IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2429/Mum./2022
(Assessment Year : 2018–19)

Dimexon Diamonds Ltd.
716, Raheja Chambers
Free Press Journal Road ……. Appellant
Nariman Point, Mumbai 400 021
PAN – AAACD1877D

v/s

Asstt. Commissioner of Income Tax
Central Circle–1(4), Mumbai ……. Respondent

Assessee by : Shri Rajesh Simhan
Revenue by : Shri H. M. Bhatt

Date of Hearing – 08/12/2023	Date of Order – 30/01/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 26/07/2022, passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions dated 28/06/2022, issued under section 144C(5) of the Act by the learned Commissioner of Income Tax (DRP–1), Mumbai–1 [*"learned DRP"*], for the assessment year 2018–19.

2. In this appeal, the assessee has raised the following grounds:–

"On the facts and in the circumstances of the case and in law, the Learned AO pursuant to direction of the DRP and in conformity with order of Deputy Commissioner of Income Tax, Transfer Princing–1(2)(1) ("learned TPO") has:

1. *Erred in determining the Appellant's total income (after setting off losses) at INR 18,77,16,715 as against the returned income of INR 17,88,45,251.*

2. *Erred in proposing transfer pricing adjustment of INR 88,71,465 to the income of the Appellant.*

Transfer pricing provisions not applicable in absence of "income"

3. *Erred in making a transfer pricing adjustment in respect of the transaction of discharge of purchase consideration by the Appellant pursuant to a scheme of merger approved by the National Company Law Tribunal (NCLT) without appreciating the fact that the said transaction does not give rise to income under the provisions of the Act leading to inapplicability of Chapter X of the Act for the said transaction.*

Without prejudice:
Scheme of arrangement approved by NCLT and purchase consideration discharged after approval from Reserve Bank of India (RBI)

4. *Erred in disregarding the fact that scheme of merger (including the amount and form of purchase consideration) was duly approved by the NCLT vide its order dated 11 January 2018 where Hon'ble NCLT specifically states that the scheme is fair and reasonable and not in violation of any provisions of law.*

5. *Erred in not appreciating the principle of law that once the scheme is approved by NCLT the same is binding on all parties concerned, especially when the scheme is approved after giving due opportunity to all parties concerned.*

6. *Erred in not appreciating the fact that the purchase consideration discharged by the Appellant pursuant to the scheme of merger was in accordance with the Foreign Exchange Management Act Regulations and was discharged after obtaining due approval from the RBI.*

7. *Erred in substituting its judgment over that of the NCLT in respect of the manner of discharge of purchase consideration once it had held that the economic interest held by the shareholder of the amalgamating company in the amalgamating company is commensurate to its economic interest in the Assessee.*

Purchase consideration discharged by the Appellant at arm's length

8. *Erred in concluding that the payment of INR 100 crores and book value of Compulsory Convertible Debentures (CCDs) of INR 85 crores represented excess consideration despite holding that the economic interest held by the shareholder of the amalgamating company in the amalgamating company translated into an equivalent economic interest in the Assessee and failing to recognize that the issuance of fresh equity*

shares, CCDs and payment of INR 100 crores was only a method of discharging the purchase consideration.

9. *Erred in concluding that the payment of INR 100 crores and book value of CCDs of INR 85 crores in the purchase consideration was excessive and thereby, making a transfer pricing adjustment for notional interest on the payment of INR 100 Crores and disallowance of interest paid on CCDs.*

10. *Without prejudice, erred in not appreciating that CCDs issued by the Appellant are quasi-equity in nature and should be treated on a similar footing to the fresh equity shares issued by the Appellant and thereby, the payment for subscribing to the CCDs cannot be considered as an excessive payment.*

Economic analysis

11. *Erred in recharacterizing the payment of INR 100 Crores as deemed loan and imputing notional interest thereon.*

12. *Erred in rejecting the economic analysis undertaken by the Appellant, without pointing out any defects in the same as well as not appreciating that the Appellant had adhered to all the conditions laid out in Section 92C(3) of the Act.*

13. *Without prejudice, failed in adopting a scientific approach in conformity with the Act and the Income Tax Rules, 1962 for identifying a comparable interest rate for the alleged excessive payment of INR 100 Crores and CCDs.*

14. *Without prejudice, erred in not following/ incorrectly following any of the methods prescribed under Section 92C(1) of the Act for benchmarking the impugned excessive payment of INR 100 Crores.*

15. *Without prejudice, erred in not following/ incorrectly following any of the methods prescribed under Section 92C(1) of the Act for benchmarking the interest rate for the CCDs issued.*

16. *Without prejudice, failed to appreciate that if at all adjustment for interest is to be made, the same should be based on international rates (such as LIBOR) and not SBI PLR.*

Short grant of credit of Advance tax and Taxes deducted at Source ("TDS")

17. *Erred in not granting advance tax credit of INR 20,93,675.*

18. *Erred in not granting TDS credit of INR 8,60,996 claimed by the Appellant in the return of income of AY 2018-19.*

Incorrect levy of interest under Section 234C of the Act

19. *Erred in levying additional interest amounting to INR 1,52,106 under Section 234C of the Act.*

Initiation of penalty proceedings under Section 270A of the Act

20. Erred in initiating penalty proceedings under Section 270A of the Act.

The Appellant craves leave to add, delete, alter, vary, omit, substitute or amend any of the above grounds at any time before or during hearing before the Hon'ble Tribunal to decide the appeal according to law."

3. Grounds no. 1 and 2 are general in nature and therefore, need no separate adjudication.

4. The issue arising in grounds no. 3-16, raised in assessee's appeal, pertains to transfer pricing adjustment on account of consideration paid by the assessee to the associated enterprise pursuant to the merger of the holding company (i.e. subsidiary of associated enterprise) with the assessee (i.e. step down subsidiary of the associated enterprise).

5. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is primarily engaged in the diamond manufacturing/distribution business with operations spread across the globe. The assessee was established in 1995 and became a wholly owned subsidiary of Dimexon (India) Holding Pvt. Ltd. ("*DIHPL*") during the year 2006-07, which in turn is wholly owned by Dimexon International Holdings B.V., Netherlands ("*DIHBV*"), the ultimate parent company of the Dimexon Group. For the year under consideration, the assessee e-filed its return of income on 29/11/2018 declaring a total income of Rs. 17,88,45,250. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. The Assessing Officer ("*AO*") made reference under section 92CA(1) of the Act to the Transfer Pricing Officer ("*TPO*") for the determination of the arm's length price ("*ALP*") of the international transactions reported by the assessee in

Form No. 3CEB. During the year under consideration, the assessee entered into the following international transactions with its AE:-

Sr. No.	*Nature of Transaction*	*Amount (Rs.) A.Y. 2018–19*	*Benchmarking Method*
1.	*Import of Rough Diamonds*	*7894002503*	*TNMM*
2.	*Export of Rough and Polished Diamonds*	*5693031372*	*TNMM*
3.	*Recovery of Expenses*	*1964511*	*Other Method*
4.	*Interest on CCD*	*8049383*	*Other Method*
5.	*Payment of purchase consideration pursuant to scheme of amalgamation* *Issue of equity shares* *Issue of CCDs* *Cash*	 *33533120* *850000000* *1000000000*	*Other Method*

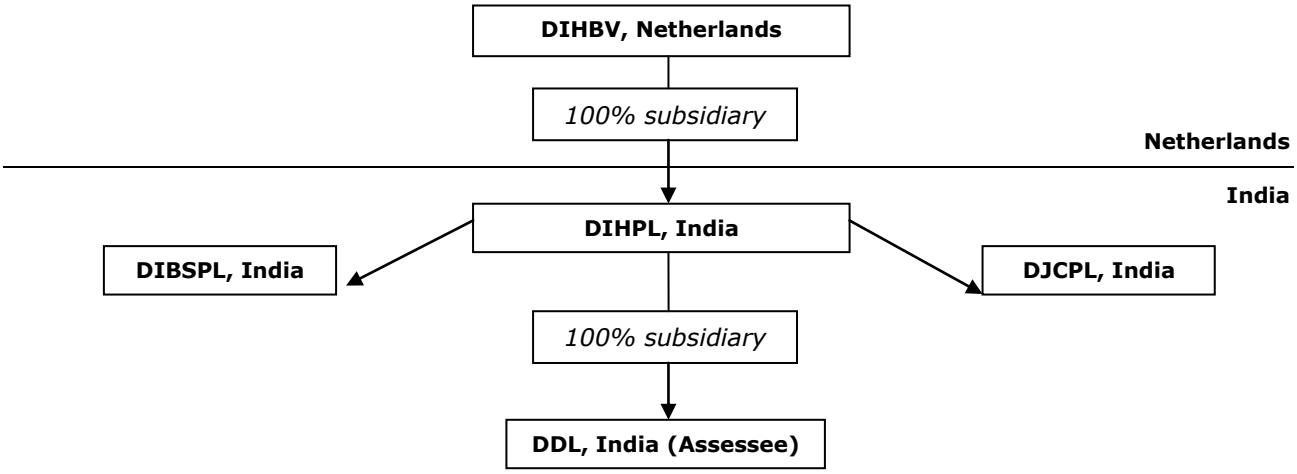
6. During the year under consideration, the assessee entered into a scheme of amalgamation with its holding company DIHPL, which in turn is a wholly-owned subsidiary of DIHBV. The aforesaid scheme of amalgamation was sanctioned by the Hon'ble National Company Law Tribunal ("*Hon'ble NCLT*") vide order dated 07/12/2017 and the appointed date for amalgamation was 01/04/2016. Pursuant to the sanction, the amalgamating company, i.e. DIHPL got merged into the assessee. For the said merger, the assessee paid a total purchase consideration of Rs. 188.35 crore to DIHBV (i.e. the holding company of DIHPL) as under:-

Issue of equity shares	*Rs. 3,35,33,120*
Issue of CCDs	*Rs. 85,00,00,000*
Cash	*Rs. 100,00,00,000*

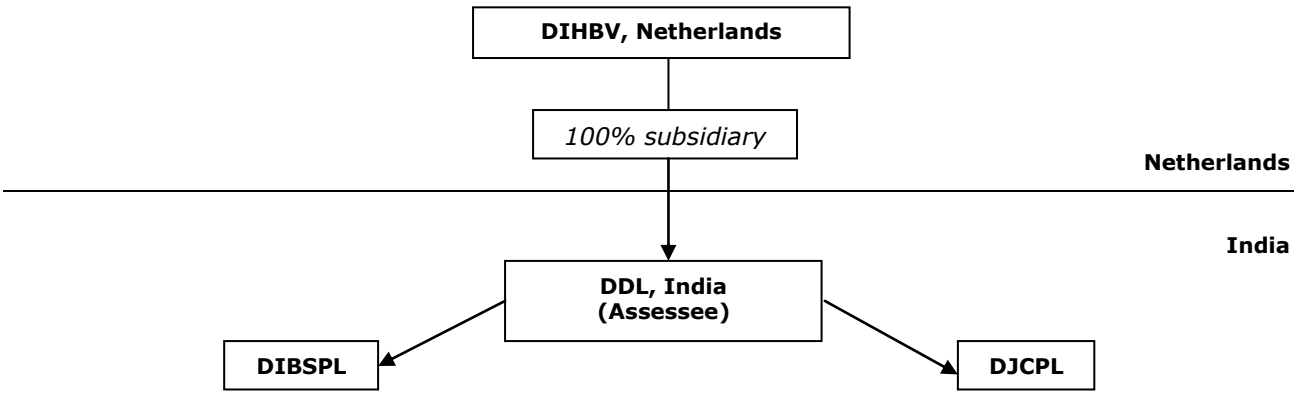
7. Therefore, pursuant to the aforesaid merger, the holding company of the assessee was changed from DIHPL to DIHBV in view of the cancellation of

existing shares of the assessee held by DIHPL and the issuance of new shares to DIHBV. Since the book value of DIHPL as on 31/03/2016 was Rs. 369,28,18,214 and pursuant to the merger, the total purchase consideration of only Rs. 188.35 crore was paid to DIHBV in the form of equity shares, Compulsory Convertible Debentures ("*CCDs*"), and cash, the assessee claimed that it has paid a lesser amount to DIHBV than the book value of the shares of DIHPL. The diagrammatic representation of the corporate structure of the Dimexon Group, pre-merger and post-merger of DIHPL with the assessee, is as under:-

