Rain Cii Carbon (India) Limited, ... vs Dcit, Circle 3(1), Hyderabad on 26 April, 2017

ITA Nos 222 309 of 2014 Rain Group cases

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member

Appeal No	Appellant	Respondent	A.Y
222/Hyd/2014	Rain Cements Ltd (formerly known as Rain CII Carbon (India) Ltd PAN:AABCR 8858F	DCIT, Circle 3(1) Hyderabad	2009-10
309/Hyd/2015	-do-	-do-	2010-11
344/Hyd/2015	Rain Industries Ltd (formerly known as Rain Commodities Ltd) Hyderabad PAN: AABCP 2276 K	-do-	2010-11
259/Hyd/2016	Rain Cements Ltd Hyderabad PAN: AABCR 8858 F	-do-	2011-12
260/Hyd/2016	Rain Industries Ltd Hyderabad PAN: AABCP 2276 K	-do-	2011-12
315/Hyd/2015	DCIT Circle 3(1) Hyderabad	Rain Commodities Ltd Hyderabad PAN:AABCP 2276K	2010-11
433/Hyd/2016	-do-	Rain Industries Ltd Hyderabad PAN:AABCP 2276K	2011-12
434/Hyd/2016	-do-	Rain Cements Ltd Hyderabad PAN:AABCR 8858 F	2011-12

For Assessee : Smt.Suvibha Nolkha
For Revenue : Shri P. Chandra Sekhar, DR

Date of Hearing: 27.02.2017
Date of Pronouncement: 26.04.2017

ORDER

Per Smt. P. Madhavi Devi, J.M.

The above appeals are filed by the assessee and the Revenue for the respective A.Ys.

This appeal is filed by the assessee against the order of the AO dated 23.12.2013 passed u/s 143(3) r.w.s. 144C(5) and 144C(13) of the I.T. Act, pursuant to the directions of the DRP, dated 27.11.2013. The assessee has raised the following grounds of appeal:

"TRANSFER PRICING ("TP") MATTERS

1. Rejecting the economic analysis and submissions of the Company and making TP adjustments to the following international transactions with Associated Enterprise CAE'):

- Purchase of Green Petroleum Coke ("GPC") - Rs 6,86,97,017;
- Shareholders corporate guarantee- Rs 13,86,30,000.

Ground specific to TP adjustment for purchase of GPC

2. Determination of Arm's Length Price ("ALP") of certain purchases of GPC made by the Appellant from AEs.

3. Not appreciating the fact that the GPC purchases from AE are at same price at which AE purchased from independent supplier.

4. Making adjustment on selective transaction without considering all the transaction with AE during the year.

5. Not appreciating the fact that the prices of GPC vary on the basis of quality and hence, different consignments of GPC are not comparable.

6. Disregarding the submissions/ evidence submitted by the Appellant.

7. Not appreciating the fact that the prices of GPC have fluctuated widely during the relevant previous year, due to external market conditions and hence, different consignments of GPC are not comparable.

Ground specific to TP adjustment on shareholder corporate guarantee

8. Making adjustment while determination of ALP on the shareholder corporate guarantee provided to the bank on behalf of its Wholly Owned Subsidiary ("WOS").

9. Determining the ALP on the shareholder corporate guarantee provided by the Company @ 2% on the guarantee amount.

10. Not appreciating the fact that the WOS was set up as a special purpose vehicle for the acquisition of business in USA.

11. Not appreciating the fact that AE had also guaranteed the loan taken by the Appellant and hence the transaction is reciprocated.

12. Not appreciating that the shareholder corporate guarantee is not covered under the definition of international transaction U/S 92B of the Act.

ITA Nos 222 309 of 2014 Rain Group cases

13. Not appreciating that the amendment to section 92B would not apply to the facts of the case.

14. Not undertaking an objective analysis for determining the ALP on the shareholder corporate guarantee.

15. Not making adjustments for the differences in the comparable transactions selected vis-

a-vis shareholder corporate guarantee of the Appellant.

16. Discriminating the US WOS by determining the ALP for shareholder corporate guarantee vis-a-vis similar shareholder corporate guarantee provided by parent companies to Indian subsidiaries in violation of Article 26 of Indian Double Taxation Avoidance Agreement. ("DTAA").

Corporate Tax Matters

17. Not providing credit of TDS of Rs.1,87,322

18. Computation of interest u/s 234C of the Act

19. Initiating penalty proceedings u/s 271(1)(c) of the Act".

2. Ground of appeal No.1 is general in nature, hence needs no specific adjudication.

3. As regards Grounds of appeal No. 2 to 7, brief facts are that the assessee company, which is engaged in the business of manufacture and trading of Cement, Calcined Petroleum Coke (CPC) and Generation of Electricity, filed its return of income for the relevant A.Y on 25.09.2010 admitting a total loss of Rs.(-) 1,30,58,11,139 under the normal provisions of the Income Tax Act ITA Nos 222 309 of 2014 Rain Group cases and book profit of Rs.39,90,66,033 u/s 115JB of the Act. Subsequently, the assessee filed a revised return of income on 9.10.2010 disclosing net income of Rs.1,45,56,72,760 under normal provisions of the Act and book profit of Rs.39,90,66,033 u/s 115JB of the Act.

4. During the assessment proceedings u/s 143(3) of the Act, the AO observed that the assessee has furnished a report in Form No.3CEB in accordance with the provisions of section 92E on 30.09.2009. As per the report, the assessee had entered into international transactions with its AEs and therefore, the AO referred the determination of the ALP of the international transactions to the file of the TPO u/s 92CA of the Act.

5. The TPO observed that the assessee generates electricity from the exhaust hot gases and coke fines material generated during the manufacture of Calcinated Petroleum Coke (CPC) and supplies such electricity to the industrial users in the state of A.P and that the international transactions with AEs are only in CPC manufacturing division. Vide these transactions, the assessee had purchased from Rain CII Carbon LLC, Green Petroleum Coke (GPC) at Rs.400,21,09,879, CPC at Rs.10,68,92,448 and sold CPC to Rain CII Carbon LLC at Rs.73,99,15,000. The TPO has observed that the assessee has bench marked these transactions using the internal CUP method. The TPO held that the purchase and sale of CPC are at Arm's Length and so is the transaction of reimbursement of expenses. With regard to purchase of GPC, he observed that the assessee has ITA Nos 222 309 of 2014 Rain Group cases compared the price at which the GPC was imported from the AE with the price at which the GPC was imported from non AEs. However, the TPO was of the opinion that some of the transactions of purchase of GPC are not within the Arm's Length range. He observed that there were 5 transactions of purchase and when they are compared with non AE transactions of the nearest available dates, they are not within the Arms' Length range. Therefore, the assessee's explanation was called for and the assessee submitted its reply vide letter dated 12.09.2012. After considering the assessee's explanations, thereafter the TPO proceeded to reject the assessee's TP study and concluded that the assessee had made an excess payment of Rs.6,86,97,017 and declared it as a shortfall to be adjusted u/s 92CA(3) of the Act. The draft assessment order was accordingly passed against which the assessee preferred its objections before the DRP. The DRP confirmed the order of the TPO/AO and the assessee is in second appeal before us.

6. The learned Counsel for the assessee submitted that the very same issue had arisen in assessee's own case for the A.Y 2009-10 in the case of Rain Commodities Ltd and this Tribunal after considering the issue at length has remanded the issue to the file of the TPO with certain observations. The copy of the order of the Tribunal is filed before us.

7. The learned DR however, supported the orders of the authorities below.

ITA Nos 222 309 of 2014 Rain Group cases

8. Having regard to the rival contentions and the material on record, we find that for the very same A.Y in the cases of assessee's group companies, the Tribunal in ITA No.83/Hyd/2014 and others dated 28.09.2016 has considered this issue at length and has held as under:

> "2. Brief facts of the case are that the assessee-company which is engaged in manufacture and trading of cement, filed its return of income for the A.Y. 2009-2010 on 13.09.2009 declaring total income of Rs.52,40,57,941. The return was initially processed under section 143(1) of the Act and thereafter, the assessment was taken-up for scrutiny by issuance of a notice under section 143(2)of the Act. Since the assessee had entered into international transactions with its A.E., the determination of the ALP of the international transaction was referred to the TPO. The TPO has passed the order under section 92CA of the Act on 31.10.2012 proposing adjustments to the returned income of the assessee. Accordingly, a draft assessment order was passed on 28.02.2013 by the Assessing Officer determining the income at Rs.97,92,70,466 by proposing the following two additions i.e., (1) TP adjustment of Rs.43,17,62,526 and (2) Disallowance of SAP expenses of Rs.2,34,50,000.
>
> 3. Aggrieved by the proposed additions, the assessee preferred its objections before the DRP which granted partial relief to the assessee and in accordance with the directions of the DRP the final assessment order was passed. Against the relief granted by the DRP, the Revenue is in appeal before us, while the assessee is in appeal against the confirmation of the adjustments proposed by the Assessing Officer. In the assessee's appeal, the assessee has raised as many as 27 grounds of appeal. At the time of hearing, the Learned Counsel for the assessee submitted that ground of appeal No.1 is general in nature and needs no specific adjudication and ground Nos. 24 to 26 are against the levy of interest under section 234B and 234C of the Act and being consequential in nature, may be remanded to the Assessing Officer for giving consequential effect. Assessing Officer is directed accordingly. Ground No.27, being against the initiation of penalty proceedings under section 271(1)(c) of the Act, is a premature ground and is accordingly rejected.
>
> 4. As regards grounds No.2 to 8, the brief facts of the case are that assessee had purchased Green Petroleum Coke ("GPC") for a sum of Rs.125,41,03,518 from its A.E. The assessee benchmarked the international transactions using internal CUP method i.e., it has ITA Nos 222 309 of 2014 Rain Group cases compared its purchase price of GPC from its A.E. with its purchases of GPC from its non-A.Es. The TPO however, observed that on examination of the comparative analysis done by the assessee, it is found that some transactions were not within the arms length range. He has presented the same in the table which is reproduced hereunder for ready reference.

Import Purchases of Green Petroleum Coke from A.E. and non-A.E. for the A.Y. 2009-10 A.E. Purchases Non-AE Purchases Diff. Diff. as % of AE between the purchase price FOB per unit Inv. In. Total Net Qty (MT) FOB per Unit Inv. No (USD) Inv. Date Total Net Qty. (MT) FOB per No Date Inv. Inv. unit (USD) Value Value (USD) (USD) 107944/ 10087119.8.08 501032811 10253 436.8 008-08 12.8.08 1396823 7940 176 260.75 59.70 Same item sold by AE to a Grp.Co(Rain Diff. between theDiff FOBas % perof unit prices CII Carbon) AE purchase price Inv. No Inv. Date Total Inv. Value (USD) FOB per Unit (USD) 082208T 22.8.81395192 5847.9 238 198.8 45.51 082208M 22.8.8330700 50106 66 370.8 84.89 107909 15.8.84244990 14739.6 288 148.8 34.07 AE Purchases 108108/ 108110 28.9.8 844222 19778 320 108095 26.9.08 2651945 13120 202 118 36.88 4.1. The TPO therefore, brought these discrepancies to the notice of the assessee and asked the assessee to explain the said discrepancies. The assessee, vide its reply dated 17.10.2012 submitted that the A.E has sold the GPC to the assessee at its purchase price and there is no mark-up on the same and hence, there is no arms length adjustment to be made. However, the Assessing Officer did not accept the assessee's explanation holding that, under the CUP method, the controlled transaction has to be compared with an uncontrolled transaction and not with any other controlled transaction. He held that in the case of the assessee, A.E's purchase of GPC from the ultimate suppliers is also a controlled transaction and therefore, it cannot be compared with the assessee's purchase of GPC from the A.E. He, therefore, did not accept the assessee's contentions that since it has purchased the GPC from the A.E. at the same price at which A.E. has purchased it, to be at arm's length. He held that the assessee has failed to establish that GPC supplied by the A.E. was of better quality than that supplied by non-A.Es and further that it has also failed to show that the terms of payment in the A.E. purchase were not in any way beneficial to it than those in the ITA Nos 222 309 of 2014 Rain Group cases non-A.E. purchases. He therefore, held that the assessee's contention that the purchase of GPC from the A.E. is at arm's length is not acceptable. Thereafter, he proceeded to compute the ALP and arrived at a short-fall of Rs.20,53,36,947 and proposed the additions. The Assessing Officer, in the draft assessment order, proposed the addition against which the assessee raised its objections before the DRP. However, the DRP rejected the assessee's objections and therefore, the assessee is in appeal before us.

