Jyoti Cnc Automation Pvt. Ltd.,, ... vs The Dy. Commr. Of Income Tax, ... on 28 November, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
[Coram: Pramod Kumar AM and Rajpal Yadav JM]
ITA No. 183/Rjt/2015 & CO No.48/Rjt/2015
Assessment Year: 2009-10

The DCIT .....Appe
Circle-1(1),
Rajkot
Vs.
M/s. Jyoti CNC Automation Pvt Ltd ..... Responden
Plot No. G-506, Lodhika GIDC, Cross Objec
Village Metoda, Rajkot
[PAN : AABCJ 1947 R]

Appearances by:
Hargovind Singh for the appellant
DM Rindani for the respondent

Date of concluding the hearing : 03.11.2017
Date of pronouncing the order : 28.11.2017
O R D E R

Per Pramod Kumar AM:

1. This appeal, filed by the Assessing Officer, and the cross objection filed by the assessee challenge correctness of the order dated 22nd March 2013 passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2009-10.

2. In the first ground of appeal of the Assessing Officer, following grievance has been raised:

"1. The Hon'ble CIT(A)-I, Rajkot has erred in law and on fact of the case in restricting the arms length interest rate on loan from 7.85% to 5.75% for loan given to Associated Enterprise."

3. The grievance raised by the assessee in the cross objection, which pertains to the same issue and will, therefore be taken up alongwith the above ground of appeal, is as follows:

> "The Hon'ble Commissioner of Income-tax (Appeals)-1, Rajkot has erred in law as well as on facts of the case in upholding the arms length interest rate @ 5.75% for loan given to Associated Enterprise"

4. The relevant material facts are like this. The assessee, through its fully owned French subsidiary by the name of Jyoti SAS, has acquired an existing company in France, by the name of Huron Gaffenstaden SAS. The assessee funded this acquisition by providing Euros 42,50,00,000 of equity capital, and, what was termed DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 as, quasi capital in the nature of interest free unsecured loan amounting to Euros 47,74,595. During the course of proceedings before the TPO, an arm' length price adjustment was made, for interest on this interest free unsecured loans, at LIBOR plus average interest spread in Europe and 100 basis point for foreign exchange risk. As the applicable LIBOR rate was 4.12%, average spread rate in Europe was 2.73%, the adjustment was made at 7.85% i.e. 4.12% plus 2.73% plus 1% for exchange risk. The adjustment was thus quantified at Rs 2,39,69,696. However, when matter travelled in appeal before the CIT(A), while learned CIT(A) upheld the adjustment in principle, he scaled down the adjustment on two counts- first, he deleted the 100 basis point or 1% rate adjustment on account of foreign exchange risk, and, - second, he substituted the average interest spread in France by average interest spread in Europe which were at 2.73% and 1.63% respectively. The ALP adjustment was thus taken at 5.75% which worked out to 1,65,94,605. None of the parties is satisfied. While Assessing Officer seeks the restoration of ALP adjustment at 7.85%, assessee's contention that no such ALP adjustment needs to be made at all. Both the parties 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. Learned counsel for the assessee has been very fair in not pressing the cross objection at all, and all that we need to decide, therefore, is the correctness of two variations made by the CIT(A) in the impugned adjustment. We may, in this regard, refer to the following observations made by the learned CIT(A):-

> "4.3 I have carefully considered the findings of the Assessing Officer in his assessment of order and the submission of the Appellate Company.
>
> At the first instance, I do not accept the Appellant's contention regarding the Quasi Equity and Commercial expediency relying upon the decision of the Mumbai Tribunal in the case of Tata Autocomp Systems Limited (ITA No.7354/Mum/11) wherein it was held that the, "Interest free loan is subject to arm's length test irrespective of commercial expediency".

The Appellant Company has also contended that requisite approval of the Reserve Bank of India (RBI) was obtained and RBI while giving approval keeps in mind all the provisions of law further

RBI has accepts the remittance as in the form of Quasi Capital Therefore No interest need to be computed for the purpose of the Income Tax Act, 1961 however same view is not acceptable because permission is given by the RBI is for totally different purpose. The RBI is only concerned with foreign exchange and they would look matter from different point of view. However, what is the Arms length price (ALP) of loan advanced to Associated Enterprise is need to be decided considering the facts and circumstances of the case. In present case since Associated Enterprise is situated in France it is most appropriate to consider mark up on the basis of average spread over LIBOR charged in France rather than adopting mark up on the basis of average spread over LIBOR charged in whole European region. The average spread charged in France out of analysis carried out by TPO himself is 163 basis point as compared to 273 basis point of whole Europe, The spread over LIBOR would depend on various economic factors of each and every country coming in European region. Further the argument of the DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 appellant company regarding considering internal cup of IDBI bank wherein bank has charged interest @ LIBOR + 100 basis points is not tenable as the transactions does not compare on the matrix of geography as well as end use of fund i.e. IDBI borrowing is to finance the working capital whereas the transaction in question is for acquisition of foreign business Therefore, it would not result in determining an ALP under Comparable Uncontrolled Price (CUP) Method. In order to determine ALP under CUP method, comparison should be made between transactions in same region having same economic factors.

As the Company to which loan has been granted by the Appellant Company is situated in France, comparison should be made with other Companies situated in France only and not whole Europe, Therefore, I reduce the spread charge over Europe from 273 basis point of whole Europe to 163 basis point of France.

Further, TPO has also added 100 basis point towards foreign exchange risk coverage. Foreign Exchange risk is normal in every business which carries out transactions with parties outside India. The currency may fluctuate both ways i.e it may increase/decrease resulting in loss/gain to the Appellant Company. No party factors the foreign exchange risk assumed by him at the time of entering into any International Transactions and no separate charges are recovered for the same. This is due to the fact that if the currency fluctuates and profit is earned by the Appellant Company, it would no!, pass on the profit to the other party.

Hence, I direct the Assessing Officer to determine the Arm's Length interest by considering the EURO LIBOR plus mark up @ 163 basis point on the interest free loan which shall work out @ 5.75%. The assessee gets the relief accordingly."

7. We are in considered agreement with very well reasoned analysis by the learned CIT(A) and the conclusions arrived at by him. As learned CIT(A) has rightly held, the arm's length interest rate for a financing transaction in France should take into account only the average French interest spread and not the average European interest spread as admittedly the conditions in entire European financial market are not the same. Similarly, so far as the adjustment on account of foreign exchange risk is concerned, neither is it based on any cogent material nor anyway one can ignore the fact that the exchange fluctuations are inherent in comparable transactions as well. The action of the

learned CIT(A) thus meets our approval on both the counts. In view of these discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

8. Ground no 1 of the Assessing Officer, as also cross objection of the assessee, are thus dismissed.

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

> "2. The Hon'ble CIT(A)-I, Rajkot has erred in law and on fact of the case in deleting the addition made by the AO of Rs.2,21,16,375/- on account of determination of arms length price on the corporate guarantee provided by the appellant company to the banks on behalf of Associated Enterprise."

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10. The assessee had issued certain corporate guarantees, for an amount of Euros 11.25 million, to its associated enterprises so as to facilitate the AE's borrowings abroad. The assessee did not charge any fees or commission for the issuance of such guarantees. The TPO was of the view that the assessee ought to have charged appropriate fees for the same, and, on the basis of this line of reasoning, an ALP adjustment of Rs.2,21,16,375 was made. To adjudicate on this grievance of the Assessing Officer, it is sufficient to take note of the fact that the learned CIT(A) has deleted the impugned adjustment on account of notional fee for issuance of corporate guarantees, on the ground that the issuance of such a corporate guarantee by the assessee, without incurring any costs and without having any impact on his profits, incomes, losses or assets, does not amount to an international transaction. That is the short ground on which the decision of the learned CIT(A) rests. Beyond this broad legal principle, learned CIT(A) has not dealt with the facts of the case, and we also, therefore, refrain from doing so.

11. Learned representatives fairly agree that this issue is covered, in favour of the assessee, by a coordinate bench decision of this Tribunal in the case of Micro Ink Ltd Vs ACIT [(2016) 176 TTJ 8 (Ahd)]. In all fairness, we must place on record the fact that Hon'ble High Court has admitted appeal, against that order and on the same issue, but that does not dilute binding nature of the decision as now, though, for all practical purposes, the forum for adjudication of Assessing Officer's grievance gets shifted to a higher forum.

12. We may add, for the sake of completeness, that, in the case of Micro Ink (supra), the coordinate bench has, inter alia, observed as follows:

> 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.

DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 (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, 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;

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(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:

> '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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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 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.

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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 about impact on profits, income, losses or assets of such enterprises is a precondition DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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.' DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10

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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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.

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.

DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 The asset or any interest in the asset.

The disposing of or parting with the asset or creating any interest therein may be:

(a) Direct or indirect.
(b) Absolute or conditional.
(c) Voluntary or involuntary.
(d) By amendment or otherwise.

(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.

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.

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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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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) DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10
>
> 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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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.pd

f). 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:

"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. .....

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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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

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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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.
>
> 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.
>
> 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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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;
>
> (c) Costs of raising funds for the acquisition of its participations.

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 perspective, as "an activity is considered to be DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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.
>
> 38 See. 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).
>
> 39 But 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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 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 discernable 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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.

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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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:--

"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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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, DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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 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."

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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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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 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 DCIT vs. M/s Jyoti Automation Pvt Ltd Assessment year: 2009-10 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.

13. We are in considered agreement with the views so expressed by the coordinate bench. Respectfully following the views so expressed by the coordinate bench, we uphold the relief granted by the CIT(A) and decline to interfere in the matter.

14. Ground no. 2 is also thus dismissed.

15. In the result, the appeal filed by the Assessing Officer as also the cross objection filed by the assessee are dismissed. Pronounced in the open court today on the 28th day of November, 2017 Sd/- Sd/-

Rajpal Yadav Pramod Kuma
(Judicial Member) (Accountant
Ahmedabad, the 28th day of November, 2017
ambt
Copies to: (1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

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Assistant
Income Tax Appellat
Rajkot benc

1. Date of dictation: ..27.11.2017- prepared by Hon'ble AM on his computer-..... ...

2. Date on which the typed draft is placed before the Dictating Member: ....27.11.2017.....

3. Date on which the approved draft comes to the Sr. P.S./P.S.: ...28.11.2017..... .

4. Date on which the fair order is placed before the Dictating Member for Pronouncement: ...28.11.2017..

5. Date on which the file goes to the Bench Clerk : ...28.11.2017..

6. Date on which the file goes to the Head Clerk : .....

7. The date on which the file goes to the Assistant Registrar for signature on the order: .....