The Dcit(Osd)-I Circle-4,, Ahmedabad vs Mastek Ltd.,, Ahmedabad on 19 March, 2018

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

BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER
AND SHRI S.S. GODARA, JUDICIAL MEMBER

ITA No.2879/Ahd/2014
Assessment Year: 2008-09

D.C.I.T. (OSD)-I, Circle - 4, Ahmedabad.	vs.	Mastek Limited, 804-805, President House, Opp. C.N. Vidhyalaya, Near Ambawadi, Ahmedabad - 380 006. [PAN - AAACM 9908 Q]

ITA No.2985/Ahd/2014
Assessment Year: 2008-09

Mastek Limited, 804-805, President House, Opp. C.N. Vidhyalaya, Near Ambawadi Circle, Ambawadi, Ahmedabad - 380 006. [PAN - AAACM 9908 Q] (Appellants)	Vs.	A.C.I.T. (OSD)-1, Range - 4, Ahmedabad. (Respondents)

Revenue by	:	Vasundra Upmanyu, CIT (D.R.)
Respondent by	:	S.N. Soparkar & Parin Shah, A.R.
Date of hearing	:	20.12.2017
Date of pronouncement	:	19.03.2018

ORDER

PER S.S. GODARA, Judicial Member

1. The Revenue and assessee filed their instant cross appeals ITA No.2879 and 2985/Ahd/2014 for A.Y. 2008-09 against the CIT(A)-VIII, Ahmedabad's order dated 27.08.2014, passed in case no.CIT(A)VIII/ACIT(OSD)/Cir.4/440/2011-12 in proceedings under section 143(3) r..w.s. 144C(3) of the Income Tax Act, 1961; in short 'the Act'.

2. We advert to Revenue's appeal ITA No.No.2879/Ahd/2014. Its first substantive ground pleads that the CIT(A) erred in law in deleting the upward adjustment of ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 Rs.26,07,06,640/- in relation to assessee's international transaction of software services distributed by UK based associated enterprises "Mastek UK (MUK)" with the following detailed discussion :-

> "I have carefully considered the facts of the case, the assessment/TPO's order and the written submission of the appellant. The appellant company has appointed a MUK (Mastek-UK) as its software services distributor. The A.O. did not accept that the payment made by the appellant to UK was at Arm's length price and it made an adjustment of Rs.26.07 Crores by holding that the MUK was also involved in negotiating and concluding customer contract and key risks such as market and credit risk were also being taken by it. The appellant has contended that based on the FAR provided in the TP report MUK was characterized as a distributor assuming normal risk. It was doing normal selling functions and the arrangement between UK and Mastek was on principal to principal basis. MUK was acting as a distributor for Mastek for both on-site and offshore services Abilities of the appellant company. It scouts for a suitable buyer, promote the software solutions, establishes contacts with the prospective customers and solicit and address any inquiry of the prospective customer, it also builds relationship and prepares a proposal for sale. The MUK enters into negotiations with the buyer and a strike a sale or concludes the contract, it has therefore, been explained and contended by the appellant that MUK was acting as a distributor for the appellant company in UK. It has been contended by the appellant that once the contract is negotiated and signed, all the activities are done by the Mastek through its UK office. It has therefore, been requested by the appellant that the upward adjustment made by the TPO/AO should be deleted.
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> It has further been pointed out by the appellant that in its own case the issue has been decided by CIT(A) for A.Y. 2007-08 and the for adjustment has been directed to be deleted, it is further pointed out that in the case of the appellant honourable ITAT Ahmedabad for A.Y. 2006-07 has held that MUK was not a 'marketing service provider' but a distributor. The upward adjustments in both these years have been directed to be deleted by the above-mentioned authorities.
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> I have carefully considered all the facts and legal aspects related to the issue. It is noted that the issue is covered in favour of the appellant by the orders of my predecessor and honourable ITAT Ahmedabad. It is noted that my predecessor while deciding the appeal for A.Y. 2007-08 has followed the order of honourable ITAT in the case of the appellant for A.Y. 2006-07. The facts of the present case are similar to these earlier years which have already been decided in the favour of the appellant. It is noted that the master agreement between MUK and Mastek, as an analysis of MUK and Mastek India are similar as compared to earlier years. The relevant extracts from the ruling of the Humble ITAT in the case of the appellant for A.Y. 2006-07 are reproduced hereunder:

ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 ".....Reverting back to the functions of a distributor we have been informed that a distributor performs selling of a product, price negotiations, enter into a contract, settle the scope of deliverables, fixed the time schedule with the customers, identify the customers, establish the contact with the customers, solicit the enquiries and appointment of other agencies and also promote the sales by advertisement. As against that, in agency relationship all such activities are not expected from an agent. Since the MUK has its own team of qualified persons and that due to deployment of the said team the revenue has increased substantially, therefore, it is meaningful to hold that the MUK in fact is a position to independently negotiate the terms with the customers and handle the customers in respect of fixing of time schedule and the scope of deliverables.

.....Once we have examined that aspect, therefore we are not in agreement with the TPO that MUK is merely a customer facing entity and simply meant for the marketing of assessee's business. We ore of the view that there was no direct evidence in the hands of the TPO to say that the assessee was simply a selling agent and that it appears that the TPO had proceeded on a presumption that the MUK has acted as a selling agent for the year under consideration. His presumption is primarily based upon one fact that there were a fixed percentage of awards given by MIL to MUK; which in his opinion is prevalent in selling agent's case. We have examined this thought of the TPO in depth ..... Even in the case of a distributor, it is expected from a distributor to consult with the manufacturer of the main concern while finalizing a contract so that the negotiation should be in line with the requirement of the main manufacturer. Though the parties i.e. MIL and MUK are associated to each other but simultaneously two separate legal entities having separate tax structure hence settled the terms of payment on sales basis, considering their respective advantages, though can be a fixed amount that there should be enviable incentive to generate more revenue.

..... Another argument has also been raised that there was no advantage in shifting of profit from India to UK. A vehement contention was raised that once the entire income of MIL is subject to special benefit as prescribed u/s 10/A and there as NIL incidence of tax, then there was no justifiable reason to park the profits in UK. It was informed by the Id. AR that in UK the assessee would suffer tax @30%, hence there was no logic to shift the profit.

..... Another fact has also been brought that the MUK had prescribed commission to its employees on sales. The employees who have earned commission on sales have generated more revenue to MUK. The progressive figures of revenue generation during the year under consideration has been brought on record and informed about the trend followed in the years to come in comparison to the revenue generation in the past. Since the MUK had made all endeavors and efforts to improve the revenue generation, therefore, in our considered opinion, it was not ITA Nos.2879 &

> 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 appropriate to characterize MUK as a 'marketing services provider' instead of a 'distributor'. In our humble opinion, MUK was rightly characterized as a distributor of services.
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> ..... Under the totality of the facts and circumstances of the case, first we hereby hold that considering the FAR analysis, risk factor and the business mode as well as the terms and conditions of the Master Agreement incorporated in the light of the changed circumstances of UK, and AE, i.e. MUK has functioned as a distributor in UK.
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> ..... Next we hereby hold that if an agreement in its totality has not been held a sham agreement, then there was no 'justification to disbelieve one of the clauses, in the present case, the clause of profit reimbursement of 5.5% to MUK. It was a mutual decision of the parties to the agreement to fix the percentage of profit for MUK. There is no hard and fast rule that a distributor always have a fluctuating percentage of profit, The TPO was not justified in ''collecting the data of alleged comparable instances which in fact were either, advertising agencies or in business consulting services but not a Distributor and then adopted arithmetic mean of 6.02% of profit which was used for computation of arm's length price. Such an adjustment was uncalled for so cannot be approved in the light of foregoing discussion. We also hold that prima- facie there was no reason to shift the tax burden to UK when admittedly there was no incentive or tax benefit to this assessee. The adjustment as made by the TPO is hereby reversed and, accordingly, the A.O. is directed to delete the impugned addition while computing the total income of the assessee. This ground No.10 is allowed."

Respectfully following the judgment of honourable ITAT Ahmedabad and also my predecessor it is held that the operations of MUK can be characterized as distributor and accordingly the approach adopted by the TPO is set aside as it was not justified. The upward adjustment made by the TPO is accordingly directed to be deleted. The ground no.10 is allowed."

3. It is therefore clear that the CIT(A) has followed tribunal's order in assessee's case itself for assessment year 2006-07 in ITA No.3120/Ahd/2010. Ld. Departmental Representative fails to point out any distinction in facts or law therein. We thus affirm CIT(A)'s above extracted finding by adopting the judicial consistency. The first issue is accordingly adjudicated in assessee's favour.

4. The Revenue's second substantive ground challenges correctness of the CIT(A)'s findings deleting upward ALP adjustment of Rs.29,07,087/- relating to assessee's international transaction of provisions of Information Technology Enabled Services (ITES) in case of "Carretek LLC" as follows :-

> ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 "I have carefully considered the facts of the case, the assessment order, the order of the TPO has made upward adjustment on account of Arms length price of the Provision of I.T enabled

services provided by the appellant to Carretek LLC. He rejected the TP study report submitted by the appellant and carried out a fresh search for the comparable companies.

The appellant had selected 13 comparables in the transfer pricing the study report submitted before the TPO and had selected TNMM as the method. The TPO rejected the TP study report submitted by the appellant and after applying the relevant filters, it selected following 9 comparables for determining the ALP of the Transaction:-

ITES - FINAL SET OF COMPARABLES - AY 2008-09 S.No Name of the Total Cost Op. Profit OP/TC Adjusted Comparable OP/TC

1. Accentia 287301205 119992769 41.76% 41.77 Technologies Ltd.

(Seg.)

