IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 1387/MUM/2022
(Assessment Year: 2017-18)

TPG Growth II Markets Pte. Ltd.
83 Clemenceau Avenue # 11-01
UE Sqaure, Singapore - 239920
[PAN:AAECT9423D] .... **Appellant**

Vs

Deputy Commissioner of Income Tax,
Int Tax Circle 4(1)(2), Mumbai, ... **Respondent**

Appearance

For the Appellant/Assessee	:	Shri Dinesh Bafna Shri Hardik Nirmal Shri Yogesh Malpani
For the Respondent/Department	:	Dr. Samuel Pitta

Date

Conclusion of hearing	:	08.03.2023
Pronouncement of order	:	06.06.2023

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. The present appeal is directed against Assessment Order dated, 28/04/2022, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for the Assessment Year 2017-18, as per directions issued by CIT (Dispute Resolution Panel-2), Mumbai-3 [hereinafter referred to as 'the DRP'] under Section 144C(5) of the Act.

2. The Appellant has raised following grounds of appeal:

1. Ground No. 1: Transfer pricing (TP") adjustment in respect

of purchase of equity shares of Sutures India Private Limited (SIPL) and Quality Needles Private Limited ("QNPL')

On the facts and in the circumstances of the case and in law, the Ld. DRP erred in upholding the action of Ld. TPO / Ld. AO of determining the arm's length price (ALP) of the international transaction of purchase of equity shares of SIPL and QNPL at INR 2,155,06 and INR 10,013.45 respectively. In doing so, the Ld. TPO/Ld. AO/Ld, DRP erred in:

a) Ignoring the existence of comparable transactions of purchase of equity shares from third parties which are akin to the transaction of the Appellant for determination of ALP

b) Disregarding the valuation report issued by independent valuation expert for valuation of equity shares of SIPL and QNPL without providing cogent reasons;

c) Adopting actual financial results for valuation of shares by replacing the projected financial values in original valuation, completely disregarding the fact that Discounted Cash Flow ('DCF") method of valuation takes into account future projections and also disregarding that such action tantamount to 'impossibility of the performance' to use actual results, were not available at the time of preparation of the valuation report,

d) Disregarding the submission of the Appellant of non-applicability of TP provisions for purchase of shares since no income arises on purchase of shares thus, Ignoring the basic principles for applicability of Chapter X

e) Recharacterising excess payment (ie, ALP of SIPL equity shares as by Ld. AO/TPO as reduced by the ALP determined by Assessee) as a loan given to AE and charging interest thereon

f) Without prejudice to the above, determining deemed interest receivable by the Assessee (a non-resident) from its AE [ie, TPG Growth II SF Pte. Ltd. (TPG SF), another non-resident) as income taxable in India under the provisions of section 5 read with section 9 of the Income-tax Act, 1961 ('the Act')

g) Determining the ALP of the international transaction of purchase of equity shares without cognizance to the provisions of Section 92C(3) of the Act.

2. Ground No. 2: TP adjustment in respect of Sale of Shares of QNPL to SIPL

On the facts and circumstances of the case and in law, Ld. DRP erred in upholding the action of Ld. AO of determining the ALP for the international transaction of sale of equity shares of QNPL to SIPL and determining the ALP of QNPL per share at INR 10,013.45 and thereby making a TP adjustment to INR 71,64,92,650. In doing so, the Ld. TPO/Ld. AO/Ld. DRP erred in:

a) Disregarding CUP method as adopted by the Assessee for determination of ALP of sale of shares of QNPL, thereby ignoring the third-party transactions entered into by SIPL on the same day and same terms;

b) Disregarding the valuation report issued by independent valuation expert for valuation of equity shares of QNPL without providing cogent reasons;

c) Adopting actual financial results for valuation of shares results by replacing the projected financial values in original valuation, completely disregarding the fact that DCF method of valuation takes into account future projections and also disregarding that such action tantamount to 'impossibility of the performance' to use actual results which were not available at the time of preparation of the report:

a) Determining the ALP of the international transaction of Sale of equity shares without cognizance to the provisions of Section 92C(3) of the Act.

3. Ground No. 3: Error in calculation of short-term capital gains by wrongly considering the sales consideration

On the facts and circumstances of the case and in law, the Ld. AO has erred in computing the capital gain on sale of shares of QNPL by considering the sale consideration as Rs. 5,60,00,82,800 instead of Rs. 5,20,69,94,250 as rectified by the Ld. TPO.

4 Ground No. 4: In respect of Appellant's subscription in the equity shares SIPL, in lieu of sale consideration as a consequence of sale of shares of QNPL to SIPL

On the facts and circumstances of the case and in law, Ld. DRP erred in upholding the action of Ld. TPO / Ld. AO in considering Appellant's subscription in 1,19,65,193 shares of SIPL towards consideration of sale of 5,20,000 shares of QNPL. In doing so, the Ld. TPO/L.d. AO/Ld. DRP erred in:

a) Ignoring the existence of comparable transactions of purchase *of equity shares by third parties from SIPL which are akin to the transaction of the Appellant for determination of ALP*

b) Disregarding the valuation report issued by independent valuation expert for valuation of equity. shares of SIPL without providing cogent reasons;

c) Adopting actual financial results for valuation of shares results by replacing the projected financial values in original valuation, completely disregarding the fact that DCF method of valuation takes into account future projections and also disregarding that such action tantamount to impossibility of the performance' to use actual results which were not available at the time of preparation of the valuation report;

d) Recharacterising excess payment (ie., ALP of SIFL equity shares as determined by L.d. AO/TPO as reduced by the ALP determined by Assessee) as a loan given to AE and charging interest thereon:

e) Disregarding the submission of the Appellant of non-applicability of TP provisions for purchase of shares since no income arises on purchase of shares thus, ignoring the basic principles for applicability of Chapter X

5. Ground No. 5: Initiating penalty proceedings under section 270A of the Act

On the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act."

3. The relevant facts in brief are that the Appellant, a foreign company, filed its return of income for the Assessment Year 2017-18 on 30/11/2017 declaring total loss of INR 72,18,784/-. The case of the Assessee was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Assessee had entered into International Transactions with Associated Enterprises (AEs) and therefore, made a reference to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) under Section 92CA(1) of the Act. The details of International Transactions identified for determination of ALP are as under:

(a) Purchase of equity shares of Sutures India Pvt. Ltd. (**SIPL**) from its AE (i.e. TPG Growth II SF Pte. Ltd.)

(b) Purchase of equity shares of Quality Needles Pvt. Ltd. (**QNPL**) from its AE (i.e. TPG Growth II SF Pte. Ltd.)

