THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai

Before Shri S. Rifaur Rahman, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.7199/Mum/2017
(Assessment Year: 2013-14)

Agility Logistics Private Limited Polaris, A-501/502, 5th Floor, Off Marol Maroshi Road, Marol, Andheri (East), Mumbai 400 059	Vs.	Deputy Commissioner of Income Tax Circle 9(1)(1), Mumbai, Room No. 210/260A, 2nd Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400 020
PAN – AAACL3717A		
(Appellant)		**(Respondent)**

ITA No.6679/Mum/2018
(Assessment Year: 2014-15)

Agility Logistics Private Limited Polaris, A-501/502, 5th Floor, Off Marol Maroshi Road, Marol, Andheri (East), Mumbai 400 067	Vs.	Asstt. Commissioner of Income Tax, Range 9(1)(1), Room No. 203, 2nd Floor, Aayakar Bhavan,M.K. Road, Mumbai - 400020
PAN – AAACL3717A		
(Appellant)		**(Respondent)**

Appellant by:	S/sshri Dhanesh Bafna, Ketan Ved, Nishant Shah & Ms. Hirali Desai, A.Rs
Respondent by:	S/shri Sunil Deshpande & Sushil Kr. Mishra, D.Rs
Date of Hearing:	04.02.2021
Date of Pronouncement:	11.02.2021

O R D E R

PER RAVISH SOOD, JM

The captioned appeals filed by the assessee are directed against the respective assessment orders passed by the Assessing Officer under Sec.143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'Act'), dated 23.12.2014 and 28.09.2018 for A.Y 2013-14 and AY: 2014-15. We shall first take up the appeal for A.Y. 2013-14 wherein the assessee has assailed the impugned order on the following grounds of appeal before us :

"1. On the facts and in the circumstances of the case and in law, the Assessment Order passed in pursuance to the directions issued by the Ld. Dispute Resolution Panel ('DRP') is a vitiated order, as the Dy. Commissioner of Income-tax, Circle-9(1)(1) ('Assessing Officer' or 'AO')/DRP erred both on facts and in law in making/confirming the addition made by the Ld. AO to the Appellant's income.

The Appellant prays that the assessment order passed by the AO be quashed.

2. On the facts and in the circumstances of the case and in law, the Ld. AO / DRP erred in confirming the upward adjustment of INR 22,61,25,615 to the income of the Appellant in respect to the international transaction of freight receipts and expenses.

In doing so, the DRP has erred in agreeing with the Transfer Pricing Officer ('TPO') / AO action of:

a. rejecting Operating Profit ('OP') to Value Added Expenses ('VAE') ratio selected by the Appellant as the Profit Level Indicator ('PLI'), and instead using OP to Total Cost (TC) ratio as the PLI;
b. rejecting economic analysis undertaken by the appellant by disregarding search of comparables undertaken by the appellant by considering OP/VAE as PLI;
c. including companies in the comparability analysis which are different from the Appellant in functions, asset base and risk profile;
d. rejecting companies similar to the Appellant in functions, asset base and risk profile while performing comparability analysis;
e. not allowing the use of multiple year data as prescribed under Rule 10B(4) of the Income Tax Rules, 1962 read with the OECD Transfer Pricing ('TP') Guidelines, and determining the arm's length price on the basis of financial information of the comparables for the year ended March 31, 2012 identified pursuant to a fresh search for comparables performed during the assessment proceedings. The Ld. AO/ TPO/ DRP erred in rejecting the contemporaneous documentation maintained by the appellant as required under the Indian TP regulations;
f. not restricting the TP adjustment to the extent of the value of the international transaction undertaken by the Appellant; and
g. denied the benefit of (+/-) 3 percent range mentioned in proviso to Section 92C(2) of the Income Tax Act, 1961 ('the Act') while computing the ALP.

The Appellant prays that the book value of the international transactions of freight receipts and expenses be held to be the arm's length price of the said transactions as per the Appellant's TP documentation, and the addition made on account of the above grounds be deleted.

3. On the facts and in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under Section 271(1)(c) of the Act without appreciating that the Appellant has neither concealed any particulars of its income nor furnished any inaccurate particulars of the income.

The Appellant craves leave to alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing."

3. Briefly stated, the assessee company which is a logistic service provider offering a comprehensive portfolio of international, domestic and specialised freight handling services had e-filed its return of income for A.Y. 2013-14 on 30.11.2012, declaring its total income under the normal provisions at Rs.15,74,32,690/- and 'book profit' u/s 115JB at Rs. 5,73,68,044/-.. Subsequently, the assessee filed a revised return on 28.03.2014 declaring the same income i.e Rs. 15,74,32,690/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

4. Observing that the assessee had during the year entered into international transactions with its Associated Enterprise (for short 'AEs') in excess of an amount of Rs.15 crores, the A.O made a reference under Sec. 92CA(1) of the Act to the Dy. Commissioner of Income-tax (Transfer Pricing)-1(1)(1), Mumbai (for short "TPO") vide his order dated 11.08.2014 after obtaining approval of the Pr. CIT-9, Mumbai.

5. During the course of proceedings it was observed by the TPO that the assessee had entered into the following international transactions during the year in question :

Sr. No.	Nature of the Transactions	Amount (Rs.)	Method adopted	Amount	Method adopted
1.	Freight Expenses	277,37,84,357/-	TNMM	257,42,03,615/-	CUP
2.	Freight Revenue	167,54,23,515/-	TNMM	145,82,64,735/-	CUP

3.	Issue of equity shares	12,57,67,894/-	Other Method	N.A	N.A
4.	Reimbursement of expenses	2,62,43,633/-	CUP	1,93,47,585/-	CUP

It was noticed by the TPO that the assessee had benchmarked its international transactions, viz. freight receipts; freight expenses; and reimbursement of expenses using External TNMM at entity level. Using Prowess and extracted additional companies from CapitalinePlus, i.e, companies for which data was not available in Prowess, the assessee in its Transfer Pricing Study Report (for short 'TP Study Report') had identified 5 comparable companies engaged in the business of providing freight forwarding services as comparables namely (i) Haytrans India Ltd; (ii). Concorde Air Logistics Ltd.; (iii). SDV International Logistics; (iv). Allcargo Logistic Ltd; and (v). Trade-Wings Ltd. Using Operating Profit/Value added expenses (OP/VAE) as the profit level indicator (PLI) the assessee had on the basis of multiple year data worked out its margin at 30.22% as against the arithmetic mean margin of 27.79% of the comparable companies and claimed its international transactions of Freight receipts & expenses as being at arm's length. TPO directed the assessee to provide single year margin of the comparable companies that were selected by his predecessor in the immediately preceding year i.e A.Y 2012-13 for determining the arm's length price w.r.t the international transactions of freight receipts & expenses. Further, the TPO called upon the assessee to compute the margins of the comparables selected in the TP study report using OP/TC as the PLI after applying two more filters in addition to the filters that were already considered in the TP study report, as under :

- service income to total income greater than 75% filter; and
- turnover filter of 1/10th times to 10 times.

On a without prejudice basis, the assessee submitted its detailed explanation and the final set of comparables that could be used for determining the arm's length margin. As per the details provided by the assessee the OP/TC margin of the final set of comparables was worked out at 2.36% as against the

assessee's OP/TC of 2.54%. It was, thus, claimed by the assessee that the international transactions of freight receipts and expenses were at arm's length. However, the TPO accepted only two comparables selected by the assessee and further included three new comparables, viz. (i). Shreyas Relay Systems Limited; (ii). Sical Logistics Limited; and (iii). Om Logistics in the final list of comparables for benchmarking the international transactions of the assessee. The final list of companies that was used by the TPO to benchmark the assessee's international transactions using OP/TC, was as under:

Sr. No.	Comparable Companies	OP/VAE	OP/TC
1.	SDV International Logistics	14.61%	2.16%
2.	Allcargo Logistics Ltd. (Multimodal Segment)	14.82%	3.76%
3.	Shreyas Relay Systems Limited	42.66%	6.96%
4.	Sical Logistics Limited	82.85%	8.75%
5.	Om Logistics Limited	7.82%	7.82%
	Mean	32.55%	5.89%
	Assessee's Margin	30.22%	2.54%

On the basis of the above the TPO worked out the arm's length price of the international transactions of freight receipts & expenses, as under:

Particulars	Reference	Amount (Rs.)
Operating Revenue	A	8,79,00,19,390
Operating Cost	B	8.57,21,09,721
Operating Profit for the year	C = A - B	21,79,09,669
Arm's Length margin (OP/TC)	D	5.89%
Arm's Length profit	E = B* D	58.46,17,883
Arm's Length Revenue	F = B + E	9,07,70,06,984
Transfer Pricing adjustment	**G = A - F**	**28,69,87,594**

Accordingly, the TPO vide his order passed u/s 92CA(3), dated 31.10.2016 made a transfer pricing adjustment of Rs. 28,69,87,594/- to the arm's length price of the international transactions of the assessee.

6. The A.O after receiving the order passed by the TPO under Sec.92CA(3), dated 31.10.2016 passed a draft assessment order under Sec.143(3) r.w.s 144C(1), dated 23.12.2016. In his aforesaid order the A.O proposed to make a transfer pricing adjustment of Rs. 28,69,87,594/-.

7. Aggrieved, the assessee objected to the additions which were proposed by the A.O in his draft assessment order, dated 23.12.2016, before the Dispute Resolution Panel-1, Mumbai, (for short 'DRP'). The DRP after deliberating at length on the issue under consideration observed that the variation in the revenue and cost of the so-called pass through costs proved that the TPO had rightly concluded that the assessee was making profits as regards the same. It was observed by the DRP that the specific invoice-wise evidences referred to by the TPO in his order revealed that the assessee and its AEs were sharing the profits of even the freight charges between them. Further, it was observed by the DRP that the TPO had clearly brought out the fact that the assessee was rendering significant services with reference to freight charges through negotiations with air and shipping companies and such benefits were reaped by the assessee separately and not shared with third parties. Insofar rejection of the multiple year data used by the assessee in its TP study report was concerned, it was observed by the DRP that as per Rule 10B(4) the data of the comparable transactions was to be of the financial year in which the assessee had entered into an international transaction. It was observed by the DRP that the exception carved out in Rule 10B(4) for using the earlier year data in addition to the data pertaining to the relevant financial year was only in respect of a situation where it could be shown that the earlier year data had an influence on the determination of transfer pricing in relation to the transactions being compared. As the assessee had failed to show as to how the earlier years data had an impact on the profits of the

current year i.e financial 2012-13 or that of the comparables, the DRP, thus, was of the view that the TPO had rightly rejected the adoption of the multiple year data by the assessee for benchmarking its international transactions. As regards the rejection of OP/VAE as PLI and adoption of OP/TC by the TPO, it was observed by the DRP that the PLI of OP/VAE was a very fragile PLI and in fact one which was mot used earlier in the case of any logistic concern providing freight forwarding services. It was further observed by the DRP that the assessee had made false claims regarding the pass through costs, and thus, the TNMM was based on improper financial and factual data. In the backdrop of its aforesaid observations the DRP was of the view that as the assessee had not benchmarked its international transactions as per the provisions of Sec. 92C(1) r.w.s 92C(3) of the Act, thus, its objection that the A.O could take recourse to Sec. 92C(3) only under the circumstances enumerated in clauses (a) to (d) was not maintainable. .As regards the seeking of inclusion of certain comparables by the TPO viz. (i). Shreyas Relay System Ltd; (ii). Sical Logistics; and (iii) Om Logistics Ltd, the DRP though accepted the objection of the assessee wherein it had sought exclusion of Sical Logistics that was included as a comparable by the TPO, but upheld the inclusion of the remaining two companies as comparables, viz. (i). Shreyas Relay System Ltd; and (iii) Om Logistics Ltd. As regards the declining on the part of the TPO to include in the final list of comparables two companies as was sought by the assessee, viz. (i). TKM Global Logistics Limited; and (ii). Hindustan Cargo Limited, it was observed by the DRP that the same was for the reason that neither the said companies figured in the TP study report nor any request for including the same in the final list of comparables was made by the assessee before the TPO. It was further observed by the DRP that even the order of the TPO was silent on inclusion/exclusion of the aforesaid concerns in the list of comparables. Accordingly, in the absence of any reference of the aforesaid two comparables in the order of the TPO or in the TP study report the DRP declined to entertain the aforesaid claim of the assessee. Further, as regards the objection of the assessee that the A.O/TPO

had erred in not restricting the TP adjustment only to the extent of the international transactions undertaken by the assessee, it was observed by the DRP that though the said issue had been decided by the Hon'ble High Court of Bombay in the case of CIT Vs. Firestone International (Pvt.) Ltd. (2015) 234 Taxman 141 (Bom), however, the 'Special Leave Petition' ('SLP') filed by the revenue was pending before the Hon'ble Supreme Court. Observing, that as the decision of the DRP were no longer appealable by the department, thus, if the contention of the assessee was to be accepted, the same would tantamount to pre-judging the issue and bringing finality to the issue pending before the Hon'ble Apex Court. Backed by his aforesaid observation the DRP in order to keep the issue alive and protect the interest of the department upheld the action of the TPO in making a transfer pricing adjustment by considering the entire turnover of the freight expenses & revenue.

8. The A.O after receiving the order passed by the DRP under Sec. 144C(5), dated 22.09.2017, passed the final assessment order under Sec.143(3) r.w.s 144C(13), dated 15.11.2017. On the basis of the directions of the DRP, the A.O made a TP adjustment of Rs.22,61,25,615/-. On the basis of his aforesaid observations, the A.O vide his order passed under Sec.143(3) r.w.s 144C(13), dated 15.11.2017 assessed the total income of the assessee under the normal provisions at Rs.38,35,58,302/- and determined its 'book profit' under Sec.115JB at Rs.5,73,68,044/-.

9. The assessee being aggrieved with the assessment order passed by the A.O passed under Sec.143(3) r.w.s 144C(13), dated 15.11.2017 has carried the matter in appeal before us. We have heard the authorised representatives for both the parties at length, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements relied upon by them. Our indulgence in the present appeal has been sought for adjudicating as to whether the A.O/DRP had rightly worked out the TP adjustment as regards the freight segment of the assessee. Ld. Authorised Representative (for short "A.R") for the assessee at

the very outset of the hearing of the appeal submitted that the issues involved in the present appeal were squarely covered by the order of this Tribunal in the case of DHL Logistics Private Limited vs. DCIT, Circle 9(3)(1), Mumbai, ITA No. 1030/Mum/2015, dated 20.12/.2019. (copy enclosed). After perusing the orders of the lower authorities in the backdrop of the contentions advanced by the ld. Authorised representatives for both the parties, we find, that the assessee has assailed the TP adjustment of Rs. 22.61 crore made by the A.O/TPO on three grounds, viz. (i). that as to whether or not the TPO/DRP were justified in rejecting the PLI of OP/VAE adopted by the assessee and substituting it with OP/TC; (ii). that as to whether or not the inclusion and exclusion of comparables by the TPO/DRP from the final list of comparables was justified; and (iii). that as to whether or not the TPO/DRP had erred in not restricting the TP adjustment only to the extent of the international transactions undertaken by the assessee with its AE's.

10. We shall first deal with the contention of the assessee as to whether or not the TPO/DRP were justified in rejecting the PLI of OP/VAE adopted by the assessee and substituting it with OP/TC for benchmarking its international transactions. As observed by us hereinabove, the assessee selecting itself as the tested party had benchmarked its aforesaid international transactions as per the TNMM at entity level. It had used three year data and had taken the Profit Level Indicator (PLI) of Operating Profit to Value Added Expenses (OP/VAE). Using Prowess and Capital line data base, the assessee on the basis of its search had selected 5 comparables namely (i) Haytrans India Ltd; (ii). Concorde Air Logistics Ltd.; (iii). SDV International Logistics; (iv). Allcargo Logistic Ltd; and (v). Trade-Wings Ltd. As per the TP study report using Operating Profit/Value added expenses (OP/VAE) as the profit level indicator (PLI), the assessee on the basis of multiple year data had worked out its margin at 30.22% as against the arithmetic mean margin of the comparable companies of 27.79%, and claimed its international transactions of Freight receipts & expenses to be at arm's length. However, the TPO in the course of

the proceedings directed the assessee to compute the margins of the comparables selected in the TP study report using OP/TC as the PLI after applying two more filters in addition to the filters that were already considered in the TP study report, as under :

- service income to total income greater than 75% filter; and
- turnover filter of 1/10th times to 10 times.

On a without prejudice basis, the assessee submitted its detailed explanation and the final set of comparables that could be used for determining the arm's length margin. As per the details provided by the assessee, the OP/TC margin of final comparables worked out at 2.36% as against the assessee's OP/TC of 2.54%. However, the TPO after retaining only two comparables (out of 5 comparables) selected by the assessee and further including three new comparables, viz. (i). Shreyas Relay Systems Limited; (ii). Sical Logistics Limited; and (iii). Om Logistics in the final list of comparables, therein determined the mean PLI (OP/TC) of the comparables at 5.89% as against 2.54% of the assessee and made a TP adjustment of Rs. 28,69,87,594/- w.r.t the entire international transactions of the freight segment of the assessee.

11. As observed by us hereinabove, the A.O/DRP had rejected the PLI of OP/VAE adopted by the assessee for benchmarking its international transactions of Freight receipts & expenses and had substituted the same by the PLI of OP/TC. Insofar the validity of the PLI of OP/VAE for benchmarking the international transactions of freight receipts and expenses is concerned, we find, that the said issue had earlier came up before this Tribunal in the case of **DHL Logistics Private Limited vs. DCIT, Circle 9(3)(1), Mumbai, ITA No. 1030/Mum/2015, dated 20.12/.2019**, a similarly placed logistic service provider. Approving the adoption of OP/VAE as the PLI for determining the arm's length price of its international transactions of freight receipts and expenses, the Tribunal had observed as under:

"22. We shall first focus on the rejection by the TPO/DRP of the PLI of OP/VAE that was applied by the assessee for benchmarking its aforesaid international transactions. As observed by us hereinabove, the DRP had upheld the rejection of PLI of OP/VAE and substitution of the same for OP/TC by the TPO. It is the claim of the ld. A.R that keeping in view the facts of the assesses case and the nature of the functions performed in logistics industry the assessee had rightly adopted the PLI on the basis of Value Added Expenses (VAE) as opposed to the Total Cost (TC). In logistics companies the element of costs can safely be bifurcated into 'direct costs' and 'value added costs'. The 'direct costs' are the expenses which are incurred by the logistics company for procuring services from a third party service providers viz. shippers/airliners, clearing and forwarding agents, transporters etc. On the other hand, the 'Value added expenses' are the expenses which would be incurred by the logistics service provider on a day-to-day basis in support of its own operations viz. personnel cost, selling cost, establishment costs etc. It is the claim of the ld. A.R that as no value was added by the assessee company which was a logistic service provider in relation to the services obtained from third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider, therefore, there was no requirement on its part to measure its operating efficiency in relation to such 'direct costs' i.e third party costs. In sum and substance, it is the claim of the ld. A.R, that as the costs pertaining to services obtained from third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider etc. does neither involve any service element of the assessee nor the assessee carries any risk or employs any of its assets with respect to the same, therefore, the PLI of OP/VAE also known as 'Berry ratio' has rightly been applied for benchmarking the international transactions of the assessee. It was averred by the ld. A.R, that in case the assessee would had provided the aforesaid services i.e shipping, transportation etc. on its own, then the same would have been liable to be included in its cost. In sum and substance, it was the claim of the ld. A.R that as the aforesaid services are provided to the customers on "as is" basis, therefore, the assesses profits could not be compared on the basis of such costs, which in fact are pass through costs. It was submitted by the ld. A.R, that the services of a logistics service provider could only be measured on the basis of the adequacy of its gross margin over the value added expenses so incurred by it. Accordingly, it was the claim of the ld. A.R that applying PLI of OP/TC would mean that the assessee was expected to earn a return on such third party/direct costs despite the fact that it was not performing any of the functions therein involved. On the basis of his aforesaid contentions, it was claimed by the ld. A.R that a comparison of the margin of the assessee in the backdrop of its Value Added Expenses as against that of its comparables would be the appropriate basis to measure the profitability of its logistics business. It was submitted by the ld. A.R, that a comparison of the returns/margins of the assessee on the basis of its 'total costs' which would include 'direct costs' that would vary from time to time depending on the volume of the business, would present a skewed result of the assesses profitability and thus could not be considered as an appropriate PLI in its case. It was submitted by the ld. A.R, that having regard to the assesses functional analysis the applying of the PLI of OP/VAE was the most appropriate approach. In order to drive home his aforesaid contention the ld.

A.R had drawn support from Rule 10B(e)(i) which sets out the determination of PLI viz., 'net profit' margin in relation to different bases depending upon the facts and circumstances of each case. As pointed out by the ld. A.R, the intent to select the appropriate PLI as per Rule 10B(e)(i) was to best measure the relationship between the profits of the controlled taxpayer and the functions of such taxpayer. The ld. A.R taking us through Rule 10B(e)(i) submitted, that the same envisaged that as per the TNMM the 'net profit' margin realised by an enterprise from an international transaction entered into with an associated enterprise was to be computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base. It was submitted by the ld. A.R that nowhere it was mandated that in all cases the 'net profit' margin was to be computed only in relation to the 'total costs' incurred by the enterprise. The ld. A.R advocating the use of the OP/VAE as the most appropriate PLI by the assessee for benchmarking its logistic operations submitted, that the assessee was merely an agency/intermediary with respect to the third parties cost and did not take any risk with respect to the same in the course of providing logistics support services. In support of his aforesaid contention, the ld. A.R had taken us through the underlying documents in the form of 'agreements' and 'invoices'. As regards its claim that while providing logistics support services in "air business" the assessee merely acted as an agent of the airlines. It was submitted by the ld. A.R that the assessee was governed by the terms and conditions of "Cargo agency agreements" which it had entered into with various airline carriers which were members of IATA. Taking us through the 'agreements', it was submitted by the ld. A.R that the assessee was to act as an agent for the various member carriers. As per the 'agreements' the assessee was vested with a limited authority to represent various member carriers while selling the air cargo transportation services to the customers and was bound to adhere to the various terms and conditions imposed by the member carriers. In sum and substance, it was the claim of the ld. A.R that the conduct of the assessee at all times was governed by the carriers. Also, as per the terms of the 'agreement' the assessee was bound to represent itself as an "agent" in all its communications viz. letterheads, telephone listings, office signs etc. with the customers, and was specifically prohibited from representing or projecting itself as a "Principal". Further, the 'agreement' also provided for indemnification of the assessee by the member carrier in the event of a loss/damage arising in the course of transportation pursuant to the sale made by the assessee. As such, it was the claim of the ld. A.R that the assessee did not assume any risks while undertaking its business. In order to fortify his aforesaid claim the ld. A.R had drawn our attention to the "house airway bill" that was issued by the assessee to its customer, which revealed that the assessee had executed the same as an agent of the carrier. Lastly, it was submitted by the ld. A.R that the functions (carriage of goods) and liabilities (indemnification of the loss etc.) assumed by the assessee vis-a-vis the customer (as per its standard terms and conditions) corresponded to those assumed by the carrier vis-à-vis the assessee. Accordingly, it was averred by the ld. A.R, that the functions and liabilities were effectively delegated by the assessee to the carrier and no part of the same was effectively assumed by the assessee. On a similar footing, it was submitted by the ld. A.R that in the case of "ocean business" also the assessee merely

acted as an agent. Further, in order to support its claim that where in a case the assesse acts as an agent of the airliner/shipliner, and thus acting as an intermediary does not bear any transportation risk it would not be entitled to earn any mark-up on the transportation function, the OP/VAE should be accepted as an appropriate PLI, the ld. A.R had relied on certain judicial pronouncements. It was further submitted by the ld. A.R that the PLI of OP/VAE had been accepted by the revenue in the past except for in A.Y 2006-07 where the matter was restored by the tribunal to the file of DRP. In support of his claim that PLI of OP/VAE was rightly applied by the assessee, the ld. A.R had relied on certain judicial pronouncements viz. (i). ACIT Vs. Agility Logistics Pvt. Ltd. (ITA No. 2000/Mum/2010, dated 25.01.2012)(Mumbai-Trib); (ii). DCIT Vs. M/s Cheil Communications Pvt. Ltd. (ITA No. 712/Del/2010, dated 30.11.2010)(Delhi- Trib); (iii). Fedex Express Transportation and Supply Chain Services India Pvt. Ltd. Vs. Dy. Cit (ITA No. 435/Mum/2014, dated 10.12.2014)(Mumbai-Trib); and (iv). Sumitomo Corporation India (P) Ltd. Vs. ACIT, Circle 24(2), New Delhi (2018) 99 taxmann.com 319(Delhi-Trib).

23. Per Contra, it was the claim of the ld. D.R that as per OECD guidelines OP/VAE is to be used as a PLI in rare cases where the tested party does not carry any risk at all, and also does not deploy any assets with respect to the costs embedded in the P& Loss account. It was the claim of the ld. D.R that PLI of OP/VAE is used in the case of pure risk free distributors (sogoshosha companies) who do not carry out any function other than merely being a conduit for the supply of the goods by the manufacturers in the territory of the distributor. On the basis of his aforesaid observations, it was submitted by the ld. D.R that the assessee in the field of logistics management had not merely facilitated the delivery of the consignments, but had in fact carried out part of the activities related to delivery of goods from one place to another. It was further submitted by the ld. D.R that the assessee assumed the entire responsibility, whether those were the goods received from the customer or from its AE, for delivery of the same to the consignee. Also, it was submitted by the ld. D.R that the assessee guaranteed proper, timely and safe delivery of the goods, as well as provided the details of current status of the goods to the client. Apart from that, it was averred by the ld. D.R that the assessee was responsible for managing the goods and handling complaints in case of loss/misdelivery of goods. On the basis of his aforesaid contentions, it was the claim of the ld. D.R that as the assessee in its field of logistic management was rendering functions by assuming responsibility for proper, safe and timely delivery of goods, providing details of current status of the consignment, and was also responsible for handling complaints in case of loss/misdelivery of goods, therefore, it could not be placed at par with the case of a pure risk free distributor. Accordingly, it was the claim of the ld. D.R before us that PLI of OP/VAE could not have been adopted for benchmarking the international transactions of the assessee. In support of his aforesaid contentions the ld. D.R had relied on the order of the ITAT, Delhi in the case of Mitsubishi Corporation Pvt. Ltd. Vs. DCIT, Circle 6(1), New Delhi (ITA No. 5042/Del/2011, dated 21.10.2014).

24. We have deliberated at length on the issue under consideration i.e rejection by the lower authorities of the PLI of OP/VAE by the assessee and substitution of the same by PLI of OP/TC. As is discernible from the orders of the lower authorities the PLI of OP/VAE had been rejected for the reasons viz. (i). that, as the freight element booked in the books by the assessee has a component of profit (or value added), therefore, the assessee claiming the same as pass through costs had wrongly reduced the same from its turnover and costs while computing its margins; (ii). that, the recovery of third party costs at ports except for in few instances where invoices were produced by the assessee, in the absence of any evidence had wrongly been treated by the assessee as back to back costs; and (iii). that, the VAE could not be safely gathered from the 'books of account' of the comparables. We shall deliberate on the aforesaid aspects, as under:

(i). For a proper appreciation of the business module of the assessee, we shall briefly deliberate on the transactions undertaken by the assessee during the year under consideration:

(a). Inbound Collect – Air Shipments :

- Shipper (outside India) hands over the consignments to DHL India's AE to forward the same via air to the consignee in India. DHL AE takes the assistance of DHL India for the same.
- DHL AE negotiates the terms of the transactions with the shipper. The consignee is assigned by the shipper to pay for the International freight. Accordingly, DHL AE assigns the collection responsibility (from the consignee) to DHL India. DHL AE pays the freight to the carrier.
- DHL India invoices and collects from the consignee the Origin Charges ('OC'), Freight (Air) and Destination Charges ('DC').
- DHL AE invoices and collects from DHL India the OC and Freight. Only DC is considered as revenue for DHL India.
- Given that the actual amount of OC and Freight (Air) agreed between the Shipper and DHL AE are merely collected by DHL India from the consignee and passed on back to back basis to DHL AE, the OC and Freight (Air) are netted off in the Profit & Loss Account of DHL India i.e the assessee.

(b). Inbound Collect – Ocean Shipments :

- The Shipper (outside India) hands over the consignment to DHL AE to forward the same via ocean to the consignee in India. DHL AE takes the assistance of DHL India for the same.
- DHL AE negotiates the terms of the transaction with the Shipper. In this case, the consignee pays for the freight (ocean).
- DHL India invoices and collects from the consignee the OC, Freight (ocean) and the DC. Freight and DC are considered as revenue for DHL India.
- DHL AE invoices and collects from DHL India the OC and Freight (ocean).

(c). Inbound Prepaid :

- The Shipper (outside India) hands over the consignment to DHL AE to forward the same to the consignee in India. DHL AE takes the assistance of DHL India for the same.
- DHL AE negotiates the terms of the transaction with the Shipper. DHL AE invoices the shipper for OC and Freight. The Shipper pays for OC and Freight to DHL AE. DHL AE further pays the freight to the carrier.
- DHL India invoices and collects from the consignee the DC. The same is accounted as revenue by DHL India.

(d). Outbound Collect :

- Shipper (India) hands over the consignment to DHL India to forward the same to the consignee (outside India). DHL India takes the assistance of DHL AE for the same.
- DHL India negotiates the terms of the transaction with the Shipper. The consignee pays the freight to DHL AE.
- DHL India pays the freight to the carrier. DHL India invoices and collects from the Shipper the OC. The same is booked as revenue.
- DHL AE invoices and collects from the consignee the freight and DC.

(e). Outbound Prepaid :

- Shipper (India) hands over the consignment to DHL India to forward the same to the consignee (outside India). DHL India takes the assistance of DHL AE for the same.
- DHL India negotiates the terms of the transaction with the Shipper. In the present case the Shipper pays for the freight.
- DHL India invoices and collects from the Shipper the OC and freight. The same is considered as revenue for DHL India.
- DHL India further pays the Freight to the carrier company.
- DHL AE invoices and collects from the consignee the DC.

On a perusal of the aforesaid transactions carried out by the assessee in the course of its international logistic transactions, it can safely be gathered that the 'Origin charges'('OC') in case of outbound shipments and 'Destination charges' ('DC') in case of inbound shipments, only form part of the revenue receipts/income of the assessee.

(ii). As observed by the TPO, the main component of the income of the assessee is on account of differential freight element which it is able to obtain from the shipping companies on account of bulk booking of space on the liner. It was observed by the TPO, that the carriers in view of heavy turnover of the assessee group would provide them very competitive rates which otherwise would not be available to a normal exporter or importer. TPO observed, that the assessee group in anticipation of the expected shipments would book cargo spaces in bulk around the world at the competitive rates so offered to them by the shipping companies. The TPO held a conviction that the assessee after making bulk bookings with the carriers would enter into bargains depending upon the time, space and the paying capacity of the client. It was observed by the TPO, that though the assessee would collect freight from the customers at an amount in excess of the rate it had negotiated with the shipping company, however, it would issue a "House

Airway Bill" of a similar amount of fare and the difference would be collected as handling charges. On the basis of his aforesaid observations, it was concluded by the TPO that the additional amount charged by the assessee from its client would in fact represent the 'mark up' on freight. Accordingly, it is in the backdrop of his aforesaid observations that the TPO had concluded that the handling charges which were charged by the assessee varied from customer to customer because they were dependent upon the 'mark up' on freight which it was obtaining from them on the basis of negotiations. Accordingly, it was observed by the TPO that the fright element booked by the assessee in its books of accounts had a component of profit in it. In order to fortify his aforesaid observations, it was further observed by the TPO that the fact that the assessee had debited the 'freight expenses' and credited the 'freight receipts' in its books of accounts revealed that the operating profit of the assessee comprised not only of its 'handling charges' but also the differential freight i.e the excess of the freight which it charged from its clients as against that paid to the shipping line. On the basis of the aforesaid observations, the TPO/DRP had rejected the adoption of PLI of OP/VAE by the assessee and had advocated the substitution of the same by PLI of OP/TC.

(iii). We have perused the aforesaid observations of the TPO and are unable to persuade ourselves to subscribe to the same. As observed by us hereinabove, the costs pertaining to services obtained by the assessee from third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider etc. neither involved any service element of the assessee nor the assessee had carried any risk or employed any of its assets with respect to the same. In our considered view, the net margin realised by the assessee pursuant to its international transactions with its AE's are to be determined only with reference to the cost incurred directly by the assessee itself and its profit margin cannot be imputed on the basis of the cost incurred by the third party or unrelated parties. We are of the considered view that the payment made by the assessee to the third party for and on behalf of the AE which had thereafter been reimbursed by the AE, cannot be included in the total costs of the assessee for the purpose of determining its profit margin. In fact, we find that Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assesse's 'net profit' margin for application of TNMM. Rule 10B(1)(e) provides that the 'net profit' margin realized by the enterprise from an international transaction entered into with an AE is to be computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise. As such, it contemplates determination of ALP with reference to the costs, assets, sales etc. of the enterprise in question, i.e the assessee, as opposed to the AE or any third party. In our considered view, the considering of the freight cost of the airlines/ship liners in the total cost base of the assessee had resulted to a distorted picture of the 'net margin' realized by the assessee from its international transactions. Our aforesaid view is fortified by the order of the **ITAT, Mumbai** in the case of **FedEx Express Transportation and Supply Chain Services India Pvt. Ltd. Vs. Dy. CIT, Range 8(1), Mumbai [ITA No. 435/Mum/2014; dated 10.12.2014]**. In the said case, it was observed by the Tribunal that the payment made by the assessee to the third party for and on

behalf of the AE which had been reimbursed by the AE, could not have been included in the total costs of the assessee for the purpose of determining its profit margin. Also, the **Hon'ble High Court of Delhi** in the case of **LI and Fung India Pvt. Ltd. Vs. CIT (2014) 361 ITR 85 (Del)**, had observed, that for applying the TNMM the assesse's net profit margin realised from the international transactions had to be calculated only with reference to the cost incurred by it and not by any other entity either third party vendors or the associated enterprise. It was further observed by the Hon'ble High Court, that Rule 10B(e)(i) of the Income-tax Rules, 1962, does not enable consideration or imputation of cost incurred by third parties or unrelated parties for the purpose of computing the assesse's 'net profit' margin for application of the TNMM. Accordingly, it was concluded by the Hon'ble High Court, that attribution by the TPO of the costs of the third party, when the assessee did not engage in that activity, and more importantly when those costs were clearly not the assesse's cost, but those of a third party, was clearly impermissible.

(iv). Apart from that, we find that from a perusal of the 'agreements' which the assessee had entered into with various carriers (i.e airlines) who are members of IATA, and also the sample 'invoices' raised by the assessee on its clients, it can safely be concluded that the assessee while providing logistics support services in "air business" had merely acted as an agent of the airlines. A perusal of the terms and conditions of "Cargo agency agreements" which the assessee had entered into with various airline carriers which were members of IATA, reveals that the assessee was to act as an 'agent' for the various member carriers. [(Page 804) of the assesse's 'Paper book' (for short 'APB')]. As per the 'agreement', the assessee was vested with a limited authority to represent various member carriers while selling the air cargo transportation services to the customers and was bound to adhere to the various terms and conditions imposed by the member carriers.(Page 805 of 'APB') In sum and substance, the assessee at all times was governed by the carriers. Also, as per the terms of the 'agreement' the assessee was bound to represent itself as an "agent" in all its communications viz. letterheads, telephone listings, office signs etc. with the customers, and was specifically prohibited from representing or projecting itself as a "Principal" (Page 806 of 'APB'). Further, the 'agreement' also provided for indemnification of the assessee by the member carrier in the event of a loss/damage arising in the course of transportation pursuant to the sale made by the assessee.(Page 807 of 'APB'). As such, the assessee did not assume any risks while undertaking its business. In order to fortify his aforesaid claim, the ld. A.R had drawn our attention to a sample "house airway bill" (Page 813-817 of 'APB') that was issued by the assessee to its customer which revealed that the assessee had executed the same as an agent of the carrier. Also, we find that the functions (carriage of goods) and liabilities (indemnification of the loss etc.) assumed by the assessee vis-a-vis the customer (as per its standard terms and conditions) corresponds to those assumed by the carrier vis-à-vis assessee. Accordingly, we are of the considered view that the functions and liabilities were effectively delegated by the assessee to the carrier and no part of the same was effectively assumed by the assessee. On a similar footing, we find that in the case of "ocean business" also the

assessee had merely acted as an agent. Further, we find that all the 'agreements' entered into by the assessee with the carriers (under both air and ocean business) were soft block agreements which provided an option to the assessee to cancel the same without incurring any penalty, therefore, no inventory risk was assumed by the assessee. (Page 860 to 865 of 'APB'). As regards the observation of the TPO, that the main component of the income of the assessee is on account of the differential freight element which it is able to obtain from the shipping companies on account of bulk booking of space on the liner, we are in agreement with the contention advanced by the ld. A.R that the advantage to the assessee on account of bulk booking was on account of its value addition activities i.e generating more customers and not on account of transportation function. In fact, we are persuaded to subscribe to the claim of the ld. A.R that transportation cost could have been included as a base only if the assessee had undertaken the transportation activity itself or would have undertaken the risks associated with the transportation function. However, as in the present case, in the absence of either of the aforesaid factor there would be no justification for including the said third party costs i.e transportation costs as apart of the base.

(v). As per the TPO, the element of freight could be considered as a pass through expense only if no profit or mark up is obtained on freight. However, as observed by the TPO, the case of the present assessee would not fall in the said category as the handling charges which were charged by the assessee varied from customer to customer, as they depended on the 'mark up' which it obtained from its customers based on negotiations. In our considered view, there is substantial force in the claim of the assessee that in order to characterize a particular item as pass through in nature an analysis has to be made with respect to the FAR of the assessee qua such activity. As the assessee does not perform any additional functions with respect to the third party cost, neither employs its assets, nor any risks are assumed for the same, therefore, it can safely be concluded that the assessee does not undertake any activity in relation to the said costs.

(vi). As regards the observation of the TPO that PLI of OP/VAE could not be safely applied as the reporting of various companies as regards classification of various expenses is not uniform, we are unable to find favour with the same. In our considered view, the assessee had only selected companies which had provided their VAE separately.

Accordingly, in the backdrop of our aforesaid observations, we are of the considered view, that as in the case before us the costs pertaining to the services obtained by the assessee from the third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider etc. neither involved any service element of the assessee nor the assessee had carried any risk or employed any of its assets with respect to the same, therefore, inclusion of the freight cost in the total cost base of the assessee by the TPO was not permissible. We thus are persuaded to subscribe to the claim of the assessee that the TPO/DRP were in error in rejecting the PLI of OP/VAE adopted by the assessee and substituting the same by PLI of OP/TC. As such, we herein restore the matter to the file of the A.O/TPO for

> the purpose of benchmarking the international transactions of the assessee by adopting the PLI of OP/VAE. **Grounds of appeal Nos. 1, 3.1 and 3.2** are allowed in terms of our aforesaid observations."

As the issue involved in the present appeal remains the same as was there before the Tribunal in the aforesaid case, therefore, concurring with the view therein taken we respectfully follow the same. Accordingly, we herein observe that as no infirmity did emerge from the adoption of the PLI of OP/VAE by the assessee for benchmarking of its international transactions of freight receipts and expenses, there was, thus, no justification for substitution of the same by the PLI of OP/TC by the TPO/DRP. We, thus, in terms of our aforesaid observations direct the A.O/TPO to benchmark the international transactions of freight receipts and expenses by taking TNMM as the most appropriate method and PLI of OP/VAE.

12. We shall now deal with the grievance of the assessee that conceptually the TP adjustment made in the hands of the assessee could even otherwise not be sustained. The ld. A.R taking us through the computation of the T.P adjustment submitted that the TPO while working out the same had erroneously considered the same at a gross level and had not restricted the same to the extent of value of the international transactions undertaken by the assessee with its AEs. As observed by us hereinabove, it was also the claim of the assessee before the DRP that for working out the TP adjustment the TPO was obligated to consider only the operating costs attributable to the AE sales. Although the DRP admitted that the said issue had been decided by the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Firestone International (Pvt.) Ltd. (2015) 234 Taxman 141 (Bom)** in favour of the assessee as was there before them, but then, being of the view that the 'Special Leave Petition' ('SLP') filed by the revenue against the said order was pending before the Hon'ble Supreme Court, thus, if the claim of the assessee was to be accepted then the same would tantamount to pre-judging and bringing finality to the issue pending before the Hon'ble Apex Court. Accordingly, the DRP in order to keep the issue alive and protect the interest

of the department upheld the action of the TPO in making the transfer pricing adjustment by considering the entire turnover of the freight receipts and expenses, and not restricting the same to the extent of the international transactions of the assessee with its AEs.

13. Before us, the ld. A.R relied on the judgments of the **Hon'ble High Court of Bombay** in the case of **CIT-8, Mumbai Vs. Tara Jewells Exports Pvt. ltd. (2016) 381 ITR 404 (Bom)** and **CIT Vs. Thyssen Crup Industries India (P) Ltd. (2016) 231 ITR 413 (Bom).** It was submitted by the ld. A.R that in its aforesaid orders the Hon'ble Jurisdictional High Court had held that the entire exercise of determining the ALP in accordance with Chapter X of the Act and in particular Section 92A & 92B of the Act, requires that the transfer pricing adjustment is to be done only in respect of the transactions entered into between the assessee with its AEs and not with the non-AEs. Further, support was drawn from the order of the Tribunal in context of the aforesaid issue in the case of **DHL Logistics Private Limited vs. DCIT, Circle 9(3)(1), Mumbai, ITA No. 1030/Mum/2015, dated 20.12.2019**.

14. Per contra, the ld. D.R relied on the orders of the lower authorities.

15. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the ld. A.R to drive home his aforesaid contention. Admittedly, a TP adjustment envisaged in Chapter X is only in respect of the international transactions of the assessee with its AEs and cannot be extended to the transactions entered into by the assessee with the independent unrelated third parties. Insofar the aforesaid settled position of law as had been so canvassed by the ld. A.R before us is concerned, we are persuaded to be in agreement with the same. In fact, we find that the **Hon'ble High Court of Bombay** in the case of **CIT-8, Mumbai Vs. Tara Jewells Export (P) Ltd. (2016) 381 ITR 404 (Bom)** and **CIT Vs. Thyssen Crup**

Industries India Pvt. ltd. (2016) 381 ITR 413 (Bom), had clearly observed, that in terms of Chapter X of the Act the TP adjustment is mandated only in respect of International transactions and not the transactions entered into by the assessee with independent unrelated parties. We find that in case if a TP adjustment is allowed in respect of transactions entered into by the assessee with unrelated third parties then the same would be result into increasing of the profit in respect of such independent transactions which would be beyond the scope and ambit of Chapter X of the Act. Apparently, the claim of the ld. A.R that the TPO had wrongly worked out the TP adjustment in respect of the AE transactions by considering the total operating costs instead of the operating costs attributable to the AE sales is prima facie found to be correct. Accordingly, we restore the matter to the file of the A.O/TPO for the limited purpose of working out the TP adjustment only in respect of the transactions of the assessee with its AEs, and if the same is found to be within the safe harbour range of +/- 5% of the ALP then no adjustment shall be called for in its hands.

16. We shall now deal with the grievance of the assessee as regards inclusion/exclusion of certain comparables by the TPO/DRP w.r.t benchmarking of the international transactions of freight receipts and expenses of the assessee. As observed by us hereinabove, the TPO in the final list of comparables had retained 2 companies (out of 5 companies) as were selected by the assessee in its TP study report. Further, the TPO had selected three new companies as comparables in the final list of comparables, viz. (i). Shreyas Relay System Ltd; (ii). Sical Logistics; and (iii) Om Logistics Ltd. On objections filed by the assessee, the DRP observed that the assessee had not raised any objection as regards the exclusion of the three companies (out of 5 companies) that were selected by the assessee as comparables in its TP study report, viz. (i). (i) Haytrans India Ltd; (ii). Concorde Air Logistics Ltd.; (iii). Trade-Wings Ltd. As regards the new companies which were included by the TPO in the final list of comparables, the DRP, though found favour with the contentions advanced by the assessee as regards one of the comparable, viz.

Sical Logistics and excluded the same from the final list of comparables, but upheld the inclusion of the remaining two companies in the final list of comparables by the TPO//DRP, viz. (i). Shreyas Relay System Ltd; and (ii). Om Logistics Limited. As regards the declining on the part of the TPO for inclusion of two companies in the final list of comparables as was sought by the assessee, viz. (i). TKM Global Logistics Limited; and (ii). Hindustan Cargo Limited, it was observed by the DRP that the neither the said companies figured in the TP study report nor any request for including the same in the final list of comparables was made by the assessee before the TPO. As observed by us hereinabove, the DRP observed that even the order of the TPO was silent on inclusion/exclusion of the aforesaid two concerns in the list of comparables. As such, in the absence of any reference of the aforesaid two comparables in the order of the TPO or in the TP study report, the DRP declined to entertain the aforesaid claim of the assessee.

17. In the backdrop of the aforesaid factual scenario, we shall deal with the sustainability of the inclusion/exclusion of the companies from the final list of comparables. Before us, the ld. A.R except for stating that the inclusion/exclusion of the same comparables in the final list of comparables had been looked at by the Tribunal in the case of **DHL Logistics Private Limited vs. DCIT, Circle 9(3)(1), Mumbai, ITA No. 1030/Mum/2015, dated 20.12/.2019**, did not advance any other contention in furtherance of his claim for inclusion/exclusion of the comparables in question. We, thus, confine ourselves to the extent the inclusion/exclusion of the comparables had been assailed before us. On a perusal of the aforesaid order of the Tribunal in the case of DHL Logistics Private Limited (supra) for A.Y 2010-11 as had been relied upon by the ld. A.R, we find, that finding favour with the contentions of the assessee as regards exclusion of two companies which were selected by the TPO in the final list of the comparables, viz. (i). Shreyas Relay System Ltd; and (ii). Om Logistics Ltd., the Tribunal concurring with the assessee had directed the A.O/TPO to exclude the same from the final list of comparables. As the functional profile of the assessee remains the same as in the case of

the aforementioned assessee, viz. DHL Logistics Private Limited (supra), thus, the aforesaid claim of the assessee for exclusion of both of the aforesaid comparables at the first blush appeared to be very convincing. But then, we cannot remain oblivious of the facts attending to the aforesaid case before the Tribunal which had weighed in its mind while directing exclusion of the said comparables from the final list of comparables, viz. (i). that the year in the case of the assessee before us is A.Y 2013-14 while for that in the case of the aforementioned assessee, viz. DHL Logistics Private Limited (supra) as was there before the Tribunal was A.Y 2010-11; and (ii). the direction for exclusion of the aforementioned companies from the final list of comparable was for a common reason in the case of both the companies, i.e both the said companies unlike the assessee before the Tribunal had significant asset base. In the backdrop of the aforesaid factual matrix, the contention of the ld. A.R that the aforesaid companies be excluded from the final list of comparables in the case of the assessee before us cannot be summarily accepted on the very face of it. However, in all fairness and in the interest of justice we restore the issue to the file of the A.O/TPO for reconsidering the assessee's claim for exclusion of the aforesaid two companies from the final list of comparables, viz. (i). Shreyas Relay System Ltd; (ii).Om Logistics Ltd. Needless to say, the A.O/TPO shall in the course of the 'set aside' proceedings afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to substantiate its aforesaid claim.

18. Resultantly, the appeal of the assessee is allowed in terms of our observations recorded hereinabove.

AY: 2014-15
ITA No. 6679/Mum/2018

19. We shall now take up the appeal of the assessee for A.Y. 2014-15, wherein the assessee had assailed the impugned order on the following grounds of appeal before us:

"Each of the grounds and/ or sub-grounds of the appeal are independent and without prejudice to the others.

1. On the facts and in the circumstances of the case and in law, the Assessment Order passed in pursuance to the directions issued by the Ld. Dispute Resolution Panel ('DRP') is a vitiated order as the DRP erred both on facts and in law in making/ confirming the addition made by the Ld. Assistant Commissioner of Income-tax - 9(1)(1) ('AO') to the Appellant's income.

   The Appellant prays that the assessment order passed by the AO be quashed.

2. On the facts and in the circumstances of the case and in law, the Ld. AO/ DRP erred in confirming the upward adjustment of Rs. 17,78,40,052 to the income of the Appellant with respect to the international transactions of freight receipts and expenses.

While doing so, the DRP erred in upholding the action of the Transfer Pricing Officer ('TPO') in:

   a. rejecting Operating Profit ('OP') to Value Added Expenses ('VAE') ratio selected by the Appellant as the Profit Level Indicator ('PLI'), and instead using OP to Total Cost ('TC') ratio as the PLI;

   b. rejecting the economic analysis undertaken by the Appellant in the Transfer Pricing Study Report ('TPSR');

   c. including companies in the comparability analysis which are not comparable to the Appellant in functions, asset base and risk profile;

   d. rejecting companies similar to the Appellant in functions, asset base and risk profile while performing comparability analysis;

   e. not restricting the value of the TP adjustment to the extent of the value of the international transaction undertaken by the Appellant with its AEs;

   f. rejecting the use of multiple year data; and

   g. denying the benefit of (+/-) 3 percent range as per the proviso to Section 92C(2) of the Income-tax Act, 1961 while computing the ALP.

   The Appellant prays that the aforesaid adjustment be deleted.

3. Disallowance under section 36(i)(iii) of the Income-tax Act ("the Act")

   a. The learned AO/ DRP erred in law and facts in disallowing Rs. 3,49,61,654 under proviso to section 36(1)(iii) of the Act.

   b. Without prejudice to the above, the learned AO erred in computing the disallowance under section 36(i)(iii) of the Act at 12% of the capital advance.

4. On the facts and in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under Section 271(1)(c) of the Act without appreciating that the Appellant has neither concealed any particulars of its income nor furnished any inaccurate particulars of the income.

The Appellant craves leave to alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing."

20. Briefly stated, the assessee company had e-filed its return of income for A.Y. 2014-15 on 30.11.2014, declaring its total income under the normal provisions at Rs.13,65,20,320/- and 'book profit' u/s 115JB at Rs. 5,58,32,198/. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

21. Observing that the assessee had during the year entered into international transactions with its Associated Enterprises (for short 'AEs') in excess of an amount of Rs.15 crores, the A.O made a reference under Sec. 92CA(1) of the Act to the Dy. Commissioner of Income-tax (Transfer Pricing)-1(1)(1), Mumbai (for short "TPO") vide his order dated 23.08.2016 after obtaining approval of the Pr. CIT-9, Mumbai.

22. During the course of proceedings it was observed by the TPO that the assessee had entered into the following international transactions during the year in question :

Sr. No.	Nature of the Transactions	Amount (Rs.)	Method adopted	Amount	Method adopted
1.	Freight Expenses	234,13,74,223/-	TNMM	277,37,84,357/-	TNMM
2.	Freight Revenue	207,75,60,974/-	TNMM	167,54,23,515/-	TNMM
3.	Issue of equity shares	-	-	125,767,894/-	Other Method
4.	Reimbursement of expenses	2,21,58,677/-	TNMM	2,62,43,633/-	TNMM
5.	Recovery of expenses	1,83,14,728/-	TNMM	-	-

It was noticed by the TPO that the assessee had benchmarked its international transactions, viz. freight receipts; freight expenses; reimbursement of expenses; and recovery of expenses using External TNMM at entity level. Using Prowess and extracted additional companies from CapitalinePlus, i.e companies for which data was not available in Prowess, the assessee in its Transfer Pricing Study Report (for short 'TP Study Report') had identified 7 comparable companies engaged in the business of providing freight forwarding services as comparables, namely (i). TKM Global Logistics Ltd; (ii). SRS Freight Management Ltd; (iii). Gordon Woodroffe Logistics Ltd; (iv). Hindustan Cargo Ltd; (v). Trade-Wings Limited (Cargo); (vi). AW Travel &

Logistic Services Ltd; and (vii). Balurghat Technologies Ltd (Transportation Operation/Travel Division). Using Operating Profit/Value added expenses (OP/VAE) as the profit level indicator (PLI) the assessee had on the basis of multiple year data worked out its margin at 23.50 % as against the arithmetic mean margin of 10.15% of the comparable companies and claimed its international transactions of freight receipts & expenses as being at arm's length. TPO directed the assessee to provide single year margin of the comparable companies that were selected by his predecessor in the immediately preceding years for determining the arm's length price w.r.t the international transactions of freight receipts & expenses. Further, the TPO called upon the assessee to compute the margins of the comparables selected in the TP study report using OP/TC as the PLI. On a without prejudice basis, the assessee submitted its detailed explanation and the final set of comparables that could be used for determining the arm's length margin. As per the details provided by the assessee the OP/TC margin of the final set of comparables was worked out at 1.91% as against the assessee's OP/TC of 2.25%. It was, thus, claimed by the assessee that the international transactions of freight receipts and expenses were at arm's length. However, the TPO picked up only five comparables (out of the aforesaid) in the final list of comparables for benchmarking the international transactions of the assessee. The final list of companies that was used by the TPO to benchmark the assessee's international transactions using OP/TC was as under:

Sr. No.	Comparable Companies	OP/VAE	OP/TC
1.	SDV International Logistics	23.50%	3.07%
2.	All cargo Logistics Ltd. (Multimodal Segment)	4.84%	3.65%
3.	Shreyas Relay Systems Limited	11.30%	2.78%
4.	Sical Logistics Limited	53.69%	5.32%
5.	Om Logistics Limited	28.21%	8.95%
	Mean	24.31%	4.75%
	Assessee's Margin	23.50%	2.25%

On the aforesaid basis the TPO worked out the arm's length price of the international transactions of freight receipts & expenses, as under:

Particulars	Reference	Amount (Rs.)
Operating Revenue	A	7.71,94,29,587
Operating Cost	B	7,54,92,49,249
Operating Profit for the year	C = A - B	17,01,80,338
Arm's Length margin (OP/TC)	D	4.75%
Arm's Length profit	E = B* D	35,85,89,339
Arm's Length Revenue	F = B + E	7,90,78,38,588
Transfer Pricing adjustment	**G = A - F**	**18,84,09,001**

Accordingly, the TPO vide his order passed u/s 92CA(3), dated 31.10.2016 made a transfer pricing adjustment of Rs. 18,84,09,001/- to the arm's length price of the international transactions of the assessee.

23. The A.O after receiving the order passed by the TPO under Sec.92CA(3), dated 27.10.2017 passed a draft assessment order under Sec.143(3) r.w.s 144C(1), dated 19.12.2017. In his aforesaid order the A.O proposed to make a transfer pricing adjustment of Rs. 18,84,09,001-. Further, the A.O proposed a disallowance u/s 36(1)(iii) of Rs. 2,67,72,000/-.

24. Aggrieved, the assessee objected to the additions that were proposed by the A.O in his draft assessment order, dated 23.12.2016 before the Dispute Resolution Panel-1, Mumbai, (for short 'DRP'). The DRP after deliberating at length on the issue under consideration observed the TPO had clearly brought out the fact that the assessee was rendering significant services with reference to freight charges through negotiations with air and shipping companies and such benefits were reaped by the assessee separately and not shared with third parties. Insofar rejection of the multiple year data used by the assessee in its TP study report was concerned, the DRP relying on the

view taken by the panel in the assessee's cae for the immediately preceding year, viz. A.Y 2013-14 observed, that as per Rule 10B(4) the data of the comparable transactions was to be of the financial year in which the assessee had entered into an international transaction. It was observed by the DRP that the exception carved out in Rule 10B(4) for using the earlier year data in addition to the data pertaining to the relevant financial year was only in respect of a situation where it could be shown that the earlier year data had an influence on the determination of transfer pricing in relation to the transactions being compared. As the assessee had failed to show as to how the earlier years data had an impact on the profits of the current year i.e financial 2013-14 or that of the comparables, the DRP, thus, was of the view that the TPO had rightly rejected the adoption of multiple year data by the assessee for benchmarking its international transactions. As regards the rejection of OP/VAE as PLI and adoption of OP/TC by the TPO, the DRP relying on its view that was taken in context of the issue under consideration while disposing off the objection of the assessee for A.Y 2013-14 observed, that the PLI of OP/VAE was a very fragile PLI and in fact one which was not used earlier in the case of any logistic concern providing freight forwarding services. It was further observed by the DRP that the assessee had made false claims regarding the pass through costs, and thus, the TNMM was based on improper financial and factual data. In the backdrop of its aforesaid observations, the DRP was of the view that as the assessee had not benchmarked its international transactions as per the provisions of Sec. 92C(1) r.w.s 92C(3) of the Act, thus, its objection that the A.O could take recourse to Sec. 92C(3) only under the circumstances enumerated in clauses (a) to (d) was not maintainable. As regards the declining on the part of the TPO to include in the final list of comparables 5 companies as was sought by the assessee, viz. (i). First Flight Couriers Ltd; (ii). Overnite Express Ltd; (iii). Hindustan Cargo Ltd; (iv). TKM Global Logistics Ltd; and (v). TVS Logistics Services Ltd., the DRP for the reasons stated in his order upheld the exclusion of the same from the final list of comparables by the TPO. As regards seeking

of exclusion of certain companies selected by the TPO from the final list of comparables, the DRP though rejected the assessee's claim in so far exclusion of , viz. (i). All Cargo Global Logistics Ltd; (ii). Om Logistics Ltd; and (iii). Shreyas Relay System Ltd, but found favour with its claim for exclusion of one of the comparable i.e Sical Logistics Limited. Further, as regards the objection of the assessee that the A.O/TPO had erred in not restricting the TP adjustment only to the extent of the international transactions undertaken by the assessee, it was observed by the DRP that the TPO should consider the adjustment on international transactions only if the assessseee was able to authentically determine the element of cost and profit/loss in respect of each such transaction with its AEs. It was observed by the DRP that if the assessee was not able to prove the element of cost and profit/loss in respect of each of its transaction with its AEs, then, the entity level adjustment would continue to apply. As regards the disallowance of interest expenditure u/s 36(1)(iii) of Rs. 2,67,72,000/-, the DRP vide its order passed under Sec. 144C(5), dated 18.07.2018 though principally upheld the view taken, but therein 'set aside' the same to his file with a direction for affording an opportunity to the assessee to disprove the existence of any nexus between the interest expenditure and the capital advances. At the same time, the DRP directed the A.O to take the correct amount of the capital advances for the purpose of computing the disallowance under Sec.36(1)(iii) of the Act.

25. The A.O after receiving the order passed by the DRP under Sec. 144C(5), dated 18.07.2018 passed the final assessment order under Sec.143(3) r.w.s 144C(13), dated 28.09.2018. On the basis of the directions of the DRP, the A.O made a TP adjustment of Rs.17,78,40,052/- and disallowance u/s 36(1)(iii) of Rs. 3,49,61,654/-. On the basis of his aforesaid observations, the A.O vide his order passed under Sec.143(3) r.w.s 144C(13), dated 28.09.2018 assessed the total income of the assessee under the normal provisions at Rs.34,93,22,030/- and determined its 'book profit' under Sec.115JB at Rs.5,58,32,198/-.

26. The assessee being aggrieved with the assessment order passed by the A.O under Sec.143(3) r.w.s 144C(13), dated 28.09.2018 has carried the matter in appeal before us. As regards the claim of the assessee that the TPO/DRP had erred in rejecting the assessee's PLI of OP/VAE for benchmarking its international transactions of freight receipts and expense and substituting the same by OP/TC, we find that as the facts and the issue leading to the controversy in question for the year under consideration remains the same as were there before us in the assessee's own case for the immediately preceding year i.e A.Y 2013-14 in ITA No. 7199/Mum/2017, thus, our order therein passed in context of the said issue shall apply mutatis mutandis for the purpose of disposal of the present issue for the year under consideration. Accordingly, in terms of our observations recorded in context of the issue in question while disposing off the assessee's appeal for A.Y 2013-14 in ITA No. 7199/Mum/2017, we herein direct the A.O/TPO to benchmark the international transactions of freight receipts and expenses by taking TNMM as the most appropriate method and PLI of OP/VAE.

27. We shall now deal with the grievance of the assessee that the TPO/DRP had erred in not restricting the value of the TP adjustment to the extent of the value of the international transaction undertaken by the assessee with its AEs. As the facts and the issue pertaining to the controversy in hand remains the same as were there before us in the case of the assessee for the immediately preceding year i.e A.Y 2013-14 in ITA no. 7199/Mum/2017, therefore, our view therein taken shall apply mutatis mutandis for the purpose of disposal of the present issue. We, thus, in terms of our aforesaid observations direct the A.O/TPO to restrict the TP adjustment only qua the international transactions of the assessee with its AEs. Accordingly, we restore the matter to the file of the A.O/TPO for the limited purpose of working out the TP adjustment only in respect of the transactions of the assessee with its AEs, and if the same is found to be within the safe harbour range of +/- 3% of the ALP then no adjustment shall be called for in its hands.

28. We shall now deal with the claim of the assessee that the A.O/DRP had erred in disallowing an amount of Rs. 3,49,61,654/- under the 'proviso' to Sec. 36(1)(iii) of the Act. Briefly stated, the assessee had debited 'Interest expenditure' of Rs. 11,32,14,306/- in its Profit & Loss a/c for the year under consideration. On being queried, it was gathered by the A.O that the aforesaid interest expenditure pertained to the interest bearing loans that were availed by it. Further, on a perusal of the balance sheet of the assessee company it was gathered by the A.O that the assesee had advanced a loan of Rs. 22.31 crores which as per "Note 30" of its financial statements was a capital advance. On being queried as to why the interest expenditure correlating to the amount of Rs. 22.31 crore given by the assessee towards assets which were capital in nature may not be disallowed u/s 36(1)(iii) of the Act, it was submitted by the assessee that all its short term borrowings and one term loan were channelized for meeting out its day to day working capital requirements, and no long term borrowings were utilised for purchase of capital assets. However, the A.O was of the view that the assessee had failed to prove to satisfaction that the entire advance was made from non-interest bearing funds, and the sum was advanced from the common pool of interest bearing and interest free funds. Observing that the assessee could not establish that the capital advance was made out of the interest free funds, the A.O, held a conviction that the interest bearing loan funds were diverted by the assessee for the purpose of acquiring capital assets. In the backdrop of his aforesaid deliberations the A.O vide his draft assessment order passed u/s 143(3) r.w.s 144C(1), dated 19.12.2017 proposed to disallow interest expenditure of Rs. 2,67,72,000/-. On objections filed by the assessee with the DRP, it was observed by the panel that the assessee in order to impress upon it that no part of the interest expenditure w.r.t the borrowed capital was liable to be disallowed had for the very first time filed detailed submissions before it. It was noticed by the DRP that the A.O had only made disallowance in respect of capital advance for Bhiwandi land and not in respect of other similar advances. Adverting to the 'proviso' to Sec. 36(1)(iii) of the Act, it was

observed by the DRP that interest paid in respect of capital borrowed for 'acquisition of an asset' was to be disallowed for the period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use. Observing that the interest paid in respect of the capital borrowed for the purpose of acquisition of the capital assets was required to be disallowed, the DRP, not finding favour with the claim of the assessee that as the capital advance were given to the parties in the earlier years when the assessee had sufficient funds of its own and there was no nexus between the interest debited in its books of account on the loans raised and the capital advance that was given prior to raising of such interest bearing funds, rejected the same. DRP while rejecting the aforesaid claim of the assessee was of the view that the onus was on the assessee to prove that there was no nexus between the capital advance and the interest bearing loans. In support of his aforesaid observation reliance was placed by the DRP on the order of the **Hon'ble High Court of Punjab & Haryana** in the case of **CIT Vs. Abhishek Industries Ltd. (2006) 286 ITR 1 (P&H)**. Backed by its aforesaid deliberations, the DRP in all fairness directed the A.O to afford an opportunity to the assessee to prove that the capital advance/investment were made in the earlier years when there was no interest liability. At the same time, the DRP taking cognizance of the fact that the A.O had only considered the capital advance w.r.t Bhiwandi land for disallowance u/s 36(1)(iii), therein directed the A.O to take the correct amount of capital advances for the purpose of disallowing the interest expenditure.

29. After receiving the order of the DRP u/s 144C(5), dated 18.07.2018 the A.O afforded an opportunity to the assessee to substantiate its claim that the capital advances w.r.t the various properties had no nexus with the interest bearing borrowed funds. In the course of the 'set aside' proceedings, the A.O, as directed by the DRP called upon the assessee to prove that the investments/capital advances made in respect of its properties situated at various places, viz. (i). Bhiwandi; (ii). Ahmedabad; (iii). Pune Wagholi-II; and (iv). Panvel did not have any nexus with the interest bearing loans. As the

assessee failed to substantiate its aforesaid claim, the A.O, thus, vide his final assessment order passed u/s 143(3) r.w.s 144C(13), dated 28.09.2018 disallowed the interest expenditure on the aggregate amount of investments/capital advances of Rs. 29,13,47,120/- @12% and made a resultant addition/disallowance of Rs. 3,49,61,654/- u/s 36(1)(iii) in the hands of the assessee company.

30. Aggrieved, the assesee has assailed before us the addition /disallowance of interest expenditure of Rs. 3,49,61,654/- made by the A.O u/s 36(1)(iii) of the Act. Mr. Ketan Ved, the ld. A.R for the assessee appellant assailed the disallowance of interest expenditure u/s 36(1)(iii) by the A.O/DRP. It was submitted by the ld. A.R that the A.O while passing the final assessment order under Sec. 143(3) r.w.s 144C(13), dated 28.09.2018 had failed to appreciate the directions of the DRP in the right perspective. It was the claim of the ld. A.R that as the capital advances/investments in the respect of the lands/properties in question were made by the assessee in the years prior to those in which the interest bearing loans were raised, and the assessee at the relevant point of time on all such occasions when the respective advances were given had sufficient self owned funds, therefore, in the absence of any nexus between the interest expenditure and the capital advances/investments in question no disallowance of any part of the interest expenditure was called for under Sec. 36(1)(iii) of the Act. It was further averred by the ld. A.R that no disallowance of any part of the interest expenditure was ever made by the A.O in the preceding years i.e those subsequent to the year in which the acquisition of the respective properties was made by the assessee. It was further submitted by the ld. A.R, that pursuant to the judgment of the **Hon'ble Supreme Court** in the case of **CIT (LTU) Vs. Reliance Industries Ltd. (2019) 307 CTR 0121 (SC),** in a case where the assessee had sufficient self owned funds to justify the investments, it was to be presumed that the said investments were made out of the same.

31. Per contra, the ld. D.R relied on the orders of the lower authorities. It was submitted b the ld. D.R that as the assessee had diverted the interest bearing funds for making capital advances/investments in capital assets, the A.O, thus, had rightly disallowed the correlating interest expenditure as per the 'proviso' to Sec. 36(1)(iii) of the Act.

32. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record in context of the aforesaid issue, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. As is discernible from the orders of the lower authorities, we find that initially the A.O vide his draft assessment order passed under Sec. 143(3) r.w.s 144C(1), dated 19.12.2017 had proposed to disallow only the correlating interest expenditure of Rs.2,67,72,000/- i.e @ 12% advances of Rs. 22,31,00,000/- as was reflected in the balance sheet of the assessee for the year under consideration. However, the DRP vide its order passed under Sec. 144C(5), dated 18.07.2018 while principally upholding the view taken by the A.O and setting aside the same to the latters file with a direction for affording an opportunity to the assessee to disprove the existence of any nexus between the interest expenditure and the capital advances, had however, directed the A.O to take the correct amount of the capital advances for the purpose of computing the disallowance under Sec.36(1)(iii) of the Act. In pursuance to the aforesaid direction of the DRP, the A.O while framing the assessment vide his order passed under Sec. 143(3) r.w.s 144C(13) dated 28.09.2018 had considered the aggregate amount of the capital advances of Rs.29,13,47,120/- that were made by the assessee with respect to the various properties, as under :

Location	F.Y. during which payment of advance was made	Closing balance as on 31.03.2014 (in Rs.)
Bhiwandi	F.Y. 06-07 to 09-10	22,30,97,120
Ahmedabad	F.Y. 07-08 & 08-09	3,50,00,000
Pune Wagholi-II	F.Y. 09-10 & 11-12	1,22,60,000
Panvel	F.Y. 08-09	2,10,00,000

Total		**29,13,47,120**

As the assessee had failed to disprove the existence of any one-to-one nexus between the capital advances and the interest expenditure, the A.O, thus, had made a disallowance under Sec. 36(1)(iii) of Rs.3,49,61,654/- (12% of Rs. 29,13,47,120/-) and added the same to the total income of the assessee.

33. We have deliberated at length on the issue under consideration and perused the orders of the lower authorities as well as considered the contentions advanced by the ld. A.R before us. On a perusal of the orders of the lower authorities, we find that it is and always had been the claim the assessee that the respective capital advances/investments in the properties in question were made much prior to raising of the interest bearing loans/borrowings. In order to appreciate the issue in the right perspective, it would be relevant to cull out the explanation of the assessee as regards the capital advances/investments that were made by it w.r.t acquisition of the respective properties, which as extracted from the assessee's reply before the DRP reads as under:

"**Advance towards land at Bhiwandi:-**

In the year 2006, the assessee was on the lookout for a suitable property to construct an industrial warehouse. Jaggannath Parmeshwar Mills Pvt. Ltd. (JPML) was acting as an aggregator of lands for I he purpose of sale to parties. JPMPL expressed its willingness and ability to sell to the assessee, 33.25 acres of land in Bhiwandi, Thane. As the assessee found the property ideal for its purpose, it gave an advance of Rs.20,00,000 to JPMPL on 02 January 2007 and accordingly they entered into an agreement. As per the Agreement to sell dated 21st May, 2007, JPMPL agreed to sell to the assessee and the assessee agreed to purchase the property being land situated at Bhiwandi, Thane for an aggregate consideration of Rs. 17,62,25,000. The consideration was due to JPMPL only it fulfills its obligation of making out clear marketable title, free of all encumbrance and impediments in respect of said property. However, JPMPL started requesting the assessee to advance further sums of money to enable them to purchase the said property. Accordingly, it was agreed that all monies paid by the assessee would be treated as 'advance' to be adjusted towards consideration at lime of execution of Sale Deed.

During the period 1 April 2006 to 12 April 2010, the assessee made the total payment of Rs. 22,21,07,120 to JPMPL as follows:

Sr. No	Financial year	Amount (Rs.)
I	2006-07	20,00,000

2	2007-08	16,66,07,120
3	2008-09	2,00,00,000
4	2009-10	3,35,00,000
	Total	22,21,07,120

JPMPL could purchase only 32.06 acres of land and it was agreed between the parties to revise the price to Rs. 58.42 lakhs per acre, thereby resulting in final consideration of Rs.18,72,94,520. However, JPMPL failed to complete the due diligence in respect of the property, Further, However they did not furnish the necessary documents of title to prove the change of user of the property or the prove that the said property could be used for constructing a warehouse. Given that JPMPL had committed several breaches of contract, the assessee entered into arbitration proceedings against JPMPL seeking specific performance of the contract that was entered into. On 9 November 2017 the arbitrator passed the award that JPMPL was required to convey the land measuring 32.06 acres and handover quiet, vacant and peaceful possession of the property to the assessee.

Detail of payment of the advance are mentioned in the attached award dated 9 November 2017. It is evident that the payment of advance towards land at Bhiwandi was made long before the loans existing as on 31 March 2014 were taken.

Towards land at Ahmedabad

The assessee company entered into a Memorandum of Understanding ("MOU") dated 22 December 2008 with Mr. Shrikant Kulkarni as a mediator to purchase land from farmers at Aslali, Ahmedabad. As per the addendum to the MOU (Enclosed at page 120 to 124 of the compilation), payment of Rs.3,50,00,000 was made during the financial year 2007-08 and 2008-09 as advance towards purchase of the land as follows:

Sr. No	Date	Amount (Rs.)
1	14 May 2007	10,00,000
2	6 December 2008	1,00,00,000
3	17 June 2008	15,00,000
4	28 August 2008	1,00,00,000
5	22 December 2008	1,25,00,000
	Total	3,50,00,000

From the above, it is clear that the payment towards advances was made for the Ahmedabad land during the financial year 2007-08 and 2008-09. "

Advance towards land at Pune-Wagholi

The assessee company entered into a Memorandum of Understanding dated 26 May 2009 with Mr. Shrikant Kulkarni to purchase land at Pune Wagholi. An advance of Rs. 78,00,000 was paid to Mr. Shrikant Kulkarni during the financial year 2009- Was per the agreement. The agreement had a clause whereby the parties to the MOU mutually agreed to increase the advance, which was to be adjusted against the total sale consideration. Hence, subsequently, an amount of Us.44,60,000 was paid to Mr. Kulkarni on 14 April 2011. Details of advance paid towards the land at Pune - Wagholi are mentioned hereunder:

Sr.No,	Date	Amount (Rs.)

1	17 April 2009	25,00.000
2	9 June 2009	25,00,000
3	15 June 2009	28,00,000
4	14 April 2011	44.60,000
Total		1.22,60,000

Advance towards land at Panvel

The assessee company entered into a Memorandum of Understanding with Rudrakasha Vanijya Pvt. Ltd., an aggregator of land. As per the MOU dated 23 December, 2008, a sum of Rs. 2,00,00,000 was paid as an advance to secure the obligations under the contract as follows:

Si: No.	Date	Amount (Rs.)
2	31 December 2 008	1, 00,00,000
3	7 January 2009	1,00,00.000
	Total	2,00,00,000

From the above facts, it may be observed that the advances towards land were not made during the year under consideration i.e. financial year 2014-15 but from financial year 2006-07 to 2009-10. The payments towards the abovementioned advances were made out of equity infusion of Rs. 161.48 crores on 7th August 2007 and Rs. 79.96 crores on 25 March 2008 from PWC Logistics Singapore Pte Ltd.

Further, it may also be noted that loans pertaining to which interest has been incurred during the year, were taken from financial year 2010-11 onwards which was much later than the period during which the advances were made. Hence, from the above, it is clear that there is no nexus between t he loans taken and advances given towards purchase of land. Reliance is also placed on the jurisdictional Tribunal decisions on this issue.

The assessee company would further like to point out that the debt equity ratio during the period when the advances were made was in the range of 0.226:1. Hence, the assessee company had adequate own funds for the purpose of making advances and did not need to utilize borrowed funds for this purpose.

Based on the above submissions, your goodselves would appreciate that there is no nexus between the loans taken and advances given. Accordingly, interest ought not to be disallowed under section 36(l)(iii) of the Act."

On a perusal of the aforesaid reply, we find that the assessee had stated before the DRP to have made the capital advances/investments in the aforesaid respective properties in the course of its business, which as claimed by it was much prior to the raising of the interest bearing loans/borrowings in question. As can be gathered from the aforesaid reply of the assessee, it is claimed by it that insofar the capital advances of Rs.22,21,07,120/- towards land at Bhiwandi was concerned, the same were spread over the period 1st

April, 2006 to 12th April, 2010 which was much prior to the raising of the interest bearing loans as reflected in the assessee's balance sheet on 31.03.2014. On a similar footing, it was the claim of the assessee that the capital advance aggregating to Rs. 3.5 crores towards land at Ahmedabad was spread over the period 14th May, 2007 to 22.12.2018 i.e prior to the raising of the interest bearing loans/advances as reflected in the assessee's balance sheet on 31st March, 2014. Again, a similar claim had been raised by the assessee in respect of the capital advance given for land at Pune, Wagholi, wherein it was claimed that the aggregate amount of Rs.1,22,60,000/- was advanced over the period 17th April, 2009 to 14th April, 2011, which too was much prior to the raising of the aforementioned interest bearing loans/advances. Similarly, as regards the capital advance given for land at Panvel, it was the claim of the assessee that an amount of Rs.2 crore was given over the period 31st December, 2008, to 7th January, 2009. Insofar, the aforesaid giving of capital advances with respect to the aforesaid four properties is concerned, it has been the claim of the assessee that as the same were made much prior to the raising of the interest bearing loans/borrowings and were sourced out of the sufficient self owned funds as were available with it at the relevant point of time on all the occasions, thus, no disallowance of any part of the interest expenditure under Sec. 36(1)(iii) could have been attributed to the said advances. In the backdrop of his aforesaid contentions, we find, that it is the primary claim of the assessee that as the respective capital advances were given during the period falling much prior to the year in which the interest bearing loans/borrowings were raised by the assessee, thus, in the absence of any nexus of such capital advances with the interest expenditure no disallowance of any part of the interest expenditure was called for under Sec. 36(1)(iii) in its hands. Apart from that, we find that the assessee explaining the sources from where the capital advances in question were made, had submitted, that the same were from the equity infusion of Rs.161.48 crores on 7th August, 2007 and Rs.79.96 crores on 25th March, 2008 from PWC logistics Singapore Pte Ltd. Insofar the interest

bearing loans pertaining to which the correlating interest expenditure was debited by the assessee in its profit and loss account for the year in question, it was submitted by the assessee before the DRP that the same were taken only w.e.f financial year 2010-11, and thus, had no nexus with the capital advances in question.

34. We have deliberated at length on the issue under consideration and are unable to subscribe to the observation of the DRP that the failure on the part of the assessee to prove that there was no nexus between the capital advances and the interest bearing loans/borrowings justified the disallowance of the interest expenditure u/s 36(1)(iii) of the Act. In the case of **CIT (LTU) Vs. Reliance Industries Ltd. (2019) 307 CTR 0121 (SC),** we find, that the **Hon'ble Supreme Court** had observed that when interest free funds available with the assessee are sufficient to meet its investments then, it can be presumed that investments are made from the said interest free funds and hence, no disallowance to the said extent would be called for u/s 36(1)(iii) of the Act. Question of law that was inter alia raised before the Hon'ble Apex Court for its kind consideration read as under :

> "1. Whether the High Court is correct in holding that interest amount being interest referable to funds given to subsidiaries is allowable as deduction under Section 36(1)(iii) of the Income Tax Act, 1961 (for short 'the Act') when the interest would not have been payable to banks, if funds were not provided to subsidiaries"

Answering the aforesaid question of law, the Hon'ble Apex Court while approving the view taken by the Hon'ble High Court of Bombay had observed, as under:

> "7. Insofar as the first question is concerned, the issue raises a pure question of fact. The High Court has noted the finding of the Tribunal that the interest free funds available to the assessee were sufficient to meet its investment. Hence, it could be presumed that the investments were made from the interest free funds available with the assessee. The Tribunal has also followed its own order for Assessment Year 2002-03.
>
> 8. In view of the above findings, we find no reason to interfere with the judgment of the High Court in regard to the first question. Accordingly, the appeals are dismissed in regard to the first question."

In the backdrop of the aforesaid settled position of law, we concur with the claim of the ld. A.R that in case the interest free funds available with the assessee were sufficient to explain the capital advance/investment, it could safely be presumed that the same were made by the assessee from the interest free funds available with it. On a perusal of the order of the DRP, we find that the panel in all fairness had after considering the exhaustive submissions which were advanced by the assessee in order to impress upon it that the capital advances in question did not have any nexus with the interest free loans/borrowings which were raised much subsequent thereto, had categorically directed the A.O that in case if the assessee is able to prove its aforesaid claim of having made the investments in the earlier years then no interest expenditure would be liable to be disallowed. However, we find, that the A.O while passing the final assessment order under Sec. 143(3) r.w.s. 144C(13), dated 28.09.2018 had summarily deal with the aforesaid issue, and by merely stating that the assessee had interest liabilities in financial year 2006-07 to financial year 2009-10 when most of the payments were made towards capital advances, had therein worked out the disallowance under Sec. 36(1)(iii) at Rs.3,49,61,654/- (12% of Rs.29,13,47,120/) and added the same to the total income of the assessee. At the same time, we also cannot remain oblivious of the fact that the assessee also in the course of the 'set aside' proceedings had failed to place on record any such material which would substantiate its claim that it had sufficient interest free funds to justify the capital advances/investments in question. Be that as it may, on a perusal of the orders of the lower authorities, we hold a strong conviction that the issue as regards the disallowance under Sec. 36(1)(iii) had not been addressed in the right perspective. In the backdrop of the contentions which were advanced by the assessee before the DRP, it prima facie appears that more or less the assessee had been able to drive home its claim that the aforesaid amounts were advanced much prior to raising of the interest bearing loans/borrowings in question, as a result whereof no part of the interest

expenditure was liable to be disallowed under Sec.36(1)(iii) of the Act. In sum and substance, the claim of the assessee that at the relevant point of time of giving the capital advances it had with it sufficient self owned funds to justify the same had not fairly been looked into by the lower authorities. In fact, both

the lower authorities had approached the issue in question with a view that the assessee was obligated to disprove the existence of a one-to-one nexus between the capital advances and interest bearing loans/borrowings, which as observed by us hereinabove cannot be subscribed on our part. In the backdrop of our aforesaid deliberations, we are of a strong conviction that the aforesaid issue requires to be revisited and therein re-adjudicated by the A.O after calling for and considering the entire set of facts pertaining to the same. At this stage, we may herein clarify that in case if the assessee in the course of the 'set aside' proceedings is able to establish that it had at the relevant point of time sufficient interest free funds available with it to justify the capital advances given w.r.t the aforesaid properties, then, it would be presumed that the aforesaid capital advances/investments were made by it from the interest free funds so available with it. Accordingly, in all fairness and in the interest of justice we restore the issue to the file of the A.O for the purpose of readjudication of the same in terms of our aforesaid observations. Needless to say, the A.O in the course of the 'set aside' proceedings shall afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to substantiate its aforesaid claim on the basis of fresh material and submissions. The **Ground of appeal No. 3** is allowed for statistical purpose in terms of our aforesaid observations.

34. The assessee had assailed the initiation of penalty proceedings under Sec. 271(1)(c) which being premature is accordingly dismissed. The **Ground of appeal No. 4** is dismissed.

35. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

36. Resultantly, the appeal of the assessee for A.Y 2013-14, ITA No. 7199/Mum/2017 and A.Y 2014-15, ITA No. 6679/Mum/2018 are partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 11/02/2021.

Sd/-	Sd/-
(S. Rifaur Rahman)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 11.02.2021
***PS. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**