Suzlon Energy Limited, Ahmedabad vs The Dcit.,Circle-8,, Ahmedabad on 22 December, 2017

ITA No.2074 & 2179/Ahd/2013
Assessment year: 2009-10

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD 'D' BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and S S Godara JM]

ITA No.2074/Ahd/2013
Assessment year: 2009-10

Suzlon Energy Limited, ...Appellant
"Suzlon", 5 - Shrimali Society,
Nr. Shree Krishna Complex,
Navrangpura,
Ahmedabad.
[PAN: AADCS 0472 N]

Vs.

Dy. Commissioner of Income Tax, ... Respondent
Circle-8, Ahmedabad.

ITA No.2179/Ahd/2013
Assessment year: 2009-10

Dy. Commissioner of Income Tax, ... Appellant
Circle-8, Ahmedabad.

Vs.

Suzlon Energy Limited, ...Appellant
"Suzlon", 5 - Shrimali Society,
Nr. Shree Krishna Complex,
Navrangpura,
Ahmedabad.
[PAN: AADCS 0472 N]

Appearances by

Tushar Hemani for the appellant
V.K. Singh for the respondent

Hearing concluded on: 25.09.2017
Order pronounced on : 22.12.2017

O R D E R

Per Pramod Kumar, AM:

ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10

1. These cross appeals are directed against the order dated 18th July, 2013 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter), for the assessment year 2009-10.

2. We will first take up the appeal filed by the assessee.

3. Grievances raised by the assessee are as follows :-

> "1. The Id. CIT(A) has erred in law and on the facts in confirming 0.75% as guarantee fees and accordingly erred in sustaining the transfer pricing adjustment of Rs.44,24,250/- out of the total adjustment of Rs.1,20,92,950/- made by the Id. AO/TPO on account of guarantee provided to Associated Enterprise.
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> 2. The Id. CIT(A) has erred in law and on the facts in confirming the action of Id. AO/TPO in making transfer pricing adjustment on account of guarantee fees despite the finding given by himself that the Appellant was justified in not charging any guarantee fees since guarantee provided by the Appellant was in the capacity of parent company and out of commercial expediency of the Appellant.
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> 3. The Id. CIT(A) has erred in law and on the facts in confirming 0.75% as guarantee fees and accordingly erred in sustaining the transfer pricing adjustment of Rs.3,82,00,000/- out of total adjustment of Rs.42,84,19,175/- made by the Id. AO/TPO on account of guarantee provided to Associated Enterprise.
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> 4. The Id. CIT(A) has erred in law and on the facts in confirming the action of Id AO/TPO in making transfer pricing adjustment on account of guarantee fees, despite the finding given by himself that the Appellant was justified in not charging any guarantee fees since it was joint and counter guarantee provided by the Appellant in the capacity of parent company and out of commercial expediency of the Appellant.
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> 5. Both the lower authorities have passed the orders without properly appreciating the facts and that they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed."

4. The interconnected grievances, raised by the Assessing Officer, are as follows :-

> "4.2). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.76,68,700/- out of total addition of Rs.1,20,92,950/- made on account of guarantee ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 fees on loans availed by Associated Enterprises' of Assessee against guarantee of Assessee.
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> 4.3). The Ld, Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.39,02,19,175/- out of total addition of Rs.42,84,19,175/- made on account of guarantee fees on loans availed by Associated Enterprises' of Assessee against guarantee of Assessee."

5. So far as these grievances of the assessee are concerned, learned representatives fairly agree that the guarantees in question are, to use the words of the CIT(A), "continuing guarantees' from the immediately preceding year and that except for the figures, entire facts of the case are similar to that of the immediately preceding assessment year 2008-09". Vide our order dated 21.04.2017, the Tribunal has allowed the appeal of the assessee, on the same point, and held that no such ALP adjustments are permissible in law. The Tribunal has, inter alia, observed as follows :-

> "19. So far as these grievances of the parties are concerned, the relevant material facts are as follows. During the course of proceedings before the Transfer Pricing Officer, it was noticed that the assessee company has extended a corporate guarantee in respect of loan of Rs 101.48 crores taken by its subsidiary Suzlon Energy BV Netherland. This loan was said to have been taken for the purpose of construction of a guest house in Europe for the use by, amongst others, the employees of assessee company. The assessee company had also extended cross guarantees, with other AEs, for loans obtained by AE Rotor Holding BV- Netherlands, SE Drive Technik GmbH- Germany, Suzlon Wind Energy GmbH- Germany and Suzlon Energy Ltd Mauritius. These loans were said to have been obtained for acquisition of a German company by the name of RE Power Systems AG. The first transaction was for the loan of Rs 4,660.89 crores, for acquisition of RE Power Systems AG, and the second transaction was for acquisition, by SE Drive Tecknik GmbH, of balance stake in RE Power Systems AG. The assessee had not charged any fees for issuance of these corporate guarantees. The stand of the assessee was that these guarantees were given in the stewardship capacity and hence need not be benchmarked. It was also submitted that these are cross guarantees by the group entities in a manner that each of the entity stood a guarantee for each other in circulating as well as reciprocating manner. The assessee further clarified that standing as a guarantor for the subsidiary does not result in any provision for services which can be treated as an international transaction. It was based on these, and several other, arguments that the assessee contended that the transaction of giving corporate guarantees cannot be treated as an international transaction. Without prejudice to this stand, it was further submitted that ICICI Bank has given a guarantee to the group in consideration of guarantee ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 commission @ 0.75% which can be treated as a CUP. None of these submissions, however, impressed the Assessing

Officer. He rejected these submissions and, while doing so, gave the following reasoning:

The above submission made by the assessee has been perused. These are dealt with issue-wise as below:

7.6.1 Providing Corporate Guarantee is not a service: The issue has been dealt with in detail at para 6.6 to para 6.13 in all its facets. As already discussed above "provision of service" is included in the definition of international transaction.

Since providing guarantee has been held to be a service, its benchmarking by the assessee company at 'nil' value has direct impact on its profits. Hence, the claim made by the assessee company that transaction does not represent international transaction and does not merit benchmarking, is not found to be correct.

7.6.2 Stewardship Activity hence not service: At para 2.2, the assessee has claimed that it is performing stewardship activity by standing as a guarantor to the loans raised by the AEs.

7.6.3 Transfer Pricing Provisions are Machinery Provisions: As discussed at para 6.4, the transfer pricing provisions mandates fixing a arms' length price to the transactions between related enterprises for international transactions including rendering of service. That the assessee has chosen to benchmark such service at 'nil' and hence has not received consideration, does not render the transaction un-benchmarkable and the provisions of transfer pricing 'void' as no consideration has been received.

7.6.4 The nature and purpose of guarantee is quasi-capital: The idea of a guarantee provided for availing loan facility to be a quasi-capital appears pretty far fetched. The courts have held that a loan advanced to an AE cannot be treated as quasi-equity as there are modes of investing in a company. Once the nature of the investment is in form of 'loan' a different colour cannot be attributed to it under the garb of the parent-child relationship. In the case of Perot Systems TSI Vs. DCIT (ITAT Delhi) the assessee, an Indian company, advanced interest free loans to its 100% foreign subsidiaries. The subsidiaries used those funds to make investments in other step-down subsidiaries. On the question whether notional interest on the said loans could be assessed in the hands of the assessee under the transfer pricing provisions of Chapter X, the assessee argued that the said "loans" were in fact "quasi-equity" and made out of commercial expediency. It was also argued that notional income could not be assessed to tax, HELD rejecting both arguments:

(i) The argument that the loans were in reality not loans but were quasi-

capital cannot be accepted because the agreements show them to be loans and there is no special feature in the contract to treat them otherwise. There is also no reason why the loans were not contributed as capital if they were actually meant to be a capital contribution;

(ii) The argument that the loans were given on interest-free terms out of commercial expediency is not acceptable because this was not a case of an ordinary business transaction but was on international transaction between associated enterprises. One had to see whether the transaction was at arm's length under the transfer pricing provisions;

ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 Once the loan taken by the AEs on the strength of the guarantee are not treated quasi equity, the act of providing a service to the AE by offering corporate guarantee also does not form part of the stewardship activity of the assesses company.

7.6.5 The assessee has discussed the issue of negative TP adjustment in subsequent years as in subsequent years, the assessee has obtained guarantees from its AEs. In normal circumstances, unless the events of prior or subsequent years are linked and part of the same contract agreement, such considerations should not be factored while deciding the current year issues. In this case, there does not appear to be any such link and the assessee has not been able to demonstrate such financial linking.

7.6.6 The assessee's contention regarding commercial expediency and the reliance on the decision of S A Builders Ltd. has been dealt with in other paras of the order relating to same issues and hence this contention is not found acceptable.

7.6.7 Wrong benchmarking of guarantee fee; The assessee has submitted that it has internal CUP in the form of guarantee fee charged by ICICI Bank at 0.70%. The CUP advanced by the assessee is not found acceptable on account of clear non-comparability of the transaction. Hence, it cannot form the basis for computation of guarantee margin in the case of the loans taken by the associate enterprises. The documents relating to the above guarantee have been perused and are discussed at para 7.6.8 and 7.6.9 below.

7.6.8 It is noticed that the assessee is wide off the issue in its attempt to compare the guarantee issued by ICICI Bank with guarantee issued by the assessee with reference to the loans taken by the associates. The document is a guarantee agreement entered into between SE Drive Technik GmbH and ICICI Bank, Singapore pursuant to the original Credit Agreement dated 9/2/2007 which has been discussed above. In this agreement, while the first four tranche relate to the loans taken by the four AEs named in the agreement, the fifth tranche relates to providing of a guarantee to the extent of Rs 1741.90 crore by the Bank to certain share owners whose shares were not bought by the group. This document does not relate to providing of guarantee for availing loan facilities and hence cannot be treated as a comparable CUP in the case of loans availed by the AEs on the guarantee of the assessee company. ICICI Bank is a part of the consortium with which the group has entered into financial agreement for providing loans and guarantee. It has provided guarantee to the buyers on a counter guarantee by the assessee company/group. Hence in effect, the transaction is in the form of guarantee given on the strength of underlying Suzlon guarantee. Since this is not a comparable transaction to the availing of loan facilities, the CUP is rejected. As discussed in detail in the earlier para on the issue of providing guarantee in respect of working capital loans availed by the AEs, a 2% guarantee amount is a reasonable and correct appreciation of risk undertaken by the assessee for which it needs to be compensated at this level.

7.6.9 Without prejudice to the discussion at 7.6.8, the guarantee documents refers to guarantee fee of 0.75% for the first 12 months, 1% for the next 24 months and 1.25% for the subsequent period. The agreement is a part of the overall facility agreement meaning thereby that this transaction between SE Drive Technik and ICICI Bank has also been guaranteed by the assessee company (along with the other four companies to the transaction) as a principal ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 guarantor. Inspite of an underlying guarantee, the bank has charged a fee of 1% (since the period is over 12 months). It has also charged a fronting fee of 0.75%. The bank would not have advanced the guarantee facility at same rates if these were not guaranteed by the assessee company. If the risk related to such underlying guarantee is added, the rate would be higher than the rate of 200 bps adopted by this office in respect of other guarantees given by the assessee. In the order relating to interest rates, it has been discussed that the risks assumed in respect of a normal rated corporates is anywhere between 4% to 4.5% in Indian context. Hence, the rate of 0.70 advocated by the assessee company is without any basis and unacceptable. The guarantee margin computed elsewhere by this office at 200 bps is most reasonable and based on sound principles of finance and does not require to be altered.

7.6.10 Incorrect allocation of risk to SEL by the TPO: The assessee has stated that attribution of 50% risk to the parent company in respect of joint and several risk liability in relation to the guarantee given by the corporations is incorrect. The assessee has also, in its letter dated 9/8/2011, at annexure-2, furnished working of the guarantee fee to be reasonably charged from the company. As discussed above, the rate of 0.70% adopted by the assessee company is wrong. It is seen that in the computation, the assessee has given a weight of only 14% to SEL while its AEs have been given much higher weightage. The logic put forth by the assessee company is that since the target company is in Germany, any default would first invite action on the German companies, then European companies, then the Mauritius based company and in the end, the Indian parent. This hypothesis is full of errors and wrong presumptions. The facility agreement has been entered in Singapore and not in Germany. Hence, the presumption that the fist risk will be faced by German companies is incorrect. In fact the entire order of risk seniority is found to be without any basis. SEL is the principal guarantor and the parent company. Hence, the first and foremost risk is being assumed by this company and not any other company. The justification for attributing 50% of the risk to the assessee company is discussed in subsequent paras with reference to the agreement and the financial position of the AEs.

7.7 Risk Allocation to SEL:

7.7.1 The Agreement:

(i) The agreement dated 9/2/2007 is the main document. While describing the corporates (group companies) who are party to the agreement, the assessee has been described as "the company and an Original Guarantor). The other companies are described as "the borrower and guarantor" Hence, implication of this categorisation puts a higher onus on the assessee than the other members,

(ii) At para 27, under 'Indemnities and Break costs', the agreement states that "The Company must, as an independent obligation, indemnify each Finance Party against any loss or liability which that Finance Party incurs..........". As per the definition, the company means Suzlon Energy Ltd or the assessee company.

(iii) At para 27.2, under 'Other indemnities', the agreement states, 'The company's liability in each case includes any loss or expense on account of funds borrowed, contracted for or utilized to fund any amount payable under any Finance Document or any credit.' ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10

(iv) The assessee or The Company has been given various powers in the agreement and is liable for various expenses related to loan. The Company may introduce or exclude guarantors from the agreement at its discretion.

(v) The assessee company has been given power to act on behalf of the parties to the agreement.

(vi) It is clear that the risks and responsibilities taken by the assessee are much higher than the other parties to the agreement.

7.7.2 The Financial status of AEs: The assessee has tried to argue that the net worth of the companies as on 31/3/2008 is much higher and hence the companies should be attributed higher share of the apportionment out of total guarantee fee determined. The financial status of the assessee company has been examined.

(i) !t is clarified that the loan agreement has been entered into on 7/2/2007. Hence, the assessee's attempt to argue that the status as on 31/3/2008 should be examined is not found acceptable, The bank would have examined the financial status as on the date of giving the loan and not subsequently, especially if the money introduced in the companies is out of borrowed capital.

(ii) The financial statement of all the companies who are party to the agreement has been examined. The assessee has based its computation on the balance sheet of 31/3/2008 which also includes cash on accounts of loans drawn by the group companies under this agreement. The contention of the assessee that the cash balance in the bank account of the parties to the agreement should be factored in is also not found acceptable. The cash is out of the loans under the same agreement and has been withdrawn for specific use. Its presence does not reflect excess cash available but cash generated by drawing the loan tranche for purchase of shares.

(iii) SEL Mauritius has a capital of E 38 million borrowings of E 160 million. In light of this fact, it is clear that the company can hardly stand guarantee for any other entity. AE Rotor Holdings has a equity of 129.44 million and debt of 471.84 million. It's position is similar to SEL Mauritius. Suzlon Windernergie GmbH, Bochum hardly has any assets or capital with which it can stand guarantee. Only in the case of SE Drive Technik GmbH, there are no substantial borrowings and the company has some capacity to stand as guarantee. The company also has cash reserves available with it which has been accounted for as discussed in para 7.7.3 below. Hence, in effect, only SE Drive Technik GmbH has some financial standing to stand as guarantee while all other companies have huge borrowings with which their financial condition render them risk prone. Since all these companies are also borrowers in the agreement, it is clear that they can not substantiate guarantee taken on behalf of others. Under these circumstances, the assessee's computation showing only 14% guarantee in the hands of the assessee company is clearly unfounded and the 50% level arrived at by this office is more than a generous estimate of the risk being undertaken by the assessee company. The computation of risk and the quantum of guarantee computed by the assessee is rejected as impractical, based on wrong presumptions and based on wrong year data.

7.7.3 The claim for available cash in the hands of the related companies. As discussed in the above para, except SE Drive Technik, none of the companies ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 have any financial standing to account for and hence can hardly be factored in while computing guarantee risks. However, the assessee has submitted following details and has claimed that the cash available in the hands of these companies should be accounted for while computing the risk level and also while computing the amount on which guarantee fee would be leviable.

- While computing the amount of outstanding guarantee your honour has allowed reduction of opening balance lying in bank with SEDT of Rs.747 Cr being cash cover available to assessee company. It may be noted that the -working of subject amount is not correct as the position of bank balance with AE and assessee company was as under:

> Cash and Bank Balances Name of AE Amt in Euro Ami in INR in Cr in Millions (1 Euro = Rs 63.3417) SEDT Germany 116.01 735.21 SWEE Germany 0.01 0.06 AERH Netherlands 1.54 9.75 SELM Moritious 1.21 7.66 SEL India as on 31.03.200S 0 875.5 TOTAL 118.83 1,628.19 Thus, suitable adjustment would be required in your proposal with regard to reduction of amount lying in the bank, the rate of the guarantee fee and allocation of amount of guarantee fee after suitable division between all four guarantors. This is without prejudice to our preliminary submission and should not be taken as the admission of the fact that any guarantee fee is chargeable,"
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> 7.7.4 The submission made above has been perused. As discussed above, the cash shown in the hands of SWEE Germany, AERH, Netherlands, SELM, Mauritius are on account of the huge loans taken by these companies and these are small amounts liable to be utilized during the routine course of business and hence cannot be factored while computing guarantee. Only in the case of SEDT, Germany, it is noticed that the company does not have significant borrowings and has a surplus of Euro 116.07 million amounting to Rs 735.21 crore. The assessee is allowed relief to this extent while computing the guarantee fee it should have charged from its AEs. As regards the claim that SEL India had cash of 875.50 crores, it is seen than this balance is not opening balance but closing balance as on 31/3/2008. Further, it is also clarified that SEL India has not taken ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 any loan. In fact it has acted as a guarantor and hence it is

liable to charge fee from its subsidiaries. Hence, any balance in the hands of the assessee company cannot be factored while computing the guarantee fee to be charged by it.

7.7.5 The above discussion clearly brings out the fact that the basic responsibility of the guarantee lies with the assessee company. In case of any default, since all the companies are exposed to part of the loan amount, it is the assessee company which will be called upon to bear the risk. Hence, the action of the assessee company in benchmarking only 14% of the risk to itself is gross error and without any justification. The agreement clearly lays down the principal onus of repayment on the assessee company. Under the circumstances, even by most conservative approximation, not more than 50% of the risk can be said to be attributed to and shared by the other parties to the agreement. The remaining 50% risk will be shared by the assessee company. The total reasonable guarantee fee has been arrived at 2% in the earlier discussion on the issue. The other parties to the agreement have availed of the loans / facilities granted by the agreement. The assessee has not utilized any of such facilities but is merely a guarantor. Hence, it should have charged guarantee fee at 1% of the amount of facility utilized by the other group companies.

7.7.6 Quantification of guarantee fee share in the transaction relating to providing guarantee on guarantee offered by ICICI Bank: As discussed at para 7.6.7, 7.6.8 and 7.6.9, the rate adopted by ICICI Bank cannot be used as CUP for benchmarking assessee's guarantee services to its AEs in respect of loans availed. As regards the guarantee fee computation in respect of the trache V guarantee component being given by ICICI Bank to SE Drive Technik, it is seen that in the agreement itself, the bank has started that if the company provides 100% liquid assets as guarantee, the fee would be reduced to 10%. This means that the Bank is bearing risk to the extent of 0.90% while remaining is its margin for services rendered. The average overall guarantee fee has been computed at 2%. If the bank picks up guarantee related risk to the extent of 0.90%, the remaining risk of 1.1% will be shared by the parties to the agreement, Since, the risk has been determined to being shared in the ratio of 50:50 between the assessee company and rest of the companies, the assessee's share in this comes to 0.55%. All the other AEs have availed of the facilities granted by the credit agreement except the assessee company. Hence, the company should have charged a fee equal to 0.55% in this case from the other AEs in respect of total credit/guarantee facility availed.

7.8 In light of the above discussion, the provision of services relating to guarantee is benchmarked as below:

1. Guarantee fee on loans of Rs.4660.89 crore availed by the AEs The average value of outstanding loans during 4660.89 crore the year (related to guaranteed loans) Guarantee fee @ 2% of above 93.22 crore Less 2% of cash with SEDT Germany (Rs 14.70 crore 735.21 crore) Balance guarantee fee 78.52 crore ITA No.2074 &

2179/Ahd/2013 Assessment year: 2009-10 Guarantee fee attributable to assessee 39,25,89,000 company (50% of the total amount as discussed above)

2. Guarantee fee on guarantee of Rs 1741.90 crore given by ICICI Bank The average value of outstanding guarantee 1741.90 crore during the year (related to Credit Agreement) Guarantee fee @ 1.1 % of above 19.16 crore Assessee's share 9,58,04,500 Total guarantee fee that should have been charged by the AE: Rs 47,83,93,500/- [Rs.39,25,89,000 + 9,58,04,500] Thus, the income of the assessee company is liable to be marked up to an extent of Rs 47.83 crore on account of guarantees provided by the company to its AEs in reference to acquisition of R E Power GmbH, Germany.

20. Accordingly, the Assessing Officer made the ALP adjustment so proposed by the Transfer Pricing Officer. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without complete success. Learned CIT(A) partly upheld the impugned ALP adjustment. While doing so, he observed as follows:

I have gone through the justifications of the Appellant for not charging guarantee fees. It was submitted that Suzlon Rotor Corporation, USA, a rotor blade manufacturing company at USA had availed working capital loan and term loan from Bank of Baroda, New York, by mortgaging its fixed assets viz, factory building, plant & machinery and hypothecation of stock. It was further submitted that the Suzlon Rotor Corporation, USA is a supplier of Blades which is a key component of windmills. The said SRC caters to most of the supply needs in USA. Without SRC, the appellant would have to import the blades from India which would have increased the logistic costs and ultimately the competitive edge in terms of pricing would have been lost. Thus looking to the critical business relationship the Appellant Company had with the SRC it was also commercially beneficial to it to support the said AE to raise loans so that it can increase its sales in USA and save on logistic cost of rotor blades.

It is further seen that similarly SEBV Netherlands has obtained a term loan for Guest House from ABN AMRO Bank after mortgaging the Guest House. It was further submitted that the purpose of guest house was to provide accommodation for employees of the Appellant Company only. It has been submitted by the A.Rs. of the Appellant that the guarantee of the Appellant has been obtained merely because the Appellant is a parent company.

Since the assets of the AEs are mortgaged against the loan, any bank would have provided loan to the companies and the guarantee was provided by the Appellant only as a parent company. Therefore, I in principle agree with the above justification given by the Appellant for not charging guarantee fees. However, since it's an international transaction ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 and subject matter of transfer pricing regulation, the transaction of guarantee has to be properly benched marked.

In order to appreciate the benchmarking aspect of the transaction of providing guarantee to AEs, the observations made by the transfer pricing officer in paras 6 to 6.12 of the order are relevant wherein he adopted 2% as guarantee fees so as to make an addition of Rs.2,02,96,000/. While dealing with the said addition, the TPO has made academic observations regarding the guarantor, borrower, credit rating, inference to Canada and US court decisions, and the reason as to why Group Company providing a guarantee should charge a guarantee fees. Vide paras 6.13 and 6.14 of the order, the TPO has observed that In the absence of internal CUP, external CUP should be applied and the guarantee fees should be charged taking into consideration the facts that under the similar circumstances what amount of guarantee fees would have been charged by an independent party. Thereafter, the TPO has adopted guarantee fees @ 2% to make an addition of Rs,2,02,96,000/-. However, I could not find any comparable instance / external CUP being taken into consideration by the TPO to benchmark the guarantee fees @ 2%. Though he himself has stated that in the absence of internal CUP, external CUP is to be applied, he has not brought on record even a single comparable instance so as to benchmark the guarantee fees @ 2%, which is not fully justified.

The justification of the Appellant for not charging guarantee fees has force and action of TPO in adopting guarantee fees @ 2% without taking into consideration any comparable instances is not fully justified. However, while dealing with the submission and observation with regard to second upward adjustments on account of guarantee fees, I find that the ICICI Bank Ltd. has charged guarantee fees @ 0.75% for providing a guarantee to one of the AEs i.e SE Drive Technik GmbH. Though appellant stated that no guarantee fees was required to be charged, I am of the opinion that this instance can certainty be taken as an external CUP as this represents the rate of guarantee fees charged by the bank to one of the AEs while providing guarantee. Hence, I modify the addition by adopting 0.75% as guarantee fees as against the 2.00% charged by the TPO, and accordingly, the addition to the extent of Rs.76,11,000/- (i.e 0.75% of 101.48 Crores) is sustained and the balance amount of Rs.1,26,85,000/- is hereby directed to be deleted.

Now I deal with the second issue which need to be decided i.e. upward adjustment of Rs.47,83,93,500/- as guarantee fees on account of joint-guarantee provided to the lenders for providing finance and other arrangements to three AEs to acquire RE Power Systems AG, Germany and to refinance the debt obtained by the Appellant. I have gone through the justification given by the A.Rs. of the Appellant for not charging guarantee fees. My attention is drawn to the Annexure-2 to the letter dated 21/10/2011 furnished the TPO, which is reproduced on pg. 102 to 112 of the written submission submitted before me. Going through the resolution passed by the Board of Directors on 09/02/2007, it is seen that the Appellant wanted to acquire 100% shareholding of leading European Wind Turbine Generator manufacturing company "REPower System AG" to expand its international business by enlarging its product portfolio with higher capacity. It was accordingly decided to obtain financial facilities of Euro 1575 Million for the purpose of acquiring shares of "REPower System AG" and for general corporate purposes of the Appellant and other group companies. It was further submitted that internationally it is a preferred practice to carry out international buy-outs or acquisitions through local companies, and accordingly, the Appellant Company arranged to infuse capital and also arranged financial facilities through ABN AMRO Bank whereby Its subsidiaries namely Suzion Energy Limited Mauritius, AE Rotor Holdings BV, Netherland and SE Drive Teknik GmbH, Germany raised the required funds of Euro 1575 Million. I have also gone through the Credit Agreement, dated 09/02/2007 for raising Euro 1575 Million, (Pg. nos.139 to 257 of P/B). Going through the various clauses of the said agreement it is seen that the entire borrowing was made to acquire "RE Power System AG" through subsidiaries and to ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 refinance the indebtedness of AE Rotors and Suzlon Mauritius. It was further submitted that subsequently by December. 2009, the Appellant Company had raised equity and debts funds through various resources like FCCB, QIP, GDR and the funds so raised and funds generated through internal accrual were infused as equity in the AEs so as to pay off loans obtained from ABN AMRO. Accordingly, it was the submission of the Appellant that guarantee provided is nothing but the extension of capital investment by the Appellant Company, which is definitely inextricably linked with the business requirement of the Appellant Company. I agree with the arguments made by the A.Rs. of the Appellant that on account of strategic investment in "R E Power Systems AG", the Appellant has become the market leader in the wind turbine generator with the presence and control over significant global markets, and accordingly the action of Appellant in not charging guarantee fees is justified particularly when a joint and counter guarantee has been provided in the capacity of parent company and out of commercial expediency of the Appellant.

I find that the net worth and net asset of all the borrowers has been considered while going through this transaction to ensure that the loan was least risky loan, which also explains the action of the Appellant for not charging guarantee fees. Vide para 9.39 of the written submission, the Appellant submitted that total outstanding borrowings were at Rs.6402.79 Crores (Rs.4660.89 Crores + Rs.1741.90 Crores), whereas, the total Net Worth of the all the group companies / guarantors were at Rs.20,663.32 Crores. (PI. refer pg. no.259 of P/B). This details would show that the group companies / guarantors had capital base in form of Equity of 20553.32 Crores. Against the said equity base the banks have funded 1he required borrowings, outstanding amount of which was Rs.6402.79 Crores Rs.4660.89 Crores + Rs.1741.90 Crores) resulting in to a debt to equity ratio of 0.31:1 which is well below the accepted norms of long term lending of 4:1.Based on the equity commitment by management, it was quite possible that any company could have availed the said loan without any third party guarantee from the Banks at the prevailing market rates. Further I find that negative pledge of the assets of all the borrowers was created and the total assets base of all the companies put together was at Rs.240835.79 Million, whereas, the outstanding balance of borrowed loan was at Rs.64027.90 Million, hence the borrowed loan was secured by 3.76 times by the assets base, and therefore, in the process the loan became the least risky loan. Therefore contention of the Appellant which justifies the action of the Appellant in not charging guarantee fees, as the loan was the not at all risky since the same was secured by the net worth and net asset of the all the borrowers appears reasonable. However, since it's an international transaction and subject matter of transfer pricing regulation, the transaction of guarantee has to be properly bench marked.

In order to appreciate the benchmarking aspect of the transaction of providing guarantee to AEs, the observations made by the transfer pricing officer are relevant. Here he has adopted guarantee fees @ 2.00% by referring to his findings while making addition of Rs.2,02,96,000/-. I have already given a finding in earlier paragraph that though TPO himself has stated that in the absence of infernal CUP, external CUP is to be applied, he has failed to bring on record even a single comparable instance so as to benchmark the guarantee fees @ 2%, which is not Justified.

The AO / TPO has not accepted that rate @ 0.75% relating to counter guarantee of ICICI Bank Lid as bench marking price saying that guarantee is different than the counter guarantee. The guarantee or counter-guarantee is governed by the "Law of Contract" and in the eyes of law, the liability of guarantor or counter guarantor is the same. In Transfer Pricing, it is simple law of comparisons and in case of lack of comparable case, the nearest comparable case has to be admitted for decision. The nearest comparable case is much better an option to deliver justice than to adopt guestimates based on pure guess work. Further as already mentioned earlier that the guarantee fees as charged by the ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 ICICI Bank Ltd @ 0.75% to one of the AEs under the impugned Credit Agreement is the best comparable instance to be treated as benchmark, and therefore, I direct the assessing officer to apply rate of 0.75% as guarantee fees as against 2.00% applied by AO on recommendation of TPO.

Now the next question for my adjudication is the allocation of the guarantee fees amongst the Appellant and three other AEs, as the guarantee provided was in the nature of joint and counter-guaranfee. The TPO has attributed 50% share of risk to the Appellant and the balance 50% is attributed to other three AEs all together. Once again, the TPO has not given any cogent reasons to justify his action in attributing 50% of guarantee fees to the Appellant and balance 50% to other three ABs all together. Therefore, this action of TPO is not justified and hereby rejected. Now I must decide as to whether the allocation made is justified or not. My attention is drawn to working given on Pg. No.258-260 of P/B. Going through the said working, it is seen that the Appellant has adopted benchmark rate of 0.75% as guarantee fees and has quantified the amount of total guarantee fees at Rs.41.77 Crores. Thereafter, the same guarantee fees has been allocated in between the co-guarantors on the basis of Weightage Average of Net Assets of the Companies, and accordingly, the weightage of the Appellant Company comes to 14.01% towards total guarantee fees, which results info amount of Rs.5.84 Crores. I have also seen the notes mentioned below the chart justifying the different weightage given to the co-guarantors. I am of the opinion that allocation as done by the Appellant is rational and done on logical basis since the allocation has been made on the basis of the Net Assets of the Companies which will be available in case of default committed by the borrowers in repaying the borrowed amount. Therefore, I agree with guarantee fees being allocated on the basis of net assets of the companies and hold that the contribution of the Appellant in the total guarantee fees shall be restricted to 14.01% which results into guarantee fee amount of Rs.5.84 Crores being added in the hands of the appellant. Hence, I sustain the addition on account of guarantee fees to the extent of Rs.5,84,00,000/- and the balance amount of Rs. 41,99,93,500/- is hereby directed to be deleted.

21. None of the parties is satisfied by the stand so taken. While the assessee is aggrieved of the CIT(A) should have deleted the impugned ALP adjustment in entirety as the issuance of corporate guarantees does not amount of an international transaction, the Assessing Officer is aggrieved of the partial relief granted by the CIT(A). Both of these parties are thus in appeal before us.

22. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

23. As learned counsel for the assessee rightly points out, this issue is covered, in favour of the assessee, by a decision of this Tribunal in the case of Micro Ink Ltd Vs ACIT [(2016) 176 TTJ (Ahd)]. While elaborating upon this judicial precedent and dealing with subsequent developments, another coordinate bench of the Tribunal, in the case of Siro Clinpharm Pvt Ltd VS DCIT and vice versa [TS 144 ITAT (2016) TP], speaking through one of us (i.e. the Accountant Member) has observed as follows:

6. While we will, in a short while, deal with very elaborate and detailed submissions made by learned Departmental Representative, we may begin by pointing out that this issue has been dealt with in detail by decision of a coordinate bench in the case of Micro Ink vs ACIT [(2016) 176 TTJ 8 (Ahd)] wherein the coordinate bench has, inter alia, observed as follows:

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21. It is only elementary that the determination of arm's length price, under the scheme of the international transfer pricing set out in the Income-tax Act, 1961, can only be done in respect of an 'international transaction'. Section 92(1) provides that, "(a)ny income arising from an international transaction shall be computed having regard to the arm's length price". In order to attract the arm's length price adjustment, therefore, a transaction has to be an 'international transaction' first. The expression 'international transaction' is a defined expression. Section 92B defines the

expression 'international transaction' as follows:

'92B - Meaning of international transaction (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 anyone or more of such enterprises.

(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.

Explanation : - For the removal of doubts, it is hereby clarified that -- (inserted by the Finance Act 2012, though with retrospective effect from 1st April 2002)

(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, ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 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;

(ii) the expression "intangible property" shall include --

(a) marketing related intangible assets, such as, trademarks, trade names, brand names, logos;

(b) technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical knowhow;

(c) artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps , engravings;

(d) data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;

(e) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation;

(f) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;

(g) contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements;

(h) human capital related intangible assets, such as, trained and organised workforce, employment agreements, union contracts;

(i) location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;

(j) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;

(k) methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;

(l) any other similar item that derives its value from its intellectual content rather than its physical attributes.'

22. As analyzed by a coordinate bench, in the case of Bharti Airtel Ltd. (supra) and speaking through one us, the legal position with respect to the above definition is as follows:

ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 '25. An analysis of this definition of 'international transaction' under Section 92B, as it stood at the relevant point of time, and its break-up in plain words, shows the following:

An international transaction can be between two or more AEs, at least one of which should be a non-resident.

An international transaction can be a transaction of the following types:

in the nature of purchase, sale or lease of tangible or intangible property, in the nature of provision of services, in the nature of lending or borrowing money, or in the nature of any other transaction having a bearing on the profits, income, losses or assets of such enterprises An international transaction 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 anyone or more of such enterprises.

Section 92B (2), covering a deeming fiction, provides that even a transaction with non-AE in a situation in which such a transaction is de facto controlled by prior agreement with AE or by the terms agreed with the AE.

26. Let us now deal with the Explanation, inserted with retrospective effect from 1st April 2002 i.e. right from the time of the inception of transfer pricing legislation in India, which was brought on the statute vide Finance Act, 2012.

27. This Explanation states that it is merely clarificatory in nature inasmuch as it is 'for the removal of doubts', and, therefore, one has to proceed on the basis that it does not alter the basic character of definition of 'international transaction' under Section 92B. Clearly, therefore, this Explanation is to be read in conjunction with the main provisions, and in harmony with the scheme of the provisions, under Section 92B. Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'.

28. The first two categories of transactions, which are stated to be included in the scope of expression 'international transactions' by the virtue of clause (a) and (b) of Explanation to Section 92B, are transactions with regard to purchase, sale, transfer, lease or use of tangible and intangible properties. These transactions were anyway covered by 2 (a) above which covered transactions 'in the nature of purchase, sale or lease of tangible or intangible property'. The only additional expression in the clarification is 'use' as also illustrative and inclusive descriptions of tangible and intangible assets. Similarly, clause (d) deals with the "

provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 accounting service" which are anyway covered by 2(b) and 3 above in "provision for services" and "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 anyone or more of such enterprises". That leaves us with two clauses in the Explanation to Section 92B which are not covered by any of the three categories discussed above or by other specific segments covered by Section 92B, namely borrowing or lending money.

29. The remaining two items in the Explanation to Section 92B are set out in clauses (c) and (e) thereto, dealing with (a) capital financing and (b) business restructuring or reorganization. These items can only be covered in the residual clause of definition in international transactions, as in Section 92B(1), which covers "any other transaction having a bearing on profits, incomes, losses, or assets of such enterprises".

30. It is, therefore, essential that in order to be covered by clauses (c) and

(e) of Explanation to Section 92B, the transactions should be such as to have bearing on profits, incomes, losses or assets of such enterprise. In other words, in a situation in which a transaction has no bearing on profits, incomes, losses or assets of such enterprise, the transaction will be outside the ambit of expression 'international transaction'. This aspect of the matter is further highlighted in clause (e) of the Explanation dealing with restructuring and reorganization, wherein it is acknowledged that such an impact could be immediate or in future as evident from the words "irrespective of the fact that it (i.e. restructuring or reorganization) has bearing on the profit, income, losses or assets of such enterprise at the time of transaction or on a future date". What is implicit in this statutory provision is that while impact on " profit, income, losses or assets" is sine qua non, the mere fact that impact is not immediate, but on a future date, would not take the transaction outside the ambit of 'international transaction'. It is also important to bear in mind that, as it appears on a plain reading of the provision, this exclusion clause is not for "contingent" impact on profit, income, losses or assets but on "future" impact on profit, income, losses or assets of the enterprise. The important distinction between these two categories is that while latter is a certainty, and only its crystallization may take place on a future date, there is no such certainty in the former case. In the case before us, it is an undisputed position that corporate guarantees issued by the assessee to the Deutsche Bank did not even have any such implication because no borrowings were resorted to by the subsidiary from this bank.

31. In this light now, let us revert to the provisions of clause (c) of Explanation to Section 92B which provides that the expression 'international transaction' shall include "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". In view of the discussions above, the scope of these transactions, as could be covered under Explanation to Section 92B read with Section 92B(1), is

restricted to such capital financing transactions, including inter alia any guarantee, deferred payment or receivable or any other debt during the course of business, as will have "a bearing on the profits, income, losses or assets or such enterprise". This precondition ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 about impact on profits, income, losses or assets of such enterprises is a precondition embedded in Section 92B(1) and the only relaxation from this condition precedent is set out in clause (e) of the Explanation which provides that the bearing on profits, income, losses or assets could be immediate or on a future date. The contents of the Explanation fortifies, rather than mitigates, the significance of expression 'having a bearing on profits, income, losses or assets' appearing in Section 92B(1).

32. There can be number of situations in which an item may fall within the description set out in clause (c) of Explanation to Section 92B, and yet it may not constitute an international transaction as the condition precedent with regard to the 'bearing on profit, income, losses or assets' set out in Section 92B(1) may not be fulfilled. For example, an enterprise may extend guarantees for performance of financial obligations by its associated enterprises. These guarantees do not cost anything to the enterprise issuing the guarantees and yet they provide certain comfort levels to the parties doing dealings with the associated enterprise. These guarantees thus do not have any impact on income, profits, losses or assets of the assessee. There can be a hypothetical situation in which a guarantee default takes place and, therefore, the enterprise may have to pay the guarantee amounts but such a situation, even if that be so, is only a hypothetical situation, which are, as discussed above, excluded. One may also have a situation in which there is a receivable or any other debt during the course of business and yet these receivables may not have any bearing on its profits, income, losses or assets, for example, when these receivables are out of cost free funds and these debit balances do not cost anything to the person allowing such use of funds. The situations can be endless, but the common thread is that when an assessee extends an assistance to the associated enterprise, which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under section 92B (1) of the Act.

33. In any event, the onus is on the revenue authorities to demonstrate that the transaction is of such a nature as to have "bearing on profits, income, losses or assets" of the enterprise, and there was not even an effort to discharge this onus. Such an impact on profits, income, losses or assets has to be on real basis, even if in present or in future, and not on contingent or hypothetical basis, and there has to be some material on record to indicate, even if not to establish it to hilt, that an intraAE international transaction has some impact on profits, income, losses or assets. Clearly, these conditions are not satisfied on the facts of this case.'

23. Learned Departmental Representative submits that this decision is no longer good law in the light of Everest Kanto Cylinders Ltd. decision (supra) and Vodafone India Services (P.) Ltd. decision (supra) by Hon'ble Bombay High Court.

24. As for Hon'ble High Court's judgment in the case of Everest Kanto Cylinders Ltd. (supra), it is necessary to appreciate the fact the assessee was charging a .5% commission on issuance of corporate guarantees, on behalf of the AEs, and it could not, therefore, be said that the transaction will have no impact on "profits, incomes, losses or assets of such enterprise". This aspect of the matter is clear ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 from an observations in the related Tribunal order, which is reported as Everest Kanto Cylinders Ltd (supra), to the effect that "However, in this case, the assessee has itself charged 0.5% guarantee commission from its AE and, therefore, it is not a case of not charging any kind of commission from its AE". The Tribunal did note, in the immediately following sentence in paragraph 23 itself, that "the only point to be seen in this case is whether the same is at ALP or not". The very fact of charging this guarantee commission brings the issuance of corporate guarantees to the net of transfer pricing. Nevertheless, the ALP adjustment made by the TPO was deleted by the Tribunal. Aggrieved by the relief so given by the Tribunal, the matter was carried in further appeal, by the Commissioner, before the Hon'ble Bombay High Court which eventually upheld the relief granted by the Tribunal. The appeal before the Hon'ble High Court was by the Commissioner, and not by the assessee, and, therefore, the grievance against the issuance of corporate guarantee being held to be an international transaction could not have come up for consideration. Of course, the assessee had no occasion to challenge the stand of the Tribunal on this aspect since the addition, on merits, was deleted anyway making revenue's success in this respect hollow and of no damage to the interests of the assessee. It was in this backdrop that the action of the Tribunal was upheld in granting relief to the assessee on merits. It is difficult to understand as to how this decision is taken as supporting the proposition that the issuance of corporate guarantee, even in a case in which neither any guarantee commission is charged nor any costs are incurred, is an international transaction. In any case, there is nothing in the operative portion which even remotely suggests that Their Lordships had any occasion to address themselves to the question as to whether the issuance of corporate guarantee amounts to international transaction. The operative portion of the judgment is reproduced below for ready reference:

> "...........In the matter of guarantee commission, the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. No doubt these are contracts of guarantee, however, when they are Commercial banks that issue bank guarantees which are treated as the blood of commerce being easily encashable in the event of default, and if the bank guarantee had to be obtained from Commercial Banks, the higher commission could have been justified. In the present case, it is assessee company that is issuing Corporate Guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and accordingly we are of the view that commission charged cannot be called in question, in the manner TPO has done. In our view the comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion we are of

> the view that the appeal does not raise any substantial question of law and it is dismissed."

25. We are unable to see, in the judgment of Hon'ble Bombay High Court, any support to the proposition that issuance of corporate guarantees is inherently within the ambit of definition of 'international transaction' under section 92B irrespective of whether or not such transactions have any "bearing on profits, incomes, losses, or assets of such enterprises". Revenue, therefore, does not derive any help from the said decision.

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26. Coming to Hon'ble Bombay High Court in the case of Vodafone India Services (P.) Ltd. (supra), which has been relied upon by the learned Departmental Representative, we find that the operative portion of this judgment, so far as relevant to this discussion, is as follows:

> '213. The amendment to section 2(47) raises several important questions of fact and of law. Whether or not it affects the proceedings which were the subject matter before the Supreme Court is not relevant for the purpose of this Writ Petition. But, whether it is relevant or not for the purpose of the assessment proceedings in respect of the petitioner which are the subject matter of this Writ Petition, is relevant. The effect of the amendment would have to be considered. It cannot be brushed aside.
>
> 214. Section 2(47), as amended, even on a cursory glance raises various issues. It is necessary to note four preliminary aspects of Explanation 2 to section 2(47). Firstly, as the opening words, For the removal of doubts it is hereby clarified that ......", indicate it is a clarificatory amendment.

Secondly, it is an inclusive definition as is evident from the words "transfer" includes ". Thirdly, the amendment is with retrospective effect from 1st April, 1962. Fourthly, the Finance Act 2012 which introduced, inter alia, the amendment to section 2(47) and section 92CA(2B) is a validating act in view of section 119 thereof.

215. Explanation 2 to section 247 broadly has four elements. Disposal or parting with or creating any interest in an asset. The asset or any interest in the asset. The disposing of or parting with the asset or creating any interest therein may be:

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(a)              Direct or indirect.
(b)              Absolute or conditional.
(c)              Voluntary or involuntary.
(d)              By amendment or otherwise.
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(iv) A non-obstante provision regarding the nature of a transfer. If an act, arrangement, transaction etc. constitutes a transfer as defined in the section it would be so notwithstanding the transfer of rights having been categorised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

216. Two aspects of a transfer are clarified - the asset itself and the manner in which it is dealt with. The asset is no longer restricted to the asset per se or a right therein, but also extends to "any interest therein". Prior to the amendment, the words "any interest therein" were absent. Further, the nature of the disposal is also expanded. It now includes the creation of any interest in any asset. Moreover, the disposal of or creation of any interest in the asset may be direct or indirect, absolute or conditional, voluntary or involuntary. It may be by way of an agreement or otherwise. Further, the concluding words constitute a non-obstante provision. It provides that the transfer contemplated therein would be notwithstanding that it has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 It would be evident, therefore, that a lot more must now be seen and considered than before while arriving at a conclusion whether the terms and conditions of the Framework agreement constituted a transfer or assignment of the call options by one party to another.

217. At the cost of repetition, we are not concerned here with whether the amendment is valid or not. One of the issues, however, that does arise is whether the amendment, albeit clarificatory, would make a difference in the construction of the provisions of the Framework agreements themselves, to wit as regards the construction of the clauses thereof without the aid of any other material for interpreting them. Vodafone's case obviously considered the ambit of the term "transfer" prior to the amendment. In the present assessment proceedings, it is the amended definition which would have to be considered.

218. We do not find it either necessary or proper to indicate the application of section 2(47) as amended to the present proceedings. The application would depend upon the facts on record or those may be permitted to be brought on record.

219. There is another aspect. The petitioner may well contend that the amended definition makes no difference it being clarificatory in nature. The provisions thereof must, therefore, be deemed always to have been in existence. We will presume that it would be open to the petitioner to contend, therefore, that the judgment of the Supreme Court would remain entirely unaffected for the Supreme Court must be deemed to have considered the term as per its true ambit, as always intended by the Parliament. On the other hand, it may be equally open to the Revenue to contend that certain ingredients of a transfer were not considered by the Revenue itself in the proceedings relating to Vodafone's case on account of the Revenue itself not having appreciated or realized the actual ambit of the term "transfer" which are now clarified by the amendment. Even assuming that the Revenue cannot re-open the Vodafone case, it cannot be barred from relying upon the true ambit of the term "transfer" in future cases, including the proceedings in respect of the petitioner. Thus, even assuming that the judgment of the Supreme Court remains unaffected by the clarificatory amendment, the Revenue would be entitled hereafter in other cases, at least, to appreciate, analyze and construe the transactions relating to call options, including the Framework

agreements in a proper perspective which it may not have done earlier.

220. These are important issues. There is no justification for withdrawing the proceedings from the channel provided by the Income-tax Act, bypassing the Tribunal and considering all these questions in exercise of the High Court's extraordinary jurisdiction under Article 226.' (Emphasis supplied)

27. Revenue's emphasis is on the last two sentences in paragraph No 213 which state that "The effect of the amendment would have to be considered. It cannot be brushed aside" but in doing so what it overlooks is the subsequent observations highlighted above which recognize the fact that merely because a subsequent Explanation is introduced by the legislature, it is not an open and shut case against the assessee or the revenue, and that all these observations are in the context that "there is no justification for withdrawing the proceedings from the channel provided by the Income-tax Act, bypassing the Tribunal and considering ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 all these questions in exercise of the High Court's extraordinary jurisdiction under Article 226". When Their Lordships have made it clear that they would not like to bypass the channels under the Income-tax Act and proceed to decide these issues in writ jurisdiction under article 226, there cannot obviously be any question of Their Lordships deciding the matter one way or the other. Any observations made by Their Lordships, while declining to decide the matter in writ jurisdiction, cannot be treated as decisive of the issue on merits. While it is true that Hon'ble Bombay High Court has observed that the effect of amendment will have to be considered, Hon'ble Bombay High Court has also observed that even after taking into account the amendments, the legal implications of this amendment is still an open issue which will have to be adjudicated in the light of pleadings of the parties. Even in these observations, which do not anyway decide anything on merits, effect of a retrospective amendment was not in the context of the precise issue before us, or on the scope of the international transaction, but in respect of connotations of 'transfer'. As learned counsel rightly contends, in the light of Hon'ble Bombay High Court's judgment in the case of Sudhir Jayantilal Mulji (supra) "ratio of a decision alone is binding, because a case is only an authority for what it actually decides and not what may come to follow from some observations which find place therein". In view of these discussions, the reliance placed on Vodafone India Services (P.) Ltd. (supra) is also equally misplaced and devoid of legally sustainable merits. In any case, as is noted by Hon'ble Supreme Court in the case of CIT v. Sun Engg. Works (P.) Ltd. [1992] 198 ITR 297/64 Taxman 442 (SC), "It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court" Their Lordships further noted that "A decision of this Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasoning" It was also recalled that in Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India AIR 1971 SC 530, Hon'ble Supreme Court had cautioned that "It is not proper to regard a word, clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment." That precisely, however, has

been the approach of the revenue authorities in placing reliance on Vodafone India Services (P.) Ltd. (supra) decision. We reject this approach.

28. For the reasons set out above, learned Departmental Representative's reliance on Hon'ble Bombay High Court's judgments in the cases of Everest Kanto (supra) and Vodafone India Services (supra) is wholly misplaced and devoid of any merits. As for coordinate bench decision in the case of Hindalco Industries (supra), all it does is to follow the Everest Kanto decision by Hon'ble Bombay High Court, but then, as we have seen earlier, that was a case in which Their Lordships were in seisin of a situation in which guarantee commission was actually charged by the assessee. That is not the case before us. The coordinate bench decisions dealing with the situations in which the guarantee commission was actually charged, and as such there was indeed a bearing on the profits of the assessee, clearly donot apply on this case. We, therefore, reject the reliance on these decisions as devoid of legally sustainable merits.

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29. Let us now deal with the reliance placed by the revenue authorities on GE Capital's case by the Tax Court of Canada. In the DRP's order, a reference is made to well known Canadian decision in the case of GE Capital Canada (supra). The said case, to quote the words of the DRP, "also shows that the group company issuing the guarantee (i.e. guarantor) would, in principle, at least need to cover the cost that it incurs with respect to providing the guarantee" and that "these costs may include administrative expenses as well as the costs of maintaining an appropriate level of cash equivalents, capital, subsidiary credit lines or more expensive external funding conditions on other debt finance". The DRP had also noted that "in addition, the guarantor would want to receive appropriate compensation for the risk it incurs" and concluded that "following the above discussions, an arm's length guarantee fees is typically required to be determined by establishing a range of fees that the guarantor would, at least, want to receive and the fees that the guaranteed group company would be willing to pay depending on the prevailing conditions within financial markets in practice".

30. However, while dealing with this aspect of the matter, it is necessary to bear in mind the fact that this judicial precedent, whatever be its worth in the hierarchy of binding judicial precedents in India, does not even deal with the fundamental question as to whether issuance of a corporate guarantee is an international transaction at all- which is what we are concerned with at present. This TCC decision dealt with a situation in which the assessee was denied, in computation of its business income, tax deduction for payment of guarantee fees on the ground that there was no effective benefit to the assessee, in obtaining the said guarantee. Aggrieved by denial of deduction, assessee carried the matter in appeal before the Canadian Tax Court, and the plea of the assessee was eventually upheld. It is also interesting to note that as a sequel to this Tax Court of Canada decision, the transfer pricing legislation was amended, to bring greater clarity on the issue and as a measure of abundant caution, and section 247 (7.1), granting specific exemption to guarantee fees, was introduced. This amendment is as follows:

(7.1) Sub-section (2) does not apply to adjust an amount of consideration paid, payable or accruing to a corporation resident in Canada (in this sub- section referred to as the "parent") in a taxation year of the parent for the provision of a guarantee to a person or partnership (in this sub-section referred to as the "lender") for the repayment, in whole or in part, of a particular amount owing to the lender by a non-resident person, if (a) the non-resident person is a controlled foreign affiliate of the parent for the purposes of section 17 throughout the period in the year during which the particular amount is owing; and (b) it is established that the particular amount would be an amount owing described in paragraph 17(8)(a) or (b) if it were owed to the parent.

(http://www.fin.gc.ca/drleg-apl/ita-lrir-dec12-l-eng.pdf)

31. It is also important to bear in mind the fact that, under the Canadian law, the definition of 'international transaction', unlike an exhaustive definition under section 92B of the Indian Income-tax Act, 1961, is a very brief but inclusive and broad definition to the effect that "'transaction' includes a series of transactions, an arrangement or an event" [See Section 247(1) of the Canadian Income-tax Act, 1985; http://laws-lois.justice.gc.ca/eng/acts/I-3.3/page-419.html#h-156] coupled with the legal position that arm's length adjustment to the prices of such transaction come into play "Where a taxpayer or a partnership and a non-resident person with whom the taxpayer or the partnership, or a member of the ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 partnership, does not deal at arm's length" [See Section 247(2) ibid]. When one takes into account these variations in the statutory provisions, it will become very obvious that the provisions of the Indian Income-tax Act, 1961 and the Canadian Income-tax Act, 1985 are so radically different that just because a particular transaction is to be examined on arm's length principle in Canada cannot be a reason enough to hold that it must meet the same in India as well. While the Canadian transfer pricing legislation, as indeed the transfer pricing legislation in many other jurisdictions, does not put any fetters on the nature of transactions between the AEs, so as to be covered by the arm's length price adjustment, and, therefore, covers all transactions between the related enterprises, Indian transfer pricing legislation covers only such transactions as are "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". Our transfer pricing provisions, perhaps being in the quest of comprehensive coverage, have ended up in a limited scope of the transactions being covered by the arm's length price adjustments for transfer pricing. In any event, as emphasized earlier as well, the decision was in the context of the deduction, and, post this decision, a specific amendment was introduced in the Canadian transfer pricing law to clarify the position that all corporate guarantees issued by the assessee, in support of its subsidiaries, are not necessarily international transactions. Revenue, therefore, does not derive any advantage from the Tax Court of Canada's decision in the case of GE Capital Canada. There are many more aspects which make this decision wholly irrelevant in the present context but suffice to say that relevant legal provisions and context being radically different, the reliance of this decision must be rejected for this short reason alone.

32. As we take note of the above legal position in Canada, it is appropriate to take note of the concept of 'shareholder activities' in the context of corporate guarantees which provides conceptual justification for exclusion of corporate guarantees, under certain conditions, from the scope of transfer pricing adjustments. Taking note of these proposed amendments, 'Transfer Pricing and Intra Group Financing - by Bakker & Levvy, IBFD publication (ISBN- 978-90- 8722-153-9)' observes that "Proposed sub-section 247(7.1) of the ITA provides that the transfer pricing rules will not apply to guarantees provided by Canadian parent corporations in respect of certain financial commitments of their Canadian controlled foreign affiliates to support the active business operations of those affiliates". As to what could be conceptual support for such an exclusion, we find interesting references in a discussion paper issued by the Australian Tax Officer in June 2008 and titled as "Intra-group finance guarantees and loans"

> (http://www.transferpricing.com/pdf/Australia_Thin%20Capitalisation.pdf). The fact that this discussion paper did not travel beyond the stage of the discussion paper is not really relevant for the present purposes because all that we are concerned with right now is understanding the conceptual basis on which, contrary to popular but apparently erroneous belief, the issuance of corporate guarantees can indeed be kept outside the ambit of services. The relevant extracts from this document are as follows:
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> "102. An independent company that is unable to borrow the funds it needs on a stand-alone basis is unlikely to be in a position to obtain a guarantee from an independent party to support the borrowings it needs. Where such a guarantee is given it compensates for the inadequacies in the financial position of the borrower; specifically, the fact that the subsidiary does not have enough shareholders' funds. .....
>
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>
> 103. It would not be expected that a company pay for the acquisition of the equity it needs for its formation and continued viability. Equity is generally supplied by the shareholders at their own cost and risk.
>
> 104. Accordingly to the extent that a guarantee substitutes for the investment of the equity needed to allow a subsidiary to be self-sufficient and raise the debt funding it needs, the costs of the guarantee (and the associated risk) should remain with the parent company providing the guarantee."

33. On a conceptual note, thus, there is a valid school of thought that the corporate guarantees can indeed be a mode of ownership contribution, particularly when, as is often the case, "where such a guarantee is given it compensates for the inadequacies in the financial position of the borrower; specifically, the fact that the subsidiary does not have enough shareholders' funds". There can be number of reasons, including regulatory issues and market conditions in the related jurisdictions, in which such a contribution, by way of a guarantee, would justify to be a more appropriate and preferred mode of contribution vis-a-vis equity contribution. It is significant, in this context, that the

case of the assessee has all along been, as noted in the assessment order itself, that "said guarantees were in the form of corporate guarantees/ quasi-capital and not in the nature of any services". In other words, these guarantees were specifically stated to be in the nature of shareholder activities. The assessee's claim of the guarantees being in the nature of quasi-capital, and thus being in the nature of a shareholder's activity, is not rejected either. The concept of issuance of corporate guarantees as a shareholder activity is not alien to the transfer pricing literature in general. On the contrary, it is recognized in international transfer pricing literature as also in the official documentation and legislation of several transfer pricing jurisdictions. The 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' itself recognizes the distinction between a shareholder activity and a provision for services, when, contrasting the shareholder activity with broader term "stewardship activity" and thus highlighting narrow scope of shareholder activity, it states that "Stewardship activities covered a range of activities by a shareholder that may include provision for services to other group members, for example services that would be provided by a coordinating centre". It proceeded to add, in the immediately following sentence at page 207 of 2010 Guidelines, that "These latter type of non-shareholder activities could include detailed planning services for particular operations, management or technical advice (trouble shooting) or in some cases assistance in day-to-day management". The shareholder activities are thus seen as conceptually distinct from the provision of services. The issuance of corporate guarantee, as long as it is in the nature of shareholder activity, can not, therefore, amount to a "provision for services".

34. Undoubtedly, pioneering work done by the OECD, in the field of international taxation, has been judicially recognized worldwide by various judicial forums, including, most notably by Hon'ble Andhra Pradesh High Court in the case of CIT v. Visakhapatnam Port Trust [1983] 144 ITR 146/15 Taxman 72 (AP). Their Lordships also referred to Lord Radcliffe's observations in Ostime v. Australian Mutual Provident Society [1960] 39 ITR 210 (HL), which has described the language employed in the models developed by the OECD as the "international tax language". The work done by OECD in the field of transfer pricing is no less significant. No matter which part of the world we live in, and irrespective of whether or not that tax jurisdiction is an OECD member jurisdiction, the immense contribution of the OECD, in the field of the transfer pricing as well, is admired and ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 respected. However, the relevance of this work, so far as interpretation to transfer pricing legislation is concerned, must remain confined to the areas which have remained intact from legislative or judicial guidance. There is no scope for parallel or conflicting guidance by such forums. Legislation is an exclusive domain of the sovereign, and, therefore, as long as an area is adequately covered by the work of legislation, things like guidance of the OECD, or for that purpose any other multilateral forum, are not decisive. While we are alive to the school of thought that when the domestic transfer pricing regulations do not provide any guidelines, it may have to be decided having regard to international best practices, we do not quite agree with it inasmuch as, in our considered view, Revenue cannot seek to widen the net of transfer pricing legislation by taking refuge of the best practices recognized by the OECD work.

35. While dealing with "special consideration for intra-group services", the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' has noted that there are two fundamental issues with respect to the intra-group services- first, whether intra-group services have indeed been provided, and, second- if the answer to the first question is in positive, that charge to

these services should be at an arm's length price. Dealing with the first question, which is relevant for the present purposes, these Guidelines (2010 version) state as follows:

> '7.6 Under the arm's length principle, the question whether an intra-group service has been rendered when an activity is performed for one or more group members by another group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance its commercial position. This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in-house for itself. If the activity is not one for which the independent enterprise would have been willing to pay or perform for itself, the activity ordinarily should not be considered as an intra-group service under the arm's length principle.
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> 7.7 The analysis described above quite clearly depends on the actual facts and circumstances, and it is not possible in the abstract to set forth categorically the activities that do or do not constitute the rendering of intra-group services. However, some guidance may be given to elucidate how the analysis would be applied for some common types of activities undertaken in MNE groups.
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> 7.8 Some intra-group services are performed by one member of an MNE group to meet an identified need of one or more specific members of the group. In such a case, it is relatively straightforward to determine whether a service has been provided. Ordinarily an independent enterprise in comparable circumstances would have satisfied the identified need either by performing the activity in-house or by having the activity performed by a third party. Thus, in such a case, an intra-group service ordinarily would be found to exist. For example, an intra-group service would normally be found where an associated enterprise repairs equipment used in manufacturing by another member of the MNE group.
>
> 7.9 A more complex analysis is necessary where an associated enterprise undertakes activities that relate to more than one member of ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 the group or to the group as a whole. In a narrow range of such cases, an intra-group activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member (usually the parent company or a regional holding company) performs solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder. This type of activity would not justify a charge to the recipient companies. It may be referred to as a "shareholder activity", distinguishable from the broader term "stewardship activity" used in the 1979 Report. Stewardship activities covered a range of activities by a shareholder that may include the provision of services to other group members, for example services that would be provided by a coordinating centre. These latter types of non-shareholder activities could include

detailed planning services for particular operations, emergency management or technical advice (trouble shooting), or in some cases assistance in day-to-day management.

7.10 The following examples (which were described in the 1984 Report) will constitute shareholder activities, under the standard set forth in paragraph 7.6:

(a) Costs of activities relating to the juridical structure of the parent company itself, such as meetings of shareholders of the parent, issuing of shares in the parent company and costs of the supervisory board;

(b) Costs relating to reporting requirements of the parent company including the consolidation of reports;

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(c)              Costs of raising funds for the acquisition of its
participations.
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In contrast, if for example a parent company raises funds on behalf of another group member which uses them to acquire a new company, the parent company would generally be regarded as providing a service to the group member. The 1984 Report also mentioned "costs of managerial and control (monitoring) activities related to the management and protection of the investment as such in participations". Whether these activities fall within the definition of shareholder activities as defined in these Guidelines would be determined according to whether under comparable facts and circumstances the activity is one that an independent enterprise would have been willing to pay for or to perform for itself.' (Emphasis supplied)

36. We have noticed that the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' specifically recognizes that an activity in the nature of shareholder activity, which is solely because of ownership interest in one or more of the group members, i.e. in the capacity as shareholder "would not justify a charge to the recipient companies". It is thus clear that a shareholder activity, in issuance of corporate guarantees, is taken out of ambit of the group services. Clearly, therefore, as long as a guarantee is on account of, what can be termed as 'shareholder's activities', even on the first principles, it is outside the ambit of transfer pricing adjustment in respect of arm's length price. It is essential to appreciate, at this stage, the distinction in a service and a benefit. One may be benefited even when no services are rendered, and, therefore, in many a situation it's a 'benefit test' which is crucial for transfer pricing legislation, such as in US Regulations 1.482-9(1)(3)(i) which defines 'benefit', form a US Transfer Pricing ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 perspective, as "an activity is considered to be provided a benefit to the recipient if the activity directly results in a reasonably identifiable increment of economic or commercial value that enhances the recipient's commercial position, or that may be reasonably anticipated to do so". The expression "activity", in turn is defined, as "including the performance of functions; the assumption of risks; the use by a rendered of tangible or intangible property or other resources capabilities or knowledge (including knowledge of and ability to take advantage of a particularly advantageous situation or circumstances); and making available to the recipient any

property or other resources of the rendered" [Regulation 1.482-9(1)(2)]. The issuance of guarantees is not within the ambit of transfer pricing in United States because it is a service but because it is covered by the specific definition discussed above. As a matter of fact, David S Miller, in a paper titled 'Federal Income Tax Consequences of Guarantees; A Comprehensive Framework for Analysis' published in the 'The American Lawyer Vol. 48, No. 1 (Fall 1994), pp. 103-165 (http://www.jstor.org/stable/20771688), has stated that a guarantee is not a service. The following observations, at pages 114, are important:

> The position that guarantees are services has been discredited by the courts with good reason38. Guarantee fees do not represent payments for services any more than payments with respect to other financial instruments constitute payment for services39. A guarantor does not arrange financing for the debtor, but merely executes a financial instrument in its favour.
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> 38See. e.g., Centel Communications Co. v. Commissioner, 92 T.C. 612, 632 (1989), aff d, 920 F2d 1335 (7th Cir. 1990); Bank of Am. v. United States, 680 F.2d 142, 150 (Cl. Ct. 1982). The Service's current position on the characterization of guarantee fees as payment for services under section 482 is inconsistent with its treatment of guarantee fees under other provisions. See P.L.R. 9410008 (Dec. 13, 1993). 39But cf Federal Nat'l Mortgage Ass'n v. Commissioner, 100 T.C. 541, 579 (1993) (Fannie Mae provided services by buying mortgages).

37. We are in agreement with these views. There can thus be activities which benefit the group entities but these activities need not necessarily be 'provision for services'. The fact that the OECD considers such activities in the services segment does not alter the character of the activities. While the group entity is thus indeed benefited by the shareholder activities, these activities do not necessarily constitute services. There is no such express reference to the benefit test, or to the concept of benefit attached to the activity, in relevant definition clause of 'international transaction' under the domestic transfer pricing legislation. As we take note of these things, it is also essential to take note of the legal position, in India, in this regard. No matter how desirable is it to read such a test in the definition of the international transaction' under our domestic transfer pricing legislation, as is the settled legal position, it is not open to us to infer the same. Hon'ble Supreme Court, in the case of Smt. Tarulata Shyam v. CIT [1977] 108 ITR 345 (SC) , took note of the situation before Their Lordships in these words:

> "We have given anxious thoughts to the persuasive arguments of Mr Sharma. His arguments, if accepted, will certainly soften the rigour of this extremely drastic provision and bring it more in conformity with logic and equity". However, Their Lordships declined to do so on the ground that "There is no scope for importing into the statute the words which are not there. Such importation would be not to construe but to amend the statute". Their Lordships noted that "Even if there be casus omissus, the defect can be remedied only by legislation and not by judicial interpretation". The benefit test, which is set out in the OECD Guidance and which ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 finds its place in the

international best practices, does not find its place in the main definition of international transaction, even though there is a reference to the expression 'benefit' in the context of cost or expense sharing arrangements but that is a different aspect of the matter altogether. In the absence of benefit test being mentioned in the definition for the present purposes, we cannot infer the same.

38. One more thing which is clearly discernible from the above discussions is that the tests recognized by these guidelines are interwoven twin tests of benefit and arm's length. Benefit test implies the recipient group member should get "economic or commercial value to enhance its commercial position". The benefit test is interlinked with the an arm's length test in the sense that it seeks an answer to the question whether under a similar situation an independent enterprise would have been willing to pay for the activity concerned, or would have performed the activity in-house for itself. So far as the benefit test is concerned, as we have noted earlier, it is alien to the definition of international transaction' under the Indian transfer pricing legislation. So far as arm's length test is concerned, it presupposes that such a transaction is possible in arm's length situation. However, in a situation in which the subsidiary does not have adequate financial standing of its own and is inadequately capitalized, none will guarantee financial obligations of such a subsidiary.

39. The issuance of financial guarantee in favour of an entity, which does not have adequate strength of its own to meet such obligations, will rarely be done. The very comparison, between the consideration for which banks issue financial guarantees on behalf of its clients with the consideration for which the corporates issue guarantees for their subsidiaries, is ill-conceived because while banks seek to be compensated, even for the secured guarantees, for the financial risk of liquidating the underlying securities and meeting the financial commitments under the guarantee, the guarantees issued by the corporates for their subsidiaries are rarely, if at all, backed by any underlying security and the risk is entirely entrepreneurial in the sense that it seeks to maximize profitability through and by the subsidiaries. It is inherently impossible to decide arm's length price of a transaction which cannot take place in arm's length situation. The motivation or trigger for issuance of such guarantees is not the kind for consideration for which a banker, for example, issue the guarantees, but it is maximization of gains for the recipient entity and thus the MNE group as a whole. In general, thus, the consideration for issuance of corporate guarantees are of a different character altogether.

40. At this stage, it would appropriate to analyze the business model of bank guarantees, with which corporate guarantees are sometimes compared, in the context of benchmarking the arm's length price of corporate guarantees. A bank guarantee is a surety that that the bank, or the financial institution issuing the guarantee, will pay off the debts and liabilities incurred by an individual or a business entity in case they are unable to do so. By providing a guarantee, a bank offers to honour related payment to the creditors upon receiving a request. This requires that bank has to be very sure of the business or individual to whom the bank guarantee is being issued. So, banks run risk assessments to ensure that the guaranteed sum can be retrieved back from the business. This may require the business to furnish a security in the shape of cash or capital assets. Any entity that can pass the risk assessment and provide security may obtain a bank guarantee. The consideration for the issuance of bank guarantee, so far as a banker is concerned, is this. When the client is not able to

honour the financial commitments and when client is not able to meet his financial commitments and ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 the bank is called upon to make the payments, the bank will seek a compensation for the action of issuing the bank guarantee, and for the risk it runs inherent in the process of making the payment first and realizing it from the underlying security and the client. Even when such guarantees are backed by one hundred per cent deposits, the bank charges a guarantee fees. In a situation in which there is no underlying assets which can be realized by the bank or there are no deposits with the bank which can be appropriated for payment of guarantee obligations, the banks will rarely, if at all, issue the guarantees. Of course, when a client is so well placed in his credit rating that banks can issue him clean and unsecured guarantees, he gets no further economic value by a corporate guarantee either. Let us now compare this kind of a guarantee with a corporate guarantee. The guarantees are issued without any security or underlying assets. When these guarantees are invoked, there is no occasion for the guarantor to seek recourse to any assets of the guaranteed entity for recovering payment of defaulted guarantees. The guarantees are not based on the credit assessment of the entity, in respect of which the guarantees are issued, but are based on the business needs of the entity in question. Even in a situation in which the group entity is sure that the beneficiary of guarantee has no financial means to reimburse it for the defaulted guarantee amounts, when invoked, the group entity will issue the guarantee nevertheless because these are compulsions of his group synergy rather than the assurance that his future obligations will be met. We see no meeting ground in these two types of guarantees, so far their economic triggers and business considerations are concerned, and just because these instruments share a common surname, i.e. 'guarantee', these instruments cannot be said to be belong to the same economic genus. Of course, there can be situations in which there may be economic similarities, in this respect, may be present, but these are more of an exception than the rule. In general, therefore, bank guarantees are not comparable with corporate guarantees.

41. As evident from the OECD observation to the effect "In contrast, if for example a parent company raises funds on behalf of another group member which uses them to acquire a new company, the parent company would generally be regarded as providing a service to the group member", it is also to be clear that when the corporate guarantees are issued for the purpose of subsidiaries raising funds for acquisitions by such subsidiaries, these guarantees will be deemed to be services to the subsidiaries, and, as a corollary thereto, when corporate guarantees are issued for the subsidiaries to raise funds for their own needs, the corporate guarantees are to be treated as shareholder activity. The use of borrowed funds for own use is a reasonable presumption as it is a matter of course rather than exception. There has to be something on record to indicate or suggest that the funds raised by the subsidiary, with the help of the guarantee given by the assessee, are not for its own business purposes. As a plain look at the details of corporate guarantees would show, these guarantees were issued to various banks in respect of the credit facilities availed by the subsidiaries from these banks. The guarantees were prima facie in the nature of shareholder activity as it was to provide, or compensate for lack of, core strength for raising the finances from banks. No material, indicating to the contrary, is brought on record in this case. Going by the OECD Guidance also, it is not really possible to hold that the corporate guarantees issued by the assessee were in the nature of 'provision for service' and not a shareholder activity which are mutually exclusive in nature. In the light of these discussions, we are of the considered view, and are fully supported by the OECD Guidance in this, that the issuance of corporate guarantees, in the nature of quasi-capital

or shareholder activity- as is the uncontroverted position on the facts of this case, does not amount to a service in which respect of which arm's length adjustment can be done.

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42. As observed by Hon'ble Delhi High Court in the case of CIT v. EKL Appliances Ltd. [2012] 345 ITR 241/209 Taxman 200/24 taxmann.com 199 (Delhi), a re- characterization of a transaction is indeed permissible, inter alia, in a situation "(i) where the economic substance of a transaction differs from its form and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner". The case of a corporate guarantee clearly falls in the second category as no independent enterprise would issue a guarantee without an underlying security as has been done by the assessee. We may, in this regard, refer to the observations made by Hon'ble High Court, speaking through Hon'ble Justice Easwar (as he then was), as follows:

> '16. The Organization for Economic Co-operation and Development ('OECD', for short) has laid down "transfer pricing guidelines" for Multi- National Enterprises and Tax Administrations. These guidelines give an introduction to the arm's length price principle and explains article 9 of the OECD Model Tax Convention. This article provides that when conditions are made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises then any profit which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, if not so accrued, may be included in the profits of that enterprise and taxed accordingly. By seeking to adjust the profits in the above manner, the arm's length principle of pricing follows the approach of treating the members of a multi-national enterprise group as operating as separate entities rather than as inseparable parts of a single unified business. After referring to article 9 of the model convention and stating the arm's length principle, the guidelines provide for "recognition of the actual transactions undertaken" in paragraphs 1.36 to 1.41. Paragraphs 1.36 to 1.38 are important and are relevant to our purpose. These paragraphs are reproduced below:--
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> "1.36 A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapters II and III. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured.

1.37 However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form. In such a case the tax administration may disregard the parties' characterization of the transaction and re-characterise it in accordance with its ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 substance. An example of this circumstance would be an investment in an associated enterprise in the form of interest- bearing debt when, at arm's length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way. In this case it might be appropriate for a tax administration to characterize the investment in accordance with its economic substance with the result that the loan may be treated as a subscription of capital. The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price. An example of this circumstance would be a sale under a long-term contract, for a lump sum payment, of unlimited entitlement to the intellectual property rights arising as a result of future research for the term of the contract (as previously indicated in paragraph 1.10). While in this case it may be proper to respect the transaction as a transfer of commercial property, it would nevertheless be appropriate for a tax administration to conform the terms of that transfer in their entirety (and not simply by reference to pricing) to those that might reasonably have been expected had the transfer of property been the subject of a transaction involving independent enterprises. Thus, in the case described above it might be appropriate for the tax administration, for example, to adjust the conditions of the agreement in a commercially rational manner as a continuing research agreement.

1.38 In both sets of circumstances described above, the character of the transaction may derive from the relationship between the parties rather than be determined by normal commercial conditions as may have been structured by the taxpayer to avoid or minimize tax. In such cases, the totality of its terms would be the result of a condition that would not have been made if the parties had been engaged in arm's length dealings. Article 9 would thus allow an adjustment of conditions to reflect those which the parties would have attained had the transaction been structured in accordance with the economic and commercial reality of parties dealing at arm's length."

17. The significance of the aforesaid guidelines lies in the fact that they recognise that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated

enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions. The reason for characterisation of such re-structuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured.

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18. Two exceptions have been allowed to the aforesaid principle and they are (i) where the economic substance of a transaction differs from its form and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner.'

43. It is thus clear that even if we accept the contention of the learned Departmental Representative that issuance of a corporate guarantee amounts to a 'provision for service', such a service needs to be re-characterized to bring it in tune with commercial reality as "arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner". No bank would be willing to issue a clean guarantee, i.e. without underlying asset, to assessee's subsidiaries when the banks are not willing to extend those subsidiaries loans on the same terms as without a guarantee. Such a guarantee transaction can only be, and is, motivated by the shareholder, or ownership considerations. No doubt, under the OECD Guidance on the issue, an explicit support, such as corporate guarantee, is to be benchmarked and, for that purpose, it is in the service category but that occasion comes only when it is covered by the scope of 'international transaction' under the transfer pricing legislation of respective jurisdiction. The expression 'provision for services' in its normal or legal connotations, as we have seen earlier, does not cover issuance of corporate guarantees, even though once a corporate guarantee is covered by the definition of international transaction', it is benchmarked in the service segment. In view of the above discussions, OECD Guidelines, as a matter of fact, strengthen the claim of the assessee that the corporate guarantees issued by the assessee were in the nature of quasi-capital or shareholder activity and, for this reason alone, the issuance of these guarantees should be excluded from the scope of services and thus from the scope of 'international transactions' under section 92B. Of course, once a transaction is held to be covered by the definition of international transaction, whether in the nature of the shareholder activity or quasi- capital or not, ALP determination must depend on what an independent enterprise would have charged for such a transaction. In this light of these discussions, we hold that the issuance of corporate guarantees in question was not in the nature of 'provision for services' and these corporate guarantees were required to be treated as shareholder participation in the subsidiaries.

44. As for the words 'provision for services" appearing in Section 92B, and connotations thereof, our humble understanding is that this expression, in its natural connotations, is restricted to services rendered and it does not extend to the benefits of activities per se. Whether we look at the examples given in the OECD material or even in Explanation to Section 92B, the thrust is on the services like market research, market development, marketing management, administration, technical service,

repairs, design, consultation, agency, and scientific research, legal or accounting service or coordination services. As a matter of fact, even in the Explanation to Section 92B- which we will deal with a little later, guarantees have been grouped in item 'c' dealing with capital financing, rather than in item 'd' which specifically deals with 'provision for services'. When the legislature itself does not group 'guarantees' in the 'provision for services' and includes it in the 'capital financing', it is reasonable to proceed on the basis that issuance of guarantees is not to be treated as within the scope of normal connotations of expression 'provision for services'. Of course, the global best practices seem to be that guarantees are sometimes included in 'services' but that is because of the extended definition of 'international transaction' in most of the tax ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 jurisdictions. Such a wide definition of services, which can be subject to arm's length price adjustment, apart, "Transfer Pricing and Intra-Group Financing - by Bakker & Levvy" (ibid) notes that "the IRS has issued a non-binding Field Service Advice (FSA 1995 WL 1918236, 1 May 1995) stating that, in certain circumstances (emphasis supplied), a guarantee may be treated as a service". If the natural connotations of a 'service' were to cover issuance of guarantee in general, there could not have been an occasion to give such hedged advice. This will be stretching the things too far to suggest that just because when guarantees are included in the international transactions, these guarantees are included in service segment in contradistinction with other heads under which international transactions are grouped, the guarantees should be treated as services, and, for that reason, included in the definition of international transactions. That is, in our considered view, purely fallacious logic. In our considered view, under Section 92B, corporate guarantees can be covered only under the residuary head i.e. "any other transaction having a bearing on the profits, income, losses or assets of such enterprise". It is for this reason that Section 92B, in a way, expands the scope of international transaction in the sense that even when guarantees are issued as a shareholder activity but costs are incurred for the same or, as a measure of abundant caution, recoveries are made for this non-chargeable activity, these guarantees will fall in the residuary clause of definition of international transactions under section 92B. As for the learned Departmental Representative's argument that "whether the service has caused any extra cost to the assessee should not be the deciding factor to determine whether it is an international and then gives an example of brand royalty to make his point. What, in the process, he overlooks is that Section 92B(1) specifically covers sale or lease of tangible or intangible property". The expression "bearing on the profits, income, losses or assets of such enterprises" is relevant only for residuary clause i.e. any other services not specifically covered by Section 92B. It was also contended that, while rendering Bharti Airtel decision, the Delhi Tribunal did go overboard in deciding something which was not even raised before us. In the written submission, it was stated that "Hon'ble Delhi ITAT was not requested by the contesting parties to decide the issue as to whether the provision of guarantee was a service or not". That's not factually correct. We are unable to see any merits in learned Departmental Representative's contention, particularly as decision categorically noted that not only before the Tribunal, but this issue was also raised before the DRP- as evident from the text of DRP decision. We now take up the issue with respect to specific mention of the words in Explanation to Section 92B which states that "For the removal of doubts, it is hereby clarified that (i) the expression "international transaction" shall include........ (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." There is no dispute that this Explanation states that it is merely clarificatory in nature inasmuch as it is 'for the removal of doubts', and, therefore, one has to proceed on the basis that it does not alter the basic character of definition of 'international transaction' under Section 92B. Accordingly, this Explanation is to be read in conjunction with the main provisions, and in harmony with the scheme of the provisions, under Section 92B. Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'. The first two categories of transactions, which are stated to be included in the scope of expression 'international transactions' by virtue of clause (a) and (b) of Explanation to Section 92B, are transactions with regard to purchase, sale, transfer, lease or use of tangible and intangible properties. These transactions were anyway covered by transactions 'in the nature of purchase, sale or lease of tangible or intangible property'. The only additional expression in the clarification is 'use' as ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 also illustrative and inclusive descriptions of tangible and intangible assets. Similarly, clause (d) deals with the " 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" which are anyway covered in "provision for services" and "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 anyone or more of such enterprises ". That leaves us with two clauses in the Explanation to Sect ion 92B which are not covered by any of the three categories discussed above or by other specific segments covered by Section 92B, namely borrowing or lending money. The remaining two items in the Explanation to Section 92B are set out in clause (c) and (e) thereto, dealing with

(a) capital financing and (b) business restructuring or reorganization. These items can only be covered in the residual clause of definition in international transactions, as in Section 92B (1), which covers "any other transaction having a bearing on profits, incomes, losses, or assets of such enterprises". It is, therefore, essential that in order to be covered by clause (c) and (e) of Explanation to Section 92B, the transactions should be such as to have bearing on profits, incomes, losses or assets of such enterprise. In other words, in a situation in which a transaction has no bearing on profits, incomes, losses or assets of such enterprise, the transaction will be outside the ambit of expression 'international transaction'. This aspect of the matter is further highlighted in clause (e) of the Explanation dealing with restructuring and reorganization, wherein it is acknowledged that such an impact could be immediate or in future as evident from the words "irrespective of the fact that it (i.e. restructuring or reorganization) has bearing on the profit, income, losses or assets of such enterprise at the time of transaction or on a future date". What is implicit in this statutory provision is that while impact on " profit, income, losses or assets" is sine qua non, the mere fact that impact is not immediate, but on a future date, would not take the transaction outside the ambit of 'international transaction'. It is also important to bear in mind that, as it appears on a plain reading of the provision, this exclusion clause is not for "contingent" impact on profit, income, losses or assets but on "future" impact on profit, income, losses or assets of the enterprise. The important distinction between these two categories is that while latter is a certainty, and only its crystallization may take place on a future date, there is no such certainty in the former case. In the case before us, it is an undisputed position that corporate guarantees issued by the assessee to the various banks and crystallization of liability under these guarantees, though a possibility, is not a certainty. In view of the discussions above, the scope of the capital financing transactions, as could be covered under Explanation to Section 92B read with Section 92B(1), is restricted to such capital financing transactions, including inter alia any guarantee, deferred payment or receivable or any other debt during the course of business, as will have "a bearing on the profits, income, losses or assets or such enterprise". This precondition about impact on profits, income, losses or assets of such enterprises is a precondition embedded in Section 92B(1) and the only relaxation from this condition precedent is set out in clause (e) of the Explanation which provides that the bearing on profits, income, losses or assets could be immediate or on a future date. These guarantees do not have any impact on income, profits, losses or assets of the assessee. There can be a hypothetical situation in which a guarantee default takes place and, therefore, the enterprise may have to pay the guarantee amounts but such a situation, even if that be so, is only a hypothetical situation, which are, as discussed above, excluded. When an assessee extends an assistance to the associated enterprise, which does not cost anything to the assessee and particularly for which the assessee could not have realized money ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under section 92B (1) of the Act.

45. Before we part with this issue, there are a couple of things that we would like to briefly deal with.

46. The first issue is this. We find that in the case of Four Soft Ltd v. Dy. CIT [(2011) 142 TTJ 358 (Hyd)], a co-ordinate bench had, vide order dated 9th September 2011, observed as follows:

> "We find that the TP legislation provides for computation of income from international transaction as per Section 92B of the Act. The corporate guarantee provided by the assessee company does not fall within the definition of international transaction. The TP legislation does not stipulate any guidelines in respect to guarantee transactions. In the absence of any charging provision, the lower authorities are not correct in bringing aforesaid transaction in the TP study. In our considered view, the corporate guarantee is very much incidental to the business of the assessee and hence, the same cannot be compared to a bank guarantee transaction of the Bank or financial institution."

47. However, within less than four months of this decision having been rendered, the Finance Act 2012 came up with an Explanation to Section 92B stating that "for the removal of doubts", as we have noted earlier in this decision, "clarified" that international transactions include, inter alia, capital financing by way of guarantee. This legislative clarification did indeed go well beyond what a coordinate bench of this Tribunal held to be the legal position and we are bound by the esteemed views of the coordinate bench. We are, therefore, of the opinion that the Explanation to Section 92B did indeed enlarge the scope of definition of 'international transaction' under section 92B, and it did so with retrospective effect. If, for argument sake, it is assumed that the insertion of Explanation to Section 92B did not enlarge the scope of definition, there cannot obviously be any occasion to deviate from the decision that the coordinate bench took in Four Soft Ltd. case (supra), but if the scope of the provision was indeed enlarged, as is our opinion, the question that really needs to be

addressed whether, given the peculiar nature and purpose of transfer pricing provision, is it at all a workable idea to enlarge the scope of transfer pricing provisions with retrospective effect There can be little doubt about the legislative competence to amend tax laws with retrospective effect, and, in any case, we are not inclined to be drawn into that controversy either. On the issue of implementing the amendment in transfer pricing law with retrospective effect, in the case of Bharti Airtel Ltd. (supra), a coordinate bench had observed as follows:

> "34. There is one more aspect of the matter. The Explanation to Section 92B has been brought on the statute by the Finance Act 2012. If one is to proceed on the basis that the provisions of Explanation to Section 92B enlarges the scope of Section 92B itself, even as it is modestly described as 'clarificatory' in nature, it is an issue to be examined whether an enhancement of scope of this anti avoidance provision can be implemented with retrospective effect. Undoubtedly, the scope of a charging provision can be enlarged with retrospective effect, but an anti- avoidance measure, that the transfer pricing legislation inherently is, is not primarily a source of revenue as it mainly seeks compliant behaviour from ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 the assessee vis-à-vis certain norms, and these norms cannot be given effect from a date earlier than the date norms are being introduced. However, as we have decided the issue in favour of the assessee on merits and even after taking into account the amendments brought about by Finance Act 2012, we need not deal with this aspect of the matter in greater detail."

48. In the present case, we have held that the issuance of corporate guarantees were in the nature of shareholder activities- as was the uncontroverted claim of the assessee, and, as such, could not be included in the 'provision for services' under the definition of 'international transaction' under section 92B of the Act. We have also held, taking note of the insertion of Explanation to Section 92B of the Act, that the issuance of corporate guarantees is covered by the residuary clause of the definition under section 92B of the Act but since such issuance of corporate guarantees, on the facts of the present case, did not have "bearing on profits, income, losses or assets", it did not constitute an international transaction, under section 92B, in respect of which an arm's length price adjustment can be made. In this view of the matter, and for both these independent reasons, we have to delete the impugned ALP adjustment. The question, which was raised in Bharti Airtel's case (supra) but left unanswered as the assessee had succeeded on merits, reamins unanswered here as well. However, we may add that in the case of Krishnaswamy SPD v. Union of India [2006] 281 ITR 305/151 Taxman 286 (SC), wherein Their Lordships had, inter alia, observed that "the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. It was for this reason that a coordinate bench of this Tribunal, in the case of Channel Guide India Ltd. v. Asstt. CIT [2012] 139 ITB 49/25 taxmann.com 25 (Mum.), held that even though the assessee had not deducted the applicable tax at source under section 195, the disallowance could not be made under section 40(a)(i) since the taxability was under the provisions which were amended, post the payment having been made by the assessee, with retrospective effect. All this only shows that even when law is specifically stated to have effect from a

particular date, its being implemented in a fair and reasonable manner, within the framework of judge made law, may require that date to be tinkered with. When a proviso is introduced with effect from a particular date specified by the legislature, the judicial forums, including this Tribunal, at times read it as being effect from a date much earlier than that too. One such case, for example, is CIT v. Ansal Landmark Township (P.) Ltd. [2015] 377 ITR 635/234 Taxman 825/61 taxmann.com 45 (Delhi), wherein Hon'ble Delhi High Court confirmed the action of the Tribunal in holding that the provision, though stated to be effective from 1st April 2013 must be held to be effective from 1st April 2005. Whether such an exercise can be done in the present case is, of course, something to be examined and our observations should not be construed as an expression on merits of that aspect of matter. Given the fact that the assessee has succeeded on merits in this case, it would not really be necessary to deal with that aspect of the matter.

49. The second issue is this. We must deal with the question whether in this case the matter should have been referred to a larger bench. The parties before us were opposed to the matter being sent for consideration by the special bench, and at least one of the reasons for which the grievance of the assessee is upheld, i.e. guarantees being in the nature of shareholder activity and excludible from the scope of services for that reason alone, is an area which had come up for consideration for the first time. In effect, therefore, there was no conflict on this ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 issue of and the other issues, given decision on the said issue, were wholly academic. It cannot be open to refer the academic questions to the special bench. No doubt, some decisions of the coordinate benches which have reached the different conclusions. There is, however, no conflict in the reasoning. Four Soft Ltd. decision (supra) had decided the issue in favour of the assessee but that was with respect to the law prior to insertion to Explanation to Section 92B. As for the post-amendment law and the impact of amendment in the definition of 'international transaction', the matter was again decided in favour of the assessee by Bharti Airtel Ltd. decision (supra) on the peculiar facts of that case. The decisions like Everest Kento Cylinders Ltd. (supra) and Aditya Birla Minacs Worldwide (supra) were decisions in which the assessee had charged the fees and, for that reason, such cases are completely distinguishable as discussed above. In Prolific' Corp Ltd. case (supra), as indeed in any other case so far, it was not the case of the assessee that corporate guarantees are quasi-capital, or shareholder activity, in nature, and, for that reason, excludible from chargeable services, even if these are held to be services in nature. That plea has been specifically accepted in the present case. Therefore, the question whether issuance of corporate guarantee per se in general constitutes a 'international transaction' under section 92B would have been somewhat academic question on the facts of this case. In any event, in Prolific' Corp Ltd. case (supra), an earlier considered decision on the same issue by coordinate bench of equal strength was simply disregarded and that fact takes this decision out of the ambit of binding judicial precedents. We have also noted that in view of the decision a coordinate bench, in the case of JKT Fabrics v. Dy. CIT [2005] 4 SOT 84 (Mum.) and following the Full bench decision of Hon'ble AP High Court in the case of CIT v. BR Constructions [1993] 202 ITR 222/[1994] 73 Taxman 473 (AP), a decision disregarding an earlier binding precedent on the issue is per incurium. Such decisions cannot be basis for sending the matters to special bench since occasion for reference to special bench arises when binding and conflicting judicial precedents from coordinate benches come up for consideration. That was not the case here. All these factors taken together, in our considered view, it was not possible in this case to refer the matter for constitution of a special bench. In any case, whatever we decide is, and shall

always remain, subject to the judicial scrutiny by Hon'ble Courts above and our endeavour is to facilitate and expedite, within our inherent limitations, that process of such a judicial scrutiny, if and when occasion comes, by analyzing the issues in a comprehensive and holistic manner.

50. In the light of the detailed discussions above, and for the detailed reasons set out above, we uphold the grievance raised by the assessee. The impugned ALP adjustment of Rs 2,23,62,603, thus stands deleted. As we do so, however, we must add that, in our considered view, the way forward, to avoid such issues being litigated and to ensure satisfactorily resolution of these disputes, must include a clear and unambiguous legislative guidance on the transfer pricing implications of the corporate guarantees as also on the methodology of determining its ALP, if necessary. Of course, no matter how good is the legislative framework, the importance of a very comprehensive analysis, in the transfer pricing study, of the nature of corporate guarantees issued by the assessees, can never be overemphasized. The sweeping generalizations, vague statements and evasive approach in the transfer pricing study reports, which are quite common in most of the transfer pricing reports, cannot do good to a reasonable cause. When judicial calls on the complex transfer pricing issues are to be taken, utmost clarity in the legislative framework and a comprehensive analysis of relevant facts, in the transfer pricing documentation, are basic inputs. Unfortunately, both of these things leave a lot to be desired. We can only hope, and we do hope, that things will change for better.

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7. We are in considered agreement with the views so expressed by the coordinate bench. Learned Departmental Representative's well researched arguments donot persuade us to deviate from the stand so taken by us. Let us deal with these arguments in little detail.

8. Learned Departmental Representative, in his written note, accepts that "the legislature brought in amendment (in Section 92B) by the Finance Act, 2012, after the decision of Four Soft Ltd dated 14/09/2011". He points out that the decision of the Tribunal, in the case of Bharti Airtel (supra), is per incurium because there were two decisions of this Tribunal, in the case of Everest Kanto Cylinders Ltd Vs DCIT [(2012) 34 taxmann.com 9 (Mum)] and Mahindra & Mahindra Ltd Vs DCIT [2012- TII-70-ITAT-Mum], which were not considered by the Bharti Airtel decision. Our attention is also invited to the rectification petition filed by the Assessing Officer, which is said to be pending for disposal before the Tribunal. We donot find merits in this plea. Mahindra & Mahindra decision (supra) was passed on 6th June 2012, though at a point of time when Finance Act 2012 had just come into force i.e. post 28th May 2012, without even being aware whether or not the Finance Act 2012 was passed as it gave certain directions depending upon the exact amendment by the said Finance Act. The matter was remitted to the file of the Assessing Officer in a rather summary manner. It cannot be, by any stretch of logic, an authority on any legal question arising out of the law which, as per the Tribunal- wrongly though, was not even in existence. As for the Everest Kanto decision (supra), the issue was decided against the assessee as, to borrow the words of the coordinate bench, "Here in this case, it is undisputed that the assessee in its T.P. Study Report and also the TPO, have accepted that it is an international transaction and CUP is the most appropriate method for benchmarking the charging of guarantee fee", and, it was for this short reason that the matter was decided against the assessee. The co-ordinate bench had further observed "in this case,

the assessee has itself charged 0.5% guarantee commission from its AE, therefore, it is not a case of not charging of any kind of commission from its AE. The only point which has to be seen in this case is whether the same is at ALP or not". Learned Departmental Representative has invited our attention to a decision of the Bangalore benches, in the case of Advanta India Limited Vs ACIT [(2015) TII-294-ITAT-BAN], which is in favour of the assessee. While learned Departmental Representative is indeed right, that is a case in which the assessee did infact recover charges, which included more than the cost incurred, from the beneficiary, and, as such, it clearly had an impact on the profits of the assessee. That is a case distinct from the present situation in which there is no impact on the profits or losses or assets or income of the assessee. In Advanta decision (supra), this aspect of the matter and the distinguishing feature has been discussed at considerable length. Learned Departmental Representative has then invited our attention to the fact a substantial question of law has been admitted by Hon'ble Delhi High Court in ITA No. 607/2014 against the order passed by the Tribunal in the case of Bharti Airtel (supra). While no doubt the matter is now pending before Hon'ble High Court for the judicial scrutiny by Their Lordships, that fact by itself does not reverse the stand taken by the Tribunal in the order so impugned. As regards the decision of Bharati Airtel being on its own peculiar facts, there can be no denial of this position but that does not mean that the so far as issues of general application are concerned, the stand of the Tribunal cannot hold good. Learned Departmental Representative then takes us through the Explanation to Section 92 B to explain its true scope and through Bharti Airtel decision as to how fallacious is its logic. Its emphasized that the impact of issuance of bank guarantees, on the profits, income, losses or assets of such enterprises, is 'real' and not 'contingent' as held in Bharti's case. It is also emphasized, apparently to highlight the fact that it is not only the impact on entity issuing the guarantee but also beneficiary of the guarantee that matters in this context, that the word used in section 92 B is 'enterprises' and not 'enterprise'. It is thus contended that the impact on the profits, incomes, losses or assets of the entity issuing guarantee is important, but the impact on the profits, income, losses or assets of the entity, which is beneficiary of the guarantee, is also important. It is pointed out ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 that Bharti Airtel decision has examined this aspect only from the point of view of the entity issuing the guarantee and that has also been decided wrongly. As for these issues being raised by the learned Departmental Representative, suffice to say that even if reasoning adopted by Bharti Airtel decision is incorrect, it is not for us to examine that aspect of the matter. Now that the matter is before Hon'ble High Court, and the matter is already under hearing, there is no point in going into these fine points, which may at best be errors of judgment rather than a glaring error rendering the decision to be per incurium, at this stage. In any case, there is a subtle difference in 'impact on' and 'influence on'. The issuance of a corporate guarantee may have an influence on the profits, incomes, losses and assets of an entity, in whose favour the guarantee is issued, but it has no impact on the same as long as it is issued without a consideration. To treat this phrase as implying a benefit test, will, in our considered view, stretching the things too far. We are, therefore, not swayed by the arguments, though extremely well researched and thought provoking, of the learned Departmental Representative- particularly at this stage. He has raised a number of other arguments as well but as those arguments are already dealt with in the case of Micro Ink decision reproduced above, we see no need to again deal with the same.

9. In the Micro Ink decision (supra), we had, amongst other things, taken not of the judicial developments leading to the insertion of Explanation to Section 92B and how within four months of Four Soft decision (supra) being announced, it was nullified by a legislative amendment. This aspect of the matter has been dealt with in paragraph 46 and 47 of this decision, which has been reproduced earlier in this order, at considerable length. It assumes even more significance in the light of a new judicial development that we will deal with in a short while now. In the present case, we are dealing with a situation in which the amendment was made with retrospective effect and it covered certain issues which were already subjected to a judicial interpretation in a particular manner. Learned Departmental Representative does not even dispute it. He is candid enough to place on record the fact, by way of a written note, that the one of the reasons of insertion of Explanation to Section 92 B was to nullify the Four Soft decision (supra). The judicial interpretation so given was certainly not the end of the road. The matter could have been carried in appeal before higher judicial forums. If the decision of a judicial body does not satisfy the tax administration, nothing prevents them from going to the higher judicial forum or from so amending the law, with prospective effect, that there is no ambiguity about the intent of legislature and it is conveyed in unambiguous words.

10. Nullifying a judicial interpretation though legislative amendment, much as many of us may abhor it, is not too uncommon an occurrence. Of course, when legislature has to take an extreme measure to nullifying the impact of a judicial ruling in taxation, it is the time for, at least on a theoretical note, introspection for the draftsman as to what went so wrong that fundamental intent of law of law could not be conveyed by the words of the statute, or, perhaps for the judicial forums, as to what went so wrong that the interpretation was so off the mark vis-à-vis fundamental principles of taxation or the sound policy considerations. However, amendment so made are generally prospective, and there is a sound conceptual foundation, as has been highlighted in the binding judicial precedents that we will deal with in a short while, for that approach. There is no dearth of examples on this aspect of the matter. Take for example, the amendment to Section 263 by the Finance Act, 1961. In many judicial precedents, [such as in the case of CIT Vs Sunbeam Auto Limited (332 ITR 167) wherein it was held that "Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open"], it was reiterated that it was only the lack, not the adequacy, of inquiry which could confer jurisdiction under section 263 on the Commissioner. By ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 inserting Explanation 2 to Section 263(1), which inter alia provided that powers under section 263 could also be invoked in the cases where "the order is passed without making inquiries or verification which should have been made", all ratio of all these decisions was nullified. That, however, is done with prospective effect, i.e. with effect from 1st June 2015. As a matter of fact, it is a laudable policy of the present tax administration to stay away from making the retrospective amendments, and thus contribute to greater certainty and congenial business climate. Nothing evidences it better than this subtle, but easily discernible, paradigm shift in the underlying approach to the amendments made in Section 263 in the very first full budget of the present Government.

11. What has, however, been done in the case before us is to amend the law with retrospective effect. Of course, it happened much before the current awareness about the evils of retrospective taxation having been translated into action.

12. Dealing with such a situation, Hon'ble Delhi High Court has, in the case of DIT vs New Skies Satellite BV [TS-64- HC -DEL (2016)], observed as follows:

> 30. Undoubtedly, the legislature is competent to amend a provision that operates retrospectively or prospectively. Nonetheless, when disputes as to their applicability arise in court, it is the actual substance of the amendment that determines its ultimate operation and not the bare language in which such amendment is couched........
>
> 36. A clarificatory amendment presumes the existence of a provision the language of which is obscure, ambiguous, may have made an obvious omission, or is capable of more than one meaning. In such case, a subsequent provision dealing with the same subject may throw light upon it. Yet, it is not every time that the legislature characterizes an amendment as retrospective that the Court will give such effect to it. This is not in derogation of the express words of the law in question, (which as a matter of course must be the first to be given effect to), but because the law which was intended to be given retrospective effect to as a clarificatory amendment, is in its true nature one that expands the scope of the section it seeks to clarify, and resultantly introduces new principles, upon which liabilities might arise. Such amendments though framed as clarificatory, are in fact transformative substantive amendments, and incapable of being given retrospective effect. ....
>
> 37. An important question, which arises in this context, is whether a "clarificatory" amendment remains true to its nature when it purports to annul, or has the undeniable effect of annulling, an interpretation given by the courts to the term sought to be clarified. In other words, does the rule against clarificatory amendments laying down new principles of law extend to situations where law had been judicially interpreted and the legislature seeks to overcome it by declaring that the law in question was never meant to have the import given to it by the Court? The general position of the courts in this regard is where the purpose of a special interpretive statute is to correct a judicial interpretation of a prior law, which the legislature considers inaccurate, the effect is prospective. Any other result would make the legislature a court of last resort. United States v. Gilmore 8 Wall [(75 US) 330, 19L Ed 396 (1869)] Peony Park v. O'Malley [223 F2d 668 (8th Cir 1955)]. It does not mean that the legislature does not have the power to override judicial decisions which in its opinion it deems as incorrect, however to respect the separation of legal powers and to avoid making a legislature a court of last resort, the amendments can be made prospective only [Ref County of Sacramento v State ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 (134 Cal App 3d 428) and In re Marriage of Davies (105 III App 3d 66)] (Emphasis, by underlining, supplied by us)

13. Quite clearly, in view of the law so laid down by Their Lordships also, just because a provision is stated to be clarificatory, it does not become entitled to be treated as 'clarificatory' by the judicial forums as well. The view taken by Hon'ble Delhi High Court support this line of reasoning. Even without the benefit of guidance of Their Lordships, the views articulated by a coordinate bench of this Tribunal, in the case of Bharti Airtel (supra) were of a somewhat similar opinion when it was observed that, "Undoubtedly, the scope of a charging provision can be enlarged with retrospective effect, but an anti- avoidance measure, that the transfer pricing legislation inherently is, is not primarily a source of revenue as it mainly seeks compliant behaviour from the assessee vis-à-vis certain norms, and these norms cannot be given effect from a date earlier than the date norms are being introduced". We may add that right now we are only concerned with the question of retrospective amendment in the transfer pricing legislation, which has, as we will see, its own peculiarities and significant distinction with normal tax laws which simply impose tax on an income.

14. Legislature may describe an amendment as 'clarificatory' in nature, but a call will have to be taken by the judiciary whether it is indeed clarificatory or not. This determination, i.e. whether the amendment in indeed clarificatory or is the amendment to overcome a judicial precedent, assumes great significance because when it is found that the purpose of such interpretive statute, or clarificatory amendment, is "correct a judicial interpretation of prior law, which the legislature considers inaccurate, the effect is prospective" and, as in this case, it deals with transfer pricing legislation which essentially seeks a degree of compliant behavior from the assessee vis-à-vis certain norms- the norms the assessee should know at the time of entering into the transactions rather than at the time of scrutiny of his affairs at a much later stage.

15. It is very important to bear in mind the fact that right now we are dealing with amendment of a transfer pricing related provision which is in the nature of a SAAR (specific anti abuse rule), and that every anti abuse legislation, whether SAAR (specific anti abuse rule) or GAAR (general anti abuse rule), is a legislation seeking the taxpayers to organize their affairs in a manner compliant with the norms set out in such anti abuse legislation. An anti-abuse legislation does not trigger the levy of taxes; it only tells you what behavior is acceptable or what is not acceptable. What triggers levy of taxes is non- compliance with the manner in which the anti-abuse regulations require the taxpayers to conduct their affairs. In that sense, all anti abuse legislations seek a certain degree of compliance with the norms set out therein. It is, therefore, only elementary that amendments in the anti-abuse legislations can only be prospective. It does not make sense that someone tells you today as to how you should have behaved yesterday, and then goes on to levy a tax because you did not behave in that manner yesterday.

16. When this is put to the learned Departmental Representative that as to how the transfer pricing legislation can be expected to have a retrospective amendment, which is almost like telling people how they should have benchmarked their international transactions in past and thus expecting them to do the impossible, his stock reply is that the amendment only clarifies the law, it does not expand the law.

17. Well, if the 2012 amendment does not add anything or expand the scope of international transaction defined under section 92B, assuming that it indeed does not- as learned Departmental

Representative contends, this provision has already been judicially interpreted, and the matter rests there unless it is reversed by a higher judicial forum. However, if the 2012 amendment does increase the scope of international transaction ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 under section 92B, as is our considered view, there is no way it could be implemented for the period prior to this law coming on the statute i.e. 28th May 2012. The law is well settled. It does not expect anyone to perform an impossibility. Reiterating this settled legal position, Hon'ble Supreme Court has, in the case of Krishnaswamy S Pd Vs Union of India [(2006) 281 ITR 305 (SC)], observed as follows:

> The other relevant maxim is, lex non cogit ad impossibilia--the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. [See : U.P.S.R.T.C. vs. Imtiaz Hussain 2006 (1) SCC 380, Shaikh Salim Haji Abdul Khayumsab vs. Kumar & Ors. 2006 (1) SCC 46, Mohammod Gazi vs. State of M.P. & Ors. 2000 (4) SCC 342 and Gursharan Singh vs. New Delhi Municipal Committee 1996 (2) SCC 459].

18. It is for this reason that the Explanation to Section 92 B, though stated to be clarificatory and stated to be effective from 1st April 2002, has to be necessarily treated as effective from at best the assessment year 2013-14. In addition to this reason, in the light of Hon'ble Delhi High Court's guidance in the case of New Skies Satellite BV (supra) also, the amendment in the definition of international transaction under Section 92B, to the extent it pertains to the issuance of corporate guarantee being outside the scope of 'international transaction', cannot be said to be retrospective in effect. The fact that it is stated to be retrospective, in the light of the aforesaid guidance of Hon'ble Delhi High Court, would not alter the situation, and it can only be treated as prospective in effect i.e. with effect from 1st April 2012 onwards.

19. As we deal with this question, it is also relevant to consider whether this Tribunal can, while adjudicating on the appeals, tinker with the date, as set out in the statute, from which an amendment is effective. In our humble understanding, as a judicial forum, we are bound not only by the law as legislated by the legislature, but by the judge made law as well. We are a part of the judicial hierarchy in this system. We are bound by the law laid down by Hon'ble Courts above, and all that we are expected to do, and we do, is to decide the issues before us in accordance with the provisions of the statute, in accordance with the law laid down by Hon'ble Courts above and in the light of binding judicial precedents. When a binding judicial precedent requires us to deviate from the specific words of the provisions of the statute in a particular manner, we have to do so. There is no escape from this call of duty. Of course, whatever we do is, and shall always remain, subject to the approval by Hon'ble Courts above.

20. There are a number of decisions in which our so tinkering with the specific words in the statute have been upheld, as long as this has been so done in accordance with the judicial principles and guidance in the judge made law. In the case of Rajeev Kumar Agarwal Vs ACIT [(2014) 249 ITD 363 (Agra)], insertion of second proviso to Section 40(a)(ia), though specifically stated to be with effect

from 1st April 2013, was read to be effective from 1st April 2005. The reasoning adopted by the bench, speaking through one of us, was as follows:

> 8. With the benefit of this guidance from Hon'ble Delhi High Court, in view of legislative amendments made from time to time, which throw light on what was actually sought to be achieved by this legal provision, and in the light of the above analysis of the scheme of the law, we are of the considered view that section ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 40(a)(ia) cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure- particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary to this proposition, in our considered view, declining deduction in respect of expenditure relating to the payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia). If it is not an intended consequence i.e. if it is an unintended consequence, even going by Bharti Shipyard decision (supra), "removing unintended consequences to make the provisions workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively". Revenue, thus, does not derive any advantage from special bench decision in the case Bharti Shipyard (supra).
>
> 9. On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincentivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable"
>
> interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction

> restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence"

to punish the assessee's for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004.

21. While approving this approach, and upholding the decision of the Tribunal do read these provisions as effective from 1st April 2005, Hon'ble Delhi High Court, in case of CIT Vs Ansal Landmark Townships Pvt Ltd [(2015) 377 ITR 635 (Del)], has observed as follows:

> 14. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance.
>
> 15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in (Rajiv Kumar Agarwal v. ACIT).

22. When such are the views of Hon'ble High Court, it is not open to us to proceed on the basis that even though the amendment is required to be read as prospective, the Tribunal cannot do so as it is a creature of the Income Tax Act itself. In our considered view, and for the detailed reasons set out above, at best the amendment in Section 92B, at least to the extent it dealt with the question of issuance of corporate guarantees, is effective from 1st April 2012. The assessment year before us being an assessment year prior to that date, the amended provisions of Section 92 B have no application in the matter.

23. For this reason also, the impugned ALP adjustment must stand deleted. We must, however, make it clear that what we have stated above, in the context of retrospective amendment, is specifically in the context of transfer pricing legislation which, as we have observed earlier, being an anti-abuse legislation, seeks a degree of compliant conduct by the taxpayers rather than being primarily a source of revenue.

24. We are in respectful agreement with the views so expressed by the coordinate bench. Having said that, we may add that while it is true that an appeal against the said order, on the same issue, is admitted by Hon'ble jurisdictional High Court but then it is not, and it cannot be, anybody's case that mere admission of appeal can vitiate binding nature of this judicial precedent. In any case, whatever we hold is, and shall always remain, subject to whatever Hon'ble jurisdictional High Court has to hold on the issue, and Hon'ble High Court, though in the case of another assessee i.e. Micro Ink (supra) is already seized of the matter. Respectfully following the views expressed by the coordinate bench, we hold that the assessee extending corporate guarantees to its AEs, particularly on the facts and in the circumstances of this case and when the assessee has done so in the course of its stewardship activities for its subsidiaries, does not constitute an international transaction, and, as such, no ALP adjustment can be made in respect of the same. Accordingly, entire ALP adjustment stands deleted. As for the quantum of this adjustment, which is mainly the subject matter of grievance raised in revenue's appeal, once the entire ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 ALP adjustment stands deleted, that aspect of the matter is wholly academic and does not call for any adjudication by us.

25. Ground no. 3 in the Assessing Officer's appeal is thus dismissed as infructuous, and ground nos. 4,5,6 and 7 in the assessee's appeal are thus allowed in the terms indicated above."

6. We see no reasons to take any other view of the matter that the view so taken, by the co-ordinate bench, for the immediately preceding assessment year. We, therefore, uphold the grievances of the assessee and delete the impugned ALP adjustments.

7. As we have held that no such ALP adjustment is permissible, grievances raised by the Assessing Officer, with respect to quantification of ALP adjustment, are dismissed as infructuous.

8. As we part with the matter, we may add that a substantial question of law on this issue, in the case of Micro Ink Limited - the decision followed by us in coming to our aforesaid conclusions, has been admitted by Hon'ble jurisdictional High Court and the issue is thus pending for adjudication by Their Lordships. In this view of the factual position, even by deciding this appeal in favour of the assessee, it is nothing more than shifting of judicial forum before which the matter is now to be agitated. We have, therefore, refrained from dealing with elaborate arguments of the parties on merits at this stage.

9. In the result, and subject to the above observations, the appeal of the assessee is allowed.

10. We now move on to the appeal filed by the Assessing Officer.

11. In the first ground of appeal, the Assessing Officer has raised the following grievance :-

> "1). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance of ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 Rs.4,10,87,892/- made u/s.14A of the Act, r.w.r. 8D by directing to adopt 'net assets' amount to calculate the 'Average Total assets" to calculate the disallowance as per Rule 8D (2)(ii)."

12. Briefly stated, the relevant material facts are like this. During the course of assessment proceedings, the Assessing Officer noted that the assessee has earned a tax exempt dividend income of Rs.11,29,11,303/-, and that the assessee was having certain investments from which the assessee has earned tax exempt income. It was in this backdrop and having rejected assessee's justification of the suo motu disallowance of Rs.19,53,47,671/- under section 14A, the Assessing Officer disallowed Rs.23,64,35,653/- by applying rule 6D r.w.s. 14A. The additional disallowance of Rs,4,10,87,892/- was thus made by the Assessing Officer. Aggrieved by the disallowance so made, assessee carried the matter in appeal before the learned CIT(A) who deleted the disallowance subject to factual verification as follows :-

> "3.3 Decision:
>
> I have carefully perused the order and the submission given by the appellant. It is seen that there is no dispute between the Appellant and the Assessing Officer about the applicability of S.14A read with Rule 8D. The only substantial contention submitted by the Appellant is that the Assessing Officer has wrongly adopted value of total assets at Rs.119,71,09,81,782/- as against correct amount of Rs.150,97,62,99,887/- (working given on pg. no.402 of P/B), which has resulted into excessive disallowance of Rs.4,10,87,982/-. The contention raised by appellant apparently looking correct. I, therefore, direct the Assessing Officer to verify the same and delete the excessive disallowance of Rs.4,10,87,892/-. Hence, these grounds of appeal are allowed."

13. The Assessing Officer is aggrieved of the relief so granted by the learned CIT(A) and is in appeal before us.

14. Having heard the rival contentions and having perused the material on record, we find that the learned CIT(A) has merely remitted the matter to the file of the Assessing Officer for a factual verification. There cannot be any infirmity in this approach, and the grievance of the Assessing Officer is devoid of any rationale. It is ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 difficult to understand that when the matter is remitted to the file of the Assessing Officer, how can the Assessing Officer be aggrieved of such a direction. We see no merits in the grievance raised by the Assessing Officer. We, therefore, uphold the order of the learned CIT(A) and decline to interfere in the matter.

15. Ground no.1 is thus dismissed.

16. In ground no.2, the Assessing Officer has raised the following grievance :-

> "2). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in allowing notional loss on account of foreign exchange fluctuation loss amounting to Rs.1,26,42,63,740/-

claimed on account of Mark to Market basis."

17. Learned Representatives fairly agree that this issue is squarely covered by a decision of the co-ordinate bench in assessee's own case for the assessment year 2008-09, and that the learned CIT(A) has also simply followed his order for the assessment year 2008-09 which stands reversed by the co-ordinate bench. While doing so, the co-ordinate bench has observed as follows :-

> "3. Briefly stated, the relevant material facts are like this. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has claimed foreign exchange loss of Rs 22,15,55,371. It was explained by the assessee that the assessee, with an export sale of Rs 2,796 crores in the said year and raw material imports of Rs 2,516.08 crores, was exposed to considerable foreign exchange fluctuation risk, and that the assessee, with a view to manage and control such risks, takes various steps such as use of derivatives, entering into foreign exchange contracts with bankers etc. It was also explained that in the case of forward contracts, the difference between the forward rate and the current rate, being premium or discount-as the case may be, is recognized as a revenue item over the life of the contact period, and any gains or losses on cancellation of such forward exchange contracts are also recognized on the same basis. It was then explained that as on the date of the closing of books, the assessee had some of these contacts, remaining to be settled in future by delivery of foreign exchange, and that the assessee had computed the loss, on the basis of foreign exchange rates as at the end of the year, on discharging these obligations. The amount so computed came to Rs 22,15,55,371. It was also explained that the assessee was maintaining its books on mercantile basis, and, therefore, even though the loss had not crystallized inasmuch as delivery was to take place in future and there may be variation in foreign exchange rates at that point of time, the loss was deductible under section 37(1). The assessee had also furnished the details of contracts and ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 corresponding exports and imports obligations. It was also explained that the actual loss was Rs 119.65 crore, and not simply Rs 22.15 as was computed on the basis of foreign exchange rates as at the end of the year. Reliance was also placed on Hon'ble Supreme Court's judgment in the case of CIT Vs Woodward Governor India Pvt Ltd [(2009) 312 ITR 254 (SC)] in support of deductibility of this foreign exchange loss. None of these submissions, however, impressed the Assessing Officer. Relying upon CBDT Instruction No. 3 of 2010, the Assessing Officer proceeded to disallow this claim on the ground that the loss had not crystallized and the loss was only notional. Aggrieved, assessee carried the matter in appeal before the CIT(A) who deleted the said disallowance. While doing so, in a very well reasoned and analytical

order, learned CIT(A) observed as follows:

I have carefully perused the assessment order and the submissions given by the appellant. It is to be seen as to whether the Appellant has satisfied the test laid down by the Supreme Court of India in the case of CIT Vs. Woodward Governor India (P) Ltd. [312 ITR 254 (SC)] to know whether the foreign exchange loss incurred during the year under consideration is allowable to the Appellant or not. Each of such condition laid down by the Apex Court is discussed hereunder:

Condition No.1 Whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received;

The Appellant is following mercantile system of accounting and that is in fact not denied by the Id. AO as per facts contained in assessment order.

Condition No.2 Whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bonafide;

As per facts on record, the appellant is following mercantile system of accounting from the beginning and there is no change in it.

Condition No.3 Whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it;

Yes. In fact in the year under consideration itself, the Appellant has earned foreign exchange income of Rs.27,95,89,730/- and incurred loss of Rs.50,11,45,101/-, and accordingly, the same treatment has been given both to the income as well as the expenditure. The detailed information about each of such transaction contained in paper book has been examined.

ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 Condition No. 4 Whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains As per details on record, the Appellant has declared foreign exchange gain in the same year under appeal. The Appellant is consistent in making entries in the books in respect of losses as well as gains.

Condition No. 5 Whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards;

The answer is affirmative as the Appellant is following Accounting Standard AS-II issued by the Institute of Chartered Accountants of India.

Condition No. 6 Whether- the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation The system adopted by the Appellant is fair and reasonable and is not adopted with a view to reduce the incidence of taxation. In fact the Rule 115 of the Income Tax Rules provides that that all the assessee should; convert their foreign exchange assets into Indian Rupees on the last day of the previous year. In CIT vs. R. B. Construction 202 ITR 222 (AP)(FB), it has been held that if rule is not considered, the decision becomes per incuram. In as much as the Appellant has followed the accounting treatment which is in conformity with Accounting Standard 11 issued by the ICAI. Various authorities have held that while determining allowability of an expenditure, accounting standard has a great persuasive value: Challapalli Sugars Ltd. Vs. CIT (1975) [98 I.T.R. 167 (SC)]. Further following authorities have held that foreign exchange fluctuation loss suffered on account of circulating capital or revenue account should be treated as revenue expenditure in the year in which the devaluation takes place when the method of accounting followed is mercantile.

- 116 ITR 1 (SC)
- 154 ITR 460 (Cal)
- 90 ITR 323 (Ker) '
- 97 ITD 125 (Ahd) (TM) @ 151 para 8.28

Accordingly, this itself establishes that the Appellant has adopted the system of accounting which is fair and reasonable and supported by the Accounting Standard AS -11, Rule 115 and various authorities and not adopted to avoid incidence of income tax. And in any case, as submitted by the Appellant, in the same assessment year under appeal before Your Honour, the Appellant ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 has earned foreign exchange gain which has been offered for taxation, which itself shows that the system adopted by the Appellant is consistent, fair and reasonable.

In view of the above facts and the fact the issue is covered by the decision of Supreme Court in the case of Woodward Governor India (P) Ltd. reported in 312 ITR 254, the ground of appeal is allowed."

4. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. It is one of the most fundamental principles of accounting that while all anticipated losses are taken into account in computing the profits and losses of business, even though such losses may not have crystallized, as long as these losses can be reasonably quantified. This approach can be contrasted with the anticipated profits being ignored, in the computation of profits and losses of an

enterprise, unless the profits are actually realized. To that extent, there is a dichotomy in accounting approach but then this is what is the sound accounting policy and it has the sanction of law. As a matter of fact, it is this principle, as recognized by Hon'ble Supreme Court in the case of Chainrup Sampatram Vs CIT [(1953) 24 ITR 481 (SC)], which explains the valuation of closing stock on market price or cost price whichever is less. There is thus, in principle, no difficulty is seeking a deduction in respect of a reasonably anticipated loss, even though it may not have actually fructified, in computation of profits and gains of business. To this extent, the Assessing Officer was clearly in error in treating the loss on foreign exchange as a notional loss not deductible in computation of business income. On the facts of the present case, however, not only anticipated losses have been claimed as deduction but anticipated profits have been offered to tax. The gains have been offered to tax on the basis of assessee's following mandatory accounting standards, and on the basis of same accounting standards losses on forward contracts have been recognized too. The claim of deduction of Rs 22.15 crores represents the difference between total foreign exchange loss of Rs 50.11 crores as at the year end date and foreign exchange gains of Rs 27.95 crore as at the year end date. What has been done by the Assessing Officer to take into account gains on such contracts but ignore the cases in which losses are computed in respect of the forward contracts. It is against this approach that the assessee had raised the grievance.

7. In the case of Woodward Governor (supra), the issue regarding deductibility of foreign exchange loss came up for consideration before Hon'ble Supreme Court and there was similar inconsistency in treatment to losses and gains on the forward contracts. Their Lordships, dealing with this issue and holding that such a loss will be deductible in computation of business profits, observed as follows:

> ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 ....it is clear that profits and gains of the previous year are required to be computed in accordance with the relevant Accounting Standard. It is important to bear in mind that the basis on which stock-in-trade is valued is part of the method of accounting. It is well established, that, on general principles of commercial accounting, in the P&L account, the values of the stock-in-trade at the beginning and at the end of the accounting year should be entered at cost or market value, whichever is lower- the market value being ascertained as on the last date of the accounting year and not as on any intermediate date between the commencement and the closing of the year, failing which it would not be possible to ascertain the true and correct state of affairs. No gain or profit can arise until a balance is struck between the cost of acquisition and the proceeds of sale. The word "profit" implies a comparison between the state of business at two specific dates, usually separated by an interval of twelve months. Stock-in-trade is an asset. It is a trading asset. Therefore, the concept of profit and gains made by business during the year can only materialize when a comparison of the assets of the business at two different dates is taken into account. Sec. 145(1) enacts that for the purpose of s. 28 and s. 56 alone, income, profits and gains must be computed in accordance with the method of accounting regularly employed by the assessee. In this case, we are concerned with s. 28. Therefore, s. 145(1) is attracted to the facts of the present case. Under the mercantile system of accounting, what is due is brought into credit before it is actually received; it brings into debit an expenditure

for which a legal liability has been incurred before it is actually disbursed. (See judgment of this Court in the case of United Commercial Bank vs. CIT (1999) 156 CTR (SC) 380 : (1999) 240 ITR 355 (SC). Therefore, the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits. As stated, there is no finding given by the AO on the correctness of the Accounting Standard followed by the assessee(s) in this batch of civil appeals.

17. Having come to the conclusion that valuation is a part of the accounting system and having come to the conclusion that business losses are deductible under s. 37(1) on the basis of ordinary principles of commercial accounting and having come to the conclusion that the Central Government has made Accounting Standard-11 mandatory, we are now required to examine the said Accounting Standard ("AS").

18. AS-11 deals with giving of accounting treatment for the effects of changes in foreign exchange rates. AS-11 deals with effects of exchange differences. Under para 2, reporting currency is defined to mean the currency used in presenting the financial statements. Similarly, the words "monetary items" are defined to mean money held and assets and liabilities to be received or paid in fixed amounts, e.g., cash, receivables and payables. The word "paid" is defined under s. 43(2). This has been discussed earlier. Similarly, it is important to note that foreign currency notes, balance in bank accounts denominated in a foreign currency, and receivables/payables and loans denominated in a foreign currency as well ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 as sundry creditors are all monetary items which have to be valued at the closing rate under AS-11. Under para 5, a transaction in a foreign currency has to be recorded in the reporting currency by applying to the foreign currency amount the exchange rate between the reporting currency and the foreign currency at the date of the transaction. This is known as recording of transaction on initial recognition. Para 7 of AS-11 deals with reporting of the effects of changes in exchange rates subsequent to initial recognition. Para 7(a) inter alia states that on each balance sheet date monetary items, enumerated above, denominated in a foreign currency should be reported using the closing rate. In case of revenue items falling under s. 37(1), para 9 of AS-11 which deals with recognition of exchange differences, needs to be considered. Under that para, exchange differences arising on foreign currency transactions have to be recognized as income or as expense in the period in which they arise, except as stated in para 10 and para 11 which deals with exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which topic falls under s. 43A of the 1961 Act. At this stage, we are concerned only with para 9 which deals with revenue items. Para 9 of AS-11 recognises exchange differences as income or expense. In cases where, e.g., the rate of dollar rises vis-a-vis the Indian rupee, there is an expense during that period. The important point to be noted is that AS-11 stipulates effect of changes in exchange rate vis-a-vis monetary items denominated in a foreign currency to be

taken into account for giving accounting treatment on the balance sheet date.

Therefore, an enterprise has to report the outstanding liability relating to import of raw materials using closing rate of exchange. Any difference, loss or gain, arising on conversion of the said liability at the closing rate, should be recognized in the P&L account for the reporting period.

10. As stated above, on facts in the case of M/s Woodward Governor India (P) Ltd., the Department has disallowed the deduction/debit to the P&L a/c made by the assessee in the sum of Rs. 29,49,088 being unrealized loss due to foreign exchange fluctuation. At the very outset, it may be stated that there is no dispute that in the previous years whenever the dollar rate stood reduced, the Department had taxed the gains which accrued to the assessee on the basis of accrual and it is only in the year in question when the dollar rate stood increased, resulting in loss that the Department has disallowed the deduction/debit. This fact is important. It indicates the double standards adopted by the Department.

11. The dispute in this batch of civil appeals centers around the year(s) in which deduction would be admissible for the increased liability under s. 37(1).

12. We quote hereinbelow s. 28(i), s. 29, s. 37(1) and s. 145 of the 1961 Act, which read as follows :

> "Sec. 28. Profits and gains of business or profession--The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession", --
>
> ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10
>
> (i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year."
>
> "Sec. 29. Income from profits and gains of business or profession, how computed--The income referred to in s. 28 shall be computed in accordance with the provisions contained in ss. 30 to 43D."
>
> "Sec. 37. General--(1) Any expenditure (not being expenditure of the nature described in ss. 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession.
>
> Explanation : For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."

> "Sec. 145. Method of accounting--(1) Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-s. (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.
>
> (2) The Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assessees or in respect of any class of income.
>
> (3) Where the AO is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-s. (1) or accounting standards as notified under sub-s. (2), have not been regularly followed by the assessee, the AO may make an assessment in the manner provided in s. 144."

13. As stated above, one of the main arguments advanced by the learned Addl. Solicitor General on behalf of the Department before us was that the word "expenditure" in s. 37(1) connotes "what is paid out" and that which has gone irretrievably. In this connection, heavy reliance was placed on the judgment of this Court in the case of Indian Molasses Company (supra). Relying on the said judgment, it was sought to be argued that the increase in liability at any point of time prior to the date of payment cannot be said to have gone irretrievably as it can always come back. According to the learned counsel, in the case of increase in liability due to foreign exchange fluctuations, if there is a revaluation of the rupee vis-a-vis ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 foreign exchange at or prior to the point of payment, then there would be no question of money having gone irretrievably and consequently, the requirement of "expenditure" is not met. Consequently, the additional liability arising on account of fluctuation in the rate of foreign exchange was merely a contingent/notional liability which does not crystallize till payment. In that case, the Supreme Court was considering the meaning of the expression "expenditure incurred" while dealing with the question as to whether there was a distinction between the actual liability in praesenti and a liability de futuro. The word "expenditure" is not defined in the 1961 Act. The word "expenditure" is, therefore, required to be understood in the context in which it is used. Sec. 37 enjoins that any expenditure not being expenditure of the nature described in ss. 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in computing the income chargeable under the head "Profits and gains of business". In ss. 30 to 36, the expressions "expenses incurred" as well as "allowances and depreciation" has also been used. For example, depreciation and allowances are dealt with in s. 32. Therefore, Parliament has used the expression "any expenditure" in s. 37 to cover both. Therefore, the expression "expenditure" as used in s. 37 may, in the circumstances of a particular case, cover an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee.

15. For the reasons given hereinabove, we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under s. 37(1) of the 1961 Act

8. In the present case also, the assessee is consistently following the mercantile method of accounting, the same accounting treatment for the foreign exchange losses and gains has been given by the assessee all along, the assessee is making entries in respect of such losses and gains, and the treatment is consistent with the Accounting Standards. As a matter of fact, the Assessing Officer has not even raised any issues with respect to the above. His case is confined to the loss being notional in nature and contrary to the CBDT guidelines. As for the CBDT instructions, it is only elementary that any instructions issued by the CBDT cannot bind the assessee even though the assessee is entitled to, and can legitimately ask for, any benefits granted to the assessee by such instructions or circulars. Nothing, therefore, turns on the CBDT instruction even if it is actually contrary to the claim of the assessee.

9. We have also noted that, as per the details filed by the assessee, the foreign exchange contracts have been entered into for genuinely restricting its bonafide risk exposure of the assessee in respect of its exports and imports transactions. These contracts cannot, therefore, be viewed on a standalone basis as speculative transactions. These transactions are integral part of the business transactions and any loss or gains arising from these transactions, for the detailed reasons set out above, are deductible in computation of profits and gains of business.

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10. In view of the above discussions, we uphold the action of the CIT(A) so far as this relief in respect of deleting the disallowance of Rs 22,15,55,371 on account of loss, at the end of the year, on foreign exchange contracts. We confirm the same and decline to interfere in the matter.

11. Ground no.1 is thus dismissed."

18. Respectfully following the views so expressed by the co-ordinate bench, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

19. Ground no.2 is thus dismissed.

20. In ground no.3, the Assessing Officer has raised the following grievance:-

> "3). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs.6,27,955/-

made u/s.36(1)(va) r.w.s.2(24)(x) of the Act on account of employees contribution towards PF & ESI."

21. Learned Representatives fairly agree that this issue is to be decided against the assessee, in the light of Hon'ble jurisdictional High Court's judgement in the case of CIT vs. Gujarat State Road Transport Corporation Limited (366 ITR 170). The relief granted by the learned CIT(A), on this issue, is thus vacated.

22. Ground no.3 is thus allowed.

23. In ground no.4.1, the Assessing Officer has raised the following grievance:-

> "4.1). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting upward adjustment of Rs.14,91,87,270/- made on account interest charged on the loans granted to the Associated Enterprises' at discounted rate to the prevailing Market rate."

24. So far as this issue is concerned, it is sufficient to take note of the fact that in the impugned CIT(A)'s order, he has merely followed his order for the assessment year 2008-09 which has not been challenged, on this point, by the Revenue authorities.

Learned Departmental Representative does not dispute this fact.

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25. In the light of the above factual position, it is clear that once the Revenue authorities accept the stand of the CIT(A) on an issue and allow it to reach finality in one assessment year, it cannot be open to them to challenge the same in the subsequent assessment year. As noted by Hon'ble Supreme Court, in the case of CIT vs. Radhasoami Satsang [(1992) 193 ITR 321 (SC)], while "strictly speaking, res judicata does not apply to income tax proceedings", "where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not at all be appropriate to allow the position to be changed in a subsequent year".

26. In view of these discussions, grievance raised by the Assessing Officer is not maintainable, and is dismissed as such.

27. Ground No.4.1 is thus dismissed.

28. Ground Nos. 4.2 & 4.3 have already been dismissed along with the grievances of the assessee in assessee's appeal.

29. In ground No.5, the Assessing Officer has raised the following grievance:-

> "5. The Ld. Commissioner of Income-tax (Appeals)-XIV, Ahmedabad has erred in law and on facts allowing the fresh claim of the Assessee in respect of Revenue expenditures of Rs.5.06 crores for issue of debenture of LIC of India when such claim was never made by Assessee in its return of income in contradiction to the Apex Court decision in the case of Goetze (India) Ltd 157 Taxman 1."

30. As for this claim, we have noted that the Assessing Officer had rejected the claim for the short reason that, in the light of Hon'ble Supreme Court's judgment in the case of Goetze India Ltd. vs.

CIT [(2006) 157 Taxman 1 (SC)], it was not open to the assessee to raise a fresh claim in the assessment proceedings, except by way of a revised return.

There was no grievance on the merits anyway. In appeal before the CIT(A), however, ITA No.2074 & 2179/Ahd/2013 Assessment year: 2009-10 the claim was accepted in principle but sent back to the Assessing Officer. While doing so, learned CIT(A) observed as follows:-

> "I have carefully perused the order and the submission given by the appellant. On going through the assessment order, it is seen that the Assessing Officer has not accepted the said claim as made by the Appellant, only for the reason that the said claim was not made by the Appellant in the return of income and for the first time it was made during the course of assessment proceedings without filing revised return of income, and therefore, in view of the Supreme Court decision in the case of Goetze (supra), the assessing officer has rejected the claim made by the Appellant. It is further seen that the AO has not controverted merits of the claim and the claim is rejected only on technical ground. The A.Rs. of the Appellant submitted before me that though the Apex Court's decision in the case of Goetze (supra) bars the assessing officer to accept the fresh / new claim otherwise than the revised return of income, the same restriction is not imposed on the appellate authorities including the first appellate authority. I have also gone through the various case laws including decisions of the Gujarat High Court relied upon by the Appellant. On going through the decisions of the Gujarat High Court in the case of Arv/'nd Mills Ltd.(supra) and Symphony Comfort Systems Ltd-(supro)(pg. nos.599-607 of P/B), it is adhered that the Apex Court's decision Goefze (supra) bars only the assessing officer to accept the additional / fresh claim during the course of assessment proceedings without filing revised return of income.
>
> However, the Appellate Authorities are empowered to accept the fresh claim which was not made in the original or revised return or even in the assessment proceedings, I have also gone through the various decisions relied upon by the Appellant on pg. nos.31-32 of written submission, which have also laid down the same proposition, The Hon'ble Bombay High Court has laid down a very clear ratio in the case of CIT Vs. Pruthvi Brokers & Shareholders Pvt. Ltd. [349 ITR 336 (Bom)] saying that the claim if made for first time before CIT(A), the admission of such claim for decision is within the powers bestowed on CIT(A). The claim was first made before AO hence Rule 46A to such claim is not applicable as AO is well aware about the facts being used for decision. In view of above cited decisions, I accept the fresh claim as made by the Appellant before me and give direction to the assessing officer to allow the claim as made by the Appellant as per law. The ground of appeal is accordingly allowed."

31. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

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32. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

33. We find that it is a well settled legal position that the bar on accepting a fresh claim in assessment proceedings, except by way of a revised return, is only on the Assessing Officer and not the appellate authorities. There is, thus, no infirmity in learned CIT(A)'s accepting the claim in principle and remitting the matter to the Assessing Officer for examination of claim on merits. Hon'ble jurisdictional High Court has also, in the case of PCIT vs. UTI Bank Ltd. (TA No.382-384 of 2016), approved this approach. We, therefore, see no merits in the grievance of the Assessing Officer and reject the same.

34. Ground No.5 is thus dismissed.

35. In ground no.6, the Assessing Officer has raised the following grievance:-

> "6. The Ld. Commissioner of Income-tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in giving relief Rs.1,40,51,080/- made on account of withholding tax on Royalty income u/s 90 of the Act when such claim was never made by Assessee in its Return of Income in contradiction to the Apex Court decision in the case of Goetze (India) Ltd., 157 Taxman 1."

36. Learned representatives fairly agree that, following the stand of the co-ordinate bench on identical issue in A.Y. 2008-09, this issue is required to be remitted to the file of the Assessing Officer for adjudication on merits. With the consent of parties, therefore, this issue stands restored to the file of the Assessing Officer.

37. Ground No.6 is thus allowed for statistical purposes.

38. In ground No.7, the Assessing Officer has raised the following grievance:-

> "7. The Ld. Commissioner of Income-tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing that the amount of disallowance u/s 14A can't be added to book profit while working out tax liability under the provision of MAT as the said section has no applicability beyond Chapter IV, while computing the book profit u/s. 115 JB of the Act."

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39. On this issue also learned representatives agree that this issue is now covered, in favour of the assessee, by Hon'ble jurisdictional High Court's judgment dated 20.07.2016 in the case of CIT vs. Alembic Ltd. (TA No.1249 of 2014). We, therefore, uphold the action of the CIT(A) on this point as well.

40. Ground No.7 is thus dismissed.

41. In the result, the appeal of the Assessing Officer is partly allowed.

42. To sum up, while assessee's appeal is allowed, Revenue's appeal is partly allowed in the terms indicated above. Pronounced in the open court today on the 22nd day of December, 2017.

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       Sd/-                                                            Sd/-
S S Godara                                                       Pramod Kumar
(Judicial Member)                                                (Accountant Member)

Dated: 22 nd December, 2017.
PBN/*
Copies to:        (1)  The appellant
                  (2)  The respondent
                  (3)  CIT
                  (4)  CIT(A)
                  (5)  DR
                  (6)  Guard File

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                                                                    Assistant Registrar
                                                          Income Tax Appellate Tribunal
                                                       Ahmedabad benches, Ahmedabad
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