(i) Pre-merger



(ii) Post-merger



8. The TPO vide order dated 31/07/2021 passed under section 92CA(3) of the Act did not agree with the submissions of the assessee and held that the

only truth embedded in and resulting from the scheme of merger is that the holding company of the assessee has changed from DIHPL to DIHBV. The TPO further held that the valuation report submitted by the assessee has no scientific basis for arriving at the purchase consideration paid in shares, CCDs, and cash. It was further held that it is abundantly clear from the valuation report that it is the management that has determined the purported purchase consideration and the valuer has simply followed the advice of the management without any application of mind whatsoever. Therefore, it was held that the valuation report cannot be taken as evidence regarding the assessee's compliance with any law in general or having entered into a transaction pursuant to the scheme of merger at ALP in particular. The TPO further held that the issue of fresh shares to DIHBV, cash consideration, and CCDs has been done with a view to shift profits out of India and reduce the taxable income of the assessee in India. It was further held that the fresh equity shares issued by the assessee to DIHBV represent the fair value of shares of the assessee post-merger. But the consideration paid in the form of CCDs and cash represents an excessive payment in lieu of purchase consideration and is not at arm's length as the assessee would not have paid the excess Rs. 100 crore in the form of cash and Rs. 85 crore in the form of CCDs to any independent party. It is also held that the assessee has not provided even a shred of documentary evidence to establish that the independent party would have entered into such a transaction at the price at which it was entered into by the assessee. Accordingly, the TPO held that the cash of Rs. 100 crore paid to DIHBV represents a deemed loan and the payment in the form of CCDs also represents excessive payment, thus the ALP

of the interest paid on such CCDs should be treated as Nil as the payment made to DIHBV vide CCDs itself was not at arm's length. The TPO also rejected the contention of the assessee that as the scheme of merger has been approved by Hon'ble NCLT the said transaction is at arm's length on the basis that the only authority of the law to determine the ALP of the international transaction is the TPO. The assessee's contention that the purchase of shares of DIHPL by the assessee and issuance of equity shares to DIHBV is a transaction on capital account, wherein no income arises was also rejected by the TPO on the basis that the assessee has made excessive payment to the tune of Rs. 185 crore in the form of CCDs and cash to DIHBV, which represents an artificial liability created in the books of the assessee for the sole purpose of shifting profits outside India. The TPO also held that it is not the case of re-characterisation but in the present case pursuant to the scheme of amalgamation, the entire character of the original equity was changed into equity, CCDs, and cash based on an unscientific valuation report prepared solely on management's guidance without any independent application of the mind by the valuer. Accordingly, the AO treated the cash paid to DIHBV as not an arm's length transaction and held it to be treated as a loan. As a result, the ALP of the interest paid on issuance of CCDs at Rs. 80,49,383 was treated as Nil using the CUP method. Further the cash of Rs. 100 crore paid to DIHBV was treated as a deemed loan and benchmarked by charging interest at SBI PLR plus 300 basis points on the basis of the CUP method. Accordingly, the TPO made up a total transfer pricing adjustment of Rs. 17,47,49,383, i.e. Rs. 80,49,383 in respect of international transaction pertaining to interest on CCD and Rs. 16,67,00,000 in respect of interest on loan provided to the AE.

9. The AO vide draft assessment order passed under section 143(3) read with section 144C of the Act computed the total income of the assessee at Rs. 54,25,19,256 after incorporating the transfer pricing adjustment made by the TPO. Being aggrieved, the assessee filed detailed objections before the learned DRP.

10. Vide its directions dated 28/06/2022 issued under section 144C(5) of the Act, the learned DRP rejected the objections raised by the assessee on this issue and held that in the present case, there has been an organizational change within the group by way of a merger between two group entities and therefore such a transaction will amount to an international transaction within the meaning of section 92B of the Act. The learned DRP further held that since in a transaction of merger, cash has been transferred from the assessee to its parent holding company and also the liability has been incurred by issuing CCDs, therefore there is clearly a bearing on the profits and income of the assessee. Thus, it was held that income from such transaction is to be computed on the basis of arm's length price. It was further held that the TPO has neither questioned nor disregarded the scheme approved by the Hon'ble NCLT, rather the TPO is examining whether the payment made to the parent holding company is consistent with the provisions of the transfer pricing. The DRP further held that the real substance of the merger transaction is that there is no change in the economic interest of DIHBV, as earlier DIHBV was holding interest in the assessee and other two subsidiaries through DIHPL. However, as a result of the merger, DIHBV directly holds 100% shares of the assessee and the other two subsidiaries through the assessee. Therefore,

DIHBV is in the same position as it was prior to the merger once it gets 100% shareholding of the assessee. Therefore, it was held that there is no other change insofar as DIHBV is concerned, as DIHBV has not parted anything that needs to be compensated. The learned DRP held that the essence of the scheme of amalgamation is that the holding company of the assessee has changed from DIHPL to DIHBV and therefore in substance there is no change in the parent holding company. Thus, the learned DRP upheld the findings of the TPO that the fresh equity shares issued to DIHBV represent a fair value of shares of the assessee post amalgamation, and the consideration paid in the form of CCDs and cash represents an excessive payment in lieu of the purchase consideration and the same is not at arm's length. Allowing the alternative plea of the assessee, the learned DRP directed that interest on excessive payment of cash, recharacterised as deemed loan, should be charged from the date of actual payment of cash instead of the complete year.

11. In conformity with the directions issued by the learned DRP, the AO vide impugned final assessment order dated 26/07/2022 passed under section 143(3) read with section 144C(13) of the Act computed the total transfer pricing adjustment of Rs. 88,71,465 and added the same to the total income of the assessee. Being aggrieved, the assessee is in appeal before us.

12. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the payment of merger consideration is on the capital account and does not result in any income. It was further submitted that as per section 92 of the Act the relevant international transaction must result in income and in alternative the provision will also be applicable to any allowance

of any expense or interest arising from the international transaction, which is not so in the present case. The learned AR further submitted that with respect to interest payable under CCDs, the assessee has benchmarked the transaction. The learned AR submitted that the TPO has ordinary characterising the merger transaction as a loan transaction and imputed interest and denied the allowance of interest on the CCDs. It was further submitted that the role of the TPO is to examine the transaction as it is and then make suitable adjustments but the TPO is not permitted to make a judgment on whether the assessee ought to have entered into the transaction in a particular manner. It was further submitted that the merger transaction has been approved by the Hon'ble NCLT and therefore the TPO has no jurisdiction to re-characterise the merger transaction. It was submitted that the TPO has neither identified any defect in the benchmarking exercise of the assessee nor presented any alternate benchmarking analysis in support of its conclusion that the merger transaction is not on an arm's length basis. The learned AR further submitted that earlier DIHBV held a company worth Rs. 369 crore but after the merger, it held a company worth Rs. 269 crore, and thus DIHBV was compensated by payment of cash of Rs. 100 crore.

13. On the contrary, the Departmental Representative ("*learned DR*") submitted that there is no change in the actual assets owned by the holding company, i.e. DIHBV, before and after the merger. The learned DR further submitted that the transaction itself is not the issue of shares and issuance of shares is only a part of the consideration, which has not been questioned by the TPO. It was further submitted that the transaction involved is the sale of investment by DIHBV and the payment in return. Further, the sale of

investment has an impact on the income/expense of the assessee. Accordingly, it was submitted that this is a capital transaction that has an impact on the income/expense based on a payment mechanism-interest on CCDs and the interest-free loan. It was further submitted that the assessee increased the value of its holding company, i.e. DIHPL, by including its own value. It was further submitted that if the entire consideration of Rs. 188 crore is paid as equity shares then there is no dispute, but the assessee is issuing CCDs on which interest is paid and has also paid Rs. 100 crore in cash, which has been disputed by the TPO. The learned DR further submitted that the valuation as per valuation reports submitted by the assessee cannot be relied upon as in the said valuation reports it has been specifically stated that the purchase consideration has been determined by the management.

14. We have considered the submissions of both sides and perused the material available on record. In the present case, there is no dispute regarding the basic facts that DIHBV, the ultimate parent company, held 100% shares of its subsidiary DIHPL, which in turn held 100% shares of the assessee company. It is further evident from the record that the DIHPL held 100% shares of the other two subsidiaries, viz. Dimexon Jewellery Creations Pvt. Ltd. and Dimexon Integrated Business Services Pvt. Ltd. From the perusal of the scheme of amalgamation amongst DIHPL, i.e. the transferor company, and the assessee, i.e. the transferee company, forming part of the paper book from pages 131-149, we find that to maintain simple corporate structure and eliminate duplicate corporate procedures and also to reduce duplication of administrative responsibilities and multiplicity of records and legal and regulation compliances, the Dimexon Group desired to merge and amalgamate

DIHPL into the assessee. The other strategic objectives sought to be achieved by way of the merger, as noted in the aforesaid scheme of amalgamation, are reproduced as under:-

> *"(1) Simplified corporate structure and improved management.*
>
> *(ii) Greater integration and greater financial strength and flexibility for the amalgamated entity, which would result in maximizing overall shareholder value, and will improve the competitive position of the combined entity;*
>
> *(iii) Rationalization of administrative and compliance related costs;*
>
> *(iv) Greater efficiency in cash management of the amalgamated entity, and access to cash flow generated by the combined business which can be deployed more efficiently to fund organic and inorganic growth opportunities, to maximize shareholder value;*
>
> *(v) Cost savings are expected to flow from more focused efforts and the elimination of duplication, and rationalization of administrative expenses; and*
>
> *(vi) The combined operations are expected to give rise to capital efficiency improved cash flows."*

15. From the aforesaid scheme of amalgamation, we also find that DIHPL was engaged in the business of, inter-alia, (i) acquiring and holding, controlling, and other interests in the share or loan capital of any company, (ii) providing financial, managerial and administrative advice, service and assistance, (iii) carrying on business as an investment holding company and for that purpose to invest or use the money and property of the company in such manner as the directors may think fit. Thus, it cannot be disputed that DIHPL was merely in the business of an investment holding company.

16. Pursuant to the approval of the aforesaid scheme of amalgamation by the Hon'ble NCLT vide order dated 07/12/2017, the shareholding of DIHPL in the assessee was cancelled and fresh shares of the assessee was issued to the ultimate parent company, i.e. DIHBV. Further, the shareholding of DIHBV in

DIHPL was also cancelled. Therefore, pursuant to the aforesaid merger, the holding company of the assessee was changed from DIHPL to DIHBV. From clause 11 of the aforesaid scheme of amalgamation, we find that for the amalgamation, the assessee paid a total purchase consideration of Rs. 188,25,33,120 to DIHBV, i.e. the shareholders of the DIHPL, in the following manner:-

Issue of equity shares	*Rs. 3,35,33,120*
Issue of CCDs	*Rs. 85,00,00,000*
Cash	*Rs. 100,00,00,000*
Total	*Rs. 188,35,33,120*

17. In its transfer pricing study report, the assessee declared the transaction of payment of purchase consideration pursuant to the scheme of amalgamation as one of the international transactions undertaken by it. The assessee claimed that while the transaction qualifies as an international transaction by virtue of section 92B of the Act, however, such transaction does not require to be benchmarked since the assessee neither generated any income nor incurred any expenditure pursuant to the implementation of such scheme of amalgamation. As per the assessee, as an abundant caution, it benchmarked the aforesaid international transaction considering the report of the third-party valuer by adopting "*other method*" as the most appropriate method. By considering the value determined by the third-party valuer as the fair market value, the assessee claimed that the aforesaid international transaction undertaken by the assessee meets the arm's length test from the Indian transfer pricing perspective.