2. Aditya Birla Minacs 1840860000 40513000 2.20% 2.75 Worldwide Ltd.

3. Asit C Mehta 38782844 3652102 9.42% 9.42 Financial Services Ltd (Seg.)

4. Cosmic Global Ltd 47577163 11086122 23.30% 21.78

5. Crossdomain 209497067 56484656 26.96% 30.32 Solutions Ltd

6. R Systems 204518285 8787300 4.30% 4.30 international (Seg.)

7. Spanco Ltd (Seg.) 375547040 41445545 11.04% 11.04

8. Triton Corp Ltd 1179500427 280842379 23.81% 20.99

9. TSR Darashaw Ltd 28.69% 35.79 Average 21.19% 19.78 The appellant has objected against the selection of certain comparables taken by the TPO for determining the arm's-length margin. It has submitted that Accentia Technologies Ltd should not be taken as comparable as the FAR of that company is different. It had acquired various companies and was also in the process of amalgamation. It has been submitted by the appellant that extraordinary events like acquisition, merger and demerger impacts the profitability the company and therefore, that company should not be treated as comparable. It has also placed reliance on the judgment of ITAT Hyderabad in ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 the case of Capital IQ Information Systems India Pvt. Ltd. in ITA No.1961/Hyd/2011 wherein the same company was rejected as comparable owing to the above-mentioned facts. On careful consideration of the facts and circumstances, the submission given by the appellant appears to be acceptable as the events like merger demerger and acquisitions has a definite impact on the profitability of the company. Accordingly, it is held that Accentia Technologies Ltd should not be taken as comparable.

The appellant has also objected to taking Cross Domain Solutions Ltd as the comparable on the ground that it was the KPO and it differs from traditional TPO/IT of outsourcing companies. The KPO requires people with higher education, specific skills and specialized business experience and the work entails decision-making. It has therefore been submitted by the appellant that the KPO business was completely different from the appellant's BPO business and accordingly that company should be rejected. The submission of the appellant has been carefully considered but the same is not acceptable as both the businesses are similar and requires equal level of competence and expertise. The technical skills which are required for KPO are also similar to the BPO business. In both type of businesses the professionals working on the solutions, which are being provided, should have deep knowledge of the subject which is being handled. The technical skills are similar. It is also noted that the AO has also applied suitable filters and thereafter after selecting the similar type of companies it has selected this company also. It has selected the companies that is functionally similar and excluded those which were functionally different. Both the companies are providing IT enabled- services and fall in that segment. The argument of the appellant is accordingly not accepted.

In view of the above discussion the revised arm's-length margin after excluding Accentia technologies Ltd is to be computed as under: -

Sr. No.	Name of the Company	OP/TC after rejecting of Accentia
1.	Cosmic Global Ltd. (Formerly Tulsyan Technologies Limited)	21.78%
2.	Triton Corp. Ltd.	20.99%
3.	TSR Darashaw Ltd.	35.79%
4.	Spanco Ltd. (Seg)	11.04%
5.	Aditya Birla Minas Worldwide Ltd.	2.75
6.	Asit C Mehta Financial Services Ltd. (Seg)	9.42%
7.	R System International (Seg)	4.30%
8.	Crossdomain Solutions Limited	30.32%
	Mean/Average	17.05%

After applying the above profit margin the upward adjustment is required to be made would be as under:-

Particulars	Amount
Operating Cost	43,608,853
Arm's length % determined	17.05%
Arm's length value	51,043,617/-
Actual Value	49,327,597/-
Difference/upward adjustment	1716020

The 5% of the transaction would be as under:-

5% of arm's length value	25,52,181
5% of actual value	24,66,380

Since the value of adjustment is within 5% range, after considering the Actual Value and also the Arm's-Length Value, the transaction is considered to be at arm's-length in accordance with the second proviso to section 92C of the Act. The upward adjustment made by the AO is accordingly directed to be deleted.

The eight ground of appeal is accordingly, allowed."

5. We have given our thoughtful consideration to the rival contentions. It is evident first of all that the CIT(A) has recomputed assessee's arm's length margin after excluding two entities M/s. Accentia Technologies Limited and M/s. Cross Domain Solutions Limited. He follows tribunal's co-ordinate bench decision (supra) in ordering the impugned exclusion. Ld. Departmental Representative fails to rebut the fact that another co-ordinate bench in Lubrizol Advanced Materials India Pvt. Ltd. vs. ACIT decided on 26.12.2016 in ITA No.2898/Ahd/2012 pertaining to assessment year 2008-09 has already concluded these very entities are not to be taken as comparables since the former one underwent extra ordinary merger event whereas the latter entity provided high-end KPO services. We observe in view of all these developments that the CIT(A) has rightly deleted the impugned adjustment after excluding the above two comparable entities from the array of comparables. The Revenue fails in its instant substantive ground as well.

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6. The Revenue's next substantive ground is that the CIT(A) has erred in law as well as on facts in reducing upward adjustment on fee for performance guarantee from 2% to 0.11% as proposed in the transfer pricing officer's order and accepted in assessment order. Learned authorised representative

at this stage informs us that the assessee's corresponding second substantive ground also raises the very issue in seeking to delete remaining adjustment component as well. We thus deem it proper to adjudicate the common issue in both parties' respective pleadings. The CIT(A)'s detailed discussion qua the same reads as under :-

> "I have carefully considered the facts of the case, the assessment order, the order of the TPO and the written submission of the appellant. The AO had made an upward adjustment of Rs.26.07 Crores on account of payment for services rendered by its UK AE, MUK, holding that the appellant did not carry out the risk adjustment while working out the arm's length price in the TP study report. Without prejudice to the adjustment made by the AO it has also made an addition to the income by holding that the appellant had assumed performance risk and credit risk in respect of the sales made by MUK. It has been held by the AO that since MUK does not have any financial backup or credit standing it has to rely on the comfort letter issued by Mastek India while entering into the performance guarantees and other related commitments made with the parties to sales contract with it. The AO has accordingly adopted an estimate of 2% if the gross sales as guarantee fee for the guarantees and comfort letters given by the appellant company and accordingly the cost of such guarantee have been worked out at Rs.10.87 Crores which the appellant was entitled to receive merely on the issue of providing guarantee to the AE. It has been held by the AO that since an addition of Rs.26.07 Crores has already been suggested no further adjustment was recommended by the TPO.
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> During, the course of appellate proceedings, the appellant has submitted that the service liability risk was borne by the appellant and the performance guarantee given to the customer with respect to the performance of software services was not on behalf of the AE. It has been submitted by the appellant that the MUK was the distributor of the appellant and does not provide any software services to the customers. The on-site component of the contract was provided by a branch of the appellant in UK whereas the offshore component was provided by the appellant from India. Effectively all the services to the customers in UK region were provided by the appellant either through its offshore facility or its branch in UK. It has given an example of Vijay sales, which is a popular electronic showroom in India and sells various electronic equipments. It is submitted by the appellant that in the event of some defect in the TV of a particular brand sold by Vijay sales the guarantee and services would be borne by the manufacturer and not the selling person. It has further been submitted by the appellant that as a result of performance guarantee given by the appellant, the revenues from the MUK has increased and the appellant has benefited from the same. The appellant has therefore, submitted that both on the count of being the ultimate service provider and on the ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 principle of business rationale, the adjustment on the performance Guarantee should not be considered.

It was noted from the order of the TPO that the basis on which the adjustment was made was not very clear. Accordingly the TPO was requested vide this office letter dated 12/02/2014 to give the basis of such estimation. The TPO, Additional C.I.T. TPO-I has informed vide his letter dated 20/03/2014 about the basis adopted by him while taking the rate of 2%. The relevant extracts of the letter sent by him is reproduced in the preceding discussion. The report given by the TPO was given to the appellant for submitting its comment thereon. The appellant has also submitted its report vide letter dated 05/05/2014. The objection and rejoinder of the appellant has also been reproduced in the preceding discussion.

The TPO has informed that the basis of 2% was the financial guarantees given by various Institutions and the rating of the companies by CRISIL. It has been held and observed by him that the rating of the appellant company was AA and accordingly the credit risk was taken by him on a conservative basis at 2% as the issue was related to performance guarantee. The TPO has also tried to justify the rate of 2% on the basis of details of performance guarantee commission charged by the Central Bank of India in certain cases.

The appellant on the other hand has submitted that the performance guarantee was provided to ensure quality and timely services whereas financial guarantee was provided to make available loans or cash credit facility to the beneficiary of the guarantee. The appellant had given performance guarantee and not the financial Guaranty. The approach of the TPO to equate performance guarantee with the financial Guaranty was not justified. It has been submitted and claimed by the appellant that there was a fundamental difference between performance guarantee and the financial Guaranty. In case of financial Guaranty the AE obtains loan or cash credit facility and the benefit accruing to the AE is in the form of reduced interest rate or favourable terms of loan, whereas no such benefit accrues to the AE in case of performance guarantee. It has accordingly been submitted by the appellant that the methodology considered by the TPO was not justified. It has been pointed out by the appellant that it has not incurred any eexpenses while providing the performance guarantee and historically no customer has invoked the performance guarantee given by the appellant till date. The performance guarantee given by the appellant does not have a bearing on profit, income, losses or assets and was therefore not covered under the TP regulations.

The appellant has also submitted that financial position and credit rating of the subsidiary would also be in line with the parent company as the same are to be treated collectively as group. Since the credit ratings of both are same no difference in the corresponding prevailing interest rate and the adjustment was required. The appellant has also submitted that the TPO has used 'naked quotes' without factoring the terms and condition of the loan, risk undertaken, relationship between bank and the client, credit ratings, economic and business interests et cetera. The appellant has also objected that the TPO has not ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited

A.Y. 2008-09 followed the principles of natural justice and opportunity of being heard was not given to the appellant.

On an overall consideration of the entire facts related to the issue it is noted that there is merit in the observations made by the TPO that the income of its subsidiary MUK has increased due to the performance guarantee given by the appellant. The facts show that the prices of various products which are sold and marketed by MUK are fixed by it. The claim of the appellant that its case is similar to a distributor of TV is without basis as in that case the price is fixed by the TV manufacturer and the distributor only gets a fixed commission on the sale price. In case of the appellant the price is fixed by the distributor and the commission which certain percentage of the sale price accordingly decreases or increases with the variation in sale price in absolute terms. Higher the price, higher is the commission earned by the distributor. As the appellant company has given performance guarantee, the distributor is able to fetch better price in the market as the performance of the product is guaranteed by somebody else. Accordingly out of the profits earned by MUK certain percentage of it is attributable to the performance guarantee given by the appellant. In case there was no performance guarantee the commission would have been less as the sale price would be less without the guarantee. Therefore, I am of the considered opinion that some upward adjustment on account of the performance guarantee given by the appellant is required to be made and the action of the TPO to that extent is justified.

The submission of the appellant that no opportunity has been given is also not justified at this stage as the comments given by the AO has been given to the appellant and it has offered its comment on all the aspects stated by the TPO in the report. Therefore, the contention of the appellant is rejected.

The other contention which has been taken by the appellant is that performance guarantee and financial Guaranty are entirely different products and therefore, it would not be appropriate to adopt the rates given for financial Guaranty for evaluating the performance guarantee. The contention of the appellant is justified. The criteria for giving the performance guarantee for a particular product would be entirely different than that of the financial Guaranty for a particular loan or credit. The performance guarantee would depend on the technical expertise and the skills of the company and the historical performance data of the product which is being sold by the distributor. It has been observed that the performance guarantee is worked out by evaluating the historical data of similar claims made in the past and the value of the product for which the performance guarantee that have been claimed, it is noted from the facts that no such historical figure or any comparable data is available for deciding the issue. The appellant is giving a commission of 5.5% of the revenues generated through MUK. It is this commission which varies in absolute terms in accordance with the price fixed by MUK while selling a product, which is guaranteed by the appellant company. The appellant has furnished a copy of sample performance guarantee agreement entered by it with British Telecommunication and it is noted

that it has guaranteed due and punctual performance by MUK of each and all of the obligations, warranties or ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 representations due to it etc. It also had agreed to indemnify the British Telecom against all losses which may incur due to breach of contract by the MUK and also the losses which may incur due to certain guaranteed obligations being enforceable, invalid or illegal. It is an admitted fact that out of the total sale consideration received by the MUK, it is retaining only 5.5% of the sales value and balance is given to the appellant company. The performance guarantee component in this commission can be only certain Percentage of the 5.5% commission retained by MUK. It is also a fact that MUK is aIso undertaking other functions of selling and distribution. It is making efforts in marketing the product and undertaking activities so as to achieve the maximum possible sales. However, the contracts are signed by MUK and manage the customer relationships until the point of final delivery of the product to the buyer. Therefore, the majority of the commission given by the appellant to UK is attributable to the activities as a distributor or the marketing agent of the appellant company and only a small component or certain percentage of that commission can be attributed due to performance guarantee given by the appellant. It is noted that the TPO has evaluated this commission at 2% of the total sales made by the appellant company. After considering overall facts and circumstances, it would be appropriate if the upward adjustment on account of performance guarantee is pegged at 2% of the sale consideration retained by the MUK. Since the MUK is retaining 5.67% of the sale consideration the amount would come to 2% of 5,67% i.e. 0.11% (rounded off) of the sales.

The appellant has objected that even if certain percentage is to be attributed to the performance guarantee, it can only be attributed to the sales made by the appellant company through MUK on which the performance guarantee was given by the appellant. The objection and argument of the appellant is justified as this can only be applied to those sales made through MUK on which to performance guarantee has been given by the appellant. Accordingly, the sales made through MUK on which the performance guarantee was given by the appellant should only be considered for applying the above rate. The appellant has submitted that it has given performance guarantee on the sales of Rs.260.35 Crores made through MUK. The AO is directed to verify this figure and apply the above rate accordingly. The addition made by the AO, on without prejudice basis, is accordingly upheld to that extent.

The ground of appeal is partly allowed."

7. Both the parties vehemently reiterate their respective facts during the course of hearing. We find that recent co-ordinate bench in M/s Suzlon Energy Ltd. vs. ACIT (2017) 188 TTJ 278 (Ahd. Trib.) holds that such a guarantee does not amount to an international transaction under section 92B of the Act as under :-

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

23. As learned counsel for the assessee rightly points out, this issue is covered, in favour of the assessee, by a decision of this Tribunal in the case of ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 Micro Ink Ltd Vs ACIT [(2016) 176 TTJ (Ahd)]. While elaborating upon this judicial precedent and dealing with subsequent developments, another coordinate bench of the Tribunal, in the case of Siro Clinpharm Pvt Ltd VS DCIT and vice versa [TS 144 ITAT (2016) TP], speaking through one of us (i.e. the Accountant Member) has observed as follows:

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

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

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

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

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

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

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

(b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 marketing channel, brand, commercial secret, know -how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

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

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

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

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

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

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

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

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

(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;

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

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

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

> '25. An analysis of this definition of 'international transaction' under Section 92B, as it stood at the relevant point of time, and its break-up in plain words, shows the following:
>
> An international transaction can be between two or more AEs, at least one of which should be a non-resident.
>
> An international transaction can be a transaction of the following types:
>
> in the nature of purchase, sale or lease of tangible or intangible property, in the nature of provision of services, in the nature of lending or borrowing money, or in the nature of any other transaction having a bearing on the profits, income, losses or assets of such enterprises An international transaction shall include a mutual agreement or arrangement between two or more associated enterprises for the 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 ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 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".

30. It is, therefore, essential that in order to be covered by clauses (c) and (e) of Explanation to Section 92B, the transactions should be such as to have bearing on profits, incomes, losses or assets of such enterprise. In other words, in a situation in which a transaction has no bearing on profits, incomes, losses or assets of such enterprise, the transaction will be outside the ambit of expression 'international transaction'. This aspect of the matter is further highlighted in clause (e) of the Explanation dealing with restructuring and reorganization, wherein it is acknowledged that such an impact could be immediate or in future as evident from the words "irrespective of the fact that it (i.e. restructuring or reorganization) has bearing on the profit, income, losses or assets of such enterprise at the time of transaction or on a future date". What is implicit in this statutory provision is that while impact on "

profit, income, losses or assets" is sine qua non, the mere fact that impact is not immediate, but on a future date, would not take the transaction outside the ambit of 'international transaction'. It is also important to bear in mind that, as it appears on a plain reading of the provision, this exclusion clause is not for "contingent" impact on profit, income, losses or assets but on "future" impact on profit, income, losses or assets of the enterprise. The important distinction between these two categories is that while latter is a certainty, and only its crystallization ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 may take place on a future date, there is no such certainty in the former case. In the case before us, it is an undisputed position that corporate guarantees issued by the assessee to the Deutsche Bank did not even have any such implication because no borrowings were resorted to by the subsidiary from this bank.

31. In this light now, let us revert to the provisions of clause (c) of Explanation to Section 92B which provides that the expression 'international transaction' shall include "capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business". In view of the discussions above, the scope of these transactions, as could be covered under Explanation to Section 92B read with Section 92B(1), is restricted to such capital financing transactions, including inter alia any guarantee, deferred payment or receivable or any other debt during the course of business, as will have "a bearing on the profits, income, losses or assets or such enterprise". This precondition about impact on profits, income, losses or assets of such enterprises is a precondition embedded in Section 92B(1) and the only relaxation from this condition precedent is set out in clause (e) of the Explanation which provides that the bearing on profits, income, losses or assets could be immediate or on a future date. The contents of the Explanation fortifies, rather than mitigates, the significance of expression 'having a bearing on profits, income, losses or assets' appearing in Section 92B(1).

32. There can be number of situations in which an item may fall within the description set out in clause (c) of Explanation to Section 92B, and yet it may not constitute an international transaction as the condition precedent with regard to the 'bearing on profit, income, losses or assets' set out in

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

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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 adjustment made by the TPO was deleted by the Tribunal. Aggrieved by the relief so given by the Tribunal, the matter was carried in further appeal,

by the Commissioner, before the Hon'ble Bombay High Court which eventually upheld the relief granted by the Tribunal. The appeal before the Hon'ble High Court was by the Commissioner, and not by the assessee, and, therefore, the grievance against the issuance of corporate guarantee being held to be an international transaction could not have come up for consideration. Of course, the assessee had no occasion to challenge the stand of the Tribunal on this aspect since the addition, on merits, was deleted anyway making revenue's success in this respect hollow and of no damage to the interests of the assessee. It was in this backdrop that the action of the Tribunal was upheld in granting relief to the assessee on merits. It is difficult to understand as to how this decision is taken as supporting the proposition that the issuance of corporate guarantee, even in a case in which neither any guarantee commission is charged nor any costs are incurred, is an international transaction. In any case, there is nothing in the operative portion which even remotely suggests that Their Lordships had any occasion to address themselves to the question as to whether the issuance of corporate guarantee amounts to international transaction. The operative portion of the judgment is reproduced below for ready reference:

> ".....In the matter of guarantee commission, the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. No doubt these are contracts of guarantee, ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 however, when they are Commercial banks that issue bank guarantees which are treated as the blood of commerce being easily encashable in the event of default, and if the bank guarantee had to be obtained from Commercial Banks, the higher commission could have been justified. In the present case, it is assessee company that is issuing Corporate Guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and accordingly we are of the view that commission charged cannot be called in question, in the manner TPO has done. In our view the comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion we are of the view that the appeal does not raise any substantial question of law and it is dismissed."

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

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

'213. The amendment to section 2(47) raises several important questions of fact and of law. Whether or not it affects the proceedings which were the subject matter before the Supreme Court is not relevant for the purpose of this Writ Petition. But, whether it is relevant or not for the purpose of the assessment proceedings in respect of the petitioner which are the subject matter of this Writ Petition, is relevant. The effect of the amendment would have to be considered. It cannot be brushed aside.

214. Section 2(47), as amended, even on a cursory glance raises various issues. It is necessary to note four preliminary aspects of Explanation 2 to section 2(47). Firstly, as the opening words, For the removal of doubts it is hereby clarified that ……", indicate it is a clarificatory amendment. Secondly, it is an inclusive definition as is evident from the words "transfer" includes ". Thirdly, the amendment is with retrospective effect from 1st April, 1962. Fourthly, the Finance Act 2012 which introduced, inter alia, the amendment to section 2(47) and section 92CA(2B) is a validating act in view of section 119 thereof.

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

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(a) Direct or indirect.

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

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

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

It would be evident, therefore, that a lot more must now be seen and considered than before while arriving at a conclusion whether the terms and conditions of the Framework agreement constituted a transfer or assignment of the call options by one party to another.

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

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

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 ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 intended by the Parliament. On the other hand, it may be equally open to the Revenue to contend that certain ingredients of a transfer were not considered by the Revenue itself in the proceedings relating to Vodafone's case on account of the Revenue itself not having appreciated or realized the actual ambit of the term "transfer" which are now clarified by the amendment. Even assuming that the Revenue cannot re-open the Vodafone case, it cannot be barred from relying upon the true ambit of the term "transfer" in future cases, including the proceedings in respect of the petitioner. Thus, even assuming that the judgment of the Supreme Court remains unaffected by the clarificatory amendment, the Revenue would be entitled hereafter in other cases, at least, to appreciate, analyze and construe the transactions relating to call options, including the Framework agreements in a proper perspective which it may not have done earlier.

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

27. Revenue's emphasis is on the last two sentences in paragraph No 213 which state that "The effect of the amendment would have to be considered. It cannot be brushed aside" but in doing so what it overlooks is the subsequent observations highlighted above which recognize the fact that merely because a subsequent Explanation is introduced by the legislature, it is not an open and shut case against the assessee or the revenue, and that all these observations are in the context that "there is no justification for withdrawing the proceedings from the channel provided by the Income-tax Act, bypassing the Tribunal and considering all these questions in exercise of the High Court's

extraordinary jurisdiction under Article 226". When Their Lordships have made it clear that they would not like to bypass the channels under the Income-tax Act and proceed to decide these issues in writ jurisdiction under article 226, there cannot obviously be any question of Their Lordships deciding the matter one way or the other. Any observations made by Their Lordships, while declining to decide the matter in writ jurisdiction, cannot be treated as decisive of the issue on merits. While it is true that Hon'ble Bombay High Court has observed that the effect of amendment will have to be considered, Hon'ble Bombay High Court has also observed that even after taking into account the amendments, the legal implications of this amendment is still an open issue which will have to be adjudicated in the light of pleadings of the parties. Even in these observations, which do not anyway decide anything on merits, effect of a retrospective amendment was not in the context of the precise issue before us, or on the scope of the international transaction, but in respect of connotations of 'transfer'. As learned counsel rightly contends, in the light of Hon'ble Bombay High Court's judgment in the case of Sudhir Jayantilal Mulji (supra) "ratio of a decision alone is binding, because a case is only an authority for what it actually decides and not what may come to follow from some observations which find place therein". In view of these discussions, the reliance placed on Vodafone India Services (P.) Ltd. (supra) is also equally misplaced and devoid of legally sustainable merits. In any case, as is noted by Hon'ble Supreme Court in the case of CIT v. Sun Engg. Works (P.) Ltd. [1992] 198 ITR 297/64 Taxman 442 (SC), "It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court"

> Their Lordships further noted that "A decision of this Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasoning" It was also recalled that in Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India AIR 1971 SC 530, Hon'ble Supreme Court had cautioned that "It is not proper to regard a word, clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment." That precisely, however, has been the approach of the revenue authorities in placing reliance on Vodafone India Services (P.) Ltd. (supra) decision. We reject this approach.

28. For the reasons set out above, learned Departmental Representative's reliance on Hon'ble Bombay High Court's judgments in the cases of Everest Kanto (supra) and Vodafone India Services (supra) is wholly misplaced and devoid of any merits. As for coordinate bench decision in the case of Hindalco Industries (supra), all it does is to follow the Everest Kanto decision by Hon'ble Bombay High Court, but then, as we have seen earlier, that was a case in which Their Lordships were in seisin of a situation in which guarantee commission was actually charged by the assessee. That is not

the case before us. The coordinate bench decisions dealing with the situations in which the guarantee commission was actually charged, and as such there was indeed a bearing on the profits of the assessee, clearly donot apply on this case. We, therefore, reject the reliance on these decisions as devoid of legally sustainable merits.

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

30. However, while dealing with this aspect of the matter, it is necessary to bear in mind the fact that this judicial precedent, whatever be its worth in the hierarchy of binding judicial precedents in India, does not even deal with the fundamental question as to whether issuance of a corporate guarantee is an international transaction at all- which is what we are concerned with at present. This TCC decision dealt with a situation in which the assessee was denied, in computation of its business income, tax deduction for payment of guarantee fees on the ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 ground that there was no effective benefit to the assessee, in obtaining the said guarantee. Aggrieved by denial of deduction, assessee carried the matter in appeal before the Canadian Tax Court, and the plea of the assessee was eventually upheld. It is also interesting to note that as a sequel to this Tax Court of Canada decision, the transfer pricing legislation was amended, to bring greater clarity on the issue and as a measure of abundant caution, and section 247 (7.1), granting specific exemption to guarantee fees, was introduced. This amendment is as follows:

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

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

31. It is also important to bear in mind the fact that, under the Canadian law, the definition of 'international transaction', unlike an exhaustive definition under section 92B of the Indian Income-tax Act, 1961, is a very brief but inclusive and broad definition to the effect that "'transaction' includes a series of transactions, an arrangement or an event" [See Section 247(1) of the Canadian Income-tax Act, 1985; http://laws-lois.justice.gc.ca/eng/acts/I-3.3/page-419.html#h-156] coupled with the legal position that arm's length adjustment to the prices of such transaction come into play "Where a taxpayer or a partnership and a non-

resident person with whom the taxpayer or the partnership, or a member of the partnership, does not deal at arm's length" [See Section 247(2) ibid]. When one takes into account these variations in the statutory provisions, it will become very obvious that the provisions of the Indian Income-tax Act, 1961 and the Canadian Income-tax Act, 1985 are so radically different that just because a particular transaction is to be examined on arm's length principle in Canada cannot be a reason enough to hold that it must meet the same in India as well. While the Canadian transfer pricing legislation, as indeed the transfer pricing legislation in many other jurisdictions, does not put any fetters on the nature of transactions between the AEs, so as to be covered by the arm's length price adjustment, and, therefore, covers all transactions between the related enterprises, Indian transfer pricing legislation covers only such transactions as are "in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises". Our transfer pricing provisions, perhaps being in the quest of comprehensive coverage, have ended up in a limited scope of the transactions being covered by the arm's length price adjustments for transfer pricing. In any event, as emphasized earlier as well, the decision was in the context of the deduction, and, post this decision, a specific amendment was introduced in the Canadian transfer pricing law to clarify the position that all corporate guarantees issued by the assessee, in support of its subsidiaries, are not necessarily international ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 transactions. Revenue, therefore, does not derive any advantage from the Tax Court of Canada's decision in the case of GE Capital Canada. There are many more aspects which make this decision wholly irrelevant in the present context but suffice to say that relevant legal provisions and context being radically different, the reliance of this decision must be rejected for this short reason alone.

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

interesting references in a discussion paper issued by the Australian Tax Officer in June 2008 and titled as "Intra-group finance guarantees and loans"

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

33. On a conceptual note, thus, there is a valid school of thought that the corporate guarantees can indeed be a mode of ownership contribution, particularly when, as is often the case, "where such a guarantee is given it compensates for the inadequacies in the financial position of the borrower; specifically, the fact that the subsidiary does not have enough shareholders' funds". There can be number of reasons, including regulatory issues and market conditions in the related jurisdictions, in which such a contribution, by way of a guarantee, would justify to be a more appropriate and preferred mode ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 of contribution vis-a-vis equity contribution. It is significant, in this context, that the case of the assessee has all along been, as noted in the assessment order itself, that "said guarantees were in the form of corporate guarantees/ quasi- capital and not in the nature of any services". In other words, these guarantees were specifically stated to be in the nature of shareholder activities. The assessee's claim of the guarantees being in the nature of quasi-capital, and thus being in the nature of a shareholder's activity, is not rejected either. The concept of issuance of corporate guarantees as a shareholder activity is not alien to the transfer pricing literature in general. On the contrary, it is recognized in international transfer pricing literature as also in the official documentation and legislation of several transfer pricing jurisdictions. The 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' itself recognizes the distinction between a shareholder activity and a provision for services, when, contrasting the shareholder activity with broader term

"stewardship activity" and thus highlighting narrow scope of shareholder activity, it states that "Stewardship activities covered a range of activities by a shareholder that may include provision for services to other group members, for example services that would be provided by a coordinating centre". It proceeded to add, in the immediately following sentence at page 207 of 2010 Guidelines, that "These latter type of non-shareholder activities could include detailed planning services for particular operations, management or technical advice (trouble shooting) or in some cases assistance in day-to-day management". The shareholder activities are thus seen as conceptually distinct from the provision of services. The issuance of corporate guarantee, as long as it is in the nature of shareholder activity, can not, therefore, amount to a "provision for services".

34. Undoubtedly, pioneering work done by the OECD, in the field of international taxation, has been judicially recognized worldwide by various judicial forums, including, most notably by Hon'ble Andhra Pradesh High Court in the case of CIT v. Visakhapatnam Port Trust [1983] 144 ITR 146/15 Taxman 72 (AP). Their Lordships also referred to Lord Radcliffe's observations in Ostime v. Australian Mutual Provident Society [1960] 39 ITR 210 (HL), which has described the language employed in the models developed by the OECD as the "international tax language". The work done by OECD in the field of transfer pricing is no less significant. No matter which part of the world we live in, and irrespective of whether or not that tax jurisdiction is an OECD member jurisdiction, the immense contribution of the OECD, in the field of the transfer pricing as well, is admired and 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 ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 the intra-group services- first, whether intra-group services have indeed been provided, and, second- if the answer to the first question is in positive, that charge to these services should be at an arm's length price. Dealing with the first question, which is relevant for the present purposes, these Guidelines (2010 version) state as follows:

> '7.6 Under the arm's length principle, the question whether an intra- group service has been rendered when an activity is performed for one or more group members by another group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance its commercial position. This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if

performed for it by an independent enterprise or would have performed the activity in-house for itself. If the activity is not one for which the independent enterprise would have been willing to pay or perform for itself, the activity ordinarily should not be considered as an intra-group service under the arm's length principle.

7.7 The analysis described above quite clearly depends on the actual facts and circumstances, and it is not possible in the abstract to set forth categorically the activities that do or do not constitute the rendering of intra-group services. However, some guidance may be given to elucidate how the analysis would be applied for some common types of activities undertaken in MNE groups.

7.8 Some intra-group services are performed by one member of an MNE group to meet an identified need of one or more specific members of the group. In such a case, it is relatively straightforward to determine whether a service has been provided. Ordinarily an independent enterprise in comparable circumstances would have satisfied the identified need either by performing the activity in-house or by having the activity performed by a third party. Thus, in such a case, an intra-

group service ordinarily would be found to exist. For example, an intra- group service would normally be found where an associated enterprise repairs equipment used in manufacturing by another member of the MNE group.

7.9 A more complex analysis is necessary where an associated enterprise undertakes activities that relate to more than one member of the group or to the group as a whole. In a narrow range of such cases, an intra-group activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member (usually the parent company or a regional holding company) performs solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder. This type of activity would not justify a charge to 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 ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 could include detailed planning services for particular operations, emergency management or technical advice (trouble shooting), or in some cases assistance in day-to-day management.

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

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

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

(c) Costs of raising funds for the acquisition of its participations.