(c) Sale of equity shares of QNPL to SIPL

(d) Allotment of equity shares of SIPL to the Appellant as consideration for the above sale of share of QNPL to SIPL

4. The TPO passed an order dated 30/01/2021 under Section 92CA(3) of the Act, and proposed transfer pricing adjustment of INR 1,99,40,70,269/-. Thereafter, the TPO passed a Rectification Order, dated 06/08/2021, and revised transfer pricing adjustment to INR 1,29,38,26,665/- from INR 199,40,70,26/-.

Sr. No.	Nature of TP adjustment	TP Adjustment as per TPO Order, dated 30/01/2021 (INR)	TP Adjustment as per Rectification Order, dated 06/08/2021 (INR)
1	On the issue of purchase of SIPL shares from AE TPO concluded that excess payment was made by the Appellant for purchase of SIPL. Treating the excess payment as loan granted to AE, TPO proposed addition of notional interest thereon	4,78,60,011	394,98,584
2	On the issue of purchase of QNPL Shares from AE: TPO concluded that the Appellant has received shares for consideration less than the fair market value. The difference in the value determined by the TPO and the purchase consideration was treated as income chargeable to tax under the head 'Income from Other Sources' in terms of Section 56(2)(viia) of the Act.	83,60,61,408	53,73,14,110

3	On the issue of sale of Shares of QNPL to SIPL: TPO concluded that the sale consideration charged from the AE was less than the arm's length price of shares sold. TPO recomputed capital gains after taking into account the arm's length price of shares determined by the TPO.	110,95,81,200	71,64,92,560
4	On subscription of shares of SIPL by Appellant, as consideration for sale of share of QNPL to SIPL TPO concluded that share subscription value was more than the arm's length price of shares of SIPL and the same had resulted in excess payment to SIPL. Treating the excess payment as loan granted to AE, TPO proposed addition of notional interest thereon	5,67,050	5,21,321
	Total	199,40,70,269	1,29,38,26,665

5. However, prior to the passing of the Rectification Order, dated 06/08/2021, by the TPO, the Assessing Officer passed the Draft Assessment Order, dated 15/06/2021, under Section 144C of the Act at the proposed assessed income of INR 115,07,88,560/- and therefore, transfer pricing adjustment as revised by the TPO could not be incorporated in the Draft Assessment Order.

6. Aggrieved by the adjustment made in the Draft Assessment Order, dated 15/06/2021, the Assessee filed Objections before the DRP on 31/08/2021. The DRP vide order dated 31/03/2022 partly allowed the aforesaid Objections. Pursuant to the directions given by the DRP, the Assessing Officer passed Final Assessment Order, dated 28/04/2022 granting partial relief to the Appellant by assessing the total income of the Appellant at INR 110,23,62,420/- as against the proposed assessed income of INR 115,07,88,560/- in the Draft

Assessment Order, dated 15/06/2021. The position after the relief granted in the Final Assessment Order can be summarized as under:

Sr. No.	Nature of TP adjustment	Adjustment proposed by TPO	DRP Directions	Final Assessment Order
1	On the issue of purchase of SIPL shares from AE	TPO proposed charging notional interest on the excess payment made by Appellant for purchase of SIPL	DRP deleted the adjustment in relation to notional interest.	Assessing Officer allowed the relief on the notional interest following DRP Directions.
		Further, the TPO proposed downward adjustment of cost of acquisition in the subsequent assessment years		However, the Final Assessment Order is silent on downward adjustment in relation to the cost of acquisition of shares in the subsequent assessment years
2	On the issue of purchase of QNPL Shares from AE:	TPO proposed adjustment/addition under Section 56(2)(viia) of the Act	DRP deleted the adjustment/addition	Assessing Officer allowed the relief following DRP directions
3	On the issue of sale of Shares of QNPL to SIPL	TPO proposed upward adjustment of INR 71,64,92,650/- impacting the sale consideration	DRP confirmed the action of the TPO	Assessing Officer made the addition by computing capital after taking into account transfer pricing adjustment of INR 71,64,92,650/- and taking sale consideration as INR 5,60,00,82,800/-
4	On subscription of shares of SIPL by Appellant,	TPO proposed charging of notional interest on the excess subscription amount over the	DRP deleted the adjustment in relation to notional interest.	Assessing Officer allowed the relief on the notional interest following DRP Directions.

	as consideration for sale of share of QNPL to SIPL	arm's length price of shares of SIPL		

7. Not being satisfied with the partial relief granted by the DRP and the Final Assessment Order, dated 28/04/2022, the Appellant has preferred the present appeal on the grounds reproduced in paragraph 2 above which are taken up hereinafter.

8. We have heard the Ld. Authorised Representative for the Appellant and the Ld. Departmental Representative and taken into consideration the material on record on which reliance was placed by the parties during the course of hearing.

9. The brief facts and the chronology of events as culled out from the material on record and after taking into consideration the submissions advanced by both the sides are as follows:

9.1 The Appellant/TPG Growth II Markets Pte. Ltd. (for Short '**TPG'**), TPG Growth II Market Holdings Pte. Ltd. and TPG Growth II SF Pte. Ltd. are private limited companies incorporated under the Singapore Laws and engaged in investment activities.

9.2 The Appellant is a wholly and subsidiary of TPG Growth II Market Holdings Pte. Ltd. (for Short '**the Holding Company**') which in turn is a subsidiary of TPG Growth II SF Pte. Ltd. (for Short '**TPG SF'**). Thus, the TPG SF is the ultimate holding company of the Appellant.

9.3 The TPG SF held 53.37% share capital of SIPL (now known as Healthium Meditech Pvt. Ltd.) and 76% share capital of QNPL.

9.4 On 09/12/2016, the Appellant entered into 'Agreement for the transfer of the Shares of Sutures India Private Limited and Quality Needles Private Limited' [for Short '**the Agreement**'] with the TPG SF. As per the Agreement, the Appellant agreed to acquire the above investment of TPG SF in shares of SIPL and QNPL. Thus, the Appellant acquired

(a) 9,15,762/- ordinary shares of SIPL for USD 110,879,905/- (equivalent to INR 736,54,52,694/-) at a value of INR 8,042.98 per share, and

(b) 3,95,200/- ordinary shares of SIPL for USD 51,484,856/- (equivalent to INR 342,00,00,000/-) at a value of INR 8,653.85 per share;

The consideration for the purchase of shares of SIPL and QNPL was discharged by the Appellant by return/cancellation of Promissory Note, dated 09/12/2016, issued by the Ultimate Holding Company/TPG SF to the Holding Company worth USD 110,879,905/- and USD 51,484,856/-, respectively.

9.5 On 06/03/2017 each share of SIPL having face value of INR 10 was split into 5 shares of INR 2 each.

9.6 On 26/03/2017, the Appellant entered into following three separate Share Purchase Agreements, each dated 26/03/2017, with the existing shareholder of SIPL after share split.