5. The Learned Counsel for the assessee, while reiterating assessee's submissions before the TPO and DRP, has drawn our attention to the order of the TPO under section 92CA of the Act to demonstrate that the TPO, instead of comparing the A.E. transactions with non-A.E. transactions, has compared the non-

A.E. transactions with other controlled transactions, which according to him, is against the principles of T.P. adjustments. Further, he also submitted that under CUP method, strict comparison has to be made as to the nature and quality of the product. He has drawn our attention to pages 2 and 3 of the paper book wherein the transactions picked-up by the TPO to be not at arm's length price have been analysed. The assessee has produced the comparative chart of transactions considered by the TPO to be not at arm's length and pointed out that the other product in terms of quality and composition with the type of Coke purchased by the assessee from each vendor is at variance. He submitted that out of 07 transactions picked-up by the TPO, one of the transaction is for purchase of 'shot coke' while, the other transactions were for the purchase of 'sponge coke'. He submitted that the quality of the product also differs as is evident from the difference in the 'Sulpher Content' of the product. He submitted that Sulpher content determines the impurity of the product purchased. He has also drawn our attention to the difference in locations from which the product has been purchased. He submitted that depending on the product source, the quality of the product differs and the price also varies. Therefore, according to him, the price of GPC is inversely related to the content of the Sulpher and also the location of the source and hence, the transactions cannot be compared with each other. Therefore, according to him, the TPO has erred in comparing the A.E. transactions with other controlled transactions and also in picking-up only some transactions. He submitted that if the transactions in entirety are considered, then the margin of the assessee is very much at arm's length price with the other non- A.E. transactions. Further, according to him, the TPO has also erred in not taking into consideration the difference in the product and quality. He therefore, prayed that the issue may be remanded to the file of the TPO for fresh analysis.

ITA Nos 222 309 of 2014 Rain Group cases

6. The Ld. D.R. however, supported the orders of the authorities below and submitted that there is huge difference in the price charged between the assessee and A.E. and related parties. As regards the assessee's contention that it is a back-to- back transaction i.e., A.E. of the assessee has supplied the material to the assessee at its purchase price, the D.R. submitted that the same is not relevant as there may be different criteria at which the A.E. has purchased the product as compared to the circumstances under which the assessee has purchased the material from its A.E. As regards the difference in the products and their quality, he submitted that the same is not sustainable as there is not much of variation in the price even though the assessee has pointed out the variations in the Sulpher content. Therefore, according to the Ld. D.R. the TP adjustment confirmed by the DRP should be upheld.

7. Having regard to the rival contentions and the material on record, we find that both the assessee as well as the Assessing Officer have adopted the CUP method for the T.P. study and the determination of the arms length price of the transactions. It is also seen that the assessee has entered into various international transactions with various parties both A.E. and non-A.E. for purchase of Green Petroleum Coke ("GPC"). The Assessing Officer has picked-up only a few transactions to hold that they are not at arm's length. We are convinced by the submissions of the assessee that the transactions with the A.E. should be compared with the transactions with non-A.Es and cannot be compared to any other controlled transactions. The TPO has compared the transaction of the assessee with its A.E. with other controlled transactions which is not permissible under the T.P. regulations and guidelines. Further, the differences between the products and their quality also have not been taken into consideration by the TPO. The CUP method requires the most direct comparison between the products and in case of any variation between the products, adjustments have to be carried out for such variations before comparing the prices. It requires close similarity in products, property or services that are involved and where the prices of the product

fluctuates regularly, timing of the transaction is also relevant, i.e., the market conditions, and the terms and conditions of the transactions would also make material difference. Thus, the similarity of products and their quality and terms and conditions such as scope and terms of warrantees provided, volume of sales or purchases, credit terms, etc., level of the market such as wholesale or retail etc., and the Geographic market i.e., the place in which the transaction takes place (like a country), the foreign currency risks, the alternatives realistically available to the buyer and seller and the intangible property attached to the sale etc., ITA Nos 222 309 of 2014 Rain Group cases are all the factors to be considered while comparing a transaction under the CUP method.

7.1. From the chart produced by the assessee referred to in the above paras, it is noticed that the assessee had purchased the GPC from various countries and therefore, the geographical source, influences the quality and composition of the product and proportionately the price also. Therefore, in our opinion, the T.P. analysis made by the TPO needs re-consideration. In view of the same, grounds of appeal No. 2 to 8 are remitted to the file of the Assessing Officer/TPO for fresh analysis in accordance with Rule 10B(1)(a) of the I.T. Rules".

9. Since the facts before us are exactly the same, we deem it fit and proper to remand this issue also to the file of the TPO for fresh analysis in accordance with Rule 10B(1)(a) of Income Tax Rules and also as directed by the Tribunal in the case of Rain Commodities Ltd/Rain Industries Ltd. Thus grounds of appeal Nos. 2 to 7 are treated as allowed for statistical purposes.

10. As regards Ground Nos. 8 to 16, brief facts are that the assessee through a common facilities agreement dated 17.07.2007 in connection with acquisition of CII Carbon LLC has provided a corporate guarantee for a combined loan of US$ 150 million wherein the assessee has guaranteed the loans availed by its AEs in USA and AE in USA guaranteed the loan availed by the assessee. The TPO analysed the interest coverage ratio and the debt equity ratio of the assessee and its AE and observed that the assessee has been showing lower debt equity ratio and higher interest coverage and hence enjoys a better credit rating as compared to its AE. Thus, he was of the opinion that the guarantee given by the assessee converted a risky loan into a risk free loan to the bankers, which provided loans to the assessee's AE in USA and therefore, the assessee carries huge costs in terms of ITA Nos 222 309 of 2014 Rain Group cases the risks taken and therefore is required to be compensated in the form of a fee for providing the bank guarantee and that the assessee ought to have charged the guarantee commission on the corporate guarantees given by it. The TPO considered the CUP as the most appropriate method and held the guarantee fee of 2% on the loan guaranteed by the assessee as reasonable. He accordingly determined the ALP and suggested the adjustment u/s 92CA of the Act. The AO passed the draft assessment order against which the assessee preferred its objection before the DRP. The DRP confirmed the draft assessment order on both the counts and the final assessment order was passed against which the assessee is in appeal before us.

11. At the time of hearing, the learned Counsel for the assessee submitted that the issue of appropriate guarantee fee on corporate guarantee given by the assessee to AEs in USA had come up before the Tribunal in the case of Rain Commodities (now known as Rain Industries) for the very same A.Y and this Tribunal in ITA No.83/Hyd/2014, dated 28.09.2016 has considered the decision

of the Coordinate Bench of the Tribunal in the case of M/s. Everest Kanto Cylinder Ltd vs. DCIT, wherein the corporate guarantee fee at 0.50% was accepted. Further it is also submitted that in the case of Rain Commodities for the A.Y 2009-10, also this issue had arisen and the Tribunal had held the LIBOR + 0.50% to be reasonable guarantee fee. Copies of the orders are filed before us.

12. Having regard to the rival contentions and the material on record, we find that in the case of Rain Commodities Ltd for the ITA Nos 222 309 of 2014 Rain Group cases very same A.Y 2009-10 (cited Supra), the Tribunal had considered the issue at length and at Paras 8 to 10.1 has held as under:

> "8. As regards Grounds No. 9 to 21 against the direction of the DRP to calculate the guarantee fee at 1.25% on the guarantee amount as against the TPO's direction to compute it at 2% on the guarantee amount of Rs.300 crores in favour of the lenders to the A.E., the Rain Commodities USA Inc., the Learned Counsel for the assessee submitted that this issue had arisen in assessee's own case in the earlier years and the Tribunal had directed the Assessing Officer to adopt the LIBOR+ 0.50% as guarantee fee. He placed reliance upon the decision of Mumbai Tribunal in the case of Glenn Mark Pharmaceuticals which has been followed by this Tribunal in assessee 's own case for the A.Y. 2008-09.
>
> 9. The Ld. D.R. however, supported the orders of the TPO and submitted that where the borrowed funds are advanced by the assessee in India to the A.E. in USA, then the LIBOR rate cannot be adopted. He submitted that the rates prevailing in India should be adopted as rightly done by the TPO. He also further distinguished the interest rate on long term loans and short term loans and submitted that the LIBOR rate is applicable only on short term loans.
>
> 10. Having regard to the rival contentions and the material on record, we find that in assessee's own case for the A.Y. 2008-09, 'B' Bench of this Tribunal, (to which one of us i.e., J.M. is the signatory), has considered the issue at length and at paras 10 to 14 by taking note of the decision in the case of M/s. Everest Kanto Cylinder Ltd., vs. DCIT, the ITAT has upheld the corporate guarantee fee at LIBOR + 0.50%. The relevant paragraphs are reproduced hereunder for ready reference.
>
> "10. We have considered the submissions of both the parties and perused the material facts on record as well as the orders of the revenue authorities. The assessee facilitated the acquisition of CII Carbon LLC by RCUSA by lending loan to its wholly owned enterprises. The assessee has taken the decision to make investment in its AE either on share capital or lending loan using its business expediency. Since, it had made the decision to make loan to its AE. By virtue of amendment to section 92B, it is international transaction. Once it is considered as international transaction, it is prudent to make bench marking also in the international arena. Similar views were expressed by the coordinate bench of this ITA Nos 222 309 of 2014 Rain Group cases Tribunal in the cases of Four Soft Pvt. Ltd. (supra), Siva Industries & Holdings Ltd.

(supra) and Vijay Electricals Ltd., (ITA No. 1159/Hyd/2013. It was held in the case of Siva Industries as below :

" Once the transaction between the assessee and the AE is in foreign currency and the transaction is an international transaction, then, the transaction would have to be looked upon by applying the commercial principles in regard to international transaction. If this is so, then the domestic prime lending rate would have no applicability and international rate fixed being LIBOR would come into play. In the circumstances, we are of the view that it is LIBOR rate which has to be considered while determining the arm's length interest rate in respect of the transaction between the assessee and the AE's."

Considering the above view, we are inclined to accept the decision of the CIT(A) and accordingly we dismiss the grounds of assessee as well as ground 2 of the revenue.

11. ALP adjustment on corporate guarantee Assessee's grounds of appeal:

The ld. CIT(A) has erred in

7. Making adjustment while determination of ALP on the shareholders corporate guarantee provided to bank on behalf of WOS.

8. Determining the ALP on the shareholder corporate guarantee provided by the Appellant @ 1.25% on the guarantee amount.

9. Not appreciating the fact that WOS was set up as a SPY for acquisition of business in USA.

10. Not appreciating that the shareholder corporate guarantee is not covered under the definition of international transaction u/s 92B of the Act.

11. Not appreciating that the amendment to section 92B would not apply to the facts of the case.

12. Not undertaking an objective analysis for determining the ALP on the shareholder corporate guarantee.

ITA Nos 222 309 of 2014 Rain Group cases

13. Not making adjustments for the differences in the comparable transactions selected vis-à-vis shareholder corporate guarantee provided by the Appellant.

14. Discriminating the US WOS by determining the ALP for shareholder-corporate guarantee vis-a-vis similar shareholder corporate guarantee provided by parent companies to Indian

subsidiaries in violation of Article 26 of India - US Double Taxation Avoidance Agreement. ('DTAA').

Revenue's ground

3. The learned CIT (A) ought to have appreciated the fact that ALP is calculated by the TPO after considering the guarantee fee and by depending on the credit rating of the AE and once the ALP is approved, the percentage on guarantee fee cannot be revised.

Ld. AR submitted that assessee, through a common facilities agreement in connection with overseas acquisition of subsidiary companies, had provided corporate guarantee in favour of RCUSA. The TPO had noted that assessee had guaranteed a consortium of banks, which provided loans to RCUSA, to indemnify the defaults, if any, on account of loan repayment by RCUSA. Ld. AR submitted that a corporate guarantee did not fall within the meaning of international transaction as defined in section 92B, that it was in the nature of shareholder activity in the business interest of parent, that the assessee was restricted by law from charging fee for a corporate guarantee provided by it in terms of para 2.2.9 of the RBI Master Circular on guarantees and Co- acceptance dated 02/07/2012, that a corporate guarantee is secondary with no cost or risk to shareholders and that it was in the business interest of the assessee. Ld. AR submitted that without prejudice to the claim that corporate guarantees are not to be charged, the method of computation of the guarantee fee was erroneous. Ld. AR also submitted that there is no cost to the assessee as it was given on the basis of Holding company and there is no profit involved in this year. Ld. AR submitted that the transaction was not relating to this year. (Refer pages 56 to 59 of paper book - relates to PY 2005-06.). Ld. AR relied on the following decisions:

1. Four Soft Pvt. Ltd., (supra)

2. Bharti Airtel Ltd. Vs. ACIT (ITA No. 5816/Del/2012

3.Redington (India) Ltd., Vs. JCIT, (ITA No.613/Mds/2014).

ITA Nos 222 309 of 2014 Rain Group cases

12. Ld. DR submitted that the assessee had not reported this transaction as international transaction. He submitted that the case Glenmark Pharmaceuticals Vs. ACIT (ITAT- Mumbai) had made after considering some calculation to arrive the figure 0.53% whereas the CIT(A) in the present case had adopted 1.25% without any basis. He also submitted that the TPO had analysed the risk factor in this transaction since the guarantee was given without any security. He also submitted that even though there is no cost to the assessee but there is intrinsic benefit to the AE. He submitted that he relies on the order of AO/TPO and justified the action of the AO.

13. After taking into consideration the above decision of the tribunal and the ratio of the four soft pvt. Ltd. (supra), we hold that the corporate guarantee is an international transaction. For the sake of clarity and ready reference, we reproduce the relevant paras below:

> 25.4. In the aforesaid view of the matter, we agree with the TPO that ALP of the corporate guarantee has to be determined as it falls within the scope and ambit of an international transaction after the retrospective amendment to section 92B. However, it appears that the TPO has applied the rate of 3.75%, which is applicable to bank guarantee issued by the bank. As the corporate guarantee is not in the nature of bank guarantee, the rate applicable to bank guarantee provided by the bank cannot be applied to corporate guarantee which is provided by a group company. In case of Glenmark Pharmaceuticals Vs. ACIT in ITA No. 5031/Mum/ 2012, dated 13/11/2013, the Mumbai Bench of the Tribunal after analysing the facts in that case had held that 0.53% corporate guarantee rate in that case was appropriate.

The ITAT Hyderabad Bench in case of Infotech Enterprises Ltd. in 16/01/2014 while considering identical issue of determining ALP of corporate guarantee provided by the assessee to its AE followed the ratio laid down in case of Glenmark Pharmaceuticals Vs. ACIT (supra) and remitted the issue back to the TPO to decide the quantum of corporate guarantee rate by following the method adopted in case of Glenmark Pharmaceuticals (supra).

26. Since the issue in the present case is identical to the issue decided by the ITAT, Hyderabad Bench in case of Infotech Enterprises (supra), following the same, we also remit this issue to the file of the TPO to decide the quantum of corporate guarantee rates accordingly. If the assessee is able to bring on record any comparables with regard to corporate guarantee, the TPO may also consider the same while determining ALP of corporate guarantee. The TPO must provide a reasonable ITA Nos 222 309 of 2014 Rain Group cases opportunity of being heard to the assessee before deciding the issue. This ground is allowed for statistical purposes."

Thus, the grounds 7 to 11 are rejected.

14. As regards grounds 12 to 14 are concerned, we find that they are relating to computation of ALP. The average margin of the comparables in similar transactions has to be arrived at before determining ALP. This issue of the percentage at which the corporate guarantee can be benchmarked has come up before various benches of the Tribunal. We find that in the case of Glenmark Pharmaceuticals Vs. ACIT in ITA No. 5031/Mum/2012, dated 13/11/2013, the Tribunal has examined the approach of the assessee therein in determining the percentage of corporate guarantee to be methodical and found it to be appropriate. Thus, the tribunal has laid down guidelines for determination of rate of corporate guarantee. In the case before us, the AO adopted 2% of the loan guaranteed and the same was reduced to 1.25% by the ld. CIT(A) without any basis or study in this matter. We find that in the decision of the coordinate bench of this Tribunal in Four Soft Pvt. Ltd. (supra), and also the decision of the Hon'ble Mumbai High Court in the case of M/s Everest Kanto Cylinder Ltd. Vs. DCIT, it was held that commercial banks guarantees are easily encashable in the event of default hence higher commission is justified for them, whereas in case of corporate guarantee the parent company would repay loan in case its AE defaults. Further, it was held that the conditions for issuance of corporate guarantees are distinct and separate from bank guarantee. Accordingly, the Hon'ble High Court upheld ITAT decision of guarantee commission @ 0.50%. The relevant portion of ITAT, Mumbai decision is reproduced for convenience:

> 21. So far as the learned Senior counsel's contention that guarantee commission is not an international transaction and there could not be any method for evaluating the ALP for the guarantee commission, we do not find any merit in the said contention in view of the amendment brought by the Finance Act, 2012 with retrospective effect from 1-4- 2002 by way of Explanation added in Section 92B. Payment of guarantee fee is included in the expression 'international transaction' in view of the Explanation i(c) of Section 92B. Once the guarantee fee falls within the meaning of 'international transaction', then the methodology provided in the rules also becomes applicable. Here in this case, it is undisputed that the assessee in its T.P. Study Report and also the TPO, have accepted that it is an international transaction and CUP is the most appropriate method for benchmarking the charging of guarantee fee. We also do not agree with the contention of the learned counsel that there could not be any cost or charge of guarantee fee by providing corporate guarantee to its subsidiary because there is an always element of benefit or cost while ITA Nos 222 309 of 2014 Rain Group cases providing such kind of guarantee to AE. However, in this case, the assessee has itself charged 0.5% guarantee commission from its AE, therefore, it is not a case of not charging of any kind of commission from its AE. The only point which has to be seen in this case is whether the same is at ALP or not. We have already come to a conclusion in the foregoing paras that the rate of 3% by taking external comparable by the TPO, cannot be sustained in facts of the present case. We also find that in an independent transaction, the assessee has paid 0.6% guarantee commission to ICICI Bank India for its credit arrangement. This could be a very good parameter and a comparable for taking it as internal CUP and comparing the same with the transaction with the AE. The charging of 0.5% guarantee commission from the AE is quite near to 0.6%, where the assessee has paid independently to the ICICI Bank and charging of guarantee commission at the rate of 0.5% from its AE can be said to be at arm's length. The difference of 0.1% can be ignored as the rate of interest on which ICICI Bank, Bahrain Branch has given loan to AE (i.e. subsidiary company) is at 5.5%, whereas the assessee is paying interest rate of more than 10% on its loan taken with ICICI Bank in India. Thus, such a minor difference can be on account of differential rate of interest.

Thus, on these facts, we do not find any reason to uphold any kind of upward adjustment in ALP in relation to charging of guarantee commission. Hence, the addition of Rs.28,50,353/- on account of TP adjustment on guarantee commission is hereby deleted and the order of the CIT(A) is set aside. Accordingly, ground NO.2 is treated to be allowed."

Following the above decision of the Mumbai Bench, which has been upheld by the Hon'ble High Court, we find that in the circumstances of the said case, it was held appropriate to charge the corporate guarantee at 0.50% from its AE and that it can be said to be at arm's length. However, in the case before us, we find that there is no corporate guarantee commission charged by the assessee. Therefore, we remit this issue to the file of the AO/TPO to determine the ALP of the corporate guarantee by following the judicial precedents, more particularly, the case of Glenmark Pharmaceuticals Vs. ACIT (supra). In the result both the assessee's as well as revenue's appeal are treated as allowed for statistical purposes.

14. The ground 15 of the Assessee relating to TDS & TCS credit, is also remitted back to the file of AO."

10.1. Respectfully following the same, we direct the Assessing Officer to adopt the same for the relevant assessment year also. The Revenue is also aggrieved by the directions of the DRP to adopt LIBOR rate by raising grounds of appeal No. 2 and 3. In view of the above decision, the Revenue's grounds of appeal No.2 and 3 are rejected and Assessee's grounds of appeal No. 9 to 21 are treated as allowed".

ITA Nos 222 309 of 2014 Rain Group cases

13. As the facts and circumstances in the case before us are exactly the same, we are inclined to follow the decision of the Coordinate Bench in the group cases of the assessee and we hold that the 0.50% is reasonable corporate guarantee fee.

14. In the result, Ground Nos. 8 to 16 are allowed.

15. As regards Ground No.17 for credit of TDS made, we find that it needs verification by the AO and therefore, this issue is remitted to the file of the AO for verification and giving relief, if any, to the assessee in accordance with law.

16. Ground Nos. 18 against computation of interest u/s 234C of the Act, we find that it is consequential to the computation of income and therefore, it is also set aside to the file of the AO to give consequential relief to the assessee, if any.

17. As regards Ground No.19 against initiation of penalty proceedings u/s 271(1)(c) of the Act, we find that it is premature and therefore, it is rejected.

18. In the result, assessee's appeal is partly allowed for statistical purposes.

19. This is assessee's appeal for the A.Y 2010-11. The assessee is aggrieved by the order of the AO dated 21.1.2015 passed u/s 143(3) r.w.s. 144C(5) and 144C(13) of the I.T. Act. The assessee has raised the following grounds of appeal:

> ITA Nos 222 309 of 2014 Rain Group cases "TRANSFER PRICING ("TP") MATTERS
>
> 1. Rejecting the submissions of the Company and making TP adjustment on shareholders corporate guarantee provided to Bank - Rs. l5,21.00,000/.

Ground specific to TP adjustment on shareholder corporate guarantee

2. Making adjustment on the shareholders corporate guarantee provided to the bank without appreciating the fact that wholly owned subsidiary ("WOS") was set up as a SPV for acquisition of business in USA.

3. Not appreciating that the shareholder corporate guarantee is not covered under the definition of international transaction U/S 92B of the Act.

4. Not appreciating that the amendment to section 92B would not apply to the facts of the case.

5. Not appreciating the fact that the Associated Enterprise ('AE') had also guaranteed the loan taken by the Appellant and hence the transaction is reciprocal.

6. Discriminating the US was by determining the ALP for shareholder corporate guarantee vis-a-vis similar shareholder corporate guarantee provided by parent companies to Indian subsidiaries in violation of Article 26 of India - US Double Taxation Avoidance Agreement. ("DTAA").

7. Not undertaking an objective analysis for determining the ALP on the shareholder corporate guarantee and making adjustment by determining the benefit to US WOS as difference in the interest rate of differently rated bonds in the Indian market i.e. 2% adjustment on the guaranteed amount.

8. Not making adjustments for the differences in the comparable transactions selected visa-vis shareholder corporate guarantee provided by the Appellant.

ITA Nos 222 309 of 2014 Rain Group cases CORPORATE TAX MATTERS

9. Not allowing the exemption U/S 1OB of the Act before setting off of business loss of non-eligible unit i.e. co- generation unit.

10. Not providing any reasoning for computing exemption u/s 1OB after setting off losses of non-eligible unit i.e. co-generation unit".

20. Ground No.1 is general in nature, hence needs no specific adjudication.

21. Ground Nos. 2 to 8 are against the transfer pricing adjustment suggested by the TPO on corporate guarantee provided by the assessee to its AEs in USA. Brief facts relating to this issue are that during the financial year under consideration, the assessee through a common set of agreement, dated 17.07.2007 has provided a corporate guarantee for a combined loan of USD 150 million. The assessee did not charge any fee for the corporate guarantee given, whereas the TPO was of the opinion that the assessee has to charge guarantee fee. We find that the very same issue had arisen in the assessee's own case for the A.Y 2009-10 and this Tribunal by order of even dated has in Paras 12 to 13 above has held the corporate guarantee fee at 0.50% to be reasonable. Respectfully following the same, the issue is remitted to the file of the TPO for computation of the corporate guarantee in accordance with the directions as above.

22. In the result, Grounds No. 2 to 8 are allowed.

23. As regards Grounds No. 9 & 10 are concerned, brief facts are that while computing the deduction u/s 10B of the Act, ITA Nos 222 309 of 2014 Rain Group cases the AO has set off of the business loss of co generation unit before allowing the deduction u/s 10B of the Act. The learned Counsel for the assessee has submitted that the co-generation unit is not an eligible unit u/s 10B and only the CPC Kiln-2 Unit is eligible for deduction. Thus, according to him, the profit/gains of the eligible unit has to be computed on a stand alone basis and the profit or loss of the non-eligible unit cannot be adjusted against the profits of the eligible units before allowing the deduction u/s 10B of the Act. In support of this contention, the learned Counsel for the assessee placed reliance upon the decision of the Hon'ble Supreme Court in the case of CIT vs. Yokogawa India Ltd reported in (2017) 77 Taxmann.com 41 (S.C).

24. The learned DR however, supported the orders of the authorities below.

25. Having regard to the rival contentions and the material on record, we find that the Hon'ble Supreme Court in the case of CIT vs. Yokogawa India Ltd reported in (2012) 341 ITR 385 (Kar.) (cited Supra) has at Paras 16 to 18 held as under:

> "16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that, "The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision."

ITA Nos 222 309 of 2014 Rain Group cases

17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already

been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly".

26. Respectfully following the same, we allow grounds of appeal No. 9 & 10.

27. In the result, assessee's appeal is allowed.

28. The assessee has raised the following grounds of appeal:

> "TRANSFER PRICING ("TP") MATTER
>
> 1. rejecting the submissions of the company and making TP adjustments to the following international transactions with AE.
>
> • Fee on shareholders Corporate Guarantee to Bank - Rs.2,20,25,940/-
>
> ITA Nos 222 309 of 2014 Rain Group cases
>
> 2. Making adjustment on the shareholders corporate guarantee provided to the bank/creditor of the AE, without appreciating the fact that guarantee was provided to the AE for the purpose of its business operations (i.e., procure raw material from the supplier in a timely manner).
>
> 3. Not appreciating that the shareholders corporate guarantee is not covered under the definition of international transaction u1s 92B of the Act.
>
> 4. Not appreciating that the amendment to section 92B would not apply to the facts of the case.
>
> 5. Adopting a rate of 1.75% based on the fee charged from the local banks, without appreciating that the guarantee given is a shareholder corporate guarantee as opposed to commercial bank guarantee.
>
> 6. a) Determining the guarantee fee on the entire amount of loan guaranteed to the bank instead of the actual amount of loan availed by the AE.

b) Determining the guarantee fee on the entire amount of loan guarantee to the creditor instead of the actual purchases made from the creditor by the AE.

CORPORATE TAX MATTERS

7. Rejecting the submissions of the Company and invoking the provisions of section l4A of the Income Tax Act, 196 I read with Rule 8D of the Income Tax Rules, 1962 to the tune of Rs. 3,73,750/-.

8. Not appreciating that the provisions of 14A are not applicable to the case, as the investments, income from which is exempt, is made out of the accumulated profits and no part of the borrowed funds were utilized for making such investments.

ITA Nos 222 309 of 2014 Rain Group cases

9. Not providing the set off of previous years' losses and unabsorbed depreciation, due to pendency of matters at various higher appellate authorities.

10. Setting off MAT credit against the gross tax liability of the Company which is computed after surcharge and cess.

11. Levy of interest on non-payment of Dividend Distribution Tax U/S I 15P of the Act of Rs.3,21,76,547/- .

12. Providing short credit of TDS and TCS to the extent of Rs. 17,16,512/-.

13. Erroneous calculation of interest U/S 234D of the Act.

14. Initiating penalty proceedings U/S 271(l)(c) of the Act".

29. As regards Grounds 1 to 6, brief facts are that the assessee is engaged in the business of manufacture and sale of cement and also of Calcinated Petroleum Coke and generation of energy. During the year, pursuant to the scheme of arrangement amongst Rain Industries Ltd & Rain CII Carbon (India) Ltd, the cement business of the holding company is transferred to the assessee herein.

30. During the assessment proceedings, the AO observed that the assessee has reported that it has entered into international transactions with its AE's for purchase of Green Petroleum Coke, sale of investments and reimbursement of expenses received. Therefore, the AO referred the issue of determination of the ALP of these transactions to the TPO u/s ITA Nos 222 309 of 2014 Rain Group cases 92CA of the Act. The TPO observed that the above transactions were at Arm's Length and no adjustment therefor is called for.

31. However, the TPO noticed that the assessee company had the transactions of corporate guarantee of 35 million US$ to Rain CII Carbon LLC and Investment of Rs.36,20,00,000 was made in Moonglow Company, Business Inc, BVI which were not reported in Form 3CEB and no bench marking analysis has been done in the assessee's TP study.

32. The TPO observed that the assessee has given the following corporate guarantees during the relevant previous year:

S.No	Date	Guarantee (in USD)	Name of the beneficiary	O/s balance as on March 2011 (in USD)
1	1.4.2010	5,000,000	Concophilips Company	
2	3.1.2011	5,000,000	Concophilips Company extended guarantee	10,000,000
3	10.6.2010	25,000,000	Wells Fargo Bank N.A	15,925,000

33. The TPO noticed that no fee has been charged by the assessee for the above Corporate Guarantees. The assessee's explanation as to why the fee was not charged where it involved services, was called for. The assessee submitted that the Corporate Guarantee (CG) does not fall within the definition of international transactions and relied on the decision of Income Tax Appellate Tribunal, Hyderabad in the case of Foursoft Ltd. The TPO observed that by virtue of the amendment made to section 92B with ITA Nos 222 309 of 2014 Rain Group cases retrospectively/ effect from 1.4.2002, the Corporate Guarantee provided by the assessee has to be considered as an international transaction and that the Tribunal in the case of Foursoft for the next year has held that if the Finance Bill of 2012 is passed by the Parliament amending the provision of section 92B, the earlier decision of Income Tax Appellate Tribunal has to be ignored. Thereafter, he proceeded to determine the ALP of Corporate Guarantee provided by the assessee. He arrived at 2% p.a. on the opening balance or the maximum during the year as reasonable corporate guarantee and suggested adjustment accordingly.

34. The AO passed the draft assessment order and the assessee preferred its objections before the DRP which confirmed the draft assessment order but restricted the rate/fee at 1.75% and the AO accordingly passed them final assessment order against which the assessee is in appeal before us.

35. The learned Counsel for the assessee reiterated the objections raised by the assessee before the TPO & DRP and submitted that giving of corporate guarantee to the AE did not cost the assessee and further that corporate guarantee became an international transaction only by virtue of the retrospective amendment made by the Finance Bill 2012 and therefore, the assessee cannot be

expected to change a fee on the guarantee given by it when it was not an international transaction at the relevant point of time. Further, she submitted an alternate argument that the guarantee given by the assessee was for supply contracts and therefore, the loans were available only to the extent ITA Nos 222 309 of 2014 Rain Group cases the material was supplied and therefore the fee should also be charged only on the amount of loan availed and not on the entire amount of loan against which the corporate guarantee was given. For this proposal, she placed reliance upon the decision of Income Tax Appellate Tribunal at Mumbai in the case of Manugraph India Ltd in ITA No.4761/Mum/2013 dated 25.03.2015.

36. As regards the fee on corporate guarantee, she prayed that it be restricted to 0.53% of the loan availed and in support of this contention, she placed reliance upon the decision of the Coordinate Bench of the Tribunal in the case of Glenmark Pharmaceuticals Ltd in ITA No.5031/Mum/2012 dated 13.11.2013.

37. The learned DR, on the other hand, relied upon the orders of the authorities below.

38. Having regard to the rival contentions and the material on record, we find that the A.Y before us is A.Y 2011-12, while the corporate guarantee has been specifically brought under the ambit of international transaction by virtue of the amendment to section 92B by the Finance Act of 2012 with retrospective effect from 1.4.2002. The issue as to whether the amendment is clarificatory and effective retrospectively or is it effective prospectively has been considered extensively by the Coordinate Bench of this Tribunal at Mumbai in the case of Siro Clinpharm Private Ltd in ITA No.2618/Mum/2014 and ITA No.2876/Mum/2014 dated 31.3.2016. In this decision, the decision of the Tribunal at ITA Nos 222 309 of 2014 Rain Group cases Hyderabad in the case of Foursoft and other related decisions were considered and it was held that this provision being in respect of transfer pricing legislation, which is anti-abuse legislation and not primarily a source of revenue, is applicable prospectively i.e. from the A.Y 2013-14 onwards. For the sake of clarity and ready reference, the relevant paras are reproduced hereunder:

> " 6. While we will, in a short while, deal with very elaborate and detailed submissions made by learned Departmental Representative, we may begin by pointing out that this issue has been dealt with in detail by decision of a coordinate bench in the case of Micro Ink vs ACIT [(2016) 176 TTJ 8 (Ahd)] wherein the coordinate bench has, inter alia, observed as follows:
>
> 21. It is only elementary that the determination of arm's length price, under the scheme of the international transfer pricing set out in the Income-tax Act, 1961, can only be done in respect of an 'international transaction'. Section 92(1) provides that, "(a)ny income arising from an international transaction shall be computed having regard to the arm's length price". In order to attract the arm's length price adjustment, therefore, a transaction has to be an 'international transaction' first. The expression 'international transaction' is a defined expression. Section 92B defines the expression 'international transaction' as follows:

> '92B - Meaning of international transaction (1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction'' means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises.
>
> (2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 ITA Nos 222 309 of 2014 Rain Group cases 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;

ITA Nos 222 309 of 2014 Rain Group cases

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

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

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

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

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

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

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

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

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

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

> '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 ITA Nos 222 309 of 2014 Rain Group cases mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises.
>
> Section 92B (2), covering a deeming fiction, provides that even a transaction with non-AE in a situation in which such a transaction is de facto controlled by prior agreement with AE or by the terms agreed with the AE.
>
> 26. Let us now deal with the Explanation, inserted with retrospective effect from 1st April 2002 i.e. right from the time of the inception of transfer pricing legislation in India, which was brought on the statute vide Finance Act, 2012.
>
> 27. This Explanation states that it is merely clarificatory in nature inasmuch as it is 'for the removal of doubts', and, therefore, one has to proceed on the basis that it does not alter the basic character of definition of 'international transaction' under Section 92B. Clearly, therefore, this Explanation is to be read in conjunction with the main provisions, and in harmony with the scheme of the provisions, under Section 92B. Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'.
>
> 28. The first two categories of transactions, which are stated to be included in the scope of expression 'international transactions' by the virtue of clause (a) and (b) of Explanation to Section 92B, are transactions with regard to purchase, sale, transfer, lease or use of tangible and intangible properties. These transactions were anyway covered by 2 (a) above which covered transactions 'in the nature of purchase, sale or lease of tangible or intangible property'. The only additional expression in the

> clarification is 'use' as also illustrative and inclusive descriptions of tangible and intangible assets. Similarly, clause (d) deals with the " provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service"

which are anyway covered by 2(b) and 3 above in "provision for services" and "mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises". That leaves us with two clauses in the Explanation to Section 92B which are not covered by any of the three categories discussed above or by other specific segments covered by Section 92B, namely borrowing or lending money.

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

ITA Nos 222 309 of 2014 Rain Group cases

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, I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 92Bwhich 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 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 ITA Nos 222 309 of 2014 Rain Group cases be fulfilled. For example, an enterprise may extend guarantees for performance of financial obligations by its associated enterprises. These guarantees do not cost anything to the enterprise issuing the guarantees and yet they provide certain comfort levels to the parties doing dealings with the associated enterprise. These guarantees thus do not have any impact on income, profits, losses or assets of the assessee. There can be a hypothetical situation in which a guarantee default takes place and, therefore, the enterprise may have to pay the guarantee amounts but such a situation, even if that be so, is only a hypothetical situation, which are, as discussed above, excluded. One may also have a situation in which there is a receivable or any other debt during the course of business and yet these receivables may not have any bearing on its profits, income, losses or assets, for example, when these receivables are out of cost free funds and these debit balances do not cost anything to the person allowing such use of funds. The situations can be endless, but the common thread is that when an assessee extends an assistance to the associated enterprise, which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under section 92B (1) of the Act.

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

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

(supra) by Hon'ble Bombay High Court.

24. As for Hon'ble High Court's judgment in the case of Everest Kanto Cylinders Ltd. (supra), it is necessary to appreciate the fact the assessee was charging a .5% commission on issuance of corporate guarantees, on behalf of the AEs, and it could not, therefore, be said that the transaction will have no impact on "profits, incomes, losses or assets of such enterprise". This aspect of the matter is clear 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 ITA Nos 222 309 of 2014 Rain Group cases 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 High Court was by the Commissioner, and not by the assessee, and, therefore, the grievance against the issuance of corporate guarantee being held to be an international transaction could not have come up for consideration. Of course, the assessee had no occasion to challenge the stand of the Tribunal on this aspect since the addition, on merits, was deleted anyway making revenue's success in this respect hollow and of no damage to the interests of the assessee. It was in this backdrop that the action of the Tribunal was upheld in granting relief to the assessee on merits. It is difficult to understand as to how this decision is taken as supporting the proposition that the issuance of corporate guarantee, even in a case in which neither any guarantee commission is charged nor any costs are incurred, is an international transaction. In any case, there is nothing in the operative portion which even remotely suggests that Their Lordships had any occasion to address themselves to the question as to whether the issuance of corporate guarantee amounts to international transaction. The operative portion of the judgment is reproduced below for ready reference:

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

> commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion we are of the view that the appeal does not raise any substantial question of law and it is dismissed."

25. We are unable to see, in the judgment of Hon'ble Bombay High Court, any support to the proposition that issuance of corporate guarantees is inherently within the ambit of definition of 'international transaction' under section 92B irrespective of whether or not such transactions have any I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 "bearing on profits, incomes, losses, or assets of such ITA Nos 222 309 of 2014 Rain Group cases 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. 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 ITA Nos 222 309 of 2014 Rain Group cases 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.

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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 ITA Nos 222 309 of 2014 Rain Group cases 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 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 ITA Nos 222 309 of 2014 Rain Group cases 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.

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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 ITA Nos 222 309 of 2014 Rain Group cases guaranteed group company would be willing to pay depending on the prevailing conditions within financial markets in practice".

30. However, while dealing with this aspect of the matter, it is necessary to bear in mind the fact that this judicial precedent, whatever be its worth in the hierarchy of binding judicial precedents in India, does not even deal with the fundamental question as to whether issuance of a corporate guarantee is an international transaction at all- which is what we are concerned with at present. This

TCC decision dealt with a situation in which the assessee was denied, in computation of its business income, tax deduction for payment of guarantee fees on the ground that there was no effective benefit to the assessee, in obtaining the said guarantee. Aggrieved by denial of deduction, assessee carried the matter in appeal before the Canadian Tax Court, and the plea of the assessee was eventually upheld. It is also interesting to note that as a sequel to this Tax Court of Canada decision, the transfer pricing legislation was amended, to bring greater clarity on the issue and as a measure of abundant caution, and section 247 (7.1), granting specific exemption to guarantee fees, was introduced. This amendment is as follows:

> (7.1) Sub-section (2) does not apply to adjust an amount of consideration paid, payable or accruing to a corporation resident in Canada (in this sub- section referred to as the "parent") in a taxation year of the parent for the provision of a guarantee to a person or partnership (in this sub-section referred to as the "lender") for the repayment, in whole or in part, of a particular amount owing to the lender by a non-resident person, if (a) the non-resident person is a controlled foreign affiliate of the parent for the purposes of section 17 throughout the period in the year during which the particular amount is owing; and (b) it is established that the particular amount would be an amount owing described in paragraph 17(8)(a) or (b) if it were owed to the parent.
>
> (http://www.fin.gc.ca/drleg-apl/ita-lrir-dec12-l-eng.pdf)

31. It is also important to bear in mind the fact that, under the Canadian law, the definition of 'international transaction', unlike an exhaustive definition under section 92B of the Indian Income-tax Act, 1961, is a very I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10brief 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 ITA Nos 222 309 of 2014 Rain Group cases 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year:

> 2009-10 affiliates to support the active business operations of those affiliates". As to what could be conceptual support for such an exclusion, we find interesting references in a discussion paper issued by the Australian Tax Officer in June 2008 and titled as "Intra-group finance guarantees and loans"http://www.transferpricing.com/pdf/Australia_Thin%20Capitalisation.pdf). The fact that this discussion paper did not travel beyond the stage of the discussion paper is not really relevant for the present purposes because all that we are concerned with right now is understanding the conceptual basis on which, contrary to popular but apparently erroneous belief, the issuance of corporate guarantees can indeed be kept outside the ambit of services. The relevant extracts from this document are as follows:
>
> "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 ITA Nos 222 309 of 2014 Rain Group cases 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10corporate guarantees as a shareholder activity is not alien to the transfer pricing literature in general. On the contrary, it is recognized in international transfer pricing literature as also in the official documentation and legislation of several transfer pricing jurisdictions. The 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' itself recognizes the distinction between a shareholder activity and a provision for services, when, contrasting the shareholder activity with broader term "stewardship activity" and thus highlighting narrow scope of shareholder activity, it states that "Stewardship activities covered a range of activities by a shareholder that may include provision for services to other group members, for example services that would be provided by a coordinating centre". It proceeded to add, in the immediately following sentence at page 207 of 2010 Guidelines, that "These latter type of non-shareholder activities could include detailed planning services for particular operations, management or technical advice (trouble shooting) or in some cases assistance in day-to-day management". The shareholder activities ITA Nos 222 309 of 2014 Rain Group cases 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 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 ITA Nos 222 309 of 2014 Rain Group cases 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member (usually the parent company or a regional holding company) performs solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder. This type of activity would not justify a charge to the recipient companies. It may be referred to as a "shareholder activity", distinguishable from the broader term "stewardship activity" used in the 1979 Report. Stewardship activities covered a range of activities by a shareholder that may include the provision of services to other group members, for example services that would be provided by a coordinating centre. These latter types of non-shareholder activities could include detailed planning services for particular operations, emergency management or technical advice (trouble shooting), or in some cases assistance in day-to-day management.

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

ITA Nos 222 309 of 2014 Rain Group cases

(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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 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 ITA Nos 222 309 of 2014 Rain Group cases (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.
>
> 38See. e.g., Centel Communications Co. v. Commissioner, 92 T.C. 612, 632 (1989), aff d, 920 F2d 1335 (7th Cir. 1990); Bank of Am. v. United States, 680 F.2d 142, 150 (Cl. Ct. 1982). The Service's current position on the characterization of guarantee fees as payment for services under section 482 is inconsistent with its treatment of guarantee fees under other provisions. See P.L.R. 9410008 (Dec. 13, 1993). 39But cf Federal Nat'l Mortgage Ass'n v. Commissioner, 100 T.C. 541, 579 (1993) (Fannie Mae provided services by buying mortgages).

37. We are in agreement with these views. There can thus be activities which benefit the group entities but these activities need not necessarily be 'provision for services'. The fact that the OECD considers such activities in the services segment does not alter the character of the activities. While the group entity is thus indeed benefited by the shareholder activities, these activities do not necessarily constitute services. There is no such express reference to the benefit test, or to the concept of benefit attached to the activity, in relevant definition clause of 'international transaction' under the domestic transfer pricing legislation. As we take note of these things, it is also essential to take note of the legal position, in India, in this regard. No matter how desirable is it to read such a test in the definition of the international transaction' under our domestic transfer pricing legislation,

as is the settled legal position, it is not open to us to infer the same. Hon'ble Supreme Court, in the case of Smt. Tarulata Shyam v. CIT [1977] 108 ITR 345 (SC) , took note of the situation before Their Lordships in these words: "We have given anxious thoughts to the persuasive arguments of Mr Sharma. His arguments, if accepted, will certainly soften the rigour of this extremely drastic provision and bring it more in conformity with logic and equity". However, Their Lordships declined to do so on the ground that "There is no scope for importing into the statute the words which are not there. Such importation would be not to construe but to amend the statute". Their Lordships noted that "Even if there be casus omissus, the defect can be remedied only by legislation and not by judicial interpretation". The benefit test, which is set out in the OECD Guidance and which 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 ITA Nos 222 309 of 2014 Rain Group cases 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 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 ITA Nos 222 309 of 2014 Rain Group cases 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 either. Let us now compare this kind of a guarantee with a corporate guarantee. The guarantees are issued without any security or underlying assets. When these guarantees are invoked, there is no occasion for the guarantor to seek recourse to any assets of the guaranteed entity for recovering payment of defaulted guarantees. The guarantees are not based on the credit assessment of the entity, in respect of which the guarantees are issued, but are based on the business needs of the entity in question. Even in a situation in which the group entity is sure that the beneficiary of guarantee has no financial means to reimburse it for the defaulted guarantee amounts, when invoked, the group entity will issue the guarantee nevertheless because these are compulsions of his group synergy rather than the assurance that his future obligations will be met. We see no meeting ground in these two types of guarantees, so far their economic triggers and business considerations are concerned, and just because these instruments share a common surname, i.e. 'guarantee', these instruments cannot be said to be belong to the same economic genus. Of course, there can be situations in which there may be economic similarities, in this respect, may be present, but these are more of an exception than the rule. In general, therefore, bank guarantees are not comparable with corporate guarantees.

41. As evident from the OECD observation to the effect "In contrast, if for example a parent company raises funds on behalf of another group member which uses them to acquire a new company, the parent company would generally be regarded as providing a service to the group member", it is also to be clear that when the corporate guarantees are issued for the purpose of subsidiaries raising funds for acquisitions by such subsidiaries, these guarantees will be deemed to be services to the ITA Nos 222 309 of 2014 Rain Group cases 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 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 ITA Nos 222 309 of 2014 Rain Group cases 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 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 ITA Nos 222 309 of 2014 Rain Group cases 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, I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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.

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 ITA Nos 222 309 of 2014 Rain Group cases loans on the I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year:

2009-10 same terms as without a guarantee. Such a guarantee transaction can only be, and is, motivated by the shareholder, or ownership considerations. No doubt, under the OECD Guidance on the issue, an explicit support, such as corporate guarantee, is to be benchmarked and, for that purpose, it is in the service category but that occasion comes only when it is covered by the scope of 'international transaction' under the transfer pricing legislation of respective jurisdiction. The expression 'provision for services' in its normal or legal connotations, as we have seen earlier, does not cover issuance of corporate guarantees, even though once a corporate guarantee is covered by the definition of international transaction', it is benchmarked in the service segment. In view of the above discussions, OECD Guidelines, as a matter of fact, strengthen the claim of the assessee that the corporate guarantees issued by the assessee were in the nature of quasi-capital or shareholder

> activity and, for this reason alone, the issuance of these guarantees should be excluded from the scope of services and thus from the scope of 'international transactions' under section 92B. Of course, once a transaction is held to be covered by the definition of international transaction, whether in the nature of the shareholder activity or quasi- capital or not, ALP determination must depend on what an independent enterprise would have charged for such a transaction. In this light of these discussions, we hold that the issuance of corporate guarantees in question was not in the nature of 'provision for services' and these corporate guarantees were required to be treated as shareholder participation in the subsidiaries.

44. As for the words 'provision for services" appearing in Section 92B, and connotations thereof, our humble understanding is that this expression, in its natural connotations, is restricted to services rendered and it does not extend to the benefits of activities per se. Whether we look at the examples given in the OECD material or even in Explanation to Section 92B, the thrust is on the services like market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, and scientific research, legal or accounting service or coordination services. As a matter of fact, even in the Explanation toSection 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 I.T.A. ITA Nos 222 309 of 2014 Rain Group cases Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 issued a non- binding Field Service Advice (FSA 1995 WL 1918236, 1 May 1995) stating that, in certain circumstances (emphasis supplied), a guarantee may be treated as a service". If the natural connotations of a 'service' were to cover issuance of guarantee in general, there could not have been an occasion to give such hedged advice. This will be stretching the things too far to suggest that just because when guarantees are included in the international transactions, these guarantees are included in service segment in contradistinction with other heads under which international transactions are grouped, the guarantees should be treated as services, and, for that reason, included in the definition of international transactions. That is, in our considered view, purely fallacious logic. In our considered view, under Section 92B, corporate guarantees can be covered only under the residuary head i.e. "any other transaction having a bearing on the profits, income, losses or assets of such enterprise". It is for this reason that Section 92B, in a way, expands the scope of international transaction in the sense that even when guarantees are issued as a shareholder activity but costs are incurred for the same or, as a measure of abundant caution, recoveries are made for this non-chargeable activity, these guarantees will fall in the residuary clause of definition of international transactions under section 92B. As for the learned Departmental Representative's argument that "whether the service has caused any extra cost to the assessee should not be the

deciding factor to determine whether it is an international and then gives an example of brand royalty to make his point. What, in the process, he overlooks is that Section 92B(1) specifically covers sale or lease of tangible or intangible property". The expression "bearing on the profits, income, losses or assets of such enterprises" is relevant only for residuary clause i.e. any other services not specifically covered by Section 92B. It was also contended that, while rendering Bharti Airtel decision, the Delhi Tribunal did go overboard in deciding something which was not even raised before us. In the written submission, it was stated that "Hon'ble Delhi ITAT was not requested by the contesting parties to decide the issue as to whether the provision of guarantee was a service or not". That's not factually correct. We are unable to see any merits in learned Departmental Representative's contention, particularly as decision categorically noted that not only before the Tribunal, but this issue was also raised before the DRP- as evident from the text of DRP decision. We now take up the issue with respect to specific mention of the words in Explanation to Section 92B which states that "For the removal of doubts, it is hereby clarified that (i) the expression "international transaction"

> shall include........ (c) capital financing, including any type of long -term or short -term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business." There is no dispute that this Explanation states that it is merely clarificatory in nature inasmuch as it is 'for the removal of doubts', and, therefore, one has to proceed on the basis I.T.A. Nos. 2618 and ITA Nos 222 309 of 2014 Rain Group cases 2876/Mum/2014 Assessment year: 2009-10 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 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 ITA Nos 222 309 of 2014 Rain Group cases 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 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 TP study. In our considered ITA Nos 222 309 of 2014 Rain Group cases 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 Act2012, we need not deal with this aspect of the matter in greater detail."

48. In the present case, we have held that the issuance of corporate guarantees were in the nature of shareholder activities- as was the uncontroverted claim of the assessee, and, as such, could not be included in the 'provision for services' under the definition of 'international transaction' under section 92B of the Act. We have also held, taking note ITA Nos 222 309 of 2014 Rain Group cases of the insertion of Explanation to Section 92B of the Act, that the issuance of corporate guarantees is covered by the residuary clause of the definition under section 92B of the Act but since such issuance of corporate guarantees, on the facts of the present case, did not have "bearing on profits, income, losses or assets", it did not constitute an international transaction, under section 92B, in respect of which an arm's length price adjustment can be made. In this view of the matter, and for both these independent reasons, we have to delete the impugned ALP adjustment. The question, which was raised in Bharti Airtel's case (supra) but left unanswered as the assessee had succeeded on merits, reamins unanswered here as well. However, we may add that in the case of Krishnaswamy SPD v.Union of India [2006] 281 ITR 305/151 Taxman 286 (SC), wherein Their Lordships had, inter alia, observed that "the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. It was for this reason that a coordinate bench of this Tribunal, in the case of Channel Guide India Ltd. v. Asstt. CIT [2012] 139 ITB 49/25 taxmann.com 25 (Mum.), held that even though the assessee had not deducted the applicable tax at source under section 195, the disallowance could not be made under section 40(a)(i) since the taxability was under the provisions which were amended, post the payment having been made by the assessee, with retrospective effect. All this only shows that even when law is specifically stated to have effect from a particular date, its being implemented in a fair and reasonable manner, within the framework of judge made law, may require that date to be tinkered with. When a proviso is introduced with effect from a particular date specified by the legislature, the judicial forums, including this Tribunal, at times read it as being effect from a date much earlier than that too. One such case, for example, is CIT v. Ansal Landmark Township (P.) Ltd. [2015] 377 ITR 635/234 Taxman 825/61 taxmann.com 45 (Delhi), wherein Hon'ble Delhi High Court confirmed the action of the Tribunal in holding that the provision, though stated to be effective from 1st April 2013 must be held to be effective from 1st April 2005. Whether such an exercise can be done in the present case is, of course, something to be examined and our observations should not be construed as an expression on merits of that aspect of matter. Given the fact that the assessee has succeeded on merits in this case, it would not really be necessary to deal with that aspect of the matter.

49. The second issue is this. We must deal with the question whether in this case the matter should have been referred to a larger bench. The parties before us were opposed to the matter being sent for consideration by the special bench, and at least one of the reasons for which the grievance of the assessee is upheld, i.e. guarantees being in the nature of shareholder activity and excludible from the scope of services for that ITA Nos 222 309 of 2014 Rain Group cases 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 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 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 ITA Nos 222 309 of 2014 Rain Group cases forward, to avoid such issues being litigated and to ensure satisfactorily resolution of these disputes, must include a clear and unambiguous legislative guidance on the transfer pricing implications of the corporate guarantees as also on the methodology of determining its ALP, if necessary. Of course, no matter how good is the legislative

framework, the importance of a very comprehensive analysis, in the transfer pricing study, of the nature of corporate guarantees issued by the assessees, can never be overemphasized. The sweeping generalizations, vague statements and evasive approach in the transfer pricing study reports, which are quite common in most of the transfer pricing reports, cannot do good to a reasonable cause. When judicial calls on the complex transfer pricing issues are to be taken, utmost clarity in the legislative framework and a comprehensive analysis of relevant facts, in the transfer pricing documentation, are basic inputs. Unfortunately, both of these things leave a lot to be desired. We can only hope, and we do hope, that things will change for better.

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

8. Learned Departmental Representative, in his written note, accepts that "the legislature brought in amendment (in Section 92B) by the Finance Act, 2012, after the decision of Four Soft Ltd dated 14/09/2011". He points out that the decision of the Tribunal, in the case of Bharti Airtel (supra), is per incurium because there were two decisions of this Tribunal, in the case of Everest Kanto Cylinders Ltd Vs DCIT [(2012) 34 taxmann.com 9 (Mum)] and Mahindra & Mahindra Ltd Vs DCIT [2012- TII-70-ITAT-Mum], which were not considered by the Bharti Airtel decision. Our attention is also invited to the rectification petition filed by the Assessing Officer, which is said to be pending for disposal before the Tribunal. We donot find merits in this plea. Mahindra & Mahindra decision (supra) was passed on 6 th June 2012, though at a point of time when Finance Act 2012 had just come into force i.e. post 28th May 2012, without even being aware whether or not the Finance Act 2012 was passed as it gave certain directions depending upon the exact amendment by the said Finance Act. The matter was remitted to the file of the Assessing Officer in a rather summary manner. It cannot be, by any stretch of logic, an authority on any legal question arising out of the law which, as per the Tribunal- wrongly though, was not even in existence. As for the Everest Kanto decision (supra), the issue was decided against the assessee as, to borrow the words of the coordinate bench, "Here in this case, it is undisputed that the assessee in its T.P. Study Report and also the TPO, have accepted that it is an international transaction and CUP is the most appropriate method for ITA Nos 222 309 of 2014 Rain Group cases benchmarking the charging of guarantee fee", and, it was for this short reason that the matter was decided against the assessee. The co-ordinate bench had further observed "in this case, the assessee has itself charged 0.5% guarantee commission from its AE, therefore, it is not a case of not charging of any kind of commission from its AE. The only point which has to be seen in this case is whether the same is at ALP or not". Learned Departmental Representative has invited our attention to a decision of the Bangalore benches, in the case of Advanta India Limited Vs ACIT [(2015) TII- 294-ITAT-BAN], which is in favour of the assessee. While learned Departmental Representative is indeed right, that is a case in which the assessee did in fact recover charges, which included more than the cost incurred, from the beneficiary, and, as such, it clearly had an impact on the profits of the assessee. That is a case distinct from the present situation in which there is no impact on the profits or losses or assets or income of the assessee. In Advanta decision (supra), this aspect of the matter and the distinguishing feature has been discussed at considerable length. Learned Departmental Representative has then invited our attention to the fact a substantial question of law has been admitted by Hon'ble Delhi

High Court in ITA No. 607/2014 against the order passed by the Tribunal in the case of Bharti Airtel (supra). While no doubt the matter is now pending before Hon'ble High Court for the judicial scrutiny by Their Lordships, that fact by itself does not reverse the stand taken by the Tribunal in the order so impugned. As regards the decision of Bharati Airtel being on its own peculiar facts, there can be no denial of this position but that does not mean that the so far as issues of general application are concerned, the stand of the Tribunal cannot hold good. Learned Departmental Representative then takes us through the Explanation to Section 92 B to explain its true scope and through Bharti Airtel decision as to how fallacious is its logic. Its emphasized that the impact of issuance of bank guarantees, on the profits, income, losses or assets of such enterprises, is 'real' and not 'contingent' as held in Bharti's case. It is also emphasized, apparently to highlight the fact that it is not only the impact on entity issuing the guarantee but also beneficiary of the guarantee that matters in this context, that the word used in section 92 B is 'enterprises' and not 'enterprise'. It is thus contended that the impact on the profits, incomes, losses or assets of the entity issuing guarantee is important, but the impact on the profits, income, losses or assets of the entity, which is beneficiary of the guarantee, is also important. It is pointed out that Bharti Airtel decision has examined this aspect only from the point of view of the entity issuing the guarantee and that has also been decided wrongly. As for these issues being raised by the learned Departmental Representative, suffice to say that even if reasoning adopted by Bharti Airtel decision is incorrect, it is not for us to examine that ITA Nos 222 309 of 2014 Rain Group cases aspect of the matter. Now that the matter is before Hon'ble High Court, and the matter is already under hearing, there is no point in going into these fine points, which may at best be errors of judgment rather than a glaring error rendering the decision to be per incurium, at this stage. In any case, there is a subtle difference in 'impact on' and 'influence on'. The issuance of a corporate guarantee may have an influence on the profits, incomes, losses and assets of an entity, in whose favour the guarantee is issued, but it has no impact on the same as long as it is issued without a consideration. To treat this phrase as implying a benefit test, will, in our considered view, stretching the things too far. We are, therefore, not swayed by the arguments, though extremely well researched and thought provoking, of the learned I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 Departmental Representative- particularly at this stage. He has raised a number of other arguments as well but as those arguments are already dealt with in the case of Micro Ink decision reproduced above, we see no need to again deal with the same.

9. In the Micro Ink decision (supra), we had, amongst other things, taken not of the judicial developments leading to the insertion of Explanation to Section 92B and how within four months of Four Soft decision (supra) being announced, it was nullified by a legislative amendment. This aspect of the matter has been dealt with in paragraph 46 and 47 of this decision, which has been reproduced earlier in this order, at considerable length. It assumes even more significance in the light of a new judicial development that we will deal with in a short while now. In the present case, we are dealing with a situation in which the amendment was made with retrospective effect and it covered certain issues which were already subjected to a judicial interpretation in a particular manner. Learned Departmental Representative does not even dispute it. He is candid enough to place on record the fact, by way of a written note, that the one of the reasons of insertion of Explanation to Section 92 B was to nullify the Four Soft decision (supra). The judicial interpretation so given was certainly not the end of the road. The matter could have been carried in appeal before

higher judicial forums. If the decision of a judicial body does not satisfy the tax administration, nothing prevents them from going to the higher judicial forum or from so amending the law, with prospective effect, that there is no ambiguity about the intent of legislature and it is conveyed in unambiguous words.

10. Nullifying a judicial interpretation though legislative amendment, much as many of us may abhor it, is not too uncommon an occurrence. Of course, when legislature has to take an extreme measure to nullifying the impact of a judicial ruling in taxation, it is the time for, at least on a theoretical note, ITA Nos 222 309 of 2014 Rain Group cases introspection for the draftsman as to what went so wrong that fundamental intent of law of law could not be conveyed by the words of the statute, or, I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 perhaps for the judicial forums, as to what went so wrong that the interpretation was so off the mark vis- à-vis fundamental principles of taxation or the sound policy considerations. However, amendment so made are generally prospective, and there is a sound conceptual foundation, as has been highlighted in the binding judicial precedents that we will deal with in a short while, for that approach. There is no dearth of examples on this aspect of the matter. Take for example, the amendment to Section 263 by the Finance Act, 1961. In many judicial precedents, [such as in the case of CIT Vs Sunbeam Auto Limited (332 ITR 167) wherein it was held that "Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open"], it was reiterated that it was only the lack, not the adequacy, of inquiry which could confer jurisdiction under section 263 on the Commissioner. By inserting Explanation 2 to Section 263(1), which inter alia provided that powers under section 263 could also be invoked in the cases where "the order is passed without making inquiries or verification which should have been made", all ratio of all these decisions was nullified. That, however, is done with prospective effect, i.e. with effect from 1 st June 2015. As a matter of fact, it is a laudable policy of the present tax administration to stay away from making the retrospective amendments, and thus contribute to greater certainty and congenial business climate. Nothing evidences it better than this subtle, but easily discernible, paradigm shift in the underlying approach to the amendments made in Section 263 in the very first full budget of the present Government.

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

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

> 30. Undoubtedly, the legislature is competent to amend a provision that operates retrospectively or prospectively.

Nonetheless, when disputes as to their applicability arise in ITA Nos 222 309 of 2014 Rain Group cases court, it is the actual substance of the amendment that determines its ultimate operation and not the bare language in which such amendment is couched........

36. A clarificatory amendment presumes the existence of a provision the language of which is obscure, ambiguous, may have made an obvious omission, or is capable of more than one meaning. In such case, a subsequent provision dealing with the same subject may throw light upon it. Yet, it is not every time that the legislature characterizes an amendment as retrospective that the Court will give such effect to it. This is not in derogation of the express words of the law in question, (which as a matter of course must be the first to be given effect to), but because the law which was intended to be given retrospective effect to as a clarificatory amendment, is in its true nature one that expands the scope of the section it seeks to clarify, and resultantly introduces new principles, upon which liabilities might arise. Such amendments though framed as clarificatory, are in fact transformative substantive amendments, and incapable of being given retrospective effect. ....

37. An important question, which arises in this context, is whether a "clarificatory" amendment remains true to its nature when it purports to annul, or has the undeniable effect of annulling, an interpretation given by the courts to the term sought to be clarified. In other words, does the rule against clarificatory amendments laying down new principles of law extend to situations where law had been judicially interpreted and the legislature seeks to overcome it by declaring that the law in question was never meant to have the import given to it by the Court? The general position of the courts in this regard is where the purpose of a special interpretive statute is to correct a judicial interpretation of a prior law, which the legislature considers inaccurate, the effect is prospective. Any other result would make the legislature a court of last resort. United States v. Gilmore 8 Wall [(75 US) 330, 19L E d 396 (1869)] Peony Park v. O'Malley [223 F2d 668 (8th Cir 1955)] . It does not mean that the legislature does not have the power to override judicial decisions which in its opinion it deems as incorrect, however to respect the separation of legal powers and to avoid making a legislature a court of last resort, the amendments can be made prospective only [Ref County of Sacramento v St ate (134 Cal App 3d 428) and In r e Marriage of Davies (105 III App 3d 66)] (Emphasis, by underlining, supplied by us)

13. Quite clearly, in view of the law so laid down by Their Lordships also, just because a provision is stated to be clarificatory, ITA Nos 222 309 of 2014 Rain Group cases it does not become entitled to be treated as 'clarificatory' by the judicial forums as well. The view taken by Hon'ble Delhi High Court support this line of reasoning. Even without the benefit of guidance of Their Lordships, the views articulated by a coordinate bench of this Tribunal, in the case of Bharti Airtel (supra) were of a somewhat similar opinion when it was observed that, "Undoubtedly, the scope of a charging provision can be enlarged with retrospective effect, but an anti- avoidance measure, that the transfer pricing legislation inherently is, is not primarily a source of revenue as it mainly seeks compliant behaviour from the assessee vis-à-vis certain norms, and these norms cannot be given effect from a date earlier than the date norms are being introduced". We may add that right now we are only concerned with the question of retrospective amendment in the transfer pricing legislation, which has, as we will see, its own peculiarities and significant distinction with normal tax laws which simply impose tax on an income.

14. Legislature may describe an amendment as 'clarificatory' in nature, but a call will have to be taken by the judiciary whether it is indeed clarificatory or not. This determination, i.e. whether the amendment in indeed clarificatory or is the amendment to overcome a judicial precedent, assumes great significance because when it is found that the purpose of such interpretive statute, or clarificatory amendment, is "correct a judicial interpretation of prior law, which I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 the legislature considers inaccurate, the effect is prospective" and, as in this case, it deals with transfer pricing legislation which essentially seeks a degree of compliant behavior from the assessee vis-à-vis certain norms- the norms the assessee should know at the time of entering into the transactions rather than at the time of scrutiny of his affairs at a much later stage.

15. It is very important to bear in mind the fact that right now we are dealing with amendment of a transfer pricing related provision which is in the nature of a SAAR (specific anti abuse rule), and that every anti abuse legislation, whether SAAR (specific anti abuse rule) or GAAR (general anti abuse rule), is a legislation seeking the taxpayers to organize their affairs in a manner compliant with the norms set out in such anti abuse legislation. An anti-abuse legislation does not trigger the levy of taxes; it only tells you what behavior is acceptable or what is not acceptable. What triggers levy of taxes is non-compliance with the manner in which the anti- abuse regulations require the taxpayers to conduct their affairs. In that sense, all anti abuse legislations seek a certain degree of compliance with the norms set out therein. It is, therefore, only elementary that amendments in the anti-abuse legislations can ITA Nos 222 309 of 2014 Rain Group cases only be prospective. It does not make sense that someone tells you today as to how you should have behaved yesterday, and then goes on to levy a tax because you did not behave in that manner yesterday.

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

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

> The other relevant maxim is, lex non cogit ad impossibilia-- the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in

> the consideration of particular cases. [See : U.P.S.R.T.C. vs. Imtiaz Hussain 2006 (1) SCC 380, Shaikh Salim Haji Abdul Khayumsab vs. Kumar & Ors. 2006 (1) SCC 46, Mohammod Gazi vs. State of M.P. & Ors. 2000 (4) SCC 342 and Gursharan Singh vs. New Delhi Municipal Committee 1996 (2) SCC 459].

18. It is for this reason that the Explanation to Section 92 B, though stated to be clarificatory and stated to be effective from 1 st April 2002, has to be necessarily treated as effective from at best the assessment year 2013-14. In addition to this reason, in the light of Hon'ble Delhi High Court's guidance in the case of New Skies Satellite BV (supra) also, the amendment in the definition of international transaction under Section 92B, to the extent it pertains to the issuance of corporate guarantee being outside the ITA Nos 222 309 of 2014 Rain Group cases scope of 'international transaction', cannot be said to be retrospective in effect. The fact that it is stated to be retrospective, in the light of the aforesaid guidance of Hon'ble Delhi High I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 Court, would not alter the situation, and it can only be treated as prospective in effect i.e. with effect from 1 st April 2012 onwards.

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

20. There are a number of decisions in which our so tinkering with the specific words in the statute have been upheld, as long as this has been so done in accordance with the judicial principles and guidance in the judge made law. In the case of Rajeev Kumar Agarwal Vs ACIT [(2014) 249 ITD 363 (Agra)], insertion of second proviso to Section 40(a)(ia), though specifically stated to be with effect from 1st April 2013, was read to be effective from 1st April 2005. The reasoning adopted by the bench, speaking through one of us, was as follows:

> 8. With the benefit of this guidance from Hon'ble Delhi High Court, in view of legislative amendments made from time to time, which throw light on what was actually sought to be achieved by this legal provision, and in the light of the above analysis of the scheme of the law, we are of I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 the considered view that section 40(a)(ia) cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure- particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary to this proposition, in

our considered view, declining deduction in respect of expenditure relating to the payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia). If it is not an intended ITA Nos 222 309 of 2014 Rain Group cases consequence i.e. if it is an unintended consequence, even going by Bharti Shipyard decision (supra), "removing unintended consequences to make the provisions workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively". Revenue, thus, does not derive any advantage from special bench decision in the case Bharti Shipyard (supra).

9. On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincentivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence"

to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of ITA Nos 222 309 of 2014 Rain Group cases these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assessee's for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004.

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

14. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance.

15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in (Rajiv Kumar Agarwal v. ACIT).

22. When such are the views of Hon'ble High Court, it is not open to us to proceed on the basis that even though the amendment is required to be read as prospective, the Tribunal cannot do so as it is a creature of the Income Tax Act itself. In our considered view, and for the detailed reasons set out above, at best the amendment in Section 92B, at least to the extent it dealt with the question of issuance of corporate guarantees, is effective from 1 st April 2012. The I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009-10 assessment year before us being an assessment year prior to that date, the amended provisions of Section 92 B have no application in the matter.

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

24. In all fairness to the learned Departmental Representative, we may add that the decision of Hon'ble Delhi High Court, in the case ITA Nos 222 309 of 2014 Rain Group cases of New Skies Satellite (supra), was not available at the point of time

when this matter came up for hearing, and we had, therefore, no occasion to hear revenue's perspective on the same. While this hearing was concluded on 7 th January, 2016, the judgment in New Skies Satellite (supra) was pronounced by Hon'ble Delhi High Court on 8 t h February, 2016. However, as that is not the decisive factor so far as our conclusions are concerned and it is only an additional factor in support of our conclusion, that does not matter really.

25. In the result, appeal of the assessee is allowed.

26. As regards the grievances raised by the Assessing Officer- which are set out in the beginning of this order, learned representatives fairly agree that both the issues raised therein are covered, in favour of the assessee, by decisions of the coordinate benches in assessee's own case for the assessment years 2003-04 I.T.A. Nos. 2618 and 2876/Mum/2014 Assessment year: 2009- 10 to 2008-09. Copies of these decisions were placed before us at pages 275-297 of the paper book.

27. In view of the above discussions, and respectfully following the coordinate benches, we uphold the order of the CIT(A) on these aspects and decline to interfere in the matter.

28. In the result, the appeal filed by the Assessing Officer is dismissed.

29. To sum up, while the appeal filed by the assessee is allowed, the appeal filed by the Assessing Officer is dismissed. Pronounced in the open court today on the 31st day of March, 2016".

39. Respectfully following the same, assessee's ground of appeal No.3 is allowed and Grounds 1,2 4 to 6 need no adjudication.

40. As regards grounds 7 and 8, against the disallowance u/s 14A r.w.r 8D of I.T. Rules, the learned Counsel for the assessee submitted that in the draft assessment order, the AO disallowed 0.5% of the average value of investment u/s 14A r.w.r 8D against ITA Nos 222 309 of 2014 Rain Group cases which, the assessee preferred its objections and the DRP directed the AO to exclude the investments made by the assessee in its foreign subsidiaries while computing the disallowance u/s 14A of the Act. It is submitted that in the final assessment order, the AO has followed the directions of the DRP and arrived at the disallowance at Rs.3,73,750. She submitted that the assessee had own interest free funds, out of which the investments were made and therefore, had incurred no expenditure for earning of dividend income and hence no disallowance u/s 14A was called for. Further, she also submitted that the investments in APGPCL was for the purpose of obtaining power at a subsidized rate and that APGPCL does not declare any dividends to its shareholders as the incentive of dividend is already provided in the form of subsidized rates of power. It is further submitted that the benefit of subsidized rate of power is taxed in the hands of the company by way of enhanced business income/profit. Thus, according to her, the assessee's investment of Rs.1,60,00,000 should be excluded from the investments for calculations of disallowance under rule 8D(iii) of the I.T.

Rules.

41. The learned DR, on the other hand, supported the orders of the authorities below.

42. Having regard to the rival contentions and the material on record, we find that the assessee has earned dividend income and the A.Y being 2011-12 the provisions of Rule 8D r.w.s 14A are applicable. The only question to be considered now is whether the investment in APGPCL is to be excluded while computing the ITA Nos 222 309 of 2014 Rain Group cases disallowance u/r 8D(iii) of the Act. The assessee's contention that APGPCL does not declare dividend to its shareholders and further that the benefit of subsidized rate of power is taxed in the hands of the company has not been verified by the authorities below. The benefit derived by the assessee by virtue of the investment is not dividend income but is subsidized rate of power. This subsidy is not exempt from tax. Further, if the benefit has resulted in enhanced business income/profits and has been taxed, then, no disallowance u/s 14A r.w.r. 8D can be made. Therefore, this limited issue is remitted to the file of the AO to verify the contention of the assessee and exclude the investment if the assessee's contention is found to be correct. Thus, grounds No. 7 & 8 are partly allowed.

43. Ground No.9 is not pressed at the time of hearing as it is submitted the consequential relief will be given while giving effect to the orders of the Courts. Hence rejected as not pressed.

44. Ground No.10, in our opinion, needs to be set aside to the file of the AO to verify the claim in terms of the ITR form filed by the assessee and AO is directed to give relief, if any, to the assessee in accordance with law after giving the assessee a fair opportunity of hearing. Ground No.10 is accordingly treated as allowed for statistical purposes.

45. Similarly, grounds 11, 12 & 13 also need factual verification by the AO. Accordingly, these grounds are set aside to the file of the AO for de novo consideration in accordance with law.

ITA Nos 222 309 of 2014 Rain Group cases

46. Ground No.14 against initiation of penalty proceedings u/s 271(1)(c) of the Act is rejected as it is a premature ground.

47. In the result, assessee's appeal is partly allowed.

48. The Revenue has raised the following grounds of appeal:

> "1. The learned DRP erred in law and on facts of the case.
>
> 2. The learned DRP erred in directing the AO to adopt charging fees @ 1.75% instead of 2% towards corporate guarantee without considering upfront fees and credit rating which comes to 2%".

49. We find that while dealing with assessee's ground of appeal No.3, we have already held that for the relevant A.Y, corporate guarantee cannot be treated as an international transaction. Therefore, the Revenue's ground is liable to be rejected.

50. In the result, Revenue's appeal is dismissed.

51. In this appeal, the assessee, Rain Industries Ltd has raised the following grounds of appeal:

"TRANSFER PRICING ("TP") MATTERS

1. Rejecting the submissions of the Company and making TP adjustments to the following international transactions with Associated Enterprise ('AE'):

ITA Nos 222 309 of 2014 Rain Group cases • Interest on funds to Wholly owned subsidiary ('WOS') - Rs.l,87,20,952;

• Fee on Shareholders Corporate Guarantee to bank - Rs. 7,98,52,500.

Ground specific to TP adjustment on Interest on funds advanced to WOS

2. Not appreciating the fact that the WOS was set up as a special purpose vehicle (' SPV') for global acquisition and the funds were provided as a matter of commercial expediency to fund the acquisition.

3. Not appreciating the fact that the acquisition resulted in benefit and expansion of the Assessee's business.

4. Discriminating the US was by determining the ALP for funds provided as loans vis-a vis similar loans provided by parent company to Indian subsidiaries in violation of Article 26 of India - US Double Taxation Avoidance Agreement. ('DTAA').

Ground specific to TP adjustment on shareholder corporate guarantee

5. Making adjustment on the shareholders corporate guarantee provided to bank, without appreciating the fact that WOS was set up as a SPV for acquisition of business in USA.

6. Not appreciating that the shareholders corporate guarantee is not covered under the definition of international transaction U/S 92B of the Act.

7. Not appreciating that the amendment to section 92B would not apply to the facts of the case.

8. Discriminating the US was by determining the ALP for shareholder corporate guarantee vis-a-vis similar shareholder corporate guarantee provided by parent company to Indian subsidiaries in violation of Article 26 ITA Nos 222 309 of 2014 Rain Group cases of India - us Double Taxation

Avoidance Agreement. ('DTAA').

9. Not making adjustments for the differences in the comparable transactions selected visa-vis shareholders corporate guarantee provided by the Appellant.

10. Not undertaking an objective analysis for determining the ALP on the shareholder corporate guarantee and determining 2% fee based on differential interest rates on various bonds in India.

11. Without prejudice to the ground that no guarantee fee shall be charged, the Hon'ble DRP erred in not considering the Hon'ble DRP's directions in case of the assessee for the A Y 2009-10, wherein the guarantee fee was determined at 1.25%.

12. Without prejudice, not determining the guarantee fee only on the amount of outstanding loan.

CORPORATE TAX MATTER

13. Not providing credit of TCS of Rs. 35,96,567/-.

14. Levy of interest u/s 234B on TP adjustments arising out of retrospective amendment in the Act.

15. Initiating penalty proceedings u/s 271(1)(c) of the Act".

52. As regards grounds 2 to 4 are concerned, the brief facts are that the assessee had entered into various international transactions with its AE and determination of ALP was referred to the TPO. From the annual report of the assessee, the TPO noticed that the assessee has given interest free loan to its subsidiary, Rain Commodities (USA) Inc. and the amount outstanding as on 31.3.2010 was Rs.138,11,64,534 but the assessee has not shown this as an international transaction in its T.P. documentation.

ITA Nos 222 309 of 2014 Rain Group cases Therefore, the TPO proceeded to conduct the analysis under CUP method and concluded that the average cost of borrowed funds to the assessee was 10.85%, on the total secured and unsecured loans and held that had the tax payer not advanced loans to its AE, it would have saved the interest cost. Therefore, he was of the opinion that the cost of the funds given as loan by the taxpayer to its AE will be the cost of funds to the taxpayer plus some reasonable amount of return based on the risk associated with the lending. Further, he was also of the opinion that size of the borrower also has a bearing on the cost of the borrowings. Taking all these factors into consideration, the TPO computed the ALP interest rate on the loan advanced by the assessee to its AE at 13.85% and suggested the shortfall to be brought to tax. Accordingly, draft assessment order was proposed against which the assessee filed its objections before the DRP. The DRP confirmed that interest is to be charged on the loan advanced by the assessee to its AE, but directed the AO to adopt LIBOR + 200 basis points for the TP adjustment. The final assessment order was passed accordingly. The assessee is in further appeal before us.

53. The learned Counsel for the assessee reiterated its submissions before the authorities below, while the learned DR supported their orders.

54. Having regard to the rival contentions and the material on record, we find that the DRP has followed the decisions of this Tribunal in the case of M/s. Foursoft Ltd (TS-518, Income Tax Appellate Tribunal-2011(Hyd) and Siva Industries & Holdings Ltd (2011-TII-67-Income Tax Appellate Tribunal-MAD-TP) to hold that it ITA Nos 222 309 of 2014 Rain Group cases is an international transaction and to adopt LIBOR as the rate of interest for T.P. Adjustment.

55. Respectfully following the decision of the Coordinate Benches of this Tribunal (cited Supra), we see no reason to interfere with the directions of the DRP. Grounds 2 to 4 are accordingly rejected.

56. As regards grounds 5 to 12 against corporate guarantee, we find that this issue is covered in favour of the assessee by the decision of the Coordinate Bench at Mumbai in the case of Siro Clinpharm Pvt Ltd wherein it was held the corporate guarantee was not international transaction prior to the amendment of section 92B by the Finance Act of 2012. Thus, ground of appeal No.6 is allowed and other grounds 5 & 7 to 12 are not adjudicated at this stage.

57. As regards ground No.13, we find that the DRP had directed the AO to verify the assessee's claim, but AO has failed to do so while passing the final assessment order. AO is directed to follow the directions of the DRP while giving effect to this order.

58. Ground No.14 is against levy of interest u/s 234B of the Act on T.P. adjustment is remitted to the file of the AO to give consequential relief, if any, to the assessee.

59. Ground No.15 is against initiation of penalty u/s 271(1)(c) of the Act is rejected as it is a premature ground of appeal.

60. In the result, assessee's appeal is partly allowed.

ITA Nos 222 309 of 2014 Rain Group cases

61. The grounds of appeal raised by the Revenue is given below:

> "1. The learned DRP erred in law and on facts of the case.
>
> 2. The Hon'ble DRP ought not have directed the TPO/AO to adopt LIBOR rate for the calculation of interest chargeable on the loans advanced by the assessee to its AE's in USA.
>
> 3. The Hon'ble DRP ought to have appreciated that the LIBOR plus cannot be taken as the base for the purpose of TP adjustment in respect of interest on loan advanced to the AE for the international transactions in view of the latest frauds regarding the 'L:IBOR' since Barclays Bank and UBS were fined by the United States Department of

Justice for attempted manipulation of the LIBOR and Euribor rates and ultimately UBS agreed to pay to regulators".

62. Since, we have already upheld the directions of the DRP while dealing with Ground Nos. 2 to 4 of the assessee's appeal, these grounds of the Revenue are rejected.

63. In the result, the Revenue's appeal is dismissed.

64. The assessee has raised the following grounds of appeal:

"TRANSFER PRICING ("TP") MATTERS

1. Rejecting the submissions of the Company and making TP adjustments to the following international transactions with Associated Enterprise ('AE'):

ITA Nos 222 309 of 2014 Rain Group cases • Interest on funds to Wholly Owned Subsidiary ('WOS') - Rs. 1,95,52,086/-;

• Fee on Shareholders Corporate Guarantee to bank - Rs. 8,16,88,110/-.

Ground specific to TP adjustment on Interest on funds advanced to WOS

2. Not appreciating the fact that the WOS was set up as a special purpose vehicle ('SPV') for global acquisition and the funds were provided as a matter of commercial expediency to fund the acquisition.

3. Not appreciating the fact that the acquisition resulted in benefit and expansion of the Assessee's business.

4. Discriminating the US WOS by determining the ALP for funds provided as loans vis-a vis similar loans provided by parent company to Indian subsidiaries in violation of Article 26 of India - US Double Taxation Avoidance Agreement. ('DTAA').

5. Without prejudice to the above, the interest rate on foreign currency loan to AE in USA should be determined by benchmarking with comparable foreign currency loan (i.e., at LIBOR plus).

6. The DRP erred in not considering its own directions in the Company's case for the 2009-10 and A Y 2010-11 wherein there were similar facts of the case.

Ground specific to TP adjustment on shareholder corporate guarantee

7. Making adjustment on the shareholders corporate guarantee provided to bank on behalf of the WOS, without appreciating the ITA Nos 222 309 of 2014 Rain Group cases fact that WOS was set up

as a SPV for acquisition of business in USA.

8. Not appreciating that the shareholders corporate guarantee is not covered under the definition of international transaction u/s 92B of the Act.

9. Not appreciating that the amendment to section 92B would not apply to the facts of the case.

10. Adopting a rate of 1.75% based on the fee charged from the local banks, without appreciating that the guarantee given is a shareholder corporate guarantee as opposed to commercial bank guarantee.

11. Determining the guarantee fee on the entire amount of loan guaranteed instead of the actual amount of loan availed by the AE.

12. The Hon'ble DRP erred in not considering its own directions in the Company's own case for the A Y 2009-10 and also, the order of Hon'ble CIT(A) in the Company's own case for A Y 2008-09, wherein the guarantee fee was determined at 1.25%.

CORPORATE TAX MATTERS

13. Not providing credit of TDS of Rs.

53,71,764/-.

14. Not providing credit of advance tax of Rs.

50,00,000/-.

15. Not providing the foreign tax credit claimed u/s 90 of the Act, amounting to Rs.1,14,66,741/-.

16. Not providing credit for adjustment made to current year's demand to the tune of Rs.

ITA Nos 222 309 of 2014 Rain Group cases 3,20,33,679/-, which was adjusted with the refund of AY 2010-11.

17. Erroneous calculation of interest u/s 234D of the Act.

18. Initiating penalty proceedings u/s 271

(l)(c) of the Act.

65. It is seen that Ground 1 is general in nature and needs no adjudication.

66. Grounds 2 to 6 are against the ALP adjustments towards interest on funds advanced to wholly owned subsidiary. We find that these grounds are same as grounds 2 to 4 in ITA No.344/Hyd/2015 and for the detailed reasons given therein, these grounds are rejected.

67. Grounds 7 to 12 are against the ALP adjustment on shareholder corporate guarantee and are similar to assessee's grounds 5 to 12 in ITA No.344/Hyd/2015. For the detailed reasons given therein, the ground No.8 is allowed and other grounds are not adjudicated at this stage.

68. Grounds 13 to 17 need factual verifications by the AO. Therefore, they are remitted to the file of the AO for verification and consequential relief, if any, to the assessee in accordance with law.

69. Ground No.18 is against initiation of penalty u/s 271(1)(c) of the Act is premature and is accordingly rejected.

70. In the result, assessee's appeal is partly allowed.

ITA Nos 222 309 of 2014 Rain Group cases

71. Grounds raised by the Revenue are as under:

> "1. The learned DRP erred in law and on facts of the case.
>
> 2. The learned DRP erred in directing the AO to adopt charging fees @ 1.75% instead of 2% towards corporate guarantee without considering upfront fees and credit rating which comes to 2%.
>
> 3. Any other ground(s) that may be urged at the time of hearing".

72. We find that while dealing with the assessee's ground of appeal No.8, we have already held that for the relevant A.Y, corporate guarantee is not an international transaction u/s 92B of the Act. Therefore, the Revenue's appeal also has no merit.

73. In the result, Revenue's appeal is dismissed.

74. To sum up, assessee's appeals are partly allowed & Revenue's appeals are dismissed.

Order pronounced in the Open Court on 26th April, 2017.

```
          Sd/-                                      Sd/-
     (S.Rifaur Rahman)                       (P. Madhavi Devi)
    Accountant Member                         Judicial Member

Hyderabad, dated 26th April, 2017.
Vinodan/sps
```

ITA Nos 222 309 of 2014 Rain Group cases

Copy to:

1 Rain Cements Ltd, Rain Center, 34 Srinagar Colony, Hyderabad 500073 2 DCIT, Circle 3(1) 7th Floor, I.T. Towers, Hyderabad 3 D.R.P. Hyderabad 4 Addl.CIT(TP), Hyderabad 5 Director of Income Tax (I.T. & T.P) Hyderabad 6 CIT-III Hyderabad 7 The DR, ITAT Hyderabad 8 Guard File By Order