18. As per the assessee, the merger transaction does not result in any income for the assessee and it is also not a case wherein the assessee has sought to claim any allowance or deduction for the equity shares, CCDs, or cash paid/issued to DIHBV. Accordingly, as per the assessee, the entire transaction is on the capital account, and transfer pricing provisions are not applicable to the transactions on the capital account. On the contrary, as evident from the record, the TPO as well as the learned DRP rejected this contention of the assessee and proceeded to make the impugned transfer pricing adjustment. Therefore, before proceeding further, it is relevant to decide whether the transfer pricing provisions under Chapter X of the Act are applicable to the present case, as only after the adjudication of the aforesaid issue, the validity of the benchmarking by the assessee as well as by the TPO can be analysed.

19. Since, after the merger, DIHBV holds 100% shares of the assessee, therefore it cannot be disputed that DIHBV is an associated enterprise of the assessee as per the provisions of section 92A of the Act. The term "*international transaction*" has been defined in section 92B of the Act as a transaction between two or more associated enterprises, either or both of them are non-residents. The relevant provisions of section 92B of the Act are reproduced as under:-

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

cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

(2) …...

Explanation.—For the removal of doubts, it is hereby clarified that—

(i) the expression "international transaction" shall include—

(a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;

(b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

(d) provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;

(e) a transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date;"

20. From the perusal of section 92B of the Act, it is evident that the transaction of business restructuring or reorganisation, entered into by an enterprise with its associated enterprise is also considered an international transaction for the purpose of this Act. However, the term "*business restructuring*" is not defined in the Act. As per the OECD guidelines, business restructuring means cross-border reorganisation of the commercial or financial relations between associated enterprises including the termination or substantial renegotiation of existing arrangements. Restructuring could be in

the form of operational change (in the functional, asset, and risk profile of the entity) or organisational change (in ownership structure/management of the entity). In the present case, the business restructuring is an organisational change amongst the entities of Dimexon Group, i.e. DIHBV, DIHPL, and the assessee, inter-alia, to maintain a simple corporate structure and eliminate duplicate corporate procedures. Therefore, we are of the considered view that the aforesaid transaction between the assessee and DIHBV squarely falls within the ambit of "*international transaction*" as defined in section 92B of the Act. Further, in the present case, the assessee has issued CCDs to DIHBV which carries interest. As per the TPO/learned DRP, the assessee has paid interest on CCDs, and the same definitely impacts the profit/losses of the assessee. Therefore also it is an "*international transaction*".

21. In the present case, as part of the business restructuring, the assessee agreed to pay a total consideration of Rs. 188,25,33,120 to DIHBV in the form of equity shares, CCDs, and cash. As per the assessee, the payment of merger consideration is on the capital account and does not result in any income to the assessee. Further, it was submitted that since, in the present case, the merger transaction does not result in any income nor any allowance or deduction has been claimed by the assessee, therefore the issuance of CCDs and payment of cash consideration does not come within the purview of section 92 of the Act. Accordingly, it was submitted that the issuance of CCDs and payment of cash consideration by the assessee cannot be subjected to transfer pricing provisions. In this regard, the learned AR placed reliance upon the decision of the Hon'ble jurisdictional High Court in Vodafone India Services Private Limited v/s Union of India, [2014] 368 ITR 1 (Bom.). From the perusal

of the aforesaid decision, we find that the Petitioner challenged the addition made by the Revenue on account of the re-valuation of the equity shares issued by it to a higher price. The Hon'ble jurisdictional High Court while allowing the writ petition filed by the taxpayer held that the issue of shares at a premium by the assessee to its non-resident holding company does not give rise to any income from an admitted international transaction and, thus, there is no occasion to apply Chapter-X of the Act in such a case. Similarly, in Shell India Markets (P) Ltd. v/s ACIT, [2014] 369 ITR 516 (Bom.), relied upon by the learned AR, the Hon'ble jurisdictional High Court held that on issuance of shares by an Indian entity to its non-resident associated enterprise, no income arises and therefore transfer pricing provisions under Chapter-X of the Act would not be applicable.

22. In the present case, it is worth noting that the international transaction is business restructuring by amalgamating DIHPL into the assessee, however, for the same the assessee has paid the consideration to its associated enterprise in three modes, i.e. equity shares, CCDs, and cash and therefore, each mode needs to be examined separately. In the present case, from the record, it is evident that insofar as the issuance of equity shares of Rs. 3,25,33,120 to DIHBV is concerned, no adjustment has been proposed by the TPO. Therefore, we are of the considered view that in line with the findings of the Hon'ble jurisdictional High Court in Vodafone India Services Private Limited (supra) and Shell India Markets (P) Ltd., the TPO rightly did not make any transfer pricing adjustment in respect of issuance of equity shares. However, only with respect to issuance of CCDs and payment of cash of Rs. 100 crore as consideration for amalgamation, the TPO disallowed the interest paid by the

assessee on issuance of CCDs and computed the interest on payment of Rs. 100 crore by treating the same as a deemed loan. It is pertinent to note that as per Explanation to section 92B of the Act, the transaction of business restructuring shall be considered an international transaction, irrespective of the fact whether it has a bearing on the profit, income, losses, or assets of such enterprises. In this regard, the observations of the Special Bench of the Tribunal in Instrumentarium Corporation Ltd. v/s ADIT, [2016] 49 ITR(T) 589 (Kolkata - Trib.) (SB), also becomes relevant, wherein it was held that while a notional interest income cannot indeed be brought to tax in general, the arm's length principle requires that income is computed, in certain situations, on the basis of certain assumptions which are inherently notional in nature. Therefore, we find no merits in the aforesaid plea of the assessee and once a transaction falls within the ambit of "*international transaction*", Chapter-X of the Act provides a mechanism for computation of arm's length price in relation to such international transaction.

23. The learned AR further submitted that the Hon'ble NCLT has approved the scheme of amalgamation and therefore the TPO has no jurisdiction to rewrite the scheme and re-characterise the nature of the merger transaction or the nature of instruments issued as part of the scheme. It was further submitted that the Hon'ble NCLT has expressly recognised that the merger is not in violation of public policy and is in the best interest of the assessee and thus the TPO cannot sit over the judgment of an order passed by the Hon'ble NCLT. It was also submitted that the merger consideration has been approved by the RBI and no objection was raised by the Income Tax Department during the proceedings before the Hon'ble NCLT.

24. As noted above, the Hon'ble NCLT vide order dated 07/12/2017 approved the scheme of amalgamation under section 230 to section 232 of the Companies Act, 2013 amongst DIHPL and the assessee. From the perusal of the aforesaid order, forming part of the paper book from pages 121-120, we find that the Hon'ble NCLT took into consideration the report of the Regional Director, wherein it was stated that the tax implications if any arising out of the scheme is subject to the final decision of the Income Tax authorities. Further, we find that before the Hon'ble NCLT, the counsel for the Petitioner companies also undertook to comply with all applicable provisions of the Act and agreed that all tax issues arising out of the scheme would be met and answered in accordance with the law. Therefore, it is evident that in the order passed by the Hon'ble NCLT, the Department has not waived off its right to examine the tax issues arising out of the scheme of amalgamation.

25. Even otherwise, it is pertinent to note that the transaction pursuant to which the assessee paid consideration of Rs. 188.35 crore to DIHBV is an international transaction as per the provisions of section 92B of the Act. We find that accordingly, the TPO proceeded to compute the arm's length price of the aforesaid international transaction. As per section 92F(ii) of the Act, arm's length price means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions. Therefore, we are of the considered view that merely because the scheme of amalgamation appears to be fair and reasonable and not violative of any provision of law or contrary to public policy, the same doesn't mean that the consideration paid pursuant to the said scheme is also at arm's length

price and if the TPO has proceeded to compute the arm's length price as per the provisions of Chapter-X of the Act the same cannot be construed to be sitting over the judgment of the Court/Tribunal in approving the scheme of amalgamation. Under the Act, the TPO is required to compute the arm's length price of an international transaction as per the transfer pricing regulations. Further, the approval by RBI to transact in terms of the scheme also cannot override the requirement of computing the arm's length price under the provisions of the Act. It is pertinent to note that the approval of the scheme by the Hon'ble NCLT and computation of arm's length price under the provisions of Chapter-X of the Act operates in different fields. We further find that in the decisions relied upon by the assessee in support of its contention, the computation of arm's length price and transfer pricing adjustment was not in the issue, therefore these decisions are distinguishable on facts. It is further pertinent to note that for computation of arm's length price, Chapter-X of the Act provides a complete machinery under which the assessee is also required to substantiate, with necessary documentation, that the price paid in an international transaction is at arm's length price following the procedure prescribed under Chapter-X of the Act. However, there is no material available on record to show that the above exercise was conducted and the merger consideration was found to be at arm's length by the Revenue at the time of approval of the scheme of amalgamation by the Hon'ble NCLT. This aspect is further evident from the observations of the Hon'ble NCLT in para 8 of its order, wherein the undertaking of the Petitioner companies to comply with the applicable provisions of the Act is recorded. Therefore, we agree with the findings of the learned DRP that the TPO is not questioning the scheme of

amalgamation as approved by the Hon'ble NCLT, and what is being questioned is whether the payments made to the parent holding company in the guise of payment for amalgamation are consistent with the provisions of transfer pricing as contained in the Act. Accordingly, we do not find any merits in the aforesaid submission of the learned AR and accordingly, the same is rejected.

26. As is evident from the record, the assessee benchmarked the transaction of payment of merger consideration by adopting "*other method*" as the most appropriate method. Rule 10AB of the Income Tax Rules, 1962, deals with "*other method*" for computation of arm's length price and the same reads as under:

> *"10AB. For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction or a specified domestic transaction shall be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts."*

27. Thus, as per the provisions of the aforesaid Rule, the "*other method"* shall be the method which takes into account the price which has been or would have been charged or paid for the same or similar uncontrolled transaction between non-associated enterprises under similar circumstances. In order to support the payment of the aforementioned merger consideration, the assessee has placed reliance upon the valuation report dated 05/01/2017 prepared by M/s V.R.Pandya & Co. and the valuation report dated 30/12/2016 prepared by M/s Chaitanya C Dalal & Co. From the perusal of the valuation report dated 30/12/2016 prepared by M/s Chaitanya C Dalal & Co., forming part of the paper book from pages 151-160, we find that the valuer arrived at

the purchase consideration of Rs. 188,35,33,120 to be discharged to the ultimate shareholder, i.e. DIHBV, in the following manner:-

> *"The management have determined Purchase Consideration of Rs. 1,883,533,120/- (Rupees One Hundred and Eighty Eight Crores Thirty Five Lakhs Thirty Three Thousand One Hundred and Twenty Only) considering the Net Payment Method, to be discharged to the ultimate shareholder i.e Dimexon International Holding BV in the following manner:*
>
> - *For every 22.49 shares of Dimexon (India) Holding Private Limited of Rs. 10/- each, the shareholder would get 1 share of Dimexon Diamonds Limited of Rs. 10/- (Fraction of shares may be given in cash)*
> - *For Every 8.872 Shares of Dimexon (India) Holding Private Limited of Rs. 10/- each, the shareholder would get 1 Compulsory Convertible Debentures of Rs. 100 each, Total amounting to Rs. 85,00,00,000/- (Rupees Eighty Five Crores Only) (Fraction of Compulsory Convertible Debentures may be adjusted in Cash)*
> - *Consideration in cash of Rs.100,00,00,000/- (Rupees One Hundred Crores Only)"*

28. We find that in the aforesaid valuation report, it has also been mentioned that the management has decided to give cash consideration to DIHBV as excess cash is available with the assessee, which has not been fully utilised. Further, the valuer also came to the conclusion that the purchase consideration determined is not detrimental to the shareholders since the merger is within the same group and the ultimate owner continues to be DIHBV. We find that similar purchase consideration is mentioned in the valuation report dated 05/01/2017 prepared by M/s V.R.Pandya & Co., forming part of the paper book from pages 161-168. It is pertinent to note that in both valuation reports the purchase consideration of Rs. 188,35,33,120 is stated to have been determined by the management of the Companies. Therefore, it is sufficiently evident that the valuation reports are not prepared on any scientific basis, however, the purchase consideration was predetermined by the

management of the Companies. Thus, we agree with the findings of the TPO that valuation reports submitted by the assessee cannot be considered for benchmarking of payment of merger consideration by adopting "*other method*" as the most appropriate method, as the purchase consideration though stated to be determined by applying Net Asset Method but the same is based on management decision. In the present case, it is pertinent to note that the international transaction of payment of merger consideration has been benchmarked by adopting "*other method*", which requires taking into consideration the amount which has been charged or paid for the same or similar uncontrolled transaction between unrelated parties and thus the valuation report for benchmarking of this international transaction requires a higher degree of independence in valuation, which is not so in the present case. Therefore, we find no infirmity in the findings of the lower authorities in rejecting the valuation report for benchmarking the international transaction.

29. It is pertinent to note that business restructuring would generally involve changes in the functions performed, assets used, and risks assumed between the parties. For an arm's length analysis, there has to be a transfer of something of value or profit potential along with the changes in functional profile. As per the assessee, the book value of DIHPL was Rs. 369,28,18,214 and the book value of the assessee was Rs. 336,26,93,249, as on 31/03/2016. The book value of the assessee and DIHPL is computed as under:-

Calculation of book value of DIHPL as on 31 March 2016	
Particulars	*Amount as on 31 March 2016 (INR)*
Share Capital	*75,41,24,770*

Reserves and surplus	*5,37,11,435*
Total	*80,78,36,205*
Less: Cost of Investment in DDL	*47,77,11,240*
Add: Book value of DDL	*3,36,26,93,249*
Book value of DIHPL as on 31 March 2016	*3,69,28,18,214*

Calculation of book value of assessee ("DDL") as on 31 March 2016	
Particulars	*Amount as on 31 March 2016 (INR)*
Share capital	*3,35,33,120*
Reserves and surplus	*3,32,91,60,129*
Book value of DDL as on 31 March 2016	*3,36,26,93,249*

30. It is further the submission of the assessee that as part of the merger transaction, the assessee had to provide a consideration of Rs. 369,28,18,214, which represented the adjusted book value of the amalgamating company, i.e. DIHPL, to the shareholders of the amalgamating company, i.e. DIHBV. Therefore, the assessee did the same by way of giving equity shares and CCDs of the assessee, which represented a total value of Rs. 269,28,90,977, computed as under:-

Instrument	*Value (in Rs.)*
33,53,312 equity shares of face value Rs. 10 each	*3,35,33,120*
85,00,000 CCDs of face value Rs. 100 each	*85,00,00,000*
Other equity	*180,93,57,857*
Total	*269,28,90,977*

31. It is further the submission of the assessee that additionally it gave consideration of Rs. 100 crore which represents the difference in the value of DIHPL (pre-merger) and the book value of the assessee (post-merger). Accordingly, it is the submission of the assessee that there is no excess

consideration which was paid to the ultimate holding company, i.e. DIHBV and what was recognised by the valuation report is fair.

32. The actual delineation of transaction, as evident from the record, is as under:-

(a) DIHPL (an Indian company) is a wholly owned subsidiary of DIHBV (a Netherlands company).

(b) DIHPL is holding 100% equity shares of the assessee (an Indian company).

(c) By the scheme of corporate restructuring, DIHPL merged with the assessee.

(d) Shares held by DIHPL in the assessee are cancelled.

(e) Assessee paid to DIHBV, Netherlands in following manner:-

(i) issue of 33,53,312 equity shares of Rs. 10 each amounting to Rs. 3,35,33,120

(ii) issue of 85,00,000 CCDs of the face value of Rs. 100 each at a coupon rate equal to SBI BPLR plus 300 basis points. Further, the CCDs issued shall not be redeemable per se and shall be compulsorily converted into equity shares of the assessee on the expiry of 10 years period from the date of issue or allotment. Each CCD so issued is compulsory convertible into 10 equity shares of Rs 10 each.

(iii) Cash of Rs. 100 crore

(f) Thus, the total consideration paid by the assessee was Rs. 188,35,33,124 for the above group restructuring.

(g) The only change is that instead of indirectly holding 100% equity shares of the assessee company through the intermediate subsidiary company, now DIHBV, Netherlands owns 100% equity of the assessee company directly.

(h) In substance, there is no change to any contractual arrangements arising from the corporate restructuring.

(i) In substance, there is no change in analysis of functions performed, assets used, and risks assumed by parties pre-restructuring and post-restructuring.

(j) Therefore, the consideration paid by the assessee to DIHBV, Netherlands, is purely a loan transaction of giving CCDs and cash repatriation of Rs. 185 crore.

33. From the perusal of the audited financial statement of DIHPL for the year ending 31/03/2016, forming part of the paper book from pages 228-244, we find that the company has a share capital of Rs. 75,41,24,770, which is entirely held by DIHBV and reserves and surplus of Rs. 5,27,11,435. Further, we find that the company does not have any fixed assets and only holds investments of Rs. 48,57,83,640 in its subsidiaries including the assessee. Further, the cash and cash equivalents are only Rs. 9,10,541. We further find that DIHPL holds corporate deposits of Rs. 30,69,72,037 with its subsidiary company from which it earned interest of Rs. 1,19,82,097. Therefore, from the above, it is evident that apart from holding investments in subsidiaries, DIHPL does not have any other business or assets.

34. In the present case, it is the claim of the assessee that DIHBV has transferred its subsidiary, i.e. DIHPL, having a book value of Rs. 369,28,18,214 to the assessee pursuant to the merger transaction, and therefore is entitled to receive a consideration of Rs. 369,28,18,214, which it has received by way of the shareholding of the entity, i.e. the assessee, having a total value of Rs. 269,28,90,977 (post-merger) and Rs. 100 crore in cash. At the outset, it is unfathomable that in an arm's length scenario, a company can be transferred at its book value. Be that as it may, it is evident from the record that merger consideration is paid to the ultimate holding company upon an amalgamation of the subsidiary company with the step-down subsidiary,

wherein the ultimate holding company, i.e. DIHBV is not transferring any of its underlying interest in shares in DIHPL, which after the merger still remains with DIHBV. As earlier DIHBV was holding the assessee and the other two subsidiaries through DIHPL, and now as a result of the merger, DIHBV directly holds 100% shares of the assessee and the other two subsidiaries through the assessee. We find that the merger transaction, in the present case, is merely a case of business reorganisation without any change in functions performed, assets used, and risks assumed between the parties. Thus, what has been transferred pursuant to the merger is merely an investment company without any erosion in function, asset, and risk profile of DIHBV requiring additional compensation apart from issuance of shares of the assessee. Therefore, in the present case, the entire merger transaction is a mere restatement of accounts of the subsidiary companies without the actual transfer of any asset and liability by DIHBV. In view of the above, we agree with the findings of lower authorities that in substance the transaction is really a relocation of shares of the amalgamating company by the amalgamated company to the existing shareholders of the amalgamating company and insofar as the parent holding company is concerned nothing has changed in substance. In view of the facts and circumstances as noted above, we are of the considered view that the lower authorities have rightly held that shares of the assessee now held by DIHBV represent the fair value of the aforesaid merger transaction. At this stage, it is also pertinent to reiterate the findings in the valuation report dated 30/12/2016 that the management has decided to give a cash consideration to the ultimate shareholder, considering the fact that excess cash is available with the assessee, which has not been fully utilised. Therefore, in view of the

above, we find no infirmity in the findings of the lower authorities that issuance of CCDs and payment of cash of Rs. 100 crore represents excessive payment.

35. During the hearing, the learned AR, on without prejudice basis, placed reliance upon the decision of the Hon'ble jurisdictional High Court in CIT v/s Tata Autocomp Systems Ltd., (2015) 374 ITR 516 (Bom.), wherein it was held that the arm's length price in case of loan advanced to associated enterprises would be determined on the basis of the rate of interest being charged in the country where the loan is received/consumed. Accordingly, it was submitted that since in the present case, the cash paid to DIHBV is treated as a deemed loan, therefore the interest computed by applying SBI PLR plus 300 basis points spread risk is not in conformity with the aforesaid decision of the Hon'ble jurisdictional High Court. Since the findings of the lower authorities in treating payment of cash to DIHBV as a deemed loan has been upheld, we direct the TPO/AO to compute the interest on the same in conformity with the observations of the Hon'ble jurisdictional High Court in Tata Autocomp Systems Ltd. (supra). To this extent, the benchmarking by the TPO/AO is modified. As regards the disallowance of interest paid on CCDs is concerned, in view of the aforesaid findings the benchmarking by the TPO/AO is upheld.

36. As regards the reliance placed by the learned AR on the decision of the Hon'ble Delhi High Court in CIT v/s EKL Appliances Ltd, (2012) 345 ITR 241 (Delhi), we agree with the findings of the learned DRP on page 40 of its directions that the exceptions as laid down by the Hon'ble High Court in para 18 of its decision are clearly applicable in the present case. Further, we are of

the view that the exceptions as noted by the Hon'ble jurisdictional High Court in para 2 of its judgment in PCIT v/s Aegis Ltd., 2019 SCC Online 2256 (Bom.) are applicable in the present case.

37. During the hearing, the learned AR furnished the scheme of arrangement in certain cases wherein cash consideration was paid in the event of a merger. However, nothing has been brought on record to show the tax implication of such consideration in the hands of the recipient or the payer. Therefore, we are of the considered view that the same has no relevance to the facts and circumstances of the present case.

38. As a result, grounds no.3-15 raised in assessee's appeal are dismissed. While ground no. 16 raised in assessee's appeal is allowed for statistical purposes.

39. Grounds no. 17 and 18, raised in assessee's appeal pertains to short grant of credit of advance tax and TDS. This issue is restored to the file of the AO with the direction to grant credit of advance tax and TDS, in accordance with the law, after conducting the necessary verification. As a result, grounds no. 17 and 18 raised in assessee's appeal are allowed for statistical purposes.

40. Ground no. 19, raised in assessee's appeal, pertains to the levy of interest under sections 234C of the Act, which is consequential in nature. Therefore, ground no. 19 needs no separate adjudication.

41. Ground no. 20 pertains to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

42. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 30/01/2024

Sd/-	**Sd/-**
AMARJIT SINGH	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 30/01/2024

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai