IT/ILT : Where assessee having raised funds by issuing FCCB bonds with zero coupon rate of interest, gave interest free advances to its AEs located abroad out of amounts so raised, since assessee had not incurred any interest liability, there was no need for receiving any interest as well and, thus, impugned addition made to ALP on basis of national rate of interest was to be deleted

[2018] 93 taxmann.com 457 (Hyderabad - Trib.)

IN THE ITAT HYDERABAD BENCH 'B'

Bartronics India Ltd.

v.

Deputy Commissioner of Income-tax, Circle- 1 (3), Hyderabad*

B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND V. DURGA RAO, JUDICIAL MEMBER
IT APPEAL NOS. 1732 (HYD.) OF 2012, 383 (HYD.) OF 2015, 520 & 521 (HYD.) OF 2016
[ASSESSMENT YEARS 2008-09 TO 2011-12]
MAY 4, 2018

Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Adjustment - Interest) - Assessment years 2008-09 to 2011-12 - Assessee raised funds by issuing FCCB bonds with zero coupon rate of interest - During relevant year, assessee gave interest free advances to its AEs located abroad out of amounts so raised from issue of FCCB Bonds - TPO was of opinion that assessee should have charged interest on advances given to subsidiaries - He thus determined yield on B rated bonds at 20 per cent and taking that as basis, assessee's bonds were rated BB rated bonds and arrived at interest rate of 17.26 per cent which assessee should have charged on advances given to subsidiaries - Accordingly, TPO made addition to assessee's ALP adjustments - Whether since assessee had not incurred any interest liability, there was no need for receiving any interest as well because transaction had no 'bearing on profits, income, losses or assets of such enterprises', a classification which is required to subject transaction to further analsysis under transfer pricing provisions - Held, yes - Whether in view of aforesaid, impugned addition was to be deleted - Held, yes [Para 9.1][In favour of assessee]

FACTS

- The assessee was engaged in the business of automatic identification and data capture technology. It raised funds by issuing FCCB bonds with zero coupon rate of interest.
- During relevant year, the assessee gave interest free advances to its AEs located abroad out of amounts so raised from issue of FCCB Bonds.
- The TPO was of the opinion that since assessee had obtained bonds with interest, assessee should have charged interest on advances given to the subsidiaries. He thus determined the yield on B rated bonds at 20 per cent and taking that as basis, the assessee's bonds were rated BB rated Bonds and arrived at the interest rate of 17.26

per cent which assessee should have charged on the advances given to subsidiaries. Accordingly, the TPO made addition to the assessee's ALP adjustment.

- The DRP, however, directed the TPO to adopt rate of LIBOR+2 per cent interest.
- On second appeal.

HELD

- There is no dispute that assessee has raised funds only for the purpose of investments in its subsidiaries. These are Zero coupon bonds and there is no interest liability to assessee. It is also fact that these funds were raised abroad and transferred abroad and only entries have been passed in assessee's books of account. It is also fact that these amounts were shown as 'advances' but the intention was always reflected as for the purpose of expansion of business. In these circumstances, even though the amounts were classified as 'loans and advances' the source of funds received were interest free and in turn passed on to subsidiaries, as per the original intention while raising money, no interest could be charged, as ultimately shares were allotted. [Para 9]
- It is one of the contentions of assessee that these transactions are not forming part of international transactions as per section 92B(1). [Para 9.1]
- *Explanation* was introduced by the Finance Act, 2012 with effect from 01-04-2002 clarifying retrospectively that capital financing is also forming part of international transactions *vide Explanation* (1)(*c*). however, it is to be noted that this amendment has been inserted by the Finance Act, 2012 by which time, assessee has already borrowed funds on zero coupon bonds and advanced these funds to the sister concerns. Therefore, at the time of entering into the transactions and also till the shares are allotted, capital financing was outside the purview of international transaction. Therefore, liability on those transactions cannot be fastened even though law has been amended to clarify that these transactions also form part of international transactions.
- Be that as it may, as assessee had not incurred any interest liability, there was no need for receiving any interest as well as the transaction had no 'bearing on the profits, income, losses or assets of such enterprises', a classification which is required to subject the transaction to further analysis under the transfer pricing provisions.
- One of the arguments of the DRP as well as the revenue is that the transaction violates FEMA regulations. It is only the contention that the transactions violate FEMA regulations but as found, assessee is entitled to invest upto 400 per cent of the net worth in the form of equity, debt and guarantee. Even the written submissions filed by the revenue DR also accepts this fact that Indian party can invest in wholly owned subsidiaries to the extent of 400 per cent of the net worth. Even though various regulations were explained, no violation has been pointed out except that the amount stated to be for investment was classified as a loan. Since equity and debt are permitted on the regulations and since no proceedings under FEMA have been initiated against the assessee-company, the so called violations noted by the revenue does not stand.
- It is admitted that the amounts are stated as loans and advances in all the annual reports on which there is no dispute, but it is the contention of assessee that the intention of borrowing as well as advancing is only towards investment and for expansion of the business. Therefore, there is no violation of FEMA regulations.

[Para 9.2]

- In view of aforesaid, it is held that advancing interest free loans must not necessarily be deemed to be an interest earning activity and an activity to capitalise the opportunity cost for investing in new territories. Since the funds were raised for the purpose of investment in subsidiaries and on the fact that these funds were interest free and ultimately, shares were allotted, it is opined that no adjustment need be made, on the CUP method adopted by the AO/TPO, even if the transaction is considered as one that of international transaction. For all the reasons stated above, no adjustment is required in the impugned year. The order of the DRP were accordingly modified and adjustment made by the TPO stands deleted. [Para 9.5]

CASE REVIEW

KAR Therapeutics & Estates (P.) Ltd. v. *Dy. CIT* [IT Appeal No. 86 (Hyd.) of 2016] and *DLF Hotel Holdings Ltd*. v. *Dy. CIT* [2016] 71 taxmann.com 300/159 ITD 1075 (Delhi - Trib.) (para 9.4) *followed*.

CASES REFERRED TO

CIT v. *EKL Appliances Ltd*. [2012] 24 taxmann.com 199/209 Taxman 200/345 ITR 241 (Delhi) (para 5.2), *Vijay Electricals Ltd*. v. *Addl. CIT* [IT Appeal No. 842 (Hyd.) of 2012, dated 31-05-2013] (para 5.2), *GSS Infotech Ltd*. v. *Asstt. CIT* [2016] 70 taxmann.com 356 (Hyd. - Trib.) (para 5.2), *KAR Therapeutics & Estates (P.) Ltd*. v. *Dy. CIT* [IT Appeal No. 86 (Hyd.) of 2016] (para 5.2), *Perot Systems TSI (India) Ltd*. v. *Dy. CIT* [2010]37 SOT 358 (Delhi) (para 6.1), *VVF Ltd*. v. *Dy. CIT* [IT Appeal No. 673(Mum.) of 2006, dated 08-01-2010] (para 6.1), *Tata Autocomp Systems Ltd*. v. *Asstt. CIT* [2012] 21 taxmann.com 6/52 SOT 48 (Mum) (para 6.1), *Soma Textiles & Industries Ltd*. v. *Addl. CIT* [2015] 59 taxmann.com 152/154 ITD 745 (Ahd. - Trib.) (para 6.1), *Shrenuj & Co. Ltd*. v. *Addl. CIT* [2015] 57 taxmann.com 274 (Mum. - Trib.) (para 6.1), *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321/60 Taxman 248 (SC) (para 6.2), *DLF Hotel Holdings Ltd*. v. *Dy. CIT* [2016] 71 taxmann.com 300/159 ITD 1075 (Delhi - Trib.) (para 9.4), *Bajaj Tempo Ltd*. v *CIT* [1992] 196 ITR 188/62 Taxman 480 (SC) (para 11.2), *Bnazrum Agro Exports (P.) Ltd*. v. *ACIT* [IT Appeal No. 774 (Mds) of 2012, dated 18-9-2012] (para 11.2), *CIT* v. *Abhinitha Foundation (P.) Ltd.* [2017] 83 taxmann.com 100/249 Taxman 37/396 ITR 251 (Mad.) (para 11.2), *ITO* v. *S Venkataiah* [2012] 22 taxmann.com 2/52 SOT 437 (Hyd.) (para 11.6), *Asstt. CIT* v. *Dhir Global Industria (P.) Ltd*. [2011] 43 SOT 640 (Delhi) (para 11.7), *Visu International Ltd*. v. *Dy. CIT* [IT Appeal No. 696 (Hyd.) of 2011] (para 11.8), *CIT* v. *Madras Radiators & Precincts Ltd*. [2003] 264 ITR 620/129 Taxman 709 (Mad.) (para 12), *CIT* v. *Nipso Polyfabriks Ltd*. [2013] 30 taxmann.com 90/213 Taxman 379/350 ITR 327 (HP) (para 12.1), *CIT* v. *AIMIL Ltd*. [2010] 321 ITR 508/188 Taxman 265 (Delhi) (para 12.1), *Dy. CIT* v. *Tetrasoft India (P.) Ltd*. [IT Appeal No. 291 (H) of 2017] (para 12.1), *Sagun Foundry (P.) Ltd*. v. *CIT* [2017] 78 taxmann.com 47 (All.) (para 12.3) and *CIT* v. *Vegetable Products Ltd*. [1973] 188 ITR 192 (SC) (para 12.4).

P. Murali Mohan Rao, AR *for the Appellant.* **Peeyush Sonkar** and **R. Laxman**, CIT-DRs *for the Respondent.*

ORDER

1. These are assessee's appeals against the orders of the AO, as confirmed by the Dispute Resolution Panel [DRP]. Since common issues are involved in these appeals, we have heard them together and disposed of by this order. For detailed analysis, the issues in AY. 2008-09 have been considered. The case was heard number of times and both the Ld. Counsel and Ld.CIT-DRs made elaborate arguments. After the hearing was completed on 15-02-2018, both the parties were advised to file written

submissions which they did on 27-02-2018 by assessee and on 09-03-2018 by the Revenue. The submissions are considered in detail.

2. Assessee, Bartronics India Ltd., is engaged in the business of automatic identification and data capture technology. It has manufacturing facility for producing the smart cards. Assessee had two subsidiaries - one subsidiary is located in USA, known as Bartronics America Inc., USA [BAI] and the other subsidiary is located in Singapore and is known as Bartronics Asia Pte Ltd., Singapore [BAPL]. Assessee has filed return of income on 30-10-2008, admitting total income of Rs. 89,48,510/- under the normal provisions and the income of Rs. 41,03,77,040/- u/s. 115JB of the Income Tax Act [Act]. As the assessee had international transactions with its Associated Enterprises [AEs] during the year, the matter has been referred to Transfer Pricing Officer [TPO]. There are other corporate issues which will be dealt with later as this issue of Transfer pricing adjustment is common in all the appeals from AYs. 2008-09 to 2011-12 with varying amounts.

I. *Transfer Pricing Issue*:

3. The only issue under the TP provisions is with reference to the advances to the subsidiaries totaling to Rs. 280.81 Crores. During the previous year, assessee had advanced funds to its sister concerns as under:

	Rs.
a. Bartronics Asia Pte Ltd., Singapore	83,96,92,039
b. Bartronics America Inc., USA	196,84,67,406
Total:	280,81,59,445

3.1 Assessee it seems has raised 25 Mn. Dollars by issue of FCCB Bonds with a coupon rate of 7.25% P.A. and 50 Mn. Dollars bearing coupon rate of 6.65% P.A. Bond holders have an option to convert into the equity shares of assessee- company. As per the assessee, bonds are Zero coupon bonds and no interest liability has been incurred by the assessee- company. The DRP also noted down in para 2.2 of the order that advances were given out of non-interest bearing bonds and the advances to subsidiaries were for the purpose of acquisitions and expansions of business outside India.

4. Before the TPO, assessee submitted that advances given to subsidiaries were interest free and they were given for the purpose of expansion of business activities of its AEs. Assessee did not charge any interest on the advances given to its subsidiaries. The TPO was of the opinion that since assessee has obtained bonds with interest, assessee should have charged interest on advances given to the subsidiaries. After detailed discussion and rejecting the assessee's contentions, the TPO determined the yield on B rated bonds at 20% and taking that as basis, assessee's bonds were rated BB rated bonds and arrived at the interest rate of 17.26% which assessee should have charged on the advances given to the subsidiaries. Accordingly, the TPO has proposed the following adjustments under the provisions of transfer pricing.

	Rs.
a. Bartronics Asia Pte Ltd., Singapore	6,45,88,574
b. Bartronics America Inc., USA	5,22,47,593

4.1 TPO proposed an adjustment of Rs. 11,68,36,167/-. Assessee raised objections before the DRP and submitted that the source of the funds advanced to the subsidiaries are proceeds of FCCBs which are obtained with the purpose of acquisition and expansion of business. The money was raised as equity with Zero coupon rate of interest and invested in subsidiaries without any interest. It was further submitted that normal rate of interest on loans and advances in the global market is less than 1% and TPO has considered 17.26% which is not correct and justified. It was further submitted that FCCB funds were received by Bank of Baroda, Offshore Branch, Singapore and the same funds were given to foreign associate companies without transfer from India. It was the transfer from foreign country to foreign country which does not have any impact with reference to assessee. It was further submitted that these advances cannot be considered as loans or deposits and no interest is chargeable as assessee is not

paying any interest. The DRP, however, did not agree with the contentions of assessee and directed the TPO to adopt rate of LIBOR + 2%. The directions of the DRP on the issue are as under:

"2.8 The panel has considered the submissions of the tax payer and also considered the additional grounds submitted by the tax payer. The tax payer had given advances to its AEs out of the proceedings of the convertible bonds issued by it. The tax payer has agreed to pay interest rate of 7.25% and 6.65% on the bonds till such bonds are converted into equity shares. The TPO has adopted the CUP as the most appropriate method and compared the corporate bonds having 'B' rating as comparable and determined the interest rate of 17.26%. The loans were given by the tax payer to AEs located in USA and Singapore. The panel agrees with the views of the TPO that in respect of advances. Arm's Length interest rate requires to be determined. The transactions were entered by the tax payer in foreign currency and the interest rates as applicable to the loans advanced in the international financial markets should be adopted for bench marking the interest rates. The panel does not agree with the contentions of the tax payer. The tax payer submitted that the advances to AEs were given with an intention to convert such advances into equity shares and the tax payer did convert such advances into equity share capital in the year 2011. Thus, the contention of the tax payer is that the TPO has changed the character of the transaction from the contribution of share capital to advances /loans.

2.8 The panel examined the contention of the tax payer very carefully. If the tax payer contention is accepted it leads to violation of Foregin Exchange Management Act 1999. Under this Act, the Reserve Bank of India has notified the regulations known as 'Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations - 2004' Under Rule 5 of these regulations no person resident in India shall make any direct investment outside India without prior approval of the RBI. Up to 400% of net worth of an Indian Party can be invested in a wholly owned subsidiary in automatic route but such an Indian Party has to comply with the Rule 15 of the regulations. Under Rule 6 the Indian Party has to submit the prescribed documents relating to investment in wholly owned subsidiary to the designed branch of an authorized dealer. Under Rule 15 of these regulations an Indian entity investing in an entity outside India needs to produce share certificates or any other document as an evidence of investment in the foreign entity to the satisfaction of the Reserve Bank within 6 months. Thus, under these regulations, firstly, the tax payer has to intimate the Reserve Bank of India / Authorised Dealer before remitting the share capital to its AEs. Thereafter, within six months, the tax payer has to produce the share certificates in support of the investment. No evidence is produced before the panel regarding the intimation to the Reserve Bank of India or to its Authorized dealer in the Financial year 2007-08. The intimation to RBI or its Authorized dealer is required even in cases where the investment comes under the automatic route. Thus, during the financial year or in the next financial year the tax payer did not convert the advances into share capital within the regulations prescribed by the RBI under FEMA- 1999.

2.9 Therefore the nature of the investment during the financial year remains as advances/loans. Once the transactions are categorized as 'advances', a tax payer has to determine the Arms' Length Interest Rate for such advances. The lending or advances to AEs was done in the international market, external commercial borrowings should be considered as comparable transactions to the advance/loan transactions between the assessee and its overseas subsidiaries. The TPO adopted the CUP method but the transactions he compared were not the actual transactions. Therefore the comparison made by the TPO under the CUP method was inappropriate. The advances were given in the international market by the tax payer and the interest rate prevailing in the international markets can be adopted for the purpose of bench marking the international transactions. In the view of the panel the appropriate interest rate is the LIBOR. A mark up is also required on the LIBOR. The panel considers that a 2% markup on LIBOR is appropriate because the loans were unsecured.

Therefore, the interest rate that needs to adopted for determination of the ALP in respect of advances to its AE is the LIBOR+2%. The AO should ascertain the LIBOR rate for 12 months period prevailing in Financial Year 2007-08 and adopt the same and add a mark up of 2%. Thus, the interest rate of 17.26% adopted by the AO as interest on advances given to AE is reduced to LIBOR+2% (12 month LIBOR rate in financial year 2007-08)".

5. It was the submission of Ld. Counsel that assessee has made advances to its AEs for the purpose of acquisition of companies and business thereby for the expansion of assessee's business. Even though these advances have been made as equity investments for the purpose of acquisition and for expansion of business, these were classified as advances while preparing the financial statements as equity shares were not allotted. It was further submitted that as per the business plan proposed, assessee raised FCCBs for 50 Mn. US$ and 25 Mn. US$ with a purpose to invest in the subsidiaries of assessee-company. It was clearly stated in the annual report for the AY. 2008-09 that the proceeds of the FCCB will be utilised for the purpose of expansion of its activities in India and abroad. It was further submitted that subsidiary company was not in a position to allot the shares as the process of investment by that company was not complete- the process has taken longer time and ultimately, shares were allotted on 30-09-2012. This indicates that assessee has always intended to make equity investments. It was submitted that on TPO/DRP's observation that the amounts were shown under 'loans and advances', assessee has to show the same under the Companies Act as the shares were not allotted but this fact cannot be held against it as ultimately shares were allotted.

5.1 It was further submitted that since the intention was to make investment as an equity investment, the provisions of Section 92CA will not be applicable as the transaction cannot be regarded as international transaction. In support, it was the contention that FCCB was raised abroad by Bank of Baroda, Offshore Branch and funds were transferred from that country and has not transferred from India. Only entries have been passed in the assessee-company accounts. Referring to paper books placed on record, it was the contention that the business for which the bonds were acquired and the purpose for which the amounts were invested was already stated in the annual reports and in the permissions obtained from RBI etc.,

5.2 Regarding the argument of DRP and TPO that assessee violated FEMA regulations, it was the submission that under Rule-5 of Foreign Exchange Management [transfer or issue of any foreign security] Regulations Act, 2004, it was mandated that no person resident in India shall make any direct investment outside India as equity without prior approval of the RBI. However, upto 400% of net worth of an Indian Party was permitted in automated route as per notification No. FEMA.173/2007-RB. It was submitted that during the AY. 2008-09, assessee net worth was about 242.36 Crores and an amount of Rs. 280.82 Crores was given as advances for investment, which is less than 400% of the net worth. Therefore, the investment made by assessee is in compliance with the notification issued under FEMA rules. Further, it was submitted that the advances given for investment cannot be re-categorised as loans for which assessee relied on the following case law:

i. *CIT* v. *EKL Appliances Ltd*. [2012] 24 taxmann.com 199/209 Taxman 200/345 ITR 241 (Delhi)

ii. *Vijay Electricals Ltd*. v. *Addl. CIT* [IT Appeal No. 842/Hyd/2012, dated 31-05-2013]

iii. *GSS Infotech Ltd*. v. *Asstt. CIT* [2016] 70 taxmann.com 356 (Hyd. - Trib.)

iv. *KAR Therapeutics & Estates (P.) Ltd*. v. *Dy. CIT* [IT Appeal No. 86 (Hyd.) of 2016]

5.3 It was further submitted that the advance made to its subsidiaries were out of FCCB proceeds, which were non- interest bearing bonds. Ld. Counsel submitted that these facts were appreciated by the ITAT

while passing order for AY. 2012- 13 as the loans were converted to equity in the AY. 2012-13. It was the submission that Co-ordinate Bench has noted all the above facts and passed an order in ITA No. 259/Hyd/2017, allowing the case in favour of assessee. It was submitted that the issue is similarly covered as the Co-ordinate Bench has relied on another decision of Co-ordinate Bench in the case of *KAR Therapeutics & Estates Pvt. Ltd*., (*supra*), which was given on similar facts.

6. Ld.DR in reply, however, referred to various annual reports and other documents of assessee as well as the subsidiaries to submit that these amounts were advanced as loans only and nowhere the intention to allot shares was mentioned. Since there is no share application money or as not shown under the head 'investments', these amounts are purely in the nature of loans and advances. Assessee being a listed company, under the mandatory disclosure as per Clause-32 of the listing agreement with a stock exchange, it has consistently declared the nature of these amounts as 'loans and advances'. It was further submitted that recipient of these amounts i.e., both the subsidiaries were consistently declared the receipt as a loan from holding company. In view of that, it was submitted that both assessee as well as subsidiaries have treated the amount as loans and advances in the impugned assessment years and the contention that these are share application money is only an afterthought and is not based on any fact or evidence. Relying on the explanation to Clause-I, Sub-Clause-C, Ld.DR submitted that the transaction of advances is an international transaction as per Section 92B(1) and any kind of advance whether given out of business consideration or otherwise is covered within the definition of 'capital financing' and therefore, the amount advanced by assessee is an international transaction. Even in Form-3CEB, assessee has declared the transaction as amount paid towards advances but has not made any separate adjustment. It was further submitted that availability of interest free fund on business expediency is not a relevant consideration for determining the ALP of the international transaction. Further, the possibility of equity investment in future not borne out of the facts; it is only an after thought.

6.1 Coming to the argument that assessee has not violated FEMA Regulations, Ld.DR submitted that DRP has noted that transactions violate the FEMA regulations. While admitting that Regulation-5 of the FEMA rules permits the investment upto 400% of the net worth, it is submitted that this limit is for total financial commitment which includes equity, debt and guarantee. Thus, the submission of assessee that it is permitted equity investment is not correct. The only conclusion which could be drawn is that the assessee could have invested the amount as per the FEMA Regulations, but does not prove the nature of investment. It was submitted that money was advanced as a loan under Sub-Regulation-4 of Regulation-6. Therefore, it is to be categorised as loan and advance only. It was further submitted that assessee has not contested the factual finding of the DRP that this transaction is in the nature of loan and advances. For the argument that assessee has invested in equity, the Ld.DR reiterated that nowhere it is shown as share application money and subsequent allotment of shares does not change the character as loans and advances and so the provisions of TP are application. Ld.DR relied on the following case law:

i. *Perot Systems TSI (India) Ltd*. v. *Dy. CIT* [2010]37 SOT 358 (Delhi);

ii. *VVF Ltd*. v. *Dy. CIT* [IT Appeal No. 673(Mum.) of 2006, dated 08-01-2010];

iii. *Tata Autocomp Systems Ltd*. v. *Asstt. CIT* [2012] 21 taxmann.com 6/52 SOT 48 (Mum);

iv. *Soma Textiles and Industries Ltd*. v. *Addl. CIT* [2015] 59 taxmann.com 152/154 ITD 745 (Ahd. - Trib.);

v. *Shrenuj & Co. Ltd*. v. *Addl. CIT* [2015] 57 taxmann.com 274 (Mum. - Trib.)

6.2 Coming to the Co-ordinate Bench decision given in AY. 2012-13, it was submitted that order was obtained by assessee on the basis of incomplete facts and the decision is not based on true and full disclosure by the assessee. The fact that treatment of advance as loans is brought on record for the first time before the Bench now and the AY 2012-13 was decided prior to deciding the issue in AY. 2008-09,

it was the first year when money was transferred to the subsidiaries. Thereafter, Ld. DR elaborately distinguished that decision and finally relied on the principles of *Res Judicata* which do not apply to the income tax proceedings and relied on the judgment of Hon'ble Supreme Court in the case of *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321/60 Taxman 248 (SC). Ld.DR distinguished the case law relied on by assessee to submit that in all those cases, the amounts were invested as share application money and so they are not applicable.

7. In reply, Ld.Counsel submitted that there is no dispute showing the amounts as 'loans and advances' but it was only the intention behind advance which is material. It was submitted that foreign funds are obtained specifically for expansion through its subsidiaries and the intention was really established at the time of raising the funds and also undertakings given to various authorities for necessary permissions. It was also established by the fact that subsequently, shares were allotted. Since no interest was borne by assessee-company on its money raised, question of taking interest from the subsidiaries does not arise as ultimately the intention was to invest in subsidiaries for expansion of business. It is also admitted that the funds were though raised as fully convertible foreign currency bonds, the shares were allotted to the ultimate bond holders which also establish that the intention of assessee is always to make investment and not to advance as a loan.

8. Coming to the decisions relied on by the Ld.DR, it was submitted that the orders were passed in favour of Revenue as the nature of advance was of loan and shares were never allotted by the subsidiaries. Whereas in the case of assessee, the advance was extended to AEs for the purpose of investment in subsidiaries and these advances were later converted to investment. Therefore, the case law relied on by the Ld.DR are not applicable.

9. We have considered the rival contentions and perused the documents placed on record and the case law relied upon. As can be seen from the orders of the authorities, as well as the submissions made, there is no dispute that assessee has raised funds only for the purpose of investments in its subsidiaries. These are Zero coupon bonds and there is no interest liability to assessee. It is also fact that these funds were raised abroad and transferred abroad and only entries have been passed in assessee's books of account. It is also fact that these amounts were shown as 'advances' but the intention was always reflected as for the purpose of expansion of business. In these circumstances, even though the amounts were classified as 'loans and advances' the source of funds received were interest free and in turn passed on to subsidiaries, as per the original intention while raising money, we are of the opinion that no interest could be charged, as ultimately shares were allotted.

9.1 It is one of the contentions of assessee that these transactions are not forming part of international transactions as per Section 92B(1). The provisions of 92B(1) is enacted originally are as under:

> 'Sec. 92B(1) For the purpose of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale of lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expenses incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprise'.

Explanation was introduced by the Finance Act, 2012 w.e.f. 01-04-2002 clarifying retrospectively that capital financing is also forming part of international transactions vide Explanation(1)(c). however, it is to be noted that this amendment has been inserted by the Finance Act, 2012 by which time, assessee has already borrowed funds on zero coupon bonds and advanced these funds to the sister concerns. Therefore, at the time of entering into the transactions and also till the shares are allotted, capital

financing was outside the purview of international transaction. Therefore, liability on those transactions cannot be fastened even though law has been amended to clarify that these transactions also form part of international transactions. Be that as it may, as assessee has not incurred any interest liability, there is no need for receiving any interest as well as the transaction has no 'bearing on the profits, income, losses or assets of such enterprises', a classification which is required to subject the transaction to further analysis under the transfer pricing provisions.

9.2 One of the arguments of the DRP as well as the Ld.DR is that the transaction violates FEMA regulations. It is only the contention that the transactions violate FEMA regulations but as explained, assessee is entitled to invest upto 400% of the net worth in the form of equity, debt and guarantee. Even the written submissions filed by the Ld.CIT- DR also accepts this fact that Indian party can invest in wholly owned subsidiaries to the extent of 400% of the net worth. Even though various regulations were explained, no violation has been pointed out except that the amount stated to be for investment was classified as a loan. Since equity and debt are permitted on the regulations and since no proceedings under FEMA have been initiated against the assessee-company, the so called violations noted by the Revenue does not stand. It is admitted that the amounts are stated as loans and advances in all the annual reports on which there is no dispute, but it is the contention of assessee that the intention of borrowing as well as advancing is only towards investment and for expansion of the business. Therefore, in our view, there is no violation of FEMA regulations.

9.3 Ld.DR made elaborate arguments that the decision by the ITAT in AY. 2012-13 was obtained by not furnishing the full facts. This contention is not correct as Bench has examined the investment over a period of time and held the fact that shares were allotted in a later year and has decided the issue as under in favour of assessee.

> 'Considered the rival submissions and perused the material facts on record. Assessee has transferred funds to its AE as investment and the same was classified in the balance sheet as loans and advances. However, it is only a classification of accounting entry in the books, but, what is relevant and important is whether such transfer of funds were duly treated as investment and accordingly shares were allotted in the subsequent AY. Assessee has submitted share allotment certificate as evidence. Since the transfer of funds were duly accounted by the AE and there is no restriction on the part of the AE to allot shares in the same AY of receipt of funds, as long as the shares allotted, it gives true nature of the transaction. In the given case, even there is no outstanding balance in the books of assessee as loans and advances, the same transaction was duly justified by receiving allotted shares in the subsequent AY. In our considered view, there is no element of profit in the above transaction. Moreover charging of interest is depending upon the contractual obligations between the parties. In the given case, assessee has transferred funds with an intention to make investment, it cannot be treated as international transaction as held by various courts, particularly, in the case of *KAR Therapeutics & Estates Pvt. Ltd*. (*supra*) wherein the coordinate bench has held as under:
>
> "9. Considered the submissions of both the parties and perused the material facts on record as well as the orders of revenue authorities. There is no dispute that the assessee had remitted $ 3387182 towards investment in share capital. The shares were allotted to the extent of $ 2654797 in the same AY. The subsidiary company has treated the balance remittance as interest free unsecured loan and repayable on demand in their financial statement. In the next AY, the subsidiary company has allotted the shares on 15/03/2012. Now, can these transactions be treated as international transaction, which qualifies for ALP adjustment. In our considered view, the amount $ 732.385 is towards investment in share capital of the subsidiary outside India and the transactions are not in the nature of international transaction referred to' section 92-B of the IT Act and transfer pricing provisions are not applicable as there is no income as well as there is no mutual agreement between

the companies for such payment of interest. Moreover, the subsidiary company also disclosed as 'interest free. Moreover, in the similar situation with uncontrolled transaction, 'the allottee company in normal course of transaction will not be expected to receive any interest leave away the international transaction. Without any certainty or any agreement on receiving any interest but merely relying on the accounting method and disclosure of the subsidiary in their financial statement cannot lead to this transaction as international transaction which require ALP adjustment. Assessee had relied on the case of *Prithvi Information Solutions Ltd*. (*supra*) wherein on the similar set of facts and circumstances, the coordinate bench of this Tribunal has held as below:

"10. We have considered the rival submissions, perused the record and have gone through the orders of the authorities below as well as decisions cited. In our opinion, the amount representing 2118.84 is towards investment in share capital of the subsidiaries outside India as the transactions are not in the nature of transactions referred to section 92-B of the IT Act and the transfer pricing provisions are not applicable as there is no income. Accordingly, we set aside the order passed by the CIT u/s 263 and that of the AO is restored and the grounds raised by the assessee in this regard are allowed. "

As held in the above, we are inclined to treat the above transaction as not an international transaction and accordingly ground No.1 of the assessee is allowed. Since we have adjudicated ground No.1 as allowed, the ground Nos. 2 & 3 are only academic in nature and accordingly, dismissed. "

Respectfully following the decision of the coordinate bench in the said case, we are inclined to treat the above transaction as not an international transaction and accordingly the ground raised on this issue is allowed.'

We respectfully follow the same as facts are unchanged.

9.4 On the issue whether every loan advance has to be an interest earning activity, the Co-ordinate Bench at Delhi in the case of *DLF Hotel Holdings Ltd*. v. *Dy. CIT* [2016] 71 taxmann.com 300/159 ITD 1075 (Trib.) also considered similar issue and held as under:

"'17.6.1 ……There is nothing on record to support the conclusion that the interest free loan must necessarily be deemed to be an interest earning activity and not an activity to capitalize the opportunity cost for investing in new territories. We hold that for the tax authorities to consider re-characterizing the transaction the tax authorities must necessarily demonstrate that the transaction as claimed and documented is a sham or on the basis of facts and evidences is at a substantial variance with the stated form. In the absence of any such exercise the tax authorities are entering at their peril in the realm of arbitrariness. In the facts of the present case there is not even a whisper of a suggestion that it was a bogus transaction, as admittedly shares have been allotted. There is nothing in the provisions of the Act which empowers the tax authorities to (insist that the interest free loan towards its AE for capitalization the opportunity of cost of entering in new territories must necessarily by modified and re-characterized into a loan simplicitor and considered to be an activity for earning interest. The tax authorities must bring on record facts and evidences impacting the veracity of the claim of the assessee and demonstrate the hollowness of the assessee's claim. No such exercise has been done to counter the consistent claim of the assessee demonstrated by facts on record that the intention was to capitalize the opportunity cost and not to encash the opportunity to best utilize the available funds. In the facts as they stand, we find that the claim of the assessee has to be allowed.

** ** **

7.16.3 We find that the Co-ordinate Bench considering the term "quasi capital" has correctly

understood II that a quasi-capital loan or advance is not a routine loan transaction simplicator. The substantive reward for such a loan transaction is not interest but opportunity to own capital. As a corollary to this position, in the cases of quasi capital loans or advances, the comparison of the quasi capital loans is not with the commercial borrowings but with the loans or advances which are given in the same or similar situations. The decisions considering the expression were held to be inapplicable as "The reward for time value of money in these cases was opportunity to subscribe to the capital, unlike in a normal loan transaction where reward is interest, which is measured as a percentage of the money loaned or advanced". We find that quasi capital can be said to be a category of debt taken by a company which in the context of transfer pricing issues is not only an instrument of legitimate funding but is also a hybrid instrument pre-stipulated to be a loan for a transitory period, the economic purpose of which is a future capital investment in all its forms including contribution to equity or subscription of capital and cannot be justifiably be treated as a debt simplicitor".

7.19 Reverting back to the main issue, we note that on behalf of the assessee, reliance has also been placed on the judicial precedent as considered by the Hon'ble Bombay High Court in the case of *Vodafone India Services (P.) Ltd*. (*supra*). A perusal of the said decision shows that it further places reliance on *Vodafone India Services (P.) Ltd*. v. *Union of India* [2014] 50 taxmann.com 300/[2015] 228 Taxman 25/368 ITR 1 (Bom.). The said decision has been relied upon for the proposition that even if shares have been issued at a premium to the foreign holding company by an India subsidiary the amounts received from non-resident being capital in nature cannot be subjected to transfer pricing provisions. The Hon'ble High Court in categoric terms considering the issues on facts have held that the-alleged shortfall between fair market of shares and the issue price of shares cannot be considered income on the basis of supposed intent of legislature. Form No. 3CEB filed by the assessee by way of abundant caution, it has been held, would not be said to have granted Jurisdiction to the TPO. The applicability of Chapter X in categoric terms was ousted as the departmental case was found to have been based on surmises'.

9.5 Respectfully following the Co-ordinate Bench decisions, we are of the opinion that advancing interest free loans must not necessarily be deemed to be an interest earning activity and an activity to capitalise the opportunity cost for investing in new territories. Since the funds were raised for the purpose of investment in subsidiaries and on the fact that these funds were interest free and ultimately, shares were allotted, we are of the opinion that no adjustment need be made, on the CUP method adopted by the AO/TPO, even if the transaction is considered as one that of international transaction. For all the reasons stated above, we are of the opinion that no adjustment is required in the impugned year. The orders of the DRP are accordingly modified and adjustment made by the TPO stands deleted. Grounds are accordingly considered allowed.

AYs. 2009-10, 2010-11 & 2011-12:

10. In the three assessment years of 2009-10, 2010-11 & 2011-12, the issue is one that of interest levy as advances made to the sister concern. The facts are similar to earlier year and assessee has advanced the funds to the sister concern in AY. 2008-09 which were continuing as such in the books of account, with further advances during these years. As there is no liability of interest on the funds borrowed by the assessee through zero coupon bonds, it was the contention that there is no need to charge any interest as advances were made as investments for expansion of the business. The TPO, however, following the order in the earlier year, estimated the interest at BB Bond rate whereas the DRP has directed the TPO to make adjustment at LIBOR+2% and AO has made the following additions:

AY.	*AO made the adjustment of Rs.*
2009-10	36,97,81,035
2010-11	11,83,41,255

2011-12 39,08,80,670

10.1 For the reasons stated in the appeal for AY. 2008- 09, the issue contested in assessee's appeals is with reference to the above adjustments and consistent with the stand taken in earlier year in above appeal for AY. 2008-09 and also in later year of 2012-13, we hold that no adjustment is required. Accordingly, assessee's grounds in these years are allowed.

10.2 The grounds on these transfer pricing issues of assessee are allowed.

II. Corporate Matters:

These issues arise only in AY. 2008-09.

1. *Disallowance u/s.10B of the Act:*

11. During the AY 2008-09, the assessee claimed deduction u/s. 10B of Rs. 16,72,92,241 in respect of undertaking engaged in export. Assessee filed return on 31-10- 2008 whereas the due date for filing return was 30-09-2008. Since there was a delay in filing return, deduction u/s. 10B was denied. It was submitted that the assessee company had trouble with software which was used for maintaining accounts and lost the financial data due to problem with software at the time of due date for filing return, which is beyond the control of assessee. It was contended that assessee faced genuine hardship in filing the return of income. Hence, assessee filed return on 31-10-2008. To evidence the same, a copy of Virus report and certificate obtained was filed. It was contended that the statutory audit of the assessee company was completed on 02-09-2008. The Tax Audit u/s 44AB and Form 3CEB were also completed. It was submitted that assessee had successfully discharged all the statutory duties within the due date provided under Act. As the assessee had to collate a large data to file the ITR, like the payments made for items referred in section 43B of the Act, Payments of TDS to revenue Account, Reconciliation of TDS as per books and as per Form 26AS, Payment of self assessment tax etc., the filing was delayed. The systems of the assessee-company were injected by a virus on 25-09-2008 and therefore the assessee was unable to' file the return of income within the due date.

11.1 The AO, however, did not allow the claim u/s. 10B and assessee made an objection before the DRP. The DRP vide Ground No. 2 in para 3.1 relied on the insertion of proviso in Sub Section(i) of Section 10B stipulating that no deduction u/s. 10B shall be allowed to those who do not furnish return of income on or before the due date specified under Sub Section 139(1) of the Act. Relying on the above, since assessee's return was furnished u/s. 139(4) belatedly, the DRP confirmed the disallowance.

11.2 It was the submission that there was only a marginal delay of 30 days in filing the return of income and the return of income was accepted by the AO as valid one. It is also submitted that assessee's audit was completed within the due date but only uploading of the return was belated. It was also further contended that proviso to Section 10B(1) is directory in nature and not mandatory. Ld. Counsel relied on the judgment of the Hon'ble Supreme Court in the case of *Bajaj Tempo Ltd*. v *CIT* [1992] 196 ITR 188/62 Taxman 480 for the proposition that a provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. Ld. Counsel also relied on the Co-ordinate Bench decision in the case of *Bnazrum Agro Exports (P.) Ltd*. v. *ACIT* [IT Appeal No. 774 (Mds) of 2012, dated 18-9-2012] Madurai, and *CIT* v. *Abhinitha Foundation (P.) Ltd.* [2017] 83 taxmann.com 100/249 Taxman 37/396 ITR 251 (Mad.). Ld. Counsel also relied on various other case law. It was further submitted that deduction u/s. 10B was allowed in the previous years as the company was incorporated way back in 1990 and assessee was claiming deduction u/s. 10B from AYs. 2005-06 to 2014-15.

11.3 Ld.DR submitted that the admitted position is that the assessee has filed its return of Income for AY 2008-09 after one month. The assessee has relied on report and certificate given by one, 'Infokall' to say that the computers were not working from 25-09-2008. These documents are self serving documents

and cannot be verified independently. Secondly, the Audited account was already signed on 02-09-2008. (Page 96 of PB/A of AY 2008-09).Therefore, the return of income could have been filed based on the financials. If the system was not working from 24-09-2008, then how come the report have been prepared and signed on 29-09-2008. Thus, it is clear that the cause is not genuine and assessee does not deserve any concession. Moreover, the act is very specific and no two interpretation are possible when the language of the section is plain and simple. Therefore, it is prayed that the disallowance u/s 10B may kindly be confirmed.

11.4 We have considered the rival contentions and perused the documents placed on record. There is no doubt that assessee has completed audit as on 02-09-2008, but the return was uploaded belatedly. The reason given is that the computer got infected and it took some time to set it right so that assessee could upload the entire data. This reasoning given is supported by a certificate from a computer specialist, who attended to the problem. Since the audit was completed on 02-09-2008 which was not doubted by the Revenue, there is no reason why assessee should postpone the uploading of the return, when all the information was ready. Therefore, the explanation given that the computers got infected is a reasonable explanation given in the circumstances. We are of the opinion that the delay in filing the return is not an intentional delay but beyond the reasonable control of assessee. On similar facts, the Co-ordinate Bench at Chennai in the case of *Bnazrum Agro Exports (P.) Ltd.* (*supra*) held as under:

> "10. Coming to 'delay' part in filing of 'return' by the assessee, we find that per Assessing Officer's order, the return was filed on 31-12-08 whereas the IT(A) in para No.5.2 takes the date of filing return as 30-10-08. In the absence of any error pointed in CIT(A)'s order, wealso take the date of filing return as 30-10-08 ITA 74/Mds/12 i.r. after one month of due date i.e. 30-09-08. The assessee's explanation in support is that there was system's failure in uploading its electronic 'return'. We find from case law of *Dhir Global* (*supra*) that the provision of 'due date' under section 139(1) has itself been held to be a directory provision instead of mandatory. The other decisions of Chennai and Hyderabad ITAT benches also follow the same legal ten. Therefore, by placing reliance in the same, we also hold that since the operation of section 139(1) of the Act is directory in nature, therefore, the assessee's plea of system failure explaining delay of one month in filing return deserves to be accepted. At the same time, we have perused Hon'ble apex court judgement cited by D.R(*supra*). We find that in the said case, the issue was entirely different i.e. allowability of 'exemption' in case under section 10(29) of the Income Tax Act in principle and not alike the instant case where the assessee has been successfully getting deduction under section 10B of the Act for the last nine consecutive *Assessment Years* (*supra*).
>
> 11. After giving our thoughtful consideration to the case and more particularly, in view of the fact that the substantive ground for rejecting assessee's deduction claim is only that of delay of 9 ITA.774/Mds/12 one month filing 'return' we are of the opinion that the assessee has successfully explained the delay. Accordingly we hold that the assessee has filed a valid return u/s. 139(1) of the 'Act'. Accordingly, the assessee is also held entitled for getting the deduction u/s. 10B of the Act."

11.5 Hon'ble Madras High Court ruling in case of *Abhinitha Foundation (P.) Ltd*. (*supra*) is as under:

> "12.5. The failure to advert to the claim in the original return or the revised return cannot denude the appellate authorities of their power to consider the claim, if, the relevant material is available on record and is otherwise tenable in law. Any 'other view will set at naught the plenary powers of appellate authorities."

11.6 Further relied in the case of *ITO* v. *S Venkataiah* [2012] 22 taxmann.com 2/52 SOT 437 (Hyd.) it was held:

> "14. In our opinion, in view of the above discussion, the claim of the assessee cannot be denied on

technicalities when the assessee is legally otherwise entitled for deduction. As such we are inclined to dismiss the appeal filed by the Revenue as devoid of merit".

11.7 In the case of *Asstt. CIT* v. *Dhir Global Industria (P.) Ltd*. [2011] 43 SOT 640 (Delhi) it was held;

Section 10B of the Income-tax Act, 1961 - Export oriented undertaking Assessment year 2006-07 - Whether proviso to section 10B(1) is directory and not mandatory - Held, yes - Whether, therefore, in case of genuine hardship, relief can be granted to assessee u/s. 10B even if return is not furnished on or before due date specified under sub-section (1) of section 139 - Held, yes

11.8 Not only that, assessee was also claiming deduction in earlier years and following the principles laid down in the case of *Visu International Ltd*. v. *Dy. CIT* [IT Appeal No. 696 (Hyd.) of 2011, the deduction u/s. 10B cannot be denied in the subsequent year without a valid reason. Since there is a reasonable cause, the return filed by assessee is to be considered as return filed u/s. 139(1). Accordingly, assessee is entitled to deduction u/s. 10B. AO is directed to allow the same. The ground is allowed.

2. *Disallowance u/s 36(1)((v)/(va) Rs. 10,11,278/-:*

12. AO had disallowed an amount of Rs. 10,11,278/- being the amount remitted with a delay which becomes income u/s. 36(1)(v)(va). DRP has confirmed the same even though assessee has objected to the same. DRP has relied on the judgements of Hon'ble Kerala High Court in the case of *South India Corpn*. [103 Taxman 322] and *CIT* v. *Madras Radiators and Precincts Ltd*. [2003] 264 ITR 620/129 Taxman 709 (Mad.).

12.1 In this regard it was submitted that it is an established position of law that no disallowance can be made u/s 36(1)(v)/(va), if the assessee has remitted the amounts before the due date of filing of Income tax return for the relevant assessment year. In the case under consideration, the relevant due date of filing of Income Tax Return was 30-09-2008 and the assessee company has remitted the entire dues towards PF/ESI before 30-09-2008. Therefore, no disallowances are warranted in this regard. In this connection, reliance is placed on the following judgments:

(*a*) *CIT* v. *Nipso Polyfabriks Ltd*. [2013] 30 taxmann.com 90/213 Taxman 379/350 ITR 327 (HP)

(*b*) *CIT* v. *AIMIL Ltd*. [2010] 321 ITR 508/188 Taxman 265 (Delhi)

(*c*) *Dy. CIT* v. *Tetrasoft India (P.) Ltd*. [IT Appeal No. 291 (H) of 2017

12.2 Without prejudice to the above, it is submitted that even if any addition is made to the income of the assessee, the same would only increase the claim of exemption u/s 10B of the Act and that would not give rise to any taxable income in the hands of the assessee.

12.3 We have considered the rival contentions and perused the case law relied upon. We are of the opinion that this issue now stands decided in favour of assessee by the various Co-ordinate Bench decisions and that of Hon'ble Allahabad High Court. The Hon'ble Allahabad High Court in the case of *Sagun Foundry Pvt Ltd*. v. *CIT* [2017] 78 taxmann.com 47 has analyzed all the case law on the issue, including that of Hon'ble Gujarat High Court and following the Supreme Court Judgment in the case of Alome Extrusions has held as under:

"26. The question, whether benefit under Section 43B, as a result of amendment of Finance Act, 2003, is retrospective or not, came to be considered in *Commissioner of Income-Tax* v. *Alom Extrusions Ltd*. (*supra*). Court considered the intent, purpose and object in the historical back drop of insertion of Section 43B and its progress by way of various amendments. Referring Section 2(24)(x) it said, income is defined under Section 2(24) which includes profits and gains. Further in clause (x) of Section 2(24) any sum received by Assessee from employees as 'contributions' to any

provident fund/superannuation fund or any fund set up under Act 1948, or any other fund for welfare of such employees constitute 'income'. This is the reason why every Assessee/Employer was entitled to deduction even prior to April, 1, 1984, keeping books on mercantile system of accounting, as a business expenditure, by making provision in his books of account in that regard. Assessee was capable of keeping money with him and just by mentioning in accounts, was able to claim deduction as business expenses. Section 43B was inserted to check this practice and it resulted in discontinuing mercantile system of accounting with regard to tax, contributions etc. With induction of Section 43B an Assessee could claim deduction on actual payment basis. By Finance Act, 1988 Parliament inserted first proviso w.e.f. 01-04-1988 which inter alia provides that any sum payable by Assessee by way of tax, duty, cess or fee, if payment is made after closing of accounting year but before date of filing of Return under Section 139(1), Assessee would be entitled to deduction on actual payment basis. This proviso did not include within its ambit, contributions under labour welfare statutes. By Finance Act, 1988, Second Proviso thus Second proviso was further amended by Finance Act, 1989 w.e.f. 01-04-1989.

27. Court held that Assessee/employer thus would be entitled to deduction only if contribution stands credited on or before due date given in the Act 1952 or Act 1948. Second proviso created difficulties, inasmuch as under Act, 1981, due date was after the date of filing of returns and thus industries made representations to the Ministry of Finance. Court, looking to the history of amendments held, it is evident that Section 43B, when enacted in 1984, commences with a non obstante clause. The underlying object being to disallow deductions claimed merely by making a book entry based on the mercantile system of accounting. At the same time, Section 43B made it mandatory for the Department to grant deduction in computing income under Section 28 in the year in which tax, duty, cess etc. is actually paid. Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under Provident Fund Act, Municipal Corporation Act (Octroi) and other Tax laws. Therefore, by way of First Proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax duty cess or fee is paid before the date of filing of the return under Act 1961, Assessee would than be entitled to deduction. This relaxation /incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer should not sit on the collected contributions and deprive workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. But when implementation problems were pointed out for different due dates, uniformity was brought about in first proviso by Finance Act, 2003. Hence, amendment made by Finance Act 2003 in Section 43B is retrospective, being curative in nature and apply from 01-04-1988. In the result when contribution had been paid, prior to filing of return under Section 139(1), Assessee/employer would be entitled for deduction and since deletion of `Second Proviso and amendment of First Proviso is curative and apply retrospectively w.e.f . 01-04-1988.

28. From the aforesaid judgment, we find that irrespective of the fact that deduction in respect of sum payable by employer contribution was involved, but Court did not restrict observations, findings and declaration of law to that context but looking to the objective and purpose of insertion of Section 43B applied it to both the contributions. It also observed clearly that Section 43B is with a non-obstante clause and therefore over ride even if, anything otherwise is contained in Section 36 or any provision of Act 1961.

29. Therefore, we are clearly of the view that law laid down by High Courts of Karnataka, Rajasthan, Punjab & Haryana, Delhi, Bombay and Himachal Pradesh have rightly applied Section 43B in respect to both contributions i.e. employer and employee. Otherwise view taken by Gujarat High Court and followed by Kerala High Court, with great respect, we find expedient to dissent

therewith".

12.4 Though the Ld.DR relied upon the certain judicial precedents which are in favour of the Revenue, in view of the decision of the Hon'ble Supreme Court in the case of *CIT* v. *Vegetable Products Ltd*. [1973] 88 ITR 192 wherein Hon'ble Supreme Court held that where two reasonable constructions of a taxing provision are possible that construction which favour Assessee must be adopted, therefore, by respectfully following the decision of the Hon'ble Allahabad Court, we prefer to follow the view expressed by that Court which is in favour of Assessee.

12.5 Considering the facts and circumstance of this case and also following the judicial precedents as discussed above, we are of the view that there is no distinction between employee's and employer's contribution to PF/ESI, when the total contribution is deposited on or before the due date of furnishing of return of income u/s 139(1) of the IT Act then, no disallowance can be made towards employee's contribution alone. Accordingly, we agree with assessee's contentions and therefore set aside the order of AO and DRP on the issue and allow the ground. AO is directed to allow the amounts.

12.6 Even otherwise, if the amount is not allowed as deduction, the same will be added to the income of the unit thereby deduction u/s. 10B may get allowed, if the disallowed amounts pertain to the unit eligible for deduction. Looking at either way, assessee will be entitled for the deduction. Accordingly, grounds are allowed.

3. *Disallowance of 100% depreciation on Pollution control equipment Rs. 2,49,62,841/-* :

13. Assessee claimed a total depreciation of Rs. 28,89,94,398/-. Out of the above sum, a sum of Rs. 2,93,68,048/- was claimed as 100% depreciation on pollution control equipment. Even though assessee had furnished details on pollution control equipment, AO was of the view that the description of the assets as stated by the assessee did not fall in the category of 100% depreciation. Therefore, he allowed 15% depreciation on the Plant & Machinery as applicable to general Plant & Machinery and disallowed a sum of Rs. 2,49,62,841/-. DRP confirmed the disallowance on the reason that assessee did not prove that pollution control equipment was required for the purpose of business and such equipment was used in controlling the pollution- emanating from the manufacturing operations of the tax payer.

13.1 Ld. Counsel submitted that there is no dispute with reference to the purchase of equipment as the AO allowed depreciation at 15%. It was the contention that assessee manufactures smart cards and pollution control equipment is required for the purpose of business. Even though the same was explained, the officers are not willing to accept the same. It was submitted that assessee has purchased pollution control equipment and necessary details were furnished to the AO so that the claim may be allowed. In the alternate, it was submitted that as assessee is entitled for deduction u/s. 10B, the disallowance of depreciation should be added to the profit of the unit and corresponding increase in the deduction u/s. 10B.

13.2 Ld.DR submitted that assessee failed to file evidence before AO as well as DRP to prove that the Plan & Machinery was a pollution control equipment eligible for 100% depreciation. The assessee has not produced any evidence even before the Hon'ble Tribunal. Therefore, Ld.DR prayed that the disallowance may be confirmed.

13.3 We have considered the rival contentions and perused the submissions. There is no dispute that assessee has purchased Plant & Machinery which has categorized by him as pollution control equipment. What sort of evidence is required to establish that these are used in controlling the pollution is not specified by the DRP. In fact the DR's observation is not correct in the sense that 'specific question was put to the taxpayer, directing to prove that pollution control equipment was required for the purpose of business'. The use of machinery in the business has not been doubted even by the AO as he allowed

depreciation at 15%. Assessee categorized certain equipment as pollution control equipment, the nature of the equipment is to be examined in the context of the business operations of assessee. Since this aspect has not correctly appreciated by the AO or DRP, we are of the opinion that this issue requires re-examination by the AO. Therefore, we set aside the issue to the file of AO to examine the nature of equipment purchased and its utilization in the business and if satisfied to allow depreciation claim at 100%. In case of any disallowance of depreciation, AO is also directed to examine whether such equipment is used and claimed in the unit claiming deduction u/s. 10B and if so, any disallowance thereon would increase the profits of the unit so that assessee may be entitled to higher deduction u/s. 10B. With these directions, the issue in this ground is set aside to the file of AO for fresh examination. Grounds are accordingly allowed for statistical purposes.

4. Disallowance of excess depreciation on assets purchased from M/s. IRIS Smart Card Limited of Rs. 10,67,89,876/-

14. Assessee claimed that it has purchased machine from IRIS Smart Cards Ltd., for a sum of Rs. 18,26,57,500/- in a slump sale agreement dt. 10-08-2007. AO invoking the provisions of Section 43(1) r.w. Explanation (3) and after obtaining the approval of Addl. CIT, restricted the depreciation claim to 15% of WDV of the machine in the books of account of IRIS Smart Cards Ltd., valued at Rs. 1,86,97,484/- and restricted the depreciation to Rs. 28,04,622/- as against 60% claimed at Rs. 10,95,94,500/-. The difference of Rs. 10,67,89,876/- was disallowed by the AO.

14.1 Assessee objected to before the DRP and submitted that the said IRIS Smart Cards Ltd., is not a sister concern and without giving an opportunity, AO disallowed the amount. Further, it was submitted that it was a case of slump sale and break up of each asset is not available. DRP, however, did not agree with the taxpayer. It relied on the shareholding of Bartronics and India Ltd., and IRIS Smart Cards Ltd., and held that the said company was a sister concern. It also held that it is not a slump sale only a machine was purchased and therefore, it confirmed the action of the AO.

14.2 Ld. Counsel submitted that assessee purchased through an agreement, after obtaining the valuation report of an independent valuer giving total value of assets. It was further submitted that AO without appreciating the documentary evidences, invoked the Section 43(1) and restricted the disallowance. Without prejudice to the above, it was submitted that disallowance would increase deduction u/s. 10B.

14.3 Ld.DR, however, supported the order of AO/DRP on facts.

14.4 We have considered the rival contentions. Even though the DRP has mentioned that assessee-company had shares in the said unit, it did not specify whether the shareholding was before the purchase of machinery or after the purchase of machinery, which makes a lot of difference. At the time of transaction, whether they are sister concerns or not is not established on record. Moreover, assessee is objecting to the contention that these are sister concerns. In view of that, we are of the opinion that this issue requires re-examination by the AO. In case, at the time of entering into agreement for purchase of the asset, both the parties are related, then Explanation-3 to provisions of Section 43(1) may come into play. There is no clear finding on this issue, therefore, we set aside the issue to the file of AO to examine afresh and give clear findings on both the issues:

i. IRIS Smart Card Ltd is a related party;

ii. Provisions of Section 43(1) Explanation-3 will apply;

In case of any disallowance on this issue, AO is also directed to examine whether the machines are utilised for the purpose of business of the unit eligible for deduction u/s. 10B and if so, the profits of that unit would increase correspondingly. The deduction u/s. 10B also may have to vary accordingly. With these observations/directions, the grounds on this issue are set aside to the file of AO for fresh

examination. Ground is considered allowed.

5. *Disallowance of Excess Depreciation.*

15. Last ground for consideration is regarding the disallowance of depreciation on computers amounting to Rs. 7,90,62,984/-:

15.1 Assessee claimed to have purchased software for a sum of Rs. 2,67,81,570/- from Asia Trading Pte Ltd., and another software for a sum of Rs. 10,49,90,070/- from a company known as Godavari Exports & Imports Private Ltd. It claimed depreciation at 60% amounting to Rs. 7,90,62,984/-. AO disallowed the entire depreciation claim on the ground that in the case of Asia Trading Pte Ltd., no original bills or invoices were produced and in the case of Godavari Exports & Imports Ltd., that company was engaged in steel products and the transaction is not a genuine transaction. Moreover, Godavari Exports & Imports Ltd. was found to be a company under the same management. DRP after considering the submissions of assessee rejected the claim on the reason that no evidence in support of purchases was produced before the AO and no interference is called for by the panel, as far as purchase from Intra Asia Trading Pte Ltd., is concerned. Coming to purchase from Godavari Exports & Imports Ltd., it held that inspite of giving repeated opportunities, assessee failed to prove the genuineness of purchase of software. In the absence of any evidence, panel agreed with the disallowance of depreciation.

15.2 Ld. Counsel submitted that the observations of the AO are completely misplaced. It was submitted that assessee neither related to Godavari Exports & Imports Ltd., nor Asia Trading Pte Ltd. It was the contention that assessee purchased the computer and software from the above two concerns and shown as addition in the fixed assets schedule. It was further submitted that no additions were made in other two concerns, which are also of the same group. Without prejudice, it was submitted that any disallowance would increase the profits of the units and therefore, claim of exemption u/s. 10B of the above should be allowed.

15.3 Ld.DR however, submitted that assessee has not controverted the factual finding given by the DRP. Therefore, the decision of DRP based on facts become final. Hence, Ld.DR prayed for confirming the disallowance.

15.4 We have considered the rival contentions. As seen from the orders of the authorities, it is not clear whether those two concerns are related concerns of assessee. Since the evidence was not furnished before the AO/DRP to establish that assessee has purchased computes and software, it is necessary to examine the transaction of purchase and sale in the hands of those companies, stated to be group concerns by the AO and clear finding should be given whether these transactions of sale of computer software are recorded by those companies and if so, the nature of purchase of computers and software by that company. AO expressed a doubt that those companies are not in the software business but in trading of steel products. This aspect may give raise to a doubt, but facts are to be examined whether the assets were available with the said companies for sale to assessee. It is for assessee to establish that it has purchased the necessary assets from the two concerns and at arm's length price. In these aspects, onus is on assessee first to establish the genuineness of transaction and on the AO to counter the submissions of assessee. Therefore, we are of the opinion that this issue also required to be examined by the AO afresh. In case any disallowance arises, AO is also directed to examine whether the claim was made from the unit eligible for deduction u/s. 10B, if so, any disallowance would increase the profits of that unit. The claims u/s. 10B are to be recomputed consequently. With these observations and directions, the issue is set aside to AO for fresh examination.

16. In the result, appeal of assessee for the AY. 2008-09 is considered allowed for statistical purposes and appeals in the remaining assessment years are allowed.

sunil

*In favour of assessee.