(a) Share Purchase Agreement with Ambrose Private Limited (For short 'Ambrose') for acquiring 419,337 shares for consideration of INR 7,36,54,52,694/- at a value of INR 1,608.59/- per share

(equivalent price per share assuming no share split INR 8,058.2/-)

(b) Share Purchase Agreement with AAJV Investment Trust (For short 'AAJA') for acquiring 8,558 shares for consideration of INR 1,37,92,378/- at a value of INR 1,611.64/- per share (equivalent price per share assuming no share split INR 8,058.2/-)

(c) Share Purchase Agreement with three individual/promoter for acquiring 4,25,280/- equity shares at a value of INR 1,611.64 per share (equivalent price per share assuming no share split INR 8,058.2/-)

(i) Mr. LG Chandrasekar [for Short 'Promoter1'] for acquiring 1,35,315/- shares for consideration of INR 21,80,78,485/-

(ii) Ms. Geeta Chandrasekhar [for Short 'Promoter2']for acquiring 1,81,055/shares for consideration of INR 29,17,94,702/-

(iii) Mr. S Subramanian [for Short 'Promoter3'] for acquiring 108,910/- Shares for consideration of INR 17,55,23,244/-

9.7 On 29/03/2017, Bonus issue of shareholder of SIPL was made in the ratio of 3 bonus equity shares for every 1 equity share held. Thus, 2,55,95,115 equity shares having face value of INR 2 each were issued as follows (i) 12,10,695 equity shares to L.G. Chandrasekhar, (ii) 17,60,415 equity shares to Geetha Chandrasekhar, (iii) 9,40,875 equity shares to S. Subramanian, (iv) 765 equity shares to S.V. Nene, (v) 85,431 equity shares to AAJV Investment Trust, (vi) 41,86,209 equity shares to Ambrose Private Limited, (vii) 1,62,95,955 equity shares to TPG SF, (viii) 4,78,500 equity shares to Ajay Patel, (ix) 5,53,845 equity shares to Hemang Badiani, (x) 69,360 equity shares from Christopher Portis, (xi)

13,065 equity shares from Mahadevan Narayannamoni[1]

9.8 On 29/03/2017 the Appellant exercised call option and acquired 1,24,800/- shares of QNPL representing 23.949% shareholding for consideration of 107,77,20,384/- at a value of INR 8,635.58/- per share from Mr. Viney Sagar Sehgal

9.9 On 30/03/2017, the Appellant sold to SIPL, 5,20,000/- equity shares of QNPL for consideration of INR 4,49,05,01,600/- at a value of INR 8635.58/- per share. In order to discharge consideration, on 31/03/2017 SIPL issued to the Appellant 1,19,65,193 equity shares of SIPL for of INR 375.29 per share (post stock-split and bonus issue) by way of preferential allotment.

9.10 Therefore, during the assessment proceedings for the Assessment Year 2017-18, the Assessing Officer noted that the Appellant had, during the previous year 2016-17, entered into following international transactions

- Purchase of 3,95,200 equity shares of SIPL by the Appellant from TPG SF at a value of INR 8,042.98 per share for a consideration of INR 7,36,54,52,694/- on 12/12/2016.

- Purchase of 9,15,762 equity shares of QNPL by the Appellant from TPG SF at a value of INR 8653.85 per share for a consideration of INR 3,42,00,000/-, on 12/12/2016.

- Sale of 5,20,000 shares of QNPL by the Appellant to SIPL at a value of INR 8,635,58 per share for a consideration of INR 4,49,05,01,600/- 30/03/2017

- Allotment of 1,19,65,193 equity shares of SIPL by SIPL to the

1 Draft Red Herring Prospectus placed at page 1607 to 1611 of the paper-book

Appellant in discharge of the above consideration of INR 4,49,05,01,600/-

9.11 The TPO passed an order, dated 30/01/2021, under Section 92CA(3) of the Act, proposing transfer pricing adjustment of INR 1,99,40,70,269/-, which was revised to INR 1,29,38,26,665/- vide Rectification Order, dated 06/08/2021.

9.12 The Assessing Officer incorporated the aforesaid transfer pricing adjustment in the Draft Assessment Order dated 15/06/2021. In the Objections filed by the Appellant against the Draft Assessment Order, the DRP granted partial relief vide order dated 31/03/2022.

9.13 The Assessing Officer passed the Final Assessment Order, dated 28/04/2022, as per the directions issued by the DRP which has been impugned by way of present appeal on the grounds reproduced in paragraph 2 above.

10 Before adjudicating the specific grounds raised, it would be pertinent to refer to the legal background common to all the issues raised in appeal.

11 The transfer pricing provisions were introduced by way of insertion of Section 92 to Section 92F in Chapter X of the Act containing special provisions relating to avoidance of tax in the year 2001. Section 92(1) of the Act provides that income arising from 'International Transaction' shall be computed having regard to the arm's length price. Section 92B of the Act deals with the meaning of expression 'International Transaction'. Section 92B(1) of the Act 'International Transaction' to mean transaction between two or more AEs (either or both of whom are non-residents) in the nature of purchase, sale, or lease of any tangible or intangible property, or

provision of services, or lending/borrowing of money, or any other transaction having bearing on the profits, income, losses or assets of such enterprises. Thus, the definition of 'International Transaction' includes in its ambit any transaction having bearing on the profit, income, losses or assets the enterprises involved. A transaction of issuance, purchase or sale of shares would have bearing on the assets, being cash, cash equivalents, receivables, payables, investments or stock-in-trade, of the enterprises involved. In case of issue of shares the assets of the issuer would increase by the subscription amount paid/payable, while the assets of the subscriber in the form of cash, investment, or stock-in-trade also see variation on subscription of shares. Similar is the impact on the assets of the enterprises involved in case of purchase/sale of shares.

12 However, for triggering the provision contained in Chapter X relating to determination of APL it is not sufficient that there must be 'International Transaction'. The aforesaid 'International Transaction' should also necessitate computation of income. Section 92(1) of the Act provides that any income arising from international transaction shall be computed having regards to the ALP. The Hon'ble Bombay High Court has, in the case of Vodafone India Services Vs. Union of India : 368 ITR 1 had observed that the provisions contained in Chapter X of the Act are machinery provisions to arrive at arm's length price of a transaction between AEs. Thus, it can be concluded that the machinery provisions contained in Chapter X related to determination of ALP would come into play at the stage of computation of income arising from 'International Transaction'.

13 Further, the Hon'ble Bombay High Court had, in the case of Shell

India Markets Private Limited Vs. ACIT : 2014 369 ITR 516, held that the provisions contained in Chapter X of the Act would be triggered only when income arises from an international transaction and such income is chargeable to tax under the provisions of the Act. Thus, the twin conditions that are required to be satisfied are that first, there must be 'International Transaction' and second, that such 'International Transaction' should result in income chargeable to tax.

14 At this juncture it would be pertinent to refer to Explanation of Section 92B(1) of the Act and Section 92B(2) of the Act which provide exception to the aforesaid rule. Explanation to Section 92B(1) of the Act provides that allowance of expense or interest arising from an 'International Transaction' shall also have to be determined having regard to the ALP. While, Section 92B(2) of the Act, cost/expenses allocated, apportioned or contributed by AEs under a mutual agreement or arrangement in relation to a benefit, service or facility provided or to be provided by one of the AEs shall also have to be determined having regard to the APL of the benefit, service or facility provided or to be provided.

15 Further, in a case where the chargeability of income under the provisions of the Act itself depends upon the computation of income and the income so computed meeting a specified threshold, the applicability of provisions of contained in Chapter X of the Act for determination of ALP would apply or not apply depending upon the specific provision contained in the Act for example in the case of Section 56(2)(vii)/(viia)/(viib) of the Act.

16 Section 92C of the Act provides for computation of arm's length

price or ALP. It provides that the ALP shall be determined by applying the Most Appropriate Method out of the following six methods:

(a) Comparable Uncontrolled Price Method (For short '**CUP Method'**)

(b) Resale Price Method (RPM)

(c) Cost Plus Method (CPM)

(d) Profit Split Method (PSM)

(e) Transactional Net Margin Method (TNMM)

(f) Such other method as may be prescribed by the Board (For short '**Other Method'**)

17 Rule 10B deals with the manner of determination of ALP using the different methods. In the present appeal we are concerned with application of CUP Method and Other Method.

18 As regards OM, Rule 10B(1)(f) read with Rule 10AB provides that OM shall be any method which takes into account the price which has been charged/paid, or would have been charged/paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts. For example a valuation of shares obtained from an independent expert determining the value/price of shares that would have been charged in case of purchase/sale of such shares by two independent third-parties.

19 As regards CUP Method, Rule 10B(1)(a) provides that ALP shall be determined by using CUP Method, being the most appropriate method, and the same shall require:

(i) Identification of the price charged/paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions (hereinafter referred to as '**the Price'**)

(ii) Computing the quantum of adjustment to be carried out to account for differences, if any, between the international transaction and the comparable uncontrolled transactions; or between the enterprises entering into such transactions, which could materially affect the price in the open market (hereinafter referred to as '**the Adjustment'**)

(iii) Adjusting the Price for the Adjustment to arrive at the ALP

20 Thus, the first step for determination of ALP using CUP Method is the identification of a transaction that is (a) comparable and (b) uncontrolled.

21 Rule 10A(ab) defined 'uncontrolled transaction' to means a transaction between enterprises other than associated enterprises, whether resident or non-resident.

22 Rule 10B(2) provides that the 'comparability' of an international transaction with an uncontrolled transaction shall be judged with reference to the following:

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions (For Short '**FAR Analysis'**);

(c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions (For Short '**Contractual Terms**');

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail. (For Short '**Market Conditions**);

23 CUP Method required high level of comparability as to property or goods involved, FAR Analysis, Market Conditions and Contractual Terms. Further, CUP Method also requires the Adjustment to the Price in case there are differences that materially affecting the price of the product/service in open market. The Adjustment could be required in respect of differences either in the international transaction and comparable uncontrolled transaction or in the enterprises undertaking the same. As per Rule 10B(3) an uncontrolled transaction shall be comparable with 'International Transaction' in case there are no differences having material affect, or the impact of differences having material effect has been reasonably accurately adjusted by way of the Adjustment. CUP can be Internal CUP being a transaction by an associated enterprise/tested party with a third party or an External CUP being a transaction between two third parties (not being associated enterprises). The onus to show that the transaction used for benchmarking is comparable uncontrolled transaction is on the person applying CUP Method for benchmarking the transaction.

24 Keeping in view the above legal background common to the grounds raised, we proceed to adjudicate the grounds raised in appeal.

Ground No. 1

25 Ground No. 1 pertain to the transaction of purchase of shares of SIPL and QNPL by the Appellant from its AE (i.e. TPG SF)

26 We would first take up the transfer pricing adjustment in relation to purchase of 9,15,762/- equity shares of SIPL by the Appellant for a consideration of INR 7,36,54,52,694/- at a value of INR 8,042,98 per share. The Appellant had selected Other Method as the most appropriate method and benchmark the transaction on the basis of valuation report, dated 17/11/2016 wherein the value of shares of SIPL was determined by an independent valuer by following Discounted Cash Flow Method at INR 8,042.98/- which was same as the actual purchase consideration paid by the Appellant to its AE (i.e. TPG SF). However,

26.1. While TPO accepted the 'Other Method' as the Most Appropriate Method for benchmarking the transaction of purchase of shares of SIPL, the TPO rejected the valuation report from independent valuer furnished by the Appellant. Instead of the projected figured, the TPO used the actual financial results for determining the value of shares of SIPL using Discounted Cash Flow Method (DCF Method), to arrive at the value of INR 2,155.06/- per share of SIPL as against INR 8,042.98/- determined in the valuation report of the independent valuer relied upon by the Appellant. Thus, the TPO concluded that the Appellant had made excess payment of INR 5,814.91/- per share for purchase of 9,15,762/- equity shares of SIPL. Accordingly, the TPO concluded that excess payment of INR 532,50,73,612/- was made by the Appellant to its AE (i.e. TPG SF) and therefore, the TPO proposed downward adjustment of INR 532,50,73,612/- in the cost of purchase of shares in subsequent years. Further, TPO treated the excess payment as loan to the AE and charged notional interest on the same at the rate of LIBOR + 2.43% per annum for a period of 135 days (from 17/11/2016 to 31/03/2017) and proposed transfer pricing addition of INR 4,78,60,001/- on account of notional interest.

26.2. In the Objections filed by the Appellant before DRP against the Draft Assessment Order, dated 15/06/2021 wherein the above transfer pricing addition of INR 4,78,60,001/- was incorporated, the DRP granted relief to the Appellant as it directed deletion the aforesaid addition. In the Final Assessment Order, 28/04/2022, the Assessing Officer implemented the aforesaid directions of DRP and no transfer pricing addition was made on account of notional interest.

26.3. The grievance of the Appellant is that the Final Assessment Order passed by the Assessing Officer is silent on the proposed downward adjustment in relation to the cost of acquisition of shares in the subsequent years.

26.4. During the course of hearing, the Learned Authorised Representative for the Appellant had vehemently contended that the TPO/DRP fell in error in arriving at the value of the share of SIPL by replacing the projected figures in DCF valuation with actual financial results for determining cash flows for different financial years. In this regard, he place reliance on the following judicial precedents:

- DQ (International) Ltd. Vs. ACIT: [ITA No. 151/Hyd/2015 (Hyderabad ITAT)
- Aaradhana Realties Limited Vs. DCTT: [ITA No. 2195/MUM/2014

(Mumbai)

- PCIT Vs. Cinestaan Entertainment Pvt. Ltd: [ITA 1007/2019 (Delhi High Court)
- Planet Gogo Pvt. Ltd. Vs. ITO: [ITA No. 1526/Del/2022 (Delhi ITAT)

26.5. Per contra, the Learned Departmental Representative supported the order passed by the TPO on this issue, and relied upon Rule 10B(5) of the Income Tax Rules, 1962 (hereinafter referred to as '**the Rules**'). He submitted that the TPO was correct in determining the value of shares of SIPL on the basis of actual financial results. He also placed reliance on BEPS: Action 8 dealing with OECD Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles (For short '**HTVI**'). The Learned Departmental Representative submitted that in cases where the actual cash flows are significantly higher than the anticipated cash flows on which the pricing was based, there was presumptive evidence that the projected cash flows used in the original valuation should have been higher, and in such situation the actual cash flows can be adopted for valuation purposes.

26.6. Having considered the rival submissions, we find merit in the contention advanced by the Learned Authorised Representative for Appellant that the TPO could not have substituted the actual figures for projected figures in DCF valuation for the purpose of determining the value of shares of QNPL. The decision of Hyderabad Bench of Tribunal in the case of DQ (International) Ltd. (supra), which was followed by the Mumbai Bench of the Tribunal in the case of Aaradhana Realties Limited (supra) supports the aforesaid contention advanced on behalf of the Appellant.

26.7. We note that in the case of DQ Entertainment (International) Ltd. (supra) it was held by the Tribunal that while computing value of intangible asset by using DCF Method the future projections cannot be substituted with the actual figures. The relevant extract of the aforesaid decisions of the Tribunal read as under:

> *"8.3 The ld. AR submitted that the valuation by applying DCF method or any other method is always applied by considering projections of revenues (which were based on the detailed market expectation on that particular date) which cannot be tinkered at a later point of time by substituting actuals. Nowhere such an approach is technically accepted.*
>
> *8.4 Ld. AR referred to the decision of the ITAT, Bangalore in the case of In Tally Solutions (P.) Ltd. v. Dy. CIT [2011] 14 taxmann.com 19/48 SOT 110 wherein the Hon'ble Bangalore Tribunal held as under:*
>
>> *"The excess earning method is the method that is adopted by the TPO. We see no infirmity in adoption of this method for the simple reason that the relevant data is available with reasonable accuracy, closing in on real valuation of a software product. This valuation is upheld by the US courts while arriving at the sale value of a software product. Further, the valuation under the method mainly revolves around discounted cash flow DCF analysis which is known to economists for the times immemorial. Thus, the TPO used a reasonable well accepted method of valuation of in tangibles including software products and accepted by courts in the countries like in USA, where the TP regime is well developed.*
>>
>> *Further, the assessee's contention to adopt the actual revenues for the future years which are available now cannot be accepted now for a simple reason that the ALP was calculated on the date of sale which was in January, 2006 itself and also under EEM future revenues will be projected based on the previous year data keeping the current year's data as the base which has got no relevance on the actual revenues during the future years. We also make it clear that the actual CAGR shall be adopted by the TPO without any discount."*
>
> *8.5 Finally ld. AR submitted that TPO's contentions of replacing the projections with actuals are legally unsustainable and technically incorrect.*

9. Ld. DR submitted that the TPO with a view to determine the fair price replaced the projected figures in the DCF with the actual figures from the audited financial statements. In this regard, the TPO observed that there was a wide difference in the valuation of the intangible and therefore the TPO is well within his powers to examine and analyze the transaction and arrived at the Arm's Length Price with the information available.

9.1 Ld. DR submitted that the TPO requested the taxpayer company to provide justification for the revenues projected as he found from the valuation report that the projections have been provided by the management themselves. The TPO obtained that financial statement of DQ Ireland and replaced projected figures in valuation report by Grant Thornton and retained all other values and margins provided by the valuer. The result of such exercise resulted in the value of IP of Jungle Book at a relatively higher amount. The TPO could not arrive at the figures of "Value till patent IP expiry" of RS.2.70 lakhs and "TAB" of RS.1.21 crores as adopted by the valuer. If such figures are known then the value of the IP will further increase. Since the difference in the valuation was so fundamental, that in an uncontrolled circumstances independent parties' would have entered into a renegotiation or an adjustment to the negotiated price. Ld. DR submitted that in such a case of wide variation in the price, the TPO is justified in concluding that the transaction is not at arm's length. The TPO is well within his powers as provided in para 9.87 & 9.88 of QECD Transfer Pricing Guidelines and substituted his own prices for the actual transaction undertaken as the difference in valuation was substantial.

10. Considered the submissions of both the parties and perused the material facts on record as well as the orders of revenue authorities. The assessee had sold 'IP' to its "AE" after considering the independent valuation from two valuers and arrived at the sale consideration. No doubt the projections were submitted by assessee for such valuation. <u>Now, the revenue has no problem with the valuation but they are replacing the projected values with actual values. The question arises, whether the action of the revenue was justified for replacing the projection with actuals after three years down the line</u> ? Ld. AR submitted two case laws before us. The first being the valuation submitted by the independent valuers has to be adopted without any modification as held in Social Media India Ltd.'s case (supra). The coordinate bench of this Tribunal held that "the assessee's valuation has to be accepted as it was supported by an *independent valuer." We are in agreement with the above decision. But now the question before us is, whether the actual result can be adopted in the valuation of "IP". The ld. AR has also brought to our knowledge the decision of ITAT, Bangalore in the case of Tally Solutions (P.) Ltd. (supra). In the above case, the assessee attempted to adopt the actual revenues for the future years which were available then, which was rightly declined by the Bangalore Bench. We are in agreement with the above findings of the Bangalore Bench that the valuation method adopted for determining the future years cannot be replaced with actuals down the line, the valuation will go either way. When it goes to north, the revenue may adopt the same time, when it goes to south, the assessee may adopt, there won't be any consistency. What is important is the value available at the time of making business decision. It should be left to the wisdom of the businessman, he knows what is good for the organization. No doubt, 'IP" was sold to "AE". The method adopted should be consistent and should be documented to review in the future. The review does not mean replacing the projection with actuals. It is the rational of adopting the values for making decision at the point of time of making decision. When the values are replaced subsequently, it is not valuation but evaluation i.e. moving the post of result determined out of projections. The revenue is doubting the valuation because the actual revenues were favourable. In rational decision making, the actual results are irrelevant. In the present case, the valuation was done by two independent valuers not by the assessee. The other issue with this are that the revenue adopted the actuals of AE without considering whether they are revenues generated out of the "IP" or not. They simply adopted the revenues of AE without giving proper findings that the revenues of AE are all generated only out of this "IP" (Jungle Book). The assessee submitted that these revenues are generated by "AE" out of other properties (IPs) as well. We are of the view that the revenue cannot adopt such values without proper verification. In our considered view, for valuation of an intangible asset, only the future projections alone can be adopted and such valuation cannot be reviewed with actuals after 3 or 4 years down the line. Accordingly, the grounds raised by assessee are allowed." (Emphasis Supplied)*

26.8. We have also perused the BEPS: Action 8 dealing with OECD Guidance for Tax Administrations on the Application of the Approach to HTVI on which reliance was placed by the Learned Departmental

Representative and the relevant extract of the same reads as under:

> *"5. Tackling information asymmetry between the extensive information available to and the absence of information available to the tax administration, other than what the taxpayer may present, is at the heart of the reason for HTVI guidance in Section D.4 of Chapter VI of the Guidelines. When a HTVI is transferred, each of the parties involved in the transaction are likely to prepare a valuation at the time of the transaction using assumptions based on its specialised knowledge, expertise and insight into the business environment in which the intangible is developed or exploited. The problem for the tax administration is that the valuation is extremely difficult to objectively evaluate since such evaluation may be wholly based on the information provided by the taxpayer. Such information asymmetry restricts the ability of tax administrations to establish or verify, at an early stage, the developments or events that might be considered relevant for the pricing of a transaction involving the transfer of intangibles or rights in intangibles, as well as the extent to which the occurrence of such developments or events, or the direction they take, might have been foreseen or reasonably foreseeable at the time the transaction was entered into.*
>
> *6. The HTVI guidance aims at providing a tool for tax administrations to address this problem. In the case of intangibles which fall within the definition of HTVI found in paragraph 6.189, and under certain conditions, tax administrations are entitled to consider ex post outcomes as presumptive evidence about the appropriateness of the ex ante pricing arrangements. Where, the actual income or cash flows are significantly higher or lower than the anticipated income or cash flows on which the pricing was based, then there is presumptive evidence (from the perspective of the tax administration) that the projected income or cash flows used in the original valuation should have been higher or lower, and that the probability-weighting of such an outcome requires scrutiny, taking into account what was known and could have been anticipated at the time of entering into the transaction involving the HTVI. However, it would be incorrect to base the revised valuation on the actual income or cash flows without also taking into account the probability, at the time of the transaction, of the income or cash flows being achieved." (Emphasis Supplied)*

26.9. The above Guidance for Tax Administrations clearly provides that where the actual cash flows are significantly higher than the projected cash flows, there is a presumption that projected cash flows should have been higher requiring scrutiny for the probability-weighing of such outcome. However, the Guidance goes on to provide that it would be incorrect to base revised valuation on actual cash flows without taking into account the said probability. We note that no such scrutiny or probability-weighing was done by the TPO. Therefore, the above OECD Guidance on which reliance was placed by the Learned Departmental Representative does not come to the aid of the Revenue.

26.10. Further, in our view, reliance by the Revenue on Rule 10B(5) of the Rule is also misplaced. Rule 10B(5) reads as under:

> *"(5) In a case where the most appropriate method for determination of the arm's length price of an international transaction or a specified domestic transaction, entered into on or after the 1st day of April, 2014, is the method specified in clause (b), clause (c) or clause (e) of sub-section (1) of section 92C, then, notwithstanding anything contained in sub-rule (4), <u>the data to be used for analysing the comparability of an uncontrolled transaction with an international transaction</u> or a specified domestic transaction <u>shall be</u>,*
>
> *<u>the data relating to the current year</u> ; or*
>
> > *<u>the data relating to the financial year immediately preceding the current year</u>, if the data relating to the current year is not available at the time of furnishing the return of income by the assessee, for the assessment year relevant to the current year*
>
> *<u>Provided that where the data relating to the current year is subsequently available at the time of determination of arm's length price of an international transaction</u> or a specified domestic transaction <u>during the course of any assessment proceeding for the assessment year relevant to the current year, then, such data shall be used for such determination irrespective of the fact that the data was not available at the time of furnishing the return of income of the relevant assessment year</u>" (Emphasis Supplied)*

26.11. Rule 10B(5) of the Rules provides for use of current year data or data pertaining to financial year immediately preceding current year. The proviso to Rule 10B(5) deals with the availability of data of current year subsequent to the determination of arm's length price and permits use of the same for determination of ALP during assessment proceedings even though the data was not available at the time of furnishing of the return of income. Thus, Rule 10(5) does not provide for or deal with the data pertaining to future/subsequent years. The data used by the TPO pertains to years subsequent to the current year. Thus, Rule 10B(5) also does not further the case of the Revenue.

26.12. A perusal of Rule 10D(1)(j) of the Rules would show that a person undertaking an International Transaction is required to maintain a record of the actual working carried out for determining the ALP, including details of the comparable data and financial information used in applying the Most Appropriate Method, and adjustments, if any, which were made to account for differences between the international transaction and the comparable uncontrolled transactions. This also shows that the data which is required to be used and maintained by the Appellant has to be data available at the time of determining the ALP [with proviso to Rule 10B(5) providing exception to the aforesaid general rule].

26.13. In view of the above, we reject the approach adopted by the TPO for the purpose of determining the value of shares of SIPL by substituting actual financial results for the projected results in the DCF valuation furnished by the Appellant.

26.14. The Revenue has accepted the directions issued by DRP and no addition has been made in relation to income arising from the international transaction of purchase of shares of SIPL. Further, admittedly even the Final Assessment Order does not provide for downward adjustment in the cost of acquisition of share of SIPL.

Therefore, in the facts and circumstances of the case we hold that no adjustment can be made in the cost of purchase of shares of SIPL. As regards, contentions of the Appellant that the TPO had ignored the comparable uncontrolled transactions, the same are dismissed as being infructuous.

27 Now we would take up the transaction relating to the purchase of purchase of 3,95,200/- equity shares of QNPL by the Appellant for a consideration of INR 3,42,00,00,000/- at a value of INR 8,653.85 per share. The Appellant had selected Other Method as the most appropriate method and benchmark the transaction on the basis of valuation report, dated 17/11/2016, wherein the value of shares of QNPL was determined by an independent valuer by following Discounted Cash Flow Method at INR 8,653.85/- which was same as the actual purchase consideration paid by the Appellant to its AE (i.e. TPG SF).

27.1. As was the case in relation to transaction of purchase of share of SIPL, TPO rejected the valuation report from independent valuer furnished by the Appellant; replaced the projected figured in the DCF valuation report with the actual financial results and arrived at the value of INR 10,769.39/- per share of QNPL as against INR 8,653.85/- determined in the valuation report of the independent valuer relied upon by the Appellant. Thus, the TPO concluded that the Appellant had received shares of QNPL for a consideration of INR 2,115.54 per share of QNPL less than the fair market value and therefore, proposed transfer pricing adjustment of INR 83,60,61,408/-. In the Draft Assessment Order, dated 15/06/2021, the Assessing Officer proposed an addition of INR 83,60,61,408/- under Section 56(2)(viia) of the Act.

27.2. In the Objections filed by the Appellant before DRP against the Draft Assessment Order, dated 15/06/2021, the DRP granted relief to the Appellant holding as under:

> *"6.3.10 The assesee has next contended that the TPO has acted without Jurisdiction in determining income chargeable to tax under section 56(2)(viia) of the Act and further that the provisions of section 56(2)(vila) of the Act are attracted where a company receives any shares of another company for a consideration which is less than its fair market value and Rule 11UA read with Rule 11U of the Income-tax Rules 1962 (the Rules') prescribes the methodology for determining the fair market value of shares and securities for the purposes of section 56(2)(viia) of the Act, in the instant case the value of shares of QNPL as per section 56(2)(viia) of the Act read with Rules 11UA of Rules is INR 1,427.26 per share, which is less than the value determined by the Assessee re INR 8,653.85, hence, the provisions of section 56(2)(vila) of the Act cannot be attracted*
>
> *6.3.11 We have considered the submission of the assesseee and find merit in the argument of the assessee. Accordingly we direct the AO to delete the addition after verifying the claim. However we reject the contention of the assesee that TPO has acted without jurisdiction in determining income chargeable to tax under section 56(2)(viia) of the Act when the AO has passed an independent order on the issue."*

27.3. In the Final Assessment Order, dated 28/04/2022, the Assessing Officer implemented the aforesaid directions of DRP and no transfer pricing addition was made under Section 56(viia) of the Act. Therefore, the grounds raised by the Appellant to the extent the same relate to the transfer pricing adjustment on account of purchase of share of QNPL are concerned, the same are dismissed as being infructuous.

28 In terms of the paragraph 26.14 and 27.3 Ground No. 1 raised by the Appellant is partly allowed.

Ground No. 2

29 Ground No. 2 pertaining to transaction of Sale of Shares of QNPL by

the Appellant to SIPL.

30 As mentioned in paragraph 9.4 and 9.8 above, during the relevant previous year the Appellant had purchased 3,95,200 equity shares (constituting 76% of shareholding) of QNPL from TPG SF on in December 2016 and thereafter, on 29/03/2017 acquired additional 124,800 equity shares (constituting 23.949% of shareholding) of QNPL from the promoter (i.e. Mr. Viney Sagar Sehgal). Hence, the Appellant acquired 5,20,000 equity shares (constituting around 99.949% shareholding) of QNPL which were subsequently sold to SIPL on 30/03/2017 at INR 8,635.58/- per equity share. Thereafter, SIPL also acquired the balance 1,100 equity shares from the individual resident promoters (i.e. Mr. Mahadevan Narayanamoni) to become 100% shareholder of QNPL.

31 The Appellant benchmarked the transaction of sale of 5,20,000 equity shares of QNPL to its AE (i.e. SIPL) by using Comparable Uncontrolled Price (CUP) Method. The Appellant relied upon the following transactions to justify that the transaction of sale of shares was at arm’s length.

(a) Purchase of 3,95,200 equity shares (constituting 76% of the shareholding) of QNPL by the Appellant from its AE (i.e TGP SF) at a value of INR 8,635.85 per equity share on 12/12/2016

(b) Purchase of 1,24,800 equity shares (constituting around 23.94% shareholding) of QNPL by the Appellant from the promoter (i.e Mr. Viney Sagar Sehgal) at a value of INR 8,635.58 per equity share on 29/03/2017

(c) Purchase of 1,100 equity shares by SIPL from individual resident promoter (i.e. Mr. Mahadevan Narayanamoni) of

QNPL

32 During the course of hearing, the Ld. Authorised Representative for the Appellant had submitted that the sale consideration received by the Appellant from its AE (i.e. SIPL) was supported by the consideration received by the other shareholder of QNPL (holding about 26% equity shares) on sale of shares of QNPL. Accordingly, the CUP Method was considered to be the Most Appropriate Method. Further, the sale consideration was supported by an independent valuation report wherein the value of share of QNPL was determined at INR 8,635.58/- per share by following DCF method. Accordingly, Other Method has also been used on a corroborative basis. He further submitted that at the time the Appellant had sold equity shares of QNPL to its AE (i.e. SIPL) at a price of INR 8,635.58/- per share, SIPL had also purchased 1,100 equity shares from a third-party individual resident promoter (i.e. Mr. Mahadevan Narayanamoni) at the same price of INR 8,635.58/- per share. The Ld. Authorised Representative for the Appellant submitted that no transfer pricing adjustment was warranted as the CUP determined by the Appellant was supported by valuation report. However, the TPO erred in ignoring the above comparable uncontrolled transactions. Further, TPO also erred in replacing the projected figured in the DCF valuation report with the actual financial results to arrive at the value of INR 10,769.39 per share (rectified to INR 10,013.45/- per share) of QNPL as against INR 8,653.85/- determined in the valuation report of the independent valuer relied upon by the Appellant.

33 On perusal of record, we find that the TPO concluded that the consideration received by the Appellant from its AE (i.e. SIPL) was

less than arm's length price determined by the TPO. Therefore, the TPO proposed upward adjustment in the sale consideration of INR 1,10,95,81,200/- which was rectified to INR 71,64,92,650/- (INR 2,115.54 per share x 3,95,200) by the TPO vide rectification order, dated 06/08/2021.

34 The above transfer pricing adjustment of INR 71,64,92,650/- in the sale consideration proposed by the TPO was taken into consideration by the Assessing Officer while determining the capital gains arising from sale of shares of QNPL in the Final Assessment Order, dated 28/04/2022. In objections filed by the Appellant on this issue, the DRP declined to grant any relief and dismissed the objection filed by the Appellant.

35 During the course of hearing the Learned Authorised Representative for the Appellant had vehemently contended that the TPO/DRP fell in error in arriving at the value of the share of QNPL by replacing the projected figures in DCF valuation with actual financial results for determining cash flows for different financial years. We have, while adjudicating Ground No. 1, already rejected the identical approach/methodology adopted by the TPO. Therefore, in view of paragraph 26.6 to 26.13 above, we reject the approach adopted by the TPO for the purpose of determining the value of shares of QNPL sold by the Appellant to its AE (i.e. SIPL).

36 Now, as regards the Appellants benchmarking of the transaction using CUP is concerned, the Learned Authorised Representative for Appellant had contended that there were comparable uncontrolled transactions which were ignored by the TPO. In the present case the Appellant has relied upon the transactions undertaken by the

promoter/shareholders within the same requirement of comparability as regards same product/service discussed in paragraph 22(a) above stands fulfilled. However, as regards requirement of comparability discussed in paragraph 22(b)/(c)/(d) above, as flowing from Rule 10B(2), the TPO has expressed doubts about the comparability of transaction of sale of share of QNPL by the individual promoters (i.e Mr. Viney Sagar Sehgal and Mr. Mahadevan Narayanamoni) on account of Contractual Terms and Market Conditions. The relevant extract of the order of TPO reads as under:

"t) As regards subsequent purchases from third parties are concerned, the same is also found to be not comparable for the reason that, the assessee purchased on 12.12 2016 and the third party purchases are on 29.03.2017. There is a time gap of more than 3 months There may have occurred many significant changes/events during this period which might have impacted the share prices which is not taken into consideration by the assessee. For comparability under CUP or otherwise, contemporaneous data is a must under transfer pricing regulations/Secondly the third party purchases are bound by Share Holders Agreement between the promoters who are also the directors. existing share holders and the assessee and hence are actually controlled transactions which cannot be compared with that of assessee's pricing. The basis of valuation of third party purchases has not been brought on record by assessee except the copy of SHA.

u) The sale of investments to a third party at a higher rate in subsequent year has no relevance to the present valuation of the reported International transaction. The assessee in the instant transactions has clearly inflated the purchase cost to reduce future taxable gains in the transactions."

37 According to the TPO there is a difference of 3 months between the International Transaction and transactions projected as comparable

uncontrolled transactions by the Appellant. In our view, the contention of the Revenue that the gap of 3 months between the International Transaction and project comparable uncontrolled transactions would make the said transactions incomparable is a general averment not supported by factual analysis. Having said as aforesaid, we do find merit in the submission of the Learned Departmental Representative to the limited extent that where under shareholders agreement the parties thereto undertake to purchase/sell shares at value determined by independent expert, the transaction undertaken are more reflective of the valuation agreed upon rather than a price determined by market forces. The shareholder agreement executed by the shareholders of QNPL is not on record. However, Amended and Restated Shareholder Agreement, dated 26/03/2017, executed amongst the shareholders of SIPL is placed at page 1182 to 1270 of the paper-book and Schedule 7 thereto, dealing with Determination of Fair Market Value, supports the aforesaid view as it provides that the valuation determined by the independent valuer shall be binding on the parties. Further, we also find merit in the contention advanced by the Ld. Departmental Representative that the promoters looking for exit option to earn return on the investments made over the years could be placed differently as compared with investor acquire 100% shareholding in terms of expectations of risk and return calling for comparability analysis of the contractual rights and obligations before accepting the transactions as comparable. The Appellant had acquired shares from the promoter (i.e. Viney Sagar Sahgal) by triggering call option in terms of Shareholders Agreement. There is nothing on record to show that the exercise of call option had no impact on the determination of sale price. Therefore, in the facts and circumstances of the present case we hold that 'Other Method' be adopted as the most appropriate method for computation of ALP of transaction of sale of shares of QNPL by the Appellant to SIPL. Accordingly, we direct the Assessing Officer/TPO to re-compute the ALP of the aforesaid international transaction and the consequent transfer pricing adjustment, if any, on the basis of DFC valuation report furnished by the Appellant after verifying the same. In terms of the aforesaid, Ground No. 2 raised by the Appellant is partly allowed.

Ground No. 3

38 Ground No.3 pertains to the computation of Short Term Capital Gains arising from sale of shares of QNPL. In view of adjudication of Ground No. 2 above, Ground No. 3 is disposed off as being consequential in nature.

Ground No. 4

39 Ground No.4 pertains to the issuance/allotment of shares of SIPL to the Appellant by SIPL as consideration for purchase of shares of QNPL by SIPL from the Appellant.

40 Both the sides agreed that issues raised in Ground No. 4 are identical to the issues raised in Ground No. 1.

41 The Appellant had valued shares of SIPL issued to the Appellant at ALP of INR 375.29 per share of SIPL (based on external CUP). The TPO rejected the CUP Method as the most appropriate method. Thereafter, the TPO proceeded to replace the projections as considered in the valuation report by independent valuer with actual number to arrive at the value of INR 2,155.06 per share of SIPL (equivalent to INR 107.96 per share post splitting of each shares

into 5 shares and issuance of 3 bonus shares for each share) as against the value of INR 8,042.98 per share of SIPL (equivalent INR 402.15 per share post split and bonus issue) as determined by independent valuer in its valuation report. Thus, the TPO concluded that excess payment of INR 426,32,11,786/- was made by the Appellant to its AE (i.e. SIPL) after taking into consideration the value determined by the TPO of (a) the shares of QNPL sold by the Appellant and (b) the shares of SIPL issued/allotted to the Appellant. TPO treated the excess payment as loan to the AE and charged notional interest on the same at the rate of LIBOR + 2.43% per annum for a period of two days (from 30/03/2017 to 31/03/2017) and proposed transfer pricing addition of INR 4,78,60,001/- on account of notional interest of INR 5,67,650/-.

42 In the Objections filed by the Appellant before DRP against the Draft Assessment Order, dated 15/06/2021 wherein the above transfer pricing addition of INR 5,67,650/- was incorporated, the DRP granted relief to the Appellant as it directed deletion the aforesaid addition. In the Final Assessment Order, dated 28/04/2022, the Assessing Officer implemented the aforesaid directions of DRP and no transfer pricing addition was made on account of notional interest.

43 While adjudicating Ground No.1 & 2 we have rejected the valuation approach/methodology adopted by the TPO for the purpose of determining the value of shares by substituting actual financial results for the projected results in the DCF valuation furnished by the Appellant. Further, the Revenue has accepted the directions issued by DRP and no addition has been made in relation to income arising from the international transaction of issuance/allotment of

shares of SIPL in the Final Assessment Order. Further, the Final Assessment Order also does not provide for downward adjustment in the cost of share of SIPL. Therefore, in the facts and circumstances of the case we hold that no adjustment can be made in the cost of purchase of shares of SIPL. As regards, contentions of the Appellant that the TPO had ignored the comparable uncontrolled transactions, the same are disposed off as being academic or infructuous. Accordingly, Ground No. 4 raised by the Appellant is partly allowed.

44 In result, the present appeal preferred by the Appellant is partly allowed.

Order pronounced on 06.06.2023.

Sd/-	***Sd/-***
(B.R. Baskaran)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 06.06.2023
Alindra, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai