

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3865/Del/2014
(Assessment Year: 2008-09)

New Delhi Television Ltd, 207, Okhla Industrial Estate, Phase- III, New Delhi PAN: AAACN0865D	Vs.	ACIT, Circle-13(1), New Delhi
(Appellant)		(Respondent)

ITA No. 3996/Del/2014

(Assessment Year: 2008-09)

ACIT, Circle-13(1), New Delhi	Vs.	New Delhi Television Ltd, 207, Okhla Industrial Estate, Phase-III, New Delhi PAN: AAACN0865D
(Appellant)		(Respondent)

Assessee by :	Shri Sachit Jolly, Adv Shri Rohit Garg, Adv Shri Siddharth Joshi, Adv
Revenue by:	Shri H. K. Choudhary, CIT DR
Date of Hearing	Multiples dates and last heard on 07/01/2020
Date of pronouncement	16/06/2020

ORDER

PER PRASHANT MAHARISHI, A. M

1. These are the cross appeals filed by the assessee, M/s New Delhi Television Ltd (the appellant) in ITA number 3865/Del/2014 and The Asst Commissioner Of Income Tax, Circle 13 (1), New Delhi (The Learned AO) in ITA number 3996/Del/2014 for Assessment Year 2008 – 09 against the order of The Commissioner Of Income Tax (Appeals) – XX, New Delhi (The Learned CIT – A) wherein, the appeal filed by the appellant against the order passed under section 143 (3) of The Income Tax Act, 1961 (The Act) dated 3/8/2012 was partly allowed.

2. The assessee has raised the following grounds of appeal in ITA No. 3865/Del/2014 for the Assessment Year 2008-09:-
- “1. That on facts and in law the Commissioner of Income Tax (Appeals) {hereinafter referred to as “CIT(A)” erred in not appreciating that the order of assessment dated 3rd August 2008 passed by the Assistant Commissioner of Income Tax, Circle-13(1), New Delhi {hereinafter referred to as the “AO”} under section 143(3) of the Income Tax Act, 1961 {hereinafter referred to as “the Act”} is barred by limitation and hence bad in law.*
- 1.1 That on facts and in law, the CIT (A) erred in law in holding that the impugned assessment completed under section 143(3) of the Act is valid in light of the extended time limit provided under section 153 of the Act.*
- 2. That on facts and in law the CIT(A) erred in upholding that the expenditure of Rs. 22,16,476/- incurred by the appellant for obtaining licenses for use of accounting software were capital in nature without appreciating that acquisition of same is merely enhancement and up gradation of accounting software already in use.*
- 3. That on facts and in law the CIT (A) erred in upholding the action of AO to himself determine Arms Length Price (ALP) of alleged “Transaction” / “International Transaction” of issue of Corporate Guarantee by the appellant de hors the fact that the Transfer Pricing Officer {hereinafter referred to as the “TPO”} had vide order dated 14th September 2011 accepted the ALP of all International Transactions undertaken by the appellant.*
- 3.1 That on facts and in law the CIT(A) erred in upholding the addition on account of alleged “Transaction” / “International Transaction” of issue of Corporate Guarantee without appreciating that there was no corporate guarantee given by the appellant in year under consideration for funds raised by M/s NDTV Network Plc (i.e. a subsidiary of the appellant).*
- 3.2 That on facts and in law the CIT(A) erred in observing/holding that the undertaking given by the appellant was an implicit guarantee which required benchmarking as per the provisions of Chapter X of the Act.*
- 3.3 Without prejudice, that on facts and in law the methodology adopted by the CIT(A) for benchmarking the above alleged transaction of issue of Corporate Guarantee is bad in law.*

4. *That on facts and in law the AO/CIT(A) erred in not allowing the benefit of +/- 5 % range, as provided in the proviso to section 92C(2) of the Act.*
5. *That on facts and in law and in law the CIT(A) has erred in upholding the action of I AO in making a disallowance of Rs. 8,96,000/- by invoking provisions of section 14A of the Act.*
 - 5.1 *That on facts and in law in absence of a valid satisfaction being recorded by the AO the CIT(A) erred in upholding his assumption of jurisdiction u/s 14A r/w Rule 8D of the Act.*
 - 5.2 *That on facts and in law the CIT(A) erred in sustaining disallowance made by the AO without appreciating the fact that no exempt income was derived by the appellant in the year under consideration.*
 - 5.3 *That on facts and in law the CIT (A) erred in not appreciating that no expenditure was incurred by the assessee in order to earn any income which is exempt from tax.*
 - 5.4 *That on facts and in law the CIT(A) erred in not appreciating that investments in group companies and others were made by the appellant only from non-interest bearing funds.*
6. *That on facts and in law the CIT (A) erred in upholding the disallowance made by the AO of Rs. 7,38,43,516/- being the transmission and up linking charges paid to M/s Intelsat Corporation by invoking provisions of section 40(a)(i) of the Act.*
 - 6.1 *That on facts and in law the CIT(A) erred in upholding that the transmission and up-linking charges paid to M/s Intelsat Corporation are chargeable to tax in India as income from "Royalty" so defined under section 9(1)(vi) of the Act and under the relevant Agreement for Avoidance of Double Taxation (AADT).*
 - 6.2 *That on facts and in law the CIT(A) erred in holding that by virtue of Article 3(2) of the India-US AADT the meaning of the word "process" as defined in the Act would apply to the provisions of AADT also.*
7. *Without Prejudice, that on facts and in law the CIT(A) erred in not appreciating that the provisions of section 9(1)(vi) were amended by the Finance Act 2012 w.e.f 1st June 1976 and as such the said amendments cannot be invoked/relied upon for TDS related issues / defaults.*

8. *That on facts and in law the CIT(A) erred in not appreciating / considering the submission made by the appellant that since the entire amount of Rs. 7,38,43,516/- was paid by the appellant to M/s Intelsat Corporation and nothing was payable as on 31st March 2008 hence in view of the decision of the Special Bench of Tribunal in the case of Merilyn Shipping and Transport vs. ACIT, reported in 136 ITD 23 (S8) the disallowance made u/s 40(a)(i) was uncalled for.*
 9. *That on facts and in law the CIT(A) erred in upholding the action of AO in re-characterizing the income declared by appellant as "Capital Gain" pursuant to sale of 2,12,500 shares of M/s Astro Awani Networks Limited as income from "Other Source" and by making an addition of Rs.10,57,89,125/-.*
 - (a) *Above shares were transferred as part of a corporate business restructuring.*
 - (b) *Shares transferred had no value/worth*
 - (c) *Shares were transferred only to boost profitability and cash flow of appellant.*
 - (d) *Valuation Report of INMAC is not reliable*
 10. *That on the facts and in law to the extent the orders passed by both AO and CIT(A) are prejudicial to the interest of the assessee the same are bad in law and void ab-initio.*
3. The revenue has raised the following grounds of appeal in ITA No. 3996/Del/2014 for the Assessment Year 2008-09:-
- "1. *On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of ESOP expenses of Rs. 17,86,56,690/-by relying on the ITAT decision in the assessee's own case for the AY 2006-07, ignoring the fact that the revenue is in appeal. Thus, the issue has not attained its finality.*
 2. *On the facts and circumstances of the case and in law, the Ld.CIT (A) has erred in reducing the disallowance of software expenses from Rs. 27,82,791/- to Rs. 5,05,378/- holding the same to be revenue in nature by relying on the DRP order in assessee's own case for AY 2009-10, ignoring the fact that the revenue is already in appeal on the issue and the matter is sub-judice.*

3. *On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of commission of Rs.45,53,30,999/- u/s 40(a)(ia) of the Act by relying on the decision of the DRP in the assessee's own case for the AY 2009-10 ignoring the fact ignoring the fact that he revenue is already in appeal on the issue and the matter is sub-judice.*
 - 3.1 *On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the above disallowance by ignoring the fact that the space for the advertisements was sold through agents and that the assessee and its agencies had relationship of principal and agent and as such the payments were liable for deduction of tax at source.*
4. *On the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs. 18,72,00,000/- on account of Corporate Guarantee Charges by relying on the decision of Hon'ble DRP in assessee's own case in the AY 2009-10 ignoring the fact that the department is already in appeal against the order and the decision is still pending.”*
4. Briefly, the fact shows that appellant is engaged in the business of television news broadcasting through its three different channels namely NDTV 24 x 7, NDTV profit and NDTV India. It also produces customized software programs for broadcasters. The assessee filed its return of income on 29/9/2008 declaring loss of ₹ 5 319275/–.
5. The case of the assessee was referred to for seeking further information under the provisions of Exchange of Information article of Double Taxation Avoidance Agreement with UK and Mauritius. The information under the exchange of information article of Indo- UK Double Taxation Avoidance Convention was received in the office of The Chief Commissioner of Income Tax – V, New Delhi on 7/6/2012. Therefore the limitation in the case was extended as per the provisions of section 153 (4) (vii) read with the first proviso. Information was sought with respect to the corporate guarantee fee, if any paid by NDTV Network Plc to the appellant with respect to the raising of hundred millions of advance during the year in question by the NDTV Network plc in United Kingdom. A separate reference on sale of shares of M/s Astro Vani Networks Limited by the appellant to NDTV Emerging Markets BV during the year from Mauritius tax authority was also sought.
6. Consequently assessment order under section 143 (3) of the act was passed on 3rd August, 2012, wherein the learned assessing officer determined the total income of the assessee at ₹ 939818728/– against the return filed at loss of ₹ (-) 70124147.

The learned assessing officer disturbed the income of the assessee by making several additions/disallowances. The assessee challenged that order before the learned CIT – A, who partly deleted the certain disallowances and partly retained and therefore both the parties are in appeal before us.

Serial number	nature of disallowances	Amount (In Rs)	Result in Appeal before CIT (A)
1	on account of employee stock option plan expenditure	178656690	Deleted
2	On account of software expenditure	1113116	Partly deleted
3	Commission expenditure by applying provisions of section 40 a (ia) for non-deduction of tax at source	455330999	Deleted
4	Corporate guarantee charges	187200000	Deleted
5	Disallowance under section 14 A read with rule 8D of the income tax rules	896000	Deleted
6	Disallowance of transmission and up linking charges	73843516	Deleted
7	Gain on sales of shares of Astra Avani networks Limited	105789125	confirmed

7. We first proceed to decide the ITA number 3996/Del/2014 filed by the learned assessing officer.
8. The first ground of appeal is that during the year under consideration the appellant charged expenses amounting to ₹ 118343111 under the head employee stock option expenses to its profit and loss account. The employees were covered under the ESOP 2004 scheme of the appellant. In its computation of taxable income, the appellant added back sum of ₹ 1 18343111 being the amount debited to profit and loss account and claimed deduction of ₹ 1 78656690/- which was recalculated as

the expenses incurred on account of ESOP . The assessee computed the claim as per the securities and Exchange Board of India guidelines which mandated that the difference between the market price and the price at which the option is exercised by the employee is to be debited to the profit and loss account as it is a 'benefit' conferred on the employee which could not be taken back by the employer company. The learned assessing officer disallowed the above expenditure stating that these expenses are notional expenses.

9. On appeal before the learned CIT – A, the assessee submitted that the employee stock option plan 2004 was instituted by the company to grant equity-based incentive to its entire eligible employees. It was approved by the board of directors in their meeting held on 5 January 2004 and by the shareholders in their meeting on January 29, 2004 and September 22, 2004 for grant of 4057000 options to the employees of the company at an exercise price of Rs 4/- each, representing one share for each option upon exercise. The maximum tenure of these options granted was seven years from the date of grant, the balance option available for grant as on 31/3/2007 was 35 5000. According the company applying the intrinsic value method recognize the excess of the market price over the exercise price of the option as an expense during the year. The assessee contested that the above company has formulated policy and scheme in compliance with the strict SEBI guidelines and once the scheme is instituted it creates a definite right and obligation between employer-employee. The accounting value of these expenditure is accounted as employee compensation and amortized . Thus claimed on a straight-line basis over the vesting period in accordance with the SEBI guidelines and guidance note issued by the Institute Of Chartered Accountants Of India. Assessee also placed reliance on the decision of Honourable Madras High Court in PVP ventures Limited in 22 taxman.com 286. Justifying the claim, it was submitted that these are the medium through which the talent was attracted and retained by the companies. It was further submitted that it is a definite liability and cannot be considered as a notional expenditure. The assessee submitted that for assessment year 2006 – 07 and 2007 – 08, identical issue travelled up to the level of the coordinate bench which decided the matter in favour of the appellant for those assessment years. Based on this, the learned CIT – A held that in appellant's own case for assessment year 2006 – 07 the coordinate bench has decided the issue in favour of the appellant per its order dated 20/12/2013 in ITA number 852/Del/2012 and 942/Del/2012 wherein it is held that the issue of employee stock option plan is covered by the decision of the special

bench of the tribunal in case of Biocon Ltd versus Deputy Commissioner Of Income Tax (LTU) Bangalore (2013) 35 taxmann.com 335. Therefore he directed the learned assessing officer to consider the above expenditure as deductible expenditure under section 37 (1) of the act and the assessing officer was directed to work out the amount of ESOP expenses to be allowed in assessment year 2008 – 09 in accordance with the decision of the special bench of the tribunal. Thus he deleted the disallowance accordingly.

10. The learned departmental representative supported the order of the learned assessing officer and submitted that ESOPs expenditure are notional expenditure.
11. The learned authorised representative submitted that the above issue is squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in assessee's own case for assessment year 2006 – 07 and 2007 – 08.
12. We've carefully considered the rival contention and perused the orders of the lower authorities. We find that identical issue is covered in favour of the assessee by the decision of the honourable Delhi High Court in assessee's own case for assessment year 2006 – 07 and 2007 – 08. The order of the honourable High Court for assessment year 2007 – 08 reported in 99 taxmann.com 401 (Delhi)/[2017] 398 ITR 57 (Delhi) has held as under:-

“2. Learned counsel for the assessee appearing on advance notice, on the other hand, urges that there is no infirmity with the approach of the Income-tax Appellate Tribunal and that this Court had on July 12, 2016 given reasons for not entertaining the appeal which was not dismissed merely on the ground of delay. The previous order of the Court records *inter alia* as follows :

"7. As far as this issue is concerned, it is pointed out by the learned counsel for the assessee that the issue stands covered in favour of the assessee and against the Revenue by the order of this Court dated August 18, 2015 in I.T.A. No. 107 of 2015 (*CIT v. Lemon Tree Hotels Ltd.*). The Court had affirmed the order of the Income-tax Appellate Tribunal deciding the issue in favour of the assessee in the said case where the addition made by the Assessing Officer by way of disallowance of the expenses debited as cost of ESOP in profit and loss account was deleted by the Income-tax Appellate Tribunal.

8. In the present case, the Income-tax Appellate Tribunal has by the impugned order restored the matter to the file of the Assessing Officer for re-adjudication. The impugned order of the Income-tax Appellate Tribunal is consistent with what has been held by this Court in *Lemon Tree Hotels (supra)*. Consequently, no substantial question of law arises as far as this issue is concerned."

3. In *Lemon Tree Hotels Ltd. (Supra)* (referred to by the previous order), the court had relied upon a ruling of the Division Bench of the Madras High Court in *CIT v. PVP Ventures Ltd.* [2012] 23 taxmann.com 286/211 Taxman 554. In *PVP Ventures Ltd. (supra)*, the Madras High Court, after considering the SEBI's claim held as follows (page 314 of 1 ITR-OL) :

"As regards the second issue which is now canvassed before this Court, viz., On the issue of expenditure of Rs. 66.82 lakhs towards the issue of shares to the employees stock option is concerned, the Tribunal pointed out that the shares were issued to the employees only for the interest of the business of the assessee to induce employees to work in the best interest of the assessee. The allotment of shares was done by the assessee in strict compliance with SEBI regulations, which mandate that the difference between the market prices and the price at which the option is exercised by the employees is to be debited to the profit and loss . . . the Tribunal in its order stated that it was a benefit conferred on the employee. So far as the company is concerned, once the option was given and exercised by the employee, the liability in this behalf got ascertained. This was recognised by the SEBI and the entire employees stock option plan was governed by the guidelines issued by the SEBI. On the facts thus found, the Tribunal held that it was not a case of contingent liability depending on the various factors on which the assessee had no control. The expenditure in this behalf was an ascertained liability, thus the expenditure incurred being on lines of the SEBI Guidelines, there could be no interference in the relief granted by the assessing authority for the expenditure arising on account of the employees' stock option plan. This expenditure

incurred as per the SEBI Guidelines and granted by the Officer could not be considered as erroneous one calling for the exercise of jurisdiction under section 263 of the Act."

4. The Special Bench ruling in *Biocon Ltd. (supra)* considered the matter rather elaborately and also examined all the previous decisions. It scrutinised different accounts of ESOPs and the points of time when they could have vested. The observations of the Special Bench in this regard, *inter alia*, are as follows (page 623 of 25 ITR (Trib)) :

"When we consider the facts of the present case in the backdrop of the ratio laid down by the Hon'ble Supreme Court in *Bharat Earth Movers v. CIT* [2000] 245 ITR 428 and *Rotork Controls India (P.) Ltd. v. CIT* [2009] 314 ITR 62 (SC), it becomes vivid that the mandate of these cases is applicable with full force to the deductibility of the discount on incurring of liability on the rendition of service by the employees. The factum of the employees becoming entitled to exercise options at the end of the vesting period and it is only then that the actual amount of discount would be determined, is akin to the quantification of the precise liability taking place at a future date, thereby not disturbing the otherwise liability which stood incurred at the end of the each year on availing of the services.

As regards the contention of the learned Departmental representative about the contingent liability arising on account of the options lapsing during the vesting period or the employees not choosing to exercise the option, we find that normally it is provided in the schemes of ESOP that the vested options that lapse due to non-exercise and/or unvested options that get cancelled due to resignation of the employees or otherwise, would be available for grant at a future date or would be available for being re-granted at a future date. If we consider it at micro level *qua* each individual employee, it may sound contingent, but if view it at macro level *qua* the group of employees as a whole, it loses the tag of 'contingent' because such lapsing options are up for grabs to the other eligible employees. In any case, if some of the options remain unvested or are not exercised, the

discount hitherto claimed as deduction is required to be reversed and offered for taxation in such later year. We, therefore, hold that the discount in relation to options vesting during the year cannot be held as a contingent liability.

C. Fringe Benefit

. . . Act 2005, with effect from April 1, 2006. Memorandum explaining the provisions of the Finance Bill, 2005 highlights the details of the fringe benefits tax. It provides that : 'Fringe benefits as outlined in section 115WB, mean any privilege, service, facility or amenity directly or indirectly provided by an employer to his employees (including former employees) by reason of their employment'. Charging section 115WA of this Chapter provides that : 'In addition to the Income-tax charged under this Act, there shall be charged for every assessment year . . . 'fringe benefit tax in respect of fringe benefits provided or deemed to have been provided by an employee to his employees during the previous year'. Section 115WB gives meaning to the expression 'fringe benefits'. Sub-section (1) provides that for the purposes of this Chapter, 'fringe benefits' means any consideration for employment as provided under clauses (a) to (d). Clause (d), which is relevant for our purpose, states that: 'any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or at concessional rate to his employees (including former employee or employees)' shall be taken as fringe benefit. The Explanation to this clause clarifies that for the purposes of this clause,—(i) 'specified security' means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and, where employees' stock option has been granted under any plan or scheme thereof, includes the securities offered under such plan or scheme. Thus it is discernible from the above provisions of the Act that the Legislature itself contemplates the discount on premium under ESOP as a benefit provided by the employer to its employees during the course of service. If the Legislature considers such discounted premium to the employees as a fringe benefit or 'any consideration

for employment', it is not open to argue contrary. Once it is held as a consideration for employment, the natural corollary which follows is that such discount (i) is an expenditure; (ii) such expenditure is on account of an ascertained (not contingent) liability; and (iii) it cannot be treated as a short capital receipt. In view of the foregoing discussion, we are of the considered opinion that discount on shares under the ESOP is an allowable deduction.

II. If yes, then when and how much ?

Having seen that the discount under ESOP is a deductible expenditure under section 37(1), the next question is that 'when' and for 'how much' amount should the deduction be granted ?

The assessee is a limited company and hence it is obliged to maintain its accounts on mercantile basis. Under such system of accounting, an item of income becomes taxable when a right to receive it is finally acquired notwithstanding the fact that when such income is actually received. Even if such income is actually received in a later year, its taxability would not be evaded for the year in which right to receive was finally acquired. In the same manner, an expense becomes deductible when liability to pay arises irrespective of its actual discharge. The incurring of liability and the resultant deduction cannot be marred by mere reason of some difficulty in proper quantification of such liability at that stage. The very point of incurring the liability enables the assessee to claim deduction under mercantile system of accounting. We have noticed the mandate of the Hon'ble Supreme Court in *Bharat Earth Movers* [2000] 245 ITR 428 that if a business liability has definitely arisen in an accounting year, then the deduction should be allowed in that year itself notwithstanding the fact that such liability is incapable of proper quantification at that stage and is dischargeable at a future date. It follows that the deduction for an expense is allowable on incurring of liability and the same cannot be disturbed simply because of some difficulty in the proper quantification. A line of distinction needs to be drawn between a situation in which a liability is not incurred and a situation in which the liability is incurred but its quantification is not

possible at the material time. Whereas in the first case, there cannot be any question of allowing deduction, in the second case, deduction has to be allowed for a sum determined on some rational basis representing the amount of liability incurred."

5. Having regard to the above discussion, especially that the previous order dated July 12, 2016 in ITA No. 366 of 2016 had considered the same items of expenditure, under section 34, we are of the opinion that no question of law arises. The appeal is accordingly dismissed."

13. In view of this, we dismiss ground number [1] of the appeal of the learned assessing officer.
14. The second [2] ground of appeal is against the order of the learned CIT Appeal in reducing the disallowance of software expenses from Rs 2782791/- to ₹ 505378 holding the same to be revenue in nature. During the year the assessee has claimed software expenses amounting to ₹ 6066309/- in its profit and loss account. The above expenditure pertaining to
 - a. annual maintenance contract expenditure Rs. 2732939/-
 - b. Up gradation of software Rs. 21528
 - c. Accounting software Rs. 2216476
 - d. license and right to use software ₹ 3 9410
 - e. other software is having limited life ₹ 5 05378
 - f. Amount wrongly booked under software expenditure Rs. 550577/-

The learned assessing officer treated the annual maintenance cost of Rs. 2732939/- as revenue expenditure and disallowed the balance expenditure of Rs. 2782792 including the up gradation of the software, accounting software and license cost et cetera, treating them as capital expenditure. He allowed depreciation at the rate of 60% on these expenditure and therefore the net expenditure of Rs 1113116/- was disallowed and added back to the taxable profits of the assessee.

15. On appeal before the learned CIT – A the assessee submitted that the issue is squarely covered in favour of the appellant by the decision of the coordinate bench for assessment year 2006 – 07. It was further stated that the learned Dispute Resolution Panel for assessment year 2009 – 10 also allowed the claim of the

assessee. The assessee extensively relied on those decisions before the learned CIT – A.

16. The learned CIT – A noted that assessee has made an expenditure of Rs 21528/- for up gradation of software, Rs. 2216476 for accounting software and ₹ 5 05378 on the software which is having limited useful life. He further noted that the accounting software expenditure has been incurred by the assessee to obtain license to use accounting software such as vision XL financials, FAMS software package and implementation of PMS software. He further noted that the learned Dispute Resolution Panel for assessment year 2009 – 10 has already allowed the up gradation of software expenditure as well as the expenditure on the software having the limited useful life as revenue expenditure. However he upheld the disallowance on the accounting software of Rs. 2216476/- holding it as capital expenditure. Therefore he deleted the partially addition made by the learned assessing officer.
17. The learned departmental representative vehemently supported the order of the learned assessing officer and held that when the software is held to be capital expenditure, only depreciation is allowable thereon and it cannot be revenue expenditure.
18. The learned authorised representative vehemently supported the order of the learned CIT – A and stated that the order of the learned CIT – A follows the order of the learned Dispute Resolution Panel in assessee's own case for assessment year 2009 – 10 which was also upheld by the coordinate bench. He therefore submitted that the issue is squarely covered in favour of the assessee.
19. We have carefully considered the rival contention and perused the orders of the lower authorities. Identical issue arose in case of the assessee for assessment year 2009 – 10 [2017] 83 taxmann.com 282 (Delhi - Trib.)/[2017] 189 TTJ 1 (Delhi - Trib.) wherein the coordinate bench decided the issue as under:-

“61. Ground No. 3 of the appeal of the Revenue is against direction of the Id DRP to delete the disallowance of Rs. 8245612/- on account of software expenses. During the year the assessee has incurred expenditure of Rs.32435619/- on software expenses and claimed the same as revenue expenditure. The Id Assessing Officer was of the view that it is capital in nature and therefore depreciation @60% thereon is allowable and not the whole expenditure. After considering the submission of the assessee Id Assessing Officer held that computer software expenses to the extent of Rs. 20614030/- shown

by the assessee is disallowable as it is capital expenditure. Therefore he allow depreciation @60% on Rs. 20614030/- amounting to Rs. 12368618/- and thus disallowed a sum of Rs. 8245612/-. The Assessing Officer was of the view that assessee has purchased accounting software and its upgradation and also on software such as google earth, pro Microsoft server calls are purchased which gives the assessee an advantage of enduring nature. The assessee aggrieved with the order of the Id Assessing Officer preferred objection before the Id DRP who directed the Id Assessing Officer delete the above disallowance vide para No. 8 of its order as under:—

'8. Disallowance of software expenses amounting to Rs. 82,45,612/-

The assessee regularly purchases softwares which are used for its programming purposes. The AO has treated it as capital expenditure. This issue was litigated in the earlier years and Commissioner of Income Tax(Appeals) has made the following observation on the same issue for the AY2007-08 which is reproduced below:

"From the submission of the appellant it is clear that the appellant has capitalized certain software purchases on its own. The 'up-gradation of software' and under the head 'other software' were treated as capital in nature by the AO and depreciation at the rate of 60% was allowed by him. However, on going through the details, it is noticed that these software need regular up-gradation or change as per the requirements of fast changing broadcasting industry. The life of these software are for a shorter period and therefore it cannot be said the same is providing enduring benefit to the appellant. For the AY 2006-07 also, my predecessor CIT(A)-XVI has allowed such expenditure as revenue expenditure in para 3.2 of the appeal order dated 30.09.2011 in appeal no. 228/08-09. The nature of software purchased and the business of the appellant for which the software so purchased were applied remains the same. In view of this, the expenditure under the head upgradation of software and other software amounting to Rs. 2,07,009/- and 5,58,006/- respectively is held as allowable deduction during the year. AO is directed to delete the addition made in this regard. "

Therefore, DRP is also of the view that these expenditures are revenue in nature and hence allowable. AO is directed not to make this addition in assessment order. Objection 1 is treated as disposed off."

62. The Id DR relied upon the order of the Id Assessing Officer whereas the Id AR relied upon the orders of the Id DRP.

63. We have carefully considered the rival contentions. The assessee has been allowed the identical claim in earlier years by the Id CIT(A) and based on that decision the Id DRP was also of the view that the above expenditure incurred by the assessee is revenue in nature. The Id DR could not controvert that why the order of the Id DRP is erroneous. In view of this we do not find any infirmity in the direction issued by the Id DRP. In the result we confirm the direction of the DRP. In view of this ground No. 3 of the appeal of the revenue is dismissed."

As there is no change in the facts and circumstances of the case, respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2009 – 10, ground number [2] of the appeal of the learned assessing officer is dismissed.

20. Ground number [3] of the appeal is with respect to the deletion of the disallowance of commission expenditure of Rs. 4 5,53,30,999/- under section 40 (a) (ia) of the act. As the appellant earns income through sale of advertisement time on its various channels, this advertisement time is sold generally through advertisement agencies. These advertisement agencies in turn sales this advertisement time to the advertisers. The appellant assessee raises invoice on such advertisement agencies after allowing 15% trade discount as per the industry practice. The appellant also accounts for only 85% of its revenue in its books of account. The appellant submits that it has offered the discount to the advertising agencies and it is not the commission as the appellant and advertisement agencies act on principal to principal basis. The learned assessing officer held that advertisement agencies were agents of the appellant and amount of 15% retained by them was in effect constructive payment of commission liable for deduction of tax at source either under section 194H or under section 194J of the income tax act. Therefore, he grossed up the amount of the revenue shown by the assessee in the profit and loss

account with the amount retained by those advertisement agents and disallowed Rs. 455330999/- under section 40(a) (ia) of the income tax act.

21. The assessee challenged the same before the learned CIT – A. He held that issue squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in CIT versus Living Media India Ltd and also the decision of the honourable Allahabad High Court in case of Jagran Prakashan Ltd versus Deputy Commissioner Of Income Tax (345 ITR 288). He further noted that the learned Dispute Resolution Panel has directed the learned Assessing Officer to not to make addition on this count for assessment year 2009 – 10 following the above decision. Therefore he directed AO to delete the addition.
22. The learned departmental representative vehemently supported the order of the learned assessing officer whereas the learned authorised representative submitted that the identical issue has been decided by the coordinate bench in assessee's own case for assessment year 2009 – 10 and therefore the issue is squarely covered in favour of the assessee.
23. We have carefully considered the rival contention and find that the issue is squarely covered by the decision of the coordinate bench in assessee's own case for assessment year 2009 – 10 wherein it has been held as under:-

“54. The assessee preferred objection before the Id Dispute Resolution Panel who vide direction dated 31.12.2013 vide para No. 6 has held as under:—

'6. Disallowance of commission paid u/s 40(a)(ia) amounting to Rs. 41,54,41,111/-

The AO has disallowed the sum on the ground that the assessee should have deducted tax on the gross amount received by the advertisement agency. On the other hand, the assessee had stated that its case is squarely covered by the decision of the jurisdictional High Court in the case of *CIT v. Living Media India Ltd.* and in the case of *JagranPrakashan Ltd. v. DCIT* [345 ITR 288 (2012)] of the Allahabad High Court. The AO has tried to differentiate the decision in the case of Living Media India Ltd. by stating that the assessee is in electronic media whereas the decision quoted is on the facts of print media company. The assessee's submission is extracted below:

"The assessee/companies who are engaged in the business of running of print and electronic media houses, the main source of revenue is advertisement charges. The advertisers approach classified agents or

accredited advertising agencies to advertise. The agents/agencies upon receipt of advertisement requirement procure the airtime from the media companies at a discount. Advertisers while making payment to accredited agencies duly deduct tax as required under law under section 194C of the Act on the amount paid by the advertiser. This customary practice is consistently followed in this above business and is governed in accordance with guidelines of Indian Newspaper Society (in short INS) for print or Indian Broadcasters Federation (in short IBF) for electronic.

An advertiser engages an advertising agency and the advertising agency in turn approaches print and electronic media for publication/broadcast of the advertisement. There is no direct link between the print and electronic media and the advertiser. In the normal course when orders are released by the advertising agencies, the name of the client is always disclosed on it, though there is no principal agent relationship between the print and electronic media on one hand and the advertising agencies on the other hand. As per the rules of INS, accreditation is awarded by INS to the advertising agency which becomes eligible to receive 15 per cent discount from media companies on procuring advertisement space for/time in publication/broadcast for advertisers. It may be noted that even the discount is not at the will or contractual discretion; it is governed by INS regulations."

DRP has carefully examined the above issue. DRP is convinced that the decision of the Hon'ble Jurisdictional High Court in the case of Living Media India Ltd. is applicable in this case since the issue is of treatment of commission paid to the advertising agencies. Therefore, the AO is directed to not to make this addition in the assessment order. In this way, objection 2 along with its sub-objections are disposed off. '

55. Before us the Id DR relied upon the draft assessment order whereas the Id AR vehemently submitted that the issue is squarely covered by the decision of Hon'ble Delhi High Court in case of *CIT v. Living Media India Ltd.* [2013] 35 taxmann.com 105/359 ITR 106. He therefore stated that there is no error in the order of the Id DRP.

56. We have carefully considered the rival contentions and also perused the facts of the case as well as the decision of the Hon'ble Delhi High Court. We are convinced with the argument of the Id AR that the issue is squarely covered by the decision of Hon'ble jurisdictional high court. The Id DR could not controvert that how this issue is not squarely covered in favour of the assessee and he also could not show us any other judicial precedent so as to persuade us to disagree with the views of the Id DRP. Further merely because the revenue has filed an SLP before the hon'ble Supreme Court against the decision of Delhi High Court cannot be a reason for sustaining the disallowance. In view of this we do not find any infirmity in the direction of the Id DRP in directing the Id Assessing Officer to delete the disallowance commission paid amounting to Rs. 415441111/-. In the result the ground No. 1 of the appeal of the Revenue is dismissed.”

24. Therefore in view of the decision of the coordinate bench in assessee's own case for assessment year 2009 – 10 we confirm the order of the learned CIT A and dismiss ground number [3] of the appeal of the revenue.
25. Ground number [4] is with respect to the order of the learned CIT – A in deleting the addition of ₹ 18720000 on account of corporate guarantee charges by relying on the decision of the Dispute Resolution Panel in assessee's own case for assessment year 2009 – 10 ignoring the fact that the Department is already in appeal against the order under decision is still pending. The learned authorised representative submitted that this is directly related to the ground number 3 and 4 of the appeal of the assessee, wherein the assessee challenges the action of the learned assessing officer himself determining the arm's length price of the alleged international transaction of the issue of corporate guarantee by the appellant, dehorse the fact that the transfer pricing Officer vide order dated 14 September 2011 accepted the ALP of the all international transactions undertaken by the appellant. He further stated that the CIT – A has also erred in upholding the addition on account of the alleged transaction of issue of corporate guarantee without appreciating that there was no corporate guarantee given by the assessee in the year under consideration for funds raised by NDTV Network plc which is a subsidiary of the appellant. As elaborate arguments are advanced by both parties on this issue, we consider it appropriate to deal with when deciding the relevant grounds of appeal in case of appeal of assessee.

26. Thus except ground number four of the appeal of the learned assessing officer all other grounds are dismissed.
27. Now we come to the appeal of the assessee in ITA number 3865/Del/2014.
28. The first ground of appeal is against the order of the learned CIT – A holding that the order of the assessment dated 3 August 2008 passed by the Asst Commissioner of income tax is not barred by limitation and hence is not bad in law. The assessee was also aggrieved stating that the impugned assessment completed under section 143 (3) of the act is not a valid order in the light of the extended time limit provided under section 153 of the income tax act.
29. The learned authorised representative submitted that this issue is covered against the assessee by the decision of the coordinate bench in case of *AT&T Ltd AT & T Global Network Services (India) (P.) Ltd. v. Dy. CIT* [2017] 86 taxmann.com 158 (Delhi - Trib.) However keep the issue alive this ground is contested.
30. The learned departmental representative vehemently supported the order of the learned CIT – A and submitted that the order is not barred by limitation.
31. We have carefully considered the rival contention and perused the orders of the lower authorities. The identical issue has been decided by the coordinate bench where the accountant member is the author of that decision in *AT & T Global Network Services (India) (P.) Ltd. v. Dy. CIT* [2017] 86 taxmann.com 158 (Delhi - Trib.) dated 18.09.2017 wherein the issue of the limitation was decided. This order of the coordinate bench was challenged before the honourable Delhi High Court. Honourable Delhi High Court in [2018] 97 taxmann.com 462 (Delhi)/[2018] 258 Taxman 197 (Delhi) approved the order of the coordinate bench. In view of this ground number [1] of the appeal of the assessee is dismissed.
32. Ground number [2] of the appeal is against the order of the learned CIT – A in upholding the disallowance of Rs. 2216476/- incurred by the appellant for obtaining license for use of accounting software holding that same were capital in nature. This issue has already been decided while deciding the appeal of the revenue wherein following the order of the coordinate bench for assessment year 2009 – 10 the software expenditure disallowed by the learned assessing officer deleted. Therefore this ground of appeal of the assessee deserves to be allowed. Even otherwise the assessee has not purchased the software but has purchased the license to use this software for its accounting purposes. That is not capital expenditure but revenue expenditure. In view of this ground [2] of the appeal of the assessee is allowed.

33. Ground no [3] and [4] of the appeal are related and linked with ground no 4 of the appeal of the Id AO. The facts of the case show that reference was made under section 92CA to the Addl Director of Income tax [TPO] –ii(4), New Delhi [The Ld Transfer Pricing Officer, TPO] after obtaining necessary approval of The Commissioner of Income Tax-5, Delhi. On reference, The TPO examined international transaction as reported in form number 3CEB submitted by the assessee. On 6/6/2011, the Id AO informed about corporate guarantee issued by the appellant to its subsidiary and therefore asked Id TPO to compute ALP of the same. The learned TPO passed an order on 14/9/2011 under section 92CA(3) of the act with regard to the international transaction as reported in Form No 3CEB and held that those are at arms' length and did not propose any adjustment. However, on enquiry by Id AO asked / enquired from the Id TPO whether the issue of ALP of Corporate Guarantee as per letter forwarded by the AO to him on 6/6/2011 has been considered or not while finalizing the transfer pricing assessment. As per letter dated 01/6/2012, the learned Transfer Pricing Officer informed Id AO that the issue regarding computation of the arm's length price of the corporate guarantee issued by the assessee has not been considered by him while finalizing the transfer pricing orders. Therefore, the learned assessing officer noted that such transaction has not been examined by the learned TPO. He therefore was of the view that an international transaction coming to the notice of the Id AO subsequent to original reference made to Id TPO, Id TPO could have determined the ALP of International Transaction. In this case Id TPO failed to do so despite Id AO informing him. Therefore he proceeded to examine the issue of ALP of the corporate Guarantee.
34. Ld AO noted that during the year NDTV network plc United Kingdom [subsidiary of appellant] has raised step up coupon Bonds 100 million US dollars. NDTV [appellant] is an ultimate holding company of NDTV network plc. For raising the step-up coupon bonds, a corporate guarantee was given by NDTV Ltd. The assessee was asked to explain why the transaction of giving a corporate guarantee to subsidiary may not be treated as international transaction and Consequently, why the adjustment of the arm's length price of the guarantee should not be made.
35. Assessee explained on 28 May 2012 that no corporate guarantee was issued by the assessee for the above impugned transaction. Assessee also informed that the audited accounts of the assessee company states that the appellant company has merely given an undertaking to provide a corporate guarantee for and behalf of the NDTV Network PLC United Kingdom company as and when required. However, no

such corporate guarantee was ever issued by the appellant. Therefore, question of any benefit in the hands of the assessee does not arise. It was also stated that it is not an international transaction.

36. Further on 31/05/2012, assessee explained that the above bonds were repurchased by the UK company in November 2009 at US\$ 72.4 million to significantly reduce its outstanding borrowing and also to cut down on interest burden. The assessee further stated that entire exercise of fund raising and repayment thereon have been done by a UK company which is a separate legal entity. The role of the assessee in raising the above fund by the subsidiary was only limited to undertake to provide a corporate guarantee for and behalf of subsidiary as and when required. It was also stated that such an undertaking was contingent in nature and in fact such contingency never arose as in November 2009 the bonds were repurchased.
37. on 11/06/2012, assessee submitted that appellant had merely provided an undertaking that it shall provide a guarantee (120 days prior to 3 years from the issuance of the bond,) which was never provided by the assessee as the bond were redeemed before the expiry of 120 days prior to the three-year period. The assessee further explained clause 2.2 of the terms and conditions of the bond issue. The assessee further referred to the note to accounts of the assessee wherein it is mentioned that the subsidiary has raised the funds by issuing US dollar 100 million convertible bonds due in 2012 and in connection with that the company has given an undertaking to provide a corporate guarantee for and on behalf of subsidiary as and when required. The assessee then explained the meaning of the word guarantee relying on the OECD commentary.
38. On 20/7/2012 the assessee further explained to the assessing officer about the above fact.
39. However the learned assessing officer rejected the contentions of the assessee and held that financial guarantees are usually provided in relation to loans by affiliates and can be either 'explicit' or 'implicit'. Explicit guarantees are those where a direct assurances given by an affiliate and implicit guarantees are those where being part of a multinational group makes it possible to raise a step-up coupon bonds, which one might not have been able to obtain as an independent entity, or secure more favourable terms. In these instances, the step-up coupon bond holders perceives that the apparent would intervene in the case of any default. The AO also referred to the paragraph number 7.13 of the OECD transfer pricing guidelines on this issue. The AO also noted that no services could be said to be received wherein associated

enterprises for reasons of its affiliation alone has a credit rating higher than it would if it were unaffiliated but an intragroup services would usually exist when the higher credit rating was due to a guarantee by another group member or where the enterprise benefited from the group's reputation deriving from global marketing and public relations campaign. Therefore, he held that assessee company has provided the guarantee to its associated enterprise for raising a step-up coupon bonds. The transaction has resulted in to a direct benefit to its associated enterprise and therefore there is an active promotion of the multinational group's attributes which positively enhances the profit-making potential of particular members of the group. Thereafter, he referred to the various judicial pronouncements on the issue and rejected claim of the assessee that it has only given an undertaking and no corporate guarantee has been given and the bonds have been encashed prior to the three years after the closing date therefore the company has not entered into a corporate guarantee. He referred to the agreement under reference which clearly shows that in the event of default or potential default by the subsidiary company, the assessee was liable for all the dues along with accrued interest to the step-up coupon bonds holders within 60 days of the default. The above clause did not mention anywhere that the assessee would be liable only after three years as claimed by the assessee. So he held that there is a corporate guarantee issued by the assessee company in favour of its subsidiary.

40. Thereafter the learned assessing officer rejecting all the arguments of the assessee applied the CUP method and determined the arm's length price of Guarantee charges at the rate of 4.68 percentage on the value of the bank guarantee on ₹ 400 crores (100 million US dollars) at ₹ 18.72 crores. Such an adjustment was made by the AO on account of arm's length price of the guarantee issued by the assessee to the subsidiary company.
41. The assessee aggrieved with the order of the assessing officer preferred an appeal before the learned CIT – A. The learned CIT – A upheld the addition made by the learned assessing officer vide para number 7.1 of his order as under:-

“7.1 The ALP of corporate guarantee issued by NDTV limited has been determined by the AO. I have carefully examined this issue and also considered the submission made by the appellant and all the relevant material placed on record. The issue has been adequately dealt with by the special bench of honourable ITAT Bangalore in case of Aztec software and technology services Ltd versus the Asst

Commissioner of income tax, Circle – 11 (1) Bangalore in ITA number 584/585/Bangalore/2006 dated 12 June 2007. It has been held by the honourable tribunal that a combined reading of the provisions of section 92C and 92CA of the act reveals that these provisions can be invoked by the AO for determining the arm's length price of international transactions. The AO himself can proceed to determine the ALP when he finds the existence of the circumstances specified in clause (a) to (d) of subsection 3 of section 92C of the act. On the other hand, if the AO considers it necessary or expedient to refer the determination of ALP to the TPO the same can be done under 92 CA (1) of the act. It has further been held by the honourable ITA T that AO is not required to demonstrate the existence of the circumstances set out in clause (a) to (d) of subsection (3) of section 92C of the act before referring the case to the TPO for the following reasons:-

- (i) proceedings under section 92C and 92CA are quite independent of and distinct from each other and the proceedings under section 92CA (1) of the act are not dependent on the proceedings under section 92C (3) of the act
- (ii) the provisions of section 92C (3) of the act confers power on the AO to determine the ALP himself where the circumstances mentioned in clause (a) to (d) of the subsection exist. In such cases, the AO is not bound to refer the case of the assessee to the TPO. On the other hand, the AO may refer the case of the assessee to the TPO if he considers it necessary or expedient to do so.
- (iii) The expression necessary or expedient is quite distinct from an independent of the circumstances mentioned in section 92C (3).

Considering the facts of the case, I hold that the AO can himself determine the ALP of corporate guarantee under section 92C (3) without making reference to the TPO. Thus the action of the AO is upheld.”

42. Further with respect to the determination of the arm's length price, he referred to the order of the learned Dispute Resolution Panel in case of the assessee for assessment year 2009 – 10. He held that the learned DRP has observed that considering the credit rating of the subsidiary, nobody would have subscribed to its bonds without undertaking given by the appellant and it was an implicit guarantee which needed benchmarking. Since the assurance of the appellant was for the issue of corporate guarantee to the extent of 40% of the transactions involved, the learned the DRP has directed the TPO to calculate the guarantee for 40% of the underlying sum for assessment year 2009 – 10. He further held that facts in the present case are exactly similar to the facts as in assessment year 2009 – 10 and therefore he directed the learned assessing officer to calculate the guarantee for 40% of the underlying some. Thus he partly allowed the appeal of the assessee.
43. By the direction of the learned CIT – A, assessee as well as the revenue both are aggrieved and therefore the appeal of the assessing officer challenges the same as per ground number[4] and appeal of the assessee challenges it by ground number [3] & [4] of the appeal.
44. The learned authorised representative, Shri Sachit Jolly, advocate, submitted that as per subscription agreement dated 24/5/2007 entered into between Jefferies international Ltd (Placing agent) and NDTV Netwrok PLC UK, [issuer company] and New Delhi television Ltd [Parent company] [Appellant] , UK subsidiary company proposed to issue step up coupon convertible bonds due on 30 May 2012 in a principal amount of \$ 100 Million. This issue was underwritten by Jefferies international Ltd who was placing agent. The appellant New Delhi television Ltd was parent company. The subscription agreement is placed at page number 49 – 126 of his paper book. He referred to the clause 4 of that agreement where issuer company undertakes that issuer and the parent copany undertakes to procure the bonds at a certain dates. According to clause 4.2 the parent company (appellant) undertakes to the placing agent and the initial investors
- (a) to implement the guarantee specified in the conditions in the manner and by the time specified in the conditions.

Therefore it was the submission that the undertaking was to be given for gurantee at a future date. He further referred to the terms and conditions of the issue of the bonds placed at appendix 1 of the subscription agreement. According to clause .2 of that appendix, guarantee in relation to bondholders redemption was mentioned that the parent company (appellant) undertakes to enter into, by not letter then 120 days

prior to date i.e. three years after the closing date, a guarantee pursuant to which the parent company will guarantee the due and punctual payment of the outstanding amount of the bonds due and payable following receipt of a put notice in accordance with the condition number 9.6. It is further mentioned that however, until such time as the parent company gives a notice of extension of the guarantee to the trustee in accordance with condition 19, in the event of default by the company in payment of the outstanding amount to bondholders due and payable under condition number 9.6, holders of bonds then outstanding shall only be entitled to direct recourse under the guarantee against the parent company in respect of 40% of the specified sum. He submitted that therefore the Id CIT (A) restricted the addition to the extent of 40 % of the addition made by the Id AO. He therefore submitted that such that it never came to happen as bonds were redeemed by the subsidiary company. He further submitted that on the basis of this the learned transfer pricing officer did not make any adjustment. He stated that the AO referred to the foreign tax division for exchange of information before the UK authority which is mentioned at page number one of the assessment order. He further referred that such information was sought by The Additional Commissioner Of Income Tax, Range – 13 to the Joint Secretary FT and TR division by letter dated 20/12/2011. These documents are placed at page number 4-6 of the paper book. He further referred to the communication received from HM Revenue and Customs [HMRC] dated 13 February 2012 wherein that authority requested the PricewaterhouseCoopers LLP for the relevant information. On 23 April 2012, PricewaterhouseCoopers informed to the senior intelligence officer of HMRC Centre for exchange of intelligence, London that with respect to US dollar hundred million convertible bonds issued on 30 May 2007 by the subsidiary company, services of Jefferies international Ltd, a leading global securities and investment banking group was obtained as an underwriter and the placing agent for issuance of bond. It also confirmed that no guarantee was issued by the New Delhi television Ltd (appellant) in respect of the above transaction for and on behalf of NDTV Networks Plc. It was further certified that NDTV network has not paid any amount to Indian company i.e. New Delhi television Ltd in year ending on 31st of March 2008 or any other year for giving an undertaking to provide a corporate guarantee for and on behalf of NDTV networks PLc. He therefore submitted that there is a categorical information received on exchange of information from the UK authorities that there is no guarantee issued by the New Delhi television Ltd in respect of the above transaction and it is only giving an

undertaking to provide a corporate guarantee for and behalf of subsidiary. He therefore submitted that it is categorically proved that no corporate guarantee is issued by the appellant to the subsidiary company. He further submitted that when the UK tax authorities has given an information under the exchange of information article confirming that no guarantee was provided by the appellant to its subsidiaries, the AO should have dropped proceedings and could not have gone beyond the information.

45. He further submitted that in the present case the learned transfer pricing officer did not make any transfer pricing adjustment, however, the learned assessing officer has made the adjustment. He stated that honourable Bombay High Court in Income Tax Appeal Number 281 of 2016 in case of The Principal Commissioner Of Income Tax Versus S G Asia Shareholdings (India) Private Limited dated 27 August 2018 held that for determining the arm's length price of an international transaction the assessing officer should make a reference to the transfer pricing officer which is also governed by the CBDT circular. The honourable High Court also held that once the circular goes unchallenged and binds the revenue, then in the absence of all these, the tribunal held that the assessing officer order cannot be sustained and he could not have proceeded to make the transfer pricing adjustment. He therefore submitted that the adjustment made by the learned assessing officer who is not empowered to do so cannot make any adjustment on account of arm's length price of the corporate guarantee.
46. He further referred to the fact that the special bench was constituted wherein it was submitted by the assessee that the assessee only gave an undertaking and not a corporate guarantee for the bonds issued by its associated enterprises. The assessee supported this fact by referring to certain clauses of the agreement. The special bench as per its order dated 23/8/2017 has held that after hearing extensively to both the parties, in their opinion, assessee only incurred an obligation by giving an undertaking which is short of guarantee. As such the question before the special bench as to whether the giving of corporate guarantee is an international transaction does not arise in the instant appeal. Therefore the special bench returned the finding to be placed before the President of the ITAT. He therefore submitted that when the special bench says that the assessee only incurred an obligation by giving an undertaking which is short of guarantee but not a guarantee, the learned assessing officer should have accepted it and could not have proceeded to make the adjustment. He further referred to the order of the President

ITAT dated 24/8/2017 wherein after taking the order of the special bench into account it was stated that the undertaking given by the assessee was not the corporate guarantee and when there is no corporate guarantee provided in this case the question referred to the special bench has become redundant. He further stated that the revenue as well as the assessee challenged these order of the special bench before the honourable Delhi High Court. In view of this he submitted that when the concurrent authorities have held that there is no corporate guarantee issued by the appellant in favour of its subsidiaries, the learned AO could not have made the addition by determining the arm's length price.

47. Coming to the merits of the case, he submitted that first of all to determine an arm's length price there has to be an international transaction. The learned assessing officer should have established first that there is an international transaction. He submitted that merely giving an undertaking to give a corporate guarantee at a future date cannot be called a transaction and therefore it cannot be an international transaction at all. He referred to the provisions of section 92B where the meaning of 'international transaction' is provided. He further stated that by giving such an undertaking there is no impact on the profit, loss, income or assets of the appellant and therefore the giving of an undertaking cannot result into an international transactions. He further referred to the explanation 1 of section 92B and submitted that the transactions relating to lending and guarantee does not have any impact on the profit and loss account of that year and also very subsequent years. There is no contemplation of any future date or effect arising on such profit and loss account. Hence, there is no international transaction established by Id AO even otherwise. None exists.
48. He further stated that as per agreement dated 24/5/2007 the Jefferies international was an underwriter of hundred percent of the subscription. He submitted that when the subscription of the hundred million US dollar issued by the subsidiary is fully underwritten, there is no reason to give any guarantee by the appellant to its subsidiary company.
49. He further referred to the annual account of New Delhi television Ltd wherein in Note No [5] in schedule B 'Notes to Accounts' it is mentioned that on 30 May 2007, NNPLC has raised funds by issuing hundred million dollar coupon convertible bonds due in 2012 (redeemable at a premium of 7.5%). In connection with this, the company has given an undertaking to provide a corporate guarantee for and behalf of NNPLC, as and when required. These bonds carry a coupon rate (net of

withholding taxes) of 4% for the first year, 6% for the second year and 9% for the balance after maturity. He therefore submitted that the notes on accounts of the appellant also disclosed that it has given an undertaking to provide a corporate guarantee but it has not provided a guarantee at that particular point of time.

50. He further referred to the annual accounts of NDTV networks plc wherein the issue of above convertible bonds are mentioned. He further referred to schedule of borrowing at serial number 12 where the stepup convertible bonds issued are shown as borrowings. He referred to the note attached to that account and stated that in that account also there was a disclosure of an undertaking by the ultimate holding company to provide a corporate guarantee as and when required. Therefore he submitted that even subsidiary accounts also confirm that there is no guarantee given by the appellant.
51. He further referred to the minutes dated 22 May 2007 of the subsidiary company where the agreements are approved. There are also the discussion only on an undertaking. He further referred to the item number 14 of the minutes of the appellant dated 22 May 2007 where also the undertaking was discussed and what could be the events in which the guarantee would be issued by the appellant company. Thus the minutes of the appellant as well as the Subsidiary both also confirmed about the undertaking only.
52. In the end he referred to the notice issued under section 148 of the income tax act on 4/8/2015 by the learned assessing officer wherein in para number [6] the issue of raising funds issuing US dollar hundred million coupon convertible bonds are discussed. He submitted that the learned assessing officer in para number [7] has mentioned that that the funds received by subsidiary company are the funds of the assessee under sham transaction and there is no reason to believe that the funds amounting to Rs 405.09 crores introduced into the books of the subsidiary company during the financial year 2007 – 08 in the form of stepp-up coupon bonds pertain to the assessee only. On this reason, case of the assessee for this very year is reopened. He therefore submitted that if that is a sham transaction and if the money belongs to the assessee itself, there cannot be any reason of giving a corporate guarantee. He submitted that nobody gives a corporate guarantee for security of his own money. He submitted that this notice was challenged by the assessee which was decided by the honourable Delhi High Court in 84 taxman.com 136 (Delhi) wherein the revenue itself is contested that this money belongs to the appellant only. He extensively referred to the various contentions raised by the

revenue therein. He therefore submitted that on this count also the addition made by the learned assessing officer cannot sustain.

53. In view of the above submission he submitted that that the addition made by the learned assessing officer is not sustainable on law as well as on the facts of the case.
54. The learned CIT DR supported the orders of the lower authorities. He submitted that there is no error in the order of the learned assessing officer in determining the arm's length price of an international transaction. He referred to assessment order para number 7.1 and 7.2 of the assessing officer wherein the learned assessing officer specifically referred the matter to the learned transfer pricing Officer. He submitted that when the learned transfer pricing officer did not examine the arm's length price of an international transaction and passes an order under section 92 CA (3), then the learned assessing officer is duty-bound to examine the transaction and its arm's length price. The learned assessing officer is precluded from determining the arm's length price only when the TPO determines the arm's length price. He therefore submitted that therefore there is no provision in the law in order to restrict the powers of the assessing officer to determine the ALP, if the transactions are not despite reference were not attended to by the by learned TPO . He referred to para number 7.1 of the order of the learned CIT appeal was dealt with this issue. He further stated that when the transfer pricing officer has specifically communicated in writing that he has not determined the ALP of the guarantee commission then the learned assessing officer has enough powers and is duty-bound to determine the arm's length price of international transaction which was not considered by the transfer pricing Officer.
55. With respect to the information of the UK tax authorities he submitted that it is merely an opinion of the PricewaterhouseCoopers obtained by HMRC and not an opinion of the UK tax authorities. Therefore it does not bind the assessing officer.
56. With respect to the order of the special bench, the learned departmental representative submitted that the order of special bench was of disbanding of special bench. The special bench was constituted to just determine whether the issue of corporate guarantee can be a international transaction or not. He submitted that the issue before the special bench was not that such an undertaking can also be considered as a corporate guarantee or not. In view of this the order of the special bench does not come in between the powers of the learned assessing officer as that was not the issue before the special bench.

57. With respect to the international transaction he submitted that according to section 92B of the act issue of a guarantee is a service and therefore it is a financial transaction which is covered specifically by introduction of an explanation [1] as international transaction.
58. He further submitted that even the undertaking to give a corporate guarantee is an assurance by the appellant to the investor that the assessee will give a corporate guarantee even if at a future date. It is amounting to issuing the guarantee today itself. He submitted so because of the reason that the assessee could not have backed out of this undertaking issued by it to the investors. He therefore submitted that giving an undertaking to give a corporate guarantee at a future date is itself a corporate guarantee. He further referred to the financial of the subsidiary company and submitted that that company in absence of the guarantee or undertaking by the appellant could not have garnered \$ 100 million on its own.
59. He further referred to the subscription agreement and submitted that if the assessee is not to be involved in the whole financial transaction of the subscription of the convertible bonds of \$ 100 Million, there was no reason that the name of the appellant could have been taken as one of the parties to the subscription agreement. He submitted that inclusion of the name of the appellant as one of the parties in the subscription agreement itself shows that assessee is issuing an undertaking to guarantee the recovery of the sum of the investors. He therefore submitted that this is also an international transaction.
60. Referring to the order of the learned dispute resolution panel in case of the assessee for assessment year 2009 – 10 is submitted that the DRP itself has stated that it is an implicit guarantee and it is nowhere stated that it is not an international transaction.
61. In view of this he supported the order of the learned assessing officer and the learned CIT – A in determining the arm's length price of the international transaction entered into by the assessee in the form of corporate guarantee.
62. We have carefully considered the rival contention and perused the orders of the lower authorities. The first argument of the learned authorised representative is that the learned assessing officer is precluded from making any adjustment on account of the arm's length price of the international transaction when specific powers are assigned by CBDT circular to the transfer pricing Officer. The learned authorised representative has relied upon the decision of the honourable Bombay High Court which reached at the doorstep of honourable Supreme Court in principle

Commissioner of income tax versus SG Asia Holdings private limited [2019] 108 taxmann.com 213 (SC)/[2019] 266 Taxman 451 (SC) where in the order of the honourable Bombay High Court in Pr CIT Holdings (India) (P.) Ltd. [2019] 102 taxmann.com 306 (Bom.) Was partly affirmed. The honourable Supreme Court held that view of the guidelines issued by the CBDT in Instruction No.3/2003 the Tribunal was right in observing that by not making reference to the TPO, the Assessing Officer had breached the mandatory instructions issued by the CBDT. The conclusion so arrived at by the Tribunal is not found to be incorrect. The honourable Supreme Court held as under:-

“2. The facts leading to the filing of this Appeal are as under:—

- (A) The respondent had received certain amount of brokerage from its parent company. During the assessment proceedings the respondent was directed to furnish details about the parent company and the rate of brokerage that was charged. After the details were furnished, the respondent was asked to establish if the parent company was involved in arbitrage activity and whether the rate charged was higher. After considering the material on record, according to the Assessing Officer, the brokerage charged by the respondent was only 0.05% which was found to be at a lower rate as compared to the prevalent rates in market. The Assessing Officer, therefore, while computing the assessment under Section 143(3) of the Income Tax Act, 1961 ('the Act', for short), by his order dated 27.12.2007 made an addition of Rs.2,89,82,746/- under Section 92 of the Act.
- (B) The respondent being aggrieved preferred an appeal before the CIT(A)¹, who by his order dated 16.02.2009 confirmed the addition made by the Assessing Officer and dismissed the appeal. The matter was carried further by filing ITA No.2399/Mum/2009 before the Tribunal.
- (C) The Tribunal by its order dated 22.04.2015 set aside the findings rendered by the first two authorities and held that transfer pricing adjustment made by the Assessing Officer was contrary to the mandatory instructions issued by CBDT² in its Instruction No.3/2003 dated 20.05.2003. While allowing the appeal, the Tribunal observed as under:—

"16.1 After considering the entire judicial discussion discussed hereinabove, in our considered opinion, the mandatory instructions issued by the Central Board of Direct Taxes cannot be brushed aside lightly. By not making reference to the Transfer Pricing Officer, the AO has breached the mandatory instructions issued by the CBDT thereby

making the assessment order on this issue in violation of the provisions of the law. We, therefore, set aside the findings of the Ld. CIT(A) on this issue and hold that the Transfer Pricing Adjustments made by the AO in contradiction to the mandatory instructions of the CBDT is bad in law. Here, we would like to make it clear that the assessment order is good but the Transfer Pricing Adjustments made therein are bad in law. Ground No.11 is therefore partly allowed.

16.2 Before parting with this issue, the Ld. DR has emphasized that if the AO has not followed the mandatory directions, the case may be set aside to the file of the AO so that he may refer the matter to the TPO. We do not subscribe to this argument of the Ld. DR for the simple reason that the Tribunal is an Appellate Authority and therefore cannot interfere in the administrative matters which are mandatory as per the provisions of the Act. Reference to the TPO is an administrative matter which was supposed to be followed by the AO which he has failed to do so. The Tribunal cannot make any good to such lapse made by the AO.

17. As we have held that T.P. Adjustments are bad in law, we do not find it necessary to dwell into the merits of the case.

18. In the result, the appeal filed by the assessee is partly allowed."

3. The view so taken by the Tribunal was affirmed by the High Court which is presently under Appeal. We heard Mr. Mahabir Singh, learned Senior Advocate in support of the Appeal and Mr. Arijit Chakravarty, learned Advocate for the Respondent.

4. Instruction No.3/2003 dated 20.05.2003 which weighed with the Tribunal and the High Court, is as under:—

"Instruction No. 3/2003

SECTION 92 OF THE INCOME TAX ACT, 1961 – TRANSFER PRICING – COMPUTATION OF INCOME FROM INTERNATIONAL TRANSACTION HAVING REGARD TO ARM'S LENGTH PRICE UNDER SECTION 92 – GUIDELINES TO TRANSFER PRICING OFFICERS AND ASSESSING OFFICERS TO OPERATIONALISE TRANSFER PRICING PROVISIONS AND TO HAVE PROCEDURAL UNIFORMITY.

INSTRUCTION NO. 3/2003, DATED 20-05-2003

(SUPERSEDED BY INSTRUCTION NO.15/2015 (F.NO.500/9/2015-APA-II), DATED 16-10-2015)

The provisions relating to transfer price contained in sections 92 to 92F of the Income-tax Act, have come into force with effect from assessment year 2002-03. In terms of the provisions, income from an international transaction is to be computed having regard to arm's length price between the associated enterprises. Further, in terms of Section 92CA, a Transfer Pricing Officer, on

a reference received from the Assessing Officer, is required to determine arm's length price of an international transaction by an order and the Assessing Officer is required to compute the income having regard to the price so determined by the TPO. The notification regarding jurisdiction of TPOs and their controlling officers have been issued by the Central Board of Direct Taxes and the copies thereof are enclosed for ready reference as Annexure II. In order to maintain uniformity of procedure and to ensure that work in this important area proceeds smoothly and effectively, the following guidelines are hereby issued:

(i) *Reference to Transfer Pricing Officer (TPO):-* The Power to determine arm's length price in an international transaction is contained in sub-section (3) of section 92C. However, section 92CA provides that where the Assessing Officer considers it necessary or expedient so to do, he may refer the computation of arm's length price in relation to an international transaction to the TPO. Sub-section (3) of section 92CA provides that the TPO after taking into account the material available with him shall, by an order in writing, determine the arm's length price in accordance with sub-section (3) of section 92C. Sub-Section (4) of section 92CA provides that on receipt of the order of the TPO, the Assessing Officer shall proceed to compute the total income of the assessee having regard to the arm's length price, determined by the TPO. Thus, whereas the determination of the arm's length price, wherever reference is made to him, is required to be done by the TPO under sub-section (3) of section 92CA, read with sub-section (3) of section 92C, the computation of total income having regard to the arm's length price so determined by the TPO is required to be done by the Assessing Officer under sub-section (4) of section 92C, read with sub-section (4) of section 92CA.

In order to make a reference to the TPO, the Assessing Officer has to satisfy himself that the taxpayer has entered into an international transaction with an associated enterprise. One of the sources from which the factual information regarding international transaction can be gathered is Form No.2CEB filed with the return which is in the nature of an accountant's report containing basic details of an international transaction entered into by the taxpayer during the year and the associated enterprise with which such transaction is entered into, the nature of documents maintained and the method followed. Thus, the primary details regarding such international transactions would normally be available in the accountant's report. The Assessing Officer can arrive at *prima facie* belief on the basis of these details whether a reference is considered necessary. No detailed enquiries are needed at this stage and the Assessing Officer should not embark upon scrutinizing the correctness or otherwise of the price of the international transaction at this stage. In the initial years of implementation of these provisions and pending development of adequate database, it would be appropriate if a small number of cases are selected for scrutiny of transfer price and these are dealt with effectively. The Central Board of Direct Taxes, therefore, have decided that wherever the aggregate value of international transaction exceeds Rs.5 crores, the case should be picked up for scrutiny and reference under section 92CA be made to the TPO. If there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprises the aggregate value of which exceeds Rs.5 crores the transaction

should be referred to TPO. Before making reference to the TPO, the Assessing Officer has to seek approval of the Commissioner/Director as contemplated under the Act. Under the provisions of section 92CA reference is in relation to the international transaction. Hence all transactions have to be explicitly mentioned in the letter of reference. Since the case will be selected for scrutiny before making reference to the TPO, the Assessing Officer may proceed to examine other aspects of the case during pendency of assessment proceedings but await the report of the TPO on the value of international transaction before making final assessment.

The threshold limit of Rs.5 crores will be reviewed depending upon the workload of the TPOs.

The work relating to selection of cases for scrutiny and reference to TPO on the above basis in respect of pending returns filed for the assessment year 2002-03 should be completed by June 30, 2003.

(ii) Role of Transfer Pricing Officer:- The role of the TPO begins after a reference is received from the Assessing Officer. In terms of section 92CA this role is limited to the determination of arm's length price in relation to the international transaction(s) referred to him by the Assessing Officer. If during the course of proceedings before him it is found that there are certain other transactions; which have not been referred to him by the Assessing Officer, he will have to take up the matter with the Assessing Officer so that a fresh reference is received with regard to such transactions. It may be noted that the reference to the TPO is transaction and enterprise specific.

The transfer price has to be determined by the TPO in terms of section 92C. The price has to be determined by any one of the methods stipulated in sub-section (1) of section 92C and by applying the most appropriate method referred to in sub-section (2) thereof. There may be occasions where application of the most appropriate method provides results which are different but equally reliable. In all such cases, further scrutiny may be necessary to evaluate the appropriateness of the method, the correctness of the data, weight given to various factors and so on. The selection of the most appropriate method will depend upon the facts of the case and the factors mentioned in rules contained in rule 10C. The TPO after taking to account all relevant facts and data available to him shall determine arm's length price and pass a speaking order after obtaining the approval of the DIT (TP). The order should contain details of the data used, reasons for arriving at a certain price and the applicability of methods. It may be emphasized that the application of method including the application of the most appropriate method, the data used, factors governing the applicability of respective methods, computation of price under a given method will all be subjected to judicial scrutiny. It is, therefore, necessary that the order of the TPO contains adequate reasons on all these counts. Copies of the documents or the relevant data used in arriving at the arm's length price should be made available to the Assessing Officer for his records and use at subsequent stages of appellate or penal proceedings.

(iii) Role of the Assessing Officer after receipt of "arm's length price": Under sub-section (4) of section 92C, the Assessing Officer has to compute total income of the assessee having regards to the arm's length price so determined by the TPO. While sub-section (4) of section 92CA clearly

provides that such computation of income will be made having regard to the arm's length price so determined by the TPO, it is imperative that a formal opportunity is given to the taxpayer before making adjustments to the total income. The opportunity with regard to the determination of arm's length price has already been given by the TPO and, therefore, opportunity by the Assessing Officer, for final determination of income under sub-section (4) of section 92C, read with sub-section (4) of section 92CA is to be given by the Assessing Officer.

(iv) *Maintenance of database*: It is to be ensured by the DIT (Transfer Pricing) that the reference received from the Assessing Officer is dealt with expeditiously so as to leave the Assessing Officer with sufficient time to offer an opportunity of being heard of the taxpayer before computing the income and completing the assessment. In order to ensure that all the references are attended to timely and effectively, a record of all such developments should be maintained in the format enclosed as Annexure I to these guidelines. This format will also serve as an important data base for future action and also help ensure uniformity in the determination of "arm's length price" in identical or substantially identical cases.

These instructions are under Section 119 of the Income-tax Act.

ANNEXURE I

Register of record to be maintained by Transfer Pricing Officer

1	2	3	4	5	6	7	8	9	10	11	12	13
Sl. No.	Date of receipt of reference from A.O.	Name of the A.O. making reference	Name and address of the taxpayer and nature of business	Nature and quantum of international transaction as per section 92B and assessment year	Name and address of the associated enterprise and the country in which it is resident	Nature of association as per section 92A	Date of issue of notice to taxpayer	Transfer price as taken by the taxpayer	Arm's length price as determined by the Transfer Pricing Officer under section 92CA (3)	Method applied	Reference to any database adopted by TPO	Date of despatch of the order of the A.O.

ANNEXURE II

In exercise of the power conferred by sub-section (1) and sub-section (2) of section 120 of the Income-tax Act, 1961, the Central Board of Direct Taxes hereby directs that the Transfer Pricing Officers mentioned in column 2 having their headquarters mentioned in column 3 shall exercise such powers and perform such function of Transfer Pricing Officers as mentioned in Section 92CA for the purpose of sections 92C and 92D of the Act, in respect of persons or classes of persons mentioned in column 5:"

5. It was submitted by Mr. Mahabir Singh, learned Senior Advocate that the expression "*.....the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction or specified domestic transaction under Section 92C to the Transfer Pricing Officer*" occurring in Section 92CA of the Act signified that discretion was vested in the Assessing Officer and it would not be mandatory in every single case that he must refer the issue of computation of the Arm's Length Price to the TPO³.

6. However, the following expressions employed in Instruction No.3/2003 put the matter in a different perspective: —

"... ..The Assessing Officer can arrive at *prima facie* belief on the basis of these details whether a reference is considered necessary. No detailed enquiries are needed at this stage and the Assessing Officer should not embark upon scrutinizing the correctness or otherwise of the price of the international transaction at this stage... .. If there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprise the aggregate value of which exceeds Rs.5 crores, the transactions should be referred to the TPO. Since the case will be selected for scrutiny before making reference to the TPO, the Assessing Officer may proceed to examine other aspects of the case during pendency of assessment proceedings but await the report of the TPO on the value of international transaction before making final assessment.

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(vi) *Role of the Assessing Officer after receipt of "arm's length price"*: Under sub-section (4) of section 92C, the Assessing Officer has to compute total income of the assessee having regard to the arm's length price so determined by the TPO."

7. In view of the guidelines issued by the CBDT in Instruction No.3/2003 the Tribunal was right in observing that by not making reference to the TPO, the Assessing Officer had breached the mandatory instructions issued by the CBDT. We do not find the conclusion so arrived at by the Tribunal to be incorrect.

8. However, the Tribunal ought to have accepted the submission made by the Departmental Representative as quoted in para 16.2 of its order and the matter ought to have been restored to the file of the Assessing Officer so that appropriate reference could be made to the TPO. It would therefore be upto the authorities and the Commissioner concerned to consider the matter in terms of Sub-Section (1) of Section 92CA of the Act.

9. We, therefore, allow this Appeal to the aforesaid extent and direct that it would now be upto the Assessing Officer to take appropriate steps in terms of Instruction No.3/2003."

63. In view of the above decision where the honourable Supreme Court held that in that particular case the matter ought to have been restored to the file of the assessing officer so that appropriate reference could be made to the transfer pricing Officer, we also restore the matter back to the file of the learned assessing officer so that appropriate reference could be made to the TPO. We leave all other issues open and also grant liberty to the assessee to agitate them before the learned assessing officer/TPO. The authorities below will pass an appropriate order after granting an opportunity of hearing to the assessee. Accordingly ground number three and four of the appeal of the assessee as well as ground number four of the appeal of the AO are partly allowed.
64. Ground number [5] of the appeal of the assessee is against the order of the learned CIT – A in upholding the action of the learned assessing officer in making a disallowance of ₹ 8 96000 invoking the provisions of section 14 A of the income tax act.
65. However during the course of appellate proceedings before us the learned AR submitted that there is no exempt income derived by the appellant in the year under consideration and therefore the issue is squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in case of Cheminvest Ltd. This fact has not been disputed by the learned departmental representative. Honourable Delhi High Court in Cheminvest Ltd versus CIT 378 ITR 33 and held that:-
- “23. In the context of the facts enumerated hereinbefore the court answers the question framed by holding that the expression "does not form part of the total income" in section 14A of the Act envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, section 14A will not apply if no exempt income is received or receivable during the relevant previous year.”
66. Thus as there is no exempt income is received or receivable during the relevant previous year in the case of the assessee for this year, the disallowance under section 14 A cannot be made. Accordingly we allow ground number [5] of the appeal of the assessee and direct the learned assessing officer to delete the disallowance of ₹ 8 96000/—.

67. Ground number [6] of the appeal of the assessee is against the order of the learned CIT – A wherein he has upheld the disallowance made by the learned assessing officer of ₹ 7 3843516 being the transmission and uplinking charges paid to M/s Intel I set Corporation by invoking the provisions of section 40 (a (ia) of the income tax act.
68. The learned authorised representative submitted that identical issue is decided in case of the assessee for assessment year 2009 – 10 wherein such disallowance was deleted.
69. The learned departmental representative supported the order of the learned lower authorities.
70. Identical issue has been considered by the coordinate bench in case of the assessee for assessment year 2009 – 10 is under:-

“57. The second ground of appeal is against the deletion of disallowance of Rs. 78123855/-on account of transmission and up linking charges paid by the assessee to Intelsat Corporation USA without deduction of tax at source. During the course of assessment proceedings it was found by the Id AO that assessee has made payment of transmission and up linking charges of Rs. 145251704/- and out of which a sum of Rs. 78123855/- was paid to M/s. Intelsat Corporation USA. The Id Assessing Officer was of the view that above is deemed income of the recipient u/s 9(1) of the Act and therefore, the assessee was liable to deduct tax at source on such payment. Hence, he disallowed the above sum holding as under:—

"4. Transmission and uplinking Charges

In the P & L Account the assessee had debited Rs.14,52,51,704/- under the head Transmission and Uplinking Charges. In the notes to account the assessee has furnished the details of expenditure in foreign currency. It has been reported that Rs. 14,52,51,704 has been incurred under the head subscription, uplinking and news service charges. Vide order sheet dt.15.02.2013, the assessee was required to furnish the details regarding TDS on uplinking and transmission charges.

The assessee in its reply dt. 11.03.2013 and 22.03.2013, submitted that the payment has been made to a foreign company and in view of the decision of Hon'ble ITAT Delhi, in *DCIT v. PanAmSat International System*

Inc.103 TTJ 861 (Delhi), it is not obliged to deduct TDS. The relevant para of reply dt. 11.03.2013 and 22.03.2013 are reproduced as under:

Reply dated 11.3.2013 (filed on 22.03.2013)

We have been show-caused as to why disallowance be not be made in respect of transmission and uplinking charges for the non-deduction of TDS u/s 40(1)(ia) paid to Intelsat? Please note that we have already given the details of transmission and uplinking charges to your honour vide our submission dated 11th March 2013. We reiterate that the provisions of TDS/withholding taxes were fully complied with. The payments were made after obtaining the requisite certificates from the Chartered Accountant as defined in the explanation to section 288B of the Income Tax Act'1961. Copies of Form 15CA/CB issued by an independent chartered accountant were also placed before you.

We respectfully submit that there should not be any disallowance on account of non-deduction of TDS/withholding taxes from the payments made to Intelsat Corporation, we are giving below a brief note on the same:

During the year under consideration, the assessee Company booked the expense of Rs. 7,81,23,855/- on account of transponder services received from M/s Intelsat Corporation (Intelsat) in terms of its agreement for the use of satellite (transponder capacity).

Before we proceed to our specific submission and a fact of the case, we here-in-below submits the nature of transaction entered between the assessee Company and Intelsat Corporation to understand its taxability and application of provisions of section 195 of the Act.

The assessee Company is engaged in the business of broadcasting, operating a TV channel. The assessee Company video-graphs events that takes place as and when they happen in the form of programs and by using transmission and up-linking facilities, it sends signals to a satellite that is hovering in space. The signals sent to the satellite are decoded and downlinked over the area covered by the satellite. A transponder is a part of the satellite which receives such signals from the earth stations and re-transmits the same back to the earth with or without amplifying them.

The assessee Company entered into an arrangement with Intelsat Corporation, a Company incorporated in and resident of USA for using such transponder capacity, to make the signals available to the cable operators, who in turn beam the signals to the viewers in their homes.

The above services are like standard facility used for transmission of programs by various media companies. The assessee Company makes use of such facility during the year provided by the Intelsat Corporation.

The assessee Company most respectfully submits the following points for favourable consideration on merits:

The payments in question made to Intelsat Corporation are not a "Royalty" within the provisions of Act as they exist during the year in question. (A retrospective amendment is made in Section 9(1)(vi) by the Finance Act, 2012 to include consideration paid for the use or right to use of transmission by satellite within the ambit of the definition of "Royalty")

Even after the above amendment in the Income Tax Act, 1961, there is no change in definition of the term 'Royalty' under the DTAA between the India - USA. Therefore, even today the payments in question could not be taxed as "Royalty" in the hands of recipient in view of the favourable position on this issue in relevant DTAA.

These payments were made after obtaining the requisite certificates from the Chartered Accountant (CA) who certified that the above sums were not chargeable to tax in India, as it constituted business income under Article 7 of the DTAA and in the absence of Permanent Establishment ('PE'), same could not be liable to tax in India.

Intelsat Corporation is a non-resident company incorporated under the laws of USA and is a tax resident of USA and, therefore, the provisions of DTAA entered between India and USA are applicable on Intelsat which are more beneficial to Intelsat.

For the year in question, the revenue of transmission and up-linking facilities in the hands of Intelsat Corporation were already held not taxable by the Honble Delhi High Court vide order dated 28/9/2012.

The issue whether the recipient of such charges is liable to tax in India is also settled by the Jurisdictional High Court in the case of *Asia Satellite*

Telecommunications Co. Ltd. v. DIT, (332 ITR 340) in favour of the taxpayer. Similarly, such charges were also held not liable to tax in India in view of Article 12(3) of DTAA entered between India and USA in the case of *DCIT v. PanAmSat International System Inc* (103 TTJ 861 (Delhi)).

In view of the facts and the legal position stated above, it is clear that the assessee Company had no liability to deduct tax on such payments under section 195 of the Act which provides that any person would be liable to deduct tax if the payments made to non-resident are chargeable to tax. When it has already been held by the jurisdictional High Court/Tribunal that such sum is not taxable in India in the recipient, no liability could be fastened on the payer to deduct on such sum. Thus, the disallowance of above sum by invoking the provisions of section 40(a)(i) of the Act will be arbitrary and unwarranted.

The legal view prevailing at the time of previous year 2008-09 was that such payments were not chargeable to tax in India under section 9(1)(vi) read with section 195 of the Act. Therefore the assessee Company was correct in law in not deducting tax at source on such payments at that point of time. The case of the assessee Company is also supported from the fact that Intelsat Corporation was held not liable to tax in India by the Jurisdictional High Court.

Without prejudice to above submissions on merit and in alternate, the assessee Company most respectfully submits that on the facts of the case the disallowance under section 40(a)(i) of the Act is unwarranted as the above provisions are applicable only in a situation where the expenses remain unpaid/payable as on 31st March of the previous year and no taxes have been deducted/deposited on the same, are not applicable in the present case. To support the above, reliance is placed on the decision in the case of ***Merilyn Shipping & Transports v. Addl. CIT*, 146 ITJ 1, ITAT (Vishakhapatnam)** wherein it has been held that **section 40a(ia) of the Act can be invoked only to disallow expenditure of the nature referred to therein which is shown as payable as on the date of balance sheet.**

It is admitted fact in present case that the above amount were paid during the year in the foreign currency as disclosed in the Audited Accounts of

the year in question Therefore, the provision of section 40(a)(ia) of the Act could not be invoked in view of the decision in the case of ***Merilyn Shipping & Transports (supra)*** as no expenses remained as payable as on March 31, 2009. Thus, in alternate on this account also no addition is warranted.

The submission of assessee was duly considered and are not acceptable. The payments made under the head Transmission and uplinking charges are covered under the definition of royalty as define in section 9 of the I. T. Act. The provisions of the section 9 which defines the term royalty are reproduced as under:

Section 9 Income deemed to accrue or arise in India.

(1) The following incomes shall be deemed to accrue or arise in India....

(vi) income by way of royalty

payable by-

- | | |
|-----|---|
| (a) | The Government; or |
| (b) | A person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or.... |
| (c) | Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of , any data, documentation, drawing or specification |

relating to any patent, invention, model, design,

secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government.

87a. *Explanation 6* - For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for downlinking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret...

(87a. Inserted by the Finance Act, 2012, w.r.e.f. 1-6-1976.

The provisions of section 9(1)(vi) regarding income by way of royalty were very clear and specific. The word "process" included the Transmission and uplinking charges however, looking to the disputes in the various courts and contrary judgments in this regard, a clarification / amendment has been inserted by the Finance Act, 2012 (with retrospective effect from 01.06.1976) which clearly says that the "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal). In view of the present status of the legislation the Transmission and uplinking charges paid by the assessee without deducting any TDS would invite the consequences of provisions of section 40(a)(i).

The assessee argument that no technical knowledge has been made available to it therefore it is not covered in the included services. The submission of the assessee is acceptable to the extent that no technical knowledge has been made available. However, for royalty the requirement of make available of technical knowledge is not required under the DTAA. It is only in the case of fee for technical services/include services. Therefore the clause regarding make available in the DTAA will not help the assessee in any way, from the liability of deducting TDS on Transmission and Uplinking charges.

The decision of Honble ITAT Delhi in the case of PANM international system is also not applicable because the payment of transmission and uplinking charges has now been covered under the definition of royalty through amendment in Finance Act, 2012. In the case of PANM International system the issue examined by the Honble ITAT was regarding making technical knowledge available for the TV Channels. Where in the case under consideration the uplinking and transmission charges are being taken as royalty as defined u/s 9(1)(Vi).

The above definition clearly indicates that transmission and uplinking charges are covered under the definition of royalty (process) and it has been categorically introduced by the Finance Act 2012 that process includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal). Since the transmission and uplinking charges are covered under the definition of royalty as defined under the provision of section 9 therefore any payment made in respect of royalty to a person who is not resident in India, will also be a income deemed or accrue or arising in India. As the expense of transmission and uplinking charges of Rs. 7,81,23,855/- to M/s Intelsat corporation is a deemed income which has arisen in India therefore, the assessee was liable to deduct TDS on this payment, under the provision of section 195 therefore, this payment of transmission and uplinking charges to M/s Intelsat Corporation is not allowable under the provisions of section 4 (a)(i). I am satisfied that the assessee has furnished inaccurate particulars of its income and has concealed its correct income on this issue, therefore, penalty proceedings u/s 271 (1)(C) of I.Tax Act have been separately initiated."

58. Aggrieved by the draft order of the Id Assessing Officer assessee preferred objection before the Id DRP who vide para No. 7 of its direction directed the AO to delete the above disallowance as under:—

"6. Disallowance of transmission and up-linking charges u/s 40(a)(i) amounting to Rs. 7,81,23,855/-

Assessee had paid the above amount to Intelsat Corporation, a company incorporated in USA for using transponder capacity, to make the signals available for the cable operators. The AO has disallowed this sum

because no TDS was made. Assessee has contended that in the case of Intelsat Corporation, the Hon'ble High Court of Delhi vide order dated 28.09.2012 has held that no tax was payable by the company on account of the revenue of transmission and up-linking facilities. In view of this, there is no question of TDS on the amounts payable to Intelsat Corporation. DRP has considered the argument of the assessee. In view of the binding decision coming from jurisdiction Delhi High Court, the contention of the assessee is accepted. The AO is directed to drop the proposed disallowance."

59. Before us the Id DR relied upon the draft assessment order whereas the Id AR vehemently submitted that the issue is squarely covered by the decision of Hon'ble Delhi High Court in case of Intelsat Corporation dated 28.09.2012. He therefore stated that there is no error in the order of the Id DRP.

60. We have carefully considered the rival contentions and also perused the facts of the case as well as the decision of the Hon'ble Delhi High Court. We are convinced with the argument of the Id AR that the issue is squarely covered by the decision of Hon'ble jurisdictional high court. The Id DR could not controvert that how this issue is not squarely covered in favour of the assessee and he also could not show us any other judicial precedent so as to persuade us to disagree with the views of the Id DRP. Further merely because the revenue has filed an SLP before the hon'ble Supreme Court against the decision of Delhi High Court cannot be a reason for sustaining the disallowance. In view of this we do not find any infirmity in the direction of the Id DRP in directing the Id Assessing Officer to delete the disallowance transmission and up linking charges paid to Intelsat Corporation USA of Rs. 78123855/- In the result the ground No. 2 of the appeal of the Revenue is dismissed."

Therefore respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2009 – 10, we direct learned assessing officer to delete the disallowance of ₹ 73843516/- on account of non-deduction of tax at source on Transmission and uplinking charges. Accordingly ground number [6], [7] and [8] of the appeal are allowed.

71. [9]th ground of appeal is with respect to the order of the learned CIT – A in upholding the action of the assessing officer in re characterizing the income declared by the appellant as capital gain pursuant to sale of 212500 shares of M/s Astrao Awani Networks Limited as income from other sources and making an addition of ₹ 1 05789125/–.
72. During the year under consideration the assessee has shown income from capital gain amounting to ₹ 105789125/– on sale of shares of Astro awani Networks Limited. The learned assessing officer noted from the para number [3] of the 'Notes to accounts' of the assessee that assessee has sold its investment in the above company for ₹ 115681000/– to ND TV Emerging Market BV. These shares were acquired by the assessee for ₹ 46.55 per share in February 2007 and on the basis of the valuation report the assessee sold in the month of March 2008 at ₹ 544.38 per share . Claim of the assessee is that the transaction of the sale of shares was in good faith and in no manner motivated to show that higher profits in the hands of the appellant. The transaction has been done in compliance with FEMA regulations and on the basis of valuation of shares done by an independent valuer.
73. However the learned assessing officer noted that the shares of increasingly loss-making company were sold at ₹ 544.38 per share which had been purchased just 13 months before the date of sale for the value of Rs. 46.55 per share. Therefore according to him it is only a corporate business restructuring whereby the appellant has sold the shares which otherwise had no value to its subsidiary at highly inflated rate. Thus AO held that the receipts shown over and above the purchase price of the above shares should be taxed as income from other sources instead of capital gain shown by the appellant in the return of income. Therefore Rs. 105789125/- was added as other income of the assessee.
74. On appeal before the learned CIT – A he agreed with the finding of the learned assessing officer that the valuation report of shares of the company is not reliable. Therefore relying upon the decision of the honourable Supreme Court in 44 ITR 362 and 82 ITR 540 the order of the learned assessing officer taxing the excess of sale price over the cost of those shares as income from other sources instead of capital gain was upheld. Therefore assessee is in appeal before us.
75. The learned authorised representative submitted that the assessee has sold the shares which it has purchased and held for more than 13 months of an unlisted entity. He submitted that there is a transfer of a capital asset and therefore same should be held as transfer of a capital asset and capital gain is required to be

charged. He submitted that without any evidence the learned assessing officer as well as the learned CIT – A has held that the same is income from other sources. He referred to circular number 225/12/2016 issued by the central board of direct taxes on second of may 2016 with respect to the transfer of shares whether to be considered as a capital gain or business income. He submitted that the genuineness of the transaction in unlisted sale are not questioned. He further submitted that there is no issue of pertaining to lifting of the corporate veil and therefore the action of the learned assessing officer in taxing it as income from other sources is not in consonance with the provisions of the income tax act.

76. The learned CIT DR vehemently supported the orders of the lower authorities. He submitted that when the assessee has purchased the shares before 13 months at miniscule price of a consistent loss-making company and subsequently sold to the subsidiary at a phenomenal price itself shows that it is not a transfer of a capital asset but it is a device to show the higher profit in the books of the company. He therefore supported the reasoning is of the lower authorities.
77. We have carefully considered the rival contentions and perused the orders of the lower authorities. On examination of the facts it is apparent that assessee has sold shares which were purchased by it before 13 months of a company and subsequently sold at substantially higher price to the associate concern of the assessee and disclosed the same as capital gain. It is the shares of an unlisted company which were transferred by the assessee. It is not in dispute that those shares were shown as a capital asset by the company. The CBDT circular dated 2/5/2006 speaks about the characterisation of income from transaction in listed securities as well as unlisted securities. As per para number two of that circular it is provided that for determining the tax treatment of income arising from transfer of unlisted shares for which no formal market exists for a trading, need has been felt to have a consistent view in assessments pertaining to such income. Therefore it was decided that the income arising from transfer of unlisted shares would be considered under the head capital gain irrespective of period of holding with a view to avoid dispute/litigation and to maintain a uniform approach. The para number three clarified that the above would not be necessarily applied in the situation where the genuineness of the transaction in unlisted shares itself is questionable, the transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil and the transfer of unlisted share is made along with the control and management of the underlying business. In the present case before us the learned assessing officer

could not prove that any of the three conditions mentioned in that circular applies. In fact the sale price of the shares is supported by the valuation report and also conform with provisions of FEMA. The learned assessing officer as well as the learned CIT – A merely proceeded on the basis of an allegation that assessee wanted to show the higher profit in its books of account. It is not denied that the assessee was the owner of the shares, it held it for 13 months, there is no allegation that the price paid by the buyer was unfounded. In fact it was supported by the valuation report which was not controverted, except the conjectures and surmises. In view of this circular, we hold that the excess of consideration realised by the assessee on sale of the above shares is chargeable to tax as capital gain and not as income from other sources. In view of this ground number nine of the appeal of the assessee is allowed.

78. In the result, appeal of the assessee and the assessing officer are partly allowed.
79. With respect to the period of the pronouncement of the above order beyond the 90 days. Of the date of hearing, relying upon the decision of the coordinate bench in case of **Ashapura Minichem Ltd. v. Deputy Commissioner of Income Tax** [2020] 116 taxmann.com 860 (Mumbai - Trib.) Wherein it has been held as under:-

11. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 19th February 2020, this order thereon is being pronounced today on the day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners:—

- | | |
|-----|--|
| (a) | The Bench may pronounce the order immediately upon the conclusion of the hearing. |
| (b) | In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement. |
| (c) | In a case where no date of pronouncement is given by the |

Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

12. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of *Shivsagar Veg Restaurant v. ACIT* [(2009) 317 ITR 433 (Bom)] wherein Their Lordships had, inter alia, directed that "We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of *Anil Rai (supra)* and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment". In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

13. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and

on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6-5-2020 read with order dated 23-3-2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15-3-2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure...". The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

14. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club v. DIT* [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the

present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockdown was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refile the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case."

80. Thus, Order pronounced in the open court on 16/06/2020.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 16/06/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi