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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Judgment Reserved On	Judgment Pronounced On
01.10.2020	10.12.2020

T.C.A.Nos.590 & 591 of 2019

Principal Commissioner of Income Tax 5,
No.121, Mahatma Gandhi Road,
Chennai-600 034. .. Appellant in both Appeals

-vs-

M/s.Redington (India) Limited,
"Redington House", Centre Point,
Plot Nos.8 & 11,
Thiru.Vi.Ka. Industrial Estate,
Guindy, Chennai-600 032.
PAN: AAB CR 0347 P .. Respondent in both Appeals

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Appeal under Section 260-A of the Income Tax Act, 1961, against the common order dated 07.07.2014 made in I.T.A.No.513/Mds/2014 and I.T.A.No.619/Mds/2014 on the file of the Income Tax Appellate Tribunal 'D' Bench, Chennai for the assessment year 2009-10.

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For Appellant (In both Appeals)	:	Ms.R.Hemalatha, Senior Standing Counsel & Mr.T.Ravi Kumar, Senior Standing Counsel
For Respondent (In both Appeals)	:	Mr.Percy Pardiwalla, Sr. Counsel for Mr.N.V.Balaji

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COMMON JUDGMENT

T.S.Sivagnanam, J.

These appeals have been filed by the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") challenging the common order dated 07.07.2014 passed by the Income Tax Appellate Tribunal 'D' Bench, Chennai (for brevity "the Tribunal") in I.T.A.No.513/Mds/2014 (filed by the assessee) and I.T.A.No.619/Mds/2014 (filed by the Revenue) for the assessment year 2009-10.

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2.The appeals were admitted on 26.08.2019, to consider the following substantial questions of law:-

"1.Whether the ITAT was right in applying the General provision Law ignoring the specific

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provisions of sub Section 47(iv) and holding that the transfer of shares by the assessee to its wholly owned subsidiary is to be considered as a Gift?

2.Whether the order of the ITAT upholding the decision of the Dispute Resolution Panel in granting10% risk adjustment allowance is not perverse?

3.Whether the order of the ITAT in allowing the claim of Trade Mark Fee and deleting the addition on account of Corporate and Bank Guarantee are not perverse?"

3.The assessee filed its return of income for the assessment year under consideration (AY 2009-10) on 28.09.2009 admitting taxable income at Rs.125,57,70,310/-. The return was processed under Section 143(1) of the Act on 23.07.2010. Subsequently, the case was selected for scrutiny on the ground that the assessee had international transactions exceeding Rs.15 Crores and the case was referred to the Transfer Pricing Officer (TPO) for computation of Arms Length Price (ALP). After hearing the assessee, the draft assessment order was passed on 31.03.2013 proposing the following additions/disallowances:-

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Sl.No.	*Addition/Disallowances proposed in the Draft Order*	*Amount*
1	LTCG adjustment determined by TPO	610,15,75,820
2	Corporate and bank guarantee charges (adjustment suggested by the TPO)	9,28,73,000
3	Trade mark and licence fee (adjustment suggested by the TPO)	1,89,33,150
4	Bad Debts	3,25,47,000
5	Factoring Charges	17,07,56,151

4.Aggrieved by the draft assessment order, the assessee filed their objection in Form 35A, which was forwarded to the Dispute Resolution Panel, Chennai (DRP) by the Assessing Officer. The DRP heard the assessee, issued directions under Section 144(5) of the Act on 20.12.2013. In terms of the directions issued, the assessment was completed under Section 143(3) read with Section 144(5) of the Act raising a demand of Rs.204.51 Crores. The assessee filed rectification application before DRP on 31.01.2014. The said application was considered and modified directions were issued on 28.07.2014, by deleting the additions on disallowance of factoring charges and bad debts. Aggrieved by such order, both the assessee and the Revenue preferred appeal to the Tribunal. The Tribunal deleted the disallowance of corporate and bank guarantee charges

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on the ground that it does not have any bearing on profits, income, loss or assets of the assessee. The disallowance of trade mark and licence fee was also deleted holding that there is nothing uncommon in the assessee's making payment to use of the trade mark to M/s.Redington Distribution (P) Limited, Singapore. With regard to the disallowance of Long Term Capital Gain (LTCG) adjustment, the Tribunal held that the transfer of shares made by the assessee without consideration was a valid gift and the transfer of shares cannot be regarded as transfer for capital gains taxation as provided in Section 47(iii) of the Act. The Tribunal accepted the contention raised by the assessee that the transfer of shares made by the assessee to its step down subsidiary Redington International (Holdings) Limited, Cayman (RC) is gift eligible for exemption under Section 47(iii) of the Act and no capital gain tax is imputable to the said transfer of shares. The Revenue's appeal was dismissed in its entirety. Challenging the order of the Tribunal, the Revenue is before us by way of these tax case appeals.

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5.Ms.R.Hemalatha, learned Senior Standing Counsel for the Revenue submitted that the assessee had transferred without consideration

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its entire holding in Redington Gulf FZE to RC on November 13, 2008 and within a very short period of less than a week, a private equity fund investment corporation invested USD 65 million in the assessee's overseas step down subsidiary Redington International (Holdings) Limited for 27.17% stake and claimed it as a gift and claimed exemption under Section 47(iii) of the Act. It is submitted that the transfer of shares by the assessee is not a gift falling under Section 47(iii) of the Act for the reason that the assessee transferred the shares only by way of re-structuring the company investment in RGF. The learned counsel referred to the minutes of the Board Meeting as well as Deed of Share Transfer and submitted that neither in the minutes of the Board Meeting, nor in the Share Transfer Deed, the word "gift" has been mentioned and the document shows that the entire transaction is in the form of re-structuring the assessee. Further, it is submitted that the Board Resolution towards re-structuring the concern of the Board be and hereby, accorded to transfer the investments held by the company in RGTF to *inter se* subsidiary companies with or without consideration. Thus, it is submitted that the words clearly show that the transfer is not by way of gift but for re-structuring the company.

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Furthermore, the concept of gift was never in the minds of the assessee when the resolution was passed by the Board or while transferring the shares. It is submitted that re-structuring of the assessee would fall under Section 47(iv) or Section 47(v) of the Act and there is a specific condition that the subsidiary company should be an Indian company.

6.Insofar as transaction done by the assessee is concerned, the subsidiary company is a non-resident and therefore, the assessee had violated the conditions stipulated under Section 47(iv)/Section 47(v) of the Act, consequently, the assessee is liable for capital gains under Section 45 of the Act, as the transaction would fall within the definition "transfer" as defined under Section 2(47) of the Act. Further, it is submitted that the transaction done by the assessee would clearly fall under clause (e) of Explanation to Section 92B of the Act, which states that a transaction of business re-structuring or re-organisation entered into by an enterprise with an associated enterprise irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprise at the time of the transaction or at any future date. The transaction done by the assessee

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would clearly fall within the said provision *dehors* whether it has bearing on profits, income, loss or assets of the company. Further, it is submitted that when there is a specific provision in respect of re-structuring/re-organisation of the company, falling under the category of "international transactions", such provision shall override other normal provisions of the Act irrespective of the fact that it has bearing on the profits, income, loss or assets of such enterprise at the time of the transaction or at any future date. In this regard, the learned counsel placed reliance on the circular issued by the Central Board of Direct Taxes (CBDT) in Circular No.14/2001 dated 09.11.2001 and referred to paragraphs 55.1 and 55.3 of the circular under the heading "New Legislation to Curb Tax Avoidance by Abuse of Transfer Pricing". Thus, it is the submission that the legislature has amended the Act to curb tax avoidance by abuse of transfer pricing. In this regard, reliance was placed on the ruling of the Authority for Advance Rulings (AAR) in the case of ***In Re Orient Green Power Pte. Ltd. vs. [(2012) 346 ITR 557].*** It is further submitted that assuming for the sake of arguments that the transfer of share to the entity abroad is a gift which should satisfy the conditions stipulated in Section 122 of the Transfer of Property Act (hereinafter

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referred to as "the T.P.Act") and the necessary ingredients being that such transfer should be voluntary, it should be without consideration and there should be acceptance by or on behalf of the donee. It is submitted that the transaction done by the assessee is not a voluntary transaction, which has been brought out in the findings of the TPO in paragraphs 17.2.3 and 17.2.5 of the order dated 29.01.2013. Further, the learned counsel referred to the findings rendered by the TPO and in particular, with regard to the transactions which took place outside the country. It is submitted that after the incorporation of RC, the Redington Gulf's shares were gifted to RC Islands and the TPO has thoroughly analysed the transaction and found that the transaction has been devised to accommodate the fund Investment Corporation (IVC) which invested USD 65 million in RIHF Cayman Islands for 27.17% stake and these PE investors have compelled them to do so and a transaction owing to such compulsion or enforcement placed by the investment corporation takes away the element of voluntariness in the transaction and therefore, it is not a gift within the meaning of "gift" as defied in Section 122 of the T.P.Act.

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7.Further, the learned counsel has referred to the findings rendered by the TPO in paragraph 17.2.5 wherein, it is stated that the CFO himself admitted that the cross border transaction was structured for business reasons for deriving commercial benefits. Therefore, it is submitted that the transaction is not voluntary, it was done with certain expectations from the receiver and therefore, does not qualify as 'gift'. Further, the learned counsel referred to the findings of the TPO as to how in a cogent manner, finding has been rendered that Redington Gulf's shares have been disposed off for a valuable consideration as per the audited balance sheet of the assessee company itself and such transaction which is backed by consideration, cannot qualify as 'gift'. With regard to the third requirement, viz., acceptance by donee company, it has not been established by the assessee by producing any documentary evidence to the said effect. Thus, none of the three conditions laid down in Section 122 of the T.P.Act has been fulfilled and therefore, the transaction is not a 'gift'. In support of the above contention, reliance was placed on the decision in the case of ***Boeing vs. CIT [(2001) 250 ITR 667]*** and the judgment of the Hon'ble Supreme Court in ***P.Krishnamenon vs. CIT [(1959) 35 ITR 48 (SC)].***

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8.It is submitted that the entire transaction of transfer of shares by way of alleged gift is to avoid the capital gain and to erode the tax effect in India, entire transaction has been clearly picturized by the TPO in its order more particularly, in paragraph 6.3. Further, the learned counsel referred to paragraphs 5.23 and 5.24 of the order of the TPO to demonstrate as to how the transaction is a circular transaction to defraud the Revenue. In this regard, reference was also made to paragraph 7.55 of the order passed by the TPO. Further, it is submitted that the assessee cherry picked Cayman Island for tax avoidance and the said country has been black listed by the Council of European Union by referring to the Article in Globe Tax Alert dated 19.02.2020. It is submitted that tax planning may be legitimate, if it is within the framework of law, colourable device cannot be part of tax planning. In this regard, the learned counsel referred to the judgment of the Hon'ble Supreme Court in ***McDowell & Co. Ltd. vs. Commercial Tax Officer [AIR 1986 SC 649]*** and ***CIT vs. Durga Prasad Mored [(1971) 82 ITR 540 (SC)].*** Reliance was placed on the decision in ***Juggi Lal Kamalapet vs. CIT [1969 73 ITR 702 (SC)]*** for the proposition that the

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Court is entitled to lift the mask of corporate entity, if the conception is used for tax evasion or to circumvent tax obligation or to perpetrate fraud. For the same proposition, reliance was placed on the decision in the case of ***CIT vs. Sri Meenakshi Mills Ltd. [AIR 1967 SC 819].***

9.The learned counsel further submitted that Section 6 of the T.P.Act deals with what are the kinds of property that may be transferred. Clause (vi) in Section 6 states that no transfer can be made for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act and the transaction done by the assessee is clearly hit by these provisions and therefore, the transaction is void. It is submitted that Explanation I to Section 92D was inserted by Finance Act, 2012 with retrospective effect from 01.04.2002, applicable for the assessment year under consideration (AY 2009-10). The argument of the assessee which is raised for the first time before this Court is that the amendment is prospective. It is submitted that such a plea which was never before the authorities or the Tribunal, cannot be raised before this Court for the first time that too in an appeal by the Revenue.

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10.Further, the assessee has not challenged the retrospective amendment by Finance Act 2012 and such argument of the assessee may be rejected. Even assuming, if the assessee is entitled to raise such an issue for the first time before this Court, then a reading of the amendment will clearly show it is an explanatory Act which will have retrospective effect. In this regard, reliance was placed on the decision in ***CIT vs. Gold Coin Health Food (P) Ltd. [(2008) 172 Taxman 386 (SC)]*** and the decision of the Hon'ble Supreme Court in ***Corporate Company Ltd. vs. Commissioner of Trade Tax,*** Appeal (Civil) No.2124 of 2007 dated 24.04.2007 and the decision of this Court in ***Sudexo Food Solutions India Private Ltd. vs. State of Tamil Nadu,*** Tax Case (Revision) Nos.14 and 15 of 2013 dated 30.04.2019.

11.The Tribunal deleted the disallowance of corporate and bank guarantee charges without considering the legal position that such transaction is taxable under 'capital financing' including any type of long term and short term borrowing, lending or guarantee, purchase or sale of

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marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business as could be seen from Clause (e) in Explanation I to Section 92B and would fall within the expression "international transaction". In support of such contention, reliance was placed on the decision of the Hyderabad Tribunal in ***Prolifics Corporation vs. DCIT [(2015) 55 taxmann.com 226 (H-Trib.)].*** With regard to disallowance of trade mark and licence fee, which was deleted by the Tribunal, it is submitted that the assessee had made an application on 29.02.2000 for registering the trade mark and obtained the certificate of registration on 17.03.2009. The agreement between the assessee and Redington, Singapore was on 01.06.2006 and the assessee was using the trade mark from 1993 onwards. The Singapore entity was formed only in the year 2005 whereas, the Indian entity was established in 1993 and much before the said company was formed, they were using the word "Redington" for their products sold in India. The assessee has not placed any material to controvert this factual position. The certificate of registration granted by the trade mark registry though issued only in 2009, it is deemed to have been granted from the date of application, that is, from

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the year 2000 onwards, in terms of Section 23 of the Trade Marks Act, 1999. Therefore, the Tribunal committed an error in permitting the assessee for adjustment of the licence fee for use of the trade mark to the subsidiary company, which was formed much later in point of time. In this regard, the learned counsel has drawn the attention of this Court to the trade mark licence granted to the assessee. Therefore, there was absolutely no necessity for payment of any licence fee and the Tribunal ought not to have interfered with the order passed by the TPO disallowing the said claim. With the above submission, the learned Senior Standing Counsel prayed for allowing the tax case appeals and answering the substantial questions of law framed in favour of the Revenue.

12.Mr.Percy Pardiwalla, learned Senior Counsel assisted by Mr.N.V.Balaji, learned counsel appearing for the assessee after elaborately referring to the factual matrix as well as the pictorial representation of the transaction, which was depicted in the order of the TPO and also in the written submissions made by the respondent, submitted that the assessee, Redington (India) Ltd., (RI) is a company incorporated in India and its

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shares are listed on the Bombay Stock Exchange and the National Stock Exchange. The overseas operation of the assessee in Middle East and Africa is carried on through the assessee's wholly owned subsidiary Redington Gulf FZE (RG), which has sixteen subsidiaries located in several countries in the Middle East and Africa. It is submitted that the assessee had intention of expanding its base and footprint in the Middle East and Africa, which required additional funds in the hands of RG and, RI also intended to list the Middle East and Africa business on an overseas stock exchange. It is submitted that during 2008, a private equity fund, Investcorp GO FRG (IVC), evinced interest in investing in the Middle East and Africa operations of the assessee. RG is established as a Free Zone Enterprise within the Jabel Ali Free Zone Authority, Dubai and the regulations governing establishment and operations of the companies within the said Free Zone Authority does not permit more than one shareholder in a free zone enterprise. Thus, it is submitted that it was not possible in IVC to directly invest in RG due to single shareholder restriction. Therefore, the assesssee (RI) is stated to have undertaken the following steps:-

(a) Incorporation of Redington International Mauritius Limited

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(RM) in 2008 with initial investment of USD 25,000 fully held by the assessee;

(b) Incorporation of Redington International (Holdings) Limited in Cayman Islands (RC) and the entire share capital of RC was held by RM; and

(c) On 13.11.2008, RG gifts its share holding to RC.

13.The assessee would state that the transaction complies the local law requirement of gift in UAE and such a transaction was necessitated to facilitate IVC's investment in RC. The explanation of the assessee for incorporating RC in Cayman Islands is that the private equity fund (IVC) was interested in investing in the Middle East and Africa operations of the assessee and to facilitate the same, it established IVC GOF RG in Cayman Islands. The explanation of the assessee for incorporating RM in Mauritius is because IVC imposed a pre-condition for investing in RC that it would be required to be listed within three years failing which, IVC had an option to exit by selling its shares to the Redington Group at a price determined having regard to the fair market value of the shares, but in any event, it would guarantee an internal rate of return of at least 7% for IVC. Further, it

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is submitted that the Redington Group was saddled with a liability to re-acquire the shares of RC from IVC, if the shares of RC are not listed on a stock exchange within three years. Further, the assessee would state that they (RI) had plans to expand its overseas activities outside Middle East and Africa and the funds raised by IVC was only for Middle East and Africa. Therefore, the assessee (RI) decided to have RM as an overseas holding company into which, non-Middle East, Africa can be consolidated, more so because, Mauritius is centrally located in European, Middle East and African Markets and has direct Air access. It is submitted that the assessee could not secure the listing of RC within a period of three years and had to re-acquire the shares of RC from IVC at fair market value during the year 2012. This re-acquisition was funded by the assessee by infusing fresh funds into RM and also by borrowing funds at an overseas level. The assessee would further state that if the assessee did not set up the subsidiaries, the obligation of re-acquiring the shares of RC would have fallen upon the assessee (RI) which would have severely affected the financial well being of the assessee. Therefore, the assessee seeks to justify their action to have a two-tier intermediate holding companies to have the

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global expansion plans other than Middle East and Africa regions and also made IVC's exist requirement and for such purpose, RM was incorporated in Mauritius, which would hold 100% shares of RC, Cayman Islands. After RM and RC were incorporated, the shares of RG (Gulf) held by the assessee (RI) were gifted to RC. Consequently, RG became a step down subsidiary of the respondent-assessee. It is submitted that the voluntary transfer of shares of RG by the assessee without consideration to RC, Cayman Islands was held to be not valid gift and not covered under Section 47(iii) of the Act and accordingly, the Assessing Officer/TPO/DRP proceeded to determine the LTC gain, though the DRP provided a 10% reduction from the ALP determined by the TOP for the lower risk assumed by IVC. On appeal before the Tribunal, it held that there is no bar for a company incorporated under the Indian Companies Act from making a gift to another company and therefore, the assessee was entitled to transfer of shares without consideration and it would be a valid gift. The transaction was held to be a valid gift and accordingly, not a transfer of a capital asset under Section 47(iii) of the Act and therefore, no capital gains were imputable in the hands of the assessee towards the gifts of the shares. Further, the Tribunal held

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that the transfer being one made without consideration, cannot be subject to charge of capital gains, as a computation thereof would fall in the absence of full value of consideration, which is the essential ingredient for determining capital gains. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in ***CIT vs. B.C.Srinivasa Shetty [(1981) 128 ITR 294 (SC)].***

14.It is submitted that the transfer of shares of RG by the assessee (RI) to RC, Cayman Islands is a 'gift', not a transfer for the purposes of Section 45 of the Act. In this regard, reliance was placed on the decision in ***Prakriya Pharmachem vs. ITO [(2016) 66 taxmann.com 149 (Guj.)]*** and the decision of the High Court of Judicature at Bombay in ***Asian Satellite Broadcast Pvt. Ltd. vs. ITO*** in ***W.P.No.2749 of 2019,*** dated 28.09.2020. The finding of the Tribunal that the transaction is a gift is a factual finding and the Revenue cannot challenge the same in the present appeal. In this regard, reliance was placed on the decision in ***CIT vs. Gillanders Arbuthnot & Co. [(1973) 87 ITR 407 (SC)].*** The fact that the transaction was for business purpose does not mean that the transfer is for consideration. In this

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regard, reliance was placed on the decision of the Authority of Advance Ruling, in ***Amiantit International Holding Ltd., In re [(2010) 322 ITR 678 (AAR)].*** Further, it is submitted that the Revenue is incorrect in contending that the assessee was compelled to carry out the transaction and the transaction cannot become involuntary merely because it is undertaken with a view to achieve some commercial growth. In support of such contention, reliance was placed on the decision in ***CIT vs. Tollygunge Club [(1977) 107 ITR 776 (SC)], CIT vs. Handicrafts and Handlooms Export Corporation of India Ltd. [(2014) 360 ITR 130 (Del.)]*** and ***Siemens Public Communications Network Pvt. Ltd. vs. CIT [(2017) 390 ITR 1 (SC)].*** It is submitted that the Revenue is wrong in contending that since the deed does not refer to gift, it cannot be treated as a transfer. The transfer is without consideration, it is voluntary and it is accepted. Thus, satisfying the three decisions in Section 122 of the T.P.Act and therefore, it is a valid gift, it is submitted that identical argument as done by the Revenue in this appeal was rejected by the High Court of Bombay in the case of ***Nerka Chemicals Pvt. Ltd. vs. UoI [(2015) 371 ITR 280 (Bom.)].*** It is further submitted that since the transfer of shares by the assessee (RI) to RC is without consideration, it

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is covered by Section 47(iii) and not 47(iv) of the Act, as the said provision covers transaction between a parent and its wholly owned subsidiary and RC is not a wholly owned subsidiary of the assessee. In this regard, reliance was placed on the decision in ***Kalindi Investment P. Ltd. vs. CIT [(2002) 256 ITR 713 (Guj.)].*** Further, when there are two alternative provisions available, the choice of the provision which casts lesser burden can be elected and the assessee is justified in electing to be governed by Section 47(iii) of the Act. In this regard, reliance was placed on the decision in ***CIT vs. Bosotto Brothers Ltd., [(1940) 8 ITR 41 (Madras)]*** and ***C.S.Mathur vs. CBDT [(1999) 235 ITR 769 (Delhi)].***

15.By way of alternate submissions, it is contended that assuming that there is a transfer, yet Section 45 of the Act would not stand attracted, as there is no gain, no consideration accrues or arises or is received by the assessee. In this regard, reliance was placed on the decisions in ***Sunil Siddharthbhai vs. CIT [(1985) 156 ITR 509 (SC)]; Dheer & Co., In re [(2011) 337 ITR 277 (AAR)]; Dana Corporation vs. Director of Income-tax (International Taxation), Mumbai [(2010) 321 ITR 178 (AAR)];*** and

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Goodyear Tire & Rubber Co., InRe [(2011) 334 ITR 69 (AAR)] which was affirmed by the High Court of Delhi in ***(2014) 360 ITR 159 (Delhi).*** Further, it is submitted that if there is no capital gain chargeable under Section 45 of the Act, there can be no income in terms of Section 2(24) of the Act. In this regard, reliance was placed on the decision in ***Cadell Weaving Co. P. Ltd. [(2001) 249 ITR 265 (Bom.)]*** and ***CIT vs. D.P.Sandhu Brothers [(2005) 273 ITR 1 (SC)].*** It is further submitted that the Revenue by invoking the provisions of Section 92 of the Act, seeks to re-characterize the transaction from 'gift' to that of 'sale' to bring the income to taxation and such an action is not permissible under Chapter X. It is submitted that the power to re-characterize the transaction was introduced by inserting Chapter XA and in particular Section 98 thereof; as provided in Section 95(2), the said chapter is applicable to assessment year 2018-19 and thereafter, has no application for the year under consideration (AY 2009-10). The allegation that the transfer of shares of RG to RC sham is allegation made by the Revenue, as if the transaction was sham, then the shares of RG would continue to vest in the assessee (RI) and there can be no question of any transfer because ownership continues to vest with the assessee. The

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Revenue does not state that the entire transaction is sham, but only the gift of shares is a sham transaction and if this argument is to be accepted, then the consequences is, the shares continue to be belong to the assessee (RI) and there is no question of levy of capital gains on the purported transfer of such shares. Further, it is not the Revenue's case that any money or monies worth has passed from RC to the assessee (RI) which is not disclosed. It is further submitted that Explanation to Section 92B of the Act was inserted by Finance Act 2012 with retrospective effect from 01.04.2002. As per the Explanation, the expression 'international transaction' includes a transaction of business re-structuring entered into by an enterprise with an associated enterprise. However, the phrase 'business re-structuring', used in the explanation has not been defined under Chapter X of the Act.

16.Black's Law Dictionary 10th Edition defines the term “re-structuring” to be “the act or practice of changing the way in which Government, business entity or system is organised”. Therefore, in the context of the phrase “business re-structuring”, it must mean the way in which a business is carried on. It is submitted that reliance on the

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explanation is apposite inasmuch as it refers to a business re-structuring and not capital re-structuring. However, for the purposes of this appeal, there may not be a need to go to the explanation, as it is not disputed that the gift of shares is an international transaction within the main sub-section, viz., Section 93B(1) itself and in view of the factual position, the transaction is not governed by the provisions of Chapter X of the Act. It is further submitted that the transfer of shares of RG by the assessee (RI) to RC (Cayman Islands) is not a transaction of business re-structuring. What is contemplated by business re-structuring is a change in the manner in which two associated enterprises carry on a business *inter se* between themselves. A change in the share holding of one company by a transfer to another associated enterprise would not tantamount to a transaction of business re-structuring as contemplated in sub-clause (e). It is further submitted that what is important to note is that the essential condition in sub-clause (e) is that the transaction must have an impact on the income and in the assessee's case, the transaction does not have an impact on the assessee's income either in the relevant assessment year or at any time in future. In the assessee's case, although the acquisition of the asset has no impact on the income of

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the assessee at the time of acquisition, but may have an impact at the time of its subsequent transfer, the transaction would still be regarded as an international transaction. Thus, when income does not arise, the question of computation of income at ALP also does not arise. In the present case, no income of any nature whatsoever arises to the assessee and therefore, the argument of the Revenue has no legal basis. Further, Chapter X has to be construed in consonance with and in harmony with the other provisions of the Act and if it is so construed, it must mean that if any transaction gives rise to income which is chargeable to tax under the Act, then under such circumstances, the income that would be brought to charge would have to be computed at the ALP irrespective of the contractual agreed price. The provisions of Chapter X can never be interpreted to set at naught in any exemption that is given in the other provisions of the Act. If the Revenue's argument was to be accepted, the same would be contrary to the law laid down in the case of ***Vodafone India Services Private Ltd. vs. UoI [(2014) 368 ITR 1 (Bom.)].***

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17.It is submitted that it was argued by the Revenue that the assessee did not contend either before the DRP or the Tribunal that the explanation is not retrospective and therefore, the assessee cannot raise such a plea at this stage. It is submitted that it was never the contention of the assessee that the transaction of gift of shares was not an international transaction and therefore, the question of retrospectivity of sub-clause (e) was not a matter in issue. The question of retrospectivity was raised only in the context of the reliance by the Revenue on sub-clause (c) to bring within the ambit of transfer pricing provision, the transaction of providing bank guarantees and corporate guarantees. The decision relied on by the Revenue passed by the AAR in ***In Re Canara Resources Ltd.,*** [AAR No.779 of 2008: dated 23.04.2009] is not applicable, as in the said case, income accrued in terms of Section 45(3). Therefore, the AAR upheld the stand of the Revenue that in such circumstances, Section 92 of the Act was attracted. The decision of the AAR in ***Orient Green Power Pte. Ltd.,*** relied on by the Revenue is the case where the AAR declined to rule on the questions posed before it, in fact, the Hon'ble Chairman of the AAR had decided the issues in favour of the assessee therein in the case of ***Deere & Co.,*** and ***Goodyear***

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Tire & Rubber Co. The approach of the AAR in not following its earlier rulings has not been approved in the case if ***Cairn UK Holdings Ltd. vs. DIT [(2013) 359 ITR 268 (Del)]*** on the ground that certainty and stability form the basic foundation of any fiscal law. The judgment in the case of ***McDowell & Co. Ltd.,*** relied on by the Revenue has to be read in the manner as explained by the Hon'ble Supreme Court, subsequently in its judgment in ***UoI vs. Azadi Bachao Andolan [(2003) 263 ITR 706 (SC)]*** and ***Vodafone International Holdings B.V. vs. UoI [(2012) 341 ITR 0001 (SC)].*** The decision in the case of ***Boeing*** relied on by the Revenue was dealing with a case of assessment in the hands of the recipient where the gift of an ambassador car to a dealer for achieving certain turnover criteria was a trading receipt and could not be regarded as something which was received gratis and having regard to the circumstances, in which it was given was of an income character. The decision in ***P.Krishnamenon*** is a case where the Revenue sought to bring the tax amount in the hands of the recipient. The decision in ***Durga Prasad Morde*** is not applicable to the facts of the case on hand, as there is no transfer of shares of RG held by RC (Cayman Islands) which it has received as gift and the proceeds thereof came back to the

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respondent in a manner that it did not make them taxable and this is not the case on hand, as RC continued to hold shares of RG till its amalgamation with RM and thereafter, RM continues to hold the shares of RG to date. The decisions relied on by the Revenue in the case of ***Juggi Lal Kamalpat*** and ***Sri Meenakshi Mills Ltd.,*** are not applicable to the case on hand, as there is no question of lifting of the corporate veil as a consequence there of bring to tax alleged capital gain in the hands of the assessee.

18.With regard to the determination of ALP of the trade mark fee, during the assessment year under consideration, the assessee had paid a sum of Rs.1,89,33,150/- towards trade mark and licence fee for using trade mark "Redington" to its associated enterprise Redington Distribution PTE Ltd., Singapore (RDPL). The TPO determined the ALP of the said trade mark/licence fee at NIL by stating that there is no genuine rationale for payment of the said trade mark/licence fee to RDPL and this finding was summarily affirmed by the DRP. The Tribunal deleted the adjustment for the reason that the tax payer is the best judge of his business affairs and it is not for the TPO to question the commercial rationale of the payment by

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plaing reliance on the decision of the Hon'ble Supreme Court in ***S.A.Builders vs. CIT [(2007) 288 ITR 1 (SC)].*** It is submitted that it is not open to the TPO to evaluate the commercial expediency behind incurring of the expenditure. In this regard, reliance was placed on the decision of the High Court of Delhi in ***CIT vs. Firgoglass India Pvt. Ltd.*** in ***I.T.A.No.123 of 2017,*** dated 03.03.2017 (the Special Leave Petition filed by the Revenue against the said judgment was dismissed in S.L.P.No.41702 of 2017); ***CIT vs. S.I.GroupIndia Ltd. [107 taxmann.com 314 (Bom)]*** and ***CIT vs. Lever India Exports Ltd., [(2017) 292 CTR 393 (Bom.)].*** In the instant case, the determination of the ALP by the TPO at Nil in an ad hoc manner by not applying any of the prescribed method is *ex facie* illegal. With regard to the registration of the trade mark and its effect from the date of submission of application etc., in the absence of any clarity of the facts, the respondent in fairness submits that this aspect of the matter may require fresh investigation into the facts and therefore, may be remanded to the Assessing Officer to re-adjudicate the allowability of the contention on the touchstone of Section 37(i) of the Act.

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19.Insofar as Bank Guarantee is concerned, the DRP has observed that the assessee has recovered the charges levied by the Bank from its Associated Enterprises. This fact has not been challenged by the Revenue. That being so, the assessee submits that insofar as bank guarantee is concerned, there is no question of making any adjustment under Section 92 of the Act. Insofar as the adjustment towards corporate guarantee is concerned, Revenue's only case is that the furnishing of a corporate guarantee is an international transaction, as it is covered by the definition thereof in clause (c) of the Explanation to S.92B inserted with retrospective effect. At the outset, the respondent submits that prior to the amendment brought about in Section 92B by the Finance Act, 2012, the Tribunal had decided that the furnishing of a guarantee by an assessee was not an international transaction, as it did not fall within any of the limbs of Section 92B. It was to get over the judicial pronouncements that an attempt was made to rope in transactions of furnishing bank guarantees, i.e., guarantees given to banks to secure them against a default by an associated enterprise that has borrowed monies from the bank. Clause (e) of the Explanation in-fact supports its case inasmuch as the Explanation makes it clear that giving

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of a corporate guarantee is not a service, since it explains service to mean provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service; without prejudice to above, it is submitted that only corporate guarantees given by the assessee which are in the nature of lending (viz., guarantees to secure a loan) are covered under Clause (c) of Explanation 1 to Section 92B. Corporate guarantees given by the assessee which are not to secure the repayment obligation of a lending transaction but to offer support to its associated enterprise in its dealings with its suppliers who offer credit facility at the time of purchases cannot be brought within the ambit of Explanation 1(c) to Section 92B of the Act. Hence, the decision of the Hyderabad Tribunal in the case of ***Prolifics Corporation*** is incorrect. It is further submitted that the nature of transactions covered by Clause (e) specifically include even those transactions which may not have a "bearing on the profit, income, losses or assets of such enterprises at the time of the transaction" are covered if they have such a bearing "at any future date". Therefore, the language used in the Explanation makes it clear that insofar

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as the transactions that fall within the main part of Section 92B are concerned, such transactions must have a bearing on the profit, income, losses or assets of an assessee in the year in which the transaction is effected. It is undisputed the corporate guarantees represent a contingent liability and lay dormant and have no bearing on the current year's profits, income or losses of an assessee. Therefore, such corporate guarantees are not covered within the definition of international transaction; reliance in this regard was placed on the decision of the Delhi Tribunal in the case of ***Bharti Airtel Limited vs. Ad.CIT [(2014) 43 taxmann.com 150 (Delhi-Trib.)].*** Further, the furnishing of a corporate guarantee by the respondent is really in the nature of a shareholder activity and hence does not give rise to any income even in the case transactions between persons who do not constitute associated enterprises.

20.Insofar as the retrospective insertion of the explanation is concerned, it is submitted that prior to the introduction of the Explanation by the Finance Act, 2012, the furnishing of a corporate guarantee was held not to constitute an international transaction. The Explanation insofar as it

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seeks to bring a transaction of corporate guarantee within the field of an international transaction is amendatory and not explanatory. Reliance was placed on ***Francis Bennion's Statutory Interpretation,*** 5th Edition, page 316 for emphasizing the concept of retrospective legislation and rights.

21.It is further submitted that as held in ***CIT vs. Vatika Township (P.) Ltd. [(2014) 227 Taxman 121 (SC)],*** the Explanation ought to be read as prospective in its application and retrospective in its effect such that it will also cover within its ambit guarantees issued prior to the introduction of the Explanation by the Finance Act, 2012. Reliance was also placed on the decision of the Hon'ble Supreme Court in ***CIT vs. Sarkar Builders [2015] 375 ITR 392 (SC).***

22.It is further submitted that the appropriate way to give effect to it, is to construe all guarantees that are covered within the scope of the definition to fall within the definition provided they are entered into after April 1, 2001 but the arm's length price, if any, can be substituted for the contracted terms, if at all, from the assessment year 2012-13 only.

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Interpreting the Explanation in any other manner shall cause grave hardship. With the above submissions, the learned Senior Counsel for the assessee sought for affirming the impugned order and answering the substantial questions of law against the Revenue and in favour of the assessee.

23.Heard Ms.R.Hemalatha, learned Senior Standing Counsel for the Revenue and Mr.Percy Pardiwalla, learned Senior Counsel for Mr.N.V.Balaji, learned counsel for the assessee.

24.The common substantial question of law, framed for consideration in both the appeals which requires to be answered, requires the factual matrix to be gone into.

25.The crux of the issue pertains to transfer of shares of RG to one of the group companies viz., RC. RG was a wholly owned subsidiary company of the assessee (RI) as on 31.03.2008, having acquired the same with effect from 01.04.2004 and the total investment in RG equity amounts to Rs.214 Crores. During the year 2008, relevant to the assessment year

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2009-10, the assessee (RI) had set up a new wholly owned subsidiary in Mauritius in July, 2008, viz., RM with an initial investment of USD 25,000 (Rs.10.78 Lakhs). RM set up a wholly owned subsidiary RC in Cayman Island, which started its operation from 14.07.2008. The assessee transferred without consideration its entire shareholding in RG to RC on 13.11.2008 pursuant to which, RG become a step down subsidiary of RM. Within about a week on 18.11.2008, a private equity fund Investcorp (IVC) invested USD 65 Million (Rs.325.78 Crores) in the assessee's step down subsidiary RC for 27.17% stake. On the said date, the value of the enterprise is stated to be USD 239 Million (Rs.1197.8 Crores). RC allotted 59,035 equity shares to the employees of the assessee and its subsidiaries under an Employee Share Purchase Scheme. Consequently, the parent company's wholly owned subsidiary RM held 69.94% stake in the step down subsidiary RC as on 31.03.2009. During the financial year 2011-12, the assessee acquired shares of its subsidiary RC from the private equity Investcorp (IVC) and the purchase was made through the other subsidiary RM. The consideration of 25.97% stake is USD 113 million (576.41 Crores). The value of the enterprise RC on the date of the said transaction,

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is stated to be Rs.2,219.52 Crores. The above re-organisation and re-structuring shows that the assessee had transferred the shares in RG without consideration to one of its associate enterprise RC and a private equity fund Investcorp (IVC) invested USD 65 million and secured 27.17% stake in RC. The value of RC increased due to transfer of shares of RG held by the assessee (RI) as on 13.11.2008.

26.The TPO has referred to a sworn statement recorded from the Chief Financial Officer (CFO) of the assessee on 18.10.2012. The question posed to the CFO of the assessee was asking him to list out the assets and liabilities of RC and also the net asset value of RC as on 18.11.2008, before the transfer of shares of RG held by the assessee, when IVC had invested USD 65 million. The CFO in his reply stated that RC was incorporated on 14.07.2008 in Cayman Island and only they had a share capital of USD 10,400. Responding to the query with regard to the assets of RC, the CFO has stated that RC holds only investments in RG and except this investment in RG, there were no other assets or income accruing to it. The assessee has not reckoned the transfer of shares of RG to RC as a sale of investment. In

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the audited financial statement for the financial year 2008-09, it has been stated that after the re-structuring of the assessee's overseas investment, the assessee continues to have effective control over all the subsidiaries and all the economic benefits which would accrue to the assessee. Based on the note prepared by the Auditors of the assessee, which formed part of the Annual Report, the assessee contended that the share transfer is not a disposal of investment as per para no.17 of AS 13 of Accounting for Investments. That the share transfer is not an international transaction due to the reasons mentioned in Note 2(e)(b) in Schedule 16. The Assessing Officer made a reference under Section 92CA(1) of the Act to the TPO for determination of ALP with reference to the transaction reported by the assessee for the assessment year under consideration (AY 2009-10). The TPO held that the transfer of eight equity shares of RG by the assessee to RC is nothing, but a disposal of investment, since each company is a separate legal entity located in different territorial jurisdictions and any such disposal has to be subjected to capital gain tax which the assessee had failed to do. It was further held that a capital asset/investment belonging to a resident (assessee) was transferred to a non-resident without any

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consideration and consequently, the income from such shares will accrue directly to the non-resident and not to the resident (assessee) and in particular, the investment was transferred to a country where the Indian Tax Authorities have no jurisdiction. The TPO found fault with the assessee for failure to comply with the Transfer Pricing provisions under the Act as spelt out in Chapter X, which mandates ALP to be maintained in an international transaction between group companies. The TPO after studying the transaction, pointed out that there was no proposal by IVC to invest its fund in RG (Dubai), the shares of which were held by the assessee. The assessee sought permission from RBI through ABN-AMRO Bank on 09.07.2008 wherein, the assessee stated that the IVC (Investcorp) is interested in acquiring stake in RG (Dubai). The said bank had given its approval on 17.09.2008. Prior to that, the assessee passed a resolution in its Board Meeting on 25.07.2008 taking note of the issues arising from RBI, Income Tax Department and other regulatory perspectives. After studying the nature of transaction, the TPO pointed out that the newly formed entities RC and RM did not have any commercial substance on their own and the assessee, in order to avoid capital gain tax as if the shares of RG were

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directly transferred to the Investcorp, would have paid capital gains tax. Therefore, the TPO came to the conclusion that the formation of two new entities outside the country could be viewed was for the purpose of tax avoidance and the assessee acted as a conduit to avoid payment of income tax. The assessee based on the auditor's certificate, contended that the transaction is not an international transaction. The TPO did not agree with the said contention and held that Section 92B gives the meaning of 'international transaction' between two or more associated enterprises either or both of whom are non-residents having a bearing on the profits or income or losses or assets of such enterprises. The TPO held that the share transfer transaction done by the assessee has a bearing on the profits or loss of the enterprises under study and therefore, it has to be considered as an international transaction and ALP has to be determined. Further, by referring to the amendment to Section 92B with effect from April, 2002, it is stated that a transaction of business re-structuring or re-organisation is also an international transaction and once the transaction is classified as an international transaction, the assessee was required to determine ALP of the transaction. Considering the correctness of the plea raised by the assessee

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that the transfer was without consideration and a gift voluntarily made by the assessee and accepted by the donee, the TPO referred to the sworn statement of the CFO wherein, he had stated that the gifts are exempted from transaction as per Section 47(iii). The TPO noted that there is no written gift deed/memorandum submitted by the assessee, the Board Resolution also does not mention about any clauses in the Articles of Association authorizing such transfer. Further, it was observed that the assessee is an artificial person created under the Companies Act and a gift without consideration and out of love and affection can be extended only to individuals and not to artificial persons. The TPO held that Section 47(iii) would not be applicable for transaction between companies and clause (iv) and clause (v) of Section 47 would also not apply, as the transferee company should be an Indian company. Further, the TPO held that when the transferee company is abroad, the income will start to accrue in the foreign country and in that process, India will lose potential revenue. The TPO noted that in the assessee's case, precisely the same has happened where the transferee company is in Cayman Island and after the transfer is effected, the dividend income would start to accrue in that country. Thus, the TPO

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concluded that the entire transaction was done with profit as motive and to avoid tax and the contention that it is a gift is highly suspicious. The assessee had raised a plea that they had decided to do a corporate re-structuring in order to expand its business in Middle East and Africa; to get their shares listed in the Dubai Stock Exchange and other overseas stock exchanges and therefore, decided to bring in an investor. The assessee contended that as per the Jabel Ali Free Zone Authority (JAFZA), under which RG is registered, only one shareholder can hold shares of the entities situated in the zone and therefore, the assessee decided on the incorporation of overseas subsidiary and step down subsidiary at Mauritius and Cayman Island respectively, and as a part of re-structuring process, the investment held by the assessee in RG (Gulf) was transferred to the overseas step down subsidiary RC and the same was done without consideration. The TPO examined the JAFZA guidelines of Dubai and has commented that a company can be incorporated in the Free Trade Zone as Branches or Free Zone Establishment (FZE) or Free Trade Zone Company (FZCO) and if there is only one shareholder in the company incorporated as FZE, its multiple shareholder can be incorporated as FZCO and there is no marked

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difference between FZE and FZCO, as both type of companies enjoy tax and other benefits and they are at par and nothing prevented the assessee to form their company as FZCO. The TPO also analysed the transaction as to how there is a loss to the Revenue by shifting profits outside the country. Thus, the TPO concluded that the transfer of shares held by the assessee in RG, Dubai to RC is an international transaction as per Section 92B of the Act and ALP has to be determined. The incorporation of RM and RC just before the share transfer was seen as means to avoid capital gain tax, these two entities have no commercial substance on their own and are used as a conduit to avoid the incidence of tax. Since the investment was transferred from one company to another company and each company being a separate legal entity in different countries, the capital gain has to be taxed in the hands of the transferor (assessee). Further, it is to be seen that the investment was transferred from a resident to non-resident and hence, after such transfer, the income from the investments would accrue only to the non-resident and not to the resident. The transaction was with a motive of profit maximization and to avoid the incidence of tax in India which cannot be exempted under Section 47(iii) of the Act.

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27.The assessee while contesting the show cause notice stated that RC and RM were set up for commercial reasons; transfer pricing provisions will not apply as a result of retroactive amendments; transfer pricing provisions are applicable only when there is income; gift of shares are exempted from the definition of 'transfer' as per Section 47(iii) and commercial bonafides of the transaction, which is a gift and not a sham transaction.

28.With regard to the subsidiary and the step down subsidiary in Mauritius and Cayman Island respectively, the TPO held that the asset held by the assessee in the form of shares of RG is shifted from Indian Tax jurisdiction to Cayman Island, income arising from any future alienation on this asset is not taxable in India. The proximity of the dates of incorporation of the entities and transferring immediately, the shares of RG is a prominent indicator of this motive. The assessee's plea that the incorporation of the companies was for commercial reason was rejected on the ground that there was no documentary evidence produced by the assessee to substantiate the

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same especially when, the tax were incorporated in tax havens. The tax authorities are entitled to examine the genuineness of the transaction.

29.With regard to the plea that the transfer pricing provisions did not apply because of the retroactive amendment, it was held that the explanation which was inserted in Section 92B with retrospective effect from 01.04.2002 by Finance Act, 2012 is a clarificatory amendment inserted for the purpose of removal of doubts and therefore, the plea raised by the assessee is not sustainable and accordingly, such plea was rejected.

30.An alternate submission was put forth by the assessee contending that even assuming that the gift was considered as an international transaction, yet the transfer pricing provisions would not apply. The assessee contended that the insertion of the explanation in Section 92B of the Act might have expanded the definition of international transaction, but there is no amendment to the main section viz., Section 92 and a reading of sub-section (1) of Section 92 would show that it is a machinery provision and would be applicable only when a transaction

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results into taxable income in the hands of the tax payer in India. In other words, it was contended that the transfer pricing provisions are applicable only when there is a charge of tax in India and in the assessee's case, the transaction does no result in a taxable income and transfer pricing provisions would not be applicable. The TPO disagreed with the contentions raised and held that Section 92 is a charging provision more particularly, as it is placed in Chapter X of the Act, a special set of provisions relating to avoidance of tax, so that the profits chargeable to tax in India do not get diverted elsewhere. To support his conclusion, several decisions were referred to which we shall discuss in the later part of this judgment.

31.The TPO next proceeded to consider the contention of the assessee that gifts are not to be considered as transfer as per Section 47(iii) of the Act. The TPO held that to qualify as a gift under Section 122 of the TP Act, it has to be voluntary, which was absent in the transaction as it had been devised to accommodate Investcorp (IVC) on account of compulsion placed upon the assessee. In this regard, the TPO referred to the sworn

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statement given by the CFO on 18.10.2012 wherein, he has stated that the IVC is a listed entity in Bahrain, the investor fund was head quartered in Cayman Island and the investment vehicle was also in Cayman Island and therefore, IVC requested RC to be based out of Cayman Island and as per their request, the assessee incorporated RC and RG's shares were transferred to RC. In respect of another query, the CFO stated that the assessee's ultimate objective was to list the Middle East and Africa business and get adequate capital to promote business in Middle East and Africa and towards this objective as a first step, the assessee intended to bring a private equity investor, which will set a benchmark valuation at the time of IPO. Further, it was stated that in order to enable the Investcorp (IVC) to invest shares in the Middle East and Africa business, they had set up RC and the whole transaction was to ensure the assessee's interest of inviting outside investors to invest in their Middle East and Africa Business and therefore, the transaction was voluntary. Taking note of the statement given by the CFO, the TPO pointed out that the international transaction was structured for business reasons and for deriving commercial benefits and it is not a voluntary transaction without any expectations and cannot qualify as gift

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(under Section 122 of the T.P.Act). Further, the TPO pointed out that the assessee transferred the shares held by it in RG to RC which in turn, stood diluted by accommodating the third party, Investcorp (IVC), who had cleared a stake of more than 27% in RC for a consideration. The transactions were thus, held to be closely interrelated and interlinked and a dissective approach cannot be taken and the transaction is intended to commercially benefit, both the assessee and the third party investor which has forced the assessee to transfer huge assets to RC and there is no voluntary element attached to the transaction.

32. With regard to the second test to qualify as a gift under Section 122 of the TP Act, the transfer should be without consideration. After referring to the balance sheet of the assessee, note 2(e) of Schedule 16 (Notes on Accounts) and the sworn statement of the CFO dated 18.01.2013, the TPO noted that the Accounting Standard 13 states that the value of long term investment has to be determined based on fair market value on such date and the assessee had determined the fair market value of Rs.214.12 Crores for investment in RC, but the CFO stated that it is only a

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representative value, which submission was rejected by the TPO. In this regard, the TPO after analysing the transaction, held that the shares in RG has been disposed of for valuable consideration as per the audited balance sheet of the company itself. Ultimately, the TPO held that none of the requirements under Section 122 of the TP Act stands fulfilled and the transaction cannot be regarded as a gift. The assessee contended that the TPO had no jurisdiction to question the business decision or wisdom of the assessee. The TPO held that it has not questioned the business decision or wisdom of the assessee, but has examined the transaction elaborately to show that there is a shifting of the tax base from India to Cayman Island, which is a tax haven. In this regard, the TPO once again referred to the sworn statement of the CFO, who accepted that before the transfer of shares of RG to RC by the assessee, if there was any sale by the assessee, the resultant income would have been offered to tax in India by the assessee and after the transfer of the shares of RG to RC, if RC sells the shares, it would be offered to tax in Cayman, which is the country of incorporation of RC. Further, the CFO stated after the transfer of shares of RG to RC, any dividend declared and paid by RG would be offered to tax in Cayman

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Island, which is the country of incorporation of RC. Thus, the TPO concluded that the CFO of the assessee himself admitted that there is shifting of profits from India to Cayman Island due to the transfer of shares in RG to RC and since the transaction was made to avoid tax in India and to shift the tax base from India to Cayman Island, the said transaction would not be covered under Section 47(iii) of the Act.

33.Next, the TPO proceeded to discuss about the valuation of shares of the IVC which is not a question admitted for consideration. To be noted, the TPO determined the ALP by Comparable Uncontrolled Price (CUP) method, computed the value of the shares of RG at Rs.885,13,80,000/- and directed the Assessing Officer to calculate the capital gains accruing as a result of such share transfer after affording opportunity to the assessee.

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34.The next issue was with regard to the guarantees, which were offered by the assessee viz., corporate guarantee and bank guarantee. From the annual report of the assessee, it is seen that the assessee had issued

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guarantees on behalf of the subsidiaries to the tune of Rs.464.36 Crores and on behalf of others to the tune of Rs.3.42 Crores. The assessee was called upon to explain. The assessee stated that they have not issued any fresh guarantee during the assessment year 2009-10. The movement in guarantees outstanding is purely on account of the currency transition adjustment on restatement of guarantees outstanding at the closing rate prevailing on 31st March, 2009 for disclosure in financial statement in compliance with the Accounting Standard. The outstanding guarantee issued by the assessee as on 31.03.2009 represents the guarantee issued on behalf of the overseas subsidiaries in earlier years. Further, the assessee stated that during the assessment proceedings, in the relevant assessment year, the TPO made addition to the corporate guarantee issued in those years by adopting the benchmark rate based on the available internal CUP charged by the bank at 0.85%. Further, they have issued corporate guarantee to M/s.Parampara Wedding Cards and M/s.Baskar Digital Press. The explanation offered by the assessee was considered by the TPO by taking note of the amendment to Section 92B by insertion of the explanation with retrospective effect from 01.04.2002 by Finance Act, 2012, which includes

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guarantees to fall within the scope of international transaction. After taking note of the factual explanation offered by the assessee, the TPO noted that in the assessee's case, there is no time period for expiry of the bank guarantee and naturally such guarantees would demand more commission charges payable to the banks and the assessee has taken maximum risk in providing such guarantees to its subsidiaries.

35.The TPO compared differences between the guarantee issued by bank and the guarantee issued by the assessee on behalf of its associated enterprise and pointed out that the bank's commission charges is not comparable to the commission charges that are payable to the assessee by the associate enterprise, the assessee is in a position to charge the commission charges along with higher risk premium and it is not a shareholder's activity. The TPO, thus, concluded that it is a clear financial service rendered by the assessee company to their associated enterprise, which has to be compensated by proper commission charges. Based on such conclusion, 2% of Rs.40862.34 Lakhs was charged as commission and upward adjustment to the income of the assessee to the tune of Rs.817.25

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Lakhs was proposed. Similarly, for corporate guarantee, which is extended to an unrelated party without charging fee was considered and 2% of the total guarantee extended was charged as commission and upward adjustment to the income of the assessee was proposed.

36.The next issue was with regard to the trade mark licence fee. During the assessment year, the assessee had paid trade mark fee to the tune of Rs.1,89,33,150/- to Redington, Singapore. TPO noted that the assessee has not produced any document to show that Redington, Singapore is the legal owner of the trade mark. After considering the assessee's explanation, the TPO held that the trade mark "Redington" is not registered in Singapore and the assessee could not prove that Redington, Singapore is the owner of the said trademark and no documentary evidence was produced even though it was specifically pointed out in the show cause notice. However, the TPO observed that the reason as to why the subsidiary company should claim trade mark fee from its parent company seems to be illogical and therefore, devoid of merits. The TPO noted that the trade mark was promoted by the assessee from 1993 onwards and any growth in the brand value is

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attributable only to the assessee. Therefore, the TPO held that there is no genuine rationale behind the payment towards the trademark licence fee and accordingly, disallowed the same in its entirety. In fine, the TPO concluded his order dated 29.01.2013 holding that the assessee has not considered the transfer of asset to their associated enterprise (AE) as an international transaction; the transfer of the asset has led to huge revenue loss to the country; the assessee had employed colourable devices to avoid tax in India and the assessee had not considered the corporate guarantee as an international transaction. The Assessing Officer was directed to consider the issue of imposition of penalty under Section 271AA of the Act, as the assessee had filed incorrect details with respect to the international transaction. On receipt of the suggestions by the TPO, the Assessing Officer issued notice dated 01.03.2013 to the assessee by affording them an opportunity to put forth their submission.

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37.After considering the written submission filed by the assessee on 19.03.2013, the Assessing Officer examined the transaction, took note of the suggestions of the TPO, submissions of the assessee and rejected the

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same and passed a draft assessment order dated 31.03.2013 under Section 143(3) read with Section 92CA(4) read with Section 144C of the Act. The assessee filed their objections before the DRP against the draft assessment order dated 31.03.2013, who rejected the contentions raised by the assessee on all grounds by order dated 20.12.2013. The assessee filed an application for rectification before the DRP and it appears that the assessee filed a writ petition before this Court, which was disposed of on 17.02.2014 directing the DRP to decide the rectification application within a time frame. The first issue raised in the rectification application was regarding the adjustment on account of transfer of shares of RG. The DRP took into consideration the grounds raised and found that the grievances of the assessee were already been redressed by the Assessing Officer himself and therefore, held the said ground to be infructuous. The second ground raised in the rectification application is with regard to the factoring charges, which were disallowance of bad debts which was not adjudicated by the DRP and after hearing the assessee, the DRP agreed with the assessee on the ground that the said issue is covered in favour of the assessee in the decision in ***Cargil Global Holding Pvt. Ltd.,*** and accordingly, directed the Assessing

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Officer to delete the disallowance. With regard to the bad debts, the DRP directed the Assessing Officer to verify whether the alleged bad debts had actually been written off by the assessee and if it is so, then the Assessing Officer was directed to allow the assessee's claim and delete the disallowance. Pursuant to the orders passed on 12.03.2014 by the DRP on the rectification application, the Assessing Officer completed the assessment vide order dated 17.01.2014. Aggrieved by the same, the assessee filed appeal before the Tribunal. The Revenue was on appeal on one issue stating that the DRP erred in rendering a finding that PE fund investment was relatively risk free investment and allowing deduction of 10% towards risk adjustment allowance. The Tribunal by the impugned order dated 07.07.2014, allowed the assessee's appeal in part and dismissed the appeal filed by the Revenue. Aggrieved by the same, the Revenue is before us by way of these tax case appeals.

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38.The first issue to be considered is whether the Tribunal was right in reversing the finding of the authorities that the transaction done by the assessee in transfer of shares was a valid gift. The first question which

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the Tribunal has dealt with in its discussion commencing from paragraph 72 of the impugned order is largely devoted to the issue as to whether a company, a corporate entity, is entitled to execute a gift. In terms of Section 5 of the TP Act, transfer of property means an act by which a living person conveys property in present or in future to one or more other living persons or to himself, or to himself and one or more other living persons and to transfer property is to perform such an act. It cannot be disputed by the Revenue that in Section 5, living person includes a company or association or body, individuals whether incorporated or not, but nothing contained in Section 5 shall affect in law for the time being in force relating to transfer of property to or by company's association or bodies of individuals. Thus, a company would be entitled to execute a gift in terms of Section 5 of the Act. Therefore, we need not dwell into the said aspect, but can safely proceed to consider as to whether the theory of gift as pleaded by the assessee has been established, whether it was a valid gift in terms of the definition in Section 122 of the TP Act. Therefore, the discussion in the impugned order of the Tribunal from paragraphs 72 to 79 need not be examined for its correctness, as the legal position is clear in terms of Section 5 of the TP Act.

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39.The Revenue does not dispute the fact that the assessee had transferred without consideration its entire share holding in RG to RC on 13.11.2008. The Revenue's contention is that the same is not a gift under Section 47(iii) of the Act for the reason that the assessee transferred the shares only by way of re-structuring the company's investment in RG; neither in the Board Resolution, nor in the deed of share transfer, the word "gift" has been used, which will clearly demonstrate that the entire transaction is in the form of re-structuring the company. In this regard, specific reference was made to the Board Resolution which stated that it is resolved that towards re-structuring the concern, the Board accorded to transfer the investment held by the assessee in RG to its *inter se* subsidiary company with or without consideration. Therefore, the Revenue would contend that the transaction having been done only as a measure of re-structuring of the assessee, it is not a gift and the concept of gift was never in the mind of the assessee when the Board took a decision or when the deed of share transfer was executed. If the transfer of shares was a measure of re-structuring of the company, the assessee would not be able to plead the

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theory of gift, as the assessee had not fulfilled the condition stipulated in Section 47(iv) or Section 47(v), as the subsidiary company is a non-resident. Thus, the Revenue would argue that the assessee is liable for capital gain under Section 45 of the Act, as the transaction falls within the ambit of Section 2(47). Further, the argument of the Revenue is that the transaction done by the assessee would fall within Explanation (e) to Section 92B to qualify for being an international transaction in terms of Section 93B(1) of the Act.

40.As noticed above, the Tribunal in the impugned order from paragraphs 72 to 79 examined the aspect as to whether a company/corporate body can execute a valid gift and concluded that a company is a person both for the purposes of the TP Act and the Gift Tax Act, 1958 and can make a gift to another company which is valid in law and accepted the contention of the assessee that it was entitled to gift its shares in RG to RC. Having held so, the Tribunal failed to examine as to whether the ingredients of Section 122 of the TP Act have been fulfilled to qualify as a valid gift. Section 122 of the TP Act defines "gift" to be transfer of certain existing movable or

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immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. The essential elements of gift are (i) absence of consideration; (ii) the donor; (iii) the donee; (iv) to be voluntary; (v) the subject matter; (vi) transfer; and (vii) the acceptance. The concept of gift is diametrically oppose to any person of consideration or compensation. It cannot be disputed that there can be transactions which may not amount to gift within the meaning of Section 122 of the TP Act, but would qualify as gift for the purpose of levy of tax under the Gift Tax Act owing to the definition contained in Section 2(iii) read with Section 4 of the Gift Tax Act. Block Stone states that "gift" are always gratuitous, grants or upon some consideration or equivalent. In several decisions, it has been held that for proving a document of gift was executed with free and voluntary consent of the donor, it must be proved that the physical act of signing the deed coincide with the mental act viz., the intention to execute the gift. The principles laid down in the Indian Contract Act relating to free consent would apply in determining whether gift is voluntary.

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41.In ***Tulsidas Kilachand vs. CIT [AIR 1961 SC 1023],*** it was held that the word consideration is used in the same sense as in the Indian Contract Act and executes natural love and affection. A transfer in consideration of an acceptance of spiritual and moral benefit, or in consideration of natural love and affection is a gift for such consideration is not with contemplated by the conclusion. The donor is the person who gives the gift. The donee is the person who accepts the gift. In terms of Section 123 of the TP Act for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. For the purpose of making a gift of movable property, the transfer may be effected either by registered instrument signed as aforesaid or by delivery. In other words, to constitute a valid gift, a pivotal requirement is acceptance thereof and suggestions can throw light on that aspect. It is not in dispute that neither in the Board Resolution, nor in the deed of share transfer, there is any mention of the word “gift” or any like term to indicate 'gift'. The Board Resolution states that the transfer of shares is towards re-structuring the

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concern for which the Board accords its approval to such transfer is with or without consideration. If such is the factual position, in our opinion, the voluntary consent of the donor viz., the assessee is missing because the physical act in proving the transfer of shares and executing the deed of share transfer should coincide with the mental act that is the intention to execute the gift. From the recapitulation of the factual position as culled out by us in the preceding paragraphs, it is clear that this animus was wholly missing in the transaction done by the assessee. The Board Resolution does not state that the transfer is by way of gift, as the words used in the resolution is with or without consideration. Therefore, at the time when the Board of the assessee took a decision to transfer its entire holdings in RG to RC, it did not consider it to be a gratuitous transfer. If the intention of the donor/assessee was to effect transfer without consideration, the resolution would have spelt out the same in no uncertain terms. The deed of share transfer also does not spell out that it is for consideration. Therefore, necessarily the Court has to look into the background facts to ascertain as to what had driven the assessee to effect the share transfer. If there were factors, which were working behind the scene which led to the approval of

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the proposal to transfer the shares, then obviously, it would mean that the transfer of share is not voluntary and would not qualify as a valid gift. This aspect of the matter has been brought out not only by the TPO in the draft assessment order, as also by the DRP and the assessment order as well.

42.The learned Senior Counsel for the assessee referred to the decision in ***Sonia Bhatia vs State Of U.P. [(1981) 2 SCC 585].*** The question arose with regard to the interpretation of sub-Section (6) of Section 5 of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 and the proviso therein in order to determine the validity of the deed of gift. This decision was pressed into service to explain the concept of "gift" as contemplated by the T.P.Act and it is submitted that "consideration" means a reasonable equivalent or other valuable benefit passed on by the promisor to the promise or by the transferor to the tranferee and that a 'gift' is undoubtedly a transfer which does not contain any element of consideration in any shape or form. There cannot be any dispute as regards the general proposition as to what connotes a valid gift, but without considering the factual position, one cannot take a decision as to whether the gift was a valid gift and whether the

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test laid down under Section 122 of the T.P.Act stands fulfilled. Therefore, in our considered view, the said decision cannot be made applicable to the facts of this case.

43.Reliance was placed on the decision in ***Goodyear Tire & Rubber Co.*** The decision arose out of a writ petition filed by the Revenue against the advance ruling order dated 02.05.2011 given by the AAR. The crux of the matter is that 74% shares of Goodyear India Limited were held by a USA company by the name of Goodyear Tire & Rubber Company. The said USA company has a 100% subsidiary in Singapore by their Name Goodyear Orient Company (Pte) Limited. Both the USA company as well as the Singapore company had approached the AAR with respect to the tax liability of the proposed transfer of the said 75% shareholding of the USA company in Goodyear India Limited Company to its 100% subsidiary in Singapore. The AAR after examining the various provisions of the Act, held that there would be no tax liability on either the USA company or the Singapore company. Firstly, the Revenue did not make any allegation that the company was established to act as a conduit to escape the rigour of the

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Indian Tax Laws. There is no allegation of creation of any step down subsidiary in a tax haven. We feel that this decision cannot be applied to the facts of the case.

44.The shares in RG was acquired by the assessee with effect from 01.04.2004 for a consideration of Rs.2141.12 Crores. The assessee does not dispute the fact that RG was financially very sound company. After about four years of acquiring the shares, the assessee set up a wholly owned subsidiary company in Mauritius, RM. This company in turn set up its wholly owned subsidiary in Cayman Island viz., RC. Consequently, RC became a step down subsidiary of the assessee. In November, 2008, the assessee transferred its entire share holding in RG to RC. Within four days of such transfer, 27.17% stake in RC was transferred in favour of a private equity fund Investcorp, IVC, for a consideration of USD 65 million (Rs.325.78 Crores). The question is as to what prompted the transfer or in other words, what worked behind the scene for the assessee to take a decision for transfer. This has been clearly picturized by the TPO not only referring to the admitted facts, but also the sworn statement recorded from

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the CFO of the assessee company. The CFO accepts that RC when it was incorporated on 14.07.2008 had share capital of only USD 10,400. It did not have any assets or income except the investment in RG. The assessee by relying upon the auditor's report would contend that the share transfer is not a disposal of investment as per paragraph 7 of AS 13 and Accounting for Investments.

45.In ***McDowell & Co. Ltd.,*** it was held that tax planning may be legitimate provided it is within the frame work of law. The learned counsel for the assessee would contend that the decision in ***McDowell & Co. Ltd.,*** should be read in the manner explained by the Hon'ble Supreme Court in ***Azadi Bachao Andolan*** and ***Vodafone International Holdings B.V.*** There can be no quarrel to the proposition that the assessing authorities have to look into all the circumstances under which the transaction took place. The authorities are required to examine as well as the Tribunal and Court as to whether the assessee had adopted any ingineous method to avoid taxation. Therefore, the authorities as well as the Courts and Tribunals are entitled to go behind the veil to examine the real intention of the parties in effecting

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transactions to come to a conclusion whether the "gifts"were genuine (See ***Rajeev Tandon vs. ACIT [(2008) 215 CTR 272]***). The chain of events speak for themselves; the decision of the Board of the assessee in resolving to approve the transfer of shares with or without consideration is a clear indicator to show that the transaction is not voluntary. This is so because, within less than a week after effecting transfer, a private equity fund Investcorp (IVC) comes in the picture, investing USD 65 million in RC for 27.17% stake. It is not disputed by the assessee that on the date when RC was incorporated, ie., in July 2008, it had only a share capital of USD 10,400 and as on 18.11.2008, i.e., when the transfer took place, RC had no other assets or income except the value of the shares in RG. The explanation of the assessee is that it had decided to corporate re-structure in order to expand its business operation in the Middle East and Africa and other countries, they wanted their shares to be listed in Dubai Stock Exchanges and other overseas stock exchanges, therefore, they decided to bring in a third party investor so that they have a benchmark valuation. The facts as narrated by the assessee in their submissions dated 22.03.2012 before the TPO would clearly demonstrate that much prior to effecting

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transfer, there were other transactions, which were in the pipeline. The sole intention of the assessee was for corporate re-structuring, which is stated to have identified a third party investor who holds the investment in Cayman Island. Therefore, the voluntariness in the transfer of shares stands excluded.

46.The assessee states that RG can hold only one share as per the regulations of JAFZA. This aspect was verified by the TPO and it has been found on facts that there are other methods by which the assessee could have formed the company in Dubai. This factual aspect could not be dislodged by the assessee. Further, this factual aspect was not interfered or considered by the Tribunal. Thus, if the chain of events is considered, it is evidently clear that the incorporation of the company in Mauritius and Cayman Island just before the transfer of shares is undoubtedly a means to avoid taxation in India and the said two companies have been used as conduits to avoid income tax. As a matter of fact, the TPO found that the assessee's explanation that the Free Trade Zone at Dubai would not permit multiple shareholders is incorrect, given the fact that the nomenclature

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would only differ when multiple shareholders are brought in the Free Trade Zone Establishment. Therefore, the plea raised by the assessee by stating that only one shareholder is permissible has to necessarily fail. The manner in which the transfer was effected and ultimately the investment landing in a tax haven will clearly show that it is a sham transaction devised to avoid tax in India. Furthermore, RC had no commercial substance on its own and the third party investor acquired about 27% stake in RC because, it had acquired the shares of RG held by the assessee, which were transferred and this acquisition took place within a week after the RG's share was transferred to RC. Thus, the asset owned by the assessee viz., the shares in RG, which were hither to within the network of the Indian tax laws, stood shifted to Cayman Island which is a tax haven. Therefore, it is evidently clear that the entire transaction was so structured to accommodate the third party investor, who has put certain conditions even prior to effecting the transfer and this has been spelt out by the CFO of the assessee in his sworn statement wherein, he would candidly admit that as per the request of the third party investor, they had incorporated RC and, RG's shares were transferred to RC. Thus, the factual matrix clearly demolishes the case of

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the assessee, as there is absolutely no voluntary element, it was executed for consideration and therefore, it fails to satisfy the test laid down in Section 122 of the TP Act to qualify as a valid gift. If such is the factual position, the transfer would attract Section 45 of the Act and would be chargeable to income tax under the head "capital gains".

47.The AAR in ***Orient Green Power Pte. Ltd.,*** observed that a gift by a corporation to another corporation, though a subsidiary or an associate enterprise, which is always claimed to be independent for tax purposes, is a strange transaction. To postulate that a corporation can give way its assets free to another even orally can only be aiding dubious attempts at avoidance of tax payable under the Act. This is all the more so since Section 47(iv) and 47(v) specifically provide for covering cases of transfer of capital assets by the parent company to the subsidiary and by the subsidiary to the holding company and the other sub-clauses deal with amalgamation, de-merger and re-organization of business and so on. Thus, it was held that it is possible to say that a gift of shares held in a company by one company to another company would not fall under Section 48(iii).

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48.An alternate submission was made that assuming there is transfer, nevertheless there is no gain that is chargeable to tax in terms of Section 45, as there is no consideration that accrues or arises or is received by the assessee. To be pointed out that in ***Sunil Siddharthbhai,*** the Court held that the appeals were decided on the assumption that the partnership firm in question is a genuine firm and not the result of a sham or unreal transaction and that the transfer by the partner of his personal asset to the partnership firm represents a genuine intention to contribute to the share capital of the firm for the purpose of carrying on the partnership business. The Court relied on the decision in ***B.C.Srinivasa Shetty*** wherein, it was observed that charging section and computation provision under each head of income constitute an integrated code and when there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not entitled to fall within the charging section. These decisions were rendered on idealistic factual position with no allegation against the assessee, who had made dubious transaction to escape the tax net from the Indian continents. Therefore, we are unable to apply these decisions to the case of the assessee. That apart, we cannot decide the matter on

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assumptions and presumptions and we are called upon to decide the substantial questions of law on the facts, which were available when the assessments were completed. The argument that no dividend had been declared by RC till date could hardly be a factor to test as to whether the theory of 'gift' as propounded by the assessee was valid and sustainable. Therefore, the argument that if there is no capital gain chargeable under Section 45, there could be no income in terms of Section 2(24) can at best be argued as a general proposition and cannot be applied to the facts of the instant case. Consequently, the decisions in the case of ***Cadell Weaving Co. P. Ltd., Dheer & Co., Dana Corporation*** cannot be applied to the facts of the instant case.

49.The reliance placed on the decision in ***Vodafone International Holdings B.V.,*** is stretching the matter far beyond the permissible limit in the given facts. Further, we note from the grounds of appeal filed by the assessee before the Tribunal, no such plea was even remotely canvassed. Thus, *dehors* foundational facts, we cannot decide these issues for academic purposes.

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50.The argument of the learned Senior Counsel for the assessee that the transfer of shares of RG by the assessee to RC is a gift and not a transfer for the purpose of Section 45 is sought to be supported by relying upon the decision in ***Prakriya Pharmachem.*** Firstly, the said decision arose out of a challenge to a notice for re-opening the assessment. While examining as to whether the reasons for re-opening were valid, the Court found that under sub-clause (iii) of Section 47, nothing would apply to any transfer of capital asset under a gift or Will or irrevocable trust. The Court has recorded that the Assessing Officer in the said case does not dispute the fact that the transfer of asset was a gift. On such admitted factual position, the Court held that the provisions of Section 45 of the Act pertaining to capital gain would not be attracted, the relevant paragraphs were relied on to explain the statutory position. We are of the opinion that on facts, the said decision will not help the case of the assessee. Reliance was also placed on the decision in the case of ***Asian Satellite Broadcast Pvt. Ltd.*** This was also a writ petition seeking to quash the notice under Section 148 of the Act reopening of the assessment. In the said decision, the Court noted the

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judgment in ***Prakriya Pharmachem.*** The argument of the assessee was largely on the ground that there was no new tangible material before the Assessing Officer post the assessment order to have reasons to believe that the income of the assessee therein for the assessment year under consideration had escaped assessment on account of the failure of the assessee therein to disclose fully and truly all material facts necessary for assessment. The issue with regard to the foundation of the re-assessment proceedings on the ground that the transaction of transfer of shares was a colourable device, the assessee was able to demonstrate that the transfer of shares was by way of a gift and is exempt from the provisions of capital gains by virtue of Section 47(iii) of the Act. The discussion in the said judgment is largely on the power of the Assessing Officer under Section 147 of the Act. On facts, the Court came to the conclusion that there is no colourable device adopted by the said assessee. Firstly, both the decisions relied on by the learned Senior Counsel were rendered in writ petitions quashing the reopening of the assessment and incidentally, the factual issue has been touched upon and in one of the cases, the Assessing Officer himself did not dispute the theory of gift which is missing in the case on

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hand. Therefore, both the decisions will not render any assistance to the case of the assessee. It was argued by the learned Senior Counsel that the Tribunal has rendered the factual finding that the transaction is a gift and the said finding, on fact, cannot be interfered in this appeal. To support such contention, reliance was placed on the decision in ***Gillanders Arbuthnot.***

51.We had earlier pointed out that the Tribunal had elaborately examined as to whether a company can execute a gift in favour of another company and after noting the various provisions, rendered a finding that in terms of Section 5, a company would be entitled to execute a gift. However, there is no in depth analysis of the correctness of the findings of the TPO/DRP/Assessing Officer that the essential ingredients of a valid gift remained unsatisfied. Therefore, the Revenue cannot be non-suited from arguing the said contention that the theory of gift itself is false, as none of the ingredients for a valid gift has been established. The Revenue in more than one place has stated that the transfer of shares was effected without consideration. Taking note of this finding, the argument of the learned Senior Counsel for the assessee is that once it is not disputed that the

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transfer is without consideration, merely because the transfer was motivated by business purpose does not mean the transfer is for consideration. In this regard, reliance was placed on the decision of the AAR in ***Amiantit International Holding Ltd.*** In the said decision, after noting the facts, the AAR held that the possibility of the transferor improving its overall business by virtue of re-organisation or mere possibility or chance of the transferor making better returns in the near or distant future as a consequence of re-organisation can clearly be regarded as consideration of accruing or arising to the transferor when he has no right to receive a definite amount or benefit from the transferee and capital gain cannot arise on the basis of uncertain and indefinite future contingencies or hypothetical and imaginary estimations.

52.In the preceding paragraphs, we have discussed about the factual matrix and we have affirmed the finding of the authorities that the two companies which were incorporated as a subsidiary and step down subsidiary are for the purpose of creating a conduit to avoid tax. Therefore, the decision will not assist the case of the assessee. The case of the assessee

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is that the transfer is voluntary, there was no compulsion from any external agency. We have noted the factual position as recorded by the authorities more particularly the sworn statement given by the CFO as to the events which preceded the incorporation of the subsidiary and step down subsidiary, the events which had occurred prior to the Board of the assessee approving the share transfer and executing the deed of transfer of shares. Upon examining the background facts, we have rendered a finding that the transfer action was not voluntary. However, the argument of the learned Senior Counsel for the assessee is that the transaction cannot be regarded as involuntary, if it is imposed on the donor and the donor has no option but to carry it out even if he chooses not to. To support such contention, heavy reliance was placed on the decision in ***Tollygunge Club.*** The assessee therein was Social and Sports Club with one of its activities of conducting horse races with amateur riders, it charged for admission into the enclosure of the club, a resolution was passed by the General Body for levying surcharge for local charity in addition to admission fee. Receipts on account of surcharge were not treated as trading receipts of the assessee therein and were not brought to tax. The ITO took a different view by

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holding that the amounts received on account of surcharge is application of the income belonging to the assessee and included it in the total income of the assessee. The first appellate authority affirmed the view taken by the ITO, which was reversed by the Tribunal and upheld by the High Court. On appeal before the Hon'ble Supreme Court, the case was decided in favour of the assessee that the receipts from the surcharge levied on admission tickets for the purposes of charity could not be included in the assessee's taxable income. We fail to understand as to how this decision can render any assistance to the case of the assessee. The factual scenario as projected shows chains of events which took place prior to the incorporation of the subsidiary and step down subsidiary and also the events which occurred prior to the decision to transfer the shares. Therefore, it cannot be stated that these were forced upon the assessee, rather it is at the instance of the third party investor whose investment was in a tax haven, the transaction was adopted by the assessee and the element of voluntariness is absolutely absent. Equally the decision in the case of ***Handicrafts and Handlooms Export Corporation of India Ltd.,*** would also not assist the case of the assessee wherein the grant of subsidy by the holding company to secure and

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protect the capital investment made by it in the said assessee company was held to be capital receipt in the said assessee's hands and therefore, not chargeable to tax. In the case of ***Siemens Public Communications Network Pvt. Ltd.,*** wherein the admitted facts are the voluntary payment made by the parent company to its loss making Indian company was understood to be payments made in order to protect capital investment of the said assessee company and therefore, it was held that it cannot be treated as a revenue receipt. The argument of the assessee before the authorities and the Tribunal and before this Court is that once the transfer is without consideration, it is voluntary and accepted, it satisfies the conditions contained under Section 125 of the Act. To support such contention, reliance was placed on the decision in ***Nerca Chemicals Pvt. vs. UoI [(2015) 371 ITR 280].*** De-hors the finding which we have rendered in the preceding paragraphs that the transaction is not a valid gift, as it does not satisfy any of the tests in Section 125 of the Act, the decision in ***Nerca Chemicals Pvt. Ltd.*** will not also help the assessee where the Assessing Officer held that the transfer is not a gift because the transfer agreement does not mention the word gift. In the case on hand, the authorities have

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noted that it was never the intention of the assessee to treat the transaction as a gift. Therefore, reference was made to the Board Resolution which says that the transfer shall be "with" or "without consideration". Therefore, one of the factual issues, which was noted by the authorities as well as by the Tribunal is that the transfer was guided for other considerations. Therefore, we have not proceeded solely on the basis of the title of the document, but are guided by the form and substance and the intention behind the transaction bearing in mind the words on caution expressed by the Hon'ble Supreme Court as regards the duty of the Courts and Tribunals while examining a transaction to consider it as to whether it is legitimate tax planning or device adopted for tax evasion. Factually we have held that the transaction is not covered under Section 47(iii), as it is not a transfer of capital asset under a gift and the authorities below rightly classified the transaction under Clause (iv) of Section 47. The argument of the assessee is that clause (iv) of Section 47 would not be attracted, as it would apply only to a wholly owned subsidiary. It should not be forgotten that we have been called upon to decide as to whether the subsidiary company and the step down subsidiary were incorporated as a device to act as a conduit to avoid

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tax in India. Therefore, the transaction effected in favour of RG would undoubtedly fall within clause (iv) of Section 47 and the incorporation of the step down subsidiary and transfer of shares in favour of a third party investor within a short span of less than a week for a stake of more than 27% and surrounding circumstances will clearly bring the transaction as transfer of the capital asset by a company to its subsidiary company and therefore, to be classified as a transaction under Section 47(iv).

53.In the decision in the case of ***Kalindi Investment P. Ltd.,*** relied on by the learned Senior Counsel for the assessee, the Court pointed out the distinction between the definition of holding company under the Companies Act and there is no justification for transplanting the said provision into the provisions of Section 47 of the Act. We find from the facts of the said case that there is no allegation of tax evasion or subsidiary company set up outside which had served as a conduit to avoid tax. Therefore, we are of the considered view that the decision is factually distinguishable. The argument which was placed on behalf of the assessee by referring to Section 92A of the Act in fact would support the case of the Revenue. By referring to the

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decisions in ***Bosotto Brothers Ltd.,*** and ***C.S.Mathur,*** it is submitted by the learned Senior Counsel that if two alternate provisions are available, it is the choice of the assessee to be covered by the provision which leaves lesser burden on the assessee and therefore, it was argued that the assessee would elect to be governed under Section 47(iii) of the Act.

54.On facts, we have found that Section 47(iii) will not apply, as we have held that the transfer was not a valid gift. Therefore, the said argument does not merit consideration. The assessee by placing reliance on the decision in ***Sunil Siddharthbhai, B.C.Srinivasa Shetty, Dheer & Co., Dana Corporation, Amiantit International Holding Ltd.,*** and ***Goodyear Tire & Rubber Co.,*** by way of alternate submission contended that assuming that there is a transfer, there is no gain that is chargeable to tax in terms of Section 45, as there is no consideration that accrues or arises or is received by the assessee.

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55.Firstly, we need to point out that the transaction is a circular transaction and is a measure adopted to avoid tax. The TPO in his order has

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done an analysis as to how there is a loss in real income and loss of revenue by shifting profits outside the country and we extract the said finding hereinbelow:-

> *"10. Loss in real income and loss to revenue by shifting profits outside the country:*
>
> *Throughout the TP proceedings the assessee tends to portray that the above transfer of shares is within the group companies only, the economic benefits will accrue to the Indian company and consequently the transaction does not attract capital gain tax. The incorporation of the new entities in the abroad and transferring a revenue generating asset to such entities will essentially mean that in future the income from such asset will accrue directly to the non-resident and not to the Indian company. In this case, previous to the share transfer, the Indian company was holding the Redington, Gulf's shares and hence dividend declared will accrue to the Indian company. This dividend if accrued to the Indian company has to be taxed in the hands of Indian company as per the Act, and such dividends are not exempted even under DTAA. As matter of fact, this particular issue was studied with*

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respect to the dividend declared by the Redington, Gulf from FY 2005-06 which is tabulated as below:-

FY	***Dividend declared by Dubai Company (which accrued to Cayman Islands company)***	***Dividend declared by Cayman Islands Company (which accrued to Mauritius Company)***	***Dividend declared by Mauritius Company (which accrued to Indian Company)***
2006-07	--	--	--
2007-08	--	--	--
2008-09	--	--	--
2009-10	--	--	--
2010-11	31.02 Cr	16.99 Cr	--
2011-12	23.96 Cr	21.42 Cr	--
Total	54.98 Cr	38.41 Cr	--

As evident from the above table, the assessee company had arranged their entities in such a manner if any dividends were declared from the RGF, Gulf it would accrue to entities which is incorporated in the tax haven countries. Due to the above rearrangement, the country had lost the potential revenue of at least of Rs.54.98 crores relevant to AY 2011-12 and AY 2012-13 alone. To that extent the shifting of profits outside the country had been established in this case due to the above restructuring. No alone that, if RGF, Gulf entity is sold off in future, the gain will accrue to the Cayman Island company and not to the Indian company."

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56.The above finding rendered by the TOP which ultimately stood crystallised in an assessment order after the directions issued by the DRP has not been touched upon for its correctness by the Tribunal. We find that the above factual conclusion would go a long way to demolish the case of the assessee which they now project before us. Consequently, the contention that there is no capital gain chargeable under Section 45, there can be no income in terms of Section 2(24) is also not acceptable. The issue as to whether there is any income or business income etc., is a question of fact. The authorities below have dealt with the same elaborately, but unfortunately, the Tribunal did not venture to examine the correctness of such finding and in our considered view, the Tribunal failed to examine the factual matrix despite being the last authority to render findings of fact. Thus, in the absence of any such finding, we are to hold that factual findings remain unassailed which we are inclined to confirm.

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57.The next issue, which is required to be considered is with regard to the order passed by the Tribunal, allowing the claim of trade mark fee and deleting the addition on account of Corporate and Bank Guarantee.

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58.During the Assessment Year under consideration, the assessee had made a payment of Rs.1,89,33,150/- towards trademark and license fee for using the trademark REDINGTON to its Associated Enterprise, Redington, Singapore. The TPO determined the ALP of the trademark/license fee as 'Nil' on the ground that there is no genuine rationale for payment of the said trademark/license fee to Redington, Singapore. The DRP affirmed the said findings of the TPO. The Tribunal deleted the same by stating that the tax payer is the best judge of his business affairs and it is not for the TPO to question the commercial rationale of payment and in this regard, placed reliance on the decision of the Hon'ble Supreme Court in ***S.A.Builders.*** The following factual aspect requires to be noted. The assessee filed an application before the trademark Registry for obtaining registration of the word mark 'Redington' on 29.02.2000. The Trademark Registry issued Certificate of Registration on 17.03.2009 and in terms of provisions of the Trade Marks Act, the Certificate of Registration is deemed to have been granted from the date of application i.e., from February 2000. It is an undisputed fact that the

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assessee has been using the Trademark 'Redington' ever since 1993. Redington, Singapore was established in the year 2005 and the Trademark agreement was entered into between the assessee and Redington, Singapore on 01.06.2006. It is seen that there was no evidence placed by the assessee either before the DRP or before the Tribunal, disputing the above factual position. The case of the Revenue is that there is absolutely no rationale for the assessee to pay a license fee for a mark, which they have been using ever since 1993 and obtained registration from the Trademark Registry with effect from February 2000. The assessee's case is that the TPO while exercising powers conferred under the provisions in Chapter X of the Act, he can only compute the Arm's Length Price and it is not for him to evaluate the commercial expediency behind incurring of such expenditure.

59.The learned Senior counsel appearing for the assessee placed reliance on the decision of the High Court of Delhi in ***Frigoglass India Private Limited*** to support the contention that the TPO cannot sit on judgment on the business and commercial expediency of the assessee by referring to the decision in ***Commissioner of Income Tax vs. EKL***

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Appliances [341 ITR 241 (Del)]. It is submitted that the Special Leave Petition in SLP(Civil) No.41702/2017 was dismissed on 19.01.2018. For the same proposition, reliance was placed on the decision in ***SI Group India Limited*** and the decision in ***Lever India Exports Limited.*** Therefore, it is argued that the adjustment made by the TPO is ex facie unsustainable in law. Further, it is contended before us that even if ALP determined by the assessee is found to be incorrect, then the TPO is bound to determine the ALP by applying the most appropriate method as contemplated to sub-sections (1) and (2) of Section 92C and determining the ALP at 'NIL' in an adhoc manner by not applying any of the prescribed method is ex facie illogical on facts.

60.The learned Senior counsel for the assessee submitted that it is a case of the assessee that the initial owner of the Trademark was Redington, Singapore and it was operating in India through a Branch till 1987 and only in 1987, the assessee name was changed to the present name namely Redington India Limited and subsequently, in 1993, the assessee took over the business of the Branch of Redington, Singapore. Further, the

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application for registration of the Trademark also refers to the Trademark being used by the assessee since 1986. The learned Senior counsel would submit that in the absence of clarity on facts, the assessee would request this Court to remand the matter back to the Assessing Officer to re-adjudicate the allowability of the deduction on the touchstone of Section 37(1) of the Act. Thus, we have to consider as to whether the TPO had evaluated the commercial expediency behind incurring the expenditure towards Trademark/license fee and if the answer to the said question is in favour of the assessee, then the issue would be whether the determination of the ALP at 'NIL' is proper and lastly whether the prayer made by the assessee to remand the issue back to the Assessing Officer needs to be granted.

61.As could be seen from the order passed by the TPO dated 29.01.2013, the assessee failed to submit any documents to establish that Redington, Singapore was the legal owner of the Trademark. All that the assessee stated was that they entered into an agreement with its wholly owned subsidiary for payment of Trademark license fees for a period of 10 years at USD 4,00,000 per annum with effect from 01.04.2006 and an

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amount of Rs.1.89 crores was paid during the Assessment Year under consideration. The TPO noted that the assessee company has been using the Logo ever since 1993, the date of commencement of its operations. Further, the TPO noted that assessee has been given the rights to register the Trademark in India in the name of the assessee and they have also been given the rights to use and exploit the Trademark in respect of the goods and services marketed in India. Taking note of this factual position, the TPO held that when assessee was using the Trademark from 1993, payment to a newly incorporated company from the year 2006 is illogical. Further, TPO noted that Redington, Singapore is a subsidiary and there is no rationale for payment of Trademark fee to the assessee's subsidiary. Further, the TPO reiterated that there was no documentary evidence placed by the assessee inspite of show cause notice having been given to show that Redington, Singapore was the owner of the Trademark. The TPO after considering the explanation offered by the assessee, pointed out that there is no documentary evidence to prove that Redington, Singapore was the owner of the Trademark and it is illogical for a subsidiary company to claim Trademark fee from its Parent and therefore, held that there is no genuine

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rationale behind the payment towards Trademark/license fee and accordingly, determined the ALP at 'Zero'.

62.The assessee objected to the findings of the TPO before the DRP and reiterated the submissions made before the TPO in response to the show cause notice issued to them. The DRP re-appreciated the factual position and after going through the records, held that it is admitted by the assessee that they have been using the Trademark for a long time without any payment and that the Trademark is not registered in Singapore in the name of Redington, Singapore, but it is registered in India in assessee's name. Furthermore, the DRP noted that the payments have been discontinued since AY 2011-12 and only for a brief period, the assessee had taken such a route. Therefore, the DRP concluded that there is hardly any real business justification for this payment and in the given facts, in an uncontrolled situation, no one would have made such a payment. Hence, they declined to interfere with the order of the TPO.

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63.In paragraph 97 of the order passed by the Tribunal, the issue relating to payment of Trademark/license fee has been dealt with.

64.The Tribunal stated that the assessee is exploiting the trademark 'Redington' for the purpose of carrying on its business and there is nothing uncommon in assessee's making payment to Redington, Singapore for use of the Trademark and it is not necessary for the TPO to go beyond this plausible explanation since it is a widely accepted business practice around the world and it is not an unique case for the assessee company alone. Further, it is for the assessee to decide dynamics of its business and the assessee is the best judge to decide on such issues. In this regard, reliance was placed on the decision in ***S.A.Builders***. Unfortunately, the Tribunal did not examine the facts as mentioned above. The TPO has specifically recorded that the assessee did not produce any document to show that the original owner of the Trademark was Redington, Singapore. The admitted fact, as rightly noted by the TPO and the DRP is that the assessee has been using the mark ever since 1993. Redington, Singapore, a wholly owned subsidiary of the assessee, was established only in 2005 and

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the agreement to pay Trademark/license fee was in the year 2006. The assessee applied to the Trademark registry for registration of the mark 'Redington', in the year 2000 and the same was registered in the name of the assessee and it is deemed to have been granted from the date of application i.e., from the year 2000. Thus, in the absence of any documentary evidence, the TPO came to such a conclusion that it is illogical for any organization to pay Trademark/license fee to a subsidiary company when the registration was in the name of the assessee and even prior to submitting the application to the Trademark registry in the year 2000, the assessee was using the mark ever since 1993. The DRP once again went into the factual matrix, perused the records and held that the assessee could not establish by placing documents that Redington, Singapore was the legal owner of the Trademark 'Redington'. In such circumstances, we can only observe that the finding rendered by the Tribunal in Paragraph 97 is perverse. The view taken by the Tribunal, stating that it is a widely accepted business practice around the world and not a unique case for the assessee company alone are all personal opinions of the Tribunal, not supported or substantiated by any records, documents or decisions. Going by the admitted facts, it is evidently clear

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that the TPO did not go into the dynamics of the business activity of the assessee nor questioned the commercial expediency of the assessee. The conclusion arrived at by the TPO as confirmed by the DRP was based on records, which were available before it and the assessee miserably failed to establish their case not only before the TPO, but also before the DRP by placing records. Therefore, we find that there is absolutely no error in the manner in which the decision was taken by the TPO and the DRP.

65.Hence the decision in the case of ***SI Group India Limited*** cannot come to the aid and assistance of the assessee, nor the decision in the case of **Lever India Exports Ltd.,** can help the assessee.

66.It was argued by the learned Senior counsel that in any event, if ALP determined by the assessee is found fault, then in terms of sub-section 3 of Section 92C, then the TPO is bound to determine the ALP in terms of sub-sections 1 and 2 of Section 92C. The finding of the TPO is that there is absolutely no rationale for effecting such a payment to wholly owned subsidiary by the Parent company, the case as projected by the

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assessee is illogical and in other words, the claim was baseless and therefore, the ALP was determined at 'NIL'. We find no error in the decision making process, considering the factual situation whole of which has been admitted and the assessee miserably failed in dislodging the factual finding rendered by the TPO by producing any document before the DRP. In such circumstances, we find absolutely no justification on the part of the assessee to seek for a remand to the Assessing Officer to redo the assessment on the said issue. For all the above reasons, we hold that the finding rendered by the Tribunal is wholly erroneous and the same is set aside.

67.The next issue is with regard to the Corporate Guarantee and Bank Guarantee.

68.From the Annual Report of the assessee, it was seen that the assessee had issued guarantees on behalf of its subsidiaries to the tune of Rs.464.36 crores and on behalf of others, to the tune of Rs.3.42 crores. The assessee was called to explain the same. The assessee stated that they had not issued any fresh guarantee during the Assessment Year 2009-10 and the

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guarantee is outstanding, is purely on account of the currency transition adjustment on restatement of guarantees outstanding at the closing rates prevailing on 31st March 2009 for disclosure in financial statement in compliance with the Accounting Standards. Further, the assessee stated that the outstanding guarantee issued by the assessee as on 31.03.2009 represents guarantee issued on behalf of the overseas subsidiaries in earlier years. Further, they stated that during the course of assessment proceedings in the relevant assessment years, the TPO made addition to the Corporate Guarantee issued during those years by adopting the bench mark rate based on the available internal comparable uncontrolled price charged by the bank at 0.85%. The assessee also issued Corporate Guarantee in favour of M/s.Parampara Wedding Cads and M/s. Baskar Digital Press. The TPO after taking note of the amended Section 92B, which was introduced with retrospective effect from 01.04.2002, examined the factual aspect and pointed out that though the assessee stated that they have not issued any fresh guarantee during the Assessment Year 2009-10, the guarantees were live and were not closed as on 31.03.2009 and the liability continued on the assessee as on 31.03.2009. Noting that providing such guarantee is one of

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the financial service rendered by the assessee for which it has to be remunerated appropriately and that concerned parties in whose favour these guarantees were extended, where Associated Enterprises of the assessee and the transactions were largely influenced by related parties, the Associated Enterprises benefited and consequently, the income would accrue only to such non-resident and to that extent, shifting of tax base from the country is bound to happen in such transaction and the assessee should have been remunerated appropriately. The Corporate Guarantee was to the tune of Rs.5574.13 lakhs and Bank Guarantee to the tune of Rs.40862.34 lakhs. Further, the TPO observed that there is no time period for expiry of the guarantee. Consequently, it will demand more commission charges than the commission charged by the Banks. That apart, the assessee had taken maximum risk in providing Bank Guarantee to their subsidiaries and the entire credit risk is owned by the assessee, the Indian Company and it has to be reimbursed at maximum percentage of fees. Further, the TPO noted as to the manner in which the Bank's charge commission on guarantees extended and observed that the Bank will insist upon cash deposits / guarantee deposits / asset mortgage etc., to extend guarantees on behalf of their

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clients. Further, it was pointed out that if a situation arises that the Bank Guarantee has to be invoked, when the Associate Enterprise is not in good financial position, obviously, the assessee is at risk and they claim that there is no risk in providing guarantees cannot be accepted. The TPO drew a comparison between the Guarantees issued by the Bank and Guarantees issued by the assessee on behalf of the Associated Enterprise to the Bank. It has been recorded that the Associated Enterprises of the assessee have not provided any security to the assessee. In the agreement / contract between the Associated Enterprises and the assessee, no condition has been imposed on the Associated Enterprises to pay the amount to the assessee and even in some agreements if it is mentioned, in the event of the Associated Enterprises financially becoming weak, the risk undertaken by the assessee becomes greater. Further, invoking a guarantee provided to an Associated Enterprise is very difficult as it depends on the financial condition of the Associated Enterprise and the law governing such transactions in that country and the assessee is bound by the provisions of FEMA and RBI guidelines. Therefore, the TPO concluded that the Bank commission charges cannot be compared for the commission charges that has been

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payable to the assessee by the Associated Enterprises and it is a clear financial services rendered by the assessee to their Associated Enterprise, which has to be compensated by proper commission charges. Accordingly, the TPO held 2% shall be charged as commission and proposed an upward adjustment to the income of the assessee to the tune of Rs.817.25 lakhs. In respect of the guarantees given to unrelated parties, the TPO held that 2% should be charged as guarantee commission and proposed an upward adjustment of Rs.111.48 lakhs to the income of the assessee. The DRP after hearing the assessee, held that the TPO has not given cogent reasons for taking a different stand than the stand taken by the Department in the earlier years as the same guarantee is continuing during the year under consideration and therefore, there cannot be a different bench marking from that of the previous year. Accordingly, the DRP directed the TPO to adopt the same rate of guarantee commission as was adopted by the TPO in the preceding year.

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69.The directions issued by the DRP were given effect to by the Assessing Officer vide Assessment Order dated 17.01.2014. The Tribunal

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held that the TP addition made against the Corporate and Bank Guarantee is not sustainable in law. This conclusion is by observing that the assessee has provided Corporate and Bank Guarantees for the overall interest of its business. It referred to the decision of the Delhi Tribunal in the case of ***Bharti Airtel Ltd.,*** wherein it is held that Corporate Guarantee does not involve any cost to the assessee and therefore, it is not an "international transaction" even under the definition of the said term as amended by the Finance Act, 2012. The Tribunal is a final authority to render findings on fact. The Tribunal failed to give any reason as to how the decision in ***Bharti Airtel Limited*** would apply to the assessee's case. Furthermore, there was no record placed before the Tribunal by the assessee that they have not incurred any cost for providing Bank Guarantee. As observed earlier, the TPO has compared the nature of documentation executed by the assessee in favour of his Associated Enterprise to come to the factual conclusion that it is a financial service. This finding of fact has not been interfered by the DRP, but the DRP was of the view that the same treatment, which was given in the previous Assessment Year should be extended for the Assessment Year under consideration also and there is no reason given by the TPO for taking

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a divergent view. The finding that the very same transaction for the previous Assessment Year was subject matter of TP adjustment, has not been disputed by the Tribunal rather not even dealt with by the Tribunal. Therefore, the finding rendered by the Tribunal is utterly perverse.

70.The argument of the learned Senior counsel appearing for the assessee is that prior to the amendment brought about in Section 92B by Finance Act 2012, the Tribunal had decided that furnishing of a guarantee by an assessee was not an "international transaction" as it did not fall within any of the limbs of Section 92B. It is submitted that to get over the judicial pronouncement, the explanation was inserted. The argument is that Clause (c) of the Explanation supports the case of the assessee inasmuch as the Explanation makes it clear that giving of a Corporate Guarantee is not a service. Without prejudice to the said contention, it is submitted that only Corporate Guarantee is given by the assessee, which are in the nature of lending are covered under clause (c) of Explanation 1 to Section 92B. Further, it is submitted that the nature of transactions covered by Clause (e) specifically include even those transactions which may not have a "bearing

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on the profit, income, losses or assets of such enterprises at the time of transaction" are covered if they have such a bearing "at any future date". It is argued that the language used in the Explanation makes it clear that in so far as the transactions that fall within the main part of Section 92B are concerned, such transactions must have a bearing on profit, income, losses or assets of an assessee in the year in which the transaction is effected. In the assessee's case, the Corporate Guarantees represent a contingent liability and lay dormant and have no bearing on the current year's profits, income or losses of an assessee and Corporate Guarantee are not covered within the definition of international transaction. It is submitted that applying "doctrine of fairness"as explained by the Hon'ble Supreme Court of India in the case ***Vatika Township Private Limited***, the explanation ought to be read as prospective in its application and retrospective in its effect such that it will also cover within its ambit guarantees issued prior to the introduction of the explanation by Finance Act 2012.

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71.We find from the grounds of appeal filed by the assessee before the Tribunal, no ground was raised as regards the argument that the

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explanation added by Finance Act 2012, is to be construed as prospective in its application. Furthermore, the Tribunal has also not recorded in its order, more particularly, from Paragraph 92 that the assessee had argued on the issue regarding prospectivity / retrospectivity. Further, the assessee has not challenged the validity of the Explanation nor its applicability with retrospective effect. That apart, even before the DRP, such contention was not raised. The Hon'ble Supreme Court in ***Gold Coin Health Food Private Limited,*** while deciding the issue whether an amendment was clarificatory or substantive in nature or whether it will have retrospective effect held as follows:

> *"14. The presumption against retrospective operation is not applicable to declaratory statutes ... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous*

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law retrospective operation is generally intended ... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what

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it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)"

72.A new Enactment or an Amendment meant to explain the earlier Act has to be considered retrospective. The explanation inserted in Section 92B by Finance Act 2012 with retrospective effect from 01.04.2002 commences with the sentence "For the removal of doubts, it is hereby clarified that -"

73.An Amendment made with the object of removal of doubts and to clarify, undoubtedly has to be read to be retrospective and Courts are bound to give effect to such retrospective legislation.

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74.The learned Senior Standing counsel for the Revenue referred to the decision in ***Co-operative Company Limited vs. Commissioner of Trade Tax in Civil No.2124 of 2007 dated 24.04.2007***, wherein it was held that when an amendment is brought into force from a particular date, no

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retrospective operation thereof can be contemplated prior thereto. The explanation in Section 92B specifically has been given retrospective effect and it is clarificatory in nature and for the purpose of removal of doubts. This issue was considered by this Court in the case of ***Sudexo Food Solutions India Private Ltd.***

75.The concept of Bank Guarantees and Corporate Guarantees was explained in the decision of the Hyderabad Tribunal in the case of ***Prolifics Corporation Limited.*** In the said case, the Revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is an additional guarantee, provided by the Parent company. It does not involve any cost of risk to the shareholders. Further, the retrospective amendment of Section 92B does not enlarge the scope of the term "international transaction" to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfill the liability and therefore, there is always an

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inherent risk in providing guarantees and that may be a reason that Finance provider insist on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that this position indicates that provision of guarantee always involves risk and there is a service provided to the Associate Enterprise in increasing its creditworthiness in obtaining loans in the market, be from Financial institutions or from others. There may not be immediate charge on P & L account, but inherent risk cannot be ruled out in providing guarantees. Ultimately, the Tribunal upheld the adjustments made on guarantee commissions both on the guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise.

76.In the light of the above decisions, we hold that the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and restore the order passed by the DRP.

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77.The Revenue had preferred appeal before the Tribunal,

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challenging the order passed by the DRP, regarding a finding that the PE Fund was relatively risk free investment, without taking note of the discussion made by the TPO in his order dated 29.01.2013. The Revenue contended that the TPO has discussed as to how the PE funds cannot be regarded as risk free funds. The Revenue relied upon the decision of the Delhi Tribunal in the case of ***Premier Exploration Services Pvt. Ltd. vs. ITO [29 ITR (T) 427 Delhi]***, wherein it has been held that no risk adjustments can be allowed, but the same has not been quantified. It was contended that the assessee has failed to bring any evidence on record to show that there was any difference in risk profile of comparable companies. It was submitted that risk adjustment cannot be allowed as a thumb rule. Unless or until it is shown or established that difference in the risk results into deflation and inflation of the financial results of comparables, no adjustment can be made on this ground. The Tribunal in Paragraph 103 of the impugned order, while dealing with those issues, dismissed the Revenue's appeal on the ground that since the Tribunal had already concluded that the transaction is outside the purview of the provisions, the appeal of the Revenue has to fail. Since we have set aside the finding of the

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Tribunal and held that the transactions would attract the TP provisions, we are required to examine as to whether the DRP was justified in holding that the PE fund was relatively risk free investment. It was assessee's case that the PE Investor (IVC) had a buy back arrangement with the assessee according to which the PE investor was assured of certain risk free return on the investment and hence, the value at which PE investor acquired 27% stake should not be considered as reflective of market price or ALP. The assessee contended that the TPO sought to apply the Comparable Uncontrolled Price ['CUP' for brevity] Method on the basis of the amount infused by IVC. It was submitted that for argument sake, even if gift of shares are considered as an international transaction, which is required to be tested for arm's length, the same cannot be compared with fund infused by IVC. Since the assessee's investment in RC is strategic and would have different investment objectives when compared to objectives of IVC. IVC is a private equity fund engaged in acquisition of investments, holds them for a certain period (3-5 years) and disposes the same at the end of the agreed period whereas the objective of the assessee is to promote their overseas business including their business in Middle East Africa. It is further

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contended that IVC gets assured return and this would mean that IVC does not bear the risk of loss that may arise on account of the business of RG. The DRP agreed with the TPO and held that the value of the shares of RC determined at the time of investment by the IVC represents the best possible estimate of the market value RC share and this represents the value of the shares, held by the assessee in RC at the time of its transfer. Having held so, the DRP proceeded to hold that they are in agreement with the argument of the assessee that in view of the buy back arrangement, the PE fund was making a relatively risk free investment, the market price would have been less than what was paid by the PE fund. The DRP ultimately held that it can be said that the PE fund paid 10% extra, on account of the buy back assurance and directed the TPO to allow 10% adjustment on the ALP determined by him or of the shares of RG and ALP shall be reduced by Rs.88.51 crores.

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78.We find from the order of the TPO that the grounds canvassed by the assessee before the DRP were the same as it was canvassed before the TPO. The TPO held that CUP method is the most appropriate method

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since a similar transaction had been taken place within one week i.e., on 13.11.2008 namely shares of RG held by the assessee were transferred to RC and on 18.11.2008, an unrelated party, the PE Investcorp (IVC) acquired 27% stake in RC. Therefore, the TPO came to the conclusion that this uncontrolled transaction is ideal in determining the ALP of the shares of RG that had been transferred to RC, more importantly, with regard to the circumstances under which the said transaction was done. Further, the TPO noted that the assessee has sought permission from the RBI through one of its agency bank, ABN-AMRO wherein it was mentioned by the assessee that the PE (IVC) is interested in acquiring the stake in RG, Dubai. Further, the assessee passed a resolution in their Board meeting on 25.07.2008 about the investment to be made by the PE. The assessee admitted that it was their objective to list the shares in an appropriate stock exchange overseas. The TPO on analysing these facts, held that the assessee knew that the PE Investor is going to acquire a stake in RC for a pre-determined sum after RG share which was held by the assessee gets transferred to RC. The Investcorp (IVC) before investing in RC would have valued the shares appropriately and there is no reason for them to buy the shares at an inflated value.

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Further, the TPO did not agree with the assessee's submission that it is a risk free Return Portfolio and it would command a higher investment price as this is against the principle of economics. Further, the assessee's claim that IVC does not bear any risk of loss on liquidation and hence investment price is higher is also against the principle of economics. On analysing the nature of transaction, the TPO recorded as follows:

> *"20.3 .....The assessee himself had admitted that the International Transactions in question were carried out with a view to list the Dubai business in stock exchanges so that additional funds can be mobilised. Once such listing is done, then the strategic investors like IVC have to exit only through the sale of shares through stock exchange. In such a situation, the investor may earn a good return if the stock does well in the market. He stands to loose if the stock does not do well. Only if the company fails to list the shares within an agreed period of time, the investor is given the exit option with an agreed rate of return on the investment, as it is the inability/failure of the company to list the shares within the agreed timeframe for whatever reasons."*

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79.The TPO proceeded to discuss about the various cases in the nature, where the Private Equity Investors had lost heavily on their investment as the target company in which they invested faired very badly in the stock market after the listing of their shares. Further, the TPO has also taken note of as to how the funds are very professionally managed and there is detailed due diligence conducted before making the investment which is with the sole view of making profits. Therefore, the TPO held that the value of shares of RC determined at the time of investment by IVC represents the best possible estimate of the market value of the share of RC and this represents the value of shares held by the assessee in RC at the time of transfer.

80.The TPO referred to the Organisation for Economic Co-operation and Development Guidelines ['OECD' for brevity] , the decisions of the Tribunal about the Moore Stephensons Valuation Report, discussed about the Discounted Cash Flow Method ['DCF' for brevity], took note of the historical performance and future profitability of the company, what are

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the parameters which have to be taken into consideration for applying DCF method and concluded that the ALP should be determined by CUP Method.

81.Accordingly, the TPO proposed that a sum of Rs.885,13,80,000/- may be added as the value of the shares that has been transferred to RC, which is also the ALP of the shares that have been transferred and the AO may also calculate the Capital gains accruing as a result of such share transfer after giving necessary opportunity.

82.As was seen from the order passed by the DRP, it was in substantial agreement with regard to the finding rendered by the TPO that the value of the shares of RC determined at the time of investment by IVC represents the best possible estimate of the market value of the shares of RC. Though such finding was rendered, the DRP agreed with the assessee that because there was a buy back arrangement, the PE fund was making a relatively risk free investment. However, such finding has been rendered by the DRP without setting aside what has been factually found and recorded by the TPO.

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83.We find that the reasoning given by the TPO is legally sustainable, reflects not only the factual position, but also the manner in which the PE funds are managed worldwide as to how they conduct detailed due diligence before making the investment, because the investment is with a sole intention of making a profit. Therefore, we find that the decision of the DRP in granting 10% risk adjustment allowance is perverse and without any analysis of the factual position which has been rightly brought out by the TPO in his order. Therefore, the order of the DRP, as confirmed by the Tribunal is set aside and the order of the TPO is restored and the Assessing Officer is directed to give effect to the said order.

84.In the result, the Tax Case Appeals are allowed and the Substantial Questions of Law are answered in favour of the Revenue. No costs.

(T.S.S., J.) (V.B.S., J.)
10.12.2020

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Index: Yes / No
Speaking Order/Non-Speaking Order

abr/kak

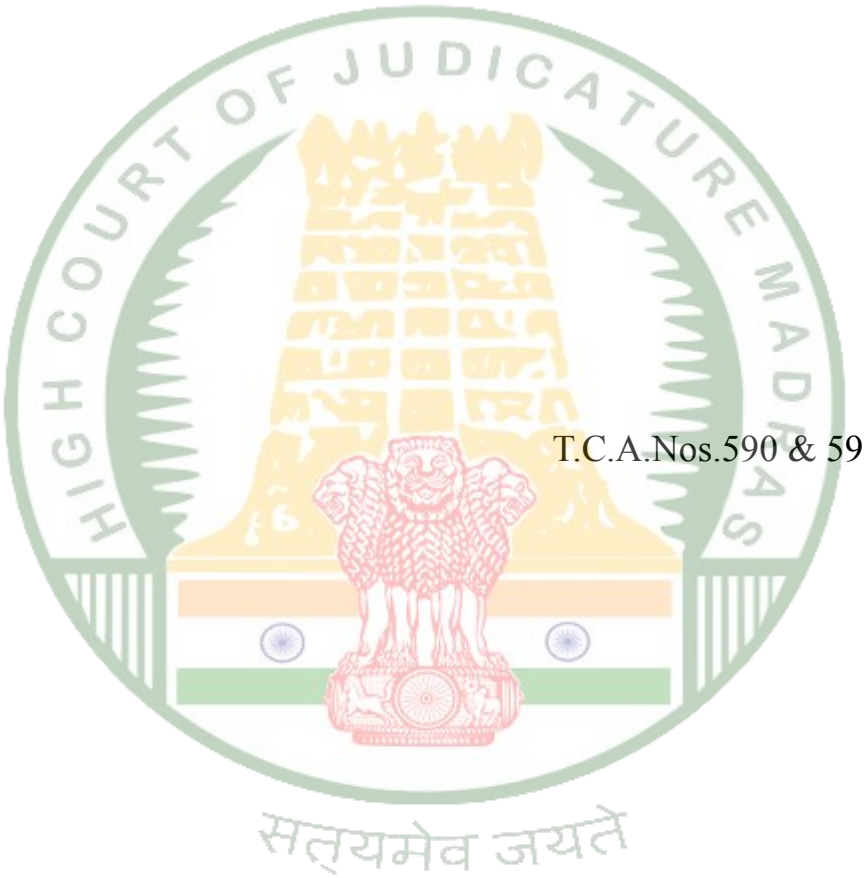
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T.S.Sivagnanam, J.
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