payer by Rs.43,17,02,728/- under section 92CA(5) of the I.T. Act. The AO accordingly made the addition.

18. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and referred to PB-347 which is Agreement Dated 13.12.2010 and Addendum to the same Dated 14.01.2011. (PB-364) on which Ground No.6 has also been considered. PB-382 is T.P. study. PB-384 to 388 shows that CUP method has been applied by the assessee and it was explained that it should not be subjected to transfer pricing adjustment. It was also explained in the present case that it is not possible to identify uncontrolled transactions or quotations. Therefore, CUP method has been selected as most appropriate method to determine ALP of the abovementioned international transaction. PB-391 to 394 are the third party comparables in which it was pointed out that the arithmetic mean of the interest rate of third party

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comparables as LIBOR + 2.85%. It was concluded that based on the analysis, the arms length rate of interest on comparable borrowings worked-out to LIBOR + 2.85% basis point. During the financial year ended 31.03.2012, AVML has paid an interest rate of 3 month LIBOR + 300 basis points of ECB amounts. Accordingly, international transaction is at Arm's Length. PB-398 is reply of the assessee to the TPO in which it was explained that Sahara Grovernor House Hospitality Ltd., a Company currently holding Grovernor House Hotel had also availed loan from Bank of China for the purpose of acquisition of the said Hotel. Accordingly, the Sahara Grovernor House Hospitality Ltd., entered into an Agreement with Bank of China Dated 20.10.2011 (PB-400) granting the Sahara Grovernor House Hospitality Ltd., credit facilities of GBP 305,000,000. As per this Agreement, the rate of interest was @ LIBOR + 250 bps. It was an independent transaction which was considered as external CUP for the purpose of benchmarking. In the case of assessee, it was a higher rate of interest. PB-409 to 411 are the Orders of the TPO for A.Ys. 2013-2014 and 2014-

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2015 in which no addition have been made of the similar nature and CUP method applied by the assessee have been accepted. Learned Counsel for the Assessee referred to pages 28 and 29 of the Order of the TPO to show that SBI rate have been applied which is highly unjustified. The findings of the DRP are wrong as the assessee has benchmarked each comparable separately. The DRP without reasons enhanced the rate of LIBOR + 400. Learned Counsel for the Assessee submitted that it has been held in several decisions that LIBOR should be taken as benchmarking rate for transaction on lending money in foreign currency. Therefore, the addition is wholly unjustified. The decisions relied upon in support of this proposition are as under :

(1) Siva Industries & Holdings Ltd., vs. ACIT, Company Circle-VI(4), Chennai (2011) 11 taxmann.com 404 (Chennai).

(2) Hinduja Global Solutions Ltd., ACIT, Circle-6(3), Mumbai (2013) 35 taxmann.com 348 (Mumbai-Tribu.).

(3) Everest Kanto Cylinder Ltd., vs. ACIT, (LTU), Mumbai (2014) 52 taxmann.com 395 (Mumbai –

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Tribu.).

(4) Kohinoor Foods Ltd., vs. ACIT, Central Circle-22 (2014) 52 taxmann.com 454 (Delhi-Tribu.)

(5) TTK Prestige Ltd., Bangalore vs. ACIT, Circle-12(4), Bangalore – Order of ITAT "A" Bench, Bangalore in ITA.No.1257/Bang/2011 – A.Y. 2005-2006 & ITA.No.130 & 131/Bang/2011 and ITA.No.475/Bang/2012 for the A.Ys. 2006-2007, 2007-2008 & 2008-2009 dated 11.04.2014

(6) M/s. Four Soft Ltd., Hyderabad vs. DCIT, Circle-1(3), Hyderabad – Order of ITAT, Hyderabad 'A' Bench in ITA.No.1495/Hyd.2010 Dated 9.9.2011.

(7) Judgment of the Bombay High Court in the case of CIT-2 vs. Tata Autocomp Systems Ltd., in Income Tax Appeal No.1320 of 2012 Dated 03.2.2015.

19. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that because of the risk LIBOR is enhanced. The creditworthiness of the A.E. shall have to be verified. No details of creditworthiness of A.E. have been filed. In comparable cases higher Libor + rate of interest have been shown. In the Agreement Dated 13.12.2010 initially the interest rate was LIBOR + 500 bps

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but later on through the Addendum Agreement, it is reduced to LIBOR + 300 bps without any reasons. The initial agreement was for 03 months and later on, it was increased to 07 years. Ld. D.R. relied upon the decision of the Hon'ble Delhi High Court in the case of CIT vs. Cotton Nationals (I) Pvt. Ltd., (2015) 276 CTR 445 (Del.).

20. We have considered the rival submissions. Copy of the Agreement and Addendum Agreement have been filed. In the initial Agreement, the terms of the loan was for 90 days subject to interest of LIBOR+500bps. However, through the Addendum Agreement, the tenure of the loan shall be for a period of 07 years from the effective date and the rate of interest was fixed LIBOR+300bps. The authorities below have not adversely commented upon the same. Even otherwise, for a longer period, the rate of interest is generally reduced, it would have no impact on the genuineness of the agreement between the parties. The TPO has applied lending rate of SBI for the purpose of making the addition. The assessee explained that when the transaction is of lending money in foreign currencies to it's

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AE-Foreign Subsidiary, the comparable transaction thereof, should be of foreign currency lend by unrelated parties and not of interest rate charged by the Indian banks of lending money. Once the transaction between the assessee and the A.E. was in foreign currency and the transaction was an international transaction, then the transaction would have been to be looked upon applying the commercial principles in regard to international transactions. If that was so, then the domestic prime lending rate would have no applicability and the international rate fixed being LIBOR would come into play. In such circumstances, the LIBOR rate had to be considered while determining the arm's length interest rate in respect of transaction between assessee and the A.E. The decisions relied upon by Learned Counsel for the Assessee above clearly supports the explanation of assessee that LIBOR should be taken as benchmarking rate for transaction of lending money in foreign currency. The assessee has also explained the difference between the money lending business by SBI and business of the assessee is not alike of Bank or Financial Institutions. The

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assessee applied CUP method for this transaction which have been accepted by the TPO in subsequent years for A.Ys. 2013-2014 and 2014-2015. Since the agreement in question is same in assessment year under appeal which is also remained the same in subsequent A.Ys. 2013-2014 and 2014-2015 and when TPO has accepted the CUP method for benchmarking the international transactions, there was no reason for the authorities below to took a different view and apply interest rate of SBI for the purpose of making the addition against the assessee. The assessee also explained that in an unrelated party case, the LIBOR+ 285 bps was considered, details of which were mentioned in the T.P. study, which would show that the interest rate applied in the case of assessee LIBOR + 300 bps is more than sufficient and as such no adjustment on account of ALP is required. The rule of consistency should have been followed by the authorities below while considering the similar transaction in assessment year under appeal. The SBI rate is a local rate and LIBOR is a foreign rate, therefore, LIBOR rate should be preferred as against the

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SBI local rate of interest. Thus, there were enough explanation given by assessee to show that international transactions of assessee for it's A.E was at arm's length and as such, no further adjustment is required in the matter. We, accordingly, set aside the Orders of the authorities below and delete the addition. Ground No.9 of appeal of assessee is allowed.

Ground No.10 :

21. This ground relates to reversal of various provisions considered as income. It is stated in the show cause notice that assessee has directly written off entries in nature of provision for sale of land, provision for obsolete stores and provision for cost of sale of land aggregating to Rs.84,05,69,987/- resulting into increase in free reserves of the Company. The assessee was required to explain the nature of these amounts written off to general reserves along with supporting documents. The assessee submitted that notice have been issued on the observation of the Special Auditor. It was submitted that assessee is engaged in the business of construction of real estate over the years.

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During the year under consideration, the assessee was constructing about 200 Villas in Aamby Valley near Lonavala. Further, the assessee credited the following three provisions to the general reserve during assessment year under appeal, they are provision for sale of land, (2) provision for obsolete source and (3) provision for cost of sale of land.

21.1. The assessee as regards provision for sale of land and provision for cost of sale of the land submitted that these are basically provisions made for loading of infrastructure facilities which were to be built in future vis-à-vis the property sold during the respective years. Due to the Composite Scheme of Arrangement and Amalgamation, the provision has been transferred to general reserve. It was submitted that usually the provisions for any contingencies are created through P & L A/c and thus whenever they are written-back, they are credited/debited to the P & L A/c only. However, in the current scenario, the assessee created the provision for the sale of the land and provision for the cost of sale of land out of project work in progress and they

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were never expensed out through P & L A/c. Thus, it would be only fair not to offer them as income while writing them off and directly crediting it to general reserves. Copies of the entries were filed. Thus, it will be appreciated that since these provisions were not debited to P & L A/c when they were made meaning thereby, not claimed as an expenses, their credit to general reserve is not affecting taxability of any income. As regards provision for obsolete stores, it was submitted that provision was created out of P & L A/c. Post-demerger the saleable stores were transferred to SPVs. The obsolete stores which were not of any use were supposed to be written off and hence, written back the provision for obsolete stores from general reserve itself as it was a loss on demerger. It was a bonafide loss suffered by the assessee. The question of crediting the same to P & L A/c by writing it back does not arises since it is not of that nature but is a loss to the assessee which were earlier provided for. The contention of assessee was, however, not accepted. The assessee filed objections before DRP also. The DRP also rejected the explanation of assessee by following

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Judgment in case of Girdharilal Gian Chand 79 ITR 561 (All.) in which it was held that *"deduction shall be allowed in respect of only those debts which have been taken into account in computing the income of the assessee of the previous year or of an earlier previous year or should represent money lent in the ordinary course of business of Banking or money lending, The debt or loan or part thereof, a deduction about which is claimed as bad debts, must have become actually bad in the accounting year."* It was noted that assessee has been unable to show that the amounts have inflated the profit of the assessee in any preceding previous year. The benefit of write-off can, therefore, be given to the assessee. No clarification has been given in this regard to direct debiting the provision for obsolete stock. The assessee's explanation that the provision has been created through debiting development work-in-progress during the previous year is not acceptable in the absence of identification of specific entries in the books of account. The addition was accordingly made of the amount of Rs.84,05,69,987/-.

21.2. The Learned Counsel for the Assessee reiterated the submissions made before the authorities below and

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submitted that on transfer of asset, an entry was made to reserve through the provision which is also mentioned in the reserve being expenses related to same. DRP has taken bad debt but assessee had never claimed it to be bad debt. No deduction was claimed in earlier years. The findings of the DRP and AO are wrong. The assets have gone to SPVs so provision will be reversed on that account, therefore, no addition is required.

22. The Ld. D.R. however submitted that these facts needs verification by the AO

23. After considering the rival submissions, we are of the view that the matter requires reconsideration at the level of the AO/TPO. The assessee has given the justification for making the provisions to general reserve. The assessee also claimed that the same provision have not been debited to the P & L A/c, therefore, it has no impact on the taxability of the income of the assessee. In these circumstances, it appears that the facts have not been properly analyzed and verified by the AO/TPO. All the details are on the record of the authorities below. Therefore,

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the Ld. D.R. rightly contended that this issue needs verification at the level of the AO/TPO. We, accordingly, set aside the Orders of the authorities below and restore this issue to the file of AO/TPO with a direction to verify the facts and in case the provisions are not debited to the P & L A/c, addition shall be deleted because assessee has not claimed deduction of the expenditure as per the above explanation. The AO/TPO shall give reasonable, sufficient opportunity of being heard to the assessee. Ground No.10 of appeal of Assessee is allowed for statistical purposes.

Ground No.11 :

24. This ground relates to entry passed in books of account of Rs.13.40 crores (June Allocation). It is noted in the show cause notice that assessee-company has made manual adjustments to various expenses by adding item as "June Allocation" in the financial statements amounting to Rs.13,40,21,704/-, details of the same expenses are noted in para 16.1 of 17 items in the impugned assessment order. The assessee was required to provide nature of these 'June

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Allocations' adjustments along with supporting case to case details, financial statements, if any TDS has been deducted. The assessee explained that it is engaged in the business of construction of real estate over the years. During the year under consideration assessee was constructing about 200 Villas in Aamby Valley near Lonavala. During the year under consideration assessee has incurred various expenditures for this purpose which includes consultancy expenses, man-power expenses, telephone expenses, hiring of vehicles, electrical expenses, vehicle maintenance, fuel expenses etc., totaling to Rs.284.85 crores for the entire year. However, to complete a project as big as that of the assessee, it takes a substantial period of time. Thus, out of the total expenditure incurred by the assessee, the impugned amount which was attributable to the project under construction, was transferred to work-in-progress vide voucher Dated 30.06.2011. Since these expenses were transferred to project work-in-progress, the expenses now standing in the books were net of the allocation. The above entry was not reflected under the head of respective

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expenditure in the trial balance. The assessee did it as per revised schedule provided by Ministry of Corporate Affairs. To comply with the said Amendment in revised Schedule-VI, the aforementioned expenses which were incurred by the assessee prior to the month of June under various heads were grouped together under the Head "June Allocation". To bring this accounting head in the books of account, assessee debited the June Allocation account and correspondingly credited the closing and inventory of work-in-progress with the same amount. In nutshell, it was submitted that June Allocation entry is only for the presentation purpose and there is no tax impact or double deduction of any expenditure by the assessee. In the present case, assessee has first debited the amount of June Allocation in its closing inventory account and increased its profit by the following expenditure and then added the same in the respective heads of expenditure to calculate the correct profit for the year. Copies of the respective ledgers were filed. This exercise was required to be undertaken because of the accounting year followed by the assessee

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company was from July to June but for Income-tax purposes, the previous year is for the period of April to March. The assessee also filed objections before DRP on the same line. However, the contention of assessee has been rejected because no details and documentary evidences on the same have been filed. The addition was accordingly made.

25. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that that these are expenses. AO disallowed the expenses for April to June, 2011 but other expenses have been allowed. Entries were given before DRP and no double claim have been made. Learned Counsel for the Assessee, therefore, submitted that this fact may be verified by the AO/TPO because details were before DRP and Special Auditor.

26. The Ld. D.R. however, relied upon the Orders of the authorities below and submitted that no evidence was provided before Special Auditor.

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27. We have considered the rival submissions. The assessee explained that the June Allocation expenses in the financial statement was carried-out because of the fact that accounting year followed by the assessee-company was from July to June but for Income-tax purposes previous year is for the period April to March. Learned Counsel for the Assessee submitted that details were filed before the authorities below and no double deduction have been claimed by assessee. Learned Counsel for the Assessee, therefore, rightly contended that this fact may be verified by the AO/TPO. It may also be noted here that except for the month of April to June, 2011, AO has allowed the claim of assessee of the similar expenditure. Therefore, the matter requires reconsideration at the level of the AO/TPO. We, accordingly, set aside the Orders of the authorities below and restore this issue to the file of AO/TPO for verification of the facts and passing the Order afresh. The AO/TPO shall give reasonable, sufficient opportunity of being heard to the assessee. In the result, Ground No.11 of appeal of assessee is allowed for statistical purposes.

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27.1. In the result, Ground No.11 of the appeal of Assessee is allowed for statistical purposes.

Ground No.12 :

28. The AO proposed an adhoc disallowance of Rs.12,66,63,005/- on account of consultancy charges paid to Siva Ventures Limited during the year under consideration. The AO observed that although the assessee has claimed the payment made to Siva Ventures Limited through cheque and TDS has also been deducted thereon, still not able to establish that the payment were relatable to business activities and the quantum of payment are relatable to the work rendered by the party. The assessee however explained that assessee is into real estate project and for the purpose of its business the assessee had taken consultancy services from Siva Ventures Limited for its project and therefore, same could be allowed to the assessee. Further, the Special Auditor have agreed regarding the justification of the expenditure. However, the Special Auditor was of the view that services were utilised

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for entire Aamby Valley Project and thus, the same may be allocated. It was submitted that this issue has also arisen in assessee's own case in previous year i.e., from A.Ys. 2007-2008 to 2011-2012 and the Ld. CIT(A) has allowed the appeal of assessee on this ground accepting the contention made by the assessee, In relation to the allocation of said expenditure to various SPVs, it was submitted that the said action of the AO is totally arbitrary and cannot be accepted in view of the fact that entire services rendered by the said party pertains to the business affairs of the assessee-company. However, it may be noted that discussion on various SPVs in the reports given by the said party is restricted to manage the infrastructure of all the SPVs and since the assessee would be receiving the fees for infrastructure management from all SPVs, the said expenditure is directly relatable to the business affairs of the assessee-company. The DRP on perusal of the assessment order noted that the company has paid consultancy charges of Rs.19.30 crores to Siva Ventures Limited during the year on the basis of the agreement

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entered between the parties in September, 2009. It was observed that the consultancy charges are paid in respect of services provided for entire Aamby Valley City Project and relates to all business segments of the Company which have been transferred to business SPVs post-demerger. The AO also noted that assessee has not established the payments were relatable to the business activities. The DRP, therefore, noted that assessee has not only failed to produce the documentary evidences to substantiate the genuineness of the services rendered vis-à-vis the payment made but has also failed to establish the nexus between services and the payment. The AO has disallowed the payment on proportionate basis. Therefore, it was confirmed.

29. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and referred to reply filed before AO at pages PB-417 to 418 of the paper book. He has submitted that all the details were filed before the authorities below. The AO did not doubt the genuineness of the payment. Only proportionate

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expenditure have been allowed without any justification. It was explained before the authorities below in the reply that assessee has explained the nature of consultancy charges paid in this regard and even Special Auditor has not denied the claim of assessee but stated that the assessee utilised the services for the entire project. The assessee is engaged in the business of construction of real estate over the years. During the year under consideration, assessee was constructing about 200 Villas in Aamby Valley near Lonavala. The project which was very large and therefore, assessee required the project consultancy services. Pursuant to the Composite Scheme of Arrangement under section 391 to 394 of the Companies Act, various undertakings of assessee along with all related assets, liabilities, employees, development rights, licenses, permits and registration etc., were transferred to various separate companies. It was further explained that assessee will manage infrastructure for all the SPVs. Thus, the assessee will receive the maintenance charges fees from SPVs to manage their Infrastructure. Therefore, in order to manage

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the current project and to undertake the business model on various SPVs, the assessee made Consultancy Agreement with SVL on 01.09.2009. On the basis of scope of services, assessee has obtained report from SVL. In the said report, Siva Ventures Limited has provided its consultancy services. During the year under consideration, assessee had received gross income of Rs.111.70 crores from construction and other related services. To generate the said large turnover, assessee has obtained above consultancy services from the Siva Ventures Limited. Thus the assessee has incurred the above expenditure for business purposes. Therefore, same should be allowed fully.

30. On the other hand, Ld. D.R. relied upon the Order of the DRP.

31. We have considered the rival submissions. This issue relates to disallowance of proportionate consultancy charges paid to Siva Venture Limited ("SVL") during assessment year under appeal. The assessee claimed that payment was made through cheque and TDS was also deducted. However, the authorities below have disallowed

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the claim on proportionate basis because some of the businesses have been transferred to SPVs as per the directions of the High Court. The assessee claimed that in preceding assessment years, same claim of assessee have been allowed by the Ld. CIT(A), which fact have not been disputed during the course of arguments. The assessee in its reply before the authorities below have explained that consultancy services were required because project was very large and huge, even after demerger, the assessee was managing the infrastructure for all the SPVs. The assessee received the maintenance charges fees from SPVs to manage their infrastructure. In this regard, agreement was executed with the SVL. Thus, it is clear that assessee obtained the large amount as income from the construction business and when assessee has obtained consultancy charges for the entire project and was also receiving maintenance charges fees from SPVs, it would show that entire expenditure should have been allowed as deduction in the hands of the assessee. Since the proportionate disallowance have been made by the authorities below,

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therefore, it is not a case that assessee did not file all the documentary evidences before the authorities below. Considering the totality of the facts and circumstances of the case in the light of explanation of assessee, we are of the view that entire consultancy charges should be allowed in the hands of assessee-company. We, accordingly, set aside the Orders of the authorities below and allow the entire deduction. Ground No.12 of appeal of Assessee is allowed.

Ground No.13 :

32. This ground relates to advance from customer of Rs.9.33 crores. The AO proposed addition of Rs.9,33,75,452/- on account of outstanding balance of customers in respect of registration of land/plots. AO noted that no satisfactory evidence was provided by the assessee to support the contention. The assessee, however, explained that assessee is not in appeal against the addition of Rs.31,23,109/- on account of Sundry Parties. The assessee had offered Rs.7,92,30,032/- as income in subsequent year during which registration/possession of the property was

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handed-over. The balance advance received for sale of land and Villa amounting to Rs.1,41,45,420/- were shown as advance only as construction of Villa was not completed during the year under consideration. No adverse view have been taken by the Special Auditor. The DRP however, noted that in case of seven parties, there are balances with the customers aggregating to Rs.9.33 crores in respect of which details of registration of plot/land were not provided to the Special Auditor for verification. The AO asked for the details of registration of plots/lands in respect of these seven identified parties. The assessee made an explanation as noted above that either the amount have been offered in subsequent year or that balance have been shown in the books because construction was not completed and part addition was not appealed. The explanation of assessee in respect of the seven parties are noted in the Order of the DRP in which it was explained that in many cases the amount were treated as advance and on completion of the work, the amount was offered for taxation in subsequent year or that the construction was not completed. The DRP,

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however, did not accept the contention of assessee in absence of evidence on record.

33. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that small payments were made and later on properties have been given to the buyer. Therefore, it cannot be treated as cash credit. The assessee has filed complete documentary evidences to explain the above issue. Therefore, matter may be remanded to the AO/TPO for further adjudication. The Ld. CIT-D.R. also suggested that the matter may go to the AO/TPO for fresh adjudication.

34. After considering the rival submissions of both the parties, we are of the view that the matter requires reconsideration at the level of the AO/TPO. The assessee explained that the amounts in question are the advances received from the parties and in some of the cases, registration of the properties were done in subsequent year. Therefore, the amounts have been offered for taxation in subsequent year. In some cases, construction was not

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completed. Therefore, amount was treated as advance. These facts are available on record of the Department in subsequent year as well for offering the same amount for taxation. According to the Learned Counsel for the Assessee, all details were submitted before authorities below, therefore, matter requires reconsideration. Further, the assessee did not file any appeal against the addition of Rs.31,23,109/- on account of Sundry Parties. Therefore, addition to that extent is maintained and for the rest of the amount, issue is restored to the file of AO/TPO for fresh adjudication. Ground No.13 of appeal of Assessee is partly allowed for statistical purposes. The AO/TPO shall give reasonable, sufficient opportunity of being heard to the assessee.

Ground No.14 :

35. This ground relates to capital expenditure debited to P & L A/c of Rs.8,75,33,790/-. The AO has proposed disallowance of the above amount on account of capital expenditure debited to the P & L A/c during the assessment year under appeal. AO observed that assessee

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has failed to justify its claim and submission was also not properly supported by documentary evidences. Assessee however, explained that WIP written-off is of Rs.2,99,02,872/-. The assessee had physically verified the inventory. However, the same is not physically available at the site and accordingly assessee has written-off the amount in question. It was further explained that Land written-off is of Rs.1,47,44,380/-. As per the Forest Department, assessee has to give land to Forest Department, if the assessee used the Forest land. Therefore, the assessee provided Satara land as compensation to utilize the forest land in Lonavala. The said land is part of WIP and therefore, the assessee had claimed it as business loss. The assessee has obtained certificate of the Chartered Accountant on both the items written-off. The assessee has further shown repair and maintenance expenses of Rs.4,28,86,538/-. AO has asked for justification of part amount of Rs.1,78,33,808/- but later on without giving opportunity of being heard made the addition of the entire amount of Rs.4.28 crores.

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Rs.4,94,144/- was incurred for the purpose of consultancy charges for coordinating with the Government Office regarding water resources. Rs.1,73,39,664/- was incurred for the maintenance of road. However, the DRP did not agree with the contention of assessee. The DRP referred to the tax audit report of Special Auditor in which it was mentioned that assessee did not provide documentary evidences on the same. The DRP, therefore, confirmed the addition considering it to be capital expenditure.

36. Learned Counsel for the Assessee submitted that complete details were filed before the authorities below but the same have not been examined by the AO/TPO. Learned Counsel for the Assessee, therefore, suggested that the matter may be remanded to the file of AO/TPO for fresh adjudication.

37. Ld. CIT-D.R. also suggested that matter could be remanded to the AO/TPO for fresh adjudication.

38. After considering the rival submissions and the nature of the items referred to by the assessee in the

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submissions before the authorities below, it is clear that the matter requires reconsideration at the level of the AO/TPO. The assessee has explained that work-in- progress was written-off because it was not found physically at the site and that land was written-off because it was provided to Forest Department as compensation to utilize Forest Land in Lonavala. This is certified by the Auditor and for the rest of the amount incurred on repair and maintenance, according to explanation of assessee, show cause notice was given for part amount, but addition was made on substantial amount, without giving opportunity of being heard to the assessee. These facts, therefore, show that explanation of assessee requires reconsideration. We accordingly, set aside the Orders of the authorities below and restore this issue to the file of AO/TPO for fresh adjudication. The AO/TPO shall give reasonable, sufficient opportunity of being heard to the assessee.

38.1. Ground No.14 of Assessee is allowed for statistical purposes.

Ground No.15 :

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39. This ground relates to T.D.S credit not given for Rs.1,92,20,596/-. The Assessing Officer has proposed to disallow the excess T.D.S credit of Rs.1,92,20,596/-. The Assessing Officer observed that the contention of assessee is not acceptable and therefore, the same should be added in the hands of the assessee. Therefore, amount of Rs.6.24 crores was added to income of assessee being the interest @ 12% on Rs. 52 crores. The assessee submitted that interest income on fixed deposits transferred to business SPVs are offered to income by SPVs in their respective returns of income for A.Y. 2012-2013. However, T.D.S. on such income is claimed by the assessee as T.D.S. certificates issued for such income was issued in assessee's name. For this purpose, no objection certificate have been obtained from SPVs giving their consent to such claim. Further, an indemnity bond indemnifying the Government for any liability arising out of the T.D.S. claim has also been obtained and submitted. The D.R.P. however, noted that in the Draft Assessment Order the A.O. has stated that tax payer will not be entitled for the excess T.D.S. credit of the impugned amount and the claim of T.D.S. made by the tax payer will be reduced by the above

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amount while computing the tax liability of the assessee for the year under consideration. Therefore, the same has been

disallowed. The assessee has not been able to reconcile the TDS credit against the principle of matching concept as the income in respect of the credit has not been reflected by the assessee. As per the provisions of Section 199 read with Rule 37BA(3) the TDS credits is to be given as under :

37BA(3) :

(i) *"Credit for tax deducted at source and paid to the Central Government, shall be given for assessment year for which such income is assessable.*

(ii) *Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax".*

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40. The DRP noted that this provision has been inserted in the Act w.e.f. 01.04.2009 and as such applicable from A.Y. 2009-2010 and is also applicable to assessment year under appeal. The DRP relied upon the Order of ITAT in the case of Lloyd Insulation (India) Ltd., in ITA.No.2400 & C.O.No.201/Del./2011 in which also following the same Rule, it was clarified that credit for the TDS shall be available for the year for which corresponding income is assessable. AO was, therefore, directed to allow credit as per Rule 37BA of the I.T. Rules, 1962 and this ground of appeal of assessee was accordingly disposed of.

41. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that though the date of demerger is 20.03.2012, but the appointed date is 31.03.2011. PB-440 is No Objection Certificate issued by Qing Ambay City Developers Corporation Limited certifying that during A.Y. 2012-2013 interest income on fixed deposit of Rs.21.01 crores was transferred from assessee to them by virtue of Mumbai High Court Order dated 20.01.2012 under the Scheme of

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Arrangement under section 391 of the Companies Act, which were duly offered for tax as income from other sources. It is also clarified that TDS certificate was however issued in the name of the assessee as the original fixed deposit was in the name of assessee-company, therefore, TDS certificate was issued in the name of assessee. It was clarified that they have not claimed TDS benefit in this regard and have no objection if assessee may get benefit of the credit. PB-442 and 446 are indemnity bond to indemnify Government of India in case of any loss. It was submitted that since the amount in question is lying with the Tax Department, so credit of the same may be given to the assessee. Learned Counsel for the Assessee submitted that it was income of the assessee and only after Judgment of the Hon'ble High Court, part amount of interest was transferred to other company. He has submitted that there is no rule framed under the Act to take care of such a situation. The Department cannot retain the Tax. Learned Counsel for the Assessee in the alternative contention submitted that benefit of TDS may have to be given to the

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SPVs who have offered income for taxation in their return of income.

42. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that Section 199 read with Rule 37BA(3) would govern the issue. The income is to be declared then only credit of the tax can be given. In this case, income is offered by the other company, therefore, credit of the tax cannot be given to the assessee. The Ld. D.R. submitted that SPVs is not before the Tribunal, therefore, no further direction is required in the matter.

43. We have considered the rival submissions and perused the material available on record. It is not in dispute that originally the FDRs were in the name of assessee and after the Order of the Hon'ble Bombay High Court under section 391 of the Companies Act, the interest income on FDRs were transferred to business SPVs who have admittedly offered the interest income for taxation in their respective return of income for assessment year under appeal. The TDS certificate was however issued in the name

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of assessee-company because originally FDs were held by the assessee-company in their name. These facts make it clear that part of the interest income was offered by SPVs in their return of income for which the entire TDS Certificate have been issued in the name of the assessee-company. Therefore, the provisions of Section 199 read with Rule 37BA(3) of the I.T. Rules would be applicable to deal with the above situation. Since part of the interest income is assessable in the hands of assessee-company, therefore, assessee-company would get credit of the TDS certificate to that extent only. The DRP, therefore, rightly directed the AO to allow credit as per Rule 37BA(3) of the I.T. Rules. Since the SPVs have declared part of the interest income in their return of income, therefore, Learned Counsel for the Assessee rightly contended in the alternative contention that they will be given credit of the TDS which was in the name of the assessee-company. Since the entire amount of the tax is lying with the Income Tax Department and the TDS certificate was in the name of the assessee-company, therefore, the authorities below are directed to grant TDS

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credit on the part amount of the interest which is available for tax by the SPVs. The credit of the TDS shall be allowed in the names of the companies who have offered it as income in their respective return of income. With these directions, this issue stands disposed of. Ground No.15 is accordingly disposed of with the above directions.

Ground No.16 :

44. This ground relates to sundry balances written off in a sum of Rs.93,68,898/-. The AO has proposed disallowance of the above amount on account of sundry balances written-off during the year under consideration in the absence of proper documentary evidences filed. The assessee however submitted that Rs.29,19,964/- was paid to CNBC on making arrangements for a conference conducted in Aamby Valley Limited (Assessee). As agreed in the aforesaid transaction the assessee can use Airtime on their channel till 2008 which the assessee could not utilize. Therefore, in the absence of recovery of the said amount, the assessee written-off the said balance.

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44.1. Rs.15 lakhs was paid as advance in relation to buy-back property. On completion of the transaction, the assessee could not have recovered the said amount, therefore, the same had been written-off.

44.2. Rs.24,09,239/- was given as loan and advance to its employees. Subsequently, employees demanded incentives against their performance. Assessee had accepted the request of the employees and written-off the said loan and advance against them.

44.3. Rs.10,32,142/- was given as loan to employees. Subsequently, employee left the organisation and could not recover the amount from him.

44.4. Rs.15,07,562/- was paid to various employees during the course of employment. However, the employees did not provide proper supporting documents against the said advance. Since the same was nominal in nature, therefore, same was written-off. The DRP however, did not accept the contention of the assessee because even before Special Auditor no documentary evidences have been filed

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in this regard. The addition was, therefore, confirmed.

45. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that the claims of assessee were rejected because no evidences have been filed. There is no discussion on merits of the case. It is a case of business loss which was supported before the authorities below by evidence and material on record. He has, therefore, submitted that matter could be remanded to the AO/TPO for fresh adjudication.

46. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that it is a case of Special Audit and no evidence was filed before him to explain this issue. The entries in the books of account are not proved. No break-up of the employees have been given. Therefore, addition was correctly made.

47. After considering the rival submissions, we are of the view that the matter could be remanded to the AO/TPO for fresh adjudication of the matter. The explanation of

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assessee clearly suggest that it may be a case of business loss because whatever amounts were given during the course of business activities could not be recovered by the assessee. The entries to that effect have been made in the paper book. Since it is a case of Special Audit and explanation of assessee was before authorities below, therefore, one more chance could be given to assessee to produce the documentary evidences before AO/TPO for final adjudication of the matter. We, accordingly, set aside the Orders of the authorities below and restore this issue to the file of AO/TPO with a direction to re-decide this issue by giving reasonable, sufficient opportunity of being heard to the assessee.

47.1. Ground No.16 of the appeal of assessee is allowed for statistical purposes.

Ground No.17 :

48. This ground relates to non-deduction of TDS of Rs.79,19,474/-. The AO proposed to disallow the above amount on account of non-deduction of TDS. The assessee

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prayed that direction may be given to the AO to allow the said expenses in subsequent year when the parties have paid their taxes. The AO however, did not accept the contention of assessee because assessee failed to deduct TDS on the amount in question. The assessee explained before DRP that assessee filed confirmation from all the parties that the amount which is in dispute has already been offered to tax by the deductee while filing their return of income. As per amended proviso, the assessee cannot be considered as assessee in default and no disallowance under section 40 (a) (ia) of the I.T. Act is called for. The DRP noted that assessee has claimed that it cannot be deemed to be in default if the recipient have shown the amount in their return of income and paid the tax thereon. However, the second proviso to section 40(a)(ia) of the I.T. Act on which assessee has placed reliance was inserted by Finance Act, 2012 w.e.f. 01.04.2013. The effect of the said proviso is to introduce legal fiction where the assessee fails to deduct tax in accordance with the provisions of Chapter-XVIIB. The Honourable Delhi High Court in the case of C.I.T. vs.

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Ansal Landmark Township (P) Ltd., (2015) 377 ITR 635 (Del.) has held that the said proviso is curative and retrospective. However, the decision has not been accepted by the department and the department has filed SLP against the said decision. The addition was, therefore, confirmed and objection of assessee was rejected. Learned Counsel for the Assessee reiterated the submissions made before the DRP.

49. On the other hand, Ld. D.R. relied upon the Orders of the DRP.

50. After considering the rival submissions, we are of the view that the matter requires reconsideration at the level of the AO/TPO. The contention of assessee was that confirmation from all the parties were filed to prove that amount which is in dispute has already been offered to tax by the deductee while filing their return of income. Therefore, according to second proviso to section 40(a)(ia) of the I.T. Act, 1961, assessee could not be deemed to be assessee in default. The assessee relied upon decision of

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Hon'ble High Court in the case of CIT vs. Ansal Landmark Township (P) Ltd., (supra) in which it was held that the *"said proviso is curative and retrospective in nature. Payee filing return of income tax and offering the same received for taxation, therefore, no disallowance was made."* Merely because SLP of the department is pending, is no ground for not following the decision of the jurisdictional High Court. In this view of the matter, we set aside the Orders of the authorities below and restore this matter in issue to the file of AO/TPO with a direction to re-examine this issue in the light of explanation of assessee and material on record and decide the issue as per Judgment of Hon'ble Delhi High Court in the case of CIT vs. Ansal Landmark Township (P) Ltd., (supra). The AO/TPO shall give reasonable, sufficient opportunity of being heard to the assessee.

50.1. In the result, Ground No.17 of the assessee is allowed for statistical purposes.

Ground Nos. 18 & 19 :

51. On these grounds, AO has proposed a reduction

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charged to WIP (Inventory) account of Rs.39,58,925/- under section 40A(3) of the I.T. Act paid during the year under consideration and further disallowance under section 40A(3) of the Act of Rs.13,55,918/-. The AO observed that submission of assessee is not tenable. The expenses have been incurred in contravention of section 40A(3) of the I.T. Act read with Rule 6DD of I.T. Rules, 1962. The assessee further submitted that assessee has its project and sale office at Ambavane village near Tq. Mulsi. Due to the limited availability of banking facilities near the village, the assessee was required to make payment in cash of Rs.13,55,918/-. As regards reduction in CWIP, assessee submitted that it has made an agreement with M/s. Aishwarya Enterprises for purchase of land on assessee's behalf. The said party had done its work intently. As per the agreement, the assessee is required to make payment in cheque to the said party and accordingly, assessee had made payment in cheque. The assessee does not have any control on said entity and therefore, the disallowance cannot be made in the hands of the assessee. The DRP

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however noted that assessee has made cash payments in violation of provisions of section 40A(3) of the I.T. Act, 1961. As per the details mentioned in the Special Audit Report, according to which, Rs.13,55,918/- to be disallowed in the current year and Rs.39,58,925/- to be disallowed in the year in which expenses is charged to the P & L A/c. The assessee claimed that some of the expenses were incurred in cash due to the fact that site Office is located at a place where there is limited availability of banking facilities near the village and the assessee at times required to make payment in cash to the parties relating to purchases made. The DRP has however noted that under Rule 6DD, there is no clause as per which, cash payment are allowed, in case limited availability of banking facilities. It is only in case where banking facilities are not available that cash payment in violation of section 40A(3) is admissible. Therefore, expenses of Rs.13,55,918/- was confirmed.

51.1. In respect of Rs.39,58,925/- assessee has claimed that it has made payment through cheque to M/s. Aishwarya Enterprises, who in turn, has made payment for

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purchase of land on assessee's behalf. Since M/s. Aishwarya Enterprises is acting on behalf of the assessee, therefore, it is an Agent of the assessee and the payment has been made on assessee's behalf. Therefore, Section 40A(3) of the Act will apply. This addition was also confirmed.

52. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that since the land to be purchased for assessee, therefore, assessee paid cheque to M/s. Aishwarya Enterprises, who, in turn, paid amount to the farmers in cheque/cash. The amount paid to M/s. Aishwarya Enterprises who made further payments is not an Agent of the assessee. It is an agreement between the Principal and is an Independent Agreement. However, as per Rule 6DD(k), such payment is allowable deduction because the same provides the exception *"Where the payment is made by any person to his Agent who is required to make payment in cash for goods or services on behalf of such person".* He has, therefore, submitted that since genuineness of the

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payment have not been doubted, therefore, it is an allowable deduction. These are revenue expenditure incurred for running day-to-day business. The assessee paid Rs.13,55,918/- to the employees for further payment for business purpose. Therefore, no disallowance be made under section 40A(3) of the I.T. Act, 1961.

53. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that no details of the expenditure were provided. Cash payments were made by the employees, but not proved. In the absence of basic details, capital expenses cannot be allowed.

54. We have considered the rival submissions. As regards amount of Rs.13,55,918/- the assessee explained that it has Office at Ambavane village near Taluka Mulshi and there is a limited banking facility available, therefore, cash payment have been made. The DRP however noted that there is no provision under Rule 6DD of the I.T. Rules, 1962, as per which, cash payments are allowed in case of

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limited availability of banking facilities. The findings of the DRP are correct. The assessee did not file any evidence for any exceptional circumstances to prove that cash was insisted by the parties and that it is a case where no banking facilities are available on the day of the payment. The Special Audit report also suggest that disallowance of the amount in question be made in current year i.e., assessment year under appeal. Therefore, Section 40A(3) of the I.T. Act, 1961, applies to the amount of Rs.13,55,918/- We, confirm the Orders of the authorities below to that extent. However, as regards payment of Rs.39,58,925/- the assessee has explained that it has made an agreement with M/s. Aishwarya Enterprises for purchase of land on assessee's behalf. The said party has done the work for the assessee. According to the agreement, the assessee was required to make payment in cheque to the said party and accordingly, the assessee had made a payment in cheque only. The assessee further explained that the said party M/s. Aishwarya Enterprises has made further payment to the farmers, partly in cash and partly through cheque.

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Therefore, these were independent agreements between Assessee and M/s. Aishwarya Enterprises and further between M/s. Aishwarya Enterprises and Farmers (sellers). Therefore, there is no violation in the case of assessee as no cash payment have been made by the assessee. Even in case, it may presume that payment is made on behalf of assessee partly in cash through M/s. Aishwarya Enterprises, Rule 6DD(k) (supra) would allow because where the payment is made by any person to his Agent who is required to make payment in cash for goods or services on behalf of such person, then, there would be no violation of provisions of Section 40A(3) of the I.T. Act, 1961. The genuineness of the payment to M/s. Aishwarya Enterprises have not been doubted by the authorities below, therefore, in such circumstances, there would be no violation of Section 40A(3) of the I.T. Act, 1961. We, accordingly, set aside the Orders of the authorities below and delete the addition of Rs.39,58,925/-.

54.1. In the result, Ground No.18 of the appeal of Assessee is allowed whereas Ground No.19 of appeal of the

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Assessee is dismissed.

Ground No.20 :

55. This issue relates to notional interest of Rs.6.24 crores. The AO has proposed the addition of the aforesaid amount on account of notional interest @ 12% on the advance of Rs.52 crores. The assessee however explained that it is in the business of real estate and provided advance to M/s. Charita City Homes Jaunpur Pvt. Ltd., which was prospective seller that promised the assessee to provide with a contiguous land either by themselves or through the owners/title holders identified by them. The said transaction was purely business in nature and notional interest cannot be disallowed. The DRP noted that tax payer has made advance of Rs.52 crores pursuant to MOU signed between the parties, but assessee failed to furnish documentary evidences in support of the same. The objection was, therefore, dismissed and addition was confirmed.

56. Learned Counsel for the Assessee reiterated the

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submissions made before the authorities below and submitted that advance was made for business purpose. PB-455 is MOU Dated 11.02.2010 and further MOU is filed at page 462 of the paper book. According to MOU, the advance was given for business purpose and it was provided that in case the party fails to transfer the clear title or that in any circumstances assessee is divested of the land under purchase, then the amount shall be recovered from the seller with interest @ 24% p.a. He has submitted that assessee has sufficient funds, therefore, no notional disallowance can be made. PB-3 is balance sheet as on 31.03.2012 which provides that assessee has share capital of Rs.931.87 crores and has huge reserves and surplus. Therefore, no notional disallowance should be made. He has submitted that assessee had paid the advance even as per Order of the AO for which source was asked for. Since assessee has sufficient capital and free reserves, therefore, addition is wholly unjustified. PB-505 is the details of advance granted to M/s. Charita City Homes Jaunpur Pvt. Ltd., out of the own funds of the assessee. It provides that

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as on 31.03.2010 assessee after giving part advance, has capital balance of Rs.441.44 crores and as on 12.03.2012 after giving the impugned advance to the aforesaid party, assessee still had availability of the capital balance of Rs.853.62 crores. He has, therefore, submitted that addition is wholly unjustified.

57. On the other hand, Ld. D.R. relied upon the orders of the authorities below and submitted that clarification on the above amounts have not been explained. No documentary evidences have been filed of other parties. Purpose of the lands to be purchased is not explained. The details of availability of the sufficient funds needs verification.

58. After considering the rival submissions, we do not find any justification to make the aforesaid addition. The assessee produced copies of the MOU through which advance was given for the purpose of business to M/s. Charita City Homes Jaunpur Pvt. Ltd. There is no provision under the Income-tax Act to make addition on account of

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charging of notional interest. The assessee also explained that it has availability of sufficient funds, therefore, when amount of advance have been given out of the capital and reserves available with the assessee, there is no question of charging notional interest on the advance. Complete details are available on record which have not been rebutted through any evidence or material on record, therefore, there were no justification to make the above addition. We rely upon the decision of Hon'ble Bombay High Court in the case of Reliance Utility and Power Limited 313 ITR 340 and decision of Hon'ble Supreme Court in the case of Munzal Sales Corporation 298 ITR 298. We, accordingly, set aside the Orders of the authorities below and delete the addition.

58.1. In the result, Ground No.20 of appeal of assessee is allowed.

Ground No.21 :

59. This issue relates to long outstanding imprest of Rs.4,14,944/-. The AO proposed to make the impugned addition on account of notional interest @ 12% on the advance of Rs.34,57,864/-. The AO observed that the above

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amount is outstanding imprest amount *"advance from period prior to April, 2011 as has not been cleared during the year".* Therefore, 12% interest was charged and addition was made. The assessee explained that Rs.28 lakhs was given as short term loan to Mr. P.P. Dash, CFO of the assessee-company for his personal use which was subsequently paid. The financial assistance was provided to the key managerial person and the same in turn always help organisation and therefore, no notional interest can be disallowed. Rs. 6 lakhs was provided as advance to vendor and consultants. Therefore, interest cannot be disallowed. Assessee has sufficient funds with it. Therefore, no notional interest should be added. The DRP has however confirmed the addition because no documentary evidences have been produced in this regard.

60. After considering the rival submissions, we are of the view that the issue is same as have been decided on ground No.20. Since assessee has sufficient funds available with it and if advance given out of the same, then, no addition on account of charging of notional interest could

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be made. We, accordingly, set aside the orders of the authorities below and delete the addition.

60.1. In the result, Ground No.21 of the appeal of assessee is allowed.

Ground No.22 :

61. This issue relates to diversion of interest bearing funds of Rs.90,13,188/-. The AO disallowed the above interest expenditure of Rs.90,13,188/- The AO observed that assessee had obtained Rs.109.01 as OD from Axis Bank. Out of which, Rs.107.41 crores were transferred to group concern as interest free advance. Therefore, interest pertaining to Rs.107.41 crores should be disallowed. Further, assessee had transferred its Axis Bank F.D. to business SPV and therefore, interest expenditure cannot be netted-off against the interest income.

61.1. The assessee submitted that it had received interest free fund from SICCL. The balance left over with the assessee was parked with FDs. Sahara Adventure Sports Limited ("SASL"), one of the group company of the

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assessee required funds. Since the assessee has deep interest in SASL, the assessee had obtained bank OD against the pledge of the aforesaid FDs and transferred loan to SASL. In a nutshell, assessee had transferred its interest free fund to its group company, therefore, interest cannot be disallowed. The assessee had not transferred its Axis Bank FD to business SPV and therefore, interest expenditure can be netted-off against the interest income. During the year under consideration, assessee had received interest income of Rs.2,18,73,424/- against those FDs and adjusted interest expenses amounting to Rs.90,13,188/-. The assessee also have a business agreement with SASL for the Brand Promotion of “Aamby Valley”, revenue sharing with IPL Franchise and allotment of equity shares in range of 10% to 15% . Thus, the assessee has business interest in SASL and loan provided for the business purpose of the assessee, therefore, interest should not be disallowed. The AO made the addition without considering the correct factual position. The DRP however confirmed the proposed order of the AO The DRP noted that the facts shows that

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interest expenses incurred by assessee on OD facility is not for the purpose of business of assessee but for the purpose of advance of funds to SASL. Since the assessee has incurred interest expenses for the purpose of advancing interest free loan to the sister concern, therefore, same is not an allowable expenses in the hands of assessee. The objection of assessee was rejected and addition was confirmed.

62. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that DRP did not dispute the claim of assessee. The assessee invested in sister concern for business purpose only. Assessee has own sufficient funds for making the investment. There were written agreement between the parties which is not disputed. AO cannot dictate the assessee as to how it has to conduct its business activities. Investment was also made for brand promotion of the assessee. The Memorandum of Understanding ("MOU") between the parties have not been disputed. Learned Counsel for the Assessee also referred to details in the

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paper book to show that addition is wholly unjustified.

63, On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that there is a direct nexus between the borrowed funds and the amount diverted for non-business purposes with Associated Enterprises. There is no documents provided by assessee that advance was necessary for business of assessee. There were no business purposes. Therefore, addition was correctly made.

64. We have considered the rival submissions. Learned Counsel for the Assessee referred to page-82 of the assessment order in which the assessee explained that assessee-company holds investment to the tune of Rs.170 crores in SASL which is group company of the assessee group. Further, the assessee has executed MOU with SASL on 09.03.2010 which is engaged in business of developing and promoting various sports activities. The said entity was in process of bidding for new IPL Franchise team for Twenty-Twenty Cricket Competition organized by the Board of Control for Cricket in India. On becoming

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successful bidder, the aforesaid party has entered into an understanding with the assessee for promotion of brand name of assessee "Aamby Valley" along with its various business verticals, revenue sharing with the IPC Franchise and allotment of equity share capital in the range of 10% to 15% to the party of the First part of its nominee, based on Fair Market Value acceptable to the First Party. Due to this MOU assessee had made a commitment to give financials assistances for business purposes. It was, therefore, explained that assessee had advanced the loan to SASL for expansion of business operations. These facts clearly prove that the assessee has a business interest in SASL and for the business purposes assessee has made advance to the said concern. The assessee also explained that prior to it assessee had received interest free funds from SICCL. The balance left over with the assessee was parked in the FDs. Against this FD, OD was obtained from the Bank. Since the source of the advance money to SASL was interest free fund received from SICCL, therefore, there is no question of disallowance of interest against the assessee. Further,

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assessee has sufficient funds as noted in the Ground No.20, therefore, it would prove that assessee make advances even out of the free funds available with it. The totality of the facts and circumstances of the case and explanation of assessee clearly show that assessee made investments in group company for business purposes, therefore, addition is wholly unjustified. We, accordingly, set aside the Orders of the authorities below and delete the addition.

64.1. In the result, Ground No.22 of the appeal of the assessee is allowed.

Ground No.23(a) :

65. This issue relates to addition of Rs.6,48,65,327/- The AO has proposed disallowance of Rs.6,38,30,357/- on account of amount paid by the assessee as development charges is excessive. The AO observed that the amount paid by the assessee is excessive, therefore, 50% of the amount were disallowed in absence of proper justification. The assessee submitted that it has not taken a ground in

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respect of addition made on account of closing stock of Rs.10,34,970/-. Assessee had entered into an agreement with M/s. Aishwarya Enterprises. The said party agreed to provide services of procurement of land and also development thereof i.e., leveling, fencing, bush cutting and marketing etc. The AO without providing any reasons have made an adhoc addition by disallowing 50% of development charges of Rs.12.76 crores. The DRP observed that assessee has acquired lands from M/s. Aishwarya Enterprises and also paid development charges towards services of leveling, fencing, bush cutting and marketing etc. These expenses were included in the cost of the land and accounted for. The assessee reiterated that the amount was paid for the purpose of business and according to the agreement, the said party is responsible for removing Kul, Boja, Navin Shart, private forest and rehabilitation. The assessee further submitted that whenever a land is initially purchased, it is uneven with trees, bushes, ditches etc., and is required to be worked upon and developed so that it can be used for business purposes. Therefore, development

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expenses were incurred on the same. The DRP however did not accept the contention of assessee because as per MOU M/s. Aishwarya Enterprises is responsible for removing Kul, Boja, Navin Shart, private forest etc., from the proposed land. Therefore, when the amount is already included in the cost of the land, no further amount is to be allowed as deduction. The objection of the assessee was rejected.

66. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and referred to PB-472 which is an agreement in question with M/s. Aishwarya Enterprises and submitted that the removal of Kul, Boja, Navin etc., is the term for clearing the title and that PB-480 to 485 are the invoices issued by M/s. Aishwarya Enterprises for completion of the development work in the lands newly purchased by Company which includes escalation, leveling, making, fencing, construction of compound wall, bush cutting etc. He has, therefore, submitted that development work is different from the work mentioned in the MOU with the said party. So, there is a

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wrong appreciation of the facts. The AO in the draft order did not dispute the genuineness of the payment into the matter.

67. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that development work is covered in MOU and only 50% have been disallowed by the authorities below. It is not an independent work. The DRP may be given an opportunity to verify the details mentioned in the MOU.

68. After considering the rival submissions, we are of the view that addition is wholly unjustified. The assessee has admittedly entered into the MOU with M/s. Aishwarya Enterprises for procurement of the land for the business purpose of the assessee. In the MOU it is mentioned that the said party shall be responsible for removing the cull Kul, Boja, Navin, Shart, private forest and rehabilitation etc., Permission for selling and regularizing such lands shall be taken by M/s. Aishwarya Enterprises from the concerned Government Authorities at his own cost. This itself proves that the responsibility as explained in the MOU upon the

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said party was with reference to procurement of the land with clear title. It has no connection with the development work which has assigned to the party separately. As per the invoices issued by M/s. Aishwarya Enterprises for payment of business expenditure, the amount was spent by them with regard to leveling, fencing, construction of compound wall, bush cutting etc. These terms are nowhere mentioned in the MOU. Therefore, addition was made on wrong premise against the assessee. It may also be noted here that the authorities below have allowed 50% of the expenditure and as such genuineness of the same incurring of the expenditure have not been doubted. If the entire amount was to be incurred by M/s. Aishwarya Enterprises, there were no reason for the authorities below to allow 50% of the deduction in favour of the assessee. In this view of the matter, we are of the view that the amount on development work have been incurred by the assessee was wholly and exclusively for the purpose of business which is different from the details mentioned in the MOU. We, accordingly, set

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aside the Orders of the authorities below and delete the entire addition.

68.1. In the result, Ground No.23(a) of the appeal of assessee is allowed.

Ground No.23(b) :

69. This issue relates to addition of Rs.6,20,30,371/- being amount incurred towards certain business and administrative expenditure. The assessee submitted that out of Rs.7.92 crores the assessee has provided evidences to the extent of Rs.1,71,98,273/-. However, the AO disallowed the entire amount without providing further opportunity to the assessee. The DRP noted details of the expenses in the order and found that assessee has not been able to provide documentary evidences which is also mentioned by the Special Auditor in the report. Therefore, objections of assessee was rejected and this ground of appeal of assessee was dismissed by the DRP.

70. After considering the rival submissions, we are of the view that the matter requires reconsideration at the level

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of the AO/TPO. Learned Counsel for the Assessee submitted that complete details were filed before AO and is also noted by the DRP in the order. He has, therefore, suggested that matter may be remanded to the AO/TPO for fresh adjudication which is also not disputed by the Ld. CIT-D.R. Accordingly, we set aside the Orders of the authorities below and restore this issue to the file of AO/TPO for fresh adjudication in accordance with law. Assessee is directed to cooperate with the AO/TPO and the AO/TPO shall give reasonable, sufficient opportunity of being heard to the assessee.

70.1. Ground No.23(b) of appeal of assessee is allowed for statistical purposes.

Ground No.23(c) :

71. This issue relates to Commission and brokerage expenses of Rs.1,13,81,000/-. The AO observed that assessee has failed to justify the claim of the expenditure. The assessee however submitted that it had booked income of Rs.65 lakhs in A.Y. 2008-2009 and Rs.61 lakhs in A.Y.

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2009-2010 against which assessee claimed Rs.3,51,000/- during the year under appeal. As one of the conditions that the management should approve the invoices is fulfilled during the year and the management has approved the same, therefore, it should be allowed as deduction. The assessee acquired one premises in BKC during the year. Assessee paid the rent, deducted TDS on the same and also had a right to use the said premises. For the said premises, assessee had paid brokerage expenses to Colliers International (India) Property Services Ltd., amounting to Rs.1,10,30,000/-. Therefore, the same should be allowed to the assessee. Further, no other SPV had their Registered Offices at the said premises. Therefore, the property is being used for business purposes. The AO asked the assessee to justify the expenditure incurred for commission and brokerage. The assessee reiterated the same submissions. However, DRP confirmed the addition.

72. Learned Counsel for the Assessee reiterated the submissions made before the authorities below. He has referred to PB-524 which is invoice of Rs.3,51,000/- for the

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amount incurred for the purpose of business. PB-525 onwards are the details which are incurred/paid to M/s. Colliers International (India) Property Services Ltd., and details of the same have been filed in the paper book. Learned Counsel for the Assessee, therefore, submitted that that this fact may be verified by the A.O. He has submitted that property in question was used for the purpose of business.

73. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that the invoice was in the name of Aamby Valley City i.e., SPV, so the expenses was to go to it. These are not allowable expenses.

74. After considering the rival submissions, we are of the view that the matter requires reconsideration at the level of the AO/TPO. PB-524 is invoice dated 12.01.2012 though in the name of Aamby Valley City, but it was with respect to commission for Aamby Valley Limited. Further, details with regard to brokerage paid to Colliers International (India) Property Services Ltd., the assessee explained that this

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property was obtained on rent and it was used for the purpose of business. Therefore, commission and brokerage was paid for the same. The details have not been examined by the authorities below. We are, therefore, of the view that the matter requires reconsideration at the level of the AO/TPO. We, accordingly, set aside the orders of the authorities below and restore this issue to the file of AO/TPO for fresh adjudication as per Law, by giving reasonable, sufficient opportunity of being heard to the assessee.

74.1. Ground No.23(c) of appeal of Assessee is allowed for statistical purposes.

Ground No.23(d) :

75. This issue relates to advertisement and sales promotion and business promotion expenses of Rs.1,08,81,770/-. The AO proposed the above disallowance on account of advertisement and sales promotion and business promotion expenses. The AO observed that proportionate expenses are not allowable as it benefits the business of SPVs and accordingly, proportionate expenses

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should have been transferred to respective business SPVs in proportion of revenue earned by business SPVs. The assessee however submitted that it has sponsored an event "Indian Bridal Week" for promoting its brand "Aamby Valley". These expenses are directly related to the business of the assessee and there is a direct nexus to the revenue. As such, the revenue increased from Rs.87.44 Crores in preceding year to Rs.111.70 crores in the current year. The benefit accrued to the business SPVs is entirely irrelevant. The entire expenditure has been incurred on account of commercial expediency. The DRP however, noted that the above expenditure are common in nature, benefit of which would directly or indirectly passed on to business SPVs in respect of which no income is also charged by the Company from respective business SPVs. Show cause notice was given to assessee as to why proportionate expenses should not be disallowed. It was also noted that assessee has incurred operational expenses (hospitality) which should be transferred to SPVs. The authorities below, therefore,

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proportionately made disallowance and objection of assessee has been rejected.

76. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that there is no dispute that expenses were incurred by the assessee. He has submitted that even if third party got benefit out of the same, it would be irrelevant. Therefore, no disallowance should be made. He has relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Yum Restaurants India P. Ltd., (2015) 371 ITR 139 (Del.) in which it was held as under :

> *"In examining a claim for deduction under section 37(1) of the Income-tax Act, 1961, on the ground of commercial expediency, what is to be seen is not whether it was compulsory for the assessee to make the payment but whether it was of commercial expediency. As long as the payment is made for the purposes of the business and not by way of penalty for infraction of any law, the payment would be allowable as a deduction. The commercial expediency of a businessman's decision*

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to incur a particular expenditure cannot be tested on the touchstone of strict legal liability to incur such expenditure. Such decisions are to be taken from a business point of view and have to be respected by the authorities, regardless of the fact that it may appear, to the latter, to be expenditure incurred unnecessarily or avoidably,"

76.1. He has also relied upon decision of Hon'ble Delhi High Court in the case of CIT vs. Discovery Communication India (2015) 370 ITR 57 (Del.) in which it was held as under:

"Held, dismissing the appeals, that the assessee was earning revenue in view of the functions being performed. Expenditure incurred on advertisement was clearly relatable and laid out for the purpose of business of the assessee and was not extraneous or unconnected with it. Consequently, it could not have been disallowed on the ground that it was not laid out or incurred wholly or exclusively for the purpose of business. One of the functions to be performed by the

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assessee being to incur the advertisement and promotion expenditure, the expenditure incurred for the purpose should be allowed under section 37(1) as incurred wholly and exclusively for purpose of the assessee. However, adequate compensation/price should be paid for the same by the associated enterprise, with reference to the functions, risk and assets. In case the assessee was not being paid adequate consideration or compensated by its associated enterprise, necessary adjustments could have been made by the Transfer Pricing Officer in accordance with the Act. The Transfer Pricing Officer did not deem it appropriate and proper to make any adjustment in respect of these international transactions. The price received by the assessee for the international transaction was accepted by the Transfer Pricing Officer. Therefore, the advertisement and promotion expenditure as one of the functions which the assessee was mandated and required to perform for the purpose of its business and would be allowable as a

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business expenditure under section 37(1)."

76.2. He has also relied upon decision of Hon'ble Supreme Court in the case of Lachminarayan Madan Lal vs. CIT, West Bengal AIR 1973 SC 2330.

77. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that sister concern is benefitted out of these expenditure. No third party involved. AO on the basis of prorata turnover correctly made disallowance. The case law submitted by assessee are distinguishable.

78. After considering the rival submissions, we are of the view that the matter requires reconsideration at the level of the AO/TPO. The assessee has incurred expenses on account of advertisement and sales promotion and business promotion expenses. The assessee-company has sponsored the events of "Indian Bridal Week" and "Vivah Home Exhibition". The assessee explained that these events were meant for promotion of its Brand "Aamby Valley". The assessee also explained that its turnover have increased due

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to this programmes and as such the amount was incurred wholly and exclusively for the purpose of its business. It is well settled Law even if third party has got benefit out of the expenditure incurred, the deduction under section 37(1) cannot be denied to the assessee. We, accordingly, set aside the Orders of the authorities below and restore this ground of appeal to the file of AO/TPO for fresh adjudication in accordance with law. The AO/TPO shall give reasonable, sufficient opportunity of being heard to the assessee.

78.1. In the result, Ground No.23(d) of the appeal of Assessee is allowed for statistical purposes.

Ground No.23(e) :

79. This issue relates to disallowance of Rs.39,66,711/- **[**Rs.6,19,62,452/- (-) Rs.5,79,95,741/- offered by the assessee**]** on account of prior period expenses during the year under consideration. The AO observed that the contention of assessee has no merit as the expenses are to be claimed in the year to which they pertain. The assessee however submitted that it has filed the appeal only

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on the addition of Rs.39,66,711/-. The assessee has not claimed any expenditure in earlier year. The tax rate is uniform in both the assessment years. The assessee had wrongly offered prior period income amounting to Rs.5,90,341/-. The said income was reversal of excess provision of expenses which were disallowed by the assessee in previous year. The DRP however noted that such deduction can be allowed on mercantile basis in the year when the liability was determined and crystallized. The contention of assessee was found to have merit. Therefore, AO was directed to verify the year in which the income has actually become due and the expenses have crystallized accordingly to tax the income if it has become due or accrued and allow the expenses if they have crystallized, in A.Y. 2012-2013 under appeal. The objection of assessee was accordingly disposed of.

79.1. The AO in view of the directions of the DRP considered this issue with respect to prior period income of Rs.8,18,12,651/-. Explanation of assessee was called for. Explanation of assessee is noted in the assessment order in

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which assessee submitted that it has engaged in real estate activities and construction and sales of land and Villas. Out of total expenditure of Rs.4,20,40,276/- booked under prior period expenses head, Rs.4 crores pertains towards reversal of the sale of land. As regards amount in question of Rs.39,66,711/- it was submitted that assessee has not claimed any expenditure in preceding years. The assessee also offered the amount of Rs.5,79,95,741/- for taxation purposes in order to avoid protracted litigation. A.O. again considered the issue of disallowance of Rs.39,66,711/- **[**Rs.6,19,62,452/- (-) Rs.5,79,95,741/- offered by assessee**]** on account of prior period expenses during assessment year under appeal. The AO noted that assessee has offered the above amount for taxation purposes and regarding expenses of Rs.39,66,711/- the assessee stated that these should be allowed in the year under consideration because of expenses crystallized during the year. The contention of assessee was not found having any merit. It was, therefore, rejected and addition was maintained.

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80. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and referred to PB-4 to show other expenses of Rs.64.75 crores shown in the income and expenditure account. PB-38 is prior period expenses of Rs.3,97,75,919/-. He has submitted that profit was declared after taking income and expenses.

80.1. Learned Counsel for the Assessee moved an application for admission of additional ground on the same issue with regard to claim of deduction of expenditure of Rs.2,02,71,219/-. It is submitted in the application that the amount of Rs.2,02,71,219/- was added back by the assessee in computation of income as prior period expenses which is allowable as deduction being expenditure pertaining to the year under consideration. Learned Counsel for the Assessee, therefore, submitted that since the claim is bonafide and all the documentary evidences are on record, therefore, same may be admitted for the purpose of disposal of Ground No.23(e) of the appeal of the assessee. Learned Counsel for the Assessee, therefore, submitted that matter may be remanded to the AO/TPO for fresh consideration.

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81. The Ld. D.R. also suggested that the matter may be sent back to the AO/TPO.

82. After considering the rival submissions, we are of the view that the matter requires reconsideration. The assessee claimed that it has not made any claim of expenditure in earlier year and that appeal is filed for deduction of the aforesaid amount only. The assessee claimed that the amount was crystallized during the assessment year under appeal. Therefore, it is an allowable deduction. No findings have been given by the AO on this issue despite directions given by the DRP to verify the claim of the assessee and in case expenses have crystallized in assessment year under appeal, then issue may be allowed in favour of the assessee.

82.1. Since the additional ground is raised on this issue and according to Learned Counsel for the Assessee the amount was already added back by assessee being prior period expenses. therefore, we admit the additional ground of appeal for the purpose of adjudication. Further, no findings have been given by the authorities below.

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Therefore, this shall have to be adjudicated by the AO/TPO. Since this issue have not been properly adjudicated by the authorities below, therefore, entire matter including the additional ground shall have to be restored to the file of AO/TPO for decision afresh in accordance with law. We, accordingly, set aside the Orders of the authorities below and restore this ground of appeal and additional ground to the file of AO/TPO for fresh adjudication in accordance with law. The AO/TPO shall given reasonable, sufficient opportunity of being heard to the assessee before deciding the issue along with additional ground of appeal as per Law. Accordingly, ground No.23(e) of appeal of Assessee is allowed for statistical purposes.

82.2. In the result, Ground No.23(e) of the appeal of Assessee is allowed for statistical purposes.

Ground No.23(f) :

83. This issue relates to addition of Rs.29,66,510/- on account of property tax paid by the assessee, but bill not in its name. The AO noted that in the absence of proper

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documentary evidences, the contention of assessee is not tenable. The assessee submitted that it was demerged from the Sahara India Commercial Corporation Limited ("SICCL") during F.Y. 2006-2007. The land was transferred to the assessee- company pursuant to approved demerger scheme. However, the Sarpanch of Gram Group Panchayat had not changed the name in its record and continuously raised the invoice in the name of SICCL. The AO noted that since property tax receipt is not in the name of assessee, therefore, same cannot be allowed as deduction in favour of assessee. The assessee however, clarified that it was demerged from Sahara India Commercial Corporation Ltd., (SICCL) in the year 2006 but in the records of the Government Department, the name of the earlier Company was continued. The assessee submitted that property tax was paid by the assessee and since asset was actually part of the property of the assessee for which property tax was paid, therefore, it was an allowable deduction. The DRP noted that assessee has not produced the evidence that property is appearing as an asset in the name of the

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assessee and therefore, objection of the assessee was rejected and addition was confirmed.

84. After considering the rival submissions, we are of the view that the matter requires reconsideration at the level of the AO/TPO. Learned Counsel for the Assessee referred to PB-500 which is bill in question in the name of SICCL. PB-498 is the letter filed with the Gram Panchayat for change of the records as per demerger as approved by the Hon'ble Bombay High Court. PB-526 is the current receipt of the same property issued in the name of assessee-company in respect of the same property. Ld. D.R. submitted that matter may be restored to the file of AO/TPO for verification of these facts. Considering the submissions of both the parties in the light of material produced now, it is clear that now the property tax has been paid of the same property by the assessee. Therefore, this fact could be verified by the AO/TPO and thereafter pass a reasoned order on the same. We, accordingly, set aside the Orders of the authorities below and restore this issue to the file of AO/TPO with a direction to re-adjudicate the issue as per law by giving

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reasonable, sufficient opportunity of being heard to the assessee. Accordingly, Ground No.23(f) of the appeal of assessee is allowed for statistical purposes.

84.1. In the result, Ground No.23(f) of the appeal of assessee is allowed for statistical purposes.

Ground No.23(g) :

85. This issue relates to addition of Rs.18,18,684/- being the amount incurred towards certain business and administrative expenditure for which bills were not available and was not supported by documentary evidences. The assessee submitted that assessee provided the evidence to the extent of Rs.20,38,350/- out of the total amount of Rs.38,57,034/-. It was submitted that AO did not allow proper opportunity to the assessee on this issue. Therefore, addition is unjustified. The assessee wished to provide balance sheet and other details, but in the absence of documentary evidences of the remaining amount, the DRP confirmed the addition.

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86. After considering the rival submissions, we are of the view that the matter requires reconsideration at the level of the AO/TPO. Learned Counsel for the Assessee submitted that complete details were filed before the authorities below which have not been considered and that complete details are mentioned even in the order of the DRP. The Ld. CIT-D.R. suggested that the matter may be sent back to the AO/TPO for verification of the facts. In this view of the matter, we set aside the Orders of the authorities below and restore this issue to the file of AO/TPO with a direction to re-decide this issue as per Law by verifying the facts from record by giving reasonable, sufficient opportunity of being heard to the assessee. Ground No.23(g) of appeal of Assessee is allowed for statistical purposes.

86.1. In the result, Ground No.23(g) of the appeal of Assessee is allowed for statistical purposes.

Ground No.23(h) :

87. The AO proposed the disallowance at Rs.5,86,819/- on account of interest earned on indirect tax.

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The assessee submitted that it had paid interest in respect of delay in payment of indirect tax i.e., Service Tax and VAT. Though the assessee has shown the same under the Head "Interest on TDS" but its nature cannot be changed. The DRP however noted that the interest is penal in nature and relied upon decision of the Hon'ble Supreme Court in the case of Prakash Cotton Mills P. Ltd., vs. CIT (1993) 201 ITR 684 (SC) in the context of liability of interest on delayed payment of P.F. dues, after examining the relevant statutory provisions affirmed the view of the Hon'ble High Court that the subject interest involved a component of both interest as well as penalty. Therefore, addition was confirmed.

88. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that the decision relied upon by the DRP in the case of Prakash Cotton Mills P. Ltd., (supra) is of P.F. He has relied upon the Order of ITAT, Kolkata Bench in the case of DCIT, Circle-3(1), Kolkata vs. M/s. Narayani Ispat Pvt. Ltd., Kolkata in ITA.No.2127/Kol/2014 Dated 30.08.2017 in which the issue was with regard to interest

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paid on late deposit of Service Tax and TDS respectively. The Tribunal noted that the issue of delay in payment of Service Tax is directly covered by Judgment of the Apex Court in the case of Lachmandas Mathura vs. CIT 254 ITR 799 (SC) which is decided in favour of the assessee wherein it has been held that interest on arrears of tax is compensatory in nature and not penal. The Tribunal, therefore, held that the interest expenses on delayed payment on Service Tax is an allowable deduction. Learned Counsel for the Assessee also relied upon the Order of ITAT, Mumbai Bench in the case of Chander K Raichandani, Mumbai vs. ACIT, Circle-2, Kalyan in ITA.No.799/Mu/2012 dated 08.02.2013 in which the Tribunal similarly held that interest payment of MVAT is an allowable deduction under section 37(1) of the I.T. Act, 1961, following the decision of Hon'ble Supreme Court in the case of Lachmandas Mathura vs. CIT (supra).

89. On the other hand, Ld. D.R. relied upon the Orders of the authorities below.

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90. After considering the rival submissions, we are of the view that the interest paid in respect of delay in payment of indirect tax i.e., Service Tax and VAT is not penal in nature. The decisions relied upon by Learned Counsel for the Assessee squarely apply to the facts and circumstances of the case. We, accordingly, set aside the Orders of the authorities below and delete the entire addition. Ground No.23(h) of appeal of Assessee is allowed.

90.1. In the result, Ground No.23(h) of appeal of Assessee is allowed.

Ground No.23(i) :

91. This issue relates to consultancy charges paid to M/s. Air One Aviation Pvt. Ltd., of Rs.5,51,500/-. The AO observed that this expenditure is not relatable to assessee's business as the business segment related to Aviation activity has been transferred to business SPVs. Therefore, it was proposed to be disallowed. The DRP on the same reasoning confirmed the addition. Learned Counsel for the Assessee submitted that this fact may be verified by the AO

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and deduction may be given either to the assessee or to Aamby Valley Airport SPVs.

92. Ld. D.R. suggested that the matter may be remanded to the AO for verification of the facts accordingly.

93. After considering the rival submissions, we are of the view that the matter requires reconsideration at the level of the A.O/TPO. The AO observed that the expenditure was not relatable to assessee's business as the expenditure relates to aviation activity which have been transferred to business SPVs. This fact may be verified and in case this expenditure is connected with business SPVs, same could not be allowed in the case of assessee. However, the same is allowable in the hands of SPVs. AO shall pass Order accordingly, by giving reasonable, sufficient opportunity of being heard to the assessee. Ground No.23(i) of the appeal of Assessee is allowed for statistical purposes.

93.1. In the result, Ground No.23(i) of the appeal of Assessee is allowed for statistical purposes.

Ground No.23(j) :

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94. This ground relates to professional charges. The AO proposed disallowance of Rs.3 lakhs claimed as professional charges paid for defending criminal case against an employee of the assessee. The AO observed that expenses related to defending criminal case against an employee filed by a guest who visited assessee's place can not be said to be business expenditure. The assessee however explained that one of the customer made an allegation for unethical behavior of employee during the business hour. To defend the case, assessee-company had paid Rs.3 lakhs to criminal lawyer. The said expenditure was incurred to protect its own business and maintain the goodwill and therefore, the same is an allowable deduction. The DRP, however, noted that such expenditure cannot be allowed against the income from business and profession because it was a criminal case filed against the employee in his personal capacity. The addition was accordingly confirmed.

95. After considering the rival submissions, we are of the view that no interference is required in the matter. The

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AO in the assessment order has recorded the submission of the assessee in which it was explained by the assessee that during the year under consideration, a guest who visited assessee's place filed a complaint against an employee of the assessee-company of his alleged unethical behavior during working hours with the said guest. The assessee were defending a criminal case pending under section 376 of the IPC. Learned Counsel for the Assessee also admitted the fact that it was a case of rape under section 376 IPC registered against the employee of the assessee. According to Section 37 of the IT Act an expense could be allowed deduction, if the same is incurred wholly and exclusively for the purpose of business of the assessee. It is not business activity of the assessee or its employee to commit rape upon a guest. The crime is always committed by a person and in the present case, offence of rape is committed by an employee in his personal capacity, therefore, it could not be treated that the amount paid to a criminal lawyer to defend an employee was incurred for business purpose. The authorities below, therefore, correctly denied the deduction

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of the same. Learned Counsel for the Assessee relied upon the Orders of the I.T.A.T Mumbai Bench in the case of Vivek P. Talwar vs. ACIT 8 taxmann.com 268 in which it was held that deductibility of legal expenses will depend nature and purpose of legal proceedings in relation to business whose profits are under computation and cannot be effected by final out-come of that proceedings. This order will not support the case of the assessee because committing an offence of rape by an employee of the assessee-company could never be treated to have any relation with the business activity of the assessee. Ground No.23(j) of the appeal of the assessee is accordingly dismissed.

95.1. In the result, Ground No.23(j) of the appeal of the assessee is accordingly dismissed.

Ground Nos. 4 and 5 :

96. Ground No.4 relates to increase in general reserve of Rs.46,999.38 crores considered as income under section 28(iv) of the I.T. Act. Ground No.5 relates to investment

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received on Composite Scheme of Arrangement and Amalgamation considered as income amounting to Rs.26,197.67 crores under section 56(2)(viia) of the I.T. Act, 1961. Both the grounds are inter-connected, therefore, both are decided together.

96.1. On the same ground, the assessee also filed an application for admission of additional ground of appeal on 08.12.2017. The same is reads as under :

> *"The DRP has erred in Law and on facts in directing to add the amount of Rs.46,999.38 crores on account of increase in general reserve on transaction related to the Composite Scheme of Arrangement and Amalgamation, to book profit of the assessee for computing the tax under section 115JB."*

96.2. The Learned Counsel for the Assessee submitted that all the facts and supporting documents are available on record on this additional ground which is legal in nature and connected with Ground Nos. 4 and 5 of the appeal above. He has, therefore, submitted that same may be

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admitted and may be decided along with ground Nos. 4 and 5. There is no serious challenge to the submissions of the assessee from the side of the Revenue. Since the additional ground is legal in nature and connected with Ground Nos. 4 and 5 of the appeal, therefore, it is admitted for hearing and disposal of the appeal.

97. The AO considered the taxability on transactions related to Composite Scheme of Arrangement and Amalgamation. Show cause notice was issued to the assessee to clarify regarding taxability on transfer under the scheme and show cause why the net increase in general reserve on overall impact of the Scheme, shall not be taxable in the hands of the assessee-company. The reply of the assessee to the AO and to the Special Auditors is reproduced in the impugned assessment order which reads as under :

> *"In the point number (1.a) of the above notice your honour had asked the assessee to justify why no taxability would arise in the hands of assessee company with respect to the net increase in General Reserve as per the scheme of amalgamation. In respect to the same first and foremost we would like to highlight the brief facts as follow:*
>
> *Aamby Valley Limited ('AVL') had several business verticals namely real estate, golf course, airport, adventure sports etc. The nature of risk and returns involved in each of these businesses is distinct from other and consequently each business or undertaking is capable of attracting a difference set of investors, strategic partners, lenders and other stakeholders. With the above objective in mind, AVL has entered into a scheme of arrangement u/s 391 to 394 of the Companies Ac. Thus pursuant to the said Composite Scheme, various undertaking of AVL along with all related assets, liabilities, employees,*

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development rights, all rights and Licenses, all permits, registration etc. had been transferred to the various separate companies with effect from March 31, 2011 (Appointed Date)on a going concern basis.

The assessee had incorporated Aamby Valley "V" Ventures Pvt Ltd. [herein referred to s "AVVPL"] and various business SPVs on 24.02.2011. As per the scheme, all the assets except land were referred by the assessee company at book value to the recipient companies (i.e. its SPV's) whereas the SPV's have recorded the same at Fair Market Value (FMV). The land was transferred at FMV and the value was obtained from registered value and recorded accordingly. Further, pursuant to the composite scheme, AVPL [from now onwards "amalgamating company"] is a wholly owned subsidiary of the assessee company. In other words, the assessee company becomes 100% holding company of all the Resulting Companies either directly or indirectly. A pictorial representation of the above composite scheme is reproduced below:

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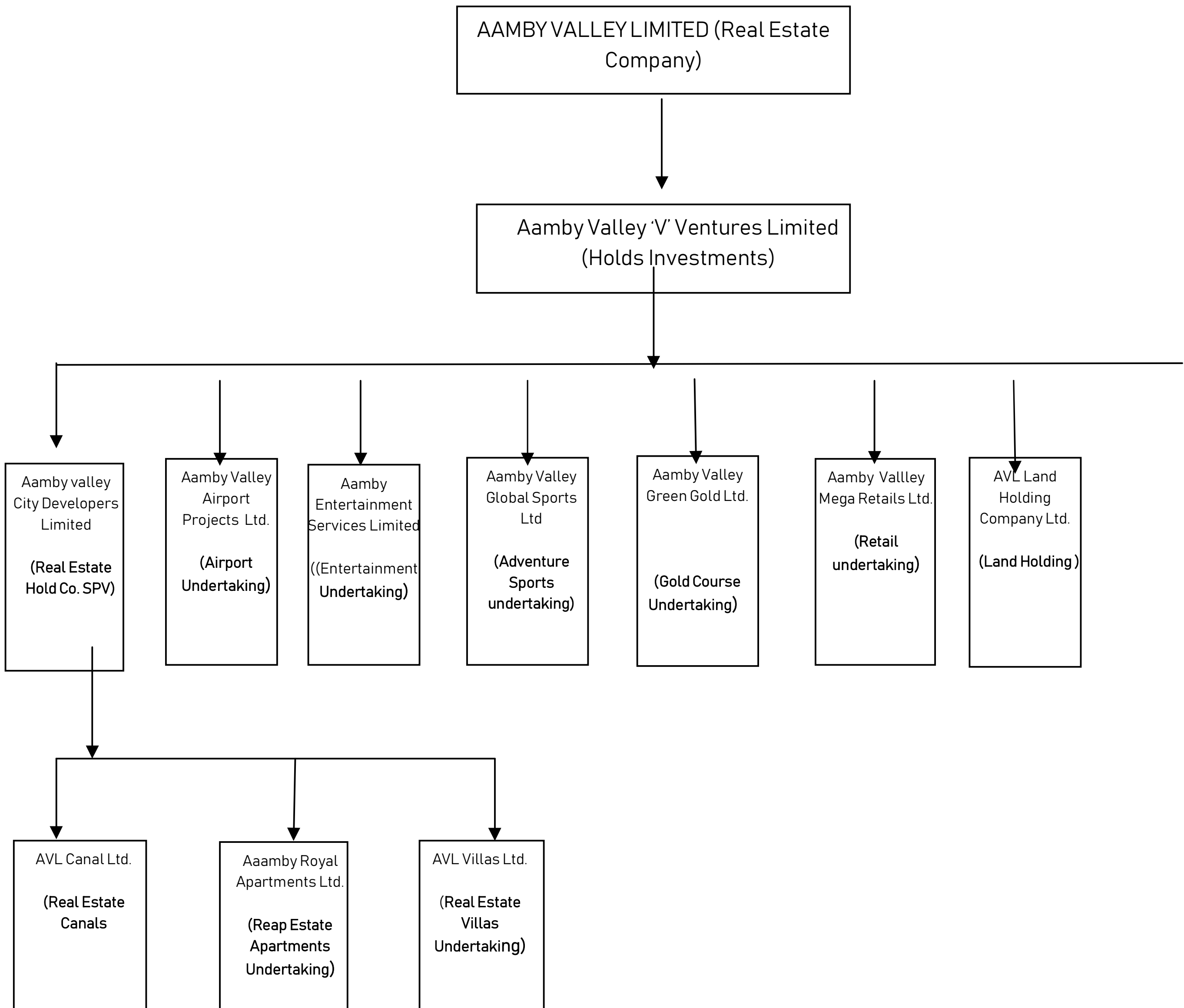

__Notes for above diagram__

1. *Pursuant to the scheme, Aamby Valley 'V' Ventures Limited got merged into Aamby Valley Limited.*

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2. *Pursuant to the scheme, various business undertakings of Aamby Valley Limited have been transferred ongoing concern basis in respective identified business vertical company ("Resulting Companies") w.e.f. 31.03.2011.*

   Further, another pertinent point to note that assessee has transferred the said assets and liabilities to SPV's at NIL Consideration.

   The above is also evident from clause 5 of the scheme dealing with 'Consideration'. The relevant para of the scheme pertaining to the consideration is reproduced below

   CONSIDERATION

   The Business SPVs are indirect wholly owned subsidiaries of the Demerged Company. The Scheme is intended to restructure within the group of companies controlled by the Demerged Company, holding of the demerged undertakings in a more efficient manner with due regard to project specific risks and consistent with the diverse needs of business and does not involve any movement of assets or liabilities to any company outside

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the group controlled by the Demerged company. Hence the Business SPVs shall not be required to pay any consideration/issue any shares to the Demerged Company or its shareholders"

As a result of the above stated facts due to the composite scheme of arrangement, there is a net increase in general reserve of the assessee company.

Now, the moot question which needs your honour's attention is whether the said increase in general reserve is table under any head in the hands of the assessee company.

The taxability in the hands of the assessee company can only be considered under the head capital gains or income from business or profession. As far as the taxability under the head capital gains is considered the special auditors in the special audit report under section 142(2A) of the Income Tax Act for the assessment year 2012-13 at pages 79 to 81 of volume I have themselves observed and commented as under:-

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" ….. In view of the above judicial pronouncements read with the submissions made by the assessee, though the transfer of business undertakings, being capital asset satisfies the conditions precedent for the applicability of charging section viz., section 45(1) of the Act, however in absence of any consideration the computation provisions cannot be applied."

After considering the assessee's contentions & remarks of special auditors, it is crystal clear that the net increase in General Reserve cannot be taxed as capital gains.

The second head of income under which in General Reserve can be subjected to tax in pursuant to the scheme, the assessee company has recorded the assets and liabilities of the AVVPL (including its Investments in the Resulting Company) at respective fair values and the surplus arising on the amalgamation has been credited to General Reserves of the assessee company.

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The relevant para of the scheme as duly approved by the High Court is reproduced as under:-

ACCOUNTING TREATMENT

IN THE BOOKS OF THE TRANFEREE COMPANY

The investments in the equity share capital of the Transferor Company as appearing in the books of accounts of the Transferee Company, shall stand cancelled.

Transferee Company shall record the assets and liabilities pertaining to Transferor Company including its Investments in Business SPVs at the respective fair values as on the Appointed Date;

Inter Company balances and investments shall be cancelled

The difference being excess of assets over liabilities recorded by Transferee Company after giving effect to clause 15.1.3 above will be credited to the General Reserve of the Transferee Company. In case of there

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being shortfall, the same shall be debited to and carried forward as goodwill."

In view of the above, the General Reserves arising in the books of the assessee company is nothing but arising due to recording of Investments held by amalgamating company at their respective fair values.

In other words, we would like to submit that the surplus arising on account of the scheme has been created by recording of assets i.e. Investment held by AVVPL i.e. the amalgamating company at their Fair Market Values. Thus, the said surplus is in the nature of capital account transaction i.e. on scheme of arrangement. Hence neither there is any profit nor is the same realized by the assessee company and hence the question of offering it to income tax does not arise.

Further, it is hereby important to note that the Scheme of Arrangement & Amalgamation between assessee and AVVL had been done as per the provisions of the section

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2(1B) of the Income Tax Act, 1961. We would like to reproduce the said section as under:-

"amalgamation" in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger as the amalgamated company) in such a manner that-

(i) *all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;*

(ii) *all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the*

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amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, 'or by a nominee for; the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;

On observation of the above section, it is to be noticed that if the following conditions are fulfilled

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then the amalgamation would be as per the Income Tax Act.

- *All the property/ liabilities of the amalgamating company immediately before the amalgamation become the property of the amalgamate company by virtue of the amalgamation.*
- *Shareholders holding not less than three-fourths in value of the shares of the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamating company by virtue of the amalgamation.*

We would now like to submit that in the current case as well as all the assets and liability are transferred to the assessee company by virtue of the amalgamation. Further, as mentioned earlier, AVVL is the wholly owned subsidiary company of the assessee and therefore, we stated that the

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assessee had satisfied all the conditions as prescribed in the Act and accordingly the all the provisions related to the Amalgamation would be applicable to the assessee.

As this junction, first of all we would like to state that the entries in the books of account are not determinative of the real nature of income or its taxability in a particular year.

The entries in the books of account are immaterial and what is material is whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto.

In view of the above facts and circumstances of the case and legal precedents, we submit before your honour that characterization of particular item in the Books of Account is not the determinative under the income tax matters. The General Reserves in the assessee company has arisen due to recording of Investments held by amalgamating

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company at its Fair Market Value. The said treatment in the Books of Account does not give rise to any real income in the hands of the asesse company.

It is a well settled position of law that under the provisions of the I.T. Act only real income can be brought to tax. No hypothetical or notional income can be brought o tax under the I.T. Act. There are plethoras of decisions available which time and again have held that it is only the real income which could be taxed under the provisions of the I.T. Act. Any hypothetical income and income which has not been received cannot be brought to tax.

There is no provision under the Income Tax Act, 1961 which provides for taxability of the notional income which has not been received and not accrued to the assessee. In the light of the above judicial pronouncements it is submitted that no

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notional income can be taxed in the hands of the assessee company merely on account of addition to General Reserves, which has arisen on account of recording of Investments at Fair Market Values. The same cannot be by any means can be termed as Real Income and cannot accordingly be brought to tax.

Once again, we would like to draw your honour's attention to page no. 85 of Volume I of Special Audit Report wherein the special auditors have acknowledged the fact that the said mention reserve which is created by virtue of amalgamation cannot be taxed u/s 28(iv) of the Income Tax Act. The relevant extract is reproduced herewith as under:-

"In view of the above, the reserve created by virtue of amalgamation does not constitute income u/s 28(iv)."

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Further, the special auditors have concluded the above after relying on various judicial pronouncements as mentioned at page no. 84 81. 85 of volume 1 of the Special Audit Report.

Therefore in a nutshell, since the said reserve is created on account of recording investments at FMV of AVVPL which is a 100% subsidiary of assessee company it is capital in nature and hence cannot be taxed as business income.

As far as your honour's query in para (1.b) of the above mentioned show cause notice issued by your honour's asking the assessee company to explain the eligibility of brought forward business loss & unabsorbed depreciation in its hands after demerger of business undertakings.

In relation to the same, of the outset we would like to submit that only real assets and liabilities were transferred to SPV's as per the composite scheme. Non real assets and liabilities i.e. brought forward

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business losses & unabsorbed depreciation were not transferred to business SPV's as required by section 72A for following 3 reasons / grounds:

1. The assessee company does not fit into the definition of merger as stipulated for Section 72A of the Income Tax Act;

2. There is no closure of assessee's business after demerger; and

Let us discuss both the aforementioned grounds in detail.

Reason No. 1

To begin with, we would like to reproduce section 72A f the Income Tax Act, which is as follows:

"72A.

(1)….

………..

(4) Notwithstanding anything contained in any other provisions of this Act, in the case of a demerger the accumulated loss and the allowance

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for unabsorbed depreciation of the demerged company shall-

(a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the result company;

(b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be".

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Section 72A of the Act provides for eligibility towards allowability of brought forward losses and unabsorbed depreciation, directly or proportionately, related to the resulting companies. Therefore, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall be allowed to be carried forward and set off in the hands of the resulting company.

However, such loss is allowed merely in the case of demerger to the resulting company. In the present case, during the year under consideration as stated above the assessee pursuant to the composite scheme has transferred various business undertakings of the company in respective identified business vertical company (resulting company). However, the Composite Scheme of arrangement is strictly not pursuant to provisions of section 2(19AA] of the Act and thus there is no demerger contemplated under section 72A of the Act. As the applicability of section 72A is only in case of demerger, the said section would not be applicable in

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case of the assessee. Thus, in view of the same, the brought forward loses and unabsorbed depreciation will continue to be losses of the assessee company only and will not get transferred to respective step down subsidiaries (resulting company).

Moreover, as contended above, since the conditions related to demerged u/s. 2(19AA) of the Act has not been satisfied, it was not mandatory for the assessee company to transfer the losses. The same is affirmed by the special auditors in the Special Audit Report u/s 142(2A) at page no. 117 of volume 1.

Further, the special auditors also affirmed to the fact that since section 72A is restricted to the cases which are covered under demerger u/s 2(19AA) which is not the assessee's case and as there is no provision which specifically provides the method of computation for transfer of losses for cases which does not satisfy the conditions of demerger, then it is upto the assessee to transfer the business loss 85 unabsorbed depreciation

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to the business SPVs or not. The relevant extract is reproduced as under:-

> "Section 72A of the Act provides for transfer of such losses and depreciation but the same are restricted to the cases which are covered as demerger under the Act. No other provision of the Act specifically provides method computation for transfer of losses for cases which does not satisfies the conditions of demerger under Section 2(19AA) of the Act."

Reason No. 2

As per condition to proviso (i) of sub section 72(1) of sub section it requires continuation of carrying on of the same business by the assessee. They do not provide that unabsorbed loss shall be set off against income from the same business. As far as the assessee is concerned it I still carrying on the business. The assessee was engaged in development of real estate and housing projects in the Aamby Valley City. It was in

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the business of sale of land and villas, building etc. constructed there upon over 67 acres of land and the said business is still being continued by the assessee. It is only few of the segments which have been decentralized and it cannot be said that the whole of the business has been discontinued by the assessee.

The assessee during the year ending 31.03.2012 has shown income from its business activities at Rs.1,17,70,36,457/-. In the subsequent year i.e. year ending 31.03.2013 the total revenue from operations generated by the assessee company was to the tune of Rs.2,12,87,16,077/- and in the year ending 31.03.2014 the same was to the tune of Rs.60,38,64,1992/- etc. Thus the figures are of revenue from operations and not in respect of other incomes, and, therefore, to say that the assessee has discontinued its business activities is contrary to the facts on records and therefore there is no justification in proposing to doubt the eligibility of the assessee company for set off of brought forwarded

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losses and unabsorbed depreciation in the hands of the assessee company.

Without prejudice to the above even if it is assumed that the business is discontinued it is not a case where the entire business has been discontinued by the assessee. As already mentioned hereinabove, only a few segments of business have been decentralized and it is a well settled that the losses pertaining to any discontinued business also can be carried forward and can be set off against any other business income. The unabsorbed losses and unabsorbed depreciation cannot be bifurcated and have to be set off against business which is being carried on by the assessee. However, in the case of the assessee since the business has not been discontinued the question of not allowing brought forward losses to the assessee would not arise as the same is still in existence and is still carrying on business and it is only few of the limbs of the business segments which have been transferred to its subsidiaries.

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Thus to conclude it can be said the brought forward losses and unabsorbed depreciation can be allowed to the assessee since, the assessee's Composite Scheme of arrangement is strictly not pursuant to provisions of section 2(19AA) of the Act and moreover, the assessee's business is not even discontinued and only few segment has been merely transferred to its subsidiaries."

1.2.2. In this regard, the assessee submitted before the Special Auditor as under:-

Mail dated 18.09.2015:

"Applicability of Section 56(2)(viia)

Now coming to your goodself's query, in relation to the applicability of Section 56(2)(viia) of the Act in case of shares of the various SPV's received by the assessee pursuant to the merger of Aamby Valley "V" Ventures Private Limited with the assessee.

In relation to the same, we would like to state that pursuant to the Composite Scheme of Amalgamation, Aamby Valley 'V' Ventures Private Limited ('the

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Amalgamating Company') the ***wholly owned subsidiary*** *of the assessee Company which is engaged in the business of Real Estate and Infrastructure Development has amalgamated with the assessee company w.e.f. March 31st, 2011. Pursuant to the merger, the assessee company received the shares of SPVs. On applicability of section 56(2)(viia) of the Income Tax Act ('Act') on the said transaction, our submission is as under :*

Firstly, we would like to reproduce Section 56(2)(viia) of as follows:-

> "56. (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely: -
>
> (viia) where a firm or a company not being a company in which the public are substantially

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interested, receives, in any previous year, from any person or persons, on o before the 1st day of June, 2010, any property, being shares of a company not being a company in which the public are substantially interested, -

(i) ***without consideration****, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;*

(ii) *for a* ***consideration which is less than the aggregate fair market value*** *of the property by an amount exceeding fifty thousand rupees, he aggregate fair market value of such property as exceeds such consideration:"*

The provision has been recently introduced under the 'Act'. Thus, in such circumstances any harmonious construction or literal meaning on the wordings of the section will not help us to deal

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with correct intention of the law maker on the said section. Therefore, we would like to bring your attention to the Memorandum of Finance Act 2010. The same is reproduced as under:-

Taxation of certain transactions without consideration or for inadequate consideration

Under the existing provisions of section 56(2)(vii), any sum of money or any property in kind which is received without consideration or for inadequate consideration (in excess of the prescribed limit of Rs.50,000/-) by an individual or an HUF is chargeable to income tax in the hands of the recipient under the head 'income' from other sources'. However, receipts from relatives or on the occasion of marriage or under a will are outside the scope of this provision.

The existing definition of property for the purposes of section 56(2)(vii) includes immovable property being land or building or both, shares and

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securities, jewellery, archaeological collection, drawings, paintings, sculpture or any work of art.

A. *These are anti-abuse provisions which are currently applicable only if an individual or an HUF is the recipient. Therefore, transfer of shares of a company to a firm or a company, instead of an individual or an HUF, without consideration or at a price lower than the fair market value does not attract the anti-abuse provision.*

In order to prevent the practice of transferring unlisted shares prices much below their fair market value, it is proposed to amend section 56 to also include within its ambit transactions undertaken in shares of a company (not being a company in which public are substantially interested) either for inadequate consideration or without consideration where the recipient is a firm or a company (not being a company in which pubic

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are substantially interested. Section 2(18) provides the definition of a company in which the public are substantially interested.

It is also proposed to exclude the transactions undertaken for business reorganization, amalgamation and demerger *which are not regarded as transfer under clauses (via), (vic), (vicb),(vid) and (vii)of Section 47 of the Act.*

Consequential amendments are proposed in –

(i) section 2(24), to include the value of such shares in the definition of income;

(ii) section 49, to provide that the cost of acquisition of such shares will be the value which has been taken into account and has been subjected to tax under the provisions of section 56(2).

These amendments are proposed to take effect from 1st June 2010 and will, accordingly, apply in

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relation to the assessment year 2011-12 and subsequent years.

B. The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income under the grab of gifts particularly after abolition of the Gift Tax Act. He provisions were intended to extend the tax net to such transactions in kind. The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. It is, therefore, proposed to amend the definition of property so as to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient.

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C. In several cases of immovable property transactions, there is a time gap between the booking of a property and the receipt of such property on registration, which results in a taxable differential. It is, therefore, proposed to amend clause (vii) of section 56(2) so as to provide that it would apply only if the immovable property is received without any consideration and to remove the stipulation regarding transactions involving cases of inadequate consideration in respect of immovable property.

The amendments are proposed to take effect retrospectively from 1st October 2009 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years.

D. It is proposed to amend the definition of 'property' as provided under section 56 so as to include transactions in respect of 'bullion'.

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This amendment is proposed to take effect from 1st June, 2010 and will, accordingly, apply in relation to the assessment year 2011-12 and subsequent years.

E. It is proposed to amend section 142A(1) to allow the Assessing Officer to make a reference to the Valuation Officer for an estimate of the value of property for the purposes of section 56(2).

This amendment is proposed to take effect from 1st July, 2010.

In respect of the same we would like to submit that whether an Explanatory Memorandum can be referred to while interpreting a tax provision has been a subject matter of debate before the Courts. A predominant view which emerges is that the Memorandum can be referred to where (a) literal reading of the provisions leads to an ambiguous situation; (b) in understanding the rationale for introduction and the mischief which the provision

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sought to prevent; (c) expanding the scope and ambit of the provision, which the Legislature never intended to do so; etc.

- ***Section is not Applicable at the time of Amalgamation***

On the observation of the above memorandum, the intention of law maker is very clear. The Memorandum states that section 56(2)(viia) was an anti-abuse measure, introduced with an objective to prevent practice of transferring unlisted shares at a value less than the fair value. Further, the law maker has also excluded the following transactions

- *Business reorganization*
- *Amalgamation*
- *Demerger*

Thus, the memorandum clearly excluded those situations when the shares are transferred at the time of Business Reorganization, Amalgamation

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and Demerger. If the law makers included the said transactions then the shares received at the time of Business Reorganizations, Amalgamation and Demerger would get automatically covered under the purview of the said section and therefore the said section will apply on each and every amalgamation that would have happened in India. This can never be the intention of the law maker to cover the transactions undertaken at the time of amalgamation under the purview of the said section.

Further, the above section was introduced after the abolition of Gift Tax and replaces the Gif Tax Act so as to prevent the laundering of unaccounted income under the pretext of gift. Thus, the said section was introduced in place of gift tax and in the present case the shares are received by the assessee pursuant to the composite scheme of amalgamation duly approved by the High Court. Thus, there is no intention on the party of the

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assessee to avoid tax liability as the same is no received as gift but by way of amalgamation.

Thus, we humbly submit that the said section will never be applicable when the shares are received pursuant to the amalgamation scheme. Therefore, the said section is not applicable in the current case.

- ***Section apply only when there is no consideration or adequate consideration***

Further, for the applicability of Section 56(2)(viia) there should be transfer of shares without consideration or inadequate consideration. Now, we would like to state the interpretation of the term 'consideration' as follows:-

The term "consideration" has not been defined under the Act. Generally, 'consideration" envisages a promisor (from whom the benefit moves) to a promise (who is the recipient of the benefit). Thus, the term "consideration", essentially requires (a) a

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promisor, (b) a promise; (c) an existing valuable benefit/property, and (d) passing of such benefit/ property from the promisor to the promise. In the absence of any of the above, the requirement of "consideration" fails.

In the present case, there is no promisor or promise since as discussed earlier the ultimate beneficiary of both the sides is the same i.e. share holder of the assessee company. However, if your goodself is not agreeable with our point that the said section is not applicable on current transaction in absence of promisor or promises, we would like to submit that the said section is attracted only on those cases wherein, the transfer is not done for adequate consideration.

In relation to the same, we would like to submit that in the present case the shares of SPVs are not transferred without consideration or inadequate consideration. Since, the assessee is the 100%

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holding of the AVVL i.e. the amalgamating company and pursuant to the scheme of amalgamation the assessee company will lose its interest and voting rights in AVVL which it had prior to amalgamation. Thus, in the present case, the consideration will be the assessee company's interest in the amalgamating company which it will lose due to composite scheme of amalgamation.

If in case, the assessee would not have been holding company of the AVVL then it would have aid the consideration to the shareholders of AVVL i.e. the market value of the AVVL as consideration. However, in the present case as the assessee is the holding company of the AVVL, hat is the assessee is the shareholder itself and though it has not paid the consideration in the monetary terms it does not mean there is no consideration. The section itself does not mention that the consideration should be in monetary terms. Thus,

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the extinguishment of interest by the assessee in the AVVL will be considered as consideration for the said transaction and thus, the provisions of section 56(2)(viia) would not be applicable as the shares of SPV's transferred are not without consideration or inadequate consideration.

- ***Section cannot be applicable when there is ultimate receiver (beneficiary) is the same.***

At this juncture, we would first like to state that the insertion of Clause (viia) of Section 56 is extending the concept of deemed gifts to firms and unlisted company. Post abolition of gift tax in 1998, a practice started gaining ground whereby unaccounted income was laundered under the pretext of gifts or transfer/ issue of shares of closely held companies at lower value than Fair Market Value ('FMV'). To curb such unaccounted flow of income, the government

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introduced Section 56(2)(viia) vide Finance Act 2010. Based on this understanding and section 56(2)(viia) being a successor to donor based gift tax provision, it can be argued that even for donee based gift taxation, the pre- requisite of (a) donor, (b) donee, and (c) property would equally apply to section 56(2)(viia) as well. Accordingly, it is highly arguable that for the purposes of section 56(2)(viia), donor, donee and property should exist at the time of transaction.

In relation to the same, we would like to submit that in current case the ultimate beneficiary is the shareholders of assessee company since, the assessee is the 100% holding company of the AVVL. Company is an artificial person and it does not have its own mind and benefit, the company runs by the minds of its directors to the benefit of its shareholders. In current case we can say that the assessee company is the absolute beneficiary of AVVL. In such circumstances, it is

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not possible to consider the said transaction is transfer since there is no ultimate beneficiary in the current case. Since, in the current case the ultimate beneficiary of the transferor and transferee company is the same. Therefore, we would like to submit that no one can transfer its assets to its own. This fact of the case is identical with such type of situations when the property/money is transferred from one pocket to other pocket and therefore in absence of ultimatetransferor and transferee the said transaction cannot come under the purview of section 56(2)(viia) of the Act.

- ***<u>Applicability of the section only on transfer of shares</u>***

Further, the said section will apply in the case of transfer of any property being the shares of the company. However, in our case since pursuant to the scheme of amalgamation AVVL is merged into the assessee company i.e., all assets and liabilities

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and not shares alone. Thus, in case of amalgamation the entire company is merged and not individual assets and liabilities. Thus, section 56(2)(viia) should not apply in the case of merger.

Further, we would like to state that when the undertaking is sold as whole it cannot be split into parts. Thus, in amalgamation the entire company is transferred and thus, individual assets and liabilities could not be split as parts and no values can be assigned to individual assets and liabilities.

Further, we would also like to state that AVVL is the 100% subsidiary of the assessee. Moreover, pursuant to the scheme of amalgamation, the assesse company has recorded the assets and liabilities of the Amalgamating Company (including its Investments in the Resulting Companies) at respective fair values. The

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amalgamating company being wholly owned subsidiary of the amalgamated company and thus, the assesse company on scheme becoming effective became the 100% holding company of all the Resulting Companies i.e. SPV's either directly or indirectly."

Mail dated 17-09-2015:

"An issue has been raised as to whether the provisions of section 56(2)(viia) would be applicable to such vesting. It is submitted that section 56(2)(viia), by a fiction, deems the receipt by a company (not being a company in which the public are substantially interested) of any shares of a company not being a company in which the public are substantially interested without consideration or for a consideration which is less than the aggregate fair market value of the property as income. In the present case there is no receipt by AVL of any shares. As a consequence the vesting of the assets and

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liabilities of V Ventures into AVL, the shares held by AVL in V Ventures got extinguished Therefore, prior to the transaction the assessee was the 100% shareholder of V Ventures who in turn was the 100% shareholder of the resulting companies. As a consequence of the transaction of amalgamation AVL became the 100% shareholder of the resulting companies. Therefore, AVL is in no manner poorer or richer as a consequence of the amalgamation and, therefore, there can be no. question of AVL having received any shares without consideration. As the consideration for the receipt of shares of the resulting company is, as explained earlier, the extinguishment of the share held by AVL in V Ventures. Without prejudice to the aforesaid, it is submitted that the proviso to section 56(2)(viia) clearly provides that the said clause shall not apply to any property received by way of a transaction not regarded as a transfer inter alia

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under clause (vii) of section 47. Clause (vii) provides that any transfer by a shareholder in a scheme of amalgamation being a share or shares held by him in "the amalgamating company if- (a) the transfer is made in consideration of the allotment to him of any share or shares in the amalgamated company except where the shareholder itself is the amalgamated company and (b) the amalgamated company is an Indian company. As both the conditions required in terms of section 47(vii) are fulfilled the proviso to section 56(2)(viia) would be clearly applicable and, therefore, the question of any income accruing to AVL as a consequence of the merger of the assets of V Ventures into AVL should not arise."

1.2.3. The Auditor vide para 1.8.4.5 of its audit report summarized the above submissions as under:

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1.8.4.5. The assessee, vide its notes had put emphasis on the following:

a) Since it is a newly inserted provision, and in such circumstances any harmonious construction or literal meaning on the wordings of the section will not help to deal with correct intention of the law maker, emphasis has been laid on Memorandum of Finance Act, 2010 for inserting clause (viia) to Section 56(2) of the Act, which clearly excludes those situations when the shares are transferred at the time of re-organisation, ***Amalgamation*** *and Demerger.*

b) The assessee is in no manner poorer or richer as a consequence of the amalgamation and, therefore, there can be no question of assessee having received any shares without consideration.

c) The consideration will be the assessee company's interest in the amalgamating

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company which it will lose due to composite scheme of amalgamation. It is further stated that the consideration for the receipt of shares of the resulting company is the extinguishment of the shares held by assessee in AVVL.

Under the amalgamation entire company is merged and not individual assets and liabilities. Thus, Section 56(2)(viia) of the Act should not apply".

97.1. The AO considered and decided this issue against the assessee as under :

1.3. The submissions made by the assessee before the undersigned and the Special Auditor have been considered and found as under:

1.3.1 During the year under consideration, a Composite Scheme of Arrangement and Amalgamation was approved by the Hon'ble High Court of Bombay. The appointed date of the

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composite scheme was on closing hours of business on 31.03.2011 i.e., 01-04-2011 and the effective date was 20.03.2012 (i.e., date of Form 21 for intimation of the order to Registrar of Companies filed by the company). The objective of the composite scheme was to transfer several business verticals (eleven business undertakings) mainly for the purpose of effective management of each individual business segment.

1.3.2. For the entire arrangement, assessee incorporated a subsidiary in the name of "Aamby Valley V Ventures Private Limited" [AVVPL] on 24-02-2011. Further, eight subsidiaries of AVVPL were incorporated out of one was "Aamby Valley City Developers Pvt. Ltd." [AVCDL] and three step down subsidiaries of AVCDL was also incorporated. All these subsidiary companies were incorporated on the same day i.e. 24-02-2011 (except Aamby Valley Global Sports Limited, incorporated on 24/03/006).

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1.3.3. The business of eleven undertakings of the assessee was transferred to different subsidiaries and step down subsidiaries of AVVPL without any consideration as per the approved scheme. Accordingly, such transfer of business undertakings does not comply with the conditions of 'demerger' as provided in section 2(19AA) of the Income Tax Act, 1961 and also the scheme was applied and got approved with reference to the provisions of the Companies Act and no specific exemption had been granted from applicability of any provisions of the Income Tax Act.

1.3.4 As a result of such transfer of business undertaking at FMV, the net worth of respective Business SPVs had significantly increased resulting into ultimate increase in the value of investment of AVVPL.

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1.3.5. Simultaneously, AVVPL has been amalgamated with the assessee and as a result of which assets of AVVPL (including investments in eight subsidiaries and three step down subsidiaries) were received by the assessee without any consideration. The investments in eight subsidiaries of AVVPL were valued at Rs.47,000 crores by the assessee in its books of accounts.

1.3.6. As a result of the whole arrangement, the benefit to the assessee is summarized hereunder:

- *received the shares of eight Business SPVs, and*
- *increase in the free reserves which was available for utilization at the discretion of the assessee as per the provisions of the companies act, 1956. ·*

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1.3.7 Analysis of applicability of provisions of Section 56(2)(viia) of the Act in instant case :

Section 56(2)(viia) of the Act provides as under:

"56.
(1)...

(2) ....

(viia) where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from . any person or persons, on or after the 1st day of June, 2010, any property, being shares of a company not being a company in which the public are substantially interested,-

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an

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amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.

Explanation-For the purposes of this clause, "fair market value" of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause (vii);]"

The assessee had received the shares of eight Business SPVs which were not earlier with the assessee as evident from the investment schedule of the audited financial statements and as the part of Composite Scheme. Though

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the assessee is emphasising that the receipt of shares are on account of amalgamation/ extinguishment of shares under the Composite Scheme and therefore, there is no receipt of shares tantamount to income chargeable under Section 56(2)(viia) of the Act, however, Section 56(2)(viia) of the Act is an exclusive definition wherein the certain transfers were specifically excluded under the proviso. The analysis of applicability of Section 56(2)(viia) of the Act in the case of assessee:

Relevant Clause of Section 47	Exclusion regarding	Applicability in the case of the assessee
(via)	*any transfer, in a scheme of amalgamation, of a capital asset being a share or shares held in an Indian company,* ***by the amalgamating foreign company to the amalgamated foreign company,*** *if-* *(a) at least twenty-five per cent of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company, and* *(b) such transfer does not attract tax on capital gains in the country, in which the amalgamating Company is incorporated.*	*Since amalgamating and amalgamated companies are Indian Companies, this clause is not applicable.*

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(vic)	***any transfer in a demerger*** *of a capital asset, being a share or shares held in an Indian company, by the demerged foreign company to the resulting foreign company if-* *(a) the shareholders holding not less than three-fourths in value of the shares] of the demerged foreign company continue to remain shareholders of the resulting foreign company; and* *(b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated* *Provided that the provisions of sections 391 to 394 17 of the Companies Act, 1956 (1 of 1956) shall not apply in case of demergers referred to in this clause;*	*The case is not of demerger, hence this clause is not applicable.*
(vicb)	*any transfer by a shareholder, in a business reorganisation, of a* ***capital asset being a share or shares held by him in the predecessor co-operative bank*** *if the transfer is made in consideration of the allotment to him of anyshare or shares in the successor co-operative bank.* *Explanation-For the purposes of clauses (vica) and (vicb), the expressions "business recorgnasation", "predecessor co-operative bank" and "successor co-operative bank" shall have the meanings respectively assigned to them in section 44DB ;]*	*Capital asset under instant case are not shares of a co-operative bank, hence this clause is not applicable.*
(vid)	*any transfer or issue of shares by the* ***resulting ompany, in a scheme of demerger*** *to theshareholders of the demerged company if the transfer or issue is made in consideration of demerger of the undertaking;]*	*The case is not of demerger, hence this clause is not applicable.*
(vii)	***any transfer by a shareholder. in a scheme of amalgamation. of a capital asset being a share held by him in the amalgamating company, if–*** (a) the transfer is made in consideratiion of the allotment to him of any share or shares in the amalgamated company, and (b) the amalgamated company is an Indian company	*This clause would have been applicable in case the shares of AVVPL were transferred by AVL as AVVPL is the amalgamating company in the instant case.* *However, shares of Business SPVs are being received by AVL which were held as investments by AVVPL hence this clause is also not applicable, since it does nto contain any provision regarding indirect holding of shares.*

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The assessee's case is not covered under any of the referred exclusions. The assessee has received assets of AVVPL which inter-alia includes shares of eight Business SPVs without adequate consideration and therefore, Section 56(2)(viia) being specific on transfer of shares, gets attracted in the present case. Further, even in the order dated 20- 01-2012 of the Hon'ble High Court of Bombay, there is no specific immunity/exemption granted from applicability of section 56(2)(viia) of the Income Tax Act, 1961.

1.3.8. ***Examination that whether the receipt of shares is with/without consideration or for an inadequate consideration***

The assessee has contended on the facts:

a) that the shares of AVVL being extinguished shall be deemed consideration against the receipt of shares having equivalent value and that the shares of the SPY's transferred are not without consideration.

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b) the assessee became 100% shareholder of the resulting companies in lieu of shares of AVVPL. Accordingly, the assessee has arrived on the conclusion that the assessee is in no manner poorer or richer as a consequence of amalgamation.

> *However, according to the clause 14 of the Composite Scheme, "no consideration shall be payable/ dischargeable for this section and the share capital of the Transferor Company Shall stand cancelled"*

Section 56(2)(viia) of the Act read with prescribed Rule provides for method of valuation for shares while dealing with this section which is based on the book value as on Valuation Date. In fact, the provisions of Section 56(2)(viia) of the Act is a specific provision which provides the specified method for computation of fair market value and does not provide the method to compute the value of consideration/cost on the basis of its intrinsic value. Hence, the intrinsic value

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of shares of AVVL shall not be considered as consideration against receipt of shares.

Therefore, in view of the above, as per the provisions of section 56(2)(viia), the fair market value of the shares of eight Business SPVs, received by the assessee without consideration, will be considered as 'Income from Other Sources' in the hands of the assessee. The method for valuation of shares for the purpose of Section 56(2)(viia) of the Act has been prescribed under Rules 11U and 11 UA of the Income Tax Rules,1962, which requires determination of FMV as on the valuation date. As per the meaning of 'Valuation Date' and 'Balance Sheet' under Rule 11U of the Income Tax Rules, 1962, the FMV of shares received by the assessee is required to be computed as on the date of receipt of shares based on the audited Balance Sheet under the Companies Act as on date of receipt of shares by the assessee.

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However, the assessee has not prepared/provided any audited balance sheet of the eight Business SPVs drawn as on the valuation date i.e., on 01-04-2011 being opening hours of business after closure of business on 31-03-2011 and after giving the effect of approved composite scheme. Hence, the Audited Balance Sheets of eight Business SPVs as on 31.03.2011 and 31.03.2012 which were available, has been analysed for the purpose determining the FMV as per Rules 11U and 11UA. After analysis of these available audited Balance Sheets, the audited Balance Sheet as on 31.03.2011 cannot be considered for the purpose of such valuation since the transactions on account of Composite Scheme were not recorded therein.

Hence, considering the fact that transactions were recorded on 20-03-2012 (i.e., date of Form 21 for intimation of the order to Registrar of Companies filed by the company) i.e., in F.Y. 2011-12 based on the date of Order 20-01-2012, audited balance of eight

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SPVs as on 31-03-2012, which was the nearest balance sheet after giving effect of the Composite Scheme has been considered for computing the FMV of the shares received by the assessee as per Rule 11UA of the Income Tax Rules, 1962.

The summary of the FMV of the shares received of eight Business SPVs without any consideration by the assessee is given hereunder:

In INR (Rs.)

S.	Name of SPVs	FMV per share*	No. of Share	FMV
1	Aamby Valley City Developer Limited	1,082,21	200,000	2164438,54
2	Aamby Valley Green Golf Ltd [AVGGL]	3,03,349	50,000	151674,92
3	Aamby Valley Airport Project Ltd	2,88,122	50,000	144061,49,352
4	Aamby Valley Global Sports Ltd	26,789	1,00,060	26791,28,448
5	Aamby Valley Mega Retails Ltd	47,918.06	50,000	23959,03,
6	Aamby Entertainment Services Ltd	57,895.34	50,000	28947,66,967
7	AVL Hotels & Resorts Limited	1,52,762.08	50,000	76381,04,141
8	AVL Land Holdings Company Limited	7,027.64	50,000	3513,82,118
	Total			**26197,67,8**

The detailed working FMV per share has been given in **Annexure-B to this order.*

97.2. The assessee filed objections before DRP. The assessee contended that the AO erred in proposing to make an addition under section 56(2)(viia) of Rs.26197.67 crores on the transactions related to Composite Scheme of

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Arrangement and Amalgamation. The assessee prayed that proposed action of the AO is bad in law. It was also submitted that AO has erred erroneously in considering the fair market value of the shares instead of book value of shares. The DRP vide Order dated 30.12.2016 under section 144C(5) of the I.T. Act decided the objection of the assessee as under :

"6.8 Amount to be taxed under section 28(iv)

1. The following is the increase in General Reserve as per the Special Audit Report :

(Rs. In Crores)

Particulars	***Book Value in AVVPL as on 1.03.2011***	***FV of assets as on31.03.2012***	***Remarks***
Assets			
Investments in 100% subsidiaries			
AVCDL	*0.20*	*36.807*	*Net Present Value as on 06.03.2012 determined by Kranti Karmasey & Co.*
AVGGL	*0.05*	*921*	

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AVAPL	0.05	1,414	
AVGSL	0.10	347	
AVMRL	0.05	1,285	
AESL	0.05	1,716	
AVLHRL	0.05	4,475	
AVLHL	0.05	35	
Cash & Bank Balance	0.03	0.03	
Profit and Loss (Dr. Bal)	0.02	-	Not taken over by AVL
Total Assets – A	0.653	47,000.03	
Liability			
Share Capital	0.65	0.65	Investment in books of AVL was cancelled pursuant to the merger.
Sundry Creditors	0.0036	0.0036	
Total Liabilities – B	0.653	0.653	
General Reserve Created in Books of AVL - (A-B)		46,999.38	

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2. The increase in General Reserve amounting to Rs.46,999.38 Cr. is the amount to be taxed under section 28(iv).

3. There is a decrease in General Reserve amounting to Rs.6,124.39 Cr. resulting from the transfer of assets to the SPVs. This is a separate transaction and it is necessary to note that the scheme envisages two separate transactions relating to transfer of assets to the SPVs and amalgamation claimed of AVVL with the assessee. Since there are two separate transactions, the benefit arising from increase in General Reserve is to be taxed under section 28(iv). No set-off of the decrease in the General Reserve is allowable.

6.9. Conclusion

In view of the above discussion, the AO is directed to tax the increase in General Reserve amounting to Rs.46,999.38 Cr. under section

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28(iv). This view is supported by the judicial decisions discussed above.

6.10. Net Amount To Be Taxed Under Sections 56(2)(viia) and 28(iv)

As discussed above, the addition made by the AO under section 56(2)(viia) amounting to Rs.26,197.68 Cr. is justified and is upheld. Further, the AO is directed to tax the increase in General Reserve amounting to Rs.46,999.38 Cr. under section 28(iv). Obviously, these two additions are two facets of the same transaction and only the higher amount should be taxed. The amount being computed under section 56(2)(viia) is lower because of the valuation rules prescribed u/s 56(2)(viia) by way of Rule 11UA. Considering the facts, the AO is directed to add Rs..46,999.38 Cr. under section 28(iv) and Rs. 26,197.68 Cr. under

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section 56(2)(viia) and thus, make a net addition of Rs.46,999.38 Cr. under section 28(iv) as this is the higher amount and the Rs.26,197.68 Cr. is covered in the Rs.46,999.38 Cr. being added.

It is clarified that if the addition of Rs.46,999.38 Cr. under section 28(iv) is not sustained by higher appellate authorities, the addition of Rs.26,197.68 Cr. under section 56(2)(viia) would still survive. Similarly, if the addition of Rs.26,197.68 Cr. under section 56(2)(viia) is not sustained by higher appellate authorities, the addition of Rs.46,999.38 Cr. under section 28(iv) would still survive. At present, income would be increased by the higher amount of Rs.46,999.38 Cr. under section 28(iv) as discussed above, as the addition of Rs. 26,197.68 Cr. is covered in the Rs. 46,999.38 Cr. being added."

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1.4.2 Further, as regard to the enhancement of income, the Hon'ble DRP's findings are as under:

6.12.2. DRPs Adjudication Regarding Enhancement

1. The jurisdictional High Court in the case of M/s Lahmeyer has held that the Explanation read with sub-section 144C(8) makes it is evident that the Dispute Resolution Panel could examine issues arising out of the assessment proceedings even though such issues were not part of the subject matter of the variations suggested by the Assessing Officer as ***Extract from W M/S Lahmeyer Holding Gmbh vs Deputy Director Of Income Tax WP.(C)*** *7417/2012 & CM No.18979/2012 below will show*

Extract

"Para 20 .... It must be noted that the DRP procedure is part of the assessment proceedings.

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Queries raised and answered during the DRP proceedings would stand on the same footing as queries raised and answered in the course of assessment proceedings before an Assessing Officer where the DRP procedure is not applicable.

Para 23. One more aspect which needs some discussion is with regard to the submission that the DRP had no occasion to consider the issue of taxability of the transaction involving the transfer of the expired value of the contract in exchange of shares as no variation had been suggested by the Assessing Officer on this aspect of the matter in his draft assessment order. It was submitted by the learned counsel for the revenue that the jurisdiction of the DRP in terms of Section 144C(8) was that it could confirm, reduce or enhance the variations proposed in the draft order, but it could not introduce a new element of tax or variation. In response to this, the learned counsel for the petitioner drew our attention to the Explanation

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added after Section 144C(8). It was submitted by the learned counsel for the petitioner that by virtue of the said Explanation, the DRP always had the power to consider any matter arising out of the assessment proceedings relating· to the draft order, notwithstanding that such matter was raised or not by the eligible assessee. Section 144C(8) and the Explanation appended thereto reads as under:-

144C(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

Explanation. - For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter

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arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.

24. The said Explanation was introduced through the Finance Act of 2012. But, it was to take effect retrospectively from 01.04.2009. The Dispute Resolution Panel's directions were issued after the Explanation had come into operation.

In any event, the Explanation is clarificatory. Reading the Explanation with sub-section 144C(8), it is evident that the Dispute Resolution Panel could examine the issues arising out of the assessment proceedings even though such issues were not part of the subject matter of the variations suggested by the Assessing Officer. In this light, it is significant that though the draft order had not proposed any addition with regard to the restructuring and the said transaction, yet,

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the DRP had asked for details of the restructuring and had examined the matter. After such examination, the DRP did not direct any addition to be made in this regard. It is evident that the DRP formed an opinion that the transaction was not exigible to capital gains tax and, to contend otherwise, in the purported reasons for re-opening of the assessment, would be nothing but a 'change of opinion' which is not permissible in law."

*2. Thus in view of Delhi High Court decision in **M/s Lahmeyer Holding Gmbh vs Deputy Director Of Income Tax W.P.(C)** 7417/2012 & CM No.18979/2012 the DRP is within its jurisdiction to issue the notice of enhancement. A similar view has been taken by the Honble Bombay High Court in the case of **Vodafone India Services Pvt., Ltd.** Taxpayer has been afforded adequate opportunity by the DRP to place on record its arguments and supporting evidence*

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and the issue of natural justice has been fully addressed.

3. The above directions would result in an enhancement of income as compared to the draft assessment order. As discussed above, the assessee has been given adequate opportunity to explain why the above addition be not made. The contentions of the assessee have been discussed in detail in the above paras.

4. The assessee also contended that this issue has been examined by the AO and he decided not to make an addition on the above issues therefore, the DRP would not be justified in directing that the above additions be made. The assessee's contentions are not acceptable and the DRP have given detailed reasons in the above paras justifying the additions made. In view of the above discussion, the DRP 's directions to make these additions are justified, and are in

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accordance with the statutory powers of the DRP u/s 144C(8). The Hon'ble Delhi High Court in Lahmeyer Holding GmbH v. DDIT 2015-TII-38-HC-INTL have held that the DRP has powers of enhancement. A similar view has been taken by the Hon'ble Bombay High Court in the case of Vodafone India Services Pvt Ltd. the Hon'ble High Court observed that proceedings before the DRP were continuation of assessment proceedings and the final assessment order was passed only after the directions of the DRP.

5. Considering the facts discussed above, while passing the final assessment order, the AO shall consider ***initiation of penalty proceedings u/s 271(1)(c) in*** *respect of the enhancement in income consequent to above directions."*

97.3. The AO in the light of submissions of the assessee, report of Special Auditor and findings of the DRP,

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concluded this issue against the assessee. His findings are reproduced as under :

"1.4. Accordingly, in view of the submissions of the assessee before the undersigned and to the Special Auditors on this matter and the findings of DRP the addition on this issue is made as under:

1.4.1 The increase in General Reserve amounting to Rs.46,999.38 Cr. is taxed under section 28(iv) and Rs.26,197.68 Cr. is added to the income of the assessee under section 56(2)(viia). Obviously, these two additions are two facets of the same transaction and only the higher amount is added. The amount being computed under section 56(2)(viia) is lower because of the valuation rules prescribed u/s 56(2)(viia) by way of Rule 11UA. Considering the facts, an amount of Rs.46,999.38 Cr. under section 28(iv) and Rs.26,197.68 Cr. under section 56(2)(viia) is added to the income of the assessee on this issue. The net addition works out at Rs.46,999.38 Cr. under section 28(iv) as this is the

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higher amount and the Rs.26,197.68 Cr. is covered in the Rs.46,999.38 Cr.

1.4.2. It is clarified that if the addition of Rs.46,999.38 Cr. under section 28(iv) is not sustained by higher appellate authorities, the addition of Rs. 26,197.68 Cr. under section 56(2)(viia) would still survive. Similarly, if the addition of Rs.26,197.68 Cr. under section 56(2)(viia) is not sustained by higher appellate authorities, the addition of Rs.46,999.38 Cr. under section 28(iv) would still survive. At present, income would be increased by the higher amount of Rs.46,999.38 Cr. under section 28(iv) as discussed above, as the addition of Rs.26,197.68 Cr. is covered in the Rs.46,999.38 Cr.

1.5. In view of the above discussion, I am satisfied that the assessee has furnished inaccurate particulars of its income and therefore, penalty proceedings u/s 271(l)(c) are initiated on this account. ***(Addition Rs. 46,999.38 Cr.)"***

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98. We have heard the Learned Representatives of both the parties. Learned Representatives of both the parties argued these grounds orally and extensively. They have also filed their written submissions which are on record. The written submissions is on the line with the oral submissions made during the course of hearing. Therefore, for the sake of convenience, the written submissions of the parties are reproduced as under.

98.1. The written submissions of the assessee from pages 1 to 43 is reproduced as under :

"Gr. No. 1 to 3 – Validity of the order and determination of total income

1. *The above grounds are general in nature and no specific adjudication is required.*

Gr. No. 4, 5 and additional ground filed on 08.12.2017 – Addition of ` 46,999.38 cr. u/s. 28(iv) of the Act and addition of ` 26,197.67 cr. u/s. 56(2)(viia) of the Act on

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account of composite scheme of arrangement in normal computation as well as book profit

2. *The above referred two grounds arise out of the same transaction that was entered into during the previous year relevant to the assessment year 2011-12. Since the disputed additions are arising out of the composite scheme of arrangement, they are discussed with together hereinbelow.*

Composite scheme of arrangement

3. *The appellant is engaged in the business of construction of residential and commercial complexes, townships including development of a hill city called 'Amby Valley', near Lonavala in the State of Maharashtra. The appellant had 100% subsidiary called Amby Valley 'V' Ventures P. Ltd (hereinafter referred to as the 'AVVL' in short). The said AVVL had in turn 11 subsidiaries/step down subsidiaries (hereinafter referred to as the 'SPVs' in short). The names of various companies and their interrelationship are depicted in the following chart:*

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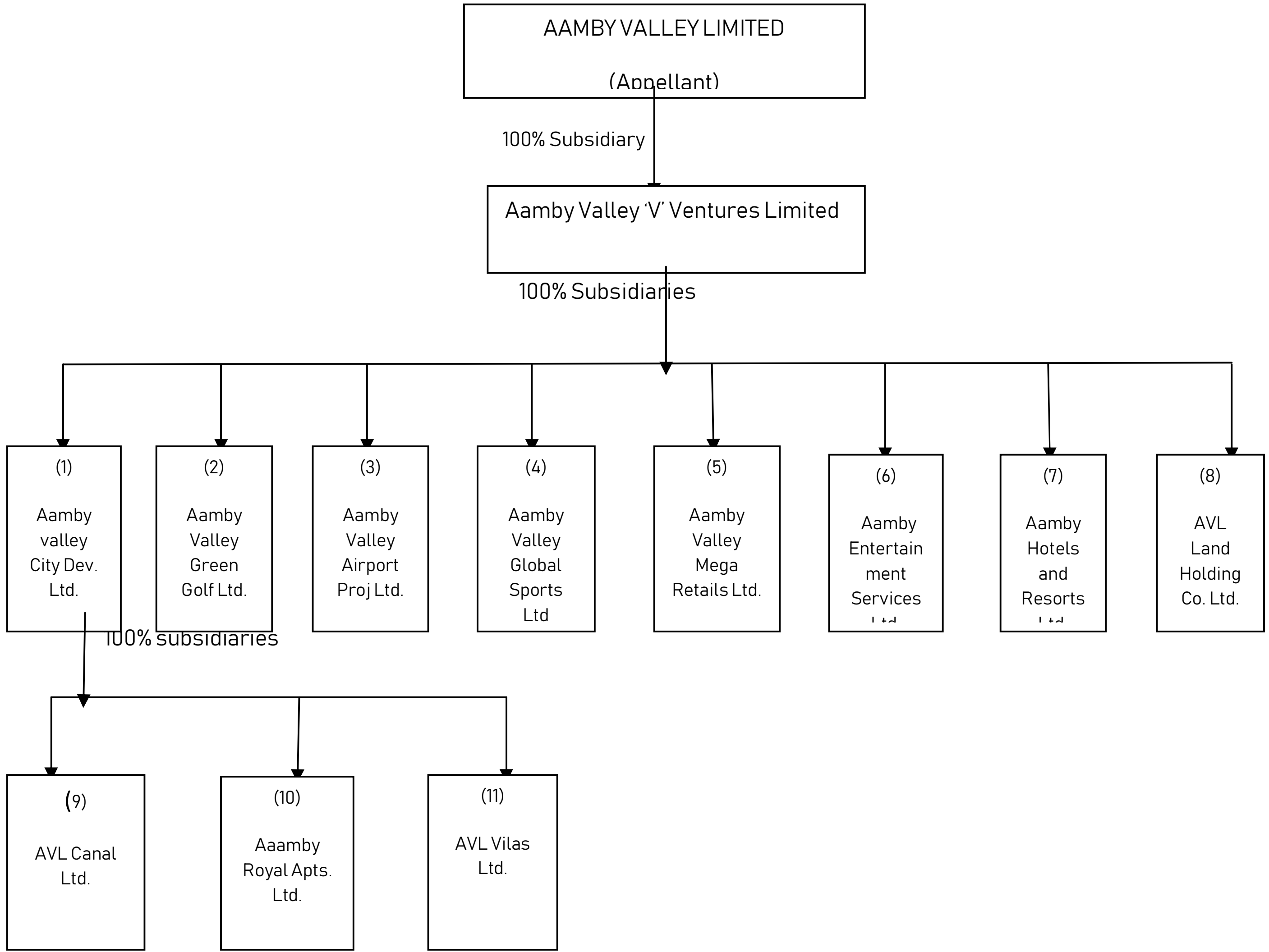

4. *The appellant along with AVVL and the SPVs filed a scheme of arrangement before the Hon'ble Bombay High Court (Pg. 101 to 149 of PB No. 1). The scheme provided as under:*

5. *Part I of the scheme contained certain definitions. According to para 1.2, 'appointed date' means the*

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closing hours of business on 31st day of March, 2011 or such other date as may be fixed by the Hon'ble High Court.

6. *Further, as per para 1.12 of part 1, the 'effective date' means last of the date on which the certified copies of the orders sanctioning the scheme passed by the Hon'ble High Court are filed with the Registrar of Companies. It has been further provided in para 2 that except to the extent specifically provided otherwise the scheme shall be operative from the 'effective date' and shall be effective from the 'appointed date'.*

7. *As per part II of the scheme (page No. 139 of PB No. 1), several business undertakings belonging to the appellant were transferred to the 11 SPVs by way of a demerger. These undertakings are real estate, golf course, airport, adventure sports etc. Pursuant to the above transfer, the position of various companies were as under:*

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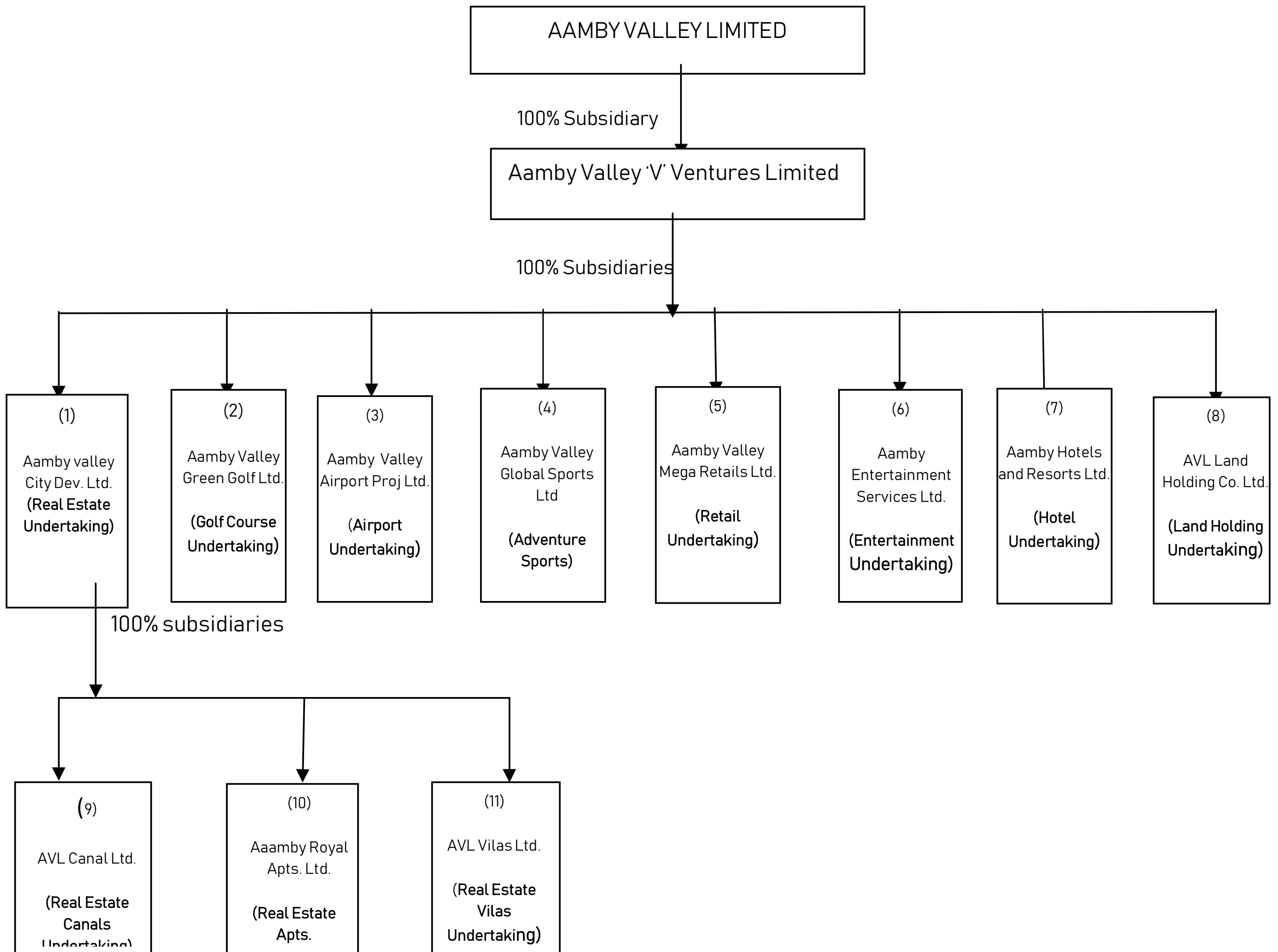

8. *The other salient terms of the said demerger were as under:*

(i) *All the assets and liabilities pertaining to the respective undertakings were transferred to the respective SPVs.*

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(ii) *The transfer was with effect from the 'appointed date'.*

(iii) *The transfer was without any consideration.*

(iv) *Effect of the transfer was recorded in the books of the appellant at the book value. Since the transfer was without any consideration the book value of the assets transferred and the liabilities assumed were reduced from the general reserve.*

(v) *The assets have been recorded in the books of respective SPVs at fair market value. Such fair market value has been determined based on independent valuers' reports. Since the net assets were acquired without paying any consideration, an equivalent amount was credited to a general reserve.*

(vi) *During the period between the 'appointed date' and the 'effective date' the businesses of respective undertakings were to be conducted by the appellant in trust on behalf of respective SPVs.*

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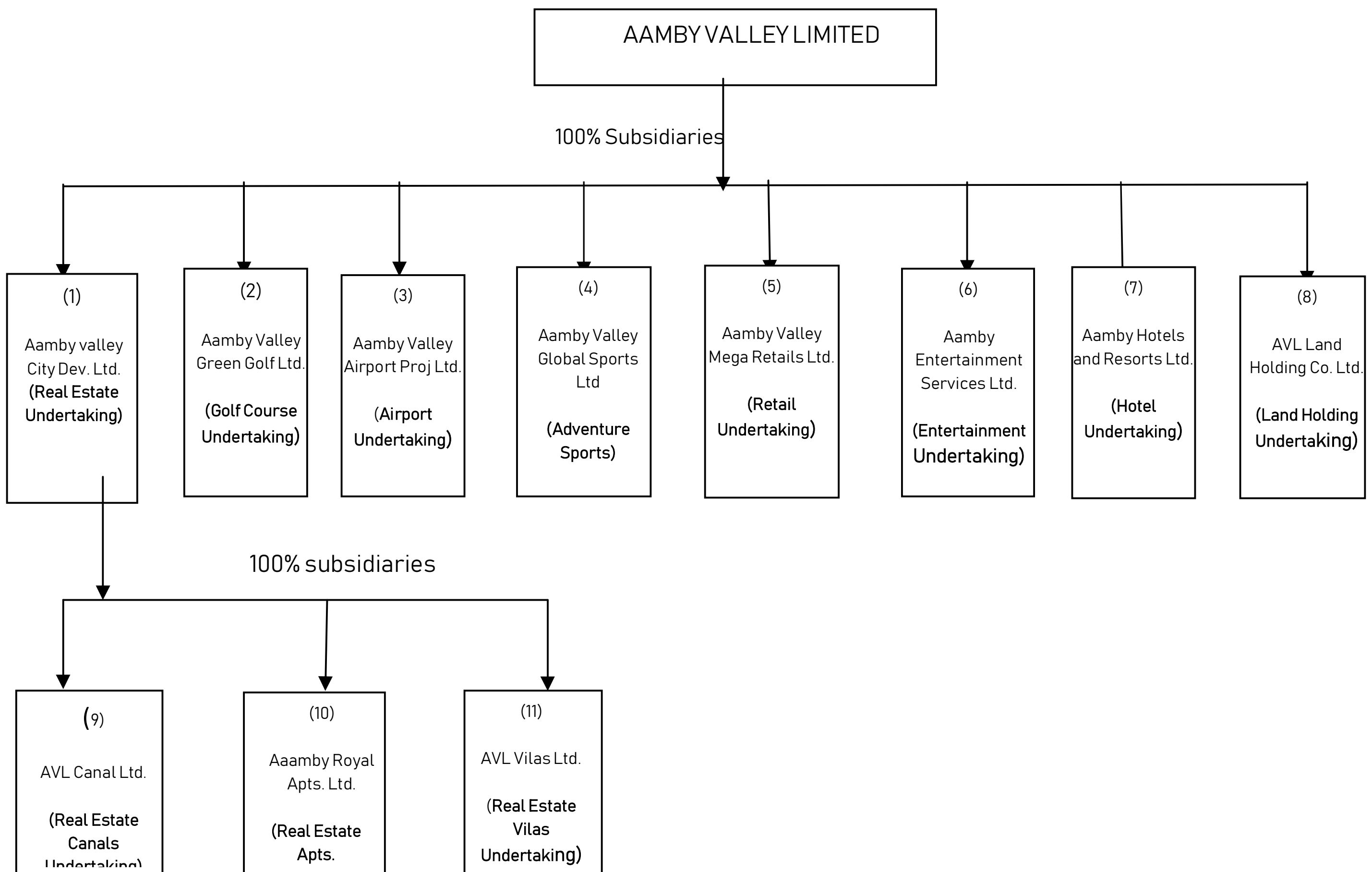
(vii) It is an admitted position that the above demerger of the undertakings was non-complaint to the Income-tax Act as conditions u/s. 2(19AA) of the Act were not satisfied.

9. It was next provided in Part III of the scheme (page No. 145 of PB 1) that AVVL, which is a 100% subsidiary of the appellant, will amalgamate with the appellant. Post such amalgamation the status of various companies was as under :



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10. The other salient terms of the amalgamation were as under:

(a) Pursuant to the amalgamation, all assets and liabilities of AVVL became assets and liabilities of the appellant with effect from the 'appointed date'.

(b) Shares held by the appellant in AVVL will be cancelled.

(c) There would be no consideration to be discharged by the appellant for vesting of the assets and assumption of the liabilities of AVVL.

(d) All assets and liabilities of AVVL were to be recorded in the books of appellant at their fair value. Such fair value was determined by an independent valuer. The main assets of AVVL were the shares of the various SPVs, which were valued at 47,002 cr. as per Discounted Cash Flow Method. The excess credit arising out of recording of assets and liabilities at fair values was credited to a general reserve.

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(e) The business of AVVL was to be carried on by that company in trust on behalf of the appellant from the 'appointed date' till the 'effective date'.

(f) On the 'effective date', AVVL is to be dissolved.

11. The above scheme was sanctioned by the Hon'ble High Court vide its order dated 20.01.2012 and became effective from 20.03.2012. It may also be noted that the Hon'ble High Court has not modified the 'appointed date' mentioned in the scheme. In so approving the scheme, the Hon'ble Court specifically found that the scheme was fair and reasonable and was not in violation of any provision of law, and was not contrary to public policy. Upon the scheme becoming operative, the appellant passed required entries in its books of account on 20.03.2012.

Assessee's stand

12. The appellant has not offered any income or capital gain in its return of income as according to it there is no income or gain arising out of the amalgamation. According to the appellant, the entire exercise has not

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resulted in any gain as the appellant has not become richer and, therefore, there is no question of any income-tax on giving effect to the above transaction.

13. The Assessing Officer was of the view that the appellant has received the shares of eight of the SPVs from AVVL in the course of amalgamation. Since the shares were received without any consideration, the value thereof determined in accordance with Rule 11UA of I.T. Rules is liable to be taxed u/s. 56(2)(viia) of the Act. The Assessing Officer was also of the view that the transaction does not fall under any of the clauses of S. 47 of the Act and, hence, the proviso to S. 56(2)(viia) of the Act is not applicable. The Assessing Officer has considered the value of shares of eight of the SPVs on the basis of the break-up value and proposed to make an addition of ` 26,197.67 cr. in the draft order passed. For this purpose, the Assessing Officer adopted the balance sheet of the SPVs as on 31.03.2012 and ignored the balance sheet of the SPVs as on 31.03.2011 on the

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ground that the transactions pursuant to the composite scheme was not recorded in the balance sheet as on 31.03.2011. The Assessing Officer was also of the view that the balance sheet drawn up as on 31.03.2012 was the balance sheet of the date closest to the date of giving effect to the composite scheme and, hence, the same was required to be taken into account. Accordingly, the Assessing Officer proposed an addition of 26,197 cr.

Order passed by the DRP

14. *The draft assessment order passed by the Assessing Officer was referred to the Dispute Resolution Panel (DRP) and the appellant objected to the proposed additions on several counts. It was submitted, first, that the 'effective date' of vesting is 31.03.2011 and, accordingly, nothing can be taxed in A.Y. 2012-13. As regards the taxability u/s. 56(2)(viia) of the Act, it was contended that it could not be said that the shares have been received without consideration. It was also contended that the intention of the*

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Legislature was never to tax an alleged benefit arising as a consequence of a corporate restructuring like an amalgamation. However, during the course of hearing, the DRP proposed to levy tax on the basis that the provisions of S. 28(iv) of the Act were attracted, to which the appellant objected stating that there is no benefit arising in the course of the business.

15. The DRP rejected all the contentions raised by the appellant and held that:

(i) the date of transfer falls during the year under consideration and, hence, the taxability arises in the year under consideration,

(ii) the amount is taxable u/s. 28(iv) of the Act as the appellant has received the benefit which is in the course of the business. The DRP quantified the value of such benefit at ` 46,999.38 cr. being the value of shares at which they were recorded in the books of the appellant (as per Discounted Cash Flow Method),

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(iii) alternatively, the addition u/s. 56(2)(viia) of the Act of 26,197 cr. was upheld for the reasons given by the Assessing Officer.

Arguments before the Hon'ble Tribunal

16. It is humbly submitted that the Assessing Officer and DRP have erred in taxing the above amounts which is completely contrary to the legal positon. The appellant has raised various propositions and the arguments which are as under.

The year of vesting

17. It is submitted that the shares of the eight SPVs stood vested in the appellant pursuant to the scheme of amalgamation sanctioned by the Hon'ble Bombay High Court. The scheme unequivocally provides for vesting of assets on the 'appointed date'. This is evident from clause No. 13 (page No. 145 of PB No. 1), which is reproduced hereinbelow:

"TRANSFER AND VESTING

13.1 With effect from the appointed date and after giving effect to part II, the whole of the undertaking

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and properties of transferor company, including investments in business SPVs, shall pursuant to the provisions contained in section 391 to 394 and all other applicable provisions, if any, of the Act and without any further act, deed, matter or thing, stand transferred to and vested in and/or to be deemed to be transferred to and vested in transferee company……………………..."

18. *From the above, it is evident that the vesting takes place, statutorily and by virtue of the Hon'ble High Court order, on the 'appointed date', and that too without any act or deed by anybody. Therefore, while giving effect to the transaction arising out of amalgamation, only the 'appointed date' has to be recognized, and no other date could be considered inter alia for the purpose of taxation.*

19. *This contention is supported by the judgment of the Hon'ble Bombay High Court in the case of CIT v. Swastik Rubber Products Ltd. (140 ITR 304, 311-312) (copy already on record). In the said case, the*

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'appointed date' was 01.07.1971 but the 'effective date' was 31.12.1971. The question arose as to whether the income during the intervening period is to be taxed in the hands of transferor-company or transferee-company. While holding that the vesting of the business assets takes place on the 'appointed date', the Hon'ble Bombay High Court held as under:

"13. The fourth question is as follows:

'Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that income earned or accruing or arising after July 1, 1971, to December 31, 1971, is not to be included in the total income of the assessee for the assessment year 1972-73 ?'

This question is nothing but a corollary to the questions Nos. (1), (2) & (3). When the obvious answer to questions Nos. (1), (2) & (3) is that the effective date of amalgamation is 1st July, 1971, as a corollary, the answer to question No. (4) would

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be that the income after 1st of July, 1971, would be the income accruing and arising to the assessee-company and not to the bank. Moreover, in answering this question, para 16 of the Tribunal's order is also relevant. The said paragraph is as follows:

'In the above connections, clause (3) of the scheme would also play a prominent and effective role. This clause has received the approval of the High Court as one of the clauses of the scheme of amalgamation. Under the said clause with effect from 1st of July, 1971, the transferor-company shall be deemed to have carried on all business and activities for and on account of the transferee-company and profits accruing of the transferor-company or losses arising to or incurred by it after 1st July, 1971, would for all the purposes be treated as profits or losses of the transferee-company. Hence, even if it is assumed, even though not admitted, that the amalgamation was

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postponed beyond 1st of July, 1971, any profits or losses accruing or arising on the business or activities carried on by the transferor-company with effect from that date would be the profits and losses of the transferee-company and for the purpose of income-tax the transferee-company would be the assessee in respect of such profits and losses. At best it can be said that with effect from that date, the transferor-company acted as a trustee or agent of the transferred company and nothing more."

20. The above legal position was subsequently affirmed by the Hon'ble Supreme Court in the case of Marshall Sons and Co. (India) Ltd. v. Ito (223 ITR 809, 823-824) (copy already on record). In the aforesaid decision, the Hon'ble Supreme Court examined the legal position in-depth and while reversing the conclusion of the Madras High Court held as under:

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"Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide, viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the court to modify the said date and prescribe such date of amalgamation/transfer as it things appropriate in the facts and circumstances of the case. If the court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the court does not prescribe any specific date but merely sanctions the scheme presented to it – as has happened in this case – it should follow that the date of amalgamation/date of transfer is the date prescribed in the scheme as 'the transfer date'. It cannot be otherwise. It must be remembered that before applying to the court under section 391(1), a scheme has to be framed and such scheme has to contain a date of

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amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by sections 391 to 394A and the relevant rules have to be followed and complied with. During the period the proceedings are pending before the court, both the amalgamating units, i.e., the transferor company and the transferee company may carry on business, as has happened in this case, but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with effect from the transfer date, the transferor company (subsidiary company) shall be deemed to have carried on the business for and on behalf of the transferee company (holding company) with all attendant consequences. It is equally relevant to notice that the courts have not only sanctioned the scheme in this case, but have also not specified any other date as the date of

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transfer/ amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income-tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the transferor company (subsidiary company) should be deemed to have been carried on for and on behalf of the transferee company. This is the necessary and the logical consequence of the court sanctioning the scheme, the filing of the certified copies of the orders of the court before the Registrar of Companies, the allotment of shares, etc., may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. Bank of Upper India Ltd., AIR 1919 PC 9."

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21. The next question to be considered is what is the 'appointed date' in the facts of the present case? As stated hereinabove, the 'appointed date' has been defined in para 1.2 (page No. 121 of PB No. 1) as 'closing hours of business on 31.03.2011'. Therefore, it is evident that the 'appointed date' is nothing but 31.03.2011 and can never be regarded as April 1, 2011 as alleged. The phrase 'closing hours of business' has been prefixed to ensure that all the transactions which took place on 31.03.2011 till the closing hours of business on that day are included. Thus, the transfer takes place on 31.03.2011 itself and on no other date. If the intention of the parties would have been to keep the 'appointed date' as any other day, it would have been specifically provided. And having regard to the definition of the said term it could have been modified by the Hon'ble High Court while sanctioning the scheme which has not been done.

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22. In the business world, the phrase 'closing hours of business' is used to mean a time of about 5 p.m. or 6 p.m. As per the Concise Oxford Dictionary (copy already on record), the word 'close' has been defined as the 'end the day's business' whereas in the Advanced Law Lexicon (copy already on record) the 'closing time' has been defined as the time or hour at which the house or office has to be closed, and business should be stopped. The Hon'ble Supreme Court of Ireland had an occasion to decide the meaning of the phrase 'close of the business' in the matter of Elektron Holdings Ltd. (Appeal No. 13/2014) dated 11.03.2016 (copy already on record) wherein the Hon'ble Court held as under:

> *"36. The context in which the phrase 'by close of business' is used is that the seventh paragraph of the Demand Letter, in the case of both Elektron and Crossplan, is preceded by a demand by IBRC for payment by the addressees, Elektron and Crossplan, forthwith of very substantial sums of*

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money, in the case of Crossplan, sums aggregating in excess of €25m. Those demands are succeeded by specific directions as to how payment of those very substantial sums of money could be effected – by electronic transfer to a specific account of IBRC, or by 'delivery' to IBRC at a specific address. The reference in the seventh paragraph to the payment not being 'received' by close of business must be interpreted by reference to the nature of the demand for payment and the manner in which payment could be made to IBRC. That the object of the demand is that IBRC will receive by electronic transfer or by 'delivery' of a bank draft in the case of each company a substantial sum of money 'by close of business', must lead to the interpretation of the phrase 'by close of business' as meaning the end of the business banking day, as the trial judge found. The reality is that beyond the end of the banking business day, the objective could not be achieved, in that, for example, there would be no

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way of delivering a bank draft to IBRC, as the doors would be closed to bank customers.

37. The end of the banking business day is the point in time when the relevant bank ceases to do banking business with its customers. As the trial judge found, in the case of IBRC, the end of banking business occurred at 4 pm on Friday, 17th February, 2012. That is what any customer of IBRC would have understood to be the meaning of 'close of business' used in a document, such as its use in the seventh paragraph of the Demand Letter. Moreover, in the light of what happened at the meeting on the morning of 17th February, 2012, as outlined by Ms. Kelly, it cannot be doubted that it must have been the understanding of the Appellants that 'close of business' meant 4 pm on that day."

23. *The following meaning of 'end of the business' available on the Wikipedia website is also apposite.*

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"In some markets it is actually defined as the point in time a few minutes prior to the actual cessation of trading, when the regular traders' orders are no longer received. During this period, the market is performing what is called 'Run To Cash', which is when the market is reconciling to its underlying cash market, EOB, COB and COP in the U.S is usually at 5:00 pm but typically 5:30 pm in the United Kingdom while EOD is 23:59."

24. In conclusion, it is submitted that the closing hours of business, in any case, has to be before the closing hours of the day and, therefore, by no stretch of imagination, the 'appointed date' could be said to be falling within the previous year under consideration. The appellant, therefore, submits that the entire addition is to be deleted as it is made on the basis that the transaction took place in the previous year relevant to assessment year 2012-13.

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25. It is relevant at this stage to consider the finding of the DRP on the above issue. The DRP has observed on page No. 21 of its order that:

(i) the company has filed Form No. 21 before the ROC on 20.03.2012 and, therefore, the scheme is effective from 20.03.2012;

(ii) the scheme is effective from the closing hour of 31.03.2011, i.e. the opening hour of 01.04.2011.

26. Apart from the fact that these observations are inherently inconsistent to each other, it reveals the pre-determined approach to tax the income anyhow in the year under consideration.

27. In any case, the date of filing of Form No. 21 is entirely irrelevant in light of the various decisions cited hereinabove. Similarly, by no stretch of imagination, the closing hours of 31.03.2011 can be said to be the same as opening hour of 01.04.2011. Therefore, there is no logic or substance in the finding of the DRP and, hence, the same is required to be jettisoned. Further, the DRP in coming to its

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conclusion has relied upon the order of Pune Bench of the Tribunal in the case of Finolex Cables. Suffice to say that the observations made by Pune Bench of the Tribunal, which are reproduced by the DRP on page No. 25, do not support the finding of the DRP in any manner whatsoever. On the contrary, the Tribunal has followed the decision of the Hon'ble Supreme Court in the case of Marshall Sons and Co. (India) Ltd. (223 ITR 809) and that of the Hon'ble Bombay High Court in the case of CIT v. Swastik Rubber Products Ltd. (140 ITR 304) which are relied upon by the appellant.

Taxability u/s. 28(iv) of the Act

28. In order to examine the applicability of provisions of S. 28(iv) of the Act, the relevant provision is reproduced hereinbelow:

"28 The following income shall be chargeable to income-tax under the head 'Profit and gains of business or profession,-

……………………………………………………………………

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(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of profession."

29. In order to tax any amount u/s. 28(iv) of the Act, the following prerequisites need to be satisfied:

(i) there must be benefit or perquisite;
(ii) it must be received in a form other than money;
(iii) it must arise out of the business or profession carried on by the recipient, and
(iv) it must be revenue in nature.

30. At first, it is submitted that there is absolutely no benefit or perquisite arising out of the scheme of amalgamation. As can be seen from various events described hereinabove, the appellant was the owner of various assets comprising different undertakings. Those undertakings stood transferred to the various SPVs without any consideration. Thereupon, the 100% subsidiary of the appellant company, viz., AVVL was amalgamated with the appellant. Since the said company, AVVL was holding all the shares of the eight SPVs, the appellant automatically became

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the owner of those shares by virtue of the vesting of assets in the appellant as per the scheme. Thus, in effect the appellant which earlier owned the assets directly continued to indirectly own the assets by being the sole shareholder of the companies who till now held the assets. In the whole process, the appellant has neither become richer nor poorer. The recording of the shares of the SPVs in the balance sheet of the appellant at their fair market value of ` 46,999 cr., (calculated on the basis of Discounted Cash Flow Method) is nothing but the fair market value of the various assets transferred by the appellant to the SPVs under the same scheme of arrangement. Thus, the first condition of S. 28(iv) of the Act i.e., receipt of a benefit or perquisite, is completely absent in the present case as a sine qua non of the same is that the recipient has gained as a consequence of the transaction.

31. *At this stage, it is worthwhile to note that the legislative intent behind the insertion of clause (iv) to*

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S. 28 of the Act is to tax real and tangible benefit or perquisite arising out of the business or profession. This is evident from the CBDT Circular (copy already on record) explaining the provisions of Finance Act, 1964. In the said Circular, it has been explained that the kind of benefit, which is intended to be taxed, viz. a receipt of a non-monetary asset in lieu of a monetary gain as a consequence of a transaction in the course of the carrying on of the business, like rent-free accommodation in consideration of services rendered. The relevant paragraphs from the said Circular are reproduced hereinbelow:

> *"82. A new clause (iv) has been inserted in section 28, with effect from 1-4-1961, by section 7 of the Finance Act, 1964, under which the value of any benefit or perquisite (whether convertible in money or not) arising from business of the exercise of a profession will be chargeable to tax under the head 'Profits and gains of business or profession'. A corresponding amendment has been made to*

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section 2(24), including the value of such benefit or perquisite in the definition of the term 'income' vide new sub-clause (va) inserted in section 2(24) by section 4(c)(i) of the Finance Act, 1964.

83. The effect of the abovementioned amendment is that in respect of an assessment for the assessment year 1964-65 and subsequent years, the value of any benefit or amenity, in cash or kind, arising to an assessee from his business or the exercise of his profession, e.g., the value of rent-free residential accommodation secured by an assessee from a company in consideration of the professional services as a lawyer rendered by him to that company, will be assessable in the hands of the assessee as his income under the head 'Profits and gains of business or profession."

32. Keeping in mind the above, it could be safely concluded that the benefit or perquisite intended to be taxed by S. 28 of the Act is completely of a different category, and the present case is not one which the

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avowed object of S. 28(iv) of the act seeks to tax. That such is the scope of S. 28(iv) of the act is also supported by the decision of Mumbai Bench of the Tribunal in the case of Rupee Finance & Management (P.) Ltd. v. ACIT (120 ITD 539) (copy already on record) wherein it was held as under:

> *"8.3.. The condition of invoking s. 28(iv) is that the chargeable income of the assessee should arise from the business or in the exercise of profession. There must be a nexus between the business of the assessee and the benefit the assessee derived. The assessee in this case purchased certain shares at a certain price and was required to hold these shares for a period of three years. It is not in dispute that this was an investment made by the appellant-company hence irrespective of the fact as to whether these investments were made in pursuance of the MoU or not, we are of the consideration opinion that such investments cannot be said to be a benefit arisen out of the*

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business of the assessee. Moreover the assessee is the purchaser of the shares and there is no event that has taken place during the current accounting year which can be said to have resulted in any income being accrued or arisen to the appellant-company during the year. If at all the assessee transfers the shares, then the benefit of profit in question can be brought to tax in those particular years. In all the case laws relied upon by the Revenue have been discussed by us while narrating their arguments and in these cases the tax has been levied on the transferor and not the transferee. The effect of this section has been explained by the CBDT in the above cited circular and from this it is clear that, when an assessee purchases goods or assets at a price lower than the market price, under whatever circumstances, the same cannot be brought to tax under s. 28(iv). The section covers fringe benefits that are availed in addition to consideration earned in carrying out

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a profession or while doing business. A benefit that is passed on by one party to another, in addition to cost or sale price, is covered in this proviso. This is clear from the example quoted. In our humble opinion, this section cannot be invoked under the present facts and circumstances.

8.4. Be it as it may the co-ordinate Bench of the Tribunal (F-Bench, Mumbai) in the case of Helios Food Improvers (P) Ltd. (supra) held that s. 28 is a charging section and takes into account the receipts of specified categories of all incomes as well as the receipts which could be generally construed as income in the ordinary sense. But the fact remains that all the receipts mentioned in s. 28 are inherently of income nature except in case of receipt under a given amount of insurance policy. It also states that s. 28(iv) refers to any benefit or perquisite and this means that such benefit or perquisite should be in the nature of income from the very beginning or it must have

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characteristics of income before it becomes chargeable at a later stage if the original transaction is completed as designed. The Bench further observed that the words 'benefit' or 'perquisite' have been used in the said section and have to be read together and would draw colour from each other. Normally the term 'perquisites' denotes meeting out of an obligation of one person by another person either directly or indirectly or provision of some facility or amenity by one person to another person or from the very beginning the person providing such facility or concession knows that whatever is being done is irretrievable to him, as it has been granted to a person as a privilege or right of that person. Thus, it was concluded that the word 'benefit' has to be interpreted in the same manner, that is, at the time of execution of the business transaction one party should give to the other party an irretrievable benefit or advantage, as an obligation or facility or a concession. In our

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opinion, only if the seller had incurred an expense or a liability or had provided a facility to the purchaser, then the value in cash of such expenses or benefit or perquisite shall be treated as income. In this case, the seller has not incurred any expenses or liability or has provided a facility. It sold its shares at a reduced price.

8.5. Applying these propositions to the case on hand, the purchase of shares at a particular price which is below the market price as an investment is not income by any stretch of imagination. It cannot also be deemed as income under s. 28(iv) as it is neither benefit nor perquisite that has arisen to the assessee from the business or in the exercise of a profession. The Hon'ble Gujarat High Court in the case of CIT vs. Bhavnagar Bone & Fertiliser Co. Ltd. (1987) 59 CTR (Guj) 116: (1987) 166 ITR 316 (Guj) has upheld the Tribunal's finding that there must be a nexus between the business of the assessee and

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the benefit which the assessee has derived for the purpose of attracting provisions of s. 28(iv). At p. 320 it has observed as follows: "After referring to various decisions, the Tribunal observed, these decisions make it abundantly clear that the benefit received or receivable by a person must be one which has intimate connection with business and even if such benefit is derived by way of bounty, nevertheless it would be taxable, if accrues to it or if received by it in the course of business or employment of office." In this case the Revenue has not demonstrated what is the business connection or the business done between the seller and the purchaser of the shares. No case has been made out that privilege or benefit or concession has been passed on by the seller to the buyer as part and parcel of a business transaction. A benefit has been assessed by the CIT(A). Mere purchase of shares by way of investment cannot be considered as business of the company though

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the objects of the company enable it to invest as well as deal in shares. As already stated there is no event which can be said to have resulted in accrual of income to the assessee. Thus on this factual matrix, mere purchase of shares, as an investment, with the lock-in-period of holding, for a consideration which is less than the market value, cannot be brought to tax, as a benefit or perquisite under s. 28(iv) of the Act. The assessee has not in this case, secured any benefit or perquisite in consideration of a business transaction undertaken with the sellers of the shares. Thus this issue is decided in favour of the Revenue and against the assesse."

33. It is next submitted that the benefit or perquisite arising to the appellant must be one that arises in the course of carrying on of the business or profession. In order to sustain a charge u/s. 28(iv) of the act the revenue must establish the existence of business transaction between the appellant and

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AVVL and the accrual of the benefit is consequent to the same. The revenue has failed to discharge the burden cast upon it. In fact, there are no business transactions between the appellant and AVVL. It was set up in February, 2011 and was wound up in March, 2012 and the only activity performed was the holding of investments.

34. Reliance is placed upon the order of Mumbai Bench of the Tribunal in the case of Nerka Chemicals P. Ltd. v. DCIT dated 31.08.2018 for A.Ys. 2009-10 to 2011-12 in ITA Nos. 4423/Mum /2014, 4585/Mum/2015 and 4850/Mum/2016 (copy already on record) wherein the question as to whether the gift of shares received by the assessee could be taxed u/s. 28(iv) of the Act was considered. It was held by the Hon'ble Bench that such a gift cannot be said to be arising in the course of assessee's business. It was held that the gift of shares was made by entities with whom the assessee had no business transactions and,

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therefore, the taxability u/s. 28(iv) of the Act cannot be sustained. While holding so, the Hon'ble Tribunal in paragraphs 43 to 47 has considered the above referred Circular of CBDT, as well as order of Mumbai Bench of the Tribunal in the case of Rupee Finance & Management (supra). The decision of the Tribunal in Rupee Finance & Management (supra) also supports the aforesaid contention. (See paragraph 8.5 thereof).

35. Reliance is also placed upon the order of the Mumbai Bench of the Tribunal in the case of DCIT v. KDA Enterprises P. Ltd. (68 SOT 349) (copy already on record). In the said case also, the issue was regarding the taxability of gift received u/s. 28(iv) of the Act. The Hon'ble Tribunal has observed on page 93 of its order that the transaction is not arising from the business and the same is in capital field.

36. It is next submitted that in any case, a book entry recording a reserve is a consequence of the

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amalgamation, which entry is required to be passed for the limited purpose of balancing the account based on the double entry system employed, cannot give rise to any benefit or perquisite in the course of the business. It may kindly be noted that the appellant has no business transactions whatsoever with its 100% subsidiary company, Amby Valley 'V' Ventures P. Ltd. The only relationship between two companies were that of holding and subsidiary company. The reserve arose out of the amalgamation pursuant to the scheme sanctioned by the Hon'ble High Court. In this factual background, it cannot be said that the amalgamation reserve arose out of any business activity of the appellant.

37. In this regard, reliance is placed upon the order of Kolkata Bench of the Tribunal in the case of ITO v. Shreyans Investments (P.) Ltd. (141 ITD 672, 679-681) (copy already on record). In the said order, it was held that a reserve arising out of the

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amalgamation cannot be treated as income u/s. 28(iv) of the Act. While holding so, the Tribunal has relied upon the judgment of the Bombay High Court in the case of Mahindra & Mahindra (261 ITR 501) [since upheld in 404 ITR 1 (SC)]. The relevant paragraphs from the Tribunal's order are reproduced hereinbelow:

> *"7. Section 28 sets out the incomes which are chargeable to income-tax under the head 'Profits and gains of business and profession', and clause iv) thereto refers to "the value of any benefit or perquisite, whether convertible into money or not, arising from the business or exercise of a profession". It is thus clear that besides the profits and gains from business and profession carried on by the assessee at any time during the previous year, any other benefit or perquisite, whether convertible into money or not, is also chargeable to tax under this head of income. A plain reading of this provision shows*

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two conditions precedents for such taxability i.e. (i) that there should be benefits or perquisites; and that (ii) that such benefits or perquisites should arise from the business or exercise of the profession. The expression 'arising from the business' essentially implies that the benefit or perquisite must be in the nature of a business receipt or revenue receipt. No matter how wide be the scope of Section 28(iv), the difference between a capital receipt and revenue receipt cannot be overlooked. In the case of Mahindra & Mahindra Ltd. v. CIT [2003] 261 ITR 501/128 Taxman 394, Hon'ble Bombay High Court has, in the context of this significant distinction between revenue and capital receipts, held that waiver of principal amount in respect of imports of plant and machinery could, by no stretch of logic, be treated as 'business income', and, therefore, as an income taxable under section 28(iv). One must bear in mind the fact that

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section 28 only refers to the "income" which can be charged to income tax under the head "profits and gains from business or profession", and, therefore, when a particular advantage, perquisite or receipt is not in the nature of income, there cannot be any occasion to bring the same to tax under section 28(iv). Hon'ble Supreme Court, in the case of Padmaraje R Kadambande v. CIT [1992] 195 ITR 877/62 Taxman 456 observed that, "...we hold that the amounts received by the assessee during the financial year in question have to be regarded as capital receipts, and, therefore, are not income within meaning of section 2(24) of the Income Tax Act." (Emphasis by underlining supplied by us). This clearly shows, as is the settled law, that a capital receipt, in principle, is outside the scope of income chargeable to tax. Of course, there are specific provisions under the Income Tax Act which provide that certain

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capital receipts can also be considered as income, such as under section 2 (24)(vi) which covers "any capital gains chargeable under section 45", but right now we are confined to normal connotations of the expression income'. Howsoever liberal or narrow be the interpretation of expression 'income', it cannot alter character of a receipt, i.e. convert a capital receipt into revenue receipt or vice versa. The crucial distinction between capital and revenue cannot be blurred or nullified by even the most liberal interpretation of expression 'income'. It is also important to bear in mind that, as held by Hon'ble Supreme Court in the case of Dr. K George Thomas v. CIT [1985] 156 ITR 412/23 Taxman 46, "the burden is on the revenue to establish that the receipt is of a revenue nature" though "once a receipt is found to be of revenue character, whether it comes under exemption or not, it is for the revenue to establish". It is thus

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clear that capital receipts are inherently outside the scope of an income which can be taxed under section 28(iv), and Hon'ble Bombay High Court, in the case of Mahindra & Mahindra Ltd. (supra) also holds so. As to what constitutes capital receipt, we find guidance from Hon'ble Madras High Court's judgment in the case of CIT v. Seshasayee Bros. (P.) Ltd. [1996] 222 ITR 818/89 Taxman 13 wherein Their Lordships, after elaborately surveying the legal precedents on this issue, concluded that, "Thus, a combined reading of the above said judicial pronouncements would go to show that when a receipt is referable to fixed capital, it is not taxable, and it is taxable as a revenue receipt when it is referable to circulating capital or stock in trade". To sum up, unless it is a revenue receipt, it cannot be in the nature of income [except in a situations in which capital receipts are specifically included in the

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definition of income such as under section 2(24)(vi)], and unless it is in nature of income, it cannot be considered for taxation under section 28(iv). The reference to benefits which can be brought to tax under section 28(iv) for benefits 'arising from the business' also indicates that such benefit must be a business receipt, or revenue receipt, in nature.

8. To find out whether or not the benefit, even if that be so, is on capital account or revenue account, it is necessary to understand the nature of transaction which has resulted in, what the Assessing Officer, perceives as 'benefit to the assessee'. This was a case of amalgamation in the nature of merger, and an amalgamation in the nature of merger, in corporate parlance, is the process of blending of two or more companies into one of these blending companies, the shareholders of each blending company becoming substantially the

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shareholder of the company which holds the blended undertaking. The expression 'amalgamating company' is used for the 'blending company' which loses its existence into the other company and the expression 'amalgamated company' is used for blended undertaking, which holds existence of those two or more companies. In essence thus, the whole exercise of amalgamation in the nature of merger is an exercise in that of pooling of resources, as also pooling of assets, into the company in which two or more companies are blended. It is a process of corporate reconstruction and it is only with the approval of Hon'ble jurisdictional High Court that this exercise is carried out. In the present case also, as stated in paragraph 4 of Part I of Schedule A (i.e. scheme of amalgamation) to Hon'ble Calcutta High Court's order dated 9th April 2008, "for the purpose of better, efficient and

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economical management, control and running of the business and to withstand the recessionary trend in the economy of the business undertaking concerned and for administrative convenience and to obtain advantage of economies of large scale, the present scheme is proposed to amalgamate the transferor company (i.e. VVPL) with the transferee company (i.e. the assessee)". As a result of amalgamation, the assessee, being the transferee company, will increase its assets and liabilities, and, even if there be any benefit in the process, such a benefit can only be in the capital field because it is relatable to the non-trading assets and capital. What it affects is the capital structure of the assesse company and the manner in which business is consolidated. As the Assessing Officer himself observes, "......this exercise of amalgamation is also aimed at bolstering the capability of the

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assessee to conduct business more dynamically and earn more profit. So, the enhancement of its capital reserve, as a result of this amalgamation can only be construed as a benefit accrued to the assessee...", but then it is not even the case of the Assessing Officer that the benefit is in the revenue field, and unless the Assessing Officer is to discharge the onus of demonstrating that the benefit is in the revenue field, there cannot be any occasion to invoke Section 28(iv). Applying the test laid down by Hon'ble Madras High Court, in the case of Seshasayee Brothers (supra), also, we find that the benefit is referable to the capital, and is thus not of an income nature. Even if, as the Assessing Officer observes, "it can be surmised that the assessee is benefited in a myriad ways by way of amalgamation", it does not lead to the conclusion that the benefit is in revenue field which alone can be treated as income and thus

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be considered for taxability under section 28(iv) of the Act. The onus is on the Assessing Officer to demonstrate that the receipt is of the revenue nature."

38. Reliance is next placed upon the judgment of the Madras High Court in the case of CIT v. Stads Ltd. (373 ITR 313) (copy already on record). In the said case, the reserve arising out of amalgamation was given the nomenclature of a general reserve, and the case of the Assessing Officer was that the same was benefit taxable u/s. 28(iv) of the Act. Rejecting such contention, the Hon'ble Madras High Court held that reserves and surplus reflected in the balance sheet could not be treated as benefit or perquisite arising from the business or exercise of profession. It was held that the amount represent an amalgamation reserve and it could not be said that it was out of normal transaction of the business. The transaction was held to be capital in nature as it arose out of amalgamation.

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39. Reliance is next placed upon the decision of the Chennai Bench of the Tribunal in the case of Spencer & Co. Ltd. v. ACIT [137 ITD 141 (TM)] (copy already on record). In the facts of the case before the Tribunal, the surplus arising out of the amalgamation was transferred to a general reserve which was treated by the Assessing Officer as income u/s. 28(iv) of the Act. It was held by the Third Member concurring with the view of the Accountant Member that there was no benefit arising in the course of business and, hence, no amount could be taxed u/s. 28(iv) of the Act. While holding so, the Tribunal also distinguished the decision of the Madras High Court in the case of Aries Advertising P. Ltd. (255 ITR 510) as that case was pertaining to remission of unclaimed balances of trading liability.

40. It is further submitted that the decision of the Third Member of the Tribunal is as good as decision of Special Bench and sanctity of the Third Member decision and Special Bench decision is of the same

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nature. This has been so held in the case of DCIT vs. Oman International Bank [286 ITR (AT) 8 (SB)]. Therefore, following the above referred decision of Third Member, it may kindly be held that creation of general reserve does not give rise to any tax liability u/s. 28(iv) of the Act.

41. *Reliance is also placed upon the order of Kolkata Bench of the Tribunal in the case of ITO v. Kyal Developers (P) Ltd. [63 SOT 93 (URO)] (copy already on record).*

42. *It is worthwhile to note that the special auditor has considered the above issue in detail and also various judicial pronouncements. After considering the issue in-depth, the special auditor had opined that the reserve arising out of amalgamation cannot be taxed in the hands of the appellant. It is worth noting that in respect of several additions the Assessing Officer and DRP have wholly relied upon on the report of special auditor, whereas in respect of this huge addition they ignored the view of the special auditor.*

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43. The appellant would also like to point out that the provisions of S. 28(iv) of the Act are not applicable as there is no benefit whatsoever. As explained hereinabove, the appellant is holding some assets indirectly which it was holding earlier directly. Secondly, whenever the shares of SPVs would be sold the appellant would get deduction on account of cost of acquisition of previous owner and, thus, there is no benefit in terms of reduction in future capital gain tax liability. Apart from this, there is no benefit whatsoever by merely having the amount credited to the general reserve. This is because, no dividend can be declared out of the said general reserve as the appellant needs actual fund to distribute the dividend. In the present case, there is no actual fund generated and the general reserve is only due to recording of assets at fair value. If the appellant would like to declare the dividend it has to earn income, pay tax thereon and dividend can be declared only thereafter. Further, the Companies

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(Declaration of Dividend out of Reserves) Rules, 1975, specifically prohibits declaration of dividend out of such general reserve.

44. The ld. DRP has relied upon the decision of Madras High Court in the case of CIT v. Ramaniyam Homes (P) Ltd. (384 ITR 530) (copy already on record). In this regard, it is submitted that the Madras High Court has not agreed with the view of Delhi High Court in the cases of Logitronics (P) Ltd. v. CIT (333 ITR 386) and Rolltainers Ltd. v. CIT (339 ITR 54). Apart from this, the decision of Madras High Court stands specifically overruled by the Hon'ble Supreme Court in the case of CIT v. Mahindra & Mahindra (401 ITR 1). The DRP has also relied upon the decision of Supreme Court in the case of Vazir Sultan Tobacco Co. Ltd. v. CIT (132 ITR 559). The said decision is not relevant as it deals with difference between concepts of 'reserve' and 'provision'. In any case, the said decision has been considered by Chennai Bench of the Tribunal in the case of Spencer & Company Ltd.

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v. ACIT (137 ITD 141) referred to hereinabove. Similarly, the decision of Madras High Court in the case of Aries Advertising P. Ltd. (255 ITR 510) is also not applicable as the issue that arose for consideration in that case was the taxability of the trading liabilities transferred to general reserve. The said decision has also been considered by the Chennai Bench of the Tribunal in the case of Spencer & Company Ltd. v. ACIT discussed hereinabove.

Taxability u/s. 56(2)(viia) of the Act

45. *The provisions of S. 56(2)(viia) of the Act are reproduced hereinbelow.*

> *"S. 56(2)(viia) Where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June, 2010 but before the [1st day of April, 2017], any property, being shares of a company not being a company in which the public are substantially interested.-*

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"(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration:

***Provided** that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause clause (vid) or clause (vii) of section 47.*

Explanation.- For the purposes of this clause, 'fair market value' of a property, being shares of a company not being a company in which the public are substantially interested, shall have the

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meaning assigned to it in the Explanation to clause (vii)."

46. *It would be worthwhile to note that the provisions of S. 56(2) of the Act were amended from time to time in order to curb bogus capital-building and money-laundering. Various clauses have been added to curb such nefarious practice. While inserting clause (v) to S. 56(2) of the Act, the Explanatory Notes on provisions of Finance (No. 2) Act 2004 stated as under:*

"In order to curb bogus capital-building and money-laundering, a new sub-clause has been inserted in section 56 to provide that any sum received without consideration on or after 1st day of September, 2004, by an individual or a Hindu undivided family from any person, shall be treated as income from other sources. A threshold limit of twenty-five thousand rupees has also been provided. If the amount so received exceeds this

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limit, the whole of the amount shall become taxable."

47. *It is submitted that in the present case it is an undisputed position that such is not so. It is not the case of the revenue that there is any money-laundering or building of bogus capital. The provisions are anti-abuse provisions to be intended to cover transactions resulting into tax evasion by dubious methods. Further, the transactions of business re-organizations were always intended to be kept out of the purview. This is evident from the Memorandum explaining the provisions of Finance Bill, 2010. The relevant portion of the same is reproduced hereinbelow:*

"A. These are anti-abuse provisions which are currently applicable only if an individual or an HUF is the recipient. Therefore, transfer of shares of a company to a firm or a company, instead of an individual or an HUF, without consideration or at a

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price lower than the fair market value does not attract the anti-abuse provision.

In order to prevent the practice of transferring unlisted shares at prices much below their fair market value, it is proposed to amend section 56 to also include within its ambit transactions undertaken in shares of a company (not being a company in which public are substantially interested) either for inadequate consideration or without consideration where the recipient is a firm or a company (not being a company in which public are substantially interested). Section 2(18) provides the definition of a company in which the public are substantially interested.

It is also proposed to exclude the transactions undertaken for business reorganization, amalgamation and demerger which are not regarded as transfer under clauses (via), (vic), (vicb), (vid) and (vii) of section 47 of the Act."

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48. Keeping the above in mind, it can be concluded that the value of shares vested in the appellant pursuant to the scheme of amalgamation sanctioned by High Court cannot be taxed.

49. It is further submitted that by virtue of amalgamation, there is only a vesting of the assets including the shares in the hands of the appellant. Although, the provisions of S. 56(2)(viia) of the Act uses the phrase 'receives …… any property, being shares', the receipt must be by way of a transaction that results in a transfer. This is borne out by the Memorandum explaining the provisions of the Finance Bill 2010 wherein it has been stated that the clause has been inserted to prevent the practice of ***transferring*** *unlisted shares (the relevant circular is already on record). Thus, for a charge under the section to be attracted, it postulates the transfer of shares. It is submitted that the transfer of shares presupposes the existence of transferor, transferee and transferred asset i.e. shares. It is submitted that in case of*

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amalgamation, there is no transfer as there is only statutory vesting of assets by virtue of the scheme sanctioned by the High Court.

50. In this regard, reliance is placed upon the decision of the Bombay High Court in the case of CIT v. Texspin Engineering & Manufacturing Works (129 Taxman 1) (copy already on record). The said case concerns with conversion of partnership firm into a company under Part IX. It has been held by the High Court that in case of transfer of capital asset, the existence of two parties is prerequisite. In statutory vesting, there was no transfer. On a parity of reasoning the shares of 8 SPVs which were hitherto held by AVVPL as a consequence of the order of the High Court vests in and become the property of the Appellant without any further act or deed but merely by virtue of the operation of the order of the High Court and, consequently, AVVPL stands dissolved without being wound up. Therefore, it is submitted that there is no transfer as understood in general law because as a

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consequence of the transaction AVVPL does not survive and is dissolved.

51. *Reliance is also placed upon the decision of Calcutta High Court in the case of Shaw Wallace & Company Ltd. v. CIT (119 ITR 399, 411). This is also a case of amalgamation where there was transfer of asset from amalgamating company to the amalgamated company. The Hon'ble High Court has observed that there was no transfer involved to another person or any consideration passing on as a result thereof. It was held that the dissolution of the amalgamating company took place by operation of the scheme sanctioned by law and as a result the rights in the shares of the amalgamating companies came to an end. Secondly, it was held that the amalgamated company was owner of all the assets of the amalgamating company as it was a 100% holding company. Once, all the assets are transferred to the amalgamated company, there was no element of gain or loss when the assessee re-arranged its capital*

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base. In his concurring judgment, Justice C. K. Banerji observed as under:

> *"The shares held by the assessee in the transferor-companies represented the capital invested by the assessee in the said companies and by the said amalgamations the assessee became the sole owner of the entire capital of the transferor-companies. By virtue of the said amalgamations the assessee as the transferee-company became the sole repository of all the rights which flowed from or were imbedded in the shares held by the assessee in the transferor-companies."*

52. *The above decision was followed by the Bombay High Court in the case of Forbes Forbes Campbell and Co. Ltd. v. CIT (150 ITR 529).*

53. *In any case, the provisions of S. 56(2)(viia) of the Act are applicable only in a case where the shares were received for no consideration or inadequate consideration. It is submitted that if the scheme is looked into as a whole, there is no question of no*

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consideration or inadequate consideration. The appellant has transferred assets of various undertakings to SPVs (Part II of the scheme), and acquired the shares of SPVs from 100% subsidiary company (Part III of the scheme). In the process, the shares of Aamby Valley 'V' Ventures P. Ltd. held by the appellant were cancelled. The net position is that the appellant is the owner of the same assets before the implementation of the scheme as well as after the implementation of the scheme.

54. *At the cost of repetition, it is submitted that the appellant has not gained or suffered a detriment. The appellant humbly submits that various charts given hereinabove may kindly be perused, and on such perusal one would come to irresistible conclusion that upon becoming the owner of the shares of SPVs the appellant has not gained anything as consequently its shares in AVVL of a similar value stood extinguished. While deciding as to whether the shares is without consideration or not one has to look*

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at the entire scheme holistically and apply the commercial wisdom of a businessman. It may be appreciated that there is a single scheme and it has been approved by the Hon'ble High Court by a single order. Therefore, the passing of the consideration and the receipt of shares cannot be looked in isolation. Accordingly, it is submitted that the shares were not received without consideration and, therefore, S. 56(2)(viia) of the Act has no application.

<u>Applicability of S. 47(vii) of the Act</u>

55. *It is submitted that section 56(2)(viia) cannot apply because of the proviso thereto. The memorandum explaining the provisions clearly indicates that the proviso was introduced as it was not intended that the provision of section 56(2)(viia) are attracted to cases of business reorganization such as demerger and amalgamation. It is submitted that if one reads the section as follows it would be clear that the charge under section 56(2)(viia) cannot be attracted. The section would read thus " where a company not*

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being a company in which the public are substantially interested (the Appellant) receives in any previous year from any person (AVVPL) any property being shares of a company not being a company in which the public are substantially interested (8 SVPs)………. Provided that this clause shall not apply to any such property (shares of 8 SVPs) received by way of a transaction not regarded as transfer under clause (vii) of section 47 that is any transfer by a shareholder in a scheme of amalgamation. Undoubtedly clause (vii) of section 47 goes to provide that such transfer has to be of a capital asset being a share or shares held by the shareholder in the amalgamating company and requires two conditions to be fulfilled before the exception can be applied viz., the transfer is made in consideration of the allotment to the shareholders of any share or shares in the amalgamated company and the amalgamated company is an Indian company. It is submitted that what is covered by the

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proviso, especially having regard to the rationale for its introduction as explained in the memorandum is a receipt of shares by an assessee as a consequence of an amalgamation. If one incorporates the provisions of clause (vii) of section 47 in its entirety then the exception carved out by the virtue of the provision can never apply because on a literal interpretation what is covered in clause (vii) are the shares held by a shareholder in the amalgamating company which as a consequence of amalgamation would get extinguished and would never be received by anybody else. Therefore, it is submitted that the exception carved out by the proviso to section 56(2)(viia) can never apply and, hence, one would have to give a purposive interpretation to section of 56(2)(viia) and hold that the provisions thereof would never apply to a receipt of shares as a consequence of an amalgamation. As the Appellant has received the shares of the 8 SPVs as a consequence of the merger of AVVPL into the Appellant it is submitted

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that the proviso to section 56(2)(viia) would clearly be attracted.

56. *In any case, as per S. 47(vii) of the Act, any transfer by a shareholder in a scheme of amalgamation of capital asset being a share of amalgamating company is not regarded as transfer. There are certain conditions provided for in the said sub-section which are reproduced hereinbelow as they are applicable for A.Y. 2012-13 and A.Y. 2013-14.*

A.Y. 2012-13	***A.Y. 2013-14***
The transfer is made in consideration of the allotment to him of any share or shares in the amalgamated company.	*The transfer is made in consideration of the allotment to him of any share or shares in the amalgamated company except where the shareholder itself is the amalgamated company.*
Amalgamated company is an Indian company.	*Amalgamated company is an Indian company.*

57. *From a perusal of the above statutory position, it can be seen that the amalgamation under consideration satisfied the conditions as existed for A.Y. 2012-13. The requirement to allot shares can only apply where*

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it is permissible in law to do so. Because the appellant, being the amalgamated company, was the 100% shareholder of the amalgamating company and thereafter holding company, it could not issue any shares to the shareholders of amalgamating company (which is the appellant itself). Since under the provisions of the Companies Act, a company cannot issue shares to itself, the condition prescribed in A.Y. 2012-13 was impossible to comply with and hence, the failure to do so cannot mean that the present case does not fall within the provision. In fact, realizing this lacuna the Legislature has amended the above sub-section (and also S. 2(19AA) of the Act), vide Finance Act, 2012 seeking to cure the unintended omission. This is evident from the Memorandum explaining the provisions of the Finance Bill 2012 (copy already on record) wherein it has been explained that the existing condition was not possible to satisfy and, hence, the amendment has been brought in. It is submitted that keeping in

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mind, the legislative intent and also the subsequent amendment curing the defect, the clarificatory amendment should be held to be retrospective in nature. It is submitted that there was an obvious omission in the provisions of the Act as earlier it had provided a condition which was impossible to comply with. To set right such unintended situation, the Legislature has proposed the amendment. It could never be the intention of the Legislature to rectify the situation for A.Y. 2013-14 and subsequent years and to retain the lacuna for A.Y. 2012-13. Keeping in mind the following authoritative pronouncements, the amendment should be held to be retrospective in nature.

(i) *CIT v. Vatika Township P. Ltd. [367 ITR 466, 469 (SC)]*

"An amendment made to a taxing statue can be said to be intended to remove 'hardships' only of the assessee, not of the Department. Imposing a retrospective levy on the assessee would have

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caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from June 1, 2002.

Where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. Where a law is enacted for the benefit of community as a whole, even in the absence of a provisions the statue may be held to be retrospective in nature."

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(ii) *Allied Motors (P.) Ltd. v. CIT [224 ITR 677, 678 (SC)]*

"A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation, so that a reasonable interpretation can be given to the section as a whole."

(iii) *CIT v. Calcutta Export Company [404 ITR 654, 655 (SC)]*

"A provision of such nature, the purpose of which is to ensure tax compliance and not to punish the taxpayer, should not be allowed to be converted into a provision which metes out stern punishment and results in malevolent results, disproportionate to the offending act and aim of legislation."

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58. Thus, if the amendment to S. 47(vii) of the Act is held to be retrospective in nature, the transaction of amalgamation in the present case would be covered by the said provision and by virtue of proviso to S. 56(2)(viia) of the Act, there would not be any tax liability under that section.

Valuation of shares

59. It is submitted that even if S. 56(2)(viia) of the Act is applicable, the valuation has to be done as per R. 11U and 11UA of Income-tax Rules. Rule 11U defines the term 'balance sheet'. According to the said definition, balance sheet means the balance sheet of such company as drawn up on the valuation date. The valuation date has been defined in clause (j) of rule 11U as the date on which property has been received by the appellant. In the facts of the present case, the property was received on the 'appointed date' which is 31.03.2011. The Assessing Officer as well as DRP have considered the balance sheet as on 31.03.2012 instead of 31.03.2011. It was, therefore,

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submitted that when the rules have prescribed a particular balance sheet, the lower authorities were not empowered to take any other balance sheet into account. Even if it is assumed, without admitting, that the date of transfer is 01.04.2011, the balance sheet as on 31.03.2012 could not be taken into account. This is for the reason that there was no such discretion available to the authority to take any balance sheet of their choice for the purpose of valuation.

60. *The argument of the Assessing Officer and DRP that since the entries have not been passed in the books of account as on 31.03.2011, the balance sheet as on that date cannot be considered is without any logic and contrary to the legal position. There is no such pre-condition in the Act, or Rules, that there has to be a particular entry in the books of account. The rules mandatorily prescribe a particular balance sheet to be taken into account. Therefore, the authorities*

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below have erred in adopting the balance sheet as on 31.03.2012.

61. *Reliance placed by the DRP on the judgment of Madras High Court in the case of CWT v. S. Ram and Ors. (147 ITR 278) is inapplicable as that was a case where the issue arose in connection with gift tax proceedings. Further, there was no rules which were governing the valuation or valuation date. The High Court has made certain observations in this factual context. As against that, the present case involves well-defined rules governing valuation which are mandatory and binding. Therefore, the lower authorities are not justified in tampering with clear language of rules.*

Taxability under MAT provision

62. *The next issue to be discussed is regarding calculation of book profit u/s. 115JB of the Act. The above issue arises out of the additional ground of appeal filed on 08.12.2017 before the Hon'ble Bench. It is submitted that the additional ground of appeal*

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raises a pure question of law and all facts required for the purpose of adjudication of the above ground are available on record and are undisputed.

63. In the draft assessment order the book profit u/s. 115JB of the Act was not increased by an amount of Rs.46,999.38 cr. credited to reserve account. However, the DRP has exercised its power of enhancement in this regard. The DRP has directed the Assessing Officer to tax the above amount under the MAT provisions also.

64. The appellant has challenged the above direction vide the additional ground of appeal filed on 08.12.2017. The DRP has observed that as per Explanation 1(b) of S. 115JB of the Act the amount carried to any reserve is required to be added back to the book profit. Accordingly, the DRP was of the opinion that the amount of Rs.46,999.38 cr., by which the general reserve has increased was to be added to the book profit. According to the DRP, although the creation of reserve was not routed through P & L A/c, merely

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because it was not passed through the P & L A/c should not escape the requirement of MAT. The DRP has also placed reliance on few decisions.

65. *In this regard, it is submitted that the appellant has drawn its P & L A/c as per Schedule VI of the Companies Act. The said P & L A/c has been duly audited by the Chartered Accountant who has not qualified his report in any manner. The audit report is available on page 2 of the paper book no. 1. Therefore, according to the legal position, the Assessing Officer has no right whatsoever to modify the book profit unless he wants to make an adjustment contemplated in the various clauses of the Explanation-1. In this regard, reliance is placed upon the decision of Supreme Court in the case of Apollo Tyres v. CIT (255 ITR 373). In the said decision, it has been held by the Hon'ble Supreme Court as under:*

> *"The use of the words 'in accordance with the provisions of Parts II and III of Sch. VI to the*

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Companies Act' was made for the limited purpose of empowering the assessee authority to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, the AO under the IT Act has to accept the authenticity of the accounts with reference to the provisions of the Companies Act which obligates the company to maintain its account in a manner provided by the Companies Act and the same to be scrutinized and certified by statutory auditors and will have to be approved by the company in its general meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the Companies Act. In spite of all these procedures contemplated under the provisions of the Companies Act, it is difficult to accept the argument of the Revenue that it is still

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open to the AO to re-scrutinize this account and satisfy himself that these accounts have been maintained in accordance with the provisions of Companies Act. Reliance placed by the Revenue on sub-s. (1A) of s. 115J in support of the above contention is misplaced. Sub-s. (1A) of s. 115J does not empower the AO to embark upon a fresh inquiry in regard to the entries made in the books of the company. The said sub-section, as a matter of fact, mandates the company to maintain its account in accordance with the requirements of the Companies Act which mandate is bodily lifted from the Companies Act into the IT Act for the limited purpose of making the said account so maintained as a basis for computing the company's income for levy of income-tax. Beyond that, the said sub-section does not empower the authority under the IT Act to probe into the accounts accepted by the authorities under the Companies Act. If the statue mandates that

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income prepared in accordance with the Companies Act shall be deemed income for the purpose of s. 115J, then it should be that income which is acceptable to the authorities under the Companies Act. There cannot be two incomes one for the purpose of Companies Act and another for the purpose of income-tax both maintained under the same Act. If the legislature intended the AO to reassess the company's income, then it would have stated in s. 115J that 'income of the company as accepted by the AO'. In the absence of the same and on the language of s. 115J, it will have to held that view taken by the Tribunal is correct and the High Court has erred in reversing the said view of the Tribunal. Therefore, the AO while computing the income under s. 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act. The AO thereafter has the limited power of making increases and

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reductions as provided for in the Explanation to the said section. To put if differently, the AO does not have the jurisdiction to go behind the net profit shown in the P&L a/c except to the extent provided in the Explanation to s. 115J. – CIT vs. Apollo Tyres Ltd. (1998) 149 CTR (Ker) 538 : (1999) 237 ITR 706 (Ker) : TC S24.2490 set aside."

66. *Reliance is also placed upon the decision of Bombay High Court in the case of CIT v. Adbhut Trading Co. (P.) Ltd (338 ITR 94) (copy already on record) wherein following the decision of Supreme Court in the case of CIT v. Apollo Tyres Ltd. (255 ITR 273), it was held that once the accounts are certified by the authorities under the Companies Act, it was not open to the Assessing Officer to contend that the Profit & Loss A/c was not prepared in accordance with the provisions of the Companies Act. It may be noted that in the case, the contention of the revenue was that*

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the appellant has intentionally prepared a wrong P & L A/c.

67. Reliance is also placed upon the order of Mumbai Bench of the Tribunal in the case of Forever Diamonds P. Ltd. v. DCIT (57 SOT 113) (copy already on record). In the said order, the Mumbai Bench of the Tribunal has considered their earlier order in the case of Bombay Diamond Co. P. Ltd. v. DCIT for A.Y. 2004-05 being ITA No. 7488/Mum/2007 dated 30.11.2009 (which has been relied upon by the DRP). The Hon'ble Tribunal has followed the decision of the Supreme Court in the case of CIT v. Apollo Tyres (255 ITR 273) and has held that the Assessing Officer has no power to modify the figure of profit as per the audited P & L A/c. In the above referred decision, the Tribunal has also considered the earlier decision of Bombay High Court in the case of CIT v. Veekaylal Investment Co. P. Ltd. (249 ITR 597) and that of Mumbai Bench of the Tribunal in the case of Sumer Builders (P.) Ltd. v.

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DCIT (50 SOT 198), both of which have been relied upon by the DRP in the present case.

68. *The appeal of the revenue from the above decision of the Tribunal is rejected by the Hon'ble Bombay High Court in the case of CIT v. Forever Diamonds P. Ltd. (Income Tax Appeal No. 1609 of 2013) dated 12.08.2015 (copy already on record).*

69. *Reliance is also placed upon the order of Mumbai Bench of the Tribunal in the case of ITO v. Bhagwan Industries Ltd. for A.Y. 2004-05 being ITA No. 6665/Mum/2008 dated 08.09.2014 (copy already on record) wherein the Tribunal decided the similar issue in favour of the assessee following the judgments in the case of CIT v. Akshay Textiles Trading & Agencies (P) Ltd. [304 ITR 401 (Bom)] and CIT v. Adbhut Trading Co. (P) Ltd. [338 ITR 94) (Bom)]. The appeal of the revenue against the said decision has also been rejected by the Hon'ble Bombay High Court in the case of Pr. CIT v. Bhagwan*

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Industries Ltd. (Income Tax Appeal No. 436 of 2015) dated 18.07.2017 (copy already on record).

70. *It is next submitted that the argument of the DRP that the amount transferred to General Reserve in terms of clause (ii) of the Explanation 1 has to be added back is fallacious as it overlooks the bare provisions of S. 115JB of the Act. Certain amounts are to be added back to the book profit as per Explanation 1 to S. 115JB of the Act. However, they are only those amounts which were debited to the P & L A/c. In the present case, the amount of general reserve has not been debited to the P & L A/c and, hence, there is no question of adding it back. Identical issue arose before the Bombay High Court in the case of CIT v. Bisleri Sales Ltd. (377 ITR 144). The Hon'ble High Court decided the issue in favour of the assessee by holding as under:*

"(a) For the subject Assessment year, the Assessing officer by order dated 21st March 2002 recomputed the book profit under Section 115JA

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of the Act (MAT provision) by adding the amounts received on account of goodwill and non-compete fees which were directly taken to the Balance sheet by the Respondent Assessee. This was inter alia on the basis of clause (b) of the Explanation to Section 115JA of the Act. The Assessing Officer had also held that the above amounts had to be routed through the Profit and Loss account for the purpose of computing profits under the Companies Act, 1956.

(b) Being aggrieved, the Respondent Assessee filed an appeal to Commissioner of Income Tax (Appeals) (the Commissioner). By order dated 16 September 2002, the Commissioner allowed the appeal by relying upon the decision of the Supreme Court in the case of Apollo Tyres Ltd. V/s. CIT, [2002] 255 ITR 273 (SC) wherein it is held in the context of MAT provisions that the Assessing Officer has to accept the authenticity of the accounts maintained in accordance with the

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provisions of Companies Act, 1956, which are duly audited and passed in the general body meeting of shareholders. It was held that the Assessing Officer has no power to disturb the profits in the Profit and Loss account as except to the extent provided in the explanation to Section 115JA.

(c) On further appeal by the Revenue the Tribunal by the impugned order dismissed the Revenue's appeal. The impugned order places reliance upon the decision of the Apex Court in Apollo Tyres Ltd., wherein it was held that it is not open to the Assessing Officer to question the correctness of the Profit and Loss account when the same have been prepared in accordance with the provisions of the Companies Act, duly scrutinized by the Auditors, approved by the general body of shareholders and filed with the Registrar of Companies. The Apex Court held that the Assessing Officer has limited power to make

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additions and reductions as provided in the Explanation to Section 115JA of the Act. The impugned order further held that the provision for Reserve made by the Respondent Assessee cannot be added to arrive at book profits in terms of clause (b) of the Explanation to Section 115JA of the Act. This is so as the Explanation presupposes that the amounts received should have been debited to the Profit and Loss account before the same can be added in terms of the Explanation. Accordingly the impugned order dismissed the Revenue's appeal.

(d) The grievance of the Revenue before us is that even though the Assessing Officer is bound by the audited accounts, made in accordance with the provisions of the Companies Act, and cannot be disturb the profits so arrived, yet in terms of explanation to Section 115JA, the Assessing Officer in the present facts ought to have applied clause (b) of the Explanation to Section 115JA of

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the Act. Therefore it is submitted that the amount carried to Reserves had to be added in terms of the Explanation to Section 115JA of the Act.

(e) We find that for the Explanation to Section 115JA of the Act to be invoked it is necessary that the amount which has been carried to the reserves should have necessarily been first debited to the Profit and Loss account resulting in a reduction in the profit declared by the Respondent / Assessee-Company. This issue stands settled in view of the Apex Court decision National Hydroelectric Power Corpn. Ltd. Vs. Commissioner of Income Tax 3 wherein it has been held that to invoke clause (b) of the Explanation below Section 115JB (identical to Section 115JA) of the Act, two conditions must be satisfied cumulatively viz. there must be a debit of the amount to the Profit and loss account and the amount so debited must be carried to Reserves. Admitted position in this case is that there is no

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debit to the Profit and loss account of the Reserves. The impugned order has in view of the self evident position taken a view that the absence of the amount being debited to Profit and Loss account and taken directly to the reserve account in the balance sheet, the books profits as declared under the Profit and Loss account cannot be tampered with. In view of the fact that the impugned order has followed the decisions of the Apex Court in Apollo Tyres and is in accordance with the decision in National Hydroelectric, the Explanation to Section 115JA of the Act would not be triggered. Thus question 2 raises no substantial question of law for consideration."

71. *It may kindly be observed that in the above case also, the argument of the revenue was same as that of the DRP in the present case, i.e. appellant should have routed the amount through P & L A/c. However such argument was rejected by the Bombay High Court.*

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72. The decisions relied upon by the DPR in the case of Bombay Diamond Co. P. Ltd. v. DCIT, Sumer Builders (P) Ltd. v. DCIT and Veekaylal Investment Co. P. Ltd. were duly considered by the Tribunal in the case of Forever Diamonds, relied upon hereinabove. The decision of Delhi High Court in the case of CIT v. Sain Processing & Wvg. Mills (P.) Ltd. (325 ITR 565), relied upon by the DRP pertains to a case where notes to accounts referred to current year's depreciation which was not debited to P & L A/c. The High Court decided the issue in favour of the assessee by observing that notes to accounts are part of P & L A/c. In the present case, the accounts were not qualified by any such note. Further, the basis of the decision of Delhi High Court is determination of true profit by taking into account the current year's depreciation. Without considering the depreciation allowance, the correct profit of the year cannot be calculated. Thus, the decision of Delhi High Court is not applicable to the facts of the case. Finally, the

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decision of Madras High Court in the case of Aries Developing P. Ltd. is also not relevant as the same is not dealing with taxability under MAT provision.

73. *Accordingly, the direction of DRP to make the addition to the book profit may kindly be held to be unsustainable.*

Rejoinder to Revenue's argument on ground 4 and 5

74. *Now, we deal with the main arguments advanced on behalf of the Department.*

Validity of the Scheme

75. *The entire scheme is a colourable device in order to evade the tax. M/s. AVVL came into existence solely for the purpose of transferring various undertakings to SPVs. Sanction of the scheme by the High Court is not relevant as the High Court has examined the scheme only from the perspective of Companies Act. The Income-tax Department was not informed about the proposed scheme.*

(a) *At the outset, it may be noted that neither the Assessing Officer nor the DRP has raised any*

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question on the rationale of the scheme. The Department has proceeded on and made the addition on the basis of the transactions which have taken place pursuant to the scheme. Now, for the first time the Department is alleging the transactions to be colourable device and thereby taking a contradictory view which, it is submitted, is impermissible in law.

(b) The DR has no right to go beyond the orders passed by the lower authorities. He cannot set up a new case or raise new challenges or expand the controversies. He cannot take a position contrary to that of the lower authorities. When the Assessing Officer has accepted the validity and genuineness of transactions, the DR cannot challenge the same. Reliance is placed upon the decisions of the Special Bench in the case of Mahindra & Mahindra Ltd. [313 ITR (AT) 263, 322 (para 79) (Mum)] and ACIT v. Prakash L. Shah [115

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ITD 167, 183 (Mum)] (para 12) (copies already on record).

(c) In any case, there is no question of the appellant having adopted a colourable device as the Department cannot allege that a scheme sanctioned by the High Court is not in accordance with law. The Hon'ble High Court sanctioned the scheme of restructuring as being fair and reasonable, not in violation of any provision of law in public interest and not prejudicial to the interest of any party concerned. Therefore, such scheme can never be said to be against the provisions of law, including the Income-tax Act and cannot be held to be colourable device. (Electrocast Sales India [170 ITD 507 (Cal) (copy already on record). In that case, the Tribunal further held that if a scheme is formulated for evasion of tax then it cannot be held to be in public interest and, accordingly, be sanctioned under the provisions of the Companies Act. The Tribunal further noted

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that in terms of Section 394 of the Companies Act before any order is passed in an application filed under Sections 391 to 394 of the Companies Act, the court is mandated to give notice to the Central Government and to take into consideration the representations, if any, made to it by the government. In these circumstances, having regard to the aforesaid orders of the Kolkata Bench of the Tribunal and the other judgments referred to therein, it would be clear that it is not open to the Revenue to now suggest that the scheme be disregarded.

(d) *Due intimation has been given to the Central Government through the Regional Director before the scheme is sanctioned and this is sufficient compliance in accordance with the provision of S. 394A of Companies Act. The assessee has also relied upon the relevant decisions wherein it is held that the Regional Director is not only empowered but duty bound to represent the*

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grievances of the Income-tax Department, if any (Electrocast Sales India [170 ITD 507 (Cal); Casby CFS Pvt. Ltd. (231 Taxman 89 (Bom). There is no legal requirement of intimation to the Income-tax Department directly by the assessee. If the Department alleges that the transaction is a colourable transaction, then it must be demonstrated as to which of the steps is a sham and as a consequence whereof what is the tax sought to be evaded.

(e) *There is no question of any colourable device as neither there is any evasion of tax nor there is any action or transaction which is impermissible or prohibited by the law. Even if the assessee would have transferred the undertakings directly to SPVs, there would not have been any tax liability as the transfer of undertaking to 100% subsidiary is not taxable by virtue of S. 47(v) of the Act. Suppose the appellant had transferred the Undertakings for a consideration which was discharged by issuance*

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of shares by the resulting companies directly to the appellant, then, in that event, the appellant could have still claimed that there would be no liability to capital gain tax in its hands as the Undertakings were transferred as a going concern but not by way of a sale and, therefore, the provision of Section 50B of the Act would be inapplicable. It would have been open to the appellant to rely upon the order of the Mumbai Bench of the Hon'ble Tribunal in the case of Avaya Global Connect Ltd. v. ACIT (26 SOT 397) to contend that in absence of any cost of acquisition, there could be no liability to capital gains. This position would also be supported by the judgment of the Hon'ble Bombay High Court in CIT vs. Bharat Bijlee Limited (365 ITR 258). At the same time, it would have been open to the resulting company to claim a deduction for the enhanced cost as the fiction created in Section 43C, or Section 49 or Section 43(1) of the Act would be inapplicable.

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(f) If an assessee has the choice of effecting a transaction in more than one permissible methods, the Department cannot reject the method employed by the assessee merely because the resulting tax burden is less. (Vodafone Essar Gujarat Ltd v. Department of Income-tax [24 taxmann.com 323 (Guj)] (copy already on record); Capegemini India Pvt. Ltd. (Company Scheme Petition No. 434 of 2014) (copy already on record).

(g) Even if the Revenue was correct in its contention that the scheme is to be disregarded, the sequitur would be that one has to ignore the same and the steps taken pursuant thereto and if that were so, then the question of the appellant having received any benefit that could be taxable under section 28(iv) or Section 56(2)(viia) of the Act cannot arise because if one ignores the scheme one would disregard the demerger as well as the merger, and status qua ante would be restored viz, the various

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undertakings would continue to vest in the appellant.

(h) *Accordingly it is submitted that the entire basis of the revenue's arguments that there has been a tax advantage sought to be derived as a consequence of the restructuring is without any foundation. There is no other allegation of any nature whatsoever made by the revenue in support of its contentions that there is an avoidance of tax and, therefore, this argument must be rejected.*

76. *There is evasion of tax in as much as the SPVs have claimed higher cost of transferred assets as SPVs have recorded the assets at fair market value.*

(a) *The appellant submits that the revenue repeatedly urged that tax advantage that was sought to be obtained was the claim of a higher cost when the inventory will be sold by the resulting companies in future as the same has been reflected in the books of the resulting companies at the fair market value prevailing on 2nd November, 2011. The*

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appellant submits that assuming the revenue's allegation is correct (which in fact is denied), nevertheless, that would only mean that the resulting companies have sought to obtain an advantage of a higher cost without having actually incurred that cost. If the revenue is justified in its conclusion, then it would be open to it to deny such claim of enhanced cost as and when the resulting company makes such claim, but the mere fact that the resulting companies have made such a claim would not justify an addition of the said amount in appellant's hands.

(b) As a matter of fact the SPVs have not claimed any benefit on account of valuation of the transferred assets. The transferred undertaking consist of assets mainly in the form of fixed assets (land) and inventory. So far as the land is concerned, there is no claim for depreciation, land not being depreciable asset. As regards the other assets and inventory, it has been categorically stated and

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demonstrated before the Hon'ble Bench that for the purpose of arriving at the taxable income, the SPVs have ignored the revaluation and adopted the same cost as that of the assessee. Thus, there is no evasion of tax as alleged by the Department – without bringing any relevant material on record - at this belated stage. Had the assessee claimed double deduction, the lower authorities would have certainly pointed out it.

77. *No role was played by AVVPL and the only purpose of inserting AVVPL was to qualify for the definition of amalgamation. The Appellant should have invested directly in the 8 SPVs and there was no need to interpose AVVPL which was incorporated in February 2011 and stood dissolved in March 2012.*

The Appellant submits that as noted hereinbefore even if the Appellant had directly transferred the undertakings to the 8 SVPs and received shares in the SVPs or its shareholder received shares in SVPs, nevertheless, there would be no adverse tax

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consequences flowing and, hence, this argument too could not be sustained to support the assessment made on the Appellant. As pointed out earlier, even if the Appellant had entered into a tax neutral demerger, then, there would have been no liability to tax in the hands of the Appellant. Assuming the SVPs had not issued shares to the shareholders of the Appellant but had issued shares to the Appellant itself, then also, there would have been no liability to capital gains to the Appellant and, accordingly, no tax which would otherwise have become payable stands avoided as a consequence of the present structure being adopted. Therefore, the Appellant submits that there is no basis whatsoever in law to support the revenue's contentions that there is a liability under section 56(2)(viia) or section 28(iv) as a consequence of the transaction entered into which the revenue alleges is a device adopted for avoiding tax without in any manner pointing out that how that is so.

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78. *All transferred assets have not been valued and hence, assessee has not complied with the directions of the High Court.*

All the assets transferred to SPVs have been valued and thus the allegation of the revenue is factually incorrect. The land has been valued vide the valuation report dated 02.11.2011 by Kanti Karamsi & Co. whereas all other assets have been valued vide valuation report dated 31.03.2012 by Sarkar Bhattacharya.

79. *On 02.11.2011 the land has been valued at 37,472 cr. whereas on 06.03.2012 the same land has been valued at around `Rs.47,000 cr.*

The valuations are different because the assets valued in both the valuation reports are different. In the valuation report dated 02.11.2011, the valuation of land has been carried out whereas on 06.03.2012, the value of shares of the SPVs have been carried out by employing the Discounted Cash Flow Method.

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80. *The figures of transferred assets in the financials of SPVs do not tally with the figures in the report of Sarkar Bhattacharya.*

The ld. DR has wrongly compared the amount of net value of buildings transferred (557.87 cr (Pg. No. 1 (555.04 cr.) and Pg. No. 2 (2.82 cr) of Department's paper book No. A-5) with the gross value of building at ` 690.24 cr (Pg. No. 4 of Department's paper book No. A-5). If the accumulated depreciation of ` 132.25 cr. (Pg. No. 4 of Department's paper book No. A-5) is taken into account, the net value of building would tally.

81. *The report of Sarkar Bhattacharya does not give any basis of valuation.*

The values of assets, other than land, are the same as book value. This is for the reason that such assets consist of machinery, furniture etc. whose book value would normally reflect the market value.

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82. The assessee has not explained as to why two different methods of valuation have been employed. This has been done to save the tax by the SPVs.

The assessee has the choice of employing the method of valuation of different assets. This choice has been approved by the Hon'ble High Court and, hence, cannot be questioned now. In any case, there is no tax saving as explained hereinabove.

83. Assessee filed revised return of income subsequent to the order of High Court but the return do not contain the effect of the scheme. The assessee has not reduced its claim of depreciation for A.Y. 2011-12 by filing any revised return.

The scheme was sanctioned by the Hon'ble High Court vide its order dated 20.01.2012 but became effective only from 20.03.2012. However, the revised return was filed on 09.02.2012 which was prior to the date on which the scheme became effective i.e. 20.03.2012. Therefore, there was no occasion to give

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impact of the scheme in the revised return. In any case, there was no question of reducing the claim of depreciation as the assessee has used the assets for the entire year, the transfer being effective from the closing hours of business on 31.03.2011. It may be noted that SPVs have not claimed any depreciation on the transferred assets for the A.Y. 2011-12 and, accordingly, no excess depreciation has been claimed.

84. No revised return has been filed pursuant to the scheme become effective.

As there was no change in the total income for A.Y. 2011-12, there was no need of filing revised return. It may be noted that the appointed date of transfer was closing hours of business as on 31.03.2011.

85. Some of the SPVs have issued bonus shares out of reserves created upon demerger.

The issue of bonus shares by SPVs is completely irrelevant as the issue under examination is

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obtaining of benefit by the assessee. It was demonstrated that the assessee has not issued any bonus shares by capitalizing the reserve created and in fact the reserve created remains intact.

86. *Assets cannot be transferred free of cost. Therefore, transfer of assets to SPVs without consideration is not justified.*

The assets have been transferred pursuant to the scheme approved by the Hon'ble High Court and, therefore, no fault can be found with the same. In any case, there is no tax advantage or double deduction in the process. Further, there is no bar in law for a company to transfer its asset without consideration as long as its Memorandum of Association permits it to do so, and it is not disputed that such is NOT the position in the assessee's case.

87. *One of the shareholder of assessee-company has sold shares at very high price.*

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The value at which the shares of the assessee-company are transferred by one of the shareholders has got no relevance with the rationale or genuineness of the scheme, or bringing to tax any amount as has been sought to be done by the Assessing Officer in the present case. A buyer would give the price based on intrinsic value of assets of the company which remains the same before and after the implementation of the scheme. In any case, the higher price means higher profit and, therefore, higher tax collection.

88. The decision of the Delhi High Court in the case of SREI Infrastructure Finance Ltd. (20 taxmann.com 476) relied upon.

The decision of the Delhi High Court merely says that the High Court approved scheme, once implemented, has to be given effect to as per the provisions of the Income-tax Act in order to arrive at the taxable income. In the said case, the assessee argued that the transfer under the scheme of arrangement is not

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a sale under section 50B of the Act. The Hon'ble High Court found that the transfer under a scheme of arrangement was a slump sale within the meaning of S. 50B of the Act. In the case before the Delhi High Court the Department had not taken any stand contrary to the scheme approved by the High Court.

89. *The assessee has not followed Accounting Standard 14 while giving effect to the scheme.*

The assessee has followed the purchase method of accounting as contemplated in AS 14. As per Accounting Standard 14, if the High Court has prescribed any accounting treatment which is contrary to AS-14, then the assessee is required to follow the treatment prescribed by the Court. Thus, the assessee, by following High Court prescribed treatment, has followed AS-14.

A. *Date of Transfer*

90. *Assessee has not obtained valuation of assets as on 31.03.2011 and hence, the transfer cannot be said to have taken place on that date. As per clause 13 of*

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Part III of the scheme transfer is to take place after giving effect to Part II. The said Part II requires the valuation report of the transferred assets.

As per clause 13 of the scheme, the transfer takes place on the appointed date and that too without any act, deed, matter etc. to be done by the parties. Thus, as per the scheme sanctioned by the High Court the transfer takes place on the appointed date. The act of obtaining valuation report is bound to take place subsequent to filing of the scheme in the High Court. It is prudent to take valuation reports after filing the scheme as the valuation report may become irrelevant if the scheme is not proceeded with. The date on which valuation has been done or report has been obtained has no relevance with the date of vesting of assets or undertaking of liabilities.

B. Taxability u/s. 28 (iv) of the Act

91. The general reserve has been created due to transfer of revenue assets and, hence, the assessee has obtained advantage in revenue field.

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Under the scheme the assessee has transferred various 'undertakings' which are capital assets and not the inventory simplicitor. Thus, the argument of the ld. DR is factually incorrect.

92. *Assessee has received the benefit out of the 'business'. The resultant reserve is a free reserve and hence, there is a benefit arising out of business which is to be taxed u/s. 28(iv) of the Act.*

The business of the assessee is not to enter into schemes of demerger and amalgamation. This is not a regular business transaction of the assessee. In fact, the assessee does not have any business transaction with AVVL and, hence, there is no question of any benefit arising out of the business.

C. *Applicability of S. 56(2)(viia) and 47(vii) of the Act*

93. *Right in the shares of AVVL has been extinguished but there is no transfer of shares and hence, S. 47(vii) of the Act is not applicable.*

The assertion made by the ld. DR is self-contradictory. The definition of transfer in S. 2(47) of

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the Act includes extinguishment of any rights in the assets.

94. *The amendment in S. 47(vii) of the Act is substantive and hence, the same is applicable from A.Y. 2013-14 and not retrospectively from any earlier date.*

The amendment merely modifies one of the condition which was admittedly impossible to comply with. Thus, the Legislature, realising the difficulty, has stepped in and made the provision workable. This cannot be said to be substantive provision. This is corrective measure and should be held retrospective as per the decisions cited on behalf of the assessee.

95. *Section 56(2)(viia) of the Act is applicable because the word used in the clause is 'receive' and not 'transfer'.*

Although the clause uses the word 'receive', the memorandum explaining the provisions uses the word 'transfer'. Since the clause has been worded from the view point of recipient, the word used is 'receive'. Considering the memorandum explaining

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the provision, it has to be held that the clause is applicable to a receipt arising by way of transfer.

D. Date of valuation

96. The valuation of shares cannot be as on 31.03.2011 as the entry for recording of shares was not passed on that date.

Rule 11UA clearly prescribes the balance sheet which has to be taken into account for the purpose of valuation. There is no such further prescription as to the passing of an entry in the books. The conditions which do not exist cannot be read into the statute.

E. Additional Ground (Book Profit)

97. Assessee has prepared the books of account by employing colourable device and hence, Assessing Officer has a power to modify it for the purpose of computing book profit.

This is completely new stand which is contrary to the stand taken by the lower authorities. For the detailed reasons given hereinabove, the ld. DR has no power to take a contrary stand. In any case, there

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is no colourable device employed by the assessee, as explained hereinabove. The Assessing Officer has no right to tamper with the audited Profit & Loss A/c.

98. *Since assessee has created a general reserve in its Balance sheet without routing it through Profit & Loss account, the amount of reserve is required to be added back to arrive at the book profit.*

Since there is no amount debited to Profit & Loss A/c which has been taken to reserve account, addition to book profit is not permissible. (CIT vs. Bisleri Sales Limited) [377 ITR 144 (Bom)].

99. *Before parting, it is submitted that the decisions of the Mumbai Bench of the Tribunal in the cases of Bombay Diamond Co. Pvt. Ltd and Sumer Builders Pvt. Ltd have been considered in the subsequent decision of the Mumbai Bench of the Hon'ble Tribunal in the case of Forever Diamonds (since upheld by Bombay High Court). This has been discussed hereinabove while elaborating arguments of the assessee. Thus, all the decisions relied upon by the*

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DR with respect to claim under section 115JB of the Act are discussed with in the rulings relied upon by the assessee."

99. The written submissions of the Learned CIT-D.R. from pages 1 to 53 is reproduced as under :

"With reference to above appeal, the Revenue wishes to submit as under, in addition to oral arguments which was made at the time of hearing.

1. The Scheme of Arrangement (SOA) : [Overall factors /facts required to be considered by the Hon'ble Tribunal]

a. Essentially the "scheme" has been an "in-house" affair, conceived and implemented by assessee company itself, other companies involved in the "scheme" are wholly owned subsidiaries, and the conceptualization of the "scheme" is essentially only by the shareholders/directors of the assessee company. The intent and outcome of the AOS with regard to Income-tax has to be considered keeping in mind this paramount fact.

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b. *While the "scheme of arrangement" is made to appear to be achieving some commercial purpose, the hidden agenda is tax-evasion which has been actualized through a series of steps/transactions having no commercial prudence or purpose excepting the only purpose of tax-evasion.*

c. *The fundamental design is to ensure primarily the transfer of closing stock/inventory held by the assessee company at cost-price of roughly Rs. 6000 crores, inconsideration of receipt of Investment (shares of SPVs) having market value of Rs. 49000 crores as per assessee's own valuation. Thus, the real "scheme" is to bring profits to books by "transferring" stock-in-trade but without routing the same through P & L Account through earning the benefit of creation of 'free general reserve" in the balance-sheet and enhanced capital base and enhanced valuation in the process.*

d. *The underlying design is not to offer the taxation the resultant profit and still enjoy the "hidden"*

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profit earned by way of such "sale" which is liable to have been offered for tax for A.Y. 2012-13.

e. Absence of "commercial purpose/prudence is evidence from:

i. The creation and extinction of AVVVL, AVVVL has carried out no commercial activity and no business except facilitating execution of the design of "scheme of Arrangement". There is no conceivable commercial purpose in this action except creating a series of artificial transactions and accounting entries under the guise of SOA.

ii. The design of transferring the assets discretionarily, and in blatant disregard of accounting standards, at different rates of amounts in the hands of "Transferor" (at book value) and of "transferee" (at Fair Market Value). There is absolutely no commercial purpose in such a treatment.

iii. The fundamental accounting principles, Accounting Standards and even common –sense

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accounting treatments have been given a go-bye under the "scheme of arrangement", without there being any commercial substance in such go-bye, thus patently the "scheme of arrangement" is merely and exclusively for the purpose of achieving tax-avoidance.

iv. *Neither "pooling" nor "purchase" method of accounting followed. Wholly arbitrary and inconceivable hybrid method designed and executed for tax-evasion.*

v. *The design of recording the "inventory" held by the assessee at FMV in the books of "transferee" complete.*

vi. *Creation of "free general reserves" (as against "capital reserve") in the books of the assessee and other SPVs of the group which can be utilized for the purposes of declaration of the dividend as also for the issuance of bonus shares thus intentionally circumventing the requirement of doing so out of tax-paid income.*

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vii. *As per S. 63 of the Companies' Act, bonus shares can be issued from "free reserves". As demonstrated during hearing, three companies comprised in the "scheme" have already issued bonus shares during subsequent period F.Y. 2012- 13, meaning thereby, that the constituents under the "scheme" have treated "free reserve" created consequent to "scheme" as retained profits without having paid any tax on such income. Noteworthy amongst these three companies in Aamby Valley City Developers Limited which issued 479.9 crore equity shares as bonus shares (worth Rs. 4799 crores) as against existing subscribed share capital of a negligible amount of Rs. 20 lacs comprising of only 2 lac shares.*

viii. *Thus and therefore, creation and availability of "free reserve" is a valuable benefit in presenti and in continuum at the time of creation of such free reserve which entitles the company to*

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declare dividend or issue bonus shares without having had paid any tax.

f. The impact of the scheme vis-à-vis the true import and taxability of the "transactions" carried out by way of passing respective entries in the books of assessee during F.Y.2011-12 relevant to A.Y. 2012-13 under the "scheme of arrangement" has to be viewed from the conduct of the parties involved including during subsequent periods.

2. ***Ground No. 4 & 5***

Both of these grounds relate to addition on account of scheme of restructuring of business which was approved by Hon'ble High Court of Bombay.

The main issues in dispute are as under:-

I. *Controversy of year of addition arising out of the implementation of said scheme & application of appointed date as date of transfer.*

II. *General arguments of addition on merits u/s 56(2)(viia) & 28(iv).*

III. *The merits of applicability of section 56(2)(viia).*

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IV. The merits of applicability of section 28(iv)

I. Appointed Date

A). Main argument of the Ld AR is that the appointed date for the scheme of restructuring as approved by the Hon'ble HC is 31.03.2011. Therefore addition on account such scheme of restructuring if at all required), than the same has to be done in AY 2011-12 (FY 2010-11) and not in impugned AY 2012-13 (FY 2011-12). Ld AR has argued that appointed date as approved by Hon 'ble High Court is the date of transfer, which cannot be tampered with by the Income Tax Authority assessing the income.

He relied on mainly the following Judicial pronouncements

i) CIT Vs Swastik Rubber Products Ltd 140 ITR 304 (Bombay HC)

ii) Marshall & Sons and Co.(India) Ltd Vs ITO 223 ITR 809(SC)

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Ld. AR relied on definition of closing time as time at which public office closes as defined in advanced law lexico. He further relied on the definition of end of the day in Wikipedia to mean end of trading of a financial market. He argued that closing time of 31.03.2011 can't be an opening time of 01.04.2011.

DRP in its order has mentioned that closing hours of 31.03.2011 mean opening hours of 01.04.2011 therefore the transaction is taxable for AY 201213. In nut-shell the DRP has held that date of transfer is during FY 2011-12.

B). My submissions are as under:-

i). All the relevant facts- are before Hon'ble ITAT, therefore Hon'ble ITAT has to decide on merits the date of vesting & year of transfer. Firstly I would like to summarise various facts for perusal of Hon'ble bench, relevant provisions of composite scheme and the applicability of judicial pronouncements on the date of vesting/transfer.

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On this issue various undisputed facts regarding dates and sequences are as under:-

Date of incorporation of SPV & AVVPL (Specific SPVs wise incorporation in given in subsequent paragraphs)	*24.02.2011*
Date of application to High court	*10.06.2011*
"Appointed Date"	*31.03.2011*
Date of Approval	*20.01.2012*
Effective Date	*20.03.2012*
Date of Valuation (at the time of demerger for giving Part II of the Scheme	*20.11.2011*
Date of valuation for giving effect to third part at the time of amalgamation.	*06.03.2012*

ii). Relevant terms and condition of transfer and vesting as per part III from demerged company and business SPVs are as under:-

4. ***Transfer and vesting***

4.1. *On the scheme becoming effective, the whole of the undertaking and properties of Real Estate Hold Co Undertaking, Real Estate Villas Undertaking, Real Estate Canals Undertaking, Real Estate Apartments Undertaking, Golf Course Undertaking, Airport Undertaking, Adventure Sports Undertah.ing and Land Holding, Retail*

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Undertaking, Entertainment Undertaking, Hospitality Undertaking and Land Holding Undertaking of the Demerged Company shall stand transferred to and vested in or deemed to be transferred to and vested in Real Estate Hold Co SPV, Real Estate Villas SPV, Real Estate Canals SPV, Real Estate Apartments SPV, Golf Course SPV, Airport SPV, Adventure Sports SPV. Retail SPV, Entertainment SPV, hospitality SPV and Land Holding SPV respectively as a going concern in the following manner.

4.1.1. *In respect of all the movable assets of the Demerged Company comprised in the respective Business Undertakings and the assets which are otherwise capable of transfer by physical delivery or novation or endorsement and delivery including cash on hand shall be so transferred to respective Business SPVs and deemed to have been physically handed over by physical delivery or notation or by endorsement and*

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delivery as the case may be to respective Business SPVs to the end and intend that the property and benefit therein passes to respective Business SPVs with effect from the Appointed Date.

4.1.2. *In respect of the assets of the Business Undertakings other than those mentioned in Clause above, including actionable claims, sundry debtors outstanding loans advances recoverable in cash or kind or for value to be received and deposits with the Government semi-Government, local and other authorities and bodies and customers, the Demerged Company shall if so required by the Business SPVs and SPVs Business may, issue notices in such form as Business SPVs may deem fit and proper stating that pursuant . to the High Court having sanctioned this Scheme between the Demerged Company Business SPVs under section 391 to 394 of the Act, the relevant debt loan, advance or other asset, be paid or made good or held on account of*

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respective Business SPVs as the person entitled thereto, to the end and intent that the right of the Demerged Company to recover or realise the same stands transferred to the concerned Business SPVs and that appropriate entries should be passed in their respective books to record the aforesaid changes.

4.1.3. *In so far as the immovable properties comprised in the respective. Business Undertakings are concerned the immovable properties shall stand transferred pursuant to this Scheme to the respective Business SPV parties shall register the certified copy of the order of the Bombay High Court approving the Scheme with the offices of the relevant sub-registrar of assurance. or similar registering authority in Maharashtra and shall also execute and register as required such other documents which may be necessary in this regard. All the assets which are subject of pending litigation sha11 stand transferred only to the extent*

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permitted by law and subject to outcome of such litigation

4.1.4. *With effect from the Appointed Date, all debts, Liabilities, contingent liabilities duties and obligation of every kind, nature and description ·of the Demerged Company pertaining to Demerger Undertaking shall also, under the provision of the Section 391 & 394 and all other applications provision is any, of the act and without any further act or deed be transferred to or be deemed to be transferred to respective business SPVs so as to become from the Appointed date the debts liabilities duties and obligation of respective business SPVs and if it shall not be necessary to obtain the consent of any kind debts liabilities and contingent liabilities duties and obligation have seen in order to give effect to the provision of this sub-clause.*

4.1.5. *The transfer and vesting of demerged undertaking as aforesaid shall be subject to the*

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existing securities, charges, mortgages and either encumbrances if any subsisting over in or respect of the property and assets or any part thereof relatable to business undertaking to the extent such that the securities, charges, mortgages, encumbrances are created to secure the liabilities forming a part of the business undertaking.

5. CONSIDERATION

5.1. The Business SPVs are indirect wholly owned subsidies of the Demerged Company. The Scheme is intended to restructure within the group of companies controlled by the Demerged Company the holding of the demerged undertaking in a more efficient manner with due regard to project specific risk and consistent with the diverse needs of business and does not involve any movement of assets or liabilities to any company outside the group controlled by the Demerged Company. Hence, the business SPVs shall not be required to

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pay any consideration/issue any share to the Demerged Company or its shareholders.

6. ACCOUNTING TREATMENT

6.1. In the books of the Demerged Company

6.1.1. The book value of all the asset and liabilities pertaining to the Demerged undertaking which cease to be asset and liabilities of the Demerged Con1pany shall be reduced by the Demerged Company at- their respective book values. The differences that is excess of the book value of assets over the book value of the liabilities pertaining to the demerged undertaking and demerged from Demerged Company pursuant to this schemes shall be adjusted against the General reserve arising pursuant to Part Ill of this Scheme.

6.2. In the Books of respective business SPVs

6.2.1. Business SPVs shall record the assets and liabilities pertaining to the respective demerged Undertaking at the respective fair value.

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iii) Relevant terms and condition of part III containing amalgamation of AVVPL with assessee i.e. AVL are reproduced as under:-

13. TRANSFER AND VESTING

13.1. With effect from the appointed date and after giving to part II the whole of the undertaking and properties of transferor company including investment in business SPVs shall pursuant to the provision contained in section 391 to 394 and all other applicable provision if any of the act and without any further act, deed matter or thing stand transferred to and vested in act. Or be deemed to be transferred to and vested in Transferee Company as a going concern so as to vest in Transferee Company all right title and interest pertaining thereto.

13.2. With effect from the Appointed date, all debts, liabilities, contingent liabilities duties and obligation of every kind, nature and description of the Transferred Company shall also, under the .provision of the Section 391 & 394 and all other

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applications provision is any, of the act and without any further act or deed be transferred to or be deemed to be transferred to Transferee Company so as to become from the Appointed date the debts liabilities, contingent liabilities duties and obligation of Transferee Company it shall not be necessary to obtain the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such debts, , Liabilities , contingent liabilities duties and obligation have arisen in order to give effect to the provision of this Sub-clause.

1.3.3. With from the Appointed date and upon the Schemes becoming effective any statutory licenses, permissions or approvals or consent held by the transferor company required to carry on operations of transferor company shall stand vested in or transferred to transferor company without any further deed or act and shall be appropriately mutated by the statutory authorities

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concerned therewith in favour of transferor company and the benefited of the all statuary and regulatory permission environmental approvals and consent, registration or other licenses consent certificates authorities (including for the operation of bank account) power of attorney given by assessee to execute in favour of the transferor company shall vest in and become available to transferor company as if they were originally obtained by transferor company. In so far as the various incentives subsidies rehabilitation schemes special status and other benefits or privileges enjoyed granted by nay government body local authority or by any other person or and ailed of by Transferor company are concerned the some shall vest with and be available t respective transferor company on the same terms and conditions as applicable and or sanctioned and or allowed to transferor company.

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1.3.4. The transfer and vesting of the undertaking of transferor company as aforesaid shall be subject to the existing securities charges mortgages and other encumbrances if any subsisting over or in respect of the property and assets or any part thereof.

14. CONSIDERATION :

14.1. Since the entire share of the transferor company is held by Transferee Company and its nominee no consideration shall be payable / dischargeable for this section and share capital of the transferor company shall stand cancelled.

15. ACCOUNTING TEREATMENT

15.1. In the books of the transferee company.

15.1.1. The investment in the equity capital of the transferor company as appearing in the books of account o the transferor company shall stand cancelled

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15.1.2. Transferred company shall record the assets and liabilities pertaining to transferor company including its investment in Business SPVs at the respective fair value as in the Appointed date.

15.1.3. Inter-company balances and investment shall be cancelled.

15.1.4. The differences being excess of assets over liabilities recorded by Transferor Company after giving effect clause 15.1.3 above will be credited to the (General Reserves of the transferor company. In case of there being a shortfall the same shall be debited to and carried forward as goodwill.

iv). My submissions on the factual aspects are as under:-

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a). Genesis of creation of reserve in the books of accounts of SPVs

To give effect to the scheme, the assessee company, for quantification of general reserve at the time of transfer and vesting of asset from Ambay Valley Ltd. to business SPVs and making entry in the books of account, has got valuation of its undertakings through valuer Kranti Karamsey & co. as on 02.11..2011. All other assets except land were valued at book value. Only land (inventory in the hands of the Assessee company) was valued at market value which has caused creation of reserve in the hands of SPV companies. The details of valuation as under:-

VALUATION SUMMARY

The Total of Distinct Business Purpose Vehicle (SPV)s of "M/s Aamby Valley Ltd,, as on 2nd November 2011 is as summarised below:

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Sr. No.	DISTNCT BUSINESS SPECIAL PURPOSE VEHICLE (SPV)S	TOTAL LAND AREA (ACRESS)	TOTAL FAIR MARKET VALUE (Rs.)
1	Aamby Valley City Developers Limited	3,680.73	255,971,680,606
2	AVL Vilas Limited	30.73	1,567,099,039
3	AVL Canal Limited	207.97	10,607,376,447
4	AVL Royal Apartments Limited	1,380.18	61,692,351,377
5	Aamby Valley Green Golf Limited	266.38	14,784,283,433
6	Aamby Valley Airport Project Limited	254.8	14,141,083,036
7	Aamby Valley Global Sports Limited	48.32	2,681,830,231
8	Aamby Valley Mega Retails Limited	46.97	2,395,701,868
9	Aamby Entertainment Services Limited	318.85	2,894,538,000
10	AVL Hotels & Resorts Limited	155.75	7,634,914,377
11	AVL Land Holdings Corttpany Limited	30.01	351,152,100
	Total	**6420.7**	**374,722,010,515**

Note: As per details/Documents provided it is understood that above mentioned APVs are 100% subsidiaries of M/s Aamby Valley Limited. In addition to that approximately 916.76 acres is under Aamby Valley Limited and has a fair market value of approximately Rs.2988,54,10,000.

Hence the total valuation of land admeasuring 7337.46 acres under M/s Aamby Valley Limited is Rs. 40460,74,20,515 as on 2nd November 2011.

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<u>Genesis of creation-of reserve in the hands of assessee</u>

ii). Similarity to give effect to the schemes of amalgamation at Part III of overall schemes the assessee has valued its SPV at discounted cash flow method. Here also only the land has been valued as per the discounted cash flow method through same valuer namely 11/s. Kranti Karamsey Co Ltd. as on 6th l\1arch 2012. Assets other land was valued at book value only for giving effect in books of account of the time of amalgamation as per the Part III of the schemes the details of valuation and as under :-

The Total Net Present Value of Distinct Business Special Purpose Vehicle SPVs of "M/s Aamby Valley Ltd." By "Discounted cash flow method (for SPVs 1 to 9) & Asset Valuation Method (for SPVs 10 & 11)" as on 6th March 2012 is as summarised below :

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Sr. No.	*DISTNCT BUSINESS SPECIAL PURPOSE VEHICLE (SPV)S*	*TOTAL LAND AREA (ACRESS)*	*NET PRESENT VALUE (Rs.)*
1	*Aamby Valley Global Sports Limited*	*48.321*	*347*
2	*Aamby Valley City Developers Limited*	*3,930.38*	*24,040*
3	*AVL Retail Ltd.*	*46.975*	*1,285*
4	*AVL Golf Ltd.*	*266.383*	*921*
5	*AVL Royal Apartments Ltd.*	*1,380.18*	*8,797*
6	*AVL Royal Canal Ltd.*	*212.090*	*3,338*
7	*AVL Hotels and Resorts Ltd.*	*148.564*	*4,475*
8	*Aamby Entertainment Services Ltd.*	*215.460*	*1,716*
9	*AVL Villas Ltd.*	*30.728*	*632*
10	*Aamby Valley Airport Project Limited*	*254.795*	*1,414*
11	*AVL Land Holdings Company Limited*	*30.01*	*35*
	Total	***6,563.89***	***47,001***

iv). The assessee has filed original return of income for A.Y. 2011-12 on 30.11.2011 as page 2 of Departmental Paper Book A-1 prior to date of the order approving the scheme. The assessee has filed revised return of income for AY 2011-12 on 09.02.2012 as per page-30 of Departmental Paper Book A-1. A perusal of original and revised return of income reveals that the assessee has not taken effect of the scheme of demerger and amalgamation for transfer of assets in revised return of income which is evident from

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glaring fact that the depreciation in original and revised return of the income has remained same as per page no. 33 of paper book A-1 (revised) and page no. 4 of paper book A-1 (original return for AY. 2011-12), return of income. The depreciation (if such scheme was affected) is bound to change as there are block of depreciable assets transferred such as building and plant & machinery etc. This proves that the transfer of assets had not taken place as on 31.03.2011.

v). Now I will deal with the judicial pronouncement on this issue

Application of Judicial Pronouncement relied by Ld. AR

Ld. AR has argued that the appointed date as mentioned and approved by the Company Courts in the demerger or amalgamation cannot be changed and he relied on the decision of the Hon'ble Supreme Court the case of Marshal and sons & Hon'ble Bombay HC in the case of Swastik Rubber Pvt. Ltd. cited supra. Therefore

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it in necessary to examine the ratio held and circumstances in which such decision has been taken.

A. Marshal & sons

Relevant facts of the case as per page 809 to 811 of ITR are reproduced as under:-

"AMALGAMATION – HOLDING AND SUBSIDIARY COMPANIES SCHEME OF AMALGAMATION SPECIFYING DATE OF TRANSFER – PRIOR TO DATE OF SANCTION OF COURT – PROVISION IS SCHEME THAT BUSINESS DONE BY SUBSIDIARY SHALL BE ON BEHALF OF HOLDING COMPANY- COURT NOT MODIFYING DATE OF TRANSFER- AMALGAMATION TAKES EFFECT ON DATE OF TRANSFER SPECIFIED IN SCHEME AND NOT ON DATE OF COURT'S ORDER- INCOME OF SUBSIDIARY COMPANY FROM DATE OF TRANSFER- IS INCOME OF HOLDING COMPANY – NOTICE TO SUBSIDIARY FOR FILING RETURN

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BEFORE INCOME-TAX OFFICER- NOT PERMISSIBLE- INCOME-TAX ACT, 1961, SS. 139(2), 142(1)-COMPANIES ACT, 1956 SS. 391,394, 394A.

Every scheme of amalgamation of companies has necessarily to provide a date with effect from which the amalgamation/transfer shall take place. It is true that while sanctioning the scheme, it is open to the company court to modify the said date and prescribe such date of amalgamation/ transfer as it thinks appropriate in the fact and circumstances of the case If the court so specifies a date, such date would be the date of amalgamation/date of transfer. But where the court does not prescribe any specific date but merely sanctions the scheme presented to it, the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise.

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The head office of the appellant-company (the holding company) was in Calcutta and that of its subsidiary was in Madras. For the purpose in Income-tax the accounting year of the appellant-company was the year ending June 30, and that of its subsidiary company was the calendar year. On December 1, 1982, the subsidiary company wrote to the Income-tax Officer standing that it desired to close its accounting on June 30, 1983, instead of on December 31, 1982, for the period of 18 months ending June 30, 1983, and that it would · like to follow the practice of its holding company. On February 3, 1983 the Income- tax Officer permitted the subsidiary company to change the accounting year, subject to certain conditioning year, subject to certain conditions. In December, 1982, the subsidiary company passed a resolution proposing to amalgamate with the holding company with from January 1, 1982. An application was made to the company

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court. Under the scheme amalgamation, the entire undertaking of the subsidiary company was to be transferred to the holding company with effect from the transfer date which was defined to mean January 1, 1982 : the subsidiary was to be amalgamated with the holding company with effect from that date and be deemed to have carried on its business for and on behalf of the holding company from that date and the implementation of the scheme was conditional upon the scheme being sanctioned by the by the court and nine-tenth of the shareholders of the subsidiary company becoming shareholders in the holding company. Pursuant to the orders of the court, resolutions approving the amalgamation were passed by the shareholders at meetings,. The company court at Madras sanctioned the amalgamation on November 21, 1983, and on a similar application the company court at Calcutta

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sanctioned the amalgamation on January 11, 1984. Certifies copies of the orders were filed before the respective Registrar of Companies on January 29,1984 and February 24, 1984 at Madras and Calcutta, respectively. The name of the subsidiary company was struck off the Register of Companies of January 21, 1986. On November 25, 1984, the Income-tax Officer issued a notice under section 139(2) of the Income-tax Act, 1961, to the subsidiary company calling upon it to file a return of its income for the assessment year 1984-85 and 1985-86. The subsidiary company replied stating the inasmuch as the subsidiary company had been amalgamation with the holding company under a scheme of amalgamation with effect from January 1,1982, there was no question of the subsidiary company filing a return for the said two assessment years. After exchange of correspondence, the Income-tax Officer issued a notice under section

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142(1) asking for compliance by February 7, 1986. Thereupon, the appellant-company filed a writ petition in the Madras High Court claiming that inasmuch as the amalgamation had taken effect on and from January 1, 1982, the Income-tax Officer had no authority to call upon the subsidiary company to file a return for any period subsidiary company subsequent to January 1, 1982, was as an agent of the holding company and not on its own account. The Income-tax Officer opposed the petition claiming that: (a) the amalgamation become effective only when it was sanctioned by the court and after certified copied of the orders of the courts were filed with the Registrars of companies; (b) that only when the name of the subsidiary companies could the subsidiary company be said to have ceased to exist; and (c) that the amalgamation.

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Was a device adopted to evade tax legitimately due from the subsidiary company as the holding company was incurring losses. The High Court dismissed the writ petition holding that (i) the date of amalgamation specified in the scheme was totally artificial ; (ii) the amalgamation was effective only when the court approved the scheme of amalgamation ; and (iii) the subsidiary company was in existence till January 21, 1986, when its name was struck off the Register of Companies. The High Court did not consider if necessary to deal with the claim that the amalgamation was a device for avoiding payment of taxes. On appeal to the Supreme Court:

Held accordingly. Reversing the decision of the High Court, that since the company courts had not only sanctioned the scheme of amalgamation as presented to the, but had also not specified any other date as the date of

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transfer/amalgamation, it followed that the date of amalgamation/date of transfer was the date specified in the scheme as the transfer date. In such a situation, it would not be reasonable to say that he scheme of amalgamation took effect on and from the date of the order sanctioning the scheme. The business carried on by the subsidiary company should be deemed to have been carried on for and on behalf of the appellant-company. This was the necessary and the logical consequence of the court sanctioning the scheme of amalgamation as presented to it. The order of the court sanctioning the scheme, the filing of the certified copies, the allotment of shares, etc., might have all taken place subsequent to the date of amalgamation in the circumstance of this case would be January 1, 1982. Therefore the notices issued by the Income-tax Officer were not warranted in law.

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The said judgment was delivered after considering the resolution of the amalgamating company that no further action or deed was required to be done except the approval. Therefore, the transfer of the company was with effect from the "appointed date".

A perusal of the judgment clearly reveals that it was a case of pure simple amalgamation where Board resolution was passed by subsidiary company or complete transfer of its asset & liabilities with holding company with effect from Jan 1, 1982 without any further act or deed except approval of company court. There was not the issue of the valuation of assets at market value, and changing value of the assets in the books of accounts of company. There was no direction for making of entries in the books of accounts and most importantly, the amalgamation was not as result of first transfer of asset by holding company to various

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SPVs and thereafter further, valuation of same assets at the time of transfer from holding company to SPVs, and further at the time of amalgamation of AVVPL to its holdings company i.e. AVL (the assessee). Further the valuation report was not the part of the scheme before the court. Therefore, consequent creation of reserve created at the time of demerger and amalgamation was not known either at the time of passing resolution or even before Hon'ble High Court. ***In this present case, on the other hand, various set of deeds and acts, including the valuation of assets, was required to be completed after "appointed date" and even after making the application before Bombay High Court before actual vesting of property and accounting entries for the same can happen. Thus, the facts in the present appeal before the Hon'ble Tribunal are entirely different and***

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therefore ratio of Marshall & Sons has no application.

B) Swastik Rubber Product Pvt. Ltd. (Bombay High Court)

In that case Hon'ble High Court has approved appointed date as date of transfer on the following facts as per page 305 of ITR volume 304 & 307 of the said order.

REFERENCE-COMPANY-SCHEME OF AMALGAMATION–DATE OF AMALGAMATION FOR I.T. ASSESSMENT WOULD BE DATE MENTIONED IN ORDER OF COURT-INCOME-TAX ACT, 1961, SS. 170, 256 (2) Company ACT,1956, SS 391, 394(2).

The Tribunal found that as per cls. (1), (2) and (3) of the scheme of amalgamation of a bank with the assessee-company the entire undertaking of the bank would be transferred to the assessee with effect front July 1, 1971. On the Petitions made to the High Court under ss. 391 and 394 of the Companies Act; 1956, the High Court passed orders that with effect front

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July I, 1971, the whole of the business and Property and liabilities of the bank shall stand transferred to the assessee without any further act or deed. According to cl. (15) of the schen1e of amalgamation the assessee was to approach the Controller of Capital Issues for the Purpose of sanction of increase in share capital and the said sanction was obtained on December 31, 1971. Clause 15 also Provided that even though the scheme of amalgamation was to be operative from 1, 1971, it was to take effect finally from the date on which any of the sanctions was last obtained.

The ITO held that the date of amalgamation for the purpose of s. 170 was December 31, 1971. On appeal, the Tribunal took the view approval of the controller of Capital Issues was a mere formality in view of the order of the High Court that the amalgamation was to

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be effective from July, 1 1971, Moreover for the purposes of income-tax, what was, crucial was the date on which the assets liabilities vested in the assessee. Accordingly the Tribunal held that the date of amalgamation was July 1, 1971. On a reference under s. 256(2) of the I.T. Act, 1961:

Held, that cl. (15) of the scheme of amalgamation could not alter the legal effect of the order sanctioning the scheme of amalgamation passed by the High court Moreover, as per cl (3) the said scheme, with effect from July, 1971, 10 have been carrying on the business on account of the assessee. In view of these there was no reason to direct the Tribunal to refer the questions of law sought to be referred by the Department.

The Supreme Court dismissed a special leave application by the Revenue for leave to appeal against this judgment - See [1983] 140 ITR

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(St.) 2.] Income-tax Application No. 124 of 1978. - R. J. Joshi with R. L. Mukherjee for the Commissioner, S.E. Dastur with G.I Patel for the assessee.

ORDER OF APPEALLATE TRIBUNAL (Pune, April 14, 1978)

These two reference applications are made by the Commissioner of Income-tax, Pune-1, Pune, and they arise out of the Tribunal's order in

1. *I.T.A. No. 458 & 457/PN/75-76 decided on the 28th of May, 1977. In R.A. No. 233/PN/77-78, the following questions have been raised :*

   "(i) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the effective date of amalgamation is July 1, 1971, relying only on clauses (1), (2) & (3) of the schemes of amalgamation without considering the scheme of amalgamation as whole ?

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2. Whether, on the facts and in the circumstances of the case, the Tribunal ered in law, in not holding that the effective date of amalgamation is December 31, 1971, ignoring the provisions of clause (15) of the scheme of amalgamation and sanction of the Controller of capital Issues given on December 31, 1971.

3. Whether the Tribunal is correct in holding that the consent from the Controller of Capital Issues is only a formality.

4. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that income earned or accruing or arising after July 1, 1971, to December 31, 1971, is not to be included in the total income of the assessee for the assessment year 1972-73 ?"

In our opinion, none of the above questions are questions of law fit to be referred to the Hon'ble High Court. Either they are questions of facts or the answers to them are obvious, Accordingly

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we refuse to draw up a statement of the case and refer it to the Hon'ble High Court. Our reasons are as follows.

The respondent-assessee to these applications is M/s Swastik Rubber Products Ltd., successors to M/s Bank of Maharashtra Ltd., Pune, and it is hereinafter called" the assessee". The Bank of Maharashtra Ltd. carried on banking business until 19th of July, 1969. By virtue of the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970, the entire undertaking of the bank including all assets and liabilities was transferred to end became vested in the Bank of Maharashtra a statutory corporation. The Bank of Maharashtra Ltd., hereinafter called the "Bank" became entitled to a compensation of Rs. 2.30 crores. Except for a sum of Rs. 12.300, the balance of the compensation was received

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by the bank in the form of Central Government securities carrying interest of 510/0 per annum.

The shareholders of the bank in their meeting dated 27th of April, 1971, passed a resolution a proving a scheme of amalgamation with the assessee. The shareholders of the assessee approved the assessee's scheme of amalgamation on the 29th of April, 1971. The petitions of the bank and the assessee to the High Court of Judicature at Bombay under ss. 391 and 394 Of the Companies Act, 1956, were heard and the High Court passed orders on the petitions by its order dated 27th of September, 1971. The relevant portion of the said order was as under :

(2) With effect from 1st day of July, 1971 (hereinafter called 'the appointed date' the whole of the undertaking and business and the property of the petitioned rights, powers,

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authorities and privileges and all properties, movable and immovable, cash balance, reserves, revenue balances and investment and all other interest and rights in, or arising out of, such properties shall stand transferred without further act or deed to Swastik Rubber Products Ltd .after the same do vest in Swastik Rubber Products Ltd. free Tom all the estate and interest of with effect from the said appointed date all and singular existing debts, obligations, and all the liabilities and dues of the petitioner be also transferred without any further act or deed to Swastik Rubber Products Ltd. and accordingly the same s a and become the debts, obligations, liabilities and duties of Swastik rubber Products Ltd.“

On 3rd of April, 1972, the High Court also passed an order for the dissolution of the Bank of Maharashtra Ltd. without a winding-up.

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4. The bank's income-tax assessment far the Assessment year 1972-73 was taken up after its dissolution and· in accordance with the provisions of s. 170 ·of the IT. Act, 1961, (erema The ITO process against the assessee who was the bank's successor. One of the questions which came up for the consideration in this assessment was, what was the effective date of the amalgamation. The question to the effective date of the amalgamation arose for the reason that even though in accordance with the order of the Bombay High Court dated 27th of September, 1971, the date of amalgamation was to be with effect from 1st of July, 1971 (i.e., the appointed date as mentioned in the scheme of amalgamation), there was a clause in the said scheme of amalgamation in accordance with which the assessee was to approach the Controller of Capital Issues for the purpose of sanction o Increase in the share

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capital and the said sanction of the Controller of Capital issues was received on the 31st of December, 1971. Also in accordance with cl. (15) of the scheme of amalgamation it was agreed between the parties that even though the se action was to be operative from the appointment date, i. e. 1st of July, 19 1 it was to take effect finally upon and from the date on which the sanctions or orders shall be last obtained. The order of the Controller of Capital issues for case of the assessee's capital as mentioned earlier was obtained on 1st of December.

5. On the above facts, in the opinion of the ITO, the date of amalgamation was 31st of December 1971 as the last order in the scheme of amalgamation being the order of the Controller of Capital Issues for the permission to the assessee to increase the share capital was made on that date. This view of the ITO was upheld by the AAC. However, when the matter

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came to the Tribunal in the second appeal by the assessee the Tribunal gave a factual finding that the date of amalgamation was 1st of July, 1971.

Facts & Circumstances of the present case which differentiates the cases- relied by Ld AR.

Analysis of the relevant findings of Hon'ble Supreme Court in the case of Marshal & Sons & Hon'ble Bombay High Court in the case of Swastik Rubber-Products Pvt. Ltd are summarized as under.

In the case of Swastik Rubber Pvt. Ltd. the issue was of pure & simple amalgamation of one company into another company, with transfer of entire asset & liabilities. The Board resolution was passed for the transfer of its entire assets & liability with effect from appointed date.

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In that case, there was no differential treatment of immovable property which was to be transferred as a result of amalgamation. In view of the above position of facts, Hon'ble High Court of Bombay held that the property vested with amalgamated Company was with effect from the appointed date. Transfer has to be effected necessarily from a certain date i.e. appointed date held in those cases.

Similarly in the case of Marshall & Sons there was resolution of subsidiary company for amalgamation with holding company without any condition other than approval by the court. Therefore, the assets to be transferred was not only identified but valued there was no pre-requisite of valuation of assets and its entries in the books of accounts for effecting transfer.

In present case, the scheme of amalgamation is not isolated. It is dependent on happening of first demerger

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of units of the assessee company into various SPV companies, subsidiaries of AVVPL and then amalgamation of AVVPL into assessee.

This fact is evident from the scheme at part III Para13.1 which states that with effect from the effective date and after giving effect of part II, the whole of undertaking of transferor company shall be vested/transferred in transferred company. Prior requisite is to give effect to Part II. For giving effect to part II, we have to refer to para 4 of the scheme which contains the terms of transfer and vesting in para 4 .1. It is stated there in that on the scheme becoming effective the whole of undertaking properties of various undertaking shall vest in SPVs in manners mention in clause 4.1.1, 4.1.2, 4.1.3, 4.1.4, 4.1.5, Para 4.1.1, 4.1.2 & 4.1.4, which provide that all

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movable assets and claim of the undertaking should be transferred to SPVs from appointed date. Para 4.1.5 deals with the securities· mortgage charge etc, which are also movable in nature. However in para 4.1.3 which deals with transfer of immovable property, it is not mentioned that the immovable property shall also stand transferred with effect from appointed date. The relevant portion of para 4.1.3 in reproduced as under.

4.1.3. In so far as the immovable properties comprised in the respective Business Undertakings are concerned, the immovable properties shall stand transferred pursuant to this Scheme to the respective Business SPV parties shall register the certified copy of the order of the Bombay High Court approving the Scheme with the offices of the relevant sub-register of assurance or similar registering authority in Maharashtra and shall also execute and register as required such other

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documents which may be necessary in this regard. All the assets which are subject matter of pending litigations shall stand transferred only to the extent permitted by law and subject to outcome of such litigation.

Therefore, as per this para of the scheme, the immovable property will not vest with SPV from "appointed date". It may be mentioned here that the entire dispute is on account of reserve created on account of transfer of immovable property only.

To find out the date of vesting of immovable property in SPV, it is necessary to examine the terms of accounting treatment as provided in para 6 of the scheme. As per clause 6.1.1, the book value of all assets & liability pertaining to demerged under taking shall be reduced by the demerged company i.e. the assessee. As per clause 6.2.1, business SPVs shall record the asset and liabilities pertaining to respective

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damaged undertaking at the respective fair market value. To give effect to the demerger in the book of accounts, the assessee has got valuation report of the undertaking by M/s Kranti Karam Sey & company where fair value of distinct Business special purpose vehicles of assessee is as on 2.11.2011 for the land which has been valued at Rs. 3747.2 crores. It is important to note here that the valuation of land has been made as on 2.11.2011 & not as on 31.03.2011. Therefore, entries in the books of account of demerged company has to be made as per accounting treatment as contained in para 6.2.1 of the scheme as on 2.11.2011, or subsequently. Entries can not be made for prior date i.e. 31.03.2011 as fair market value has been determined as on 2.11.2011. On the same or on subsequent date and not any prior Date, the transfer would take place in the hands of demerged company i.e. the assessee.

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Now coming to the provision of transfer & vesting of part III i.e. amalgamation of Aamby Valley 'V' Venture Pvt. Ltd. with the asessee, para 13.1 has already been reproduced earlier. As per para 13.2, all debts & liabilities shall be transferred to the transferee company. Para 13.3 deals wi1h statutory licenses, permission or approval or consents held by transferor company shall stand vested in transferee company with effect from & upon the Scheme becoming effective. Therefore, in part III also as far as immovable property is concerned, the vesting is with the date when Scheme becomes effective. Therefore, immovable property will be vested in transferred company upon the Scheme becoming effective and after the necessary valuation as envisaged under the scheme.

In part III also it is important to analyse accounting treatment contained in para 15 of this scheme. As per para 15.1.2 the transferor company shall record assets and liabilities pertaining to

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transferor company including its investment in business SPVs at respective fair market values. Here also the assessee has valued net present value of SPVs by discounted cash flow as on 6.03.2012 again in respect of land (immovable property) owned by all SPVs. It may be mentioned that total area of land admeasuring 6563 acres was owned by SPVs. Area of land area was 6420.7 acres in valuation as on 2.11.2011 used for part II. Therefore area of land mentioned in valuation report for implementing para III is more than mentioned in valuation report implen1enting part II. The area land for valuation as on 6.03.2012 held by SPVs is more than area of land held by SPVs as on 2.11.2011. If the date of transfer/vesting is taken as 30.11.2011 the how there would be different land area owned by same SPVs.

In view of the above facts it is clear that for part III, Date of vesting in immovable property held by SPVs is appointed date and after giving effect to part II,

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which is 02.11.2011 as submitted in earlier para by virtue of para 13.l.As per para 13.3 date of vesting in immovable property will be effective date i.e. 20.3.2012. As per accounting entries mentioned in the scheme fair market value of asset & liabilities of transferor company will be recorded. Therefore, the primary requisite of transfer & vesting of property is to get fair market value of the assets and liability ascertained. The assessee has made valuation of assets & liability of immovable property of Transferor Company as on 06.03.2012. Therefore, the said valuation can't be said as fair market value of the assets of Transferor Company as on 31.03.2011 (appointed date).Thus, the assets have not, and could not have, stood transferred in any case as on 31.03.2011.

Further, the assessee company has filed revised return of income for A.Y. 2011-12 on 09.02.2012 where effect of transfer of assets has not been given through the scheme was approved by High Court by

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then. This is evident from one clear fact that even for Income Tax purposes the value of depreciation is not changed in revised return as assets transferred included depreciable assets such as buildings, plant & machinery. Therefore, the assessee has affected the transfer in the books of accounts for F.Y 2011-12. Hence the assessee has not treated vesting/transfer of assets as on appointed date by the assessee. In view of the above facts & circumstances, the principle of appointed date being date of vesting in properties of amalgamating company will not apply which was pronounced by the Hon'ble Supreme Court in the case of Marshal Sons & Co. (India) Ltd &. Hon'ble High Court of Bombay in the case of Swastik Rubber Products Pvt. Ltd. cited Supra because of impossibility to perform various acts as stated above.

My arguments for non application of appointed date on date of vesting/transfer as held in Marshal Sons & Co. (India) Ltd & Swastik Rubber Products P Ltd

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is not applicable due to following reasons/ circumstances are summarized in present case.

i) In both the cases Marshal & Sons & Swastik Rubber Products Pvt. Ltd., there was simple amalgamation of one company into another company where transferor company has passed clear resolution to make transfer effective from particular date i.e. appointed date subject to approval of the court. In present case the scheme is composite in ·nature i.e. firstly demerge of certain undertaking of assessee company into SPVs which were subsidiaries of AVVPL & then merger of AVVPL into assessee & appointed date is same i.e. 31.03.2011.

ii) As per scheme of limited demerger -in the transfer of the immovable property in it is not mentioned that the transfer/vesting of property is with effect from appointed date, where as in transfer of movable properties, it was specifically

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mentioned that such transfer/vesting will be w.e.f. appointed date.

iii) In the scheme of limited demerge the, there is specific mention of accounting entries to be recorded in the books of accounts i.e. the properties transferred in special purpose vehicle company has to be at market value. The assessee has valued the immovable property in form of land as on 02.11.2011.

iv) If there is complete demerger of the company, then a view might be possible that what even value of assets and liability, the same would be transferred. Here demerger is only part of the assets and liability of assessee company. Therefore, prerequisite is to make entry in books of assets & liability of Assessee Company transferred. ***Therefore for vesting/transfer there is prerequisite to make entry in books of***

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accounts which requires valuation as per the scheme.

v) The fair market value has not been ascertained as on appointed date. Therefore, entry in the book of account can't be affected to transfer of immovable property with effect from 31.3.2011. In these circumstances there is impossibilities to transfer/vesting of the property on 31.3.2011.

vi) As far as amalgamation of AVVPL into assessee is concerned, the transfer/vesting of property AVVPL has to done after giving the effect of part II. As mentioned above the effect of part II has to be only after i.e. the valuation date as on 2.11.2011. ***Such vesting at the time of amalgamation cannot be on appointed date i.e. 31.03.2011 which is prior to 2.011.2011.***

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vii) For amalgamation contained in part III, again, accounting treatment which states that the assets of transferor company has to be entered at market value in the books of transferee company. To find out market value of immovable property of special purpose vehicle, the valuation has been done as on 6.03.2012 ·& not on appointed date. Therefore, in the books of accounts of the transferee company the transfer/vesting of property can be made only on 6.03.2012 or an subsequent date.

viii) In the valuation of land for implementing part II, total area of land of all special purpose vehicles in 6420.7 acres where as total area of land for all special purpose vehicles in 6563.89 acres in valuation for implementing part III. Therefore, in the books of accounts how area of land for these enterprises will vary if date of vesting in taken as one date i.e. 31.03.2011?.

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ix) At the time of demerger entire assets of the assessee company is not transferred to special purpose vehicles, Part of assets was retained by the assessee to the extent of 916.76 acres of land as per valuation report as on 2.11.2011. Therefore, without ascertaining value of land transferred in absence of valuation report on 31.03.2011, how reduction can be ascertained in the hand of assessee being demerge entity is not known.

x) The assessee while revising its ROI subsequent to the approval order of High Court has not incorporated the effect of such transfer for A.Y. 2011-12.

In view of the above facts, concept of "appointed date" as date of transfer/vesting as propounded in the Marshal & Sons & Swastik Rubber products P. Ltd. Will not apply. Date of Vesting/transfer has to be ascertained on the basis of peculiar facts of the case and entries in the

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books of accounts, which, in turn, is dependent on valuation of immovable assets which is as per the requirement of the scheme in present case. Valuation of property in case of part II is as on 2.11.2012. Therefore, these circumstances, date with effect from which entries in the books of accounts are made in determinative factor for transfer/vesting of the property. In any case both these dates of valuation as on 2.11.2011, 26.03.2012 fall in F.Y 2011-12 relevant of A.Y 2012-13. Therefore, addition on account of such arrangements have rightly been made in A.Y. 2012-13. The arguments of Ld. AR on appointed date is not supported by the facts of the case. Neither the method of valuation, nor valuation report was enclosed in the scheme for approval. ***Therefore, just defining of appointed date in the scheme without its workability has no meaning but only a legal fassad. Hence, the arguments of Ld. AR on appointed date needs to be rejected.***

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B) Without the prejudice to the above stand, it is submitted that the scheme envisaged in part II is no complete demerger as all assets and liabilities of Assessee Company are not demerged with SPV Companies. The assessee has also accepted that the condition for demerger contained in section 2(19AA) of I.T. Act, 1961. Part III is amalgamation of AVVPL with the assessee. It may be pointed out that AVVPL has been brought into existence only for implementing the scheme of restoration. It has taken birth with SPV companies on 24.02.2011 and has died with the order of Hon'ble High Court. Thus, AVVPL has acted only as conduit or transferring assets & liabilities of specific enterprises of the assessee. Hence creations & amalgamation of AVVPL is only a colorable device for creating confusion for applying the judicial pronouncements such as appointed date etc. I rely on the decision of Hon'ble Supreme Court in the case of Mc. Dowell & Co. Ltd. Vs Commercial Tax Officers (1985) 154 ITR

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148 (SC) and CIT Vs Shiv Raj Gupta 2015-TIOL-08-HC-DEL-IT scheme is basically only transfer of specific enterprises to SPV Companies formed . Therefore, date of transfer has to be reckoned with actual transfer of assets & liabilities entered in the books of accounts of the assessee i.e. effective date of orders. I rely on the judicial pronouncements on the concepts of substance over form in this case apart from the SC decision in McDowell case namely Bhopal Sugar Industries Ltd. Vs STO (1977) 3 SCC 147, Moped India Ltd. Vs Assistant Collector Central Excise (1985)-TMI-41634 (S.C Of India).

Additional submissions of Learned D.R. on "appointed date" is as under :

***(C) Further without prejudice to these** above submissions, it is submitted that the Ld.AR has argued that closing hours of 31.03.201 I cannot be taken as opening hours of 01.04.2011. He has relied on the definition of closing hours in Advanced*

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*Law Lexico. Ld.DRP has relied on form No.**21** submitted before Registrar of companies and **actual vesting of property** on 01.04.2011. Basically Ld.DRP's intention to treat the transfer on 01.04.2011 is that the vesting/transfer has taken place during F.Y.2011-12 and to tax the same for A.Y.2012-13. Under these facts and circumstances of the case as discussed above when by conduct of assessee the vesting/transfer has taken place during F.Y. 2011-12, it legally erroneous to consider closing hours of 31.03.2011 as time of transfer of assets as Hon'ble DRP itself in Part-III has approved the Scheme in respect of appointed date with rider of implementation of Part-II and giving effect there to. Therefore, in view of the above, it is submitted that the Department has rightly initiated action in the year under reference."*

II. <u>General Arguments on merits of addition:-</u>

A) While passing draft assessment order, the assessing officers has made addition of

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Rs.26,917.67 crores u/s 56(2)(viia). On reference by the assessee u/s 144C Hon'ble DRP confirmed the addition made by the assessing officer. Further, DRP has also made addition u/s 28(iv) of IT Act for Rs. 46,999.38 crores & held that since addition u/s 28(iv) is more than the quantum of addition u/s 56(2)((viia), the net addition of higher amount should be made as the taxation arises on two aspects of same transactions.

B) Ld. AR has made mainly two arguments against addition on merits in general.

1. *The entire arrangements has not made the assessee company richer as the entire transaction in only restructuring of business of the group and reserve is not created due to business activity but due to amalgamation & hence a capital reserve.*
2. *The business restructuring scheme is tax natural.*

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C) My Submission on facts.

Firstly I would like to summarise the effects & facts of the entire arrangements :-

i) As per part II of the scheme of arrangements various 11 undertaking of the assessee company have been transferred on a going concern basis to respective identified business verticals (Resulting companies) as follows:

a. Real Estate Hold Co Undertaking into Aamby Valley City Developer Limited;

b. Real Estate Villas Undertaking into AVL Villas Limited;

c. Real Estate Canals Undertaking into AVL Canal Limited

d. Real Estate Apartments Undertaking into AVL Royal Apartments Limited;

e. Golf Course Undertaking into Aamby Valley Green Golf Limited;

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f. Airport Undertaking into Aamby Valley Airport Project Limited;

g. Adventure Sports Undertaking into Aamby Valley Global Sports Limited;

h. Retail Undertaking into Aamby Valley Mega Retails Limited;

i. Entertainment undertaking into Aamby Entertainment Services Limited;

j. Hospitality Undertaking into AVL Hotels & Resorts Limited; and

k. Land Holding Undertaking into AVL Land Holdings Company Limited.

The holding pattern of all companies are depicted as under :

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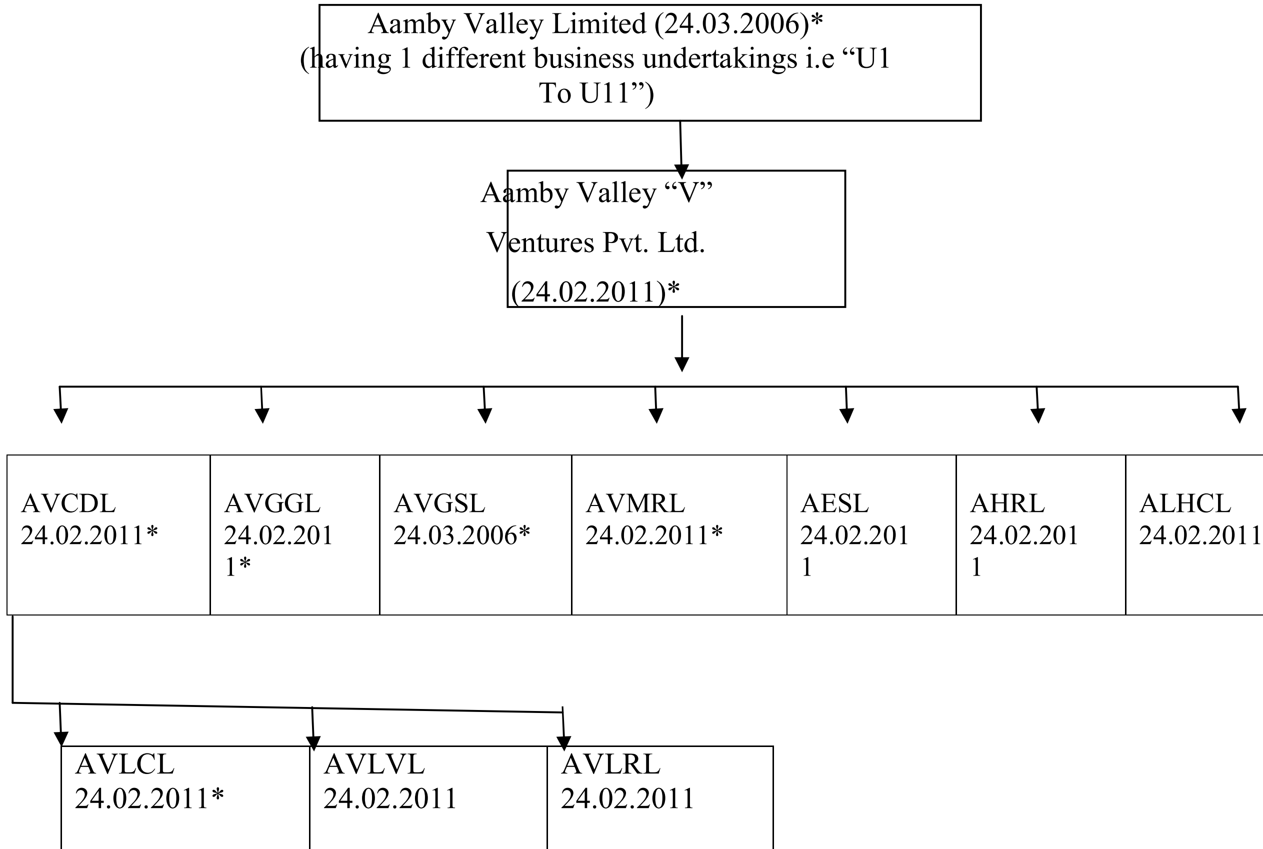
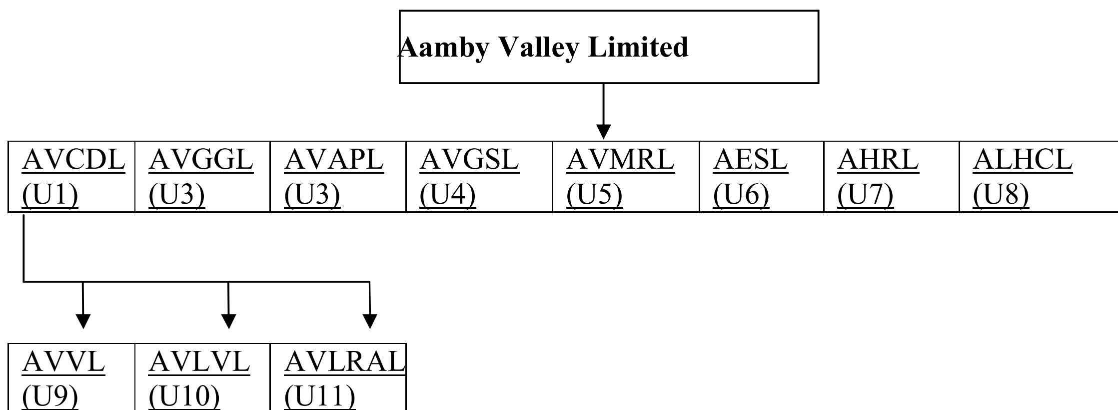


*Date of Incorporation

Structure after the effect of the composite scheme



Transfer of business undertaking is done as under :

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Sl. No.	***Undertaking of AVL (Demerged Company)***	***Transferred to (Resulting companies)***	***Abbreviation***
1	*Real Estate Hold Co Undertaking*	*Aamby Valley City Developer Limited*	*AVCDL*
2	*Real Estate Villas undertaking*	*AVL Villas Limited*	*AVLVL*
3	*Real Estate Canal Undertaking*	*AVL Canal Limited*	*AVLCL*
4	*Real Estate Apartment undertaking*	*AVL Royal Apartment Limited*	*AVLRAL*
5	*Golf Course undertaking*	*Aamby Valley Green Golf Limited*	*AVGGL*
6	*Airport Undertaking*	*Aamby Valley Airport Project Limited*	*AVAPL*
7	*Adventure Sports Undertaking*	*Aamby Valley Global Sports Limited*	*AVGSL*
8	*Retail Undertaking*	*Aamby Valley Mega Retail Limited*	*AVMRL*
9	*Entertainment Undertaking*	*Aamby Entertainment Services Limited*	*AESL*
10	*Hospitality Undertaking*	*AVL Hotels and Resorts Limited*	*AVLHRL*
11	*Land Holding Undertaking*	*AVL Land Holding Company Limited*	*AVLHCL*

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At the time of "demerger" of these undertaking, accounting method were prescribed in para 6 which requires that demerged company i.e. assessee will reduce the book value of the respective assets and liabilities and business SPVs shall record the assets and liability of demerged undertaking at fair market value. Business SPVs will record the excess of assets over liability so recorded as general reserve which shall constitute free reserve available for all purposes by business SPVs at its discretion. To give the effect of these accounting entries, the assessee has obtained valuation report of various undertaking as on 02.11.2011 from M/s Kanti Karamsey & Co, Mumbai. In respect of land of various undertakings & valuation reports of the fixed assets and miscellaneous assets from Dr. Shankar Bhattacharya as on 31.03.2011. A Creation of general reserve in the books of SPVs is on account of valuation of Land held in various undertaking, which was held as inventory in the hands

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of the assessee as tabulated on page 22 of DRP reproduced as under :

S. No.	Name of the Company	Land Area	Value of Land in the books of AVl(Rs.)(as on 01-04-2011)	FV of Land in the books of AVl(Rs.)(as on 01-04-2011)	Treatment in the Books of Business SPVs(as per audited financial statement of the respective SPVs as on 31-03-2012)	Treatment in AVL as on 31-03-2011
1	AVCDL	3,680.73	5702.34	347.084	Fixed assets	Inventory
				24,447.94	Inventory	Inventory
2	AVLVL	30.73	95.27	156.71	Inventory	Inventory
3	AVLCL	207.97	435.87	1060.74	Inventory	Inventory
4	AVLRAL	1380.18	2158.40	6169.24	Inventory	Inventory
5	AVGGL	266.38	202.94	1295.44	Fixed assets	Inventory
				182.99	Inventory	Inventory
6	AVAPL	254.80	11.32	1414.11	Fixed assets	Inventory
7	AVGSL	48.32	2.16	268.18	Fixed assets	Inventory
8	AVMRL	46.97	260.36	239.57	Fixed assets	Inventory
9	AESL	318.85	77.78	289.45	Fixed assets	Inventory
10	AHRL	155.75	431.45	763.49	Fixed assets	Inventory
11	ALHCL	30.01	1.34	35.12	Inventory	Inventory
	Total		9379.23	37473.20		

General reserve to the extent of being difference of market value and book value Rs.28,094 is created on account of determination of market value of land which was

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inventory in nature in the books of account of the assessee.

ii) Amalgamation of Aamby Valley 'V' Venture Pvt. Ltd. into AVL (assessee) is governed by part III of the scheme.

It may be mentioned that Aamby Valley 'V' Venture Pvt. Ltd. (AVVPL in short) was the holding company of all the SPV con1panies. Accounting treatment is given in para 15 of the scheme which states that investment in equity shares capital of the transferor (AVVPL) as appearing in the books of accounts shall stand cancelled and transferee company shall record the assets and liability pertaining to transferor company including its investment in Business SPVs at respective fair market value. To give effect these accounting treatments, the assessee has got valuation of SPVs which is basically land belonging to SPV vide valuation of M/s Kanti Karamsey and Co. as on 6.03.2012 (which is reproduced in earlier paragraph). Total value of land as per discounted cash flow was

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determined at Rs. 47,001 crores. All these lands were in fact originally belonging to assessee held as inventory. Source of creation of General reserve in the hands of assessee on account of valuation of SPV is nothing but on account of valuation and transfer of land to SPV which were held earlier by assessee as inventory (stock in trade).

My comments on general arguments of Ld. AR are as under:

1) It is wrong to state that the assessee has not become richer by this composite scheme. The assessee's income was accumulated in form of inventory i.e. the land transferred to SPVs as the same is basically difference between fair market value and book value. Reserve created in the books of assessee is basically in lieu of transfer of inventory. Reserve as per the terms of the scheme is free reserve which can be used for any purpose as per scheme. Therefore, the assessee has become richer to the extent of increase in reserve. Further, the Ld. AR, has argued that no

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consideration was received by the assessee at the time of transfer of assets to SPV. It may be clarified that the inventory has been transferred to SPVs with valuation of SPVs worth Rs. 47001 crores, which is basically reserve in the books of the assessee. The assessee has transferred its inventory to SPVs which are separate legal entity. Therefore even though those SPVs are group concerns but the same is different legal entity. Hence legal transfer of inventory at market value in excess of book value is gain in assessee's hand, arising out of business.

2) Second argument of Ld. AR is that overall scheme is tax neutral. This argument is also not true as the inventory of the assessee has been transferred to SPV companies at market value at many folds of book value in assessee book and most of these assets are inventory in the hands of SPVs. Therefore whenever there would be sale of inventory by the SPVs, these SPVs are bound to claim cost as per accounting entry at enhanced value of such inventory. This is illustrated

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in departmental paper book where inventory is sold in Paper Book Ld. AR has argued that transaction may have tax implication in hands of other assessee and not in hands of the assessee. This argument is firstly against the scheme of restructuring where the consideration received by the assessee is nil at the time of transfer of inventory to its SPVs. Therefore, there is tax implication hidden in the scheme Secondly in the assessee's hand general reserve is created in range of Rs. 46999 crores on account of transfer of its inventory which are required to be taxed in the hands of the assessee, as per the provision of Income Tax Act.

III. Issue of addition made by AO in draft assessment order and approved By DRP amounting Rs. 26917.67 crores u/s 56(2)(viia)

i) ***Facts of addition****: -As per part III of scheme of restructuring of the assessee i.e. amalgamation of AVVPL into assessee, the assessee has received share of 8 SPVs at market value as per clause 15.1.2 of the scheme held by AVVPL. At the time of amalgamation the*

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assessee has received these shares without any consideration as per clause 14 of the scheme. Therefore, the assessing officer invoked section 56(2)(viia) to tax value of shares of SPV, companies after considering the reply of the assessee invoking rule 11UA after considering balance sheet of these SPVs as on 31.03.2012. The details of company wise FMV of share are reproduced as under which is tabulated in page 29 of draft assessn1ent order:-

S. No.	Name of SPVs	FMV per share	No. of shares	FMV
1	Aamby Valley City Developer Limited(AVCDL)	10,82,219.27	2,00,000	2,16,44,38,54,471
2	Aamby Valley Green Golf Limited (AVGGL)	3,03,349.85	50,000	15,16,74,92,388
3	Aamby Valley Airport Project Limited (AVAPL)	2,88,122.99	50,000	14,40,61,49,352
4	Aamby Valley Global Sports Limited (AVGSL)	26,789.68	1,00,060	2,67,91,28,448
5	Aamby Valley Mega Retail Limited(AVMRL)	47,918.06	50,000	2,39,59,30,311
6	Aamby Entertainment Services Limited (AESL)	57,895.34	1,00,060	2,89,47,66,967
7	AVL Hotels and Resorts Limited (AVLHRL)	1,52,762.08	50,000	7,63,81,04,141
8	AVL Land Holding Company Limited (AVLHL)	7,027.64	50,000	35,13,82,118
	Total			2,61,97,67,80,998

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Hon'ble DRP has confirmed the action taken by the AO.

ii) ***Ld. AR has made following main argument against the addition u/s 56(2)(viia)***

a) Transfer of shares in the scheme of amalgamation is specifically exempted u/s 47(vi) of IT Act and same is applicable for not invoking section 56(2)(viia) by virtue of provision of said section.

b) Amendment made clause (vii) of section 47 in sub clause(a) i.e. transfer is made in consideration of allotment to him of any hare in the amalgamated company except where the share holder itself is the amalgamated company is retrospective in nature. Though the amendment has been brought w.e.f. 1.4.2013. The same is clarificatory in nature and is retrospective in nature and relied on the clarificatory circular amending section 47(vii) that clarification was required to implement the section in proper perspective. Ld. AR relied on following Judicial pronouncement that the amendment in clause (vii) should be read retrospectively.

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i) CIT Vs. Vatika Township Pvt. Ltd. (2014) 367 ITR 466 (SC)

ii) Allied Motors Pvt. Ltd. Vs CIT (1997) 224 ITR 677

iii) CIT Vs. Calcutta Expert Company (2018) 404 ITR 64 (SC)

c) Ld. AR has relied on the following judicial pronouncements where transfer on account of amalgamation has not been held as transfer·

i) CITVs Texspin Engg. & Mfg. works (2003) 129 Taxman 1 (Bom.)

ii) Shaw Wallace & Co. Ltd. (1979) 119 ITR 399 (Cal)

iii) Forbes & Forbes Campbell & Company Ltd. (1984) 150 JTR 529.

d) Ld. AR has finally argued that if at all the addition has to be made u/s 56(2)(viia), the same has to be done strictly as per rule 11UA which requires that the valuation of shares of SPV

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has to be done as per the balance sheet as on 31.03.2011. i.e. appointed date where the balance sheet of these SPVs were prepared as on 31.03.2011 without transfer of assets from the assessee company or without creation of the huge general reserve.

iii) My submission on the issue of addition u/s 56(2)(viia) on merits are· as under:-

a) Undisputed fact is that the assessee company had received shares of SPV companies at the time of amalgamation of AVVPL with the assessee as per part III of the scheme discussed earlier without any consideration. For applicability of section 56(2)(viia), the eligible assessee being firm or a company in which public are not substantially interested receives any shares without any consideration, aggregate fair market value of such shares have tobe brought to tax. The provision of section 56(2)(viia) is reproduced as under :-

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56. Income from other sources

1. Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

2. In particular, and without prejudice to the generality of the provision of sub section (1) the following Incomes, shall be chargeable to Income Tax under the head " Income from other sources ", namely:

viia). where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June, 2010, any property, being shares of a company not being a company in which the public are substantially interested,--

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(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

***Provided** that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (Vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.*

Explanation.-For the purposes of this clause, "fair market value" of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause (vii);]

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In view of the above provisions it is clear that the requirement for attracting section 56(2)(viia) is not transfer but receiving of shares. By virtue of proviso to said subsection as reproduced above, if such receiving of share is by way transaction as mentioned in clause (via) or (vic) or (vicb) or (vid) or (vii) of section 47, then the main provision will not apply.

In view of the above position the arguments of Ld. AR that if as there is no transfer of shares, provision of section 56(2)(viia) will not apply, is not in accordance with provisions of law.

b) Now the issue is whether clause (via) or (vic), or (vicb) or (vid) or (vii) of section 47 will apply. The Ld. AO & Ld. DRP has examined the issue which is tabulated in page 26 & 27 of assessment order which is reproduced as under :

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Relevant Clause of section 47	*Exclusion regarding*	*Applicability in the case of the assessee*
(Via)	*Any transfer, in a scheme of amalgamation of a capital asset being a share or shares held in an Indian Company, by the amalgamating foreign company to the amalgamated FOREIGN COMPANY, if* *(a) At least 25% of the share holders of the amalgamating foreign company continue to remain shareholder of the amalgamating foreign company, and* *(b) Such transfer does not attract tax on the capital gain in the country, in which the amalgamating company is incorporated*	*Since amalgamating & amalgamating companies are Indian Companies, this clause is not applicable.*
(vic)	*Any transfer in a demerger of a capital asset, being a shares or shares held in an Indian Company, by the demerged foreign company to the resulting foreign company, if-* *(a) The share holders holding not less than -% in value of the shares of the demerged foreign company continue to remain shareholder of the resulting foreign company, and* *(b) Such transfer dopes not attract tax on capital gain in the country, in which the demerged foreign company is incorporated* *(c) Providing that the provision of the section 391 to 394 17of the Companies Act1956 (one of the 1956) shall of apply in case of DEMERGERS refer to in this clause*	*This case is not of demerger, hence this clause is not applicable*
(vicb)	*Any transfer by shareholder, in a business reorganization of a capital asset being a share or shares held by him in the Predecessor Cooperative Bank if the transfer is made in consideration of the allotment to him of any share or share in the Successor Cooperative Bank Explanation: for the purposes of the clauses (Vlca) & (Vicb), the expressions 'business*	*Capital asset under instance case are not shares of a Co-operative Bank, hence this clause is not applicable.*

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	reorganization ' . "Predecessor Corporative Bank" and "Successor Corporative Bank Shall have the meanings respectively assign to them in section 44 DB	
(vid)	*Any transfer or issue of shares by the resulting company, in a scheme of demerger to the share holders of the demerged company if the transfer or issue is made in consideration of the demerger of the undertaking*	*The case is not of demerger, hence this clause is not applicable.*
(VII)	*Any transfer by shareholder, in a scheme of amalgamation, of a capital asset being a share or shares held by him in the amalgamated company if—* *(a) The transfer is made in consideration of the allotment to him of any shares in the shares in the amalgamated company *Except where the share holder itself is the amalgamated company.* *(b) The amalgamated company is an Indian Company*	*This clause woud have been applicable in case the shares of AVVPL were transferred by AVL as AVVPL is the amalgamating company in the instant case. However, shares of business SPVs are being received by AVL which were held as investment by AVVPL hence this clause of also not applicable, since it does not contain any provision regarding indirect holding of shares.*

** added by finance Act, 2012 w.e.f. 01.04.2013*

The only clause which even needs examination for applicability in assessee case is clause (vii), as this clause is applicable for amalgamation of Indian company. Other clauses are not even remotely connected. The provision of clause (vii) of section 47 is reproduced above in the said table. This clause would

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have applicable only if shares of amalgamating company i.e. AVVPL in present was transferred. This clause is attracted if there is transfer by a share holder in the scheme of amalgamation share of amalgamating company. In present case, AVVPL is the amalgamating company. Therefore for attracting the clause, share of AVVPL is required to be transferred. In present case the assessee has received share of SPV companies which are not amalgamating company. Therefore clause (vii) of section 47 will not apply.

Last argument of Ld. AR on the applicability of clause (vii) in the amendment introduced in the condition (a) "except where the share holder itself is an amalgamated company" is only clarificatory and for making the provision workable hence should be considered as retrospective in nature and relied on the decisions in the case of Vatika Township Pvt. Ltd., Allied Motors Pvt. Ltd. And Calcutta export Company cited Supra.

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It is submitted that firstly said amendment contained in condition (a) of clause(vii) is no way helps the assessee as this condition is also applicable when the transfer made in consideration of shares of amalgamated company. In present case, amalgamated company is the assessee itself. There is no transfer of shares of Assessee Company. Though this condition is waved by virtue of this amendment. However, the earlier requirement of transfer by a share holder of shares of amalgamating company i.e. AVVPL is not fulfilled. In present case, the shares held by the assessee being an amalgamated company, in the amalgamating company (AVVPL) is cancelled. Therefore none of condition contained is clause (vii) of sec 47 is fulfilled as the share received in question by the assessee is share of SPV companies which are neither amalgamated nor amalgamating company.

Further, it may further be submitted that even reliance on various judicial pronouncements by Ld. AR that

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these amendment are made only to make provisions workable cannot be accepted as section 56(2)(viia) is substantive provisions of law and not procedural section. It may be mentioned that the provision of clause (vii) was otherwise workable only intended benefit was not available, if share holder is other than amalgamated company such benefit was available. It was extended to amalgamated company as a share holder also by mean of this amendment. Therefore such amendment in substantive provisions of law cannot be treated as procedural, as the said amendment is effective from 01.04.2013 & not applicable to impugned, assessment year i.e. A.Y. 2012-13.

Further, it may be submitted here that this clause (viia) of section 47 is basically intended for plain amalgamation and not a composite scheme like present case when of share of SPVs are transferred to amalgamated company. SPVs are neither amalgamating nor amalgamated company.

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c) Now I will deal with various judicial pronouncement relied by Ld. AR for non applicant of sec 56(2)(viia)

i) Texspin Engineering and manufacture works (2003) 129 taxmann 1 (Bombay)

*In that case the issue was taxing the difference in market value asset of firm and which was converted into a private Ltd. company treating it as a transfer u/s 2(47)(iii) and taxing under the **head** 'capital gain' . The transaction was treated as transfer by AO which was not approved by Hon'ble ITAT & the view of ITAT was Confirmed by Hon'ble High Court. In para 6 of the order Hon'ble High Court has not treated it as a transfer in view of the fact that necessary condition for transfer i.e. existence of party & counter party & incoming consideration **qua** transfer is not satisfied.*

*In present case the facts are **entirely** different, the taxing provision in sec 56(2)(viia) and not section 45 where the 'transfer' is the prime requisite for attracting*

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capital gain. The requirement for attracting section 56(2)(viia) is the receiving of shares which in undisputed fact in present case. Therefore, this judicial pronouncement has no bearing on the facts of the..

ii) SHAWWALLACE & Co. LTD. Vs. CIT(l979) 119ITR 399 (Calcutta).

In this case, the issue was the applicability of capital gain provision u/s 45, 47(vi) & 2(47). In that scheme of amalgamation, ITAT held summary of judgment, past 399 to 401.

CAPITAL LOSS-MUST RESULT FROM A "TRANSFER OF ASSETS"- AMALGAMATIONN OF COMPANIES-ASSESSEE-COMPANY HOLDING IOO% SHARES OFTHREE SUBSIDIARY COMPANIES-AMALGAMATION OF SUBSIDIARY COMPANIES WITH ASSESSEE. COMPANY-PROPERTY, RIGHTS AND POWERS OF' SUBSIDIARY COMPANIES TRANSFERRED AND VESTED IN ASSESSEE-COMPANY- ALL LIABILITIES AND DEBTS OF SUBSIDIARY COMPANIES TO BECOME

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LIABILITIESAND 'DEBTS OF ASSESSEE-COMPANY AS FROM DATE OF AMALGAMATION-..SUBSIDIARY COMPANIES DISSOLVED WITHOUT WINDING UP-NO ELEMENT OF TRANSFER INVOLVED IN THE EXTINGUISHMENT OF THE RIGHTS OF TEE ASSESSEE IN THE SHARES OF SUBSIDIARY COMPANIES- EXI1NGUISHMENT OF RIGHTS INEXTRICABLY LINKED WITH TRANSFER OF CAPITAL ASSETS OF AMALGAMATING COMPANIES TO THE AMALGAMATED COMPANY-DID NOT INVOLVE EITHER A TRANSFER INVOLVING ANOTHER PERSON OR ANY CONSIDERATION-THERE CANNOT BE TRANSFER BY A PERSON TO HIMSELF -- NET ASSETS OF AMALGAMATING COMPANIES TAKEN OVER BY ASSESSEE MUCH LESS IN VALUE THAN VALUE OF SHARES HELD BY ASSESSEE IN SUBSIDIARY COMPANIES-DIFFERENCE CANNOT BE CLAIMED AS CAPITAL LOSS-INCOME-TAX ACT, I961, SS, 2(47), 45,

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Under s. 45 of the I.TAct, 1961, a capital gain, or in the negative sense, a capital loss, can only occur on the transfer of a capital asset. A transfer always involves more than one party. There cannot be a transfer by a Person to himself Therefore, the expression " or the extinguishment of any rights therein " in s. 2(47) of the Act must mean the extinguishment of rights as a result of some operation involving more than one Person, A consideration must be involved in a transfer before there can be any capital gain or capital loss.

The assessee-company was holding 100 percent of the shares of three subsidiary companies. Under the schemes of arrangement arrived at by and between the assessee on the one hand and each of the subsidiary companies on the other, the subsidiary companies were amalgamated with the assessee on the following terms and conditions : (a) All the property, rights and Powers of the subsidiary companies would be transferred to the assessee as from the 1st January, 1966, and vest in the assessee, (b) All liabilities and

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debts of the subsidiary companies would as from the said date be transferred to and become the liabilities and debts of the assessee (c) The assessee being the beneficial owner of the entire issued share capital, there would be no issue of shares to the assessee. (d) The subsidiary companies would be dissolved without winding up. In the assessment year 1967.68, the assessee claimed a capital loss of Rs. on the ground that the loss had occurred on amalgamation of the subsidiary companies with the assessee. The ITO held that the claim was not admissible on account of s.47(vi) of the 1961 Act. On appeal, the AAC confirmed the order of the ITO and disallowed the assessee's claim. On further appeal to the Tribunal, the assessee contended that s. 47(vi) of the Act was not applicable inasmuch as the capital loss had occurred on the "extinguishment of the rights of the assessee in the shares of the subsidiary companies as a result of the amalgamation, that the extinguishment of such rights was for a consideration, being the net assets transferred to the

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assessee from the amalgamating companies, that there was a transfer in the artificial and extended sense within the meaning of s. 2(47) of the Act and that there was a consequent capital loss within the meaning of 45 of the Act inasmuch as the net assets of the amalgamating companies transferred to the assessee very much less in value than the value of their shares held by the assessee. The revenue contended that there cannot be any capital gain or loss inasmuch as there was 'mo transfer involved in the amalgamation and, even if there was a transfer, the same came within the Purview of s. 47. The Tribunal held that, as a result of the scheme of amalgamation, the rights and liabilities of the amalgamating companies vested in the amalgamated company and there was extinction of the rights of the assessee in the share capital the amalgamating companies, that the transaction was similar to a transaction where a shareholder received his share of capital of a company on a final distribution of the net assets in liquidation, that there was no transfer of capital assets which would result in

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capital gain or loss and dismissed the assessee's appeal. On a reference:

Held, that, under the scheme, there had been, firstly, a transfer of the capital assets of the amalgamating companies to the amalgamated company and it was covered by s. 47(vi) of the Act and there cannot be any capital gain or loss arising from such a transfer as section 45 does not apply to such transfer,

(ii) As a result of the dissolution of the amalgamating companies the right of the assessee in the shares of those companies came to an end Such extinguishment OJ the lights in the shares vas inextricably linked with the transfer of the capital assets of the amalgamating companies to the amalgamated company. Under s. 47(vi) such a transaction had to be excluded from the operation of so 45 and there cannot be any capital gain or loss,

(iii) The met eject of the scheme of amalgamation was a transfer of the entire capital assets of the subsidiary

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companies to the holding company which also held the entire share capital of the subsidiary companies, Such a transfer or transaction would within s, 47(v) of the Act and should be excluded from the operation of s, 45.(iv) The assessee in effect had au the rights of an owner over all the assets of the subsidiary companies inasmuch as the assessee held 100 per cent. shares of the subsidiaries and there cannot be any element of gain or loss when the assessee rearranged its capital base, for, instead of keeping the capital in the name or in the control of its subsidiaries the assessee brought back the same under its direct control.

Therefore, the Tribunal was right in rejecting the contention of the assessee that the loss representing the difference between the cost of the shares held by the assessee in the subsidiary companies and the net assets taken over by the assessee from the respective companies as a result of the scheme of amalgamation should be allowed as a capital loss.

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In present case, transfer as per provision of sec 2(47) need not be established as the income has not been taxed under the head 'Income from other sources' i.e. u/s 56(2) (viia). In sections 56(2)(viia), the word used is 'received' and not 'transfer'. The assessee has received shares of SPVs. This is uncontroverted fact. Hence, the above judicial pronouncement will not apply.

iv) Forbes & Forbes Campbell & Company ltd. Vs. CIT (1984) 150 ITR 52a (Bombay) The summary of the decision in said in reproduced as under:-page 529

CAPITAL GAIN-AMALGAMATION OF 100% SUBSIDIARY WITH PARENT CAPITAL AND ASSETS OF SUBSIDIARY VEST IN PARENT COMPANY-NO EXTINGUISHMENT OF RIGHT OF PARENT COMPANY IN CAPITAL SUBSIDIARY-VALUE OF NET ASSETS OF SUBSIDIARY ON DATE OF AMALGANATION EXCEEDING COST OF PARENT COMPANY'S SHAREHOLDING IN SUBSIDIARYIES -EXCESS NOT CHARGEABLE TO TAX AS CAPITAL GAIN- INCOME-

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TAX ACT, 1961, SS. 2(47), 45-COMPANIES ACT, 1956, S. 394.

Under s. 394 of the Companies Act, 1956, in the case of amalgamation of d 100% subsidiary with its Parent company, the entire capital and assessee the subsidiary company vest in the Parent company as a result of the amalgamation and the Parent company becomes the sole owner of the capital of the subsidiary company. There is, therefore, no extinguishment of the right of the parent company in the capital on the liquidation of the subsidiary company and there is no question of accrual of capital gain or sustaining of capital Loss. Hence, -the excess value of the net assets of the subsidiary company on the date of its amalgamation over the cost of the Parent company's shareholding in the subsidiary is not chargeable to tax as capital gain under s. 45 of the IT Act, 1961.

In this case also, like in shaw Wallace case, it was held that in case of amalgamation, there is no transfer of

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assets and hence no capital gain u/s 45 of IT Act. ***In present case, the Charging section is not section 45 but 56(2)(viia). Therefore, the restriction of the definition of transfer u/s 2(47) will not apply.***

d) Relevant balance Sheet for determination of value of shares of SPVs under rule 11UA.

The method for determination of fair market value u/s 56(2) (viia) is prescribed in Rule II U & 11UA of I.T. Rules, 1962, which requires the determination of fair market value as on valuation date and valuation date means date on which the property is received by the assessee as per Clause (J) of Rule 11 U. As per Clause (b) of rule 11 U, the relevant balance sheet for determination of fair market value of shares in the audited balance sheet as on valuation date i.e. date on which such shares has been received if balance sheet in not available then the immediately preceding audited balance sheet prior to valuation date should be considered .

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Therefore, core issue for determination of valuation of shares is the valuation date. In present case, as discussed in earlier para, transfer of undertaking to SPVs and amalgamation of AVVPL in the assessee company as per part II & part III of the scheme respectively are related to valuation of the undertaking. The assessee has submitted the valuation report as on 2.11.2011 & 8.3.2012 respectively. Therefore vesting and transfer of property cannot be assumed prior to 8.3.2012. The assessee, has not submitted the entries made in the books of accounts for transferring the property and resolution of the company to effect the restructuring through specifically asked by Hon'ble bench during the hearing . Therefore, just mentioning the appointed date in the composite scheme, the appointed date cannot be considered as date of transfer. Only evidence in support of affecting the scheme in the balance sheet of the assessee and SPVs as on 31.3.2012. Therefore, nearer date of receiving., the shares of SPVs

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company in the hands of assessee is 31.3.2012. In view of the-' above of facts, the assessing office has rightly considered the audited balance sheet of SPV companies as on 31.3.2012 for determining fair market value of shares of · SPV companies under Rule II UA of IT Rule, 1962. Arguments of Ld. AR that audited balance sheet as on 31.3.2011 of SPVs should be considered for Rule II UA has two flaws. Firstly, date of transfer is not 31.3.2011. It is 31.3.2012 & earlier audited balance sheet i.e. on 31.3.2011 can't be considered as the balance sheet as on 31.3.2011 does not contain effect of scheme. Therefore, such implementation of rule is against the implementation of Sec 56(2)(via).

In this regard, it is mentioned here that Ld. DRP have relied on the decision of Madras High court in case of Commissioner of Wealth Tax Vs. S Ram and other (1984) 147 ITR 0278 (Mad through applicable for Gift Tax Act has persuasive value as the decision holds that if balance sheet as on date of gift is not available,

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Balance sheet of prior & after date may be considered. The DRP has relied on this decision on page 39 of its order.

iv) Merits of addition u/s 28(iv)

A) The facts of tile case are as under:-

i) The Assessing Officer has passed draft assessment order u/s 144C and made addition of Rs.26197.67 crores u/s 56(2)(viia) for the scheme of restructuring approved by High Court order. On reference to the DRP by the assessee, DRP has confirmed the addition made by the assessing officer. Further DRP has directed AO it make addition U/s 28(iv) of IT Act for Rs. 46999.38 which was added in general reserve of the assessee company at the time of execution of part III of the said scheme of arrangement during amalgamation of AVVPL with the assessee as a result of valuation of II SPVs and accordingly enhanced the addition with the finding that since it is not a separate addition, the addition u/s 28(iv) is greater than

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addition u/s 56(2)(viia), therefore, the additional should be made u/s 28(iv).

ii) Ld. DRP has relied on the decision Hon'ble Madras High Court Ramniyam Homes 68 Taxmann.com 289 and Hon'ble Madras High Court decision in the case of Arises advertising Ltd. 255 ITR 510 to hold that creation of general reserve in the books of account of the assessee is benefit accruing u/s 28 (iv) of I. Act, 1961. DRP has considered the objection of the assessee and case laws relied by the assessee & special auditor namely ITO vs Dayal Developers Pvt. Ltd. ITAT Kol. ITA No. 627/Kol/2012, Spencer & Company Ltd. Vs. ACIT,, (ITA No. 440/Mad/2011)ITAT Chennai, CIT Vs Stads Ltd. Madras High Court ITA No. 118 of 2015 & CIT Vs. Shreya Investment P. Ltd. ITA No. 1485 of 2011& found not applicable on facts of the case.

B) Ld. AR's main argument against the addition U/s 28(iv) of IT Act are as under:-

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a) Benefit must arise from business for attracting Section 28(iv). In present case he argued that reserve in the books of accounts is created only due to amalgamation. Hence it can't be said to arise from business. Ld. AR argued that reserve created on account of amalgamation is capital in nature & can't be said to be created on account of business activity. He relied on the following judicial pronouncements:-

i) Nerka Chemicals P. Ltd. Vs. DCIT ITA No. 4423/ Mum/2014, 4585/ Mum/2015 & 4850/ Mum/2016

ii) Spencer & Co. Ltd. Vs. ACIT, Chemical, Madras ITAT 440/Mad/2011

iii) CIT Vs Stad Ltd., ITA No. 118 of2015 (Madras High Court)

iv) Oman International.

v) ITO Vs Shreyas Investment P. Ltd. , ITA No. 1485/Kol/2014, Kolkatta ITAT.

b) The Ld AR argued that for attracting Section 28(iv) benefits should be akin to prerequisite. Such is not facts of the present case. He relied on the decision of Rupee Finance (2008) 119TTJ (Mumbai) 643, and

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circular 20D dated 7the July 1964 which had given the example of prerequisite for taxing u/s 28(iv).

c) Ld. AR argued that the reliance of Ld. DRP on the decision of the Hon'ble Madras High Court in the case of Ramaniyan Homes is not proper as the same has been over ruled by Hon'ble Supreme Court in 404 ITRl. Ld. AR also argued that reliance of DRP on the decision of Hon'ble Supreme Court in the case Vazir Sultan is not proper as the said decision differentiates between reserve & provision.

d) The Ld. AR argued that special auditor has given the findings that section 28(iv) is not applicable on the fact of the case.

C) My submission are as under:-

i) The main argument of Ld. AR is that benefits mentioned in 28(iv) must rise out of carrying out the business. I would like to reproduce section 28(iv) of which is as under"-

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"28.Thefollowing income shall be chargeable to income tax under the head" Profits and gains of business or profession"-

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the value of any benefit or perquisites whether convertible into money or not, arising from the business or profession"

Therefore, for applicability of sec 28(iv) such benefit must arise from the business. Word used in section 28(iv) is 'arise'. Word 'arise' has been interpreted as 'Carrying out' the business. Now let us examine the facts of the case. The assessee company has existing specific dedicated enterprises which was transferred to 8 subsidiary companies & 3 step down subsidiaries. As per the scheme of restructuring (part II). All these 8 subsidiaries & three step down subsidiaries were owned by AVVPL (Aamby Valley Venture 'V' Pvt. Ltd) which was again wholly owned by the

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assessee. The transfer of these are specific enterprises is done as per accounting system mentioned in the scheme, where the assessee will transfer the asset & Liability of these enterprises at book value in its books of account. However, these special purpose subsidiaries will enter the asset and liability at fair market value of said enterprise in their books of accounts. As per valuation report as on 02.11.201 I, the asset in the form of land whose book value was Rs. 9379 crores was valued at Rs.37,473.30 crores of fair market value. (Kindly refer to page 22 of DRP order). Therefore, reserve created at the time of demerger in the books of SPV companies was only on account of enhanced fair market value of land which was inventory in assessee's hand, and got transferred to SPV companies.

All the SPV companies were wholly owned subsidiaries of AVVPL. As per Part III of the scheme, AVVPL got merged with the assessee.

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Here also asset & liability of those SPV companies were entered in the book of account of assessee company at fair market value. Asset other than land was valued at Book value. The land held by the SPVs was valued at Rs.47001 crores as on 06.03.2012. These land which were held by the assessee as inventory and transferred to these SPV companies. Enhanced fair market value of land is the basis of creation of general reserve at the time of amalgamation of AVVPL with the assessee company. Therefore, it is established that the general reserve created in the books of accounts of assessee is created on account of difference in fair market value & book value of land held by the assessee company as inventory which were transferred to SPV in overall effect of the scheme. The difference in fair market value & book value of inventory is nothing but accumulated profit which has arisen from the business. There cannot be any

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reason or argument to disprove that accretion in value of inventory has not arisen from business. Accordingly it submitted that general reserve created in present case of the books of account of the assessee has arisen from business and is not a capital reserve which is normally understood or account of Capital restructuring in normal amalgamation.

ii). Now I will deal with the judicial pronouncements relied by Ld.AR.

a) CIT Vs Mahindra & Mahindra Ltd Yr.(2018) 404 ITR I (SC).

Ld AR relied on this decision and argued that for the applicability of section 28 (iv) income must arise from the business.

The decision summary is reproduced as under :-

Held, dismissing the appeals, (i) that prima facie, for the applicability of arise from the business or profession u/s section 28(iv) of the Act, the income

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must arise and the benefit which is received has to be in some other form other than in the shape of money. The amount of Rs.5,74,064 was a cash receipt due to the waiver of loan. Therefore, the very first condition of section 28(iv) was not satisfied and the amount of Rs.57,74,064 could not be taxed under the provisions of section 28(iv) of the Act.

In the above decision, Hon'ble SC held primary condition for applicability of Sec 28(iv) i.e. the benefit must arise from the business and other than in shape of money. In present case as discussed in earlier paragraph, the assessee has created general reserve in form of valuation of SPVs which was basically profit embedded in inventory prior to implementation of the said scheme. Therefore such reserve is a benefit arising out of business & benefit in form of market valuation of SPV companies & therefore other than cash. Hence, this decision of Hon'ble SC favous the

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case of revenue than the assessee in given facts & circumstances of this case.

b) Ld. AR relied on the decision of ITAT, Chenai Bench 'B' (third member) in the case of Spencer & Co. Ltd vs ACIT, Circle VI(4), Chennai in ITA No.440(MDS) of 2011 where it has held that balancing arising out entries passed in book of accounts as a result of amalgamation cannot be treated as income taxable u/s 28(iv).

The findings of Hon'ble ITAT is reproduced as under.

"Section 263, read with sections 143 and 147, of the Income-tax Act, 1961- Revision of orders prejudicial to interest of revenue - Assessment year 2002-03- whether income-escaping assessment order passed under section 143(3), read with section 147, is an assessment order passed by Assessing Officer; therefore, any issue, which Commissioner thinks that Assessing Officer has not considered in said assessment,

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can be brought to life by Commissioner in exercise of his powers under section 263 - Held, yes - Whether in such a case, revisional power of Commissioner cannot be denied on ground that issue considered in income-escaping assessment and issue proposed to be considered in revisional proceedings are different - Held, yes [In favour of revenue]

Section 47, read with section 2(47), of the Income-tax Act, 1961 - Capital gains Transactions not amounting to transfer - Assessment year 2002-03 During relevant assessment year, a company namely, SIFL, got amalgamated with assessee company - Pursuant to amalgamation, assets and liabilities and rights and obligations of SIFL vested with assessee-company and those items had been recorded at their fair values - Excess of fair value of net assets taken over by assessee-company over paid-up value of allotted equity shares worked out to Rs.2,899.68

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lakhs- said surplus amount was transferred by assessee to its General Revenue Account Whether since assessee had acquired business of another company through medium of amalgamation, in view of provisions of section 47(vi), there was no transfer as such of any capital asset and, therefore, question of taxing capital gains did not arise Held, yes [In favour of assessee}"

Section 28(iv) of the Income-tax Act, 1961 - Business income - Value of any benefit or perquisite, arising from business or exercise of profession - Assessment year 2002-03 - Whether haying regard to facts stated under heading 'Capital Gains Transactions not _amounting to transfer', it was to be concluded that sum of Rs.2,899.68 lakhs was only a balance are arising out of entries passed in books of account as a result of amalgamation and same could not be

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treated as income taxable under section 28(iv) - Held, yes [In favour of asessee] "

The facts of present case is entirely different as present case it is not of simple amalgamation. In present case, there is first "trader" of assessee's inventory. into different SPV companies & then amalgamation of holding company of SPVs i.e. AVVPL into assessee. Therefore, the general reserve created as a result of amalgamation is basically on account of transfer of its inventory at market value & reserve is the difference in market value & book value of inventory as AVVPL is basically a conduit for affecting the scheme to give colourable devise of amalgamation, which has come into existence for this purpose only.

c) ITO vs Shreyan Investment P Ltd. ITA No.1485 (Kol.) of 2014, Kolkata ITAT Ld. AR argued that reserve arising out of amalgamation is

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a capital reserve & sec.28(iv) does not apply & relied on this decision.

The finding of the said decision in catch note is reproduced as under:-

"Section 28(iv) of the Income-tax Act, 1961 - Business income- Value of any benefit or perquisite arising from business or exercise of profession [Capital reserve on amalgamation- Assessment year 2008-09 - Whether capital reserve arising all account of amalgamation is of revenue nature - Held, no –

Whether, therefore, capital reserve arising on amalgamation can be taxed as a benefit or perquisite arising from business under section 28(iv) under head 'Profits and gains of business or profession'- Held, no [Para 9} [In favour of assessee}"

The facts of this case is entirely different as in present case, the reserve is general reserve which is

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defined in the scheme which can be used for any purpose. Therefore it is not a capital reserve. The reserve represents benefit arising out of business activity. Therefore, this decision is not applicable.

d). Rupee Finance & Management P. Ltd Vs. ACIT (2009) 120 lTD539 (Mumbai). Ld. AR argued that u/s 28(iv), the word 'benefit' has to be interpreted in same manner as the word prerequisite & relied on the above decision & also circular explaining the provision of 28(iv) scheme this section was brought in statue in 1964.

Hon'ble ITAT in the cited decision has considered the above circular & has arrived at the conclusion in para 8.3 & 8.4 of the said decision, that for attracting section 28(iv) benefit or prerequisite should be in nature of income. The word benefit has to be interpreted in time same manner that is at the time of execution of business transaction one party should give to other party an irretrievable benefit or advantage, as an obligation or facility as a

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concession. In the decision only emphasis that benefit or perquisites should be irretrievable,

In the present Case, the decision is no way against applicability of section 28(iv) looking at the ultimate result of the "the scheme of arrangement". The assessee has given its inventory at market value to its SPVs and has got shares of those SPVs at market value which is irretrievable benefit. Therefore, the facts are in consonance with the decision. Further example cited in the Explanatory circular of sec 28 (iv) is for perquisites. The word 'benefit' is other than perquisites as these two words are disjointed by 'the word' 'or', In any case in present case the benefit has arisen as a result of business and not in cash, therefore as per the decision of Hon'ble SC in the case of Mahindra & Mahindra Cited Supra, the same is covered u/s 28(iv).

e). Nerka Chemicals Pvt. Ltd Vs DCIT I.T.A.NO. 4423/Mumbai/2014, 4585/Mumbai/2015 & 4850/Mumbai/2016.

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In Para 43 on Page 31 of the said judgment the Hon'ble ITAT has prescribed & condition for applicability of the section 28(iv).

i). The assessee has to receive benefit or a prerequisite

ii). The benefit or prerequisite must be in a form other cash.

iii). Such receipt must arise from carrying out of business.

In present case, all these conditions are fulfilled. The assessee has received shares of SPVs company at market value as a result of "transfer" of inventory held by it and subsequent "merger". Therefore the same is benefit which is determined by creation of general reserve which can be utilised for any purposes. Reserve is basically created on account of profit embedded on its inventory which got transferred and which ultimately led to "free general reserve" in said enterprises in form of Land.

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f). CIT Chennai Vs STADS Ltd (2015) 373 ITR 313 (Mad). ITA.118 of 2015 (Madras HC)

Finding of Hon'ble HC with facts of the case are as under:-

*Para 7). It is seen that by order dated March 10, 2003 this court approved the scheme of amalgamation of three transferor companies, viz., M/s **I.**Trigger Technologies (P) Ltd., M/s Web Technologies (P) Ltd., Linus Solutions (P) Ltd. with the transferee company, viz., M/s. System Telecom and Data Services (P) Ltd. (the Stad Ltd.), who is the assessee respondent herein. In the scheme of amalgamation, the details of the combined share capital of the four companies prior to the amalgamation and post-amalgamation was explicitly given.. Based on the same, the assessee claimed that the combined share capital of the four companies before amalgamation was Rs.3,04,48,600/- and equity share capital of the company post-amalgamation was Rs.87,60,380/- and the*

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difference was Rs.2,16,88,220/-. The assessee showed the said difference under the category "Reserves and Circulars" in the balance sheet.

Para 8). The Department took a view that it is a profit & gains or profession, more particularly it is a value of benefit or perquisite arising from business or exercise of profession. But the Commissioner of Income Tax {Appeals) set aside the view of the department, which the Tribunal has confirmed by a one line order. Probably, that prompted the Revenue to pursue the matter before this court forcing us to right more explicitly and detailed order on the interpretation of section 28(iv), which Sri T. Ravikumar, learned standing counsel wants us to interpret in the present case.

Para 9). The short point that arises for consideration in this appeal is whether the amalgamation reserve consequent to the merger of four companies would fall within the ambit of Profit and gains of business

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or profession, more particularly under section 28(iv) of the Income-tax Act.

Para 10). Since the issue revolves around section 28(iv) of the Income Tax Act it is necessary to extract the same herein for better clarity.

"28.Profits and gains of business or profession - The following income shall be chargeable to Income Tax under the head 'Profits and gains of business or profession',-.

(iv) The value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession".

Para 11). A plain reading of the above said provision makes it clear that the amount reflected in the balance sheet of the assessee under the head "Reserve the surplus" cannot be created as a benefit or perquisite arising from business or exercise of profession. The difference amount post amalgamation was the amalgamation Reserve and it could not be said that it is out of

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normal transaction of the business. The present transaction is capital in nature arose on account of amalgamation of four companies. Hence, we have no hesitation to hold that the manner in which the Revenue wants to treat this amount is not in consonance with section 28(iv) of the Income -tax Act.

On the basis of said judgment, Ld. AR argued that the amalgamation reserve is capital in nature & therefore, section 28(iv) is not attracted.

The facts of the present case is entirely different. Here, the scheme is not of amalgamation alone but demerger of different enterprises from the assessee company to various SPVs and amalgamation of holding company of SPVs with the assessee & reserve is created on account of transfer of inventory of the assessee in various enterprises in form of Land which was valued at the time of transfer at market value. The difference of market value of inventory & book value is the

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reason of creation of reserve. Further, in the scheme, very specifically it is mentioned that the said reserve is general reserve which can be used for any purpose. Therefore this decision will not apply.

iii). Ld. AR has argued that special auditor u/s 142(2A) has reported that see 28(iv) will not apply. My submission in this regard is that there was no terms of reference to the special auditor to examine the taxability of Income. Only reference was to examine books of accounts and give factual findings. Term of references are mentioned on page 58 & 59 of special audit report volume I (main volume). The special auditor was required in point no. 8 on page 59 to examine the issue of demerger and amalgamation thoroughly and give report on correctness of transfer of assets and liability and also as to whether valuation of the assets especially cost of land has been done correctly, as per the scheme approved by Hon'ble

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High Court of Bombay. Therefore such findings of special auditor on the non applicability of sec 28(iv) has no binding value.

However, it is necessary to examine judicial pronouncement relied by special auditor to arrive at such conclusions. Special auditors have relied in following decisions to arrive such conclusion.

(i) Income Tax Officer v/s M/s Kyal Developers Pvt. Ltd. ITA No. 6298/Kol/2012, ITAT (Kol.)

(ii) Spencer & Company Ltd. Vs ACIT (ITA No.440/Mds.2011) !TAT, Chennai (iii)CIT.V/s STADS Ltd Madras AC- March 2015- Tax case (Appeal) No. 118 of 2015.

The decision in the case of Spencer & Company Ltd & STADS Ltd cited supra have already been discussed in earlier paragraph and submitted that these decisions are not applicable for non applicability of section 28(iv) on the facts & circumstances of this case.

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I will deal with decision of Kolkata ITAT in ITA No. 627/Kol./2012 ITAT Kolkata. In the said case, Hon'ble ITAT has relied on the decision of CIT vs Seshasayee Brothers Pvt. Ltd 222 JTR 8 I 8 in para 7 of page 5 of the order that when a receipt is referable to fixed capital it is not taxable and it is taxable as revenue receipt when it is referable circulating capital or stock in trade. On the basis of this finding of Hon'ble HC, Hon'ble ITAT has held that unless it is demonstrated that receipt in form revenue field, the same is not taxable. Accordingly capital serve created did not a benefits 28(iv).

In present case, as stated in earlier paragraph, general reserve on account of amalgamation is basically on account of transfer of assessee's inventory to SPV due of market valuation of land. Therefore, the general reserve is in revenue field on the basis of creation of such reserve apart from specially mentioned in the scheme that such

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reserve is general reserve. Therefore, this decision will not apply.

iv. DRP while applying section 28(iv) has relied on following decision:-

a) Ramaniyan Homes 68 taxman.com 289

b) Aries Advertising Pvt. Ltd 255 ITR

Ld. AR argued that decision of Hon'ble Madras High Court in the case of Ramaniyan Home has been reversed by Hon'ble SC in the case Mahindra & Mahindra Ltd. cited supra. The decision in the case of Mahindra & Mahindra has been discussed earlier which in no way help the assessee on given facts & circumstances in assessee's case.

Para 8 & 9 of the decision of Hon'ble Madras High Court in the case of Aries Advertising Pvt. Ltd. citied Supra relying on the decision of Hon'ble Supreme Court in the case of CIT vs T.V.

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Sundram Iyengar & Sons Ltd (1996) 222 ITR 344 held that general reserve created on account of trading operation is a benefit u/s 28(iv) of Income Tax Act, 1961. The said paragraphs are reproduction as under:-

"Therefore, it would have to be held that once the assessee transferred this amount to the general reserve, it treated the same as the pro. Once this position is clear, then the further question remains as to whether the amount has above becomes the income of the assessee in its hand. That question no more remains res Integra. The Supreme Court in the case of CIT vis. T. V. Sundaramb {engar and Sons Ltd. [19961222 ITR 344 has concluded this question as also the claim of the assessee that these amounts which were in the nature of deposits or credits did not change !heir character and could not be said to be an income in the hands of the assessee. The Supreme Court, by majority, has answered the question that such amounts

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after they were treated to be profits, as has happened in this case, changed character and therefore could be held to be income particularly because the assessee had become richer by reason of such amount having been treated as a profit and further having been transferred to the general reserve. The apex court came to the following conclusion (head note):that if a common sense view of the matter were taken, the assessee, because of the trading operation, had become richer by the amount which it transferred to its profit and loss account. The moneys had arisen out of ordinary trading transactions. Although the amounts received originally were not of income nature, the amounts remained with the assessee for a long period unclaimed by the trade parties. By lapse of time, the claim other deposit became time-barred and the amount attained a totally different quality. It became a definite trade surplus. · The assessee itself had treated the money ·as its

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own money and taken the amount to its profit and loss account. The amounts were assessable in the hands other assessee. "

The situation is no different ·in the present case. The amount represents the various credits and deposits during the trading with the aforementioned Aries Advertising Bureau. They remained for a long time to be recovered (even before the limitation period) and thus remained unclaimed. The amounts were then transferred by the assessee-company to the general reserve obviously treating them to be the profits. Therefore, in our opinion, the Supreme Court's decision cited supra applies on all fours. ln that view we are of the clear opinion that the amount of Rs.1,77,186 being the credit balances written off and transferred to ,the general reserve account has to be treated as income of the assessee chargeable to income-tax. We answer the reference accordingly against the assessee.

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Therefore, in the given facts and circumstances of the case the decision in the above two cases supports Revenue's action for taxing the assessee u/s 28(iv).

V) Conclusion *:- In view of the above judicial pronouncements & facts of the case, section 28 (iv) applies for taxing the benefit of free general reserve arising on account of amalgamation of AVVPL with assessee mainly on following reasons :-*

i) The amalgamation of AVVPL as per part III of the scheme is not a simple amalgamation on standalone basis. AVVPL along with that its 8 SPVs & 3 step-down subsidiaries were created on 24.02.2011 (except l) for basically transferring its various enterprises to SPVs.. Main reasons of creation of reserve is on account of profits embedded in the inventories transferred by

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Assessee company and valuation thereof over and above book value transferred to SPV companies.

As per part III of the scheme AVVPL which was subsidiary of the assessee company got amalgamation with 'assessee'. Therefore, AVVPL was created only for implementing the scheme, which was a tool for transferring various enterprises to SPV companies.

*ii) The reserve created ultimately in the hand of the assessee company is nothing but accumulated profit of the assessee company in **it** inventory of which was transferred. Therefore, the same arises on account of business of the assessee.*

iii) The creation of general reserve is therefore a benefit arising from business which is not in cash as receipt is of shares of SPV companies at market value.

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iv) The general reserve can't be said as capital reserve as the source of the creation of reserve in transfer of its inventory where profit was in built which came on surface because of its valuation at market rate.

Additional ground on MAT.

The assessee has raised additional grounds for non applicability of the provisions of MAT u/s 115JB of I.T. Act on account of addition of general reserve created during the year.

Additions made under MAT:-

i) Hon'ble DRP in para 6.11 has treated general reserve created in to assessee's books of account for the purpose of MAT on the ground only because a receipt is not passed through Profit & Loss account through revenue in nature does not escape from the application of MAT. Ld. DRP has relied on following judicial pronouncement for

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taxing general reserves created under the scheme for completing book profit under MAT.

a. Bombay Diamond Co. Ltd. Vs DCIT ITA No 7488/Mum/2007

b. Sumer Builders (p) Ltd. (2012) 19 Taxmann. Com 43 (mum)

c. Sainpcesssing &.wings mills (p) Ltd. 2009 176 taxmann.com 448

d. Veekaylal investment Co. Ltd. 249 ITR 597

e. Arising Advertisement Pvt. Ltd. 2002 I 25 taxmann 969

ii) Ld. AR argued that since these general reserves is not routed through profit & loss account no adjustment can be made in books of profit and loss u/s 115 JB of the IT Act and relied on the decision of Hon'ble SC in the case of Apollo Tyres.

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iii) ***Submission:-***

Clause (b) to explanation section 115 JB requires that books profit as per the books of account has to be increased by amount carried to any resources by whatever name called other than a resource specified under section 33AC.

In present case the general reserve is not a reserve created u/s 33AC of the IT Act. Therefore such reserve in present case has to be added to books profit computed as per the P & L Account prepared in accordance with part II of Schedule VI of the Companies Act.

There is no requirement that such reserves had to routed through P & L account under clause (b) of the explanation 1 of section 115JB for its increase in books of profit. Moreover, as per the provisions of Section 1 15JB, the comparison of amount of reserve as on 31.03.2011 and 31.03.2012 would indicate that the amount of Rs.47,000 crores credited to reserve account has been "carried

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to any reserve during the year" for the purposes of clause(b) of Explanation 1 of Section 115JB.

Without prejudice to the above, in present case general reserves created in assessee's books of account is on account of transfer of its inventory therefore the same should have been routed through the P & L account as per part II of Schedule VI of Companies act. The assessing Officer has been given the power to temper the books of profit it such profit is computed as per profit &loss account which are not prepared as per part II of Schedule VI of companies Act rely on the decision relied by DRP. DRP has reproduced the relevant part of the decision in its order. It may be mentioned that these decision are given after considering the decision of Hon'ble Supreme Court in the case of Apollo Tyres.

In case of Bombay diamond Co Ltd. Murnbai v/s DCIT ITA NO 7488/M/107 in para 14 plea was taken that decision of Apollo tyres is not

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applicable Hon'ble ITAT therefore after considering the decision of Apollo tyres has given the decision that if P&L is not prepared as per part II of the Schedule VI of companies act the adjustment for creating of general resources is permissible."

99.1. The Ld. D.R. apart from filing the above written submissions also relied upon draft assessment order. He has also submitted that SPVs did not do any business earlier. Application for Amalgamation was made for the period retrospectively to which Income-tax Department was not informed of the Scheme. There is no Valuation Report of the assets as on 31.03.2011. In case of amalgamation, Valuation Report should be there to each other transaction. The difference in fair market value and actual value is taxable which is not capital reserve. It is revenue reserve. The assets were transferred after appointed date. No details of fair market value of appointed have been filed. The report dated 31.03.2012 on market value of fixed assets dated 31.03.2011 was filed from Dr. Sarkar Bhattacharya. There

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is a huge difference in valuation and no reasons have been given for the assets that are valued later on. Assessee was required to file revised return for self as well as for SPVs. No effect have been given of the Order of the Hon'ble Bombay High Court for amalgamation as no assets have been transferred on 31.03.2011. The assessee has not explained why there were two valuations adopted in the case of the transferor and the transferee company. The general reserve was used for issue of bonus shares. There is no transfer of shares of AVVL to the assessee. The shares of SPVs are transferred who are not in amalgamation. It is not a case of mere book entry. There is a transfer of assets of assessee to SPVs. The reserve should rotate through books of account.

99.2. The Ld. D.R. referred to the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd., vs. DCIT & Another (2009) 308 ITR 417 (Bom.) in which it was held as under :

> *"Held, dismissing the appeal, that it was a loan taken for trading activity and ultimately, upon waiver the*

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amount was retained in the business by the assessee. The amount had become the assessee's income and was assessable."

99.3. The Ld. D.R. referred to the decision of Hon'ble Delhi High Court in the case of Logitronics P. Ltd., vs. CIT (2011) 333 ITR 386 (Del.) in which it was held as under :

"Held, dismissing the appeal, that the Tribunal had found that nothing was brought on record to show that the loan taken by the assessee from the Bank was utilised for the purpose of acquiring capital assets. On the contrary, the material on record indicated that the assessee had obtained the loan or credit facility by way of hypothecation of finished goods, semi-finished goods, raw material, book debts, receivable claims, securities and rights by way of first charge which indicated that the assessee had obtained the loan facility for its business activity or trading operations. On the question whether the whole amount of the loan had been utilised either for the purpose of acquiring a capital asset or for

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the purpose of business activity or trading activity the Tribunal remitted the matter to the Assessing Officer for fresh adjudication. The Tribunal had rightly culled out the principle laid down from the various judgments and had given an opportunity to the assessee to prove its case before the Assessing Officer. Therefore, there was no reason or occasion for the assessee to feel aggrieved by the order of the Tribunal".

99.4. The Ld. D.R. referred to the decision of Hon'ble Delhi High Court in the case of Rollatainers Ltd., vs. CIT (2011) 333 ITR 54 (Del.) in which it was held as under :

"BUSINESS INCOME — REMISSION OR CESSATION OF TRADING LIABILITY—WAIVER OF LOAN TAKEN FOR PURCHASE OF CAPITAL ASSET—NOT IN REVENUE FIELD — LOAN WRITTEN OFF IN CASH CREDIT ACCOUNT — TAXABLE INCOME — INCOME-TAX ACT, 1961, s.41(1)."

99.5. The Ld. D.R. referred to the decision of Hon'ble Delhi High Court in the case of SREI Infrastructure Finance Ltd., vs. Income-tax Settlement Commission (2012) 251 CTR 129 (Del.) in which it was held as under :

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"When a scheme under sections 391 to 394 of Companies Act, 1956 is sanctioned by Court, it is treated as a binding statutory scheme because scheme has to be implemented and enforced but this cannot be a ground to escape tax on 'transfer' of a capital asset as per provisions of Act."

100. We have considered the rival submissions made by the parties orally as well as in the written submissions and have perused the material available on record. The Facts as noted above are not disputed that assessee company was having its 100% subsidiary company namely M/s. A.V.V. Venture P. Ltd. There were 08 subsidiary companies of M/s. A.V.V. Venture P. Ltd. as noted in the aforesaid order. The Aamby Valley City Developers Limited was having 03 subsidiary companies. The assessee-company is engaged in the business of construction of residential and commercial complexes, township including development of Hill City called "Ambey Valley", near Lonavala in the State of Maharashtra. A Composite Scheme of Arrangement and Amalgamation was made between the

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assessee and various subsidiary companies which have been approved by the Honorable Bombay High Court. The said Scheme was approved by the Honorable Bombay High Court without any modification or changes vide their Judgment Dated 20th January 2012. The judgment and its Annexures are filed in the paper book.

100.1. Part-I of the Scheme contains the definition. Para 1.2 (PB-121) defines the 'appointed date' means the closing hours of business on 31st March 2011 or such other date as may be fixed by the Honorable High Court of Judicature at Bombay. Para-1.12 of Part-1 defines the "effective date" means the last of the dates on which the certified copies of the Orders sanctioning this Scheme passed by the High Court of Judicature at Bombay or such other Competent Authority, as may be applicable, are filed with the Registrar of Companies, Maharashtra, Mumbai. Clause-2 also provides that except to the extent specifically provided otherwise, the Scheme shall be operated from the effective date, but shall be effective from appointed date. Part-II (PB-139) of the Scheme provides several business

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undertakings belonging to the assessee were transferred to the 11 SPVs by way of demerger. These undertakings are Real Estate, Golf Course, Airport, Adventure Sports etc., as noted in the Order. Relevant terms and conditions of transfer and vesting as per Part-II of the Scheme of Arrangement and Amalgamation from the assessee-company and respective SPVs companies are as under :

"PART-II

TRANSFER OF BUSINESS UNDERTAKINGS OF THE DEMERGED COMPANY INTO BUSINESS SPVs

4. TRANSFER AND VESTING

4.1. On the Scheme becoming effective, the whole of the. undertaking and properties of Real Estate Hold Co Undertaking. Real Estate Villas Undertaking. Real Estate Canals Undertaking, Real Estate Apartments Undertaking, Golf Course Undertaking, Airport Undertaking. Adventure Sports Undertaking, Retail Undertaking, Entertainment Undertaking. Hospitality Undertaking and Land Holding Undertaking of the Demerged Company shall stand transferred to and

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vested in or deemed to be transferred to and vested in Real Estate Hold Co SPV. Real Estate Villas SPV, Real Estate Canals SPV, Real Estate Apartments SPV, Golf Course SPV. Airport -SPV, Adventure Sports SPV, Retail SPV. Entertainment SPV, Hospitality SPV and Land Holding SPV respectively as a going concern in the following manner :

4.1.1. In respect of all the movable assets of the Demerged Company, comprised in the respective Business Undertakings and the assets which are otherwise capable of transfer by physical delivery or novation or endorsement and delivery, including cash on hand, shall be so transferred to respective Business SPVs and deemed to have been physically handed over by physical delivery or novation or by endorsement and delivery, as the case may be, to respective Business SPVs to the end and intent that the property and benefit therein passes .to respective Business SPVs with effect from the Appointed date.

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4.1.2. In respect of the assets of the Business Undertakings other than those mentioned in Clause 4.1.1 above, including actionable claims, sundry debtors, outstanding loans, advances recoverable in cash or kind or for value to be received and deposits: with the Government, Semi-Government, local and other authorities and bodies and customers, the Demerged Company shall if so required by the Business SPVs, and Business SPVs may. issue notices in such form as Business SPVs may deem fit and proper stating that pursuant to the High Court having sanctioned this Scheme between the Demerged Company and Business SPVs under Section 391 to 394 of the Act, the relevant debt, loan, advance or other asset, be paid or made good or hold on account of respective Business SPVs. as the person entitled thereto, to the end and intent that the right of the Demerged Company to recover or realise the same stands transferred to the concerned Business SPVs and that appropriate entries should be passed in their respective books to record lire aforesaid changes.

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4.1.3. In so far as the Immovable properties comprised in the respective Business Undertakings are concerned, the immovable properties shall stand transferred pursuant to this Scheme to the respective Business SPV parties shall register the certified copy of the order of the Bombay High Court approving the Scheme with the offices of the relevant sub-registrar of assurance or similar registering authority in Maharashtra and shall also execute and register as required such other documents which may be necessary in this regard. All the assets which are subject matter of pending litigations shall stand transferred only to the extent permitted by law and subject to outcome of such litigation.

4.1.4. With effect from the Appointed Date, all debts, liabilities, contingent liabilities, duties and obligations of every kind nature and description of the Demerged Company pertaining to Demerged Undertakings shall also, under the provisions of Sections 391 to 394 and ail other applicable provisions,

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if any, of the Ad, and without- any further act or deed, be transferred to or be deemed to be transferred to respective Business SPVs, so as to become from the Appointed Date the debts, liabilities, contingent liabilities duties and obligations of respective Business SPVs and It shall not be necessary to obtain the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such debts, liabilities, contingent liabilities, duties and obligations have arisen in order to give effect to the provisions of this sub-clause.

4.1.5. The transferor and vesting of Demerged Undertakings as aforesaid shall be subject to the existing securities, charges, mortgages and other encumbrances if any, subsisting over or in respect of the property and assets or any part thereof refutable to Business Undertakings to the extent such securities, charges, mortgages, encumbrances are created to secure the liabilities forming part of the Business Undertakings,

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5. CONSIDERATION

5.1. The Business SPVs are indirect wholly owned subsidiaries of the Demerged Company. The Scheme is intended to restructure within the group of companies controlled by the Demerged Company, the holding of the Demerged undertakings in a more efficient manner with due regard to project specific risks and consistent with the diverse needs of business and does not involve any movement of assets or liabilities to any company outside the group controlled by the Demerged Company. Hence, the Business SPVs shall not be required to pay any consideration/issue any shares to the Demerged Company or its shareholders.

6. ACCOUNTING TREATMENT

6.1. IN THE BOOKS OF THE DEMERGED COMPANY

6.1.1. The book value of all assets and liabilities pertaining to the Demerged Undertakings which cease to be the assets and liabilities of the Demerged Company shall be reduced by the Demerged Company at their respective book values. The difference that is the excess

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of the book value of assets over the book value of the liabilities pertaining to the Demerged Undertakings and demerged from the Demerged Company pursuant to this Scheme shall be adjusted against the General Reserve arising pursuant to Part-III of this Scheme.

6.2. IN THE BOOKS OF RESPECTIVE BUSINESS SPVS.

6.2.1. Business SPVs shall record the assets and liabilities pertaining to respective Demerged Undertakings, at the respective fair values,

6.2.2. Business SPVs will record the excess of assets over liabilities so recorded as General Reserve which shall constitute Free Reserves available for all purposes as the Business SPVs at its own discretion considers proper."

100.2. Part-III of the Scheme provides the terms and conditions of the Scheme in respect of amalgamation of AVVL which is 100% subsidiary of the assessee which reads as under :

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"PART-III

AMALGAMATION OF AAMBY VALLEY "V" VENTURES PRIVATE LIMITED WITH AAMBY VALLEY LIMITED

"13. TRANSFER AND VESTING

13.1. With effect from the Appointed Date and after giving effect to Part-II, the whole of the undertaking and properties of Transferor Company, including investments in Business SPVs, shall pursuant to the provisions contained In Sections 331 to 394 and all other applicable provisions, if any, of the Act and without any further act, deed, matter or thing, stand transferred to and vested in and/or be deemed to be transferred to and vested in Transferee Company as a going concern so as to vest in Transferee Company all rights, title and interest pertaining thereto.

13.2. With effect from the Appointed Date, all debts, liabilities, contingent liabilities, duties and obligations of every kind, nature and description of Transferor Company shall also, under the

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provisions of Sections 331 to 394 and ell other applicable provisions, if any, of the Act. and without any further act or deed, be transferred to or be deemed to lie transferred to Transferee Company, so as to become from the Appointed Date the debts, liabilities, contingent liabilities, duties and obligations of Transferee Company and it shall not be necessary to. obtain the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such debts, liabilities, contingent liabilities, duties and obligations have arisen In order to give effect to the provisions of this sub-clause.

13.3. With effect, from the Appointed Date and upon the Scheme becoming effective any statutory licenses, permissions or approvals or consents held by Transferor Company required to carry on operations of Transferor Company shall stand vested in or transferred to Transferee Company without any further act or deed, and shall be

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appropriately mutated by the statutory authorities concerned therewith in favour of Transferee Company and the benefit of all statutory and regulatory permissions, environmental approvals and consents, registration or other licenses, consents, certificates, authorities (including for the operation of Sank accounts), power of attorneys given by, issued to or executed in favour of Transferor Company shall vest in and become available to Transferee Company as if they were originally obtained by Transferee Company, In so far as the various Incentives, subsidies, rehabilitation schemes, special status and other benefits or privileges enjoyed, granted by any Government body, local authority or by any other person, or availed of by Transferor Company, ere concerned, the same shall vest with and be available to respective Transferee Company on the same terms and conditions as applicable to Transferor Company, as the same had been allotted

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and/or granted and/or sanctioned and/or allowed to Transferee Company.

13.4. The transfer and vesting of the undertaking of Transferor Company as aforesaid shall be subject to the existing securities. Charges, mortgages and other encumbrances, if any, subsisting over or in respect of the property and assets or any part thereof.

14. CONSIDERATION :

14.1. Since the entire share capital of Transferor Company is held by Transferee Company and its nominees, no consideration shall be payable/dischargeable for the Section and the share capital of the Transferor Company shall stand cancelled.

15. ACCOUNTING TREATMENT

15.1. IN THE BOOKS OF TRANSFEREE COMPANY.

15.1.1. The investments in the equity share capital of the Transferor Company as appearing in

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the books of accounts of the Transferee Company, shall stand cancelled.

15.1.2. Transferee Company shall record the assets and liabilities pertaining to Transferor Company including its investment in Business SPVs at the respective fair values as on the Appointed Date.

15.1.3. Inter-Company balances and investments shall be cancelled.

15.1.4. The difference being excess of assets over liabilities recorded by Transferee Company after giving effect to Clause 15.1.3 above will be credited to the General Reserve of the Transferee Company. In case of there being a shortfall, the same shall be debited to and carried forward as Goodwill.

16. BUSINESS AND PROPERTY IN TRUST

16.1. During the period between the Appointed Date and the Effective Date.

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16.1.1. Transferor Company shall carry on its business and activities in trust for Transferee Company and with reasonable diligence and business prudence and shall not alter or diversify its businesses nor venture into arty new business, nor alienate, charge, mortgage, encumber or otherwise deal with (he assets or any part thereof except in the ordinary course-of business without The prior written consent of the Board of Directors of Transferee Company or pursuant to any pre-existing obligation undertaken prior to the date of acceptance of the Scheme.

16.1.2. Transferee Company shall be entitled, pending the sanction of the Scheme, to apply to the Central/State Government(s) and all other agencies,- departments and authorities concerned as are necessary under any Law for such consents, approvals and sanctions which Transferee Company, may require to carry or the business of Transferor Company.

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17. CONTRACTS, DEEDS AND OTHER INSTRUMENTS.

17.1. Subject to the other provisions contained In this Scheme, alt contracts, deeds, bonds, agreements and other Instruments of whatever nature to which, any of Transferor Company is a party subsisting or having effect immediately before the Scheme coming into effect shall be in full force and effect against or in favour of Transferee Company, and may be enforced as If, instead of Transferor Company, Transferee Company had been a party thereto.

18. STAFF, WORKMEN & EMPLOYEES

18.1. Upon the corning into effect of this Schema, all staff, workmen arid employees of Transferor Company, engaged in or in service on the Effective Data shall be deemed to have become staff, workmen and employees of Transferee Company without any break m their service and on the basis of continuity of service, and the terms and

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conditions of their employment with Transferee Company shall not be less favourable limn those applicable to them with reference to Transferor Company respectively on the Effective Data.

18.2. In so far as the existing provident fund, gratuity fund end pension and/or superannuation fund, trusts, retirement fund or benefits and any other funds or benefits created by Transferor Company for its employees (collectively referred to as the ''Funds"}, the Funds and such of the investments made by the Funds, shall be transferred to Transferee Company and shall be held for the benefit of the employees of Transferor Company pursuant to this Scheme in the manner provided hereinafter. The Funds shall, subject to the necessary approvals and permissions and at the discretion of Transferee Company, either be continued as separate funds of Transferee Company for the benefit of the employees related to Transferor Company or be transferred to and merged with

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other similar funds of Transferee Company. In the event that the Transferee Company do not have its own funds in respect of any of the above, the Transferee Company may, subject' to necessary approvals and permissions, continue to contribute to the. relevant Funds of Transferor Company, until such time that the Transferee Company create their own fund, at which time the Funds and the investments and contributions pertaining to the employees related to Transferor Company shall be transferred to the funds created by the Transferee Company.

19. WINDING UP OF TRANSFEROR COMPANY

19.1. On and from the Effective Date, Transferor Company shall stand dissolved without being wound up.

19.2. On and with effect from, the Effective Date, the name of Transferor Company shall be struck off from the records of the relevant Registrar of Companies.

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19.3. The Board of Directors (or any Committee thereof) of Transferor Company shall without any further act. instrument or deed be end stand dissolved."

100.3. The Judgment of the Honorable Bombay High Court Dated 20th January 2012 is effective from 20th March 2012 as the assessee-company has filed Form No.21 before Registrar of Companies on 20th March 2012, but operative from the appointed date i.e., 31st March 2011. Honorable Bombay High Court had not modified the appointed date and found the above Scheme of Arrangement and Amalgamation to be fair and reasonable as it did not violate any provisions of law and was also not contrary to public policy. The assessee recorded the entries in the books of account as per Judgment of the Honorable Bombay High Court. The assessee did not offer any income in its return of income as according to the assessee there is no income or gain arising out of the said Composite Scheme of Arrangement and Amalgamation. The A.O. however, did not accept the contention of assessee and made the addition

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under section 56(2)(viia) of the Income Tax Act, 1961. The value of the shares were determined in accordance with Rule 11UA of the I.T. Rules by taking the fair market value as on 31st March 2012 ignoring the fact that the Scheme was operative from the closing business hours of 31st March 2011. The A.O. for the purpose of determining the value of the shares considered the balance sheet of SPVs as on 31st March 2012, but not the balance sheet as on 31st March 2011 as the transaction pursuant to the said Composite Scheme was not recorded in the balance sheet as on 31st March 2011. The A.O. took the view that balance sheet drawn as on 31st March 2012 was the balance sheet of the date close to the date of giving effect to the Composite Scheme. The assessee however, objected to the same. The assessee contended that the transaction under the Scheme falls in the preceding A.Y. 2011-12 and that the provisions of Section 28(iv) and Section 56(2)(viia) are not applicable. Therefore, the first question to be determined in the present appeal would be, whether the transaction under the Composite Scheme would fall in preceding A.Y. 2011-12 or

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in the assessment year under appeal i.e., A.Y. 2012-13. The assessee contended that the shares of 08 SPVs has been vested in the assessee- company pursuant to the Scheme of Arrangement and Amalgamation approved by the Honorable Bombay High Court. The said scheme provides for vesting of the assets on the appointed date which is 31st March 2011.

101. The Ld. D.R. however, contended that the transfer and vesting of assets has not taken place on 31st March 2011. It is submitted that the assessee for giving effect to the Scheme at the time of transfer and vesting of assets from assessee-company to the business of SPVs and making entry in the books of account got valuation of its undertaking as on 2nd November, 2011. Land, except all other assets, are valued at market value, due to which, creation of reserves in the hands of SPVs companies have arisen. In this regard, our attention was drawn towards the valuation summary to which total land area of each of SPVs and respective fair market value of land is given. The land have been valued as per discounted cash flow method through the same value as on 6th March 2012. It is also

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contended that no entries have been made as on 31st March 2011. Therefore, there cannot be a vesting of the property on the appointed date. Since the Scheme was effective from 20th March 2012 and the fair market value was worked-out on 2nd November 2011, the date of vesting of the property cannot be 31st March 2011 and the assets have not and could not have been transferred as on 31st March 2011. This is the main submission of the Ld. D.R. to argue that the appointed date 31st March 2011 is not relevant. In the background of these facts and submissions of both the parties, the question would be, whether the transfer of the undertaking and the assets to the various SPVs have taken place during the assessment year under appeal or preceding A.Y. 2011-12 as per the Composite Scheme of Arrangement and Amalgamation entered into among the assessee as well as various SPVs. In this case, the transfer of undertakings as well as amalgamation has taken place on 31st March 2011. Therefore, there is no question of making the addition on account of transaction arising during the assessment year under appeal. No addition, therefore, could be made in

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assessment year under appeal. In this case, the Composite Scheme of Arrangement and Amalgamation have been approved by the Honorable Bombay High Court without modifying or amending any terms and conditions of the Scheme as referred to above. This Scheme is divided into 04 Parts **[**PB-120(c)**]**. Part-1 of the Scheme deals with definition, date of taking effect and share capital. Part-II deals with transfer of business, undertakings of AVL into business SPVs. Part-III deals with amalgamation of AVV Venture Private Limited with assessee-company and Part-IV deals with other terms and conditions applicable to this Scheme. We have already noted the "appointed date" would mean the closing hours of business on 31st March 2011. According to this, the closing hours for business on 31st March 2011 or such other date as may be fixed by the Honorable Bombay High Court, will be the appointed date. The Honorable Bombay High Court approved the same as it is without any alteration. Therefore, in our opinion, the closing hours of the business as on 31st March 2011 would be 31st March 2011 only. According to the Scheme the

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movable assets of the undertakings would be transferred to SPVs from appointed date. If certain immovable properties as per Para 4.1.3 of the Scheme do not vest with SPV from the appointed date, it is due to the procedural aspect only because it is apparent that once Scheme become effective, the whole of the undertakings and properties to be demerged with respective SPVs shall stand transferred to and vested in or deemed to be transferred to and vested with the respective SPVs as a going concerns. Clause 4.1.3 although deals with immovable property of the respective business undertakings, but this Clause clearly states that immovable properties shall stand transferred pursuant to the Scheme to the respective business SPVs, parties shall register the certified copy of the Order of the Honourable Bombay High Court approving the Scheme with the Office of relevant Sub-Registrar of Assurance or similar Registering Authority in Maharashtra and shall also execute and register as required such other documents which may be necessary in this regard. This Clause nowhere says that the immovable properties to the respective SPVs will not stand

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transferred or vest therein on the appointed date. According to this Clause, property shall stand vested pursuant to this Scheme but the registration of properties shall be done after the Order of the Honourable High Court. This Clause is not contrary to Clause 4.1 of the Scheme which provides that properties shall be transferred with effect from the appointed date. Para-2 of Part-I of the Scheme clearly provides date of taking effect except to the extent specifically provided otherwise, the Scheme shall be operative from the effective date but shall be effective from the "appointed date". From the reading of this Clause, it is apparent that Scheme shall be operative from the effective date but shall be effective from the appointed date. In view of this, we are of the view that the Scheme has to take effect from the appointed date i.e., from the closing hours of business as on 31st March 2011 as defined in the Scheme. As per the various Clauses of the Scheme referred to above, it is clear that the transfer and vesting of the whole of the undertakings and properties of AVVL including the investment in business SPVs takes place under the Scheme

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as per the Judgment of the Honorable Bombay High Court on the appointed date. As per the sanctioned Scheme, the transfer took place without any further act, deed, matter or things stands transferred. No basis have been shown by the Ld. D.R. to fix the date of vesting of the properties as per the Scheme on 1st April 2011. Nothing is brought on record by the Ld. D.R. as to how 1st April 2011 shall be the appointed date despite appointed date have been defined in the Judgment of the Bombay High Court as 31st March 2011. The Honorable Supreme Court in the case of Union of India versus Amrit Lal (2004) 3-SCC-75 held that "*Judges interpret statutes, they do not interpret judgments. They interpret words of statute, their words are not to be interpreted as statute.*" We do not understand as to how the Department have been taking the appointed date as 1st April 2011 against the appointed date of 31st March 2011 approved by the Honorable High Court of Bombay in their Judgment. The Department has no right to interpret the Judgment of The Honorable Bombay High Court in their way to thwart the Composite Scheme of Arrangement and

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Amalgamation approved by the Honourable Bombay High Court. Further, the valuation of the asset, passing entries in the books of account etc., are not relevant for the purpose of deciding the date of transfer. The Honorable Supreme Court in the case of Sutlez Cotton Mills Ltd., vs. Commissioner of Income Tax, West Bengal (1979) 116 ITR 1 (SC) held as under :

> *"It is now well settled that the way in which entries are made by an assessee in his books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. The assessee may, by making entries which are not in conformity with the proper principles of accountancy, conceal profit or show loss and the entries made by him cannot, therefore, be regarded as conclusive one way or the other. What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee."*

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101.1. The Hon'ble Supreme Court In the case of Tuticorin Alkali Chemicals and Fertilizers Ltd., 227 ITR 172 held that *"Book entries are not determinative of income of assessee. When the question is, whether a receipt of money is taxable or not, or whether certain deductions from that receipts are permissible in Law or not, the question has to be decided according to the Principles of Law, but not in accordance with the Accounting Practice".* We, therefore, do not agree with the submissions of the Ld. D.R. that transfer and vesting of the assets whether movable or immovable properties of the undertakings takes place on any other date except the appointed date as defined under the Scheme and approved by the Honourable Bombay High Court. Merely because the valuation of the properties of undertaking was carried on 2nd November 2011 to determine the fair market value will not affect the appointed date. Clauses-7 and 16 of the Scheme clearly provides that during the period between the appointed date till the Scheme become effective, the transferor-company shall carry on its business activities in trust for the transferee-company. It clearly provides that the

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transferor-company carrying on business and holding the assets on behalf of the transferee-company from the date of the Composite Scheme till it is approved by the Honorable Bombay High Court and certified copies filed with the Registrar of Companies. Therefore, there may be difference in properties of various undertakings, the land on the appointed date as well as on the date when Scheme came into operation after the same was approved by the Bombay High Court, as during this period transferor-company might have acquired the land, but that will naturally be held as trustee on behalf of the transferee-company. We also do not agree with the contention of the Ld. D.R. that immovable properties will not vest in SPVs until and unless valuation report are procured and necessary book entries in this regard are made in the books of account. Determination of the fair market value of the assets of the demerged undertaking as well as recording of the entries in respect of the transfer and vesting of the assets in the SPVs will not change the appointed date as well as date of transfer and vesting of the properties for all the intending purposes

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because the transfer would be valid from the appointed date only. The Honorable Bombay High Court could not have passed the Order on the date when the Scheme is entered into between various Companies. Once this Scheme is approved by the Honourable High Court without any modification, whatever has contained in the Scheme shall be relevant for the purpose of determining the rights of the parties. Therefore, determining the fair market value, registration of properties as well as recording of accounting entries in the books of account of various companies, in our view, will not change the date of transfer and vesting of the assets and liabilities various undertakings into respective Companies. Thus, the appointed date only shall be relevant to decide this issue. The Ld. D.R. also contended that assessee has filed revised return for A.Y. 2011-12 on 9th February 2012 i.e., after the approval of the Scheme, but has not changed the quantum of depreciation in the revised return. This submission has no merit as the effective date of the Scheme was 20th March 2012 i.e., the date when the certified copy of the Order of the High Court along with

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Composite Scheme is filed before the Registrar of Companies. The assessee could have passed the entries in its books of account only when certified copy of the Judgment of the High Court was filed before the Registrar of Companies. The assets in fact stand transferred or vested on the closure of the business hours on 31st March 2011 i.e., prior to that date, no question of vesting and transfer of assets to the respective companies arise. Since the assessee-company has used the assets during A.Y.2011-12 for its business purposes, there is no question of change of depreciation in the revised return. Learned Counsel for the Assessee relied upon decision of Honourable Bombay High Court in the case of CIT vs., Swastik Rubber Products Ltd., (supra), which clearly apply to the facts and circumstances of the case. As per the Scheme approved by the Bombay High Court, it is apparent that demerger, amalgamation and vesting of the business assets takes place on the appointed date and from appointed date till the Scheme become operative, the transferor-company acts as a Trustee of the transferee company. Learned Counsel for the Assessee also

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relied upon Judgment of the Honourable Supreme Court in the case of Marshall Sons and Company (India) Ltd., vs. ITO (supra) which is also applicable to the present case. The appointed date as defined in the 'Scheme' means closing hours of business on 31st March 2011. However, the closing hours of the business has not been defined in the Scheme. Generally, closing hours of the business would mean the time when business closes or up-to what time a business enterprise carrying on business. Learned Counsel for the Assessee referred to the dictionary meaning as well as referred to the Judgment of the Supreme Court of Ireland (supra), according to which, the closing hours of business, in any case, has to be before the closing hours of the day. We, therefore, hold that the closing hours of the business means before closing hours of the day of 31st March 2011 which can never be extended up to 1st April 2011. In view of the above discussion, we hold that transaction of Composite Scheme of Arrangement and Amalgamation takes place in previous year relevant to the A.Y. 2011-12 and no transaction took place in previous year relevant to

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assessment year under appeal i.e., 2012-13. Therefore, no addition could be made in assessment year under appeal under any of the provisions of Law. Since the Scheme have been approved by the Honourable Bombay High Court, therefore, the Scheme could not be regarded as a colourable device to avoid payment of the taxes. Since the validity and genuineness of the transaction and Scheme have not been doubted by the A.O, therefore, same cannot be questioned by the Revenue that the transaction had taken place in assessment year under appeal. Therefore, no addition could be made in A.Y. 2012-13 under appeal. We, accordingly, set aside the Orders of the authorities below and delete the entire addition in assessment year in appeal.

101.2. In view of the above, the issue on merit is left with academic discussion only. However, both the parties have extensively argued the issue on merit about the taxability of the amount in question, therefore, we proceed to decide the same issue on merits as well. The first issue is whether the net increase in general reserve of assessee

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arisen due to Scheme of Amalgamation be regarded as profit under section 28(iv) of the I.T. Act, 1961.

102. The Honorable Supreme Court in the case of CIT, Mysore vs. Canara Bank Ltd., (1967) 63 ITR 328 (SC) held as under :

> *"The respondent-bank had opened a branch in Karachi on November 15, 1946. After the partition of India in 1947, the currencies of the two Dominions of India and Pakistan continued to be at par until there was a devaluation of the Indian rupee on September 18, 1949. On that date the respondent had a sum of Rs.3,97,221 at the Karachi branch belonging to its head office. As Pakistan did not devalue its currency the parity between the Indian rupee and the Pakistan rupee ceased to exist. The exchange ratio between the two countries was not determined until February 27, 1951. The bank did not carry on any business in foreign currency and even after it was permitted*

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to carry on business in Pakistan currency on April 3, 1951, it carried on no foreign exchange business. The Appellate Tribunal found that the money was lying idle in the Karachi branch and was not utilised in any banking operation even within Pakistan. The State Bank of Pakistan granted permission on July 1, 1953, and two days later the bank remitted the amount to India and in view of the difference in values of the currencies made a profit of Rs. 1,73,817. The question was whether this amount was a revenue receipt:

Held, on the facts, that the appreciation of the money did not arise in the course of any trading operation. Assuming that the amount of Rs.3,97,221 was originally stock-in-trade, when it was blocked and sterilised and the bank was unable to deal with that amount, it ceased to be its stock-in-trade and the increase in its value owing to exchange fluctuation was a capital receipt.

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If by virtue of exchange operations profits are made during the course of business and in connection with business transactions, the excess receipts on account of conversion of one currency into another would be revenue receipts. But if the profit by exchange operations comes in, not by way of business of the assessee, the profit would be capital.

Held also, that as the statements of case were agreed to by the parties, and the Commissioner did not challenge in the High Court the finding that the monies were lying idle in the Karachi branch of the bank, and further conceded before the High Court that there was no evidence that the blocked balance was in fact employed by the Karachi branch for internal banking operations in Pakistan or for its business in Pakistan and other foreign currencies, it was not permissible for the Commissioner, in the appeal before the Supreme Court, to challenge the findings of fact in the

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statement of case or to produce additional evidence in the Supreme Court for controverting those findings."

103. The Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd., 225 ITR 746 held that *"Under the Act, income chargeable to tax is the income that is received or is deemed to be received in India in the previous year relevant to the year for which assessment is made or the income that accrues or arise or is deemed to accrue or arise in India during such year. The computation of such income is to be made in accordance with method of accounting regularly employed by the assessee. If income does not result at all there cannot be a tax even though in bookkeeping an entry is made about a hypothetical income which does not materialize."* Thus, the Income Tax Act does not recognise hypothetical or notional income which is not received or accrued to the assessee. In the draft assessment order A.O. did not make proposed addition under section 28(iv) of the Income Tax Act. The Special Auditor also did not recommend for the additions both under capital gains or

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Section 28(iv). Section 28(iv) of the Income Tax Act which provides as under :

> *"The following income shall be chargeable to tax under the Head "Profits and Gains of Business or Profession – (iv) the value of any benefit or perquisite, whether convertible into money or not arising from business or the exercise of profession."*

103.1. We may note that when clause-(iv) was inserted in Section-28, the CBDT brought out circular explaining the said provision of the Finance Act 1964 (supra), in which it is apparent that the legislative intent behind the intention of Section 28(iv) is to tax receipt of non-monetary asset in lieu of monetary gain as a consequence of a transaction in the course of carrying on the business/profession like rent free residential accommodation received by an assessee from a company in consideration of professional services rendered by him to that company. From perusal of the above provisions, it is

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necessary that for the applicability of Section-28(iv), following conditions must be satisfied.

(i) There must be benefit or perquisite;

(ii) It must be received in a form other than the money;

(iii) It may be convertible into income or not;

(iv) It must arise from business or exercise of a profession carried on by the recipient;

(v) it must be in the nature of revenue;

104. The ITAT, Mumbai bench in the case of Rupee Finance & Management (P) Ltd., vs. ACIT (2009) 120 ITD 539 explained the scope of Section 28(iv) of the Income Tax Act in para 8.5 of the Order which reads as under :

> *"8.5. Applying these propositions to the case on hand, the purchase of shares at a particular price which is below the market price as an investment is not income by any stretch of imagination. It cannot also be deemed as income under s. 28(iv) as it is neither benefit nor perquisite*

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that has arisen to the assessee from the business or in the exercise of a profession. The Hon'ble Gujarat High Court in the case of CIT vs. Bhavnagar Bone & Fertiliser Co. Ltd. (1987) 59 CTR (Guj) 116 : (1987) 166 ITR 316 (Guj) has upheld the Tribunal's finding that there must be a nexus between the business of the assessee and the benefit which the assessee has derived for the purpose of attracting provisions of s. 28(iv). At p. 320 it has observed as follows : "After referring to various decisions, the Tribunal observed, these decisions make it abundantly clear that the benefit received or receivable by a person must be one which has intimate connection with business and even if such benefit is derived by way of bounty, nevertheless it would be taxable, if accrues to it or if received by it in the course of business or employment of office." In this case the Revenue has not demonstrated what is the business connection or the business done between the seller

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and the purchaser of the shares. No case has been made out that privilege or benefit or concession has been passed on by the seller to the buyer as part and parcel of a business transaction. A benefit has been assessed by the CIT(A). Mere purchase of shares by way of investment cannot be considered as business of the company though the objects of the company enable it to invest as well as deal in shares. As already stated there is no event which can be said to have resulted in accrual of income to the assessee. Thus on this factual matrix, mere purchase of shares, as an investment, with the lock-in-period of holding, for a consideration which is less than the market value, cannot be brought to tax, as a benefit or perquisite under s. 28(iv) of the Act. The assessee has not in this case, secured any benefit or perquisite in consideration of a business transaction undertaken with the sellers of the shares. Thus

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this issue is decided in favour of the Revenue and against the assessee."

105. The Learned Counsel for the Assessee mainly contended that Composite Scheme of Arrangement and Amalgamation has not made the assessee richer as the entire transaction is only restructuring of the business of the assessee group. The reserve is not created or arising out of the business activity carried on by the assessee. The reserve has arisen or created due to the amalgamation and, therefore, does not a revenue receipt, but a capital receipt. Even otherwise, it was contended that the business restructuring is tax neutral. The recording of the shares on SPVs in the balance-sheet of the assessee at the fair market value of Rs.46,999 crores (calculated on the basis of discounted cash flow method) is nothing but the fair market value of the various assets transferred by the assessee to the various SPVs under the same scheme of arrangement.

106. On the other hand, Ld. D.R. contended that it is incorrect to suggest that the assessee has not become richer by its composite scheme. The assessee's income was

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accumulated in the form of inventory i.e., land transferred to SPVs as the same is basically difference between the fair market value and the book value. The reserve created in the books of account of assessee is basically in lieu of transfer of inventory. Reserve as per the terms of the Scheme is free reserve which can be used for any purpose as per the Scheme. Ld. D.R, therefore, contented that assessee has become richer to the extent of increase in reserve. It may be clarified that the inventory has been transferred to SPVs with valuation of SPVs worth Rs.47,001 Crores which is basically reserve in the books of the assessee. The assessee has transferred its inventory to SPVs which are separate legal entities. Therefore, even though those SPVs are group concerns but the same is different legal entity. Hence the legal transfer of inventory at market value in excess of book value is a gain in assessee's hands, arising out of the business.

107. The question before the Tribunal is that *"whether the net increase in the general reserve of the assessee arisen due to amalgamation of AVVPL with assessee can be*

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regarded to be a benefit or perquisite arising from the business carried on or exercise of the profession by the assessee ? For applicability of Section 28(iv), it is necessary that benefit or perquisite must arise from carrying on the business or profession. If any benefit or perquisite does not arise from the business or profession carried on by the assessee, the provisions of Section 28(iv) cannot be applied. It is noted above that the intention of the Legislature is not to apply the provisions of Section 28(iv) to a case where there is increase in the general reserve arising due to recording of the shares in the balance sheet of the assessee at their market value. In our view, when a company is amalgamated with the other company, this activity cannot be regarded to be a business transaction. In the case of assessee, we have noted AVVPL which was incorporated in February, 2011, got amalgamated with the assessee and by getting amalgamated with the assessee. AVVPL got wind-up. The AVVPL was holding only the investment in its subsidiary companies, the increase in general reserve cannot be regarded to be the one which is arising out of

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normal business transaction and during the course of carrying on business or profession. Thus, the general reserve in assessee-company has arisen due to recording of investments held by the amalgamating company at its fair market value. It did not give rise to any real income to the assessee. It is capital in nature. Similar view have been taken by the Honorable Madras High Court in the case of CIT vs Stads Ltd., (2015) 373 ITR 313 (Mad.) in which in para 11 it was held as under

> *"A plain reading of the above said provision makes it clear that the amount reflected in the balance-sheet of the assessee under the head "reserves and surplus" cannot be treated as a. benefit or perquisite arising from business or exercise of profession. The difference amount post-amalgamation was the amalgamation reserve and it could not he said that it is out of normal trans-action of the business. The present transaction is capital in nature arose on account of amalgamation of four companies. Hence, we have*

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no hesitation to hold that the manner in which the Revenue wants to treat this amount is not in consonance with section 28 (iv) of the Income-tax Act".

107.1. The contention of the Ld. D.R, thus, cannot be accepted that for applicability of provisions of Section 28(iv), it is not necessary that the benefit or perquisite must arise from the business or the exercise of profession carried on by the recipient. The ITAT, Kolkata Bench in the case of ITO vs Shreyans Investments Private Limited 141 ITD 672 (Kolkata-Tribunal) relying on the decision of the Honorable Bombay High Court in the case of Mahindra and Mahindra 261 ITR 501 (Bom.) had taken a view that reserve arising out of amalgamation cannot be treated as income under section 28(iv) of the Income-Tax Act, 1961. The decision of the Honourable Bombay High Court in the case of Mahindra and Mahindra (supra), has been upheld by the Honorable Supreme Court reported in 404 ITR 1. Learned Counsel for the Assessee also relied upon decision of the Chennai Bench of the Tribunal in the case of Spencers and Company

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Limited vs., ACIT 137 ITD 141 (T.M.) (Madras-Tribunal). In this case, the surplus arising out of the amalgamation was transferred to a general reserve which were treated by the Assessing officer as an income chargeable to tax under section 28(iv) of the Income Tax Act, 1961. When the matter went to Third Member, the Third Member agreed with the view of the Accountant Member that *"there were no benefit arising in the course of business and, therefore, no such amount can be charged to tax under section 28(iv) of the Income Tax Act, 1961. The Tribunal while holding so also distinguished the decision of the Honourable Madras High Court in the case of Arise Advertising Private Limited 265 ITR 510 mentioning that the said decision pertains to the remission of unclaimed balance of trading liability."* It is well settled Law that decision of the Third Member is as good as the decision of the Special Bench as is held by the Special Bench of the Tribunal in the case of DCIT vs., Oman International Bank (2006) 286 ITR (AT) 8 (SB). Similar view have been taken by the ITAT, Kolkata Bench in the case of ITO vs., Kyal Developers Private Limited 63 SOT 93 (URO).

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107.2. We may note that while making the addition under section 28(iv) of the Income-Tax Act, 1961, the DRP relied upon the decision of the Honourable Madras High Court in the case of Ramaniyam Homes 384 ITR 530 (supra). It was also relied upon by the Ld. D.R. In the said decision, the question relate to principal amount of loan waived by the Bank under "one time settlement scheme". The issue before the Court was, Whether the said waiver comes within the definition of expression "Income" ? In the said decision, the Honorable High Court did not agree with the decision of the Delhi High Court in the case of Logitronics Private Limited vs., CIT 333 ITI 386 and that of Rollatainers Limited vs., CIT 339 ITR 54. The said decision have been overruled by the decision of the Honorable Supreme Court in the case of CIT vs Mahindra and Mahindra (supra). Therefore, the said decision would not help the Revenue. The DRP has also referred to the decision of the Honourable Supreme Court in the case of Wazir Sultan Tobacco Company Limited 132 ITR 559 which deals with difference between the terms "Provision and Reserve".

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This decision does not relate to the perquisite or benefit as given under section 28(iv) of the Income Tax Act. Thus, in our view, the amalgamation cannot be regarded to be the ordinary business transaction. The Ld. D.R, though, contended that benefit has arisen to the assessee by way of increase in general reserve in consequence of the Composite Scheme of Arrangement and Amalgamation and assessee has no other activities except that assessee is in the business, therefore, the benefit cannot be said to be arisen from any activity other than the business. We do not agree with the submission of the Ld. D.R. In our view, the net increase in the general reserve of the assessee-company is neither a benefit nor a perquisite nor it is arisen out of carrying on of the business or profession by the assessee. The transaction of Composite Scheme of Arrangement and Amalgamation cannot be regarded to be the one carried into during the course of carrying on the business. We, therefore, hold that provisions of Section 28(iv) is not applicable to the facts and circumstances of the case. We, accordingly, set-aside the orders of the authorities below

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and delete the addition of Rs.46,999.38 crores made under section 28(iv) of the Income Tax Act.

108. The next issue is regarding applicability of provisions of Section 56(2)(viia) of the Income Tax Act, 1961. The A.O. took the view that in consequence of Composite Scheme of Arrangement and Amalgamation the assessee received the shares of SPVs without adequate consideration and, therefore, said Section is applicable on transfer of shares. In the present case, as the transactions were recorded in the books of account on 20th March 2012 and there was no audited balance sheet on that date, the audited balance sheet of 8 SPVs as on 31st March 2012 which was the nearest balance sheet after operation of the scheme of arrangement was considered for computing value as per Rule 11UA of the Income-Tax Rules. The A.O. accordingly, computed the value as per Rule 11UA on the basis of the balance sheet as on 31st March 2012 and made addition of Rs.26,197.67 crores under Section 56(2)(viia) of the Income-Tax Act, 1961. The assessee objected to the addition but, the DRP confirmed the action of the Assessing

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Officer. Section 56(2)(viia) of the Income Tax Act provides as under :

> ***"(viia) where a firm or a company not being a company in which the public are substantially interested‹ receives‹ in any previous year, from any person or persons‹ on or after the 1st day of June‹ 2010‹ any property‹ being shares of a company not being a company in which the public are substantially interested,—***
>
> ***(i) without consideration ‹the aggregate fair market value of which exceeds fifty thousand rupees‹ the whole of the aggregate fair market value of such property;***
>
> ***(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees‹the aggregate fair market value of such property as exceeds such consideration:***

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Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.

Explanation.—For the purposes of this clause‹ 'fair market value" of a property‹ being shares of a company not being a company in which the public are substantially interested‹ shall have the meaning assigned to it in the Explanation to clause (vii);"

108.1. Initially by Finance Act 2004 with effect from 1st April, 2005, under Section 56(2) sub-section (v) was inserted and subsequently, other sub-sections (vi) (vii) and (viia) were inserted by the Taxation Laws Amendment Act, 2006, Finance Act 2009 with effect from 01st October 2009 and sub-section (viia) was inserted by the Finance Act, 2010 with effect from 01st June 2010. When clause (v) was inserted under Section 56(2) the Explanatory Notes on the said provision of Finance Act 2004 reads as under :

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> *"In order to curb bogus capital building and money lending, a new sub-section has been inserted in Section 56 to provide that any sum received without consideration on or after First day of September 2004, by an individual or HUF from any person shall be treated as income from other sources.*
>
> *A threshold limit of 25000 rupees is also provided. If the amount so received exceeds this limit, the whole of the amount shall become taxable.*

108.2. From its explanatory note, it is apparent that these provisions were brought into the statute to curb bogus capital building and money laundering. When the clause-(viia) was inserted in Section 56(2), the Memorandum explaining this provision of Finance Bill 2010 (supra), states – *"In order to prevent the practice of transferring unlisted shares at prices much below their market value, it is proposed to amend Section 56(2) to also include within its ambit, transactions undertaken in shares of a company (not*

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being a company in which public are substantially interested) either for inadequate consideration or without consideration where recipient is a Firm or a Company". Section-2(18) provides the definition of a *"Company" in which the public are substantially interested. It is also proposed to exclude transactions undertaken for business reorganisation arrangements and amalgamation which are not regarded as 'Transfer' under clauses (via) (vic) (vicb) (vid) and (vii) of Section 47 of the Income Tax Act, 1961".* From this Memorandum, it is apparent that this provision is anti abuse provision intended to cover transactions resulting into tax evasion by dubious methods. In the Memorandum nowhere expressed that this provision has been brought into the Statute to cover transactions of business restructuring or rearrangement. It is not denied that the assessee has received shares of SVPs companies at the time of amalgamation of AVVPL with the assessee and assessee is a company in which public are not substantially interested. However, the above provisions contained under Section 56(2)(viia) used the words *"receives-any property*

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being shares". But the Memorandum explaining the said provision clearly states that *"this clause has been inserted in order to prevent the practice of transferring unlisted shares."* In our view, the said Section can be applied if there is a transfer of shares in favour of a Firm or a Company. For the transfer of shares, we agree with the assessee that there must be a transferor and transferee and transferred assets i.e., shares. In the case of amalgamation, it cannot be said that there is a transfer of shares as there is only statutory vesting of the assets by virtue of the Scheme. Section 56(2)(viia) is applicable only if assessee being a Company receives shares of a Company either without consideration or for a consideration which is less than the aggregate fair market value. In the instant case, due to Composite Scheme of Arrangement and Amalgamation, it cannot be said that there is no consideration or inadequate consideration. In fact, due to the arrangement, the assessee transferred the assets of various undertakings to SPVs and in consideration thereof, acquired the shares of SPVs through AVVL and through this process, the shares of AVVL held by the

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assessee got substituted with the shares of various SPVs which were being earlier held by AVVL. It is not the case of the Revenue that the market value of the shares received by the assessee was less than the market value of the undertaking which was transferred by the assessee to various SPVs. Even no such evidence was brought on record. Therefore, in this view of the matter, the provisions of Section 56(2)(viia) would not apply to this case. It may also be noted here that Section 56(2)(viia) excludes the transaction of business reorganisation and amalgamation which are not regarded as transfer under various sub-clauses of Section 47 of the Income Tax Act including sub-section (vii) of Section 47 of the Income Tax Act. The assessee stated that it has received the shares in consequence of the amalgamation and, therefore, the case would fall within the exception provided under section 47(vii) of the Income Tax Act, 1961. This Section provides *"any transfer by a shareholder in scheme of amalgamation, of a Capital Asset being a share or shares in the amalgamating company, if – (a) the transfer is made in*

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consideration of the allotment to him of any share or shares in the amalgamated company except where the shareholder itself is the amalgamated company and (b) the amalgamated company is an Indian Company".

108.3. The word in the aforesaid Section *"except where the shareholder itself is the amalgamated company",* has been inserted in Section 47(vii) by Finance Act 2012 with effect from 2013. Prior to this, these words were not there in the Act. The notes and clauses of Finance Bill 2012 provides that this amendment was made apparently with effect from 1st April 2013 so that this Section can be applied to a case where amalgamating company was the 100% subsidiary of the amalgamated company as it was not possible to apply this provision in such cases because the only shareholder of the amalgamating company was the amalgamated company. To remove this difficulty, this Section was amended. Learned Counsel for the Assessee argued that this amendment was retrospective and will apply to the assessment year under appeal as it was inserted to cure the defect and was clarificatory in nature,

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therefore, should be held to be retrospective in nature. Earlier this Section provided a condition which was impossible to comply with the case where amalgamating company was 100% subsidiary company of the amalgamated company. Learned Counsel for the Assessee relied upon decisions of Honorable Supreme Court in the case of Vatika Township Private Limited and Allied Motors Private Limited (supra).

109. The Ld. D.R. however, contended that the amendment was made from A.Y. 2013-2014 and will not apply to assessment year under appeal. The Ld. D.R. contended that this amendment are made only to make the provisions workable and cannot be accepted as Section 56(2)(viia) is substantive provisions of law and the procedural Section 47(vii) was otherwise workable only intended to benefit which was not available.

110. The question, therefore, before us is, *Whether the provisions of section 47(vii) as amended by Finance Act 2012 is retrospective in nature ?* It is a fact that existing provision

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of section 47(vii) was not possible to comply with when amalgamating company is the 100% subsidiary of the amalgamated company. This is, in fact, was a defect in Section 47(vii) prior to the amendment. The amendment was made to cure this defect. Therefore, the decisions relied upon by the Learned Counsel for the Assessee above squarely apply to this case as the provisions of section 47(vii) prior to the amendment if read clause-(a) thereof, was unworkable and could not have applied in case, where amalgamating company is the owner of 100% shares of the amalgamating company. The Memorandum explaining the amendment made by Finance Bill 2012 amending the provisions of Section 47(vii) clearly states that *"provisions of Section 47(vii) could not have applied where in case of amalgamation, amalgamated company hold all the shares of amalgamating company".* This clearly denotes that in such situation existing provisions of Section 47(vii) was unworkable and unintended consequences has arisen and the amendment has been made obviously to provide the remedy to remove the defect. We are, therefore, of the view

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that the above provisions are retrospective in nature and it is clarificatory in nature only. We do not agree with submission of the Ld. D.R. that it is not a case of amalgamation of AVVPL into the assessee-company. No doubt in view of the para-II of the Composite Scheme of Arrangement and Amalgamation, various undertakings will first vest in various SVPs, but, subsequently due to the applicability of Para-III of the Scheme, the holding Company of all the SVPs i.e., AVVPL got amalgamated into the assessee-company and all the assets and liabilities of the amalgamating company, immediately before the amalgamation becomes the property and liability of the assessee-company by virtue of the amalgamation and due to the simultaneously retrospective amendment to Section 47(vii) and in Section 2(1B) which defines the amalgamation. The condition of amalgamation is, therefore, stands complied with in this case since the merging of AVVPL into the assessee-company, in our view, complied with all the three conditions as stipulated in the definition of the amalgamation, it cannot be said that it is not a case

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of amalgamation. No bonus shares have been issued out of general reserve. We, therefore, hold that provisions of Section 56(2)(viia) cannot be applied in respect of this transaction as it is a case where the transfer in the case of assessee falls under section 47(vii) of the Income-Tax Act. We, accordingly, delete the addition under Section 56(2)(viia) also.

110.1. Before concluding, we may mention that while arguing on the in applicability of provisions of Section 56(2)(viia) of the Income-Tax Act, the decisions in the cases of Taxspin Engineering and Manufacture Works, (Bombay) Shah Wallace & Co. Ltd., (Kolkata), Forbs & Forbs Campbell & Co. Ltd., (Bombay) have been referred to. It was submitted that there is no transfer as understood in general Law because as a consequence of transaction, AVVPL does not survive and is dissolved. Since we have held that no addition can be made under Section 56(2)(viia) of the Income Tax Act in the case of the assessee, therefore, the question of making any valuation under Rule-11UA would not arise. However, both the parties have extensively argued

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on this issue also. Therefore, we may briefly note that if any addition is made under Section 56(2)(viia), the question arise how the fair market value of property being shares has to be determined. The fair market value under explanation has been defined to be *"fair market value of a property other than immovable property"* means *"the value determined in accordance with the method as may be prescribed."*. Rules-11U and 11UA of I.T. Rules have been prescribed. Rule-11UA, clauses (c) and (b) gives formula for determining the fair market value of unquoted equity shares. As per formula, the book value of the assets have to be reduced by the book value of the liability as per the balance sheet and the resultant figure has to be divided by total amount of equity share capital as shown in the balance sheet and multiply by paid-up value of such equity shares. The dispute before us does not relate to formula given under Rule 11UA, but, the dispute relates to balance-sheet of which date has to be considered for determining the fair market value of the assets under this Rule.

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111. The Revenue has taken the value as per balance sheet as on 31st March 2012, as according to the Revenue, the assessee has incorporated the entries effecting the Scheme in the balance sheet of the assessee and SPV Companies in the balance sheet as on 31st March 2012.

112. Learned Counsel for the Assessee, however, contended that balance sheet as on 31st March 2011 has to be considered as per the rules. The valuation date has been defined to be the date on which property has been received by the assessee. As per the Composite Scheme, the assessee has received the property as on 31st March 2011, therefore, the balance sheet as on 31st March 2011 has to be considered. The "appointed date" as fixed by the Honourable High Court is also the *"closing hours of the business on 31st March 2011",* therefore, in our view, the balance sheet as on 31st March 2011 has to be considered for the purpose of determining the value of the property under Rule-11UA of the I.T. Rules. This issue is decided in favour of the assessee by holding that no addition could be made against the assessee under both the provisions i.e., Section 28(iv) of the

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Income Tax Act, 1961 and Section 56(2)(viia) of the Income Tax Act, 1961. The entire addition on merit is, therefore, deleted.

113. The assessee also raised Additional Ground above. The DRP in their Order treated the general reserve created into the assessee's books of account for the purpose of MAT, part of the book profit and directing the A.O. by exercising his power of enhancement at such amount while computing the book profit under section 115JB of the I.T. Act, 1961, as the said receipt has not been passed through the profit and loss account even though it is revenue in nature.

113.1. Learned Counsel for the Assessee submitted that assessee had drawn its profit and loss account as per Schedule-VI of the Companies Act. The said profit and loss account were duly audited by the chartered accountant who had not qualified his report. The A.O. cannot alter or change the profit and loss account, unless an adjustment contemplated in the various clauses of Explanation-1 to the

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said Section. He has relied upon decisions of the Honourable Supreme Court in the case of Apollo Tyres Limited vs., CIT 255 ITR 373, Foreover Diamonds Private Limited vs DCIT 57 SOT 113; ITO vs., Bhagwan Industries Limited ITA.No.6665/Mum./2008; CIT vs. Akshay Trading and Agents Private Limited 304 ITR 401 and CIT vs., Bisleri Sales Limited Bombay 377 ITR 194 (Bom.).

114. The Ld. D.R, however, opposed submission of the assessee. Section 115JB of the Income-Tax Act, 1961 is reproduced as under :

> "[**Special provision for payment of tax by certain companies.**
>
> **115JB.** (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, [2012], is

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less than [eighteen and one-half per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of [eighteen and one-half per cent]].

(2) **[**Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956) :**]**

Provided that while preparing the annual accounts including profit and loss account,—

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

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(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956) :

Provided further that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act,—

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

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shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.

Explanation [1].—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by—

(a) the amount of income-tax paid or payable, and the provision therefor; or

(b) the amounts carried to any reserves, by whatever name called [other than a reserve specified under section 33AC]; or

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(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or

(d) the amount by way of provision for losses of subsidiary companies; or

(e) the amount or amounts of dividends paid or proposed ; or

(f) the amount or amounts of expenditure relatable to any income to which [section 10 (other than the provisions contained in clause (38) thereof) or [***] section 11 or section 12 apply; or]

(g) the amount of depreciation,]

(h) the amount of deferred tax and the provision therefor,

(i) the amount or amounts set aside as provision for diminution in the value of any asset,

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[if any amount referred to in clauses (a) to (i) is debited to the profit and loss account, and as reduced by,—**]**]]

[(i) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997 otherwise than by way of a debit to the profit and loss account), if any such amount is credited to the profit and loss account:

Provided that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this

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Explanation or Explanation below the second proviso to section 115JA, as the case may be; or]

(iii) the amount of income to which any of the provisions of [section 10 (other than the provisions contained in clause (38) thereof)] or [***] section 11 or section 12 apply, if any such amount is credited to the profit and loss account; or

[(iia) the amount of depreciation debited to the profit and loss account (excluding the depreciation on account of revaluation of assets); or

(iib) the amount withdrawn from revaluation reserve and credited to the profit and loss account, to the extent it does not exceed the amount of depreciation on account of revaluation of assets referred to in clause (iia); or]

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(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

Explanation.—For the purposes of this clause,—

(a) the loss shall not include depreciation;

(b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil; or]

(iv) to (vi) [***]

(vii) the amount of profits of sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year during which the entire net

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worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.—For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986); or

[(viii) the amount of deferred tax, if any such amount is credited to the profit and loss account.]

[Explanation 2.—For the purposes of clause (a) of Explanation 1, the amount of income-tax shall include—

(i) any tax on distributed profits under section 115-O or on distributed income under section 115R;

(ii) any interest charged under this Act;

(iii) surcharge, if any, as levied by the Central Acts from time to time;

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(iv) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and

(v) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time.]

The following Explanation 3 shall be inserted after Explanation 2 of sub-section (2) of section 115JB by the Finance Act, 2012, w.e.f. 1-4-2013 :

Explanation 3.—For the removal of doubts, it is hereby clarified that for the purposes of this section, the assessee, being a company to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956) is applicable, has, for an assessment year commencing on or before the 1st day of April, 2012, an option to prepare its profit and loss account for the relevant previous year either in accordance with the provisions of *Part II and Part III of Schedule VI to the Companies Act, 1956 or in

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accordance with the provisions of the Act governing such company.

(3) Nothing contained in sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section (2) of section 32 or sub-section (3) of section 32A or clause (ii) of sub-section (1) of section 72 or section 73 or section 74 or sub-section (3) of section 74A.

(4) Every company to which this section applies, shall furnish a report in the prescribed form[97] from an accountant as defined in the Explanation below sub-section (2) of section 288, certifying that the book profit has been computed in accordance with the provisions of this section along with the return of income filed under sub-section (1) of section 139 or along with the return of income furnished in response to a notice under clause (i) of sub-section (1) of section 142.

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(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.]

[(5A) The provisions of this section shall not apply to any income accruing or arising to a company from life insurance business referred to in section 115B.**]**

[(6) The provisions of this section shall not apply to the income accrued or arising on or after the 1st day of April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or Special Economic Zone, as the case may be:]

[**Provided** that the provisions of this sub-section shall cease to have effect in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012.]"

115. From the above provisions, it is apparent that book profit has to be deemed to be the total income of

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assessee. The book profit is defined under Explanation-1 for the purpose of Section to mean *"the net profit as shown in the profit and loss account for relevant previous year prepared under sub-section (2) as increased by the amount as has been stipulated under Explanation-1 (a) to (i) and has to be reduced by the amount given under sub-clauses (i) to (viii)"*. Sub-section (2) requires that *"every assessee being Company shall, for this Section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts-II and III of Schedule VI of the Companies Act"*. It also requires that the assessee must follow Accounting Policies, Accounting Standards adopted for preparing such accounts including profit and loss account and the method and rates adopted for calculating the depreciation, while preparing the profit and loss account, as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the Company at its Annual General Meeting in accordance with the provisions of Section 210 of the Companies Act. This sub-section further requires that in case, the assessee

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has adopted financial year under Companies Act which is different from previous year under Income Tax Act. Accounting Policies, Accounting Standards and the method and rates for calculating the depreciation must correspond to the Accounting Policy, Standards and method which have been adopted for preparing such accounts including profit and loss account for such financial years or part of such financial years falling within the relevant previous year. Clause (b) of Explanation-1 requires that book profits so computed has to be increased by the amount carried to any reserve by whatever name called other than a reserve specified in Section-33AC. In Explanation-1, after clauses (a) to (i) there is an embargo which states that *"if any amount referred to in clauses (a) to (i) is debited to the profit and loss account".* In view of this embargo, it is apparent that this Explanation mandates that profit shown as per profit and loss account has to be increased for the purpose of book profit by adding items as stipulated under clauses (a) to (i) are debited to the profit and loss account. Natural inference will be that, if any of those amounts is not debited

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to the profit and loss account, that amount cannot be added to the profit for the purpose of computing the book profit. This is an undisputed fact that net reserve in the general reserve for which the addition was made amounting to Rs.46,999.87 crores has not been debited to the profit and loss account, though, we have already deleted the addition and the additional ground has become infructuous at this stage, but, we may note that this question has been answered in favour of the assessee by the Judgment of the Honorable Supreme Court in the case of Apollo Tyres vs., CIT 255 ITR 373 (SC) in which it was held that *"Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided under Explanation to 115JA of the I.T. Act, 1961."* The Honorable Bombay High Court in the case of CIT vs. Adbhut Trading Company Private Limited 338 ITR 94 while interpreting the meaning of book profit for the purpose of section 115JB following the decision of the Honorable Supreme Court in the case of Apollo Tyres Limited (supra), held that *"once accounts including profit and*

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loss account are certified by the authorities under the Companies Act, it is not open to the Assessing Officer to contend that profit and loss account has not been prepared in accordance with the provisions of the Companies Act and dismiss the departmental appeal." The decisions relied upon by the Ld. D.R. would not support the case of the Revenue. Honorable Bombay High Court in the case of CIT vs., Bisleri Sales Limited 337 ITR 111 had taken the same view. These decisions are applicable to the facts of this case as in the case of the assessee also, the DRP while making the addition under section 115JB of the I.T. Act, 1961, took the view that the assessee should have routed the increase in the general reserve through profit and loss account, but, in this case also similar arguments have been rejected by the Honorable Bombay High Court. In view of the above, we delete the addition made under section 115JB of the Income Tax Act as well. The additional ground is, therefore, allowed.

116. In the result Ground Nos.4 and 5 and additional ground raised by the assessee are allowed.

117. In the result, appeal of assessee is Partly Allowed

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Order pronounced in the open Court.

Sd/-	Sd/-
(L.P. SAHU)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Delhi, Dated 22nd February, 2019

VBP/-

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// BY Order //

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