IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF FEBRUARY, 2026

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.18439 OF 2024 (T - IT)

C/W

WRIT PETITION No.18474 OF 2024 (T - IT)

IN WRIT PETITION No.18439 OF 2024

BETWEEN:

UNITED SPIRITS LIMITED
A COMPANY REGISTERED UNDER
THE COMPANIES ACT 1956 AND
HAVING ITS OFFICE AT UB TOWERS
NO.24, VITTAL MALLYA ROAD
BENGALURU – 560 001
REPRSENTED HEREIN BY ITS
GENERAL MANAGER
MR.JAYATHEERTHA KULKARNI

... PETITIONER

(BY SRI MR.PERCY PARDIWALLA, SR.ADVOCATE FOR
SMT.TANMAYEE RAJKUMAR, ADVOCATE)

AND:

1 . DEPUTY COMMISSIONER OF INCOME TAX

TRANSFER PRICING 2(2)(2)
HAVING HIS OFFICE AT
80 FEET ROAD, BMTC BUILDING
KORAMANGALA
BENGALURU – 560 095.

2 . JOINT COMMISSIONER OF INCOME-TAX
SPECIAL RANGE-7,
HAVING HIS OFFICE AT
80 FEET ROAD, BMTC BUIDLING
KORAMANGALA
BENGALURU – 560 095.

3 . DEPUTY COMMISSIONER OF INCOME-TAX
CENTRAL CIRCLE 2(1),
HAVING HIS OFFICE AT
C R BUILDING ANNEXE
NO.1, QUEEN'S ROAD
BENGALURU – 560 001.

4 . PRINCIPAL COMMISSIONER OF
INCOME TAX (CENTRAL)
HAVING OFFICE
C R BUILIDNG, ANNEXE
NO.1, QUEEN'S ROAD
BENGALURU – 560 001.

... RESPONDENTS

(BY SRI Y.V.RAVI RAJ, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO A) DECLARING THAT THE IMPUGNED PROCEEDINGS ARE BARRED BY LIMITATION; B) QUASHING THE COMMUNICATION DATED 18/06/2024 (ANNEXURE-K) BEARING NO. ITBA/COM/F/2024-25/1065690239(1) ISSUED BY THE R3 TO THE PETITIONER FOR THE ASSESSMENT YEAR 2014-15 AS BEING BARRED BY LIMITATION AND THUS WITHOUT JURISDICTION; C) DIRECTING THE RESPONDENTS TO FORTHWITH

REFUND THE TAXES PAID OVER AND ABOVE THE RETURNED INCOME FOR ASSESSMENT 2014-15 TOGETHER WITH APPLICABLE INTEREST.

IN WRIT PETITION No.18474 OF 2024

BETWEEN:

UNITED SPIRITS LIMITED
A COMPANY REGISTERED UNDER
THE COMPANIES ACT, 1956 AND
HAVING ITS OFFICE AT UB TOWERS
NO.24, VITTAL MALLYA ROAD,
BENGALURU – 560 001
REPRESENTED HEREIN BY ITS
GENERAL MANAGER
MR. JAYATHEERTHA KULKARNI.

... PETITIONER

(BY SRI MR.PERCY PARDIWALLA, SR.ADVOCATE FOR
SMT.TANMAYEE RAJKUMAR, ADVOCATE)

AND:

1 . DEPUTY COMMISSIONER OF INCOME TAX
TRANSFER PRICING 2(2)(2)
HAVING HIS OFFICE AT
80 FEET ROAD, BMTC BUILDING
KORAMANGALA
BENGALURU – 560 095.

2 . DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE 7(1)(1)
HAVING HIS OFFICE AT
80 FEET ROAD, BMTC BUILDING
KORAMANGALA
BENGALURU – 560 095.

3 . DEPUTY COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE 2(1)
HAVING HIS OFFICE AT
C R BUILDING, ANNEXE
NO.1, QUEEN'S ROAD
BENGALURU – 560 001.

4 . PRINCIPAL COMMISSIONER OF INCOME TAX
(CENTRAL)
HAVING OFFICE
QUEEN'S ROAD
BENGALURU – 560 001.

... RESPONDENTS

(BY SRI Y.V.RAVI RAJ, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO A) DECLARING THAT THE IMPUGNED PROCEEDINGS ARE BARRED LIMITATION; B) QUASHING THE COMMUNICATION DATED 18/06/2024 (ANNEXURE-T) BEARING NO. ITBA/COM/F/17/2024-25/1065690239(1) ISSUED BY THE R3 TO THE PETITIONER FOR THE AY 2013-14 AS BEING BARRED BY LIMITATION AND THUS WITHOUT JURISDICTION; C) DIRECTING THE RESPONDENTS TO FORTHWITH REFUND THE TAXES PAID OVER AND ABOVE THE RETURNED INCOME FOR ASSESSMENT 2013-14 TOGETHER WITH APPLICABLE INTEREST.

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: **THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

CAV ORDER

The parties to the *lis* in both these cases are common. Relief sought also is identical, but facts are different. Therefore, the facts obtaining in each of the petitions would be narrated separately.

2. Heard Sri Percy Pardiwalla, learned senior counsel appearing for the petitioner and Sri Y. V. Ravi Raj, learned counsel appearing for the respondents.

3. Facts in brief, germane, are as follows: -

WRIT PETITION NO.18474 of 2024:

3.1. The petitioner is a public limited company engaged in the business of manufacture and sale of alcoholic beverages. The issue in the *lis* revolves around the return of income filed by the company for the assessment year 2013-14 declaring a total income of ₹4,93,71,22,200/-. Since the petitioner enters into international transactions, the 2nd respondent/Deputy Commissioner of Income-Tax, Central Circle on 30-09-2015 makes a reference to the Deputy

Commissioner of Income-Tax, Transfer Pricing, under Section 92CA(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act' for short) for determining arm's length price of the transactions entered into by the petitioner. In furtherance of the aforesaid communication, an order is passed under Section 92CA(3) of the Act determining an aggregate transfer pricing adjustment of ₹7,38,89,39,877/-. After determining the aggregate transfer pricing adjustment, a draft assessment order is passed under Section 143(3) r/w Section 144C(1) of the Act declaring the total income at ₹15,60,38,20,756/-. The petitioner aggrieved by the said determination files its objections before the Dispute Resolution Panel and the Dispute Resolution Panel does not interfere with the draft assessment order, issues certain directions under Section 144C(5), but nonetheless upheld the transfer pricing adjustment. On closure of the dispute, final assessment order is passed under Section 143(3) r/w Section 144C(13) of the Act determining total income of the petitioner at ₹15,19,93,90,755/- Aggrieved by the said determination the petitioner files an appeal before the Income Tax Appellate Tribunal ('the Tribunal' for short). The Tribunal partly allows petitioner's appeal, remits the matter back to the

respondents Nos.1 and 2 on certain grounds. Pursuant to the said remand, the petitioner communicates seeking the respondents to pass an order giving effect to the order of the Tribunal. On 24-03-2023 the 1st respondent issues a notice under Section 92CA(2) of the Act calling upon the petitioner to furnish evidence/material relied upon by the petitioner for computation of the arm's length price and to decide other issues as mentioned in the order. The petitioner then replies on 12-04-2023 which results in two notices being issued on 20-10-2023 and 15-11-2023 again seeking the petitioner to furnish certain details. This is replied to by the petitioner on two dates, one on 27-10-2023 and the other on 05-01-2024. On the said reply, the 1st respondent issued a notice under Section 92CA(2) of the Act, calling upon the petitioner again to produce certain documents on or before 01-03-2024. The petitioner on 28-02-2024 furnished the said details through reply submissions. On 07-02-2024 the jurisdiction of the petitioner was transferred from respondent No.2 to respondent No.3. On 31-03-2024, the petitioner contended that the time provided under Section 153(5) r/w Section 153(3) of the Act for giving effect to the order of the Tribunal expired on 31-03-2024. The petitioner

communicates to the 3rd respondent seeking refund of the tax paid over and above the return of income, by contending that the time for passing an order to give effect to the order of the Tribunal expired on 31-03-2024. Since the 3rd respondent failed to pass an order giving effect to the said order, refund must ensue. The representation comes to be rejected by the impugned order dated 18-06-2024 holding that issuance of refund in a remand proceeding would be time barred only by 31-03-2025 and not by 31-03-2024 as was contended. The petitioner aggrieved by the said order is before this Court in the subject petition, to set aside the order impugned and for a direction to refund the tax paid over and above the return of income for the assessment year 2013-14 with applicable interest.

WRIT PETITION NO.18439 of 2024:

3.2. The position of the petitioner in this petition remains the same as in the companion petition. The petitioner here files a return of income for the assessment year 2014-15 declaring its income as ₹3,87,70,39,200/-. The petitioner then noticing certain defects filed a revised return of income declaring total income of

₹4,64,40,44,920/- for the assessment year 2014-15. Again, since the petitioner had entered into international transactions for the assessment year 2014-15 the order comes to be passed under Section 92CA(1) of the Act determining the transfer pricing adjustment for the said assessment year in terms of an order dated 26-10-2017. This leads to passing of a draft assessment order on 26-12-2017 by incorporating the transfer pricing adjustment and disallowing the income declared in the return and determining a total income at ₹18,26,72,09,820/-. The balance tax payable including interest was determined at ₹6,43,88,41,680/-. The petitioner goes before the Dispute Resolution Panel, which upheld the transfer pricing adjustment and the order of Transfer Pricing Officer. After the dispute resolution failed, an order is passed by the Joint Commissioner of Income-Tax/2nd respondent, determining the total income at ₹16,09,01,40,058/-. The petitioner approaches the Tribunal by filing an appeal and the Tribunal along with the companion appeal disposes the subject appeal also, allowing it in part and remitting the matter back after which, for the first-time a notice was issued on 20-02-2024 and the contention with regard to

limitation and its expiry remains the same as obtaining in the companion petition.

4. The learned senior counsel Sri. Percy Pardiwalla appearing for the petitioners would contend that Section 153 of the Act provides the period within which the Assessing Officer has to frame an assessment. Under Section 153(3) an order of fresh assessment or an order under Section 92CA of the Act made in pursuance of an order under Section 254, must be made before the expiry of 9 months from the end of the financial year in which the order under Section 254 of the Act is received by the Commissioner. He would emphasize on the fact that Section 153(4) is a non-obstante clause and provides that when a reference is made under Section 92CA(1) of the Act, during the course of proceedings for assessment or re-assessment, the period can be extended by 12 months by the said assessment year. The order of the Tribunal is received by the designated authority in the financial year 2022-23. Therefore, the learned senior counsel submits that the limitation expired on 31-03-2024, as a result of which the respondents are precluded from giving effect to the order of the Tribunal. The impugned order

observes that the period would expire on 31-03-2025 without any basis and therefore, refund is sought from the hands of the respondents over and above the tax paid after filing of the return of income in Writ Petition No.18474 of 2024 for the assessment year 2013-14. The learned senior counsel submits that the entire issue revolves round on limitation for passing an order as obtaining under Section 153 of the Act.

5. Per contra, the learned counsel Sri Y. V. Ravi Raj representing the revenue would vehemently refute the submissions in contending that under Section 153(5) of the Act when an order under Section 254 requires verification on any issue by submission of a document, the time that is specified would become 12 months from the end of the financial year in which the Tribunal's order is received. It is the case of the revenue that normal time limit for acquiring fresh assessment would not become applicable in the case at hand. Since reference is made under Section 92CA, time limit for completing fresh assessment is extended by additional 12 months beyond the normal time limit. Therefore, expiry of the time limit would be 31-03-2025 and not 31-03-2024 as is contended by the

petitioners. He would further contend that the case at hand is a case of *de novo* assessment under Section 92CA, as the order of the Tribunal has set aside the Transfer Pricing Assessment in its entirety. The reference under Section 92CA continues, since the case sprang out of the said reference and the limitation is governed under Section 153(4) and not Section 153(5) of the Act.

6. I have given my anxious consideration to the submissions made by the respective leaned counsel and have perused the material on record. In furtherance whereof, the issues that call for consideration are:–

(i) Whether the reference under Section 92CA(1) to the Transfer Pricing Officer by the Assessing Officer or the matter remitted back to the Transfer Pricing Officer by the Tribunal would decide limitation under Section 92CA(3) of the Act?

(ii) In the facts of the case whether the limitation period is governed under Section 153(3), 153(4) or 153(5) of the Act?

ISSUES 1 AND 2:

7. Since the issues are intertwined, they are taken up together and considered. To consider these issues, it is germane to notice Section 92CA of the Act. It reads as follows:

> "**Section 92CA - Reference to Transfer Pricing Officer. –**
>
> (1) **Where any person, being the assessee, has entered into an international transaction or specified domestic transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Principal Commissioner or Commissioner, refer the computation of the arm's length price in relation to the said international transaction or specified domestic transaction under section 92C to the Transfer Pricing Officer.**
>
> **(2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction or specified domestic transaction referred to in sub-section (1).**
>
> (2A) Where any other international transaction other than an international transaction referred under sub-section (1), comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, the provisions of this Chapter shall apply as if such other international transaction is an international transaction referred to him under sub-section (1).
>
> (2B) Where in respect of an international transaction, the assessee has not furnished the report under section 92E and such transaction comes to the notice of the Transfer Pricing Officer during the course of the proceeding before him, the

provisions of this Chapter shall apply as if such transaction is an international transaction referred to him under sub-section (1).

(2C) Nothing contained in sub-section (2B) shall empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year, proceedings for which have been completed before the 1st day of July, 2012.

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction or specified domestic transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.

(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires:

Provided that in the circumstances referred to in clause (*ii*) or clause (*x*) of *Explanation 1* to section 153, if the period of limitation available to the Transfer Pricing Officer for making an order is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to have been extended accordingly.

> (4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer.
>
> (5) With a view to rectifying any mistake apparent from the record, the Transfer Pricing Officer may amend any order passed by him under sub-section (3), and the provisions of section 154 shall, so far as may be, apply accordingly.
>
> (6) Where any amendment is made by the Transfer Pricing Officer under sub-section (5), he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.
>
> (7) The Transfer Pricing Officer may, for the purposes of determining the arm's length price under this section, exercise all or any of the powers specified in clauses (*a*) to (*d*) of sub-section (1) of section 131 or sub-section (6) of section 133 or section 133A.
>
> …….. ……. …….”

(Emphasis supplied)

Where a person being an assessee enters into an international transaction in any previous year and the Assessing Officer considers it necessary or expedient to do so, he may refer the matter for computation of arm’s length price under Section 92C to the Transfer Pricing Officer. The procedure stipulated is mandated under sub-sections (2) and (3) of Section 92CA. Section 153 of the Act reads as follows:

"**Section 153 - Time limit for completion of assessment, reassessment and recomputation:**

(1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of twenty-one months from the end of the assessment year in which the income was first assessable:

…….. ……. …….

(3) Notwithstanding anything contained in sub-sections (1), (1A)and (2), an order of fresh assessment **or fresh order under section 92CA,** as the case may be, in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment, **or an order under section 92CA**, as the case may be, may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be* :

Provided that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be,* on or after the 1st day of April, 2019, the provisions of this sub-section shall have effect, as if for the words "nine months", the words "twelve months" had been substituted.

(4) Notwithstanding anything contained in *sub-sections (1), (1A), (2), (3) and (3A)*, where a reference under sub-section (1) of section 92CA is made during the course of the proceeding for the assessment or reassessment, the period available for completion of assessment or reassessment, as the case may be, under the said *sub-sections (1), (1A), (2), (3) and (3A)*, shall be extended by twelve months.

(5) Where effect to an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264 is to be given by the Assessing Officer or the Transfer Pricing Officer, as the case may be, wholly or partly, **otherwise than by making a** fresh assessment or reassessment or **fresh order under section 92CA,** as the case may be, such effect shall be given within a period of three months from the end of the month in which order under section 250 or section 254 or section 260 or section 262 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, the order under section 263 or section 264 is passed by the *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be* :

Provided that where it is not possible for the Assessing Officer or the Transfer Pricing Officer, as the case may be, to give effect to such order within the aforesaid period, for reasons beyond his control, the Principal Commissioner or Commissioner on receipt of such request in writing from the Assessing Officer or the Transfer Pricing Officer, as the case may be, if satisfied, may allow an additional period of six months to give effect to the order:

Provided further that where an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264 requires verification of any issue by way of submission of any document by the assessee or any other person or where an opportunity of being heard is to be provided to the assessee, the order giving effect to the said order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264 shall be made within the time specified in sub-section (3).

…….. ……. …….”

(Emphasis supplied)

Section 153 prescribes time limit for completion of assessment and reassessment and recomputation.

8. The issue now would be, whether the limitation operating under Section 153(3), 153(4) or 153(5) would become applicable. Section 153(3) speaks about setting aside or cancelling an order of assessment passed under Section 92CA. Section 153(3) further provides the timeline for passing a fresh order under Section 92CA or fresh assessment, as the case would be. Therefore, Section 153(3) does not solely apply to setting aside or cancelling an order of assessment only, it applies even to cancelling an order under Section 92CA. In both these cases at different assessment years scrutiny of assessment was taken for the assessment years 2013-14 and 2014-15. What orders are passed would not be relevant, but the order of the Tribunal assumes significance. The final assessment order comes to be passed on 12-10-2017 and 10-10-2018 respectively in both these cases. They reach the Tribunal as all the authorities held in favour of the revenue. The Tribunal passed orders under Section 254 of the Act by allowing appeals partly and remitting the matter back to respondents 1 and 2. It becomes necessary to notice on what grounds the Tribunal allowed the appeals. The Tribunal allows appeals, partly dismissing certain

grounds and allowing certain grounds. The order concerned in W.P.No.18474 of 2024 reads as follows:

> "9.5 We have heard rival submissions and perused the material on record. The TPO made an addition of Rs.68,60,16,563 for the reason that the payments made to W&M for stock purchase has been diverted for onward remittance to Ultra Dynamix and other third parties. The TPO relied on the internal report of the taxpayer submitted to him and held that the international transaction with W&M is same as indicated in the internal report. The TPO therefore determined the ALP of this transaction to be NIL by such other method prescribed by the CBDT and the entire amount of Rs. 68,60,16,563 was determined as the adjustment under section 92CA. Before the DRP, assessee assailed the impugned findings of the TPO on various factual reasons as incorporated at page 23 and 24 of the DRP directions. The assessee also argued that proper opportunity of hearing was not provided to the assessee in this regard. The DRP however relied on the TPOs impugned findings and confirmed the above adjustment.
>
> **9.5.1 On a perusal of the material on record, we find that the assessee was not allowed sufficient opportunity of hearing in connection with the impugned addition. The submissions of the assessee before the DRP has also not been considered and addressed on merits. We thus set aside the impugned TP adjustment of Rs. 68,60,16,563 and restore the issue to the file of the AO/TPO for proper consideration of facts and to decide as per law after allowing sufficient opportunity of hearing to the assessee.**
>
> **9.6 In the result, grounds 3.1 to 3.3 are allowed for statistical purposes.**
>
> **<u>Disallowance under section 14A of the Act (Ground 4) (Corporate Tax Issues)</u>**
>
> 10. Brief facts in relation to the issue are as follows:

During the relevant assessment year 2013-2014, the assessee had earned dividend income from the following sources:-

Source	Amount (Rs. In crore)	Remarks
Overseas subsidiary	2.539	Offered to tax
Mutual Funds / Dividend from domestic companies	2.299	Exempt by virtue of section 10(34) and 10(35) of the Act.
Total	4.838	

10.1 During the course of assessment proceedings, the AO proposed to apply the provisions of section 14A read with rule 8D. The AO had proposed to make the subject disallowance of Rs.90,89,00,000.

10.2 Aggrieved, the assessee filed objection before the DRP. The DRP upheld the proposed disallowance, however, with specific directions to exclude overseas investments, the income from which was offered to tax in India (para 2.12 page 45 of the paper book).

10.3 Based on the DRP's direction, the AO excluded the investments in overseas subsidiaries and recomputed the disallowance at Rs.48,04,00,000 in the final assessment order.

10.4 Aggrieved by the final assessment order, the assessee has raised this issue before the ITAT. The learned AR submitted that the issue stands covered in favour of the assessee by the order of the Tribunal in assessee's own case for assessment year 2012-2013 (supra), wherein the Tribunal has given the following directions:-

- Disallowance u/s 14A of the Act is not attracted when the own funds are in excess of the value of the investments.

- Disallowance u/s 14A of the Act cannot exceed the exempt income earned by the assessee.

- Disallowance u/s 14A of the Act cannot be made on investments where no dividend income has been earned.

10.5 The learned Departmental Representative supported the findings of the A.O. and the DRP.

10.6 We have heard rival submissions and perused the material on record. In the final assessment order, following the DRP directions, the AO made the disallowance under section 14A as per rule 8D at Rs. 48,04,00,000. The Tribunal in assessee's own case for the AY 2012-13 in IT(TP)A No. 489/Bang/2017 order dated 29.5.2020 considered the arguments made on similar disallowance and remanded the issue to the AO with various directions. The arguments of the learned AR are similar to the arguments considered by the Tribunal in the above order. The findings of the ITAT for the earlier year are as under:-

"36. We heard the parties on this issue and perused the record. The Ld A.R made various contentions and hence this issue requires to be restored to the file of the AO for examining it afresh in the light of various contentions of Ld A.R, which are summarized below:-

(a) It is the contention of Ld A.R that the own funds available with it is in excess of the investments. The jurisdictional Hon'ble Karnataka High Court in the case of CIT vs. Microlabs Limited (2016)(383 ITR 490) has dealt with an identical issue. The High Court extracted following decision rendered by the Tribunal:-

……..
Accordingly, we direct the AO to examine the claim of the assessee and if it is found that the own funds available with the assessee is in excess of the value of investments, then no disallowance u/r 8D(2)(ii) out of interest expenditure is called for.

(b) In the alternative, the assessee has also submitted that the loan funds were taken for specific purposes and utilised the same for those purposes. Accordingly, it was contended that, when the assessee would be able to show the nexus between the interest expenditure and its utilization for specific purposes, no interest disallowance

is called for. In this regard, it is stated that it has paid interest on security deposits, cash credits/overdrafts, working capital demand loan, bill discounting facilities. When the disallowance is worked out under rule 8D(2)(ii), this contention of the assessee would loose its significance.

(c) The Ld A.R submitted that, for the purpose of computing average value of investments, the AO should consider only those investments which have actually yielded exempt dividend income. We notice that this argument of the assessee finds support from the decision rendered by the Special bench in the case of Vireet Investments P Ltd (165 ITD 27)(Delhi-SB). Accordingly, we direct the AO to exclude investments, which did not yield exempt income, while computing average value of investments.

(d) The Ld A.R also contended that the disallowance should not exceed the amount of exempt income. In this regard, he placed his reliance on the decision rendered by jurisdictional High Court in the case of Pragathi Krishna Gramin Bank vs. JCIT (2018)(95 taxmann.com 41). We direct the AO to take into consideration above said binding decision while examining this issue.

Accordingly, we restore this issue to the file of the AO for examining it afresh in the light of discussions made supra."

10.6.1 Following the above order of the ITAT in assessee's own case for assessment year 2012-2013, we set aside the disallowance under section 14A of the I.T.Act and restore the issue to the file of the AO. The AO shall follow the above directions of the ITAT and recompute the disallowance u/s 14A of the I.T.Act. It is ordered accordingly.

10.7 In the result, ground 4.1 to 4.12 are allowed for statistical purposes.

<u>Disallowance of interest u/s 36(1)(iii) of the I.T.Act (Ground 5) (Corporate Tax Issue)</u>

11. Brief facts in relation to the above ground are as follows:

The assessee had advanced loans to certain related parties / subsidiaries, wherein the rate of interest varied from 0 to 16 per cent. During the course of assessment proceedings, the AO has sought information with respect of loans and advances made towards related parties. In the draft assessment order passed by the AO, disallowance was made to the extent of Rs.1,38,05,93,276 by applying SBI's Prima Lending Rate on the amount of outstanding loans as on 31st March, 2013.

11.1 Aggrieved by the draft assessment order, the assessee filed objection before the DRP. The DRP retained the disallowance proposed by the AO, but directed to exclude notional interest income imputed by the TPO with respect to the advances made to AE's outside India but upheld the disallowance under section 36(1)(iii) on a protective basis.

11.2 In the final assessment order, the AO has computed the disallowance u/s 36(1)(iii) at an amount of Rs.140,46,63,276 being higher than the proposed disallowance in the draft assessment order, out of which Rs.26,77,06,867 was on protective basis.

11.3 Aggrieved by the final assessment order, the assessee raised this issue before the ITAT. At the outset, the learned AR submitted that in assessee's own case for assessment year 2012-2013, the Bangalore Bench of the Tribunal following the decision of the Hon'ble Apex Court in Reliance Industries reported in (2019) 102 taxmann.com 52 (SC) have held that no disallowance shall be made u/s 36(1)(iii) of the Act when own funds are in excess of the loans extended (para 42 page 28 of the order). The learned AR reiterated the submissions that the loans have been extended out of commercial expediency and out of own interest free funds.

11.4 The learned Departmental Representative relied on the findings of the AO and the DRP.

11.5 We have heard rival submissions and perused the material on record. The AO made a disallowance of Rs.138,05,93,276 under section 36(1)(iii) for the reason that

the interest bearing funds have been given as interest free loans to various related parties including AEs. The DRP upheld the disallowance made by the AO with a direction that the disallowance of interest by the AO to the extent of TP adjustment in relation to this interest free loan should be only on protective basis. Following the directions, the AO in the final assessment order, made an addition of Rs.140,46,63,276 and a protective addition of Rs. 26,77,06,867 under section 36(1)(iii) of the I.T.Act.

11.5.1 The Tribunal in appellant's own case for the AY 2012-13 in IT(TP)A No. 489/B/2017 order dated 29.5.2020 considered similar issue and held as follows:-

> *"42. We heard Ld D.R and perused the record. From the arguments of the ld A.R, we notice that the own funds available with the assessee is in excess of the aggregate amount of interest free advances and hence the decision rendered by Hon'ble Supreme Court in the case of Reliance Industries Ltd (supra) shall apply to the facts of the present case, in which event, no interest disallowance is called for. We notice that this contention of the assessee has not been examined by the AO in the light of decision of Hon'ble Supreme Court referred above. Accordingly, we restore this issue to the file of the AO to examine the factual aspects and for deciding this issue following the decision rendered by Hon'ble Supreme Court, referred above. If the disallowance gets deleted on this ground, then other contentions of the assessee would be rendered academic in nature. However, if any part of disallowance is liable to be made, then the AO should consider other arguments of the assessee also in the set aside proceedings."*

11.5.2 Following the above order of the ITAT, we set aside the substantive and the protective addition made under section 36(1)(iii) and restore the issue to the file of the AO to follow similar directions as given above.

11.5.3 Hence grounds 5.1 to 5.14 is allowed for statistical purposes.

Disallowance of payments for promotion and advertisement expenses (Ground 6 and 7) (Corporate Tax Issue)

12. Brief facts in relation to the above grounds are as follows:

During the assessment year 2012-2013, the assessee had made payments to the following parties amounting to Rs.44,33,55,403 for promotion of its brand logo and claimed it as revenue expenditure on advertisement and promotion.

Party name	Amount in Rs.
Royal Challengers Sports Pvt.Ltd.	10,00,00,000
United Racing & Bloodstock Breeders	16,07,37,530
United Mohun Bagan Football Team Pvt. Ltd.	10,83,75,465
Force India F1 Team Limited	7,42,28,408
Total	44,33,55,403

12.1 The AO in draft assessment order held that the payments made on the account of brand promotion results in enduring benefit to the assessee and accordingly treated the said payments as a capital expenditure.

12.2 Aggrieved by draft assessment order, the assessee filed objection before the DRP. The DRP agreed with the view of the AO that the subject expenditure gives enduring benefit to the assessee and upheld the disallowance proposed by the AO. Further, the DRP also held that no capital asset has been created in the books by the assessee, and unless asset is recognized and no depreciation is claimed, no depreciation can be allowed.

12.3 The final assessment order was passed by the AO in accordance with the directions of the DRP.

12.4 Aggrieved, the assessee has raised this issue before the ITAT. The learned AR submitted that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2012-2013 wherein the Tribunal has held that payment of these expenses on sponsorship are revenue expenditure. The said issue has been discussed by the Tribunal in para 43 to para 49 on page 28 to page 38 of

its order. (The findings of the Tribunal are recorded in para 45 to para 49 on page 30 to 38 of the order). In view of the foregoing, the AR submits that the brand promotional expenses be allowed as business expenditure u/s 37(1) of the Act.

12.5 The learned Departmental Representative supported the finding of the AO and the DRP.

12.6 We have heard rival submissions and perused the material on record. The AO disallowed the sales promotion and advertisement expenses totally amounting to Rs. 44,33,55,403 [36,91,12,995 + 7,42,42,408] for the reason that these expenses are brand promotion expenditures of USL logo, it promotes the brand the assessee, gives enduring benefit and hence capital in nature. The DRP confirmed the action of the AO.

12.6.1 Similar issue has been considered by the Tribunal in assessee's own case for the AY 2012-13 in IT(TP)A No. 489/B/2017 order dated 29.5.2020 wherein it was held as under:-

> *"45. We have heard Ld D.R on this issue and perused the record. We notice the issue relating to allowability of expenditure incurred on sponsorship of sports event was considered by the Mumbai bench of ITAT in the case of Samudra Developers Pvt Ltd (ITA 5974/Mum/2013 dated 26- 04-2017) and it was held that the same is allowable as revenue expenditure. For the sake of convenience, we extract below the operative portion of the order passed by Mumbai bench of Tribunal on an identical issue:-*
>
> > "3. Second ground of appeal pertains to deleting the disallowance on account of sponsorship fees and management fees. In the earlier part of our order, we have mentioned the facts about the various disallowances made by the AO including the capitalisation of sponsorship. Treating it as an intangible asset, he allowed depreciation on it @25%.
> >
> > 3.1. The FAA after considering the elaborate submissions of the assessee,held that it had entered into an agreement with the sports company namely India-Win in the month of March, 2010, that the

assessee-group became cosponsor of Mumbai Indian IPL cricket team as an associate partner, that as per the agreement the ground logo of the assessee group was displayed permanently in the cricket stadium is also on the playing gear of the players,that in the terms of the agreement and amount of Rs.4.50 crores was paid towards sponsorship fees during the year under consideration, that the sponsorship fees for different years had been apportioned and allocated to 3 entities of the assessee group which were using the brand logo in the ratio of their respective turnovers during the year, that out of the expenditure of Rs. 2.50 crores and amount of Rs. 21.61 lakhs was allocated to the assessee, that the expenditure incurred on IPL sponsorship did not provide it any benefit of enduring nature, that the expenditure had been incurred year after year by the assessee group with a view to get visibility, that it was in nature of some kind of advertisement expenditure, that same should be allowed as revenue expenditure. Referring to the case of Delhi Cloth and General Mills Co.Ltd.(115 ITR 659) of the honorable Delhi High Court, the FAA allowed the appeal filed by the assessee.

3.1.a. With regard to management fee, the FAA observed that there was no doubt about the genuineness of expenditure, that the expenditure was incurred for availing infrastructure facilities administrative support, like manpower recruitment, HR services, uses of computer, telephone, photo copiers, infrastructure set up etc. in order to carryout business operations smoothly, that the parent company had allocated a certain amount to the account of the assessee in the ratio of its turnover. He finally held that expenditure had to be allowed as revenue expenditure.

3.2. Before us, the DR supported the order of the AO and the AR relied upon the order of the FAA. We find that the assessee group had entered into an agreement with India Win, that it was a co- sponsor of Mumbai Indian IPL team, that it had incurred similar expenditure in the subsequent two years, that out of the total expenditure the assessee had claimed a very small proportion under the head sponsorship expenses. Such an expenditure is for advertising the brand name of the Group. Being a recurring expenditure, it had to be allowed as revenue expenditure. We find that in the case of Delhi Cloth and General Mills Co.Ltd.(supra)the Hon'ble Court had held that expenditure incurred for organizing sports events are allowable items of revenue expenditure as such events publicise the names of the sponsor. The AO was not justified in capitalising the

expenses. The entire expenditure was rightly allowed by the FAA as revenue expenditure. After going through the details of expenditure incurred by assessee under the head managerial expenses, we are of the opinion that it had not got any enduring benefit from the expenditure incurred nor did the expenditure create any capital asset. Therefore, we do not want to interfere with the order of the FAA. Considering the above, we decide second ground of appeal against the AO."

46. The Delhi bench of Tribunal has also examined an identical claim in the case of M/s Pepsico India Holdings Pvt Ltd (supra) and the same was allowed as revenue expenditure with the following observations:-

"Re: Disallowance of INR 3,85,15,497/- being sponsorship fees paid to ICC

87. In Grounds No. 7 to 7.3 in I.T.A. No. 1044/DEL/2014 for AY 2009-10, the assessee has challenged the disallowance of INR 3,85,15,497/- being sponsorship fees paid by the assessee to ICC. Our attention was drawn to paras 4 to 4.3 of the final assessment order wherein the said issue has been discussed by the AO. It has been submitted that during the relevant previous year the assessee entered into an agreement dated 20.08.2008 with ICC Development (International) Limited (ICC) for obtaining sponsorship rights in respect of various ICC cricketing events around the world. The assessee paid an amount of Rs. 3,85,15,497/- for sponsoring cricketing events held during 2008 to ICC. The said amount was proposed to be disallowed by the AO in the Draft Assessment Order, for the following reasons: -

(i) Similar expense has been disallowed in the earlier years as part of the Transfer Pricing Adjustment on account of AMP expenses.

(ii) Assessee has been bearing substantial portion of the fees paid to ICC for acquiring sponsorship rights even though benefit of the same is derived by the other entities of the world.

88. Aggrieved by the addition proposed by the AO, the assessee had filed objections before the DRP. The DRP vide directions dated 20.12.2013 upheld the action of the AO, on the ground, that the expenditure was benefitting all the entities across the globe and hence, it could not be said to have been incurred wholly and exclusively for the business of the assessee.

89. The learned counsel for the assessee submitted that the said disallowance was unwarranted since the said expense was incurred in view of the fact that major viewership of cricket is in the Indian subcontinent. He also referred to various newspapers reports which demonstrated the popularity of the sport in India to support the aforesaid contentions. It was also submitted that the assessee company has consistently promoted its range of products using cricket as an advertising platform. It was also to our notice that payment of sponsorship fees to ICC was remitted by the assessee after deduction of tax at source as instructed by the Income Tax Department. Further, the assessee had obtained the approval of the Ministry of Youth Affairs and Sports for sponsoring the events covered under the agreement. Copy of the order under section 195 of the Act and the approval received from the Ministry of Youth Affairs and Sports has been enclosed at pages 247 to 249 and 224 of the paperbook respectively. He further submitted that the expenditure was wholly and exclusively for the business of the assessee company and had not been disputed by the revenue. Any incidental benefit that may arise to any other person or entity cannot be a bar for allowance of expenditure under section 37 of the Act, as per the settled position of law. Reference in this regard was made to the decisions of the Hon'ble Supreme Court of India in CIT vs. Chandulal Keshavlal & Co. [1960] 38 ITR 601 (SC), Sasson J. David and Co. P. Ltd vs. CIT 118 ITR 261(SC) and SA Builders Ltd. vs. CIT 288 ITR 1(SC). He further submitted that the Revenue cannot step into the shoes of an assessee to determine the commercial expediency of an expenditure incurred by it.

90. On the other hand, the learned DR relied upon the order of the AO and the DRP in support of his contentions.

91. After considering the rival submissions and on perusal of the impugned orders, we find that, here the disallowance of Rs.3,85,15,497/- has been made on account of sponsorship fee by the assessee to the ICC on the ground that similar expenditure was disallowed in the earlier years as part of Transfer Pricing Adjustment on account of AMP expenses; and secondly, assessee has been bearing substantial portion of the fees to the ICC for acquiring the sponsorship rights even though benefit of the same is derived by either entity of the world. The contention raised by the learned counsel that since major viewer of cricket is an

Indian subcontinent looking to its mass popularity in India, the assessee company has been consistently promoting its range of products using cricket as an advertisement platform. The said payment has been made after obtaining the approval of Ministry of Health Affairs and Sports and after deducting TDS u/s.195. Once the expenditure has been incurred wholly and exclusively for the purpose of business which fact has not been disputed by the Department, then even if some incidental benefit which may arise to any other entity cannot be a bar for allowance of expenditure u/s. 37. Under the principle of commercial expediency such an expenditure has to be seen from the angle, whether the decision taken by the assessee for paying sponsorship fees was for the purpose of business or not. Here in this case, the commercial expediency has not been doubted but rather it has been held by the AO that in all the years transfer pricing adjustments has been made on this score and benefit is arising to the other AEs also. What is relevant for an expense to be allowable as revenue expense is that, whether it has been incurred during the course of business and is for the purpose of business. Benefit factor to other related parties is relevant under transfer pricing provision and not while allowability of business expense u/s 37(1). It is well known fact that companies use sports event as a platform to advertise their range of products as it has a very high viewership. Any such incurring of expenditure is ostensibly for promotion of business only and hence, no disallowance is called for.

Accordingly, Grounds No.7 to 7.3 in ITA No.1044/Del/2014 pertaining to A.Y. 2009-10 are allowed."

47. We notice that the co-ordinate benches are consistently holding the view that the expenditure incurred on sponsoring of sports events are intended to promote business only and hence the same is allowable as expenditure. The allowability of brand promotion expenses was examined by Hon'ble Delhi High Court in the case of Modi Revelon P Ltd (supra) and the relevant discussions made by the High Court are extracted below:-

"22. As far as the second aspect, i.e. expenditure for promotion of the brand is concerned, there is no doubt that the dealer's functions extend to advertising the products of the assessee, manufactured by the sister concern. On this aspect, Section 37 of the Income-tax

Act would be relevant. The said provision reads as follows:

"SECTION 37 GENERAL:
(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

Explanation : For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

(2B) Notwithstanding anything contained in subsection (1), no allowance shall be made in respect of expenditure incurred by an assessee on advertisement in any souvenir, brochure, tract, pamphlet or the like published by a political party.

The applicable test as to what constitutes expenses "laid out or expended wholly and exclusively for the purposes of the business or profession" was explained in Gordon Woodroffe Leather Manufacturing Co. v. CIT [1962] Supp. (2) SCR 211. The correct approach, said the Court, which has to be taken in all such cases is to see whether:

"was the sum of money expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business"

Again, in Sassoon J. David & Co. (P.) Ltd. v. CIT [1979] 118 ITR 261/ 1 Taxman 485 (SC) the Supreme Court outlined the correct test of commercial expediency as the guiding principle to decide whether the expenditure was to facilitate profits, as follows:

(iii) that the sum of money was expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business of the assessee"

> In Smith Kline & French (India) Ltd. v. CIT [1992] 193 ITR 582/[1991] 59 Taxman 357 (Kar.), it was held that in normal commercial sense and in common parlance sales promotion and publicity are activities aimed at gaining goodwill in the market. They need not be confined to media propaganda but can involve indirect approaches. The judgment of a Division Bench of this Court in CIT v. Adidas India Marketing (P.) Ltd. [2010] 195 Taxman 256 (Delhi) has recognized that brand promotion exercises undertaken through media campaigns, schemes, programmes etc are essential for propagation of the brand. The necessity (or lack of it) is not something which income tax authorities can go into; as long as it is voluntarily undertaken by the business enterprise for profit earning, it would be entitled to claim relief under section 37(1).
>
> 23. In the present case, the AO was conscious of the fact that brand promotion expenses are a necessary ingredient in marketing strategies. Therefore, he allowed about 50 per cent of those expenses. However, the reasoning for disallowance of the rest, i.e. that the assessee could claim only a proportion of such expenses, since advertising expenses were to be borne by the sister concern dealer, and that the proportion was in respect of its territory, was not upheld. This Court does not see any fallacy in the Tribunal's approach or reasoning, on this aspect. One is not unmindful of the concerns of a business which engages in sale of consumer items, and faces continuous competition. Brand promotion enhances the visibility of given products or services, and are often perceived as conferring a competitive advantage on those who adopt those strategies or schemes. Expenditure towards that end is based on pure commercial expediency, which the revenue in this case, ought to have recognised, and allowed. The revenue's arguments on this point too are insubstantial."

48. The observations made by the Hon'ble jurisdictional Karnataka High Court in the case of CIT vs. ITC Hotels (2014)(47 taxmann.com 215) on the concept of "enduring benefit" is relevant here and the same is extracted below:-

> "6. The first substantial question of law relates to a sum of Rs.10 lakhs, which were paid by the assessee as a license fee for the use of central court yard, having marble, (for short "Court Yard") in Lallgarh Palace (for short 'Palace'). It appears that

there was a Memorandum of Understanding (for short 'MOU') between the Assessee and Maharaja Ganga Sinhji Charitable Trust (for short the "trust"). The assessee, as per the MOU, had acquired a right to use the court yard for their business of hotel, being run in the palace, more efficiently and profitably. The question is whether the expenditure of Rs.10 lakh resulted in any addition to the fixed capital of the assessee. According to the Revenue, the assessee had acquired right to use the court yard apart from the palace, and thus, had acquired an advantage of enduring benefit of a trade. In other words, the expenditure incurred by the assessee for the use of court yard is in the capital field and it cannot be said to have been incurred to facilitate trading operation of the assessee.

7. Learned Counsel appearing for both the sides placed reliance upon the judgment of the Supreme Court in the case of Empire Jute Co. Ltd. v. CIT [1980] 124 ITR 1/3 Taxman 69, in support of their contentions. Mr. Aravind, learned counsel for the Revenue tried to distinguish the ratio laid down by the Supreme Court in this case on the basis of factual matrix involved therein. As against this, learned counsel appearing for the respondent/assessee placed reliance upon the principle laid down by the Supreme Court in the said judgment.

8. We have perused the judgment. We find ourselves in agreement with the learned counsel appearing for the respondent/assessee. It would be relevant to reproduce the relevant observation made by the Supreme Court, in the said judgment, which, in our opinion, support the case of the respondent/assessee to contend that the expenditure of Rs. 10 lakhs would be on revenue account. The relevant observation in the case of Empire Jute Co. Ltd. (supra) reads thus:

'The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the Courts may be referred to as they

might help to arrive at a correct decision of the controversy between the parties.

One celebrated test is that laid down by Lord Cave L.C. in Atherton Vs. British Insulated & Helsby Cables Ltd, (1925) 10 Tax Cases 155 (HL), where the learned Law Lord stated :

"...when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite condition) for treating such an expenditure as properly attributable not to revenue but to capital".

This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in CIT v. Nchanga Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC) : TC16R.991, it would be misleading to suppose that in all cases, securing a benefit for the business would be, prima facie, capital expenditure "so long as the benefit is not so transitory as to have no endurance at all. There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case'.

9. It is clear that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the

assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. In the present case, except the right to use the court yard, no other rights were created in favour of assessee. In other words, the amount paid to the Trust was for the use of the court yard under the MOU for an indefinite future, and therefore, it would be on revenue account. In other words merely because the advantage may endure for an indefinite future would not mean that the expenditure would be on capital account and not revenue. The advance of Rs. 10,00,000/-, in the present case, consists merely in facilitating the assessee's business operations, enabling the management to conduct their Hotel business more efficiently and profitably. We are, therefore, satisfied that the view taken by the Tribunal in answering this question in favour of Assessee and against the Revenue is correct and deserve no interference by this Court."

49. Respectfully following the above cited decisions, we set aside the order passed by AO on this issue and direct him to allow the impugned sponsorship expenses as revenue expenditure."

12.6.2 Following the above order the ITAT in assessee's own case for assessment year 2012-2013 (supra), we allow deduction of sales promotion and advertisement expenses of Rs. 44,33,55,403. As the entire expenses are allowed as revenue expenditure, the question of depreciation does not arise.

12.7 Hence grounds 6.1 to 6.7 and grounds 7.1 to 7.7 are allowed.

<u>Disallowance of payments based on Project Spirit Report (ground 8) (Corporate Tax Issue)</u>

13. Brief facts of the issue raised in the above ground are as follows:

During the financial year 2014-2015, the Board of Directors of the assessee had mandated an inquiry in relation to matters connected with audit qualifications made in the

assessee's financial statements for the financial year 2013-2014. The inquiry identified references to certain additional parties / additional matter which also potentially dealt with transactions of similar nature in which the documents identified raised concerns as to the propriety of the underlying transactions / matters. It is stated that based on the above, the assessee wanted to identify whether the additional parties / matter involved any impropriety, or the transactions were improper. The report namely Project Spirit Report dated 29th June, 2016 was submitted with the AO during the course of assessment proceedings. On analysis of the report, the AO identified the transactions relating to the year under consideration and classified them into capital and revenue transactions. The AO disallowed an amount of Rs.48,14,00,000 u/s 37 of the Act treating them as revenue transactions. Further, an amount of Rs.6,35,10,000 has been treated as interest income on alleged interest free loans / advances provided to the subsidiary at an adhoc rate of 14.5%.

13.1 Aggrieved by the draft assessment order, the assessee filed objection before the DRP. The DRP had confirmed the disallowance proposed by the AO. The final order was passed in accordance with the DRP's directions thereby making an addition of Rs.54,49,10,000.

13.2 Aggrieved, the assessee has raised this issue before the ITAT. The learned AR's submissions are summarized below:-

- At the outset, it is submitted that assessee has not debited the profit and loss account / claimed deduction in relation to expenses amounting to Rs.21.58 crore disallowed pursuant to the Project Spirit Report. The above fact was highlighted to the lower authorities in the submissions furnished by the assessee (page 128 to 130 of the paper book). Given that the expenses were not claimed by the assessee, the disallowance of the expenses is unwarranted and bad in law.

- With respect to the remaining transactions, the assessee submitted that the disallowance based on the Project Spirit Report has been made

without providing the reasons for making such disallowance and on an arbitrary basis without adjudicating on the objections filed by the assessee. In this connection, it was submitted that various Courts have repeatedly held that there must be something more than bare suspicion to support an addition or disallowance in an assessment. No disallowance can be made which are based on mere conjectures and surmises. In this context, it was submitted that the assessee being a victim of such fraud would in fact be eligible to claim such sums a deductible bonafide business loss as highlighted in the following judicial pronouncements:-

(i) Baridas Daga v. CIT (34 ITR 10 (SC)

(ii) Sassoon J David & Co. P. Ltd. v. CIT (1975) 98 ITR 50 (Bom.)

(iii) CIT v. Parmanand Makhan Lal (1983) 15 Taxman 12 (Patna)

(iv) Kothari & Sons v. CIT (1966) 61 ITR 23 (Madras)

(v) Ramchandar Shivnarayan v. CIT (1978) 111 ITR 263 (SC)

(vi) Khaitan & Co. v. CIT (1979) 1 Taxman 280 (Calcutta)

(vii) Churakulam Tea Estates (P) Ltd. v. CIT (1995) 81 Taxman 214 (Kerala)

(viii) CIT v. India United Mills Ltd. (1978) 112 ITR 129 (Bombay).

- The CBDT vide its undernoted circular (Circular No.35-D (Xivii20) (F.No.10/48/65-It(A-1)], dated 24.11.1965 has accepted the above ruling of the Hon'ble Apex Court in the case of Badridas Daga (supra) and has held that any loss sustained due to embezzlement of employees would be available as a business loss u/s 28.

- According, it was submitted that the disallowance is against the principles enunciated by the Hon'ble Apex Court and the Circular issued by the CBDT and the same needs to be deleted.

13.3 The learned Departmental Representative supported the finding of the AO and the DRP.

13.4 We have heard rival submissions and perused the material on record. The AO made an addition of Rs.54,49,10,000 for the reason that the funds of the assessee has been diverted for various non business purposes. The AO relied on the 'Project Spirit Report' prepared by M/s Ernst and Young (E&Y) vide letter dated 14.10.2016 for the purpose of arriving at the impugned finding that the funds of the assessee have been diverted in many ways and hence the revenue expenditure claimed as deduction amounting to Rs.48,14,00,000 is to be disallowed. The AO further held that the diversion of funds to various entities would not be returned back to the assessee. The AO therefore charged an interest of Rs. 6,35,10,000 calculated at 14.5% on Rs. 43.8 crores. The DRP confirmed the AO's additions. Referring to the DRP objections, the learned AR argued that out of disallowance of Rs. 48.14 crores, a sum of Rs. 15.23 crores pertain to other entities and hence the same cannot be disallowed in assessee's case. Similarly, it was argued that the entirety of Rs. 43.8 crores on which interest income of Rs.6,35,10,000 is imputed did not pertain to the assessee and hence the impugned addition of Rs. 6,35,10,000 is bad in law. These arguments have not been considered properly by both AO and DRP. The assessee's claims in the DRP objections [Page 128 to 134 of the appeal memo] regarding deduction under section 28 on account of fraud committed on the company has also not been considered by the AO/DRP. It appears that the AO has made the addition only on the basis of 'Project Spirit Report' without properly examining the claim of the assessee that certain transactions and the addition

made thereto does not relate to the assessee. Considering the material on record and for the aforesaid reasoning, we set aside the impugned addition and restore this issue to the file of the AO for proper examination of all the facts relating to the said issue. The assessee shall provide all documentary evidence relating to its claim and the AO also shall make a proper enquiry in this regard. All contentions are left open to be considered by the AO in accordance with the law.

13.4.1 Hence grounds 8.1 to 8.8 are allowed for statistical purposes.

Interest u/s 234B of the I.T.Act (ground 9)

14. The above ground is only consequential and the same is **dismissed.**

Interest u/s 234C of the I.T.Act (ground 10)

15. The limited submission of the assessee is that interest u/s 234C of the I.T.Act should be calculated on the return income and not on the assessed income of the assessee. In this context, the learned AR relied on the Bangalore Bench order of the Tribunal in the case of SAP India Private Limited reported in (2014) 41 taxmann.com 7 (Bangalore – Trib.).

15.1 We have heard rival submissions and perused the material on record. The Bangalore Bench of the Tribunal in the case of SAP India Private Limited (supra) had held that interest u/s 234C of the I.T.Act shall apply on the returned income and not on the assessed income. Following the co- ordinate Bench order of the Tribunal, we direct the A.O. to calculated interest u/s 234C of the I.T.Act accordingly.

15.2 In the result, ground 10 is allowed for statistical purposes.

Short credit of TDS / TCS (Ground 11)

16. The assessee had claimed TDS / TCS credit of Rs.24,19,36,874 in the return of income filed. The A.O., however, restricted the credit to Rs.24,02,13,419. Thereby not granting credit for TDS of a sum of Rs.17,23,384.

16.1 We have heard rival submissions and perused the material on record. We direct the AO to verify the TDS credit and grant the same as per law.

Allowability of education cess paid as a tax deductible expenditure (Additional Ground 12)

17. The above ground relates to the claim of deduction of education cess including secondary and higher educational cess as deduction while computing the total income.

18. We have heard rival submissions and perused the material on record. The Kolkata Bench of Tribunal in the case of Kanoria Chemicals & Industries Ltd Vs. Addl. CIT (ITA No.2184/Kol/2018dated 26.10.2021) has held that the education cess is an additional surcharge levied on income tax and hence it partakes the character of income tax. Accordingly it held that the education cess is not allowable as deduction. The Tribunal also noted the decision rendered by Hon'ble Bombay High Court in the case of Sesagoa Ltd. 117 Taxmann.com 96 and by Hon'ble Rajasthan High Court in the case of Chambal Fertilisers & Chemicals Ltd. Vs. JCIT (ITA No.52/2018 dated 31.7.2018), wherein it was held that the education cess is allowable as deduction. However, the Tribunal observed that the decision rendered by Hon'ble Supreme Court in the case of CIT Vs. K. Srinivasan (1972) 83 ITR 346 was not brought to the notice of the above said Hon'ble High Courts. Accordingly, the Tribunal has expressed the view that the decision rendered by Hon'ble Supreme Court in the case of K. Srinivasan (supra) shall prevail on this issue and accordingly held that the education cess is not allowable as deduction.

18.1 Following the above said decision of Kolkata bench of Tribunal in the case of Kanoria Chemicals & Industries Ltd (supra), we hold that payment of education cess including secondary and higher

education cess is not allowable as deduction. Accordingly, we reject this ground of the assessee.

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

(Emphasis added)

The Tribunal partly allowed the interest imputed on interest advanced for statistical purposes and on other grounds as found in the order itself. The issue is not with regard to merit of the grounds in the appeal. What happened in the aftermath of the order forms the contention in the case at hand.

9. The issue would be, whether there has been a reference under Section 92CA(1) to the Transfer Pricing Officer or the matter being remitted to the Transfer Pricing Officer by the Tribunal to decide the issue under Section 92CA(3). There is a world of difference between the matter being remitted by the Tribunal to the Transfer Pricing Officer under Section 92CA and reference by the Assessing Officer to the Transfer Pricing Officer under the same provision of Section 92CA. The subtle difference is considered by the Division Bench of the High Court of Delhi in the case of **NEW**

DELHI TELEVISION LIMITED v. DISPUTE RESOLUTION PANEL[1], wherein it is held as follows:

"…. …. ….

63. As is manifest from a reading of Section 92-CA(1) of the Act, upon the assessing officer noticing an international transaction or a specified domestic transaction having been undertaken by an assessee, the said authority is statutorily obliged to make a reference to the Transfer Pricing Officer for the purposes of computation of the arm's length price (ALP). On receipt of that reference, the Transfer Pricing Officer is obliged to place the assessee on notice and proceed to determine the arm's length price in respect of the international transactions in question. The Transfer Pricing Officer while undertaking that evaluation also stands enabled by virtue of Section 92-CA(2-B) to take into consideration any international transaction which though not disclosed in the report under Section 92-E by the assessee may come to its notice.

64. Ultimately, and on conclusion of the adjudicatory process, the Transfer Pricing Officer in terms of sub-section (3) would proceed to pass an order determining the arm's length price in relation to the international transaction. The order under Section 92-CA(3) which the Transfer Pricing Officer frames is undoubtedly binding on the assessing officer and who in terms of sub-section (4) thereof is required to compute the total income of the assessee in conformity with the arm's length price as determined by the Transfer Pricing Officer.

65. Section 92-CA(1) of the Act speaks of a reference being made to the Transfer Pricing Officer by the assessing officer concerned alone. However, and by virtue of the status and position which stands conferred upon the Income Tax Appellate Tribunal, we find no justification to doubt its authority to make

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[1] **2024 SCC OnLine Del 3806**

such a reference while considering an appeal that may come to be laid before it. This, since in terms of Section 253 of the Act, an assessee is entitled to question a direction framed by the Dispute Resolution Panel and which may have come to be translated into an actual order of assessment. Consequently, once such an appeal were to be laid before the Income Tax Appellate Tribunal, it would stand empowered to not only examine the correctness of the directions framed by the Dispute Resolution Panel with respect to international transactions but also to such other and additional aspects and which may not necessarily be confined to only international transactions as decided by the assessing officer. We thus find ourselves unconvinced to hold that the Income Tax Appellate Tribunal under the statutory scheme of the Act should not be recognised to have the power to remit the matter directly to the desk of the Transfer Pricing Officer.

66. Our conclusion in this respect stands fortified from a reading of Section 153(3) which speaks of an order of the Income Tax Appellate Tribunal requiring a "fresh assessment" or a "fresh order under Section 92-CA". It is pertinent to note that the word "order" in the context of Section 92-CA is undoubtedly a reference to the adjudication undertaken by the Transfer Pricing Officer. This in the light of Section 92-CA(3) using the phrase "... the Transfer Pricing Officer, shall, by order in writing, determine...." Similarly, Section 92-CA(4) uses the expression "On receipt of the order under sub-section (3)". The extent of the authority of the assessing officer is thereafter explained by that provision to be "... to compute the total income of the assessee...." It is thus manifest that the order which is envisaged under Section 92-CA is the one made by the Transfer Pricing Officer. We thus find on a conjoint reading of Sections 92-CA(3) and 153(3) that it would be well within the authority of the Income Tax Appellate Tribunal to remit a matter directly to the Transfer Pricing Officer. There would appear to be no justification for the Income Tax Appellate Tribunal being compelled or required to first

remit the matter to the assessing officer and for a consequential reference being framed if issues pertaining to an international transaction itself constituted the subject-matter of an appeal.

… … …

70. Section 153(3) of the Act in unambiguous terms sets out the time-frame within which a fresh assessment is liable to be completed once a matter is remanded by the Income Tax Appellate Tribunal in terms of a judgment rendered and referable to Section 254 of the Act. The order of the Income Tax Appellate Tribunal contemplated under Section 153(3) of the Act is one which may have set aside or cancelled an assessment. As is manifest from a reading of the operative directions that were framed by the Income Tax Appellate Tribunal, it had while remanding certain items for reconsideration to the assessing officer, remitted the issues pertaining to arm's length price directly to the Transfer Pricing Officer. It becomes pertinent to note that the aforesaid reference to the Transfer Pricing Officer and for it undertaking a fresh adjudication was based on the consent of the parties. Even the aspect of corporate guarantee and whether it would be an international transaction was an issue which was remanded directly to the Transfer Pricing Officer subject to the rider that the same would be taken up for consideration after the Special Bench had rendered its decision.

… … …

72. We, additionally, find that the prescription of nine months would also be applicable to a fresh order which is liable to be made in accordance with Section 92-CA of the Act. This since Section 153 of the Act speaks not merely of assessments but also orders that are liable to be framed under Section 92-CA. The order which is spoken of in Section 92-CA of the Act, as explained above, is the one which the Transfer Pricing Officer may come to make in accordance with sub-section (3) thereof. It is thus manifest that the assessment exercise was liable to be concluded within a period of nine months when computed from 14-7-2017.

... ...

80. It becomes pertinent to observe that the Section 92-CA(1) reference rests solely upon the assessing officer being of the opinion that a reference is required to be made to the Transfer Pricing Officer for computation of arm's length price. That power stands conferred upon the assessing officer and is available to be exercised in the course of assessment. However, and as is plainly evident from Section 153(3) of the Act, the statute does not deprive the Income Tax Appellate Tribunal of the authority and jurisdiction to require a fresh order under Section 92-CA being made. As we had observed hereinabove, Section 153(3) of the Act speaks of assessments as well as orders under Section 92-CA that may be required to be made pursuant to an order passed by an Income Tax Appellate Tribunal in exercise of its appellate jurisdiction comprised in Section 254 of the Act. In our considered opinion, the reference which the assessing officer proceeded to frame on 27-12-2018 was thus clearly superfluous and in any case cannot be sustained on the basis of Section 153(4) of the Act.

81. It is pertinent to note that sub-section (4) of Section 153 is concerned with a reference referable to Section 92-CA(1). That provision, as noticed hereinabove, is confined to a reference to the Transfer Pricing Officer that may be made by the assessing officer. The limited application of Section 153(4) is also evidenced from that provision using the expression "made during the course of the proceeding for the assessment or reassessment". Sub-section (4) is thus clearly confined to a reference that the assessing officer may choose to make in the course of assessment. Sub-section (3) of Section 153 of the Act, on the other hand, deals specifically with assessments and orders under Section 92-CA that the authority concerned may be liable to make in terms of the directions issued by the Income Tax Appellate Tribunal. Consequently, it would be the principle of generaliaspecialibus non derogant which would stand

> **attracted and be determinative of the question that stands posited**."

(Emphasis supplied)

The High Court of Delhi considers the entire spectrum of the provisions and holds that the matter remitting back to the Transfer Pricing Officer by the Tribunal is not same as the reference by the Assessing Officer to the Transfer Pricing Officer. The limitation would kick in.

10. The issue further would be, the date on which the limitation would expire whether it is 31-03-2024 as contended by the petitioner, or 31-03-2025 as contended by the revenue. This again need not detain this Court for long or delve deep into the matter. A coordinate Bench of this Court considers an identical issue in the case of **WIPRO LIMITED v. JOINT COMMISSIONER OF INCOME TAX**[2] wherein it is held as follows:

> "8. Both the counsel for the Assessee and the Sr. Panel Counsel for the Revenue have filed their Written Submissions and have pressed into service a catena of decisions, relevant of which have been adverted to; having heard the learned counsel for the parties and having perused

[2] **2021 SCC OnLine Kar 15898**

the Petition Papers, this Court is inclined to grant indulgence in the matter as under and for the following reasons:

I. Some legal principles & morals which are to animate levy of tax and refund of un-taxable:

(i) A great Indian poet **Kalidasa** (500 CE) in his epic poem "Raghuvamsham" (1-18) states: *"The King Dilip collects from his subjects only 1/6th of their income as tax for the welfare of State, indeed like the sun taking earthly water drops, only to indemnify her with multiples of rain-drops…"* **Chanakya** in his acclaimed work "Arthashastr" advises the Rulers: *"Collect taxes from the citizens as honeybees collect nectar from the flowers, gently and without inflicting pain…"*;

(ii) A renowned jurist of yester-decades late **Mr. Nani Palkhivala**, in the concluding paragraph of Preface to the Eighth Edition of "The Law and Practice of Income Tax" said "*Every Government has a right to levy taxes. But no Government has the right, in the process of extracting tax, to cause misery and harassment to the taxpayer and the gnawing feeling that he is made the victim of palpable injustice*."; the function of the Assessing Officer is to administer the statute with solicitude for the Public Exchequer with an inbuilt idea of fairness to tax payers; this view finds expression in the decision of the Apex Court in ACIT vs. Rajesh Jhaveri Stock Brokers P. Ltd. **(2007) 291 ITR 500 (SC).**

(iii) **Walton J**. had observed in Vestey v. Inland Revenue Commissioners **[1979] Ch 177 (197 – 198)** *"I conceive it to be in the national interest, in the interest not only of all individual tax payers – which includes most of the nation – but also in the interests of the Revenue authorities themselves, that the tax system should be fair… One should be taxed by law, and not be untaxed by concession … A tax system which enshrines obvious injustices is brought into disrepute with all tax-payers accordingly, whereas one in which injustices, when discovered, are put right (and with retrospective effect when necessary) will command respect and support...".*

(iv) A Welfare State like ours is constitutionally expected to be fair & reasonable in dealing with the subjects and it must avoid any harassment to the assessee public, without causing any loss to the Exchequer (see Nokia Corporation v. Director of Income-tax **[2007] 292 ITR 22 (Delhi HC)**; the State as constitutionally ordained, needs to conduct itself as a **virtuous litigant** and should meet honest claims; this view finds resonance in the decision of the Apex Court in State of U.P. v. Manohar **[2005] 2 SCC 126**; the maxim *actus curiae neminem gravabit*, i.e., an act of court shall prejudice none, is equally applicable to the quasi-judicial functions of Tax Authorities, as well.

(v) Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by authority of law; if a tax has been paid in excess of the tax specified, the same has to be refunded; in Tata Chemicals **363 ITR 658 (SC)**, the Apex Court reasoned out why State should pay interest for holding tax payers' money; a "tax refund" is a refund of taxes when the tax liability is less than the tax paid; when the said amount is refunded, it should carry interest as a matter of course, since it is a kind of recompense for the 'unauthorized use or retention' of money; refund due & payable to an assessee is a debt owed; Parliament has enacted this principle in Section 244A of the 1961 Act; in *Aluminium Corporation of India Ltd. v UOI* 1978 **(2) ELT 452 (SC)** the Apex Court observed that a good government involves not only diligent collection of taxes, but also ready refunds of excess levies.

II. As to meaning of "assessment"; difference between "assessment" & "assessment order"

(i) The DCIT has stated in the impugned order "... ***As this is the case of fresh assessment/re-assessment, an additional interest u/s. 244A(1A) will not be applicable ...*** **"; much has been argued on behalf of the assessee that his is not a case of fresh assessment/re-assessment, and therefore the impugned order is liable to be voided, whereas the Revenue has contended to the contrary; therefore, it**

becomes necessary to discuss these concepts. While juxtaposing contextual construction qua literal interpretation of statutes, Justice Krishna Iyer in CIT vs. ARAVIND REDDY, **AIR 1980 SC 96** observed:

> *"The significance of a word of a plural semantic shades may, in a given text depend on the pressure of the context or other indicia. Absent such compelling mutation of sense, the speech of the lay is also the language of the law …";*

Keeping *inter alia* the above observation in mind, one has to ascertain the meaning of the above terms.

(ii) The 1961 Act has a Dictionary Clause in Sec.2; Section 2(9) merely states that the assessment includes reassessment; this does not throw much light on the debated questions; in Sir Rajendranath Mukerjee v. CIT, (1934) 2 ITR 71 (PC), it has been held under the erstwhile Income Tax Act, 1922 that the word 'assessment' is not confined to the definite act of making an order of assessment; in C.A. Abraham v. ITO [1961] 41 ITR 425 (SC), in the context of section 44 of 1922 Act (similar to section 189 of the 1961 Act), it has been held that the term 'assessment' employed therein not only referred to computation of income but included the procedure for declaration & imposition of tax liability and the machinery for enforcement thereof;

(iii) It is pertinent to refer to what the Hon'ble Supreme Court observed in Auto & Metal Engineers v. Union of India **[1998] 229 ITR 399 (SC)**:

> *"7. In the Act the provisions regarding procedure for assessment are contained in Chapter XIV (sections 139 to 158). Under the said provisions, the process of assessment involves (i) filing of the return of income u/s. 139 or u/s. 142 in response to a notice issued u/s. 142(1); (ii) inquiry by the Assessing Officer in accordance with the provisions of sections 142 and 143; (iii) making of the order of assessment by the Assessing Officer u/s. 143(3) or section 144; and (iv) issuing of the notice of demand u/s. 156 on the basis of the order of assessment. The process of*

assessment, thus, commences with the filing of the return or where the return is not filed by the issuance by the Assessing Officer of notice to file the return u/s. 142(1) and it culminates with the issuance of the notice of demand u/s. 156. The making of the order of assessment is, therefore, an integral part of the process of assessment..."

(iv) In CIT v. Purshottamdas T. Patel [1994] 209 ITR 52 (Guj), the Hon'ble High Court of Gujarat has observed that section 153 requires that the assessment should be completed within the prescribed time limit and unless the total income is ascertained & tax payable is determined, the process of assessment cannot be said to be complete; it also held that an 'order of assessment' is an order in writing whereby the total income of the assessee is assessed and the tax payable by him is determined; thus, the passing of an assessment order is only an integral part of the process of assessment and therefore, the word 'assessment' cannot be confined to the act of making an order of assessment; there is a certain legal difference between the terms 'assessment' & 'assessment order'; it can be stated that the use of the word 'assessment' would mean the whole process of determination of income and the same should not be restricted to a mere passing of an assessment order.

III. As to meaning of the term 'setting aside or cancelling an assessment'

(i) Ordinarily, when an assessment is set aside or cancelled, a fresh assessment follows; a perusal of the following sections reveals that making of a fresh assessment invariably precedes setting aside or cancelling an assessment:

- Section 153(2A) prior to substitution by Finance Act, 2016 with effect from 01.06.2016.
- Section 153(3) post substitution by Finance Act, 2016 with effect from 01.06.2016.
- Proviso (a) to Section 240;

- Explanation 1(iii) to section 245A(b)
- Section 251(1)(a) – words as omitted by Finance Act, 2001 with effect from 01.06.2001.

It may be noted that Section 153 which is the subject matter of interpretation herein, is entitled "Time limit for completion of assessment, reassessment and recomputation; therefore it is primarily concerned with laying down time limits which have to be adhered to by the assessing officers.

(ii) In the light of the above, a question arises as to whether the terms 'setting aside' or 'cancelling' an assessment employed in the subject provisions, do mean setting aside or cancellation of the entire assessment order or would it include even setting aside or cancellation of only a part of the assessment order [as with respect to particular issues, rest having been left intact by the ITAT or the like]; the said provisions cautiously employ the word 'assessment' and not the term 'assessment order'; however, one will have to see the setting in which these provisions actually occur. A summary of the said provision is set out hereunder:

Sub-Section	**Nature of Assessment**	**Proceedings under section**	**Time limit** ***[from the end of the assessment year in which income was first assessable]***	***Time limit [from the end of the Financial Year***
153(1)	Regular Assessment	To pass assessment orders under section 143(1) and 144.	21 months From AY 2018-19, time limit has been amended to 18 months From AY 2019-20, time limit has been further reduced to 12 months	
153(2)	Income escapement	To assess/re-	NA	*12 months from*

	assessment	assess/ recompute under section 147		*the end of FY in which notice under section 148 was served.* *From 1st April 2019, the above time limit has been reduced to 9 months.*
153(3)	To make fresh assessment pursuant to order u/s 254/263/264 setting aside or cancelling assessment received by the PCIT or CCIT or the orders passed by the PCIT or CCIT.		NA	*9 months from the date of referred order's under this section (254, 263,264 orders) Post 01.04.2019,* *If the order is received after 01.04.2019,* *then in such cases the time limit has been increased to 12 months*
153(4)	Notwithstanding sub-sec, (1), (2) & (3), where a reference has been made to Transfer Pricing Officer during the proceeding for assessment, reassessment made.			*The period as specified in sub-section (1)(2) & (3) shall be further extended by 12 months.*
153(5)	To give effect to the order of the higher authorities i.e. CIT (A), ITAT, HC and SC orders	To give effect to an order passed by higher authorities other than those orders which require fresh assessment or reassessment and such order requires verification of any issue by way of submission of any document by the assesse or an opportunity is required to be provided to the assessee.		*Effect to the order to be given within 3 months from the end of the month in which order is received.* *PCIT or CIT may allow an additional period of six months. [subject to certain conditions]* *If the order which has to be given effect to*

				requires verification of any issue then the time limit of 9 months is applicable.
153(6) subject to provision of section [153(3) and (5)]	Exceptions to clause (1) and (2) above.	Assessment, reassessment or recomputation made on assessee or any person.	In consequence of or to give effect to any findings or directions contained in order's otherwise than in appeal.	**12 months** from the end of the month in which order is received .
		Assessment of partner order in consequence of an assessment made on the firm under section 147		**12 months** from the end of the month in which order in case of firm is passed
153(7) Applicable for the period prior to 1.4.2016	To give effect to the order, finding or direction referred to in section 153(5) & (6)	AO to give effect to such orders within time specified u/s 153(5) & (6) and such orders are passed/ received by income-tax authorities before 1-6-2016		Effect to be given before 31.03.2017
153(8)	Revival of order passed u/s. 153A(2) or 153(1)			1 month from the end of month of revival or within 21 months from the date of authorization for search has been issued – whichever is earlier.

Further, Explanation 1 below section 153 provides that in computing the period of limitation, time taken for specified processes, as listed therein, should be excluded.

Section 153 lays down the time limit to make assessment, reassessment & recomputation under various scenarios; section 153 is substituted by Finance Act, 2016; the brief outline of this section is as under:

- Sub-section (1) deals with time-limit for making assessment order under sections 143 or 144. With the advancement of e-assessments, the time limits for doing an assessment are progressively going to be reduced.
- Sub-section (2) deals with time-limit for making assessment order under section 147, Section 147 deals with re assessment orders.
- Sub-section(3) deals with time-limit for making order of fresh assessment in pursuance of an order under section 254 or section 264, by virtue of which the original assessment is either set aside or cancelled.
- **Sub-section (4) states that where a reference under section 92CA(1) is made during the course of the proceeding for the assessment or reassessment, the period available for completion of assessment or reassessment, as the case may be, under the said sub-sections (1),(2) and (3) shall be extended by twelve months. This would apply only when the reference is made in the course of proceeding for assessment or reassessment and not otherwise.**
- Sub-section (5) deals with time-limit to give effect to an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264, wholly or partly, otherwise than by making a fresh assessment or reassessment.
- Sub-section (6) deals with time-limit for making assessment, reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order under section 250, Section 254, section 260, section 262, section 263, or section 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under

the Act. The said sub section is subject to subsection (3) and (5).

- Sub-sections 7 and 9 deal with transition provisions as section 153 is substituted.
- Sub –section 8 deals with time-limit in case of search based assessments.

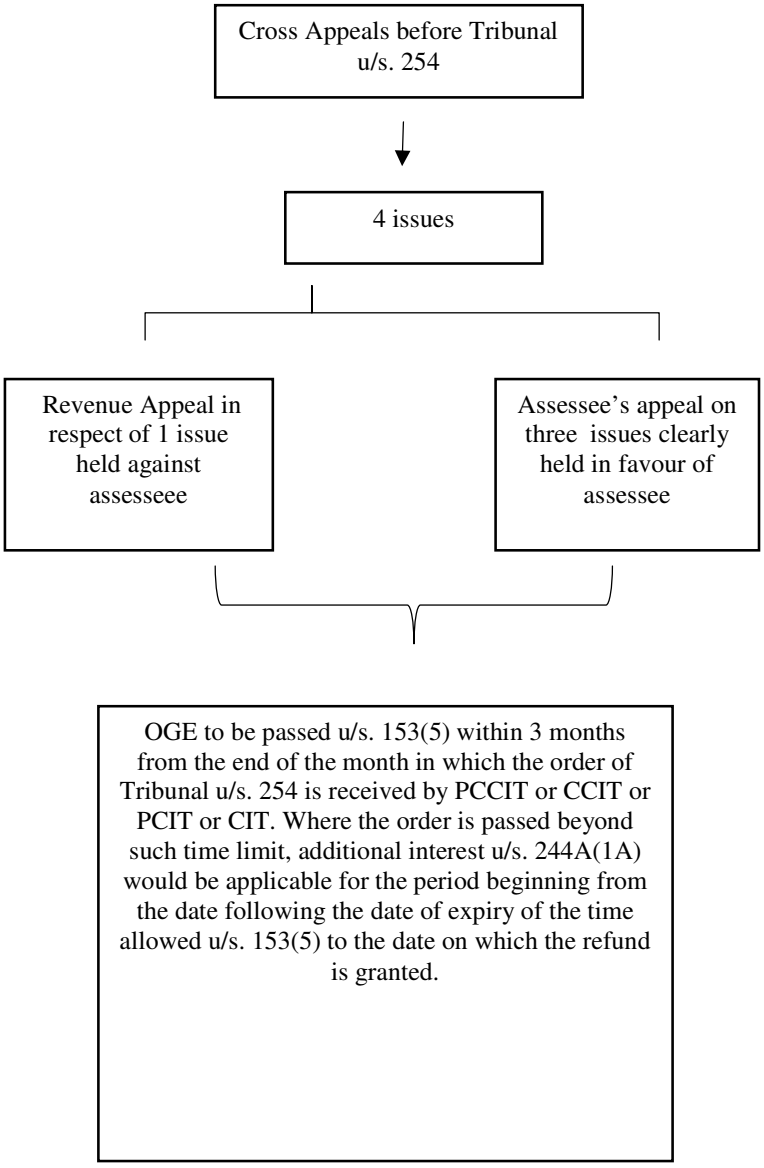
A second proviso is added to sub-section (5) of section 153 by the Finance Act, 2017. The said proviso states that where an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264 requires verification of any issue by way of submission of any document by the assessee or any other person or where an opportunity of being heard is to be provided to the assessee, the Order Giving Effect to the said order u/s.250 or sec.254 or sec.260 or sec.262 or sec.263 or sec.264 shall be made within the time specified in sub-section (3). The dates specified in the Table above shown as B would be relevant for this purpose.

IV. As to Order Giving Effect (OGE):

(i) The following general principles have relevance in considering the Orders Giving Effect in the light of Parliamentary amendments to the 1961 Act:

- **It is a fundamental principle that income tax is payable on real income, vide Apex Court decision in Poona Electric Co. Vs. CIT (1965) 57 ITR 521.**
- **This real income can be brought to tax through assessment contemplated under the Act.**
- **The basic principle is that ordinarily assessments cannot be done piecemeal.**
- **There are a few exceptions to the rule of "no piecemeal assessment' as in the case where income has escaped assessment where re-assessment powers do avail, as discussed by Calcutta High Court in Karan Chand Thapar vs. ACIT (2005) 276 ITR 105 para 13.**

(ii) OGE is not a regular assessment as held in the case of Sundaram Finance **417 ITR 679 Mad**; passing an Appeal Effect Order is an implied obligation of every authority to comply with the directions of his superior in the hierarchy; this is an inherent aspect of adherence to judicial discipline; **OGE to an order on appeal or on revision has to be passed in order to compute the total income and to determine the tax payable by or refundable to the assessee for the assessment year concerned, in the light of additions/disallowances affirmed or varied at every such stage; it may be noted that such OGE could either be adverse or beneficial as it may either result in a tax payable by or refundable to the assessee, as illustrated by the following:**



(iii) It may be important to note that even before such amendments were made, binding appellate orders used to be given effect to by the Writ Courts on being moved by the assesses grieving against denying or delaying of refund of tax, The Parliament presumably having taken cognizance of the difficulties faced by the prudent assesses has through the amendment has obviated the principle of judicial discipline in a hierarchical structure that, orders of the higher ups in the hierarchy have to be unreservedly followed by the lower authorities, as has been explained by the Apex Court in UOI vs. KAMALAKSHI FINANCE CORPORATION, **1991 (55) ELT 433**; the Parliament by the subject amendments has prescribed a time limit for making refund of tax and has also provided for the payment of interest on the delayed refunds.

V. Difference between 'assessment', 'reassessment' or 'recomputation' and 'fresh assessment'

(i) The words 'assessment, 'reassessment' or 'recomputation' have been used in the following sections of the 1961 Act:

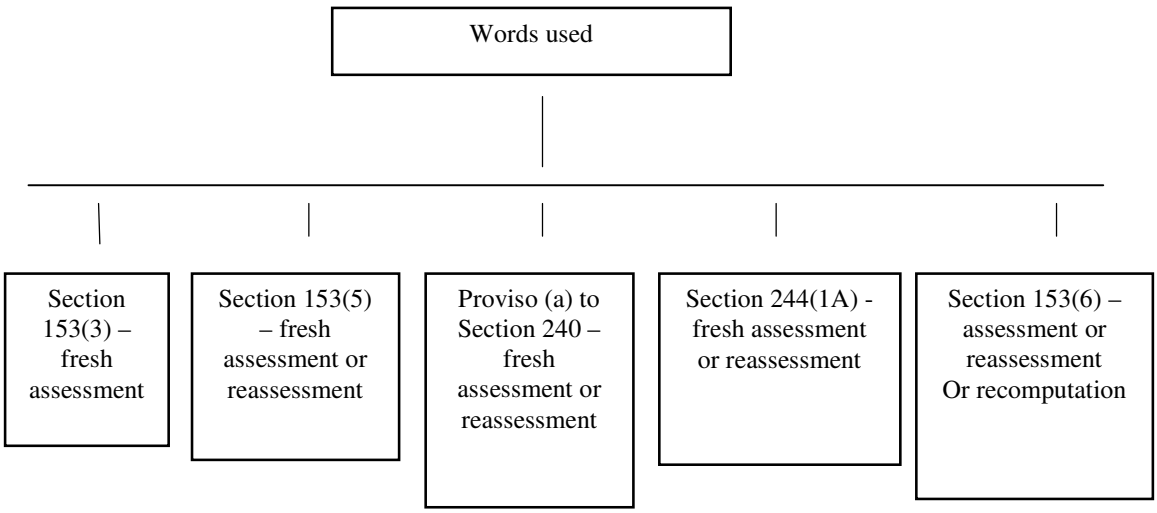
- Section 147 (prior to substitution vide Finance Act, 2021 with effect from 01.04.2021) and section 147 (post substitution vide Finance Act, 2021 with effect from 01.04.2021)
- Explanation to section 147 (post substitution vide Finance Act, 2021 with effect from 01.04.2021)
- Section 148 (prior to substitution vide Finance Act, 2021 with effect from 01.04.2021) and section 148 (post substitution vide Finance Act, 2021 with effect from 01.04.2021)
- Section 150
- Section 153(3)(ii) [prior to substitution vide Finance Act, 2016 with effect from 01.06.2016]
- Section 153(6)(i) [post substitution vide Finance Act, 2016 with effect from 01.06.2016]

From the above, it can be safely assumed that the word 'reassessment' has been used in cases where income has escaped assessment.

(ii) On the other hand, the phrase 'fresh assessment' has been used in the following sections:

- Proviso (a) to Section 240;
- Section 251(1)(a) –words omitted by Finance Act, 2001 with effect from 01.06.2001.
- Explanation 1(iii) to section 245A(b).
- Section 153(2A) prior to substitution by Finance Act, 2016 with effect from 01.06.2016.
- Section 153(3) post substitution by Finance Act, 2016 with effect from 01.06.2016.

The term 'fresh assessment' as employed in the above sections is accompanied by the term 'setting aside or cancelling an assessment'; it may further be noted that section 153(6) is subject to the provisions of sections 153(3) & 153(5); therefore, the 'assessment, reassessment or recomputation' as referred to in sections 153(6) would not include the 'fresh assessment' as contemplated in sections 153(3) & 153(5); the following table is illustrative:



(iii) The word 'reassessment' is used next to the term 'fresh assessment' in section 153(5), Proviso (a) to section 240 & section 244A(1A); the definition of the term 'assessment' as contained in section 2(8) which merely provides that assessment includes reassessment, shall not *ipso facto* be applicable in all situations governed by various provisions of the 1961 Act; if the fresh assessment included a fresh reassessment, there was no need for the Parliament to employ the two terms, simultaneously; **Lord Hewart C.J.** in Spillers Limited Vs. Caradix Assessment Committee & Pritchard**, (1931) All E.R. 524** stated: *"It ought to be the rule… that words are used in an Act of Parliament correctly and exactly and not loosely and not inexactly…"*; section 2 i.e., the Dictionary Clause of the Act employs the usual expression 'unless the context otherwise requires' and this itself indicates that the words used in various provisions of the Act may take their colour from their context and at times, in variance with the statutory definitions; The maxim *expressio unius exclusio alterius* with all its arguable limitations also lends support to the above view to some extent; **Maxwell** on "The Interpretation of Statutes" 12th Edition, LexisNexis at page 293 explains this maxim as under:

> *"By the rule usually known in the form of this Latin maxim, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class: expressum facit cessare tacitum. Further, where a statute uses two words or expressions, one of which generally includes the other, the more general term is taken in a sense excluding the less general one: otherwise there would have been little point in using the latter as well as the former."*

(iv) It is pertinent to note that section 153(3) [post substitution vide Finance Act, 2016 w.e.f. 01.06.2016] does not use the word 'reassessment' alongside 'fresh assessment'; however, the said word has been used alongside 'fresh assessment' in section 153(5) [post substitution vide Finance Act, 2016; accordingly, reassessment is not envisaged u/s

153(3); such reassessment can only come u/s 153(2) or Section 153(6) which deals with assessment, reassessment or recomputation to give effect to any finding or direction contained in the order of superior authority or court; thus if an order of assessment is set aside in appeal with a direction that a fresh reassessment be made, the same would be covered by section 153(3); One may also note that section 2(40) of the Income Tax Act, 1961, Act defines the term "regular assessment" to mean assessment under sub section 3 of section 143 or section 144; therefore these terminologies have different import in different sections. In the light of this discussion, it is clear that the term "assessment" is used in section 153(1) to mean the entire process of assessment; section 153(2) uses the words, 'assessment', 'reassessment' or 'recomputation' but in respect of section 147 which deals with income escaping assessment; section 153(3) uses the term "fresh assessment" in pursuance of the orders passed setting aside or cancelling an assessment; therefore, this term "fresh assessment", though not defined, contemplates a new assessment consequent to the higher authorities cancelling or setting aside the assessment; Section 153(5), talks of giving effect to an order passed by the higher authorities, wholly or partly, otherwise than by making a fresh assessment or reassessment. The words "wholly or partly" obviously pertain to giving effect to the order of the higher authorities which would be done by the lower authority either in part or in whole depending on the issues that are settled by the higher authorities. However, such an exercise cannot be done within the time limits specified in Section 153(5), where there is a fresh assessment or reassessment and in such cases the longer time limits specified in Section 153(3) would apply; a harmonious construction of these provisions would mean as under :

a. **That in order to give effect to the order of the superior authorities, either wholly or partly in terms of Section 153(5), it should not be a case of reassessment or fresh assessment, which if**

they are, would otherwise fall into Section 153(3);

b. That Section 153(3), when it uses the term 'fresh assessment', would mean that the entire exercise of assessment is to be done afresh as it is used along with the terminology "setting aside or cancelling" which would mean the whole order of assessment being set at naught and not some issues comprised in the assessment order; when the assessment order is set aside on some issues only and confirmed on other, it is not a case of 'setting aside or cancelling the assessment'.

c. That Section 153(5) would apply where the assessing officer has to give effect to the order of the higher authorities in whole or in part provided that no fresh assessment i u/s.153(3) or a reassessment u/s. 153(2) relating to income escaping assessment, is to be undertaken.

d. Therefore, if the orders to be given effect to are to be made by following the principles already laid down by the higher forum, it would not be a case pf fresh assessment in terms of Section 153(3) or a reassessment in terms of Section 153(2); it would simply mean that the orders of the higher forum are to be applied & followed by the assessing officer; . it may be borne in mind that longer time limits are provided in Section 153(3) & second proviso to Section 153(5) because it may entail doing the entire process once over or where detailed evidences may be required for accomplishing the task; however where a shorter time limit is prescribed u/s. 153(5), the legislative mandate is to subserve the objectives of ensuring timely compliance with the orders of the superior authorities.

(v) One more aspect needs to be stated here: instructions were issued by the CBTD long before Sec.244A(1A) was loaded to the statute book making the

right to interest on delayed refund a substantive right; the relevant portion of instruction 7 of F.No.279/MISC/M-42/2011-ITJ dated 24.05.2011 reads as under:

> *"iv. Appeal effect should be particularly monitored by the CIT in the cases in which the ITAT has decided certain issues in favour of the assessee and set aside-remanded back other issues to the Assessing Officer. The set-aside issues must be decided on priority".*

The said practice & procedure are reflected by the following observations of the ITAT in the case of Sanat Products Ltd. v. DCIT **[2006] 5 SOT 510 [ITAT – Del.**]:

> *"No particular procedure has been given in the Act or the Rules to carry out the appeal effect. Wherever no particular procedure has been given in the Act or the Rules, then naturally the authorities have to adopt a procedure or practice, which is practical, adheres to the well-settled legal principle and does not cause prejudice to the assessee or the Government. One of the basic principle in the administration of justice in India, where hierarchy of courts is existing, is that it is mandatory on the subordinate Tribunal or authorities to carry out the directions given to them by the superior authorities or Tribunals in exercise of appellate powers. Failure to do so will result in chaos in the administration of justice….. [vide Para 7]*
>
> *Whenever an appellate authority passes an order, there are three possibilities. Firstly, the appellate authority may confirm the whole or part of the order passed by the lower authority. Secondly, the whole or part of the order may be quashed or additions may be deleted. Thirdly, the whole or part of the issue raised may be set aside for fresh examination with or without any specific directions. Whenever some additions are confirmed or deleted, the issues become final as far as the Assessing Officer is concerned. Only course open to him is to carry out the directions given by the Commissioner (Appeals). Of course, if the assessing authority is not satisfied with the order of the Commissioner (Appeals), he can prefer an appeal before the Tribunal but, at the same time, the appeal effect has to be given. There is a practice that appeal effect orders are passed under section 250, read with section 143(3), and issues which have become final are dealt in such order and accordingly, fresh demand, if any, is raised. There is no bar*

in the Act for raising the demand and, therefore, there is nothing wrong in this practice being followed by the revenue authorities. [Para 8]

However, difficulties would arise only where some of the additions are confirmed and/or deleted and some issues are set aside for fresh examination by the Assessing Officer, as in the instant case. [Para 9]

Piecemeal assessment is not possible under section 143(3), however, while giving appeal effect in the present kind of situation, the Assessing Officer was performing two functions, namely, carrying out the directions of the appellate authority in respect of the issues which had become final and secondly, re-examining the issues which had been set aside to him. Each of these functions seemed to be independent and there is no bar in the Act to carry out these functions separately. There was no infirmity in the practice being followed by the revenue authority in passing the separate appeal effect order by firstly giving appeal effect order in respect of issues which had become final and passing the second order in respect of those issues which had to be examined afresh. Such kind of practice was more practical and convenient to both the parties and there was no legal bar against such a practice. [vide Para 10]"

VI. As to limitation period under the 1961 Act:

(i) The provisions of 1961 Act prescribe periods of limitation for various acts & procedures of assessees and assessing authorities; limitation is prescribed, *inter alia*, for the issue of scrutiny notice u/s 143(2), issue of notice u/s 147, for completing assessment u/s 153, etc; limitation is provided for acts of assessee as well ie., due date for filing of returns u/ss 139(1)/(4)/(5); in Parashuram Pottery Works Col Ltd. v. ITO [1977] 106 ITR 1 at p.10, it is stated: "At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity"; arguably, limitation may have

arbitrariness in its fixation but has to be strictly construed without equitable consideration vide R. Rudraiah v. State of Karnataka (1998) 3 SCC 23; similarly, in C. Ramaiah Reddy 339 ITR 210 Kar, a Bench of this court has observed that if proceedings are not initiated within the time prescribed, the remedy is lost and the assessee would acquire an indefatigable right; such a right accruing by the lapse of time cannot be at the mercy of the officials, who do not discharge their duties within the prescribed period or a reasonable time; in the matter of limitation, question of prejudice does not arise vide M. Janardhana Rao Case 273 ITR 50 SC; if no action is taken within the prescribed time limit, the authority in a sense becomes *functus officio* and thus lacks jurisdiction to take the action in the concerned matter.

(ii) The above principle would apply even to passing of fresh assessment or OGEs where different time limits are prescribed u/s. 153(3/(5)(6); in Freight Systems (India) Pvt. Ltd [TS-143-HC-2021(MAD)-TP], the Hon'ble Madras High Court quashed the final assessment order dated 29.10.2010 for AY 2006-07 as being barred by limitation u/s.153(2A) [presently section 153(3)]; similar view is expressed by a Bench of this Court in Paul Noel Rodrigues [2015] 57 taxmann.com 12 (Karnataka); an assessee may challenge an adverse OGE as being barred by time; while the similar principle applies to favourable OGE as well, the Department cannot take advantage of its own lapse both on the first principle of doctrine against unjust enrichment and on the statutory mandate that it has to grant the refund to an assessee as a functional consequence of an appellate order even without the assessee having to make any claim [section 240]; the right to receive interest on the delayed refund does not depend on the application of the assessee, but follows as a natural corollary to the right to receive refund vide NATIONAL HORTICULTURE vs. UNION OF INDIA, 253 ITR 12; this can be likened to centuries-old-principle that *the debtor should find the creditor and pay the debt.*

VII. Payment of interest on delayed refunds u/s. 244A(1A):

(i) This provision has been brought on the statute book vide Finance Act, 2016 w.e.f. 01.06.2016; entitlement of an assessee to the interest on delayed refund as envisaged under this provision to some extent brings a sort of parity in the converse situation where he is liable to pay interest for delayed payment of taxes in terms of section 234B; it may be pertinent to note that it was inserted and brought into effect from the same time as section 153 was substituted by Finance Act, 2016; similarly, section 153(5) was substituted by Finance Act, 2016 prescribing the time limit to give effect to the orders passed under the sections mentioned therein, wholly or partly, otherwise than by making a fresh assessment or reassessment; prior to such amendment, no time limit was prescribed for passing of OGE; it may be noted that the requirement of paying interest u/s 244A(1A) has been brought in for the cases covered u/s 153(5); this is for the following reasons:

- Both the sections have been enacted vide Finance Act, 2016 and both they have been brought into effect from 01.06.2016.

- Both sections 153(5) and 244A(1A) deal with giving effect to orders u/s. 250 or section 254 or section 260 or section 262 or section 264.

- The said sections deal with giving effect to orders passed under the sections mentioned therein, either wholly or partly.

- The said sections make exception to making of fresh assessment or reassessment.

- Section 244A(1A) provides for interest for the period beginning from the date following the date of expiry of the time allowed u/s. 153(5) to the date on which the refund is granted.

(ii) The legislative intention in enacting section 244A(1A) can be discerned from the Memorandum explaining the provisions of the Finance Bill, 2016, the relevant extract of which reads as under:

"Payment of interest on refund…….

It is also proposed to provide that where a refund arises out of appeal effect being delayed beyond the time prescribed under sub-section (5) of section 153, the assessee shall be entitled to receive, in addition to the interest payable under sub-section (1) of section 244A, an additional interest on such refund amount calculated at the rate of three per cent per annum, for the period beginning from the date following the date of expiry of the time allowed under sub-section (5) of section 153 to the date on which the refund is granted. *It is clarified that in cases where extension is granted by the Principal Commissioner or Commissioner by invoking proviso to sub-section (5) of section 153, the period of additional interest, if any, shall begin from the expiry of such extended period."*

Similar legislative intent is forthcoming from the Notes on Clauses to the Finance Bill, 2016 and paragraph 60.4 of the Circular No. 3 of 2017 dated 20.01.2017.

(iii) Interest u/s 244A(1A) would not accrue in cases of fresh assessment or reassessment; use of words 'wholly or partly' therein would again indicate that the bar of interest accrual is confined only to that part of the assessment that are occasioned by remittance/remand and would not extend to other concluded issues that give rise to refund u/s 153(5); employment of identical language in section 153(5) and section 244(1A) too supports this analogy; it is clear that section 244A(1A) would apply to cases covered u/s 153(5); thus where, in respect of certain issues, order giving effect to be passed u/s 153(5), otherwise than by making a fresh assessment or reassessment is passed beyond the prescribed time-limit, interest u/s 244A(1A) has to be granted in respect of refund arising on such issues that are concluded and that the pendency of consideration on remitted issues does not interdict the statutory accrual of interest; an

argument to the contrary cannot be countenanced without straining the text & context of the provision.

VIII. Application of the above principles to facts of the case:

(i) In the instant case, the following "title facts" are not in dispute;

a) Assessment Year is 2008-09

b) ITAT order is dated 04.01.2017

c) TPO's OGE is dated 31.10.2017

d) AO's OGE is dated 28.12.2017

e) Assessee filed Rectification u/s 154 against OGEs of TPO and AO on 18.01.2018

f) TPO passed the Rectification Order on 26.03.2018

g) Assessee follows up his application dated 18.01.2008 u/s 154 before AO with:

i) Application u/s 154 dated 24.1.2018
ii) Application u/s 154 dated 3.4.2018
iii) Letter dated 17.5.2018
iv) Letter dated 22.3.2019
v) Impugned order 29.3.19

(ii) A careful analysis of the order of ITAT dated 4.1.2018 would reveal that the ITAT dealt with several issues differently, some having been remitted for reconsideration and the conclusions on other left intact; the same may be summarised as follows:

On TP issue, following earlier order, issue was remitted to the file of TPO to follow the directions given for earlier AYs

Sl.Nos:

1. On 14A issue, issue was set aside to the record of AO to re-examine the same in the light of orders of ITAT in assessee's own case for earlier assessment years.

2. Issue of set off of loss was allowed in favour of assessee.

3. Issue of depreciation of software was allowed in favour of assessee.

4. Issue of allocation of corporate expenses between eligible and non eligible units was allowed in favour of assessee.

5. Issue of computation of profits of overseas development centre (ODC), was remitted to the record of AO and assessee was directed to file relevant details as required by AO so that AO can ascertain the market value of goods and services transferred.

6. Issue of eligibility of interest income, rental income and other income u/s. 10A was remitted to AO by following earlier decision in assessee's own case. In earlier decision, issue of scrap sales and issue of interest were decided in favour of assessee and issue of other income was remitted as no details were available. While issue of interest is clearly in favour of assessee and issue of other income is a case of set aside for further verification, and it is not clear as regards guidelines to AO on rental income.

7. Issue of taxability of interest received u/s. 244A was remitted to the record of AO for limited purpose of computation of interest.

8. Issue of deemed export turnover for purpose of section 10A was held against the assessee.

9. Issue of exclusion of VAT/GST from export turnover was held against the assessee.

10. Issue of exclusion of communication charges and other reimbursement of expenses from export turnover, it was held that the same shall be reduced from the total turnover as well.

11. Issue of denial of section 10A relief in respect of amount of export turnover not remitted into India within six months was held in favour of the assessee.

12. Issue of denial of section 10A relief in respect of undertaking established prior to 1993 was held in favour of the assessee but to the extent of extended capacity. The matter was remitted to AO to verify the same if necessary.

13. Issue of allocation of corporate overhead to section 80IB unit beyond what was already allocated by the assessee was held in favour of the assessee.

14. Issue of denial of deduction u/s. 80IB in respect of trading of monitory and printer was held in favour of the assessee.

15. Issue of allocation of corporate overhead to section 80IC unit beyond what was already allocated by the assessee was held in favour of the assessee.

16. Issue of eligibility of other income for deduction u/s. 80IC was held against the assessee.

17. Issue of allocation of corporate overhead to section 80IAB beyond what was already allocated by the assessee was held in favour of the assessee.

18. Issue of eligibility of other income for deduction u/s. 80IB was held against the assessee.

19. Issue of foreign tax credit was held in favour of the assessee.

(iii) In para 50 of the ITAT order, it is stated that the appeal is partly allowed; it is not stated that the appeal is allowed for "statistical purposes"; thus, it is a case where the ITAT has held some issues definitively, and on some other, it had remitted the matter to the AO/TPO for a limited consideration afresh; in respect of issues in Sl.Nos.1, 2 & 7 in the above summary, there is virtually a direction warranting OGE; it is quiet clear from the facts of the case that the respondents have not undertaken any fresh assessment or reassessment; the ITAT has not directed assessment or reassessment at all, but it only asked the TPO to follow its directions in the earlier year; in respect of other issues definitive answers having been given, it cannot be a case of setting aside entire assessment; it is a case of setting aside an assessment only on specific issues; as already discussed above, in respect of issues where there is a definitive holding, section 153(5) would apply and the AO has to pass OGE within the time specified thereunder read with II Proviso thereto; in respect of issues which are set aside [ie., Sl.Nos. 1, 2 & 7],the AO had to pass OGE following the principles already settled; accordingly, it has to be held that the AO was required to pass OGE within the time specified u/s. 153(5); in respect of issues which are set aside (i.e., Sl.Nos.1, 2 & 7 above), the AO ought to have passed an assessment order u/s 153(5) following the principles already laid down by the superior forum.

IX. As to Revenue's other contention being unsustainable:

(i) Even according to the argued case of the Revenue, regardless of its sustainability only that part of the order giving effect to ITAT order which relates to the Transfer Pricing Adjustment constitutes a fresh assessment; as a corollary of that, the balance portion of the order which otherwise warranted giving effect to the ITAT order, does not amount to a fresh assessment or reassessment; both the TPA and the other substantial portion of giving effect were

completed by one order giving effect to ITAT, dated 28.12.2017; if refund was granted immediately thereafter, the claim for additional interest in terms of section 244A(1A) would not have arisen, as rightly argued by the assessee; the actual refund having been made only on 04.05.2019, even when the assessment in respect of one issue of TPA as early as 28.12.2017, delay has been brooked in granting refund.

(ii) The above apart, case of the assessee becomes stronger since his book profit is far greater than its profit as per the normal provisions and that the refund arises only because tax paid by the assessee was more than the tax payable on the book profit; therefore, it can be safely stated that no part of the refund payable arose because of the reduction in the TPA; added to this, the demand attributable to the TPA as finally made is miniscule ie., Rs.25 lakh or so, as compared to the total refund including interest of over Rs.1,380/- crore admittedly made over to the assessee; the contention of the Revenue militates against the rule of proportionality and the fairness standards which the Tax Authorities are expected to adhere.

(iii) The vehement contention of the Revenue essentially structured on the text of section 4 of the 1961 Act that any order giving effect to the order of the ITAT will result in re-determination of the assessee's total income and therefore will constitute a fresh assessment, if accepted, would inexorably lead to the result that the Revenue can invariably retain the refund determined, without the liability to pay the additional interest in terms of Sec.244A(1A) for the delayed period; that would also lead to an absurd conclusion that every OGE has to be considered as a fresh assessment or reassessment and therefore would be outside the purview of Sec.153(5) and consequently any delay in granting actual refund would also be outside the ambit of Sec.244A(1A); this would defeat the very object for which this provision has been brought on the statute book.

In the above circumstances, this writ petition succeeds in part;

> i) A Writ of **Certiorari** issues quashing the impugned order; petitioner-Assessee is permitted to submit the fresh claim for additional interest at the rate of 3% per annum for the period envisaged in section 153(5) r/w section 244A(1A), within eight weeks.
>
> ii) A Writ of **Mandamus** issues to the respondents to compute the interest amount till date and pay it to the petitioner- Assessee within eight weeks next following.
>
> iii) If delay is brooked in complying the above direction, the Revenue shall pay to the petitioner - Assessee an extra interest, at the rate of 1.5 % per month and this amount, after payment, may be recovered personally from the erring officials of the Department.
>
> Now, no costs."
>
> (Emphasis supplied)

Since the coordinate Bench of this Court considers the entire spectrum of the issue, delving deeper in the case at hand would not be required. The coordinate Bench considers the aspect of delay as obtaining under Section 153(3), 153(4) and 153(5) of the Act. The judgment of the coordinate Bench was rendered interpreting the unamended Section 153 of Act, which did not include calculation of the limitation period for a fresh order under section 92CA as provided under the amended Section 153(3) and Section 153(5) of the Act. However, the observations of the coordinate Bench interpreting Sections 153(3), 153(4) and 153(5) of the Act and the

interpretations of the terms 'assessment', 'reassessment' and 'fresh assessment' as contained under Section 153 are squarely applicable to the case at hand. If the facts obtaining in the case at hand are considered *qua* the law as considered, by the coordinate Bench in **WIPRO** and the High Court of Delhi in **NEW DELHI TELEVISION** *supra*, what would unmistakably emerge is that, the limitation to pass an order after remand from the Tribunal is 31-03-2024 and not 31-03-2025. The order is received from the Tribunal by respondents 1, 2 or 3, as the case would be, on 05-04-2022 and 22-11-2022 respectively. Therefore, if 12 months is computed from the end of the financial year of 2022-23 which would be 12 months from 31-03-2023 and limitation of which would expire on 31-03-2024. There is no extension of one year as contended by the revenue, merely because documents are sought by the revenue or reply is filed by the petitioner to the documents so sought. In that light the petitions deserve to succeed on the sole score of limitation.

11. The judgment of the coordinate Bench in **WIPRO** was challenged before the Division Bench of this Court in W.A.No.1322

of 2021. The Division Bench on 23-12-2021 passed the following interim order:

> "We have heard Sri.K.V.Aravind, learned counsel for the Revenue and learned Senior Counsel Sri.S.Ganesh for the respondent – assessee.
> Prima facie, we are of the considered view that the matter requires consideration. **Hence, we deem it appropriate to stay clause-iii of the order dated 25.8.2021 passed in W.P.No.20040/2019, impugned herein, until further orders.**
> **So far as clause-ii of the said order, learned Senior Counsel Sri.S.Ganesh undertakes before this Court that no proceedings shall be initiated by the respondent – assessee pursuant to the said directions issued in clause-ii, till the next date of hearing**.
> The said submission is placed on record.
> Accordingly, list the matter on 10.1.2022, as prayed.
> Order on IA.I/2021
> IA.I/2021 filed for condonation of delay stands disposed of as not pressed."
>
> (Emphasis supplied)

The Division Bench stays the operation of clause-iii of the order of the coordinate Bench in **WIPRO** *supra* which deals with payment of interest on the amount of refund. So far as clause-ii is considered the Division Bench does not stay the operation of the said clause and merely directs that no further proceedings should be initiated against the assessee until the next date of hearing pursuant to the directions issued under clause-ii. This interim order is still subsisting

as on date. Therefore the entire judgment has not been stayed by the Division Bench. The entire consideration in the judgment is with respect to the relief granted in clause-i and clause-ii of the judgment and clause-iii is only an additional relief granted by the coordinate Bench which is incidental to the relief granted under clause-i and clause-ii, both of which have not been stayed by the Division Bench.

12. What remains now is the right of the petitioner to receive refund under Section 244A(1A) of the Act. This is also considered by the coordinate Bench. The coordinate Bench was considering an identical circumstance of the Tribunal allowing the appeal partly on statistical purposes. Therefore, the very paragraphs quoted hereinabove would become applicable to the claim of the present petitioner in both these cases for refund of the amount paid over and above the tax that is paid after filing of the return of income, that too when the orders of the Tribunal have attained finality, since the revenue has not chosen to question the said orders of the Tribunal which had allowed appeals on certain grounds only for statistical purpose and had remitted back to the hands of

respondents 1, 2 or 3 to pass necessary orders afresh under Section 153(3), 153(4) or 153(5) of the Act.

13. In the light of the limitation getting expired on 31-03-2024, any action beyond the said date is *de hors* jurisdiction, as the question of limitation is always a question of jurisdiction. If a claim is barred by limitation either by the act of the revenue or the assessee, it would touch upon the jurisdiction of such claim. Respondents 1 and 3 having passed no order pursuant to remittance by the Tribunal on or before 31-03-2024, they are precluded from passing any order now beyond the said date. In that light, as observed hereinabove, the petitions deserve to succeed, not only by obliteration of proceedings but a direction for refund of the tax.

14. For the aforesaid reasons, the following:

O R D E R

(i) Writ Petitions are ***allowed.***

(ii) The communication dated 18-06-2024 issued by the 3rd respondent for the assessment years 2013-14 and 2014-15 concerning in these petitions stand quashed.

(iii) The respondents shall initiate action for refund of tax paid over and above the return of income filed for the assessment years 2013-14 and 2014-15 concerning Writ Petition No.18474 of 2024 and Writ Petition No.18439 of 2024 respectively. The refund shall be processed and paid within 12 weeks from the date of receipt of the order along with applicable interest.

(iv) In the event of failure of the revenue to comply with this order within the said period of 12 weeks, the assessee would become entitled to interest at 12% per annum from the date of the order till the date of payment; otherwise, applicable interest would be from the date the remittance was made till the date of payment.

Sd/-
(M.NAGAPRASANNA)
JUDGE

Bkp
CT:MJ