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

36. We have noticed that the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' specifically recognizes that an activity in the nature of shareholder activity, which is solely because of ownership interest in one or more of the group members, i.e. in the capacity as shareholder "would not justify a charge to the recipient companies". It is thus clear that a shareholder activity, in issuance of corporate guarantees, is taken out of ambit of the group services. Clearly, therefore, as long as a guarantee is on account of, what can be termed as 'shareholder's activities', even on the first principles, it is outside the ambit of transfer pricing adjustment in respect of arm's length price. It is essential to appreciate, at this stage, the distinction in a service and a benefit. One may be benefited even when no services are rendered, and, therefore, in many a situation it's a 'benefit test' which is crucial for transfer pricing legislation, such as in US Regulations 1.482-9(1)(3)(i) which defines 'benefit', form a US Transfer Pricing perspective, as "an activity is considered to be 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.

ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 As a matter of fact, David S Miller, in a paper titled 'Federal Income Tax Consequences of Guarantees; A Comprehensive Framework for Analysis' published in the 'The American Lawyer Vol. 48, No. 1 (Fall 1994), pp. 103-165 (http://www.jstor.org/stable/20771688), has stated that a guarantee is not a service. The following observations, at pages 114, are important:

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

39But cf Federal Nat'l Mortgage Ass'n v. Commissioner, 100 T.C. 541, 579 (1993) (Fannie Mae provided services by buying mortgages).

37. We are in agreement with these views. There can thus be activities which benefit the group entities but these activities need not necessarily be 'provision for services'. The fact that the OECD considers such activities in the services segment does not alter the character of the activities. While the group entity is thus indeed benefited by the shareholder activities, these activities do not necessarily constitute services. There is no such express reference to the benefit test, or to the concept of benefit attached to the activity, in relevant definition clause of 'international transaction' under the domestic transfer pricing legislation. As we take note of these things, it is also essential to take note of the legal position, in India, in this regard. No matter how desirable is it to read such a test in the definition of the international transaction' under our domestic transfer pricing legislation, as is the settled legal position, it is not open to us to infer the same. Hon'ble Supreme Court, in the case of Smt. Tarulata Shyam v. CIT [1977] 108 ITR 345 (SC) , took note of the situation before Their Lordships in these words: "We have given anxious thoughts to the persuasive arguments of Mr Sharma. His arguments, if accepted, will certainly soften the rigour of this extremely drastic provision and bring it more in conformity with logic and equity". However, Their Lordships declined to do so on the ground that "There is no scope for importing into the statute the words which are not there. Such importation would be not to construe but to amend the statute". Their Lordships noted that "Even if there be casus omissus, the defect can be remedied only by legislation and not by judicial interpretation". The benefit test, which is set out in the OECD Guidance and which finds its place in the international best practices, does not find its place in the main definition of international transaction, even though there is a reference to the expression 'benefit' in the context of cost or expense sharing arrangements but that is a different aspect of the matter altogether. In the absence of benefit test being mentioned in the definition for the present purposes, we cannot infer the same.

38. One more thing which is clearly discernible from the above discussions is that the tests recognized by these guidelines are interwoven twin tests of benefit ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 and arm's length. Benefit test implies the recipient group member should get "economic or commercial value to enhance its commercial position". The benefit test is interlinked with the an arm's length test in the sense that it seeks an answer to the question whether under a similar situation an independent enterprise would have been willing to pay for the activity concerned, or would have performed the activity in-house for itself. So far as the benefit test is concerned, as we have noted earlier, it is alien to the definition of international transaction' under the Indian transfer pricing legislation. So far as arm's length test is concerned, it presupposes that such a transaction is possible in arm's length situation. However, in a situation in which the subsidiary does not have adequate financial standing of its own and is inadequately capitalized, none will guarantee financial obligations of such a subsidiary.

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

40. At this stage, it would appropriate to analyze the business model of bank guarantees, with which corporate guarantees are sometimes compared, in the context of benchmarking the arm's length price of corporate guarantees. A bank guarantee is a surety that that the bank, or the financial institution issuing the guarantee, will pay off the debts and liabilities incurred by an individual or a business entity in case they are unable to do so. By providing a guarantee, a bank offers to honour related payment to the creditors upon receiving a request. This requires that bank has to be very sure of the business or individual to whom the bank guarantee is being issued. So, banks run risk assessments to ensure that the guaranteed sum can be retrieved back from the business. This may require the business to furnish a security in the shape of cash or capital assets. Any entity that can pass the risk assessment and provide security may obtain a bank guarantee. The consideration for the issuance of bank guarantee, so far as a banker is concerned, is this. When the client is not able to honour the financial commitments and when client is not able to meet his financial commitments and 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 ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 guarantees. Of course, when a client is so well placed in his credit rating that banks can issue him clean and unsecured guarantees, he gets no further economic value by a corporate guarantee either. Let us now compare this kind of a guarantee with a corporate guarantee. The guarantees are issued without any security or underlying assets. When these guarantees are invoked, there is no occasion for the guarantor to seek recourse to any assets of the guaranteed entity for recovering payment of defaulted guarantees. The guarantees are not based on the credit assessment of the entity, in respect of which the guarantees are issued, but are based on the business needs of the entity in question. Even in a situation in which the group entity is sure that the beneficiary of guarantee has no financial means to reimburse it for the defaulted guarantee amounts, when invoked, the group entity will issue the guarantee nevertheless because these are compulsions of his group synergy rather than the assurance that his future obligations will be met. We see no meeting ground in these two types of guarantees, so far their economic triggers and business considerations are concerned, and just because these instruments share a common surname, i.e. 'guarantee', these instruments cannot be said to be belong to the same economic genus. Of course, there can be situations in which there may be economic similarities, in this respect, may be present, but these are more of an exception than the rule. In general, therefore, bank guarantees are not comparable with corporate guarantees.

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

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 ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner". The case of a corporate guarantee clearly falls in the second category as no independent enterprise would issue a guarantee without an underlying security as has been done by the assessee. We may, in this regard, refer to the observations made by Hon'ble High Court, speaking through Hon'ble Justice Easwar (as he then was), as follows:

> '16. The Organization for Economic Co-operation and Development ('OECD', for short) has laid down "transfer pricing guidelines" for Multi- National Enterprises and Tax Administrations. These guidelines give an introduction to the arm's length price principle and explains article 9 of the OECD Model Tax Convention. This article provides that when conditions are made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises then any profit which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, if not so accrued, may be included in the profits of that enterprise and taxed accordingly. By seeking to adjust the profits in the above manner, the arm's length principle of pricing follows the approach of treating the members of a multi-national enterprise group as operating as separate entities rather than as inseparable parts of a single unified business. After referring to article 9 of the model convention and stating the arm's length principle, the guidelines provide for "recognition of the actual transactions undertaken" in paragraphs 1.36 to 1.41. Paragraphs 1.36 to 1.38 are important and are relevant to our purpose. These paragraphs are reproduced below:--
>
> "1.36 A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapters II and III. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured.
>
> 1.37 However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form. In such a case the tax administration may disregard the parties' characterization of the transaction and re-characterise it in accordance with its

substance. An example of this circumstance would be an ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 investment in an associated enterprise in the form of interest- bearing debt when, at arm's length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way. In this case it might be appropriate for a tax administration to characterize the investment in accordance with its economic substance with the result that the loan may be treated as a subscription of capital. The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price. An example of this circumstance would be a sale under a long- term contract, for a lump sum payment, of unlimited entitlement to the intellectual property rights arising as a result of future research for the term of the contract (as previously indicated in paragraph 1.10). While in this case it may be proper to respect the transaction as a transfer of commercial property, it would nevertheless be appropriate for a tax administration to conform the terms of that transfer in their entirety (and not simply by reference to pricing) to those that might reasonably have been expected had the transfer of property been the subject of a transaction involving independent enterprises. Thus, in the case described above it might be appropriate for the tax administration, for example, to adjust the conditions of the agreement in a commercially rational manner as a continuing research agreement.

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

17. The significance of the aforesaid guidelines lies in the fact that they recognise that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions. The reason for characterisation of such re-structuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured.

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

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

44. As for the words 'provision for services" appearing in Section 92B, and connotations thereof, our humble understanding is that this expression, in its natural connotations, is restricted to services rendered and it does not extend to the benefits of activities per se. Whether we look at the examples given in the OECD material or even in Explanation to Section 92B, the thrust is on the services like market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, and scientific research, legal or accounting service or coordination services. As a matter of fact, even in the Explanation to Section 92B- which we will deal with a little later, guarantees have been grouped in item 'c' dealing with capital financing, rather than in item 'd' which specifically deals with 'provision for services'. When the legislature itself does not group 'guarantees' in the 'provision for services' and includes it in the 'capital financing', it is

reasonable to proceed on the basis that issuance of guarantees is not to be treated as within the scope of normal connotations of expression 'provision for services'. Of course, the ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 global best practices seem to be that guarantees are sometimes included in 'services' but that is because of the extended definition of 'international transaction' in most of the tax jurisdictions. Such a wide definition of services, which can be subject to arm's length price adjustment, apart, "Transfer Pricing and Intra-Group Financing - by Bakker & Levvy" (ibid) notes that "the IRS has issued a non-binding Field Service Advice (FSA 1995 WL 1918236, 1 May 1995) stating that, in certain circumstances (emphasis supplied), a guarantee may be treated as a service". If the natural connotations of a 'service' were to cover issuance of guarantee in general, there could not have been an occasion to give such hedged advice. This will be stretching the things too far to suggest that just because when guarantees are included in the international transactions, these guarantees are included in service segment in contradistinction with other heads under which international transactions are grouped, the guarantees should be treated as services, and, for that reason, included in the definition of international transactions. That is, in our considered view, purely fallacious logic. In our considered view, under Section 92B, corporate guarantees can be covered only under the residuary head i.e. "any other transaction having a bearing on the profits, income, losses or assets of such enterprise". It is for this reason that Section 92B, in a way, expands the scope of international transaction in the sense that even when guarantees are issued as a shareholder activity but costs are incurred for the same or, as a measure of abundant caution, recoveries are made for this non-chargeable activity, these guarantees will fall in the residuary clause of definition of international transactions under section 92B. As for the learned Departmental Representative's argument that "whether the service has caused any extra cost to the assessee should not be the deciding factor to determine whether it is an international and then gives an example of brand royalty to make his point. What, in the process, he overlooks is that Section 92B(1) specifically covers sale or lease of tangible or intangible property". The expression "bearing on the profits, income, losses or assets of such enterprises" is relevant only for residuary clause i.e. any other services not specifically covered by Section 92B. It was also contended that, while rendering Bharti Airtel decision, the Delhi Tribunal did go overboard in deciding something which was not even raised before us. In the written submission, it was stated that "Hon'ble Delhi ITAT was not requested by the contesting parties to decide the issue as to whether the provision of guarantee was a service or not". That's not factually correct. We are unable to see any merits in learned Departmental Representative's contention, particularly as decision categorically noted that not only before the Tribunal, but this issue was also raised before the DRP- as evident from the text of DRP decision. We now take up the issue with respect to specific mention of the words in Explanation to Section 92B which states that "For the removal of doubts, it is hereby clarified that (i) the expression "international transaction"

> shall include..... (c) capital financing, including any type of long -term or short - term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business." There is no dispute that this Explanation states that it is merely clarificatory in nature inasmuch as it is 'for the removal of doubts', and, therefore, one has to proceed on the basis that it does not alter the basic character of definition of 'international transaction' under Section 92B. Accordingly,

this Explanation is to be read in conjunction with the main provisions, and in harmony with the scheme of the provisions, under Section 92B. Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'. The first two categories of transactions, which are stated to be included in the scope ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 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 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 ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 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 TP study. In our considered view, the corporate guarantee is very much incidental to the business of the assessee and hence, the same cannot be compared to a bank guarantee transaction of the Bank or financial institution."

47. However, within less than four months of this decision having been rendered, the Finance Act 2012 came up with an Explanation to Section 92B stating that "for the removal of doubts", as we have noted earlier in this decision, "clarified" that international transactions include, inter alia, capital financing by way of guarantee. This legislative clarification did indeed go well beyond what a

coordinate bench of this Tribunal held to be the legal position and we are bound by the esteemed views of the coordinate bench. We are, therefore, of the opinion that the Explanation to Section 92B did indeed enlarge the scope of definition of 'international transaction' under section 92B, and it did so with retrospective effect. If, for argument sake, it is assumed that the insertion of Explanation to Section 92B did not enlarge the scope of definition, there cannot obviously be any occasion to deviate from the decision that the coordinate bench took in Four Soft Ltd. case (supra), but if the scope of the provision was indeed enlarged, as is our opinion, the question that really needs to be addressed whether, given the peculiar nature and purpose of transfer pricing provision, is it at all a workable idea to enlarge the scope of transfer pricing provisions with retrospective effect There can be little doubt about the legislative competence to amend tax laws with retrospective effect, and, in any case, we are not inclined to be drawn into that controversy either. On the issue of implementing the amendment in transfer pricing law with retrospective effect, in the case of Bharti Airtel Ltd. (supra), a coordinate bench had observed as follows:

> ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 "34. There is one more aspect of the matter. The Explanation to Section 92B has been brought on the statute by the Finance Act 2012. If one is to proceed on the basis that the provisions of Explanation to Section 92B enlarges the scope of Section 92B itself, even as it is modestly described as 'clarificatory' in nature, it is an issue to be examined whether an enhancement of scope of this anti avoidance provision can be implemented with retrospective effect. Undoubtedly, the scope of a charging provision can be enlarged with retrospective effect, but an anti-

avoidance measure, that the transfer pricing legislation inherently is, is not primarily a source of revenue as it mainly seeks compliant behaviour from the assessee vis-à-vis certain norms, and these norms cannot be given effect from a date earlier than the date norms are being introduced. However, as we have decided the issue in favour of the assessee on merits and even after taking into account the amendments brought about by Finance Act 2012, we need not deal with this aspect of the matter in greater detail."

48. In the present case, we have held that the issuance of corporate guarantees were in the nature of shareholder activities- as was the uncontroverted claim of the assessee, and, as such, could not be included in the 'provision for services' under the definition of 'international transaction' under section 92B of the Act. We have also held, taking note of the insertion of Explanation to Section 92B of the Act, that the issuance of corporate guarantees is covered by the residuary clause of the definition under section 92B of the Act but since such issuance of corporate guarantees, on the facts of the present case, did not have "bearing on profits, income, losses or assets", it did not constitute an international transaction, under section 92B, in respect of which an arm's length price adjustment can be made. In this view of the matter, and for both these independent reasons, we have to delete the impugned ALP adjustment. The question, which was raised in Bharti Airtel's case (supra) but left unanswered as the assessee had succeeded on merits, reamins unanswered here as well. However, we may add that in the case of Krishnaswamy SPD v. Union of India [2006] 281 ITR 305/151 Taxman 286 (SC), wherein Their Lordships had, inter alia, observed that "the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is

understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. It was for this reason that a coordinate bench of this Tribunal, in the case of Channel Guide India Ltd. v. Asstt. CIT [2012] 139 ITB 49/25 taxmann.com 25 (Mum.), held that even though the assessee had not deducted the applicable tax at source under section 195, the disallowance could not be made under section 40(a)(i) since the taxability was under the provisions which were amended, post the payment having been made by the assessee, with retrospective effect. All this only shows that even when law is specifically stated to have effect from a particular date, its being implemented in a fair and reasonable manner, within the framework of judge made law, may require that date to be tinkered with. When a proviso is introduced with effect from a particular date specified by the legislature, the judicial forums, including this Tribunal, at times read it as being effect from a date much earlier than that too. One such case, for example, is CIT v. Ansal Landmark Township (P.) Ltd. [2015] 377 ITR 635/234 Taxman 825/61 taxmann.com 45 (Delhi), wherein Hon'ble Delhi High Court confirmed the action of the Tribunal in holding that the provision, though stated to be effective from 1st April 2013 must be held to be effective from 1st April 2005. Whether such an exercise can be done in the ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 present case is, of course, something to be examined and our observations should not be construed as an expression on merits of that aspect of matter. Given the fact that the assessee has succeeded on merits in this case, it would not really be necessary to deal with that aspect of the matter.

49. The second issue is this. We must deal with the question whether in this case the matter should have been referred to a larger bench. The parties before us were opposed to the matter being sent for consideration by the special bench, and at least one of the reasons for which the grievance of the assessee is upheld, i.e. guarantees being in the nature of shareholder activity and excludible from the scope of services for that reason alone, is an area which had come up for consideration for the first time. In effect, therefore, there was no conflict on this issue of and the other issues, given decision on the said issue, were wholly academic. It cannot be open to refer the academic questions to the special bench. No doubt, some decisions of the coordinate benches which have reached the different conclusions. There is, however, no conflict in the reasoning. Four Soft Ltd. decision (supra) had decided the issue in favour of the assessee but that was with respect to the law prior to insertion to Explanation to Section 92B. As for the post-amendment law and the impact of amendment in the definition of 'international transaction', the matter was again decided in favour of the assessee by Bharti Airtel Ltd. decision (supra) on the peculiar facts of that case. The decisions like Everest Kento Cylinders Ltd. (supra) and Aditya Birla Minacs Worldwide (supra) were decisions in which the assessee had charged the fees and, for that reason, such cases are completely distinguishable as discussed above. In Prolific' Corp Ltd. case (supra), as indeed in any other case so far, it was not the case of the assessee that corporate guarantees are quasi-capital, or shareholder activity, in nature, and, for that reason, excludible from chargeable services, even if these are held to be services in nature. That plea has been specifically accepted in the present case. Therefore, the question whether issuance of corporate guarantee per se in general constitutes a 'international transaction' under section 92B would have been somewhat academic question on the facts of this case. In any event, in Prolific' Corp Ltd. case (supra), an earlier considered decision on the same issue by coordinate bench of equal strength was simply disregarded and that fact takes this decision out of the ambit of

binding judicial precedents. We have also noted that in view of the decision a coordinate bench, in the case of JKT Fabrics v. Dy. CIT [2005] 4 SOT 84 (Mum.) and following the Full bench decision of Hon'ble AP High Court in the case of CIT v. BR Constructions [1993] 202 ITR 222/[1994] 73 Taxman 473 (AP), a decision disregarding an earlier binding precedent on the issue is per incurium. Such decisions cannot be basis for sending the matters to special bench since occasion for reference to special bench arises when binding and conflicting judicial precedents from coordinate benches come up for consideration. That was not the case here. All these factors taken together, in our considered view, it was not possible in this case to refer the matter for constitution of a special bench. In any case, whatever we decide is, and shall always remain, subject to the judicial scrutiny by Hon'ble Courts above and our endeavour is to facilitate and expedite, within our inherent limitations, that process of such a judicial scrutiny, if and when occasion comes, by analyzing the issues in a comprehensive and holistic manner.

50. In the light of the detailed discussions above, and for the detailed reasons set out above, we uphold the grievance raised by the assessee. The impugned ALP adjustment of Rs 2,23,62,603, thus stands deleted. As we do so, however, we must add that, in our considered view, the way forward, to avoid such issues ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 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 6th June 2012, though at a point of time when Finance Act 2012 had just come into force i.e. post 28th May 2012, without even being aware whether or not the Finance Act 2012 was passed as it gave certain directions depending upon the exact amendment by the said

Finance Act. The matter was remitted to the file of the Assessing Officer in a rather summary manner. It cannot be, by any stretch of logic, an authority on any legal question arising out of the law which, as per the Tribunal- wrongly though, was not even in existence. As for the Everest Kanto decision (supra), the issue was decided against the assessee as, to borrow the words of the coordinate bench, "Here in this case, it is undisputed that the assessee in its T.P. Study Report and also the TPO, have accepted that it is an international transaction and CUP is the most appropriate method for benchmarking the charging of guarantee fee", and, it was for this short reason that the matter was decided against the assessee. The co-ordinate bench had further observed "in this case, the assessee has itself charged 0.5% guarantee commission from its AE, therefore, it is not a case of not charging of any kind of commission from its AE. The only point which has to be seen in this case is whether the same is at ALP or not". Learned Departmental Representative has invited our attention to a decision of the Bangalore benches, in the case of Advanta India Limited Vs ACIT [(2015) TII-294-ITAT-BAN], which is in favour of the assessee. While learned Departmental Representative is indeed right, that is a case in which the assessee did infact recover charges, which included more than the cost incurred, from the beneficiary, and, as such, it clearly had an impact on the profits of the assessee. That is a case distinct from the present situation in which there is no impact on the profits or losses or assets or income of the assessee. In Advanta decision (supra), this aspect of the matter and the distinguishing feature has been discussed at considerable length. Learned Departmental Representative has then invited our attention to the fact a ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 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 aspect of the matter. Now that the matter is before Hon'ble High Court, and the matter is already under hearing, there is no point in going into these fine points, which may at best be errors of judgment rather than a glaring error rendering the decision to be per incurium, at this stage. In any case, there is a subtle difference in 'impact on' and 'influence on'. The issuance of a corporate guarantee may have an influence on the profits, incomes, losses and assets of an entity, in whose favour the guarantee is issued, but it has no impact on the same as long as it is

issued without a consideration. To treat this phrase as implying a benefit test, will, in our considered view, stretching the things too far. We are, therefore, not swayed by the arguments, though extremely well researched and thought provoking, of the learned Departmental Representative-particularly at this stage. He has raised a number of other arguments as well but as those arguments are already dealt with in the case of Micro Ink decision reproduced above, we see no need to again deal with the same.

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

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10. Nullifying a judicial interpretation though legislative amendment, much as many of us may abhor it, is not too uncommon an occurrence. Of course, when legislature has to take an extreme measure to nullifying the impact of a judicial ruling in taxation, it is the time for, at least on a theoretical note, introspection for the draftsman as to what went so wrong that fundamental intent of law of law could not be conveyed by the words of the statute, or, perhaps for the judicial forums, as to what went so wrong that the interpretation was so off the mark vis-à-vis fundamental principles of taxation or the sound policy considerations. However, amendment so made are generally prospective, and there is a sound conceptual foundation, as has been highlighted in the binding judicial precedents that we will deal with in a short while, for that approach. There is no dearth of examples on this aspect of the matter. Take for example, the amendment to Section 263 by the Finance Act, 1961. In many judicial precedents, [such as in the case of CIT Vs Sunbeam Auto Limited (332 ITR 167) wherein it was held that "Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open"], it was reiterated that it was only the lack, not the adequacy, of inquiry which could confer jurisdiction under section 263 on the Commissioner. By inserting Explanation 2 to Section 263(1), which inter alia provided that

powers under section 263 could also be invoked in the cases where "the order is passed without making inquiries or verification which should have been made", all ratio of all these decisions was nullified. That, however, is done with prospective effect, i.e. with effect from 1st June 2015. As a matter of fact, it is a laudable policy of the present tax administration to stay away from making the retrospective amendments, and thus contribute to greater certainty and congenial business climate. Nothing evidences it better than this subtle, but easily discernible, paradigm shift in the underlying approach to the amendments made in Section 263 in the very first full budget of the present Government.

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

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

> 30. Undoubtedly, the legislature is competent to amend a provision that operates retrospectively or prospectively. Nonetheless, when disputes as to their applicability arise in court, it is the actual substance of the amendment that determines its ultimate operation and not the bare language in which such amendment is couched.....
>
> 36. A clarificatory amendment presumes the existence of a provision the language of which is obscure, ambiguous, may have made an obvious omission, or is capable of more than one meaning. In such case, a subsequent provision dealing with the same subject may throw light upon it. Yet, it is not every time that the legislature characterizes an amendment as retrospective that the Court will give such effect to it. This is not in derogation of the express words of the law in question, (which as a matter of course must be the first to be given effect to), but because the law which was intended to be given retrospective effect to as a clarificatory amendment, is in its true nature one that expands the scope of the section it seeks to clarify, and resultantly introduces new ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 principles, upon which liabilities might arise. Such amendments though framed as clarificatory, are in fact transformative substantive amendments, and incapable of being given retrospective effect.

.....

37. An important question, which arises in this context, is whether a "clarificatory" amendment remains true to its nature when it purports to annul, or has the undeniable effect of annulling, an interpretation given by the courts to the term sought to be clarified. In other words, does the rule against clarificatory amendments laying down new principles of law extend to situations where law had been judicially interpreted and the legislature seeks to overcome it by declaring that the law in question was never meant to have the import given to it by the Court? The general position of the

courts in this regard is where the purpose of a special interpretive statute is to correct a judicial interpretation of a prior law, which the legislature considers inaccurate, the effect is prospective. Any other result would make the legislature a court of last resort. United States v. Gilmore 8 Wall [(75 US) 330, 19L Ed 396 (1869)] Peony Park v. O'Malley [223 F2d 668 (8th Cir 1955)] . It does not mean that the legislature does not have the power to override judicial decisions which in its opinion it deems as incorrect, however to respect the separation of legal powers and to avoid making a legislature a court of last resort, the amendments can be made prospective only [Ref County of Sacramento v State (134 Cal App 3d 428) and In re Marriage of Davies (105 III App 3d 66)] (Emphasis, by underlining, supplied by us)

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

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

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

anti-abuse legislations can only be prospective. It does not make sense that someone tells you today as to how you should have behaved yesterday, and then goes on to levy a tax because you did not behave in that manner yesterday.

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

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

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

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

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19. As we deal with this question, it is also relevant to consider whether this Tribunal can, while adjudicating on the appeals, tinker with the date, as set out in the statute, from which an amendment is effective. In our humble understanding, as a judicial forum, we are bound not only by

the law as legislated by the legislature, but by the judge made law as well. We are a part of the judicial hierarchy in this system. We are bound by the law laid down by Hon'ble Courts above, and all that we are expected to do, and we do, is to decide the issues before us in accordance with the provisions of the statute, in accordance with the law laid down by Hon'ble Courts above and in the light of binding judicial precedents. When a binding judicial precedent requires us to deviate from the specific words of the provisions of the statute in a particular manner, we have to do so. There is no escape from this call of duty. Of course, whatever we do is, and shall always remain, subject to the approval by Hon'ble Courts above.

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

> 8. With the benefit of this guidance from Hon'ble Delhi High Court, in view of legislative amendments made from time to time, which throw light on what was actually sought to be achieved by this legal provision, and in the light of the above analysis of the scheme of the law, we are of the considered view that section 40(a)(ia) cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure-

particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary to this proposition, in our considered view, declining deduction in respect of expenditure relating to the payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia). If it is not an intended consequence i.e. if it is an unintended consequence, even going by Bharti Shipyard decision (supra), "removing unintended consequences to make the provisions workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively". Revenue, thus, does not derive any advantage from special bench decision in the case Bharti Shipyard (supra).

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

Delhi High Court ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assessee's for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004.

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

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

22. When such are the views of Hon'ble High Court, it is not open to us to proceed on the basis that even though the amendment is required to be read as prospective, the Tribunal cannot do so as it is a creature of the Income Tax Act itself. In our considered view, and for the detailed reasons set out above, at best the amendment in Section 92B, at least to the extent it dealt with the question of

issuance of corporate guarantees, is effective from 1st April 2012. The assessment year before us being an assessment year ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 prior to that date, the amended provisions of Section 92 B have no application in the matter.

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

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

8. It is sufficiently clear that the TPO had himself taken financial guarantees given by various institutions as the relevant bench mark for the performance guarantee adjustment in question. We hold in these facts and circumstances the above judicial precedent of the co-ordinate bench would squarely apply in the facts of the instant case as well. This Revenue's third substantive ground is declined whereas assessee's second substantive ground is accepted.

9. This leaves us with Revenue's last substantive ground in challenging CIT(A)'s order deleting upward adjustment of Rs.1,81,79,272/- proposed by the Transfer Pricing Officer and accepted in assessment as pertaining to human resource management services. We find that the CIT(A) has followed this tribunal's order in assessee's case itself in preceding assessment year 2006-07 (supra) as under :-

> "I have carefully considered the facts of the case, the assessment order, the order of the TPO and the written submission of the appellant. It is noted that ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 the TPO had made adjustment on account of Arm's Length Price of the charges levied by the appellant on HRM function. The appellant had not taken this transaction as the International transactions and accordingly the same was not referred by the AO to the TPO. However, the TPO considered the same as international transaction holding that it

was a separate service and made an adjustment by computing the arms length price of the same. The appellant on the other hand has objected that it is not a separate service and the HRM function forms an integral part of the software development service and therefore, it should not have been regarded as a separate international transaction.

The appellant has explained that it was engaged in providing offshore software development and technical support services while, it's AEs primarily Act as distributors of software development services to their respective customers. For enabling AEs to provide on-site services, the appellant seconds employees to them. Such secondment of employees for providing on-site services brings back more offshore work as well as skills and competencies. The appellant has further submitted that HRM function was not a separate service and it forms an integral part of the software services and hence the same should not be regarded as separate international transaction. It has been pointed out by the appellant that during the FY 2007 - 08 no separate HRM services were provided by the appellant to the AEs, The expenses in relation to performing the HRM functions were entirely incurred in relation to the recruitment of the employees. The appellant has further pointed out that while making the functional analysis for International transactions related to the software services it has included the HRM functions as part of that analysis, It has done detailed analysis of the specific activity forming a subset of the main international transaction. It has therefore, been submitted by the appellant since it was a subset of the main international transaction no separate adjustment treating the same as an independent transaction should be made.

On a careful consideration of the overall facts and circumstances it is noted that the similar issue had arisen during the course of assessment for A.Ys. 2002-03, 2003-04, 2004-05 and 2006-07 and the same have been decided in favour of the appellant by ITAT Ahmedabad. The honourable ITAT has held that the appellant had made out a case that by arrangement for sending employees to AEs the appellant had also been benefited. It was held that that it was not appropriate to hold that HRM function should be taken as recruitment service. The relevant extracts of the findings given by the honourable ITAT for A.Y. 2006-07 are reproduced here under: -

"26. We have heard both the sides at length. We have perused the orders of the Revenue Authorities in the light of the voluminous compilation filed. It is true that the assessee is engaged in providing 'offshore' software development. The Associate Enterprises are also in the business of providing related services for software development 'onsite'. Facts have revealed that for enabling the AEs to provide 'onsite' service, the assessee has seconded its employees to those AEs.

ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 26.1. To deal with this problem it is better to first examine the correct meaning of this notion i.e. "Secondment" and have found that a 'secondment' takes place when an employee or a

group of employees are temporarily assigned to work for an another organization. The 'secondment' is a practice through which one entity makes the services of it's employee/ employees available to another entity for a short period of time while continuing to treat that person as if's employee either by remunerating him or by not removing from the roll of employment. Possible reasons for the 'secondment' are viz. career development, to gain new skill/experience, enabling such employee to remain with the parent-employer so as to preserve benefits such as pension benefit etc., income generation for the parent-employer, to provide cover for offshore short term projects, to provide cover for short term absence etc. The idea behind a 'secondment arrangement' is that the 'secondee' (the employee) will remain employed with the 'seconder' (the parent or seconding-employer) during the period of secondment and following the termination of requirement of the 'host' (the other absorbing unit) such persons "'return' to fhe 'seconder'. The benefit of such "arrangement is the continuity of the employment. The 'secondee' remains employed by the 'seconder' so that the statutory period of continuous employment remain unbroken, to qualifying for pension or other employment rights. The payment of fees or remuneration depends upon the 'secondment agreement' from party to party, but the primary liability is of the "seconder'. Now the argument is that by such secondment of trained employees, in return, the assessee has substantially been benefitted and because of the 'onsite' services provided by AEs, in the result, there was 'offshore' work was generated for the assessee. As far as the assessee is, concerned, its 'offshore' revenue has admittedly increased. A fundamental question has cropped up because of TPO's decision that whether the HRM function can be said to be "an integral part' of the overall software development services of the assessee? If we consider the overall scenario and the globalization of such services, then what is apparent is that the entities which are in the business of software development have to engage technically expert employees. Those employees perform their duties 'onsite1 as well as sometime 'offshore'. Such entrepreneurs provide cushion to those employees if they have been sent abroad for an 'onsite' deployment. Whether it was justifiable on the part of the TPO, to hair-split these two activities? As far as our common understanding of the business model of this assessee is concerned, as also the prevailing business pattern all over the world is concerned, the deployment of Human Resources is inter-linked with the business activity of the assessee, then such HRM activity can be said to be the intricately linked activity with the main business activity of an entrepreneur. Reason being, in the present case, software development services cannot be performed independently or in isolation with the deployment of technical persons. In such business model, there is an established existence of AEs abroad. Those AEs generally demand for supply of technical employees/engineers so as to accomplish the software development project "onsite'. Such facility is provided by the Head Office, i.e. MIL. In return, MIL has also heaped the prize i.e. high ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 revenue generation. By displaying different FAR, the TPO had made an attempt to distinguish the two activities. Nevertheless, the law prescribes that FAR should be appropriately documented, so that the correct figures is in the knowledge of the Revenue Department.

26.2. As far as the Commercial and business expediency is concerned, we have been informed that the Id. CIT(A) in past four years has decided this issue in favour of the assessee. It was held that in the business Interest of the assessee to second its employees to its AEs, the MIL has seconded the employees. However, the allegation of the TPO is that the AEs have been benefited from such secondments. Be that the position, even if it was so, that Associate Enterprise is benefited, then there should not be any scope to draw an adverse inference that MIL should also snatch the profit out of the pockets of AEs. As long as the MIL has got his pound of flash and disclosed better-revenue generation, there should not be any objection to the revenue.

26.2. As far as the non-mentioning of HRM function in Form No.2CEB is concerned a clarification has been given that no international transaction of HRM services had actually been carried out with any of the AEs in respect of secondment of employees, hence there was no question about reporting the same in the said prescribed form. The expenses in relation to performing the HRM function are stated to be entirely incurred and borne by MIL. Expenditure on training is also borne by MIL. Those were not recruited on the basis of any request of AEs. At the time of recruitment there was no surety given of their off-shore appointment immediately but they could be seconded at a later stage. Hence at first instance, none of the expense relate to the employees was meant for sending them to AEs. The purpose of recruitment at the first stage is their in-house absorption. No part of the expenditure was on behalf of AE hence there was no transaction which could be alleged as international Transaction. We find this explanation a reasonable explanation because admittedly there was no International transaction with AEs for charging the HRM services but the TPO had made out a case that there ought to be some mark up and hence he has opined for an addition in the total income. There was no such case that an upward adjustment was recommended by the TPO in respect of an International transaction already executed between the parties.

27. The assessee has made out a case that by such an arrangement of sending the employees to AEs, in return assessee has also been benefited. Employees, after returning, are with upgraded skills, better experience, update knowledge and with a better delivery skills. This is one part of the advantage and the other part of the advantage happened to be procurement of "offshore" business in high volume. We are therefore of the view that the comparability analysis as carried out by the TPO do not match with the facts of the case. It is not appropriate to hold that HRM function as carried out by this assessee is to be taken as recruitment services. We therefore hold that the assessee was not functioning as an external recruitment agency. At the cost of ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 repetition, while arguing before us, the Id. DR has supported the action of the TPO primarily on the ground that by the deployment of skilled engineers at the services of AEs, those AEs have been benefited, hence, in return, the assessee should have recovered some compensation on secondments. It is not a correct approach because one has to examine the business strategies and the business model of an Enterprise and if it is

> found that other benefits are much higher than the small amount of compensation, then naturally applying a common business acumenship, no compensation or mark-ups should be asked for. In the present case as well, facts and figures have revealed that following the said business strategy the business growth as a whole was much higher than the impugned compensation amount. This allegation is also to be ruled out that those very employees were otherwise regular employees of the assessee-company and they have been absorbed after their return for the period for which they were sent abroad and worked "offshore" with AEs. It is true that such employees are the regular group of experts but they have been paid by AEs when worked on-site abroad, which means the burden of salary for the "offshore"

period was in fact borne by AEs, otherwise to maintain bunch of trained employees the MIL had to incur the expenditure on salary. Therefore, there was an argument of counter claims and in support reliance was placed on Boston Scientific International VV (210-TII-16-ITAT-MUM- TP). For these reasons we also hold that the secondee-provider is not akin to recruitment service-provider or that "secondment" is different from "recruitment". Finally, we hold that there was no legal basis for the impugned upward adjustment and the same is hereby directed to be deleted. This ground is allowed.

Since the facts of the present year are similar to the one decided by honourable ITAT, Ahmedabad, respectfully following the decision the upward adjustment made by the TPO/AO is directed to be deleted this year as well.

The ground of appeal is accordingly allowed."

10. It has therefore come on record that the instant issue has not arisen for the first time between the parties. This is not the Revenue's case that the impugned assessment year involves any different facts or law vis-à-vis those in said preceding assessment years. We thus adopt judicial consistency to affirm the CIT(A)'s finding qua this last issue.

Revenue's appeal no.2879/Ahd/2014 is dismissed.

11. This leaves us with assessee's cross appeal no.2985/Ahd/2014.

ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09

12. The assessee's first substantive ground avers that both the lower authorities have erred in law as well as in facts in invoking section 14A read with rule 8D(2)(iii) disallowance amounting to Rs.57,56,632/- in relation to exempt income of Rs.7.7 Crores. The CIT(A) affirmed the impugned disallowance with the following discussions :

> "I have carefully considered the order and the submission made by the appellant during the course of appellate proceedings. It was noted by the AO that the appellant has earned dividend income from mutual funds amounting to Rs.7.71 Crores which was claimed as exempt income. The AO has accordingly made a disallowance by

applying the third limb of Rule 8D by making disallowance out of administrative expenditure relatable to earning of exempt income. The total disallowance of Rs.57,56,632/- was made from which the disallowance of Rs.2 lakh, which was already made by the appellant, was reduced and net addition was made.

The appellant on the other hand has submitted that it has not incurred any specific expenditure, directly relating to the investment in units of mutual funds and earning exempt income thereon during the Financial Year 2007-08. The appellant has further submitted that as a matter of abundant caution, while filing the Return of income, the appellant itself, on a conservative basis, tentatively allocated certain indirect expenses and offered disallowance of Rs.2 Lakhs under section 14A of the Act being expenditure incurred to earn exempt income. It has been submitted by the appellant that major administrative work was performed by mutual fund distributors and they are paid brokerage by the mutual funds. Further, the advisory services in respect of purchase/sale of mutual funds were also provided by mutual fund distributors for which no payment was made. The decision in respect of investment is taken only by Chief Financial Officer of the appellant and no other person was involved. No specific staff or any other arrangement was required to manage the investment portfolio of mutual funds. It is accordingly been requested by the appellant that the disallowance made by the AO should be deleted.

After examining all the facts and the law related to the issue it is noted that the fact that appellant has earned dividend income of Rs.7.71 Crores and it has claimed exemption from tax on this income is undisputed. The disallowance made by the AO pertains to the administrative expenditure only and no disallowance out of interest has been made as there was no borrowing cost during the year which would have been allocated for this purpose. The appellant has itself made a disallowance of Rs.2 Lakhs on account of section 14A relating to exempt income. However, the appellant has itself admitted that the disallowance is made on an dhoc basis out of abundant precaution. It is noted that the appellant has not followed any method for making the disallowance and no details of expenditure incurred for the purpose of earning the exempt income from mutual funds have been kept so that the veracity of the disallowance made by the appellant itself can be verified. The action of the ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 appellant clearly show that while admitting that certain expenditure has been incurred for the purpose of earning the dividend income, it has not maintained any proper account for such expenditure. It has not disallowed the expenditure on the basis of actual determination. The basis adopted by the appellant is not systematic and scientific. It is only an estimate which has been made by the appellant without any basis. It is accordingly held that the administrative expenditure disallowed by the appellant are not a reliable and therefore, not acceptable. I am therefore, not satisfied with the correctness of the claim of the appellant in respect of administrative expenditure in relation to the dividend income received by the appellant which does not form part of the total income under the Income tax Act.

The Provisions of Rule 8D have been brought in the Act to make the disallowance in these types of cases. Since the appellant itself accepts that the expenses have been incurred for earning the dividend income and it is also a fact that the appellant has not kept the actual details of expenditure the disallowance will have to be made on the basis of the Rule 8D. Accordingly, it is held that the disallowance under section 14A should be made by applying the provisions of Rule 8D which has rightly been done by the AO. The contention of the appellant is therefore, dismissed and the disallowance made by the A.O is upheld.

The ground of appeal is accordingly, dismissed."

13. Learned Sr. Counsel vehemently contends during course of hearing that neither of the lower authority has expressed any satisfaction in tune with section 14A(2) of the Act regarding assessee's books of account or the correctness of the relevant expenditure in its profit & loss account. He quotes Hon'ble Delhi High Court's decision in CIT vs. Taikishah Engineering India Limited (2015) 370 ITR 338 (Delhi) that the impugned disallowance in absence of such satisfaction is not sustainable. We find no reason to accept assessee's instant argument. It is seen that the lower authorities dealt with interest expenditure and that too on proportionate basis in the said case than direct one whereas the issue before us is that of administrative expenditure disallowance. We observe in this facts that the impugned administrative expenses disallowance is not alike former two limbs since falling in different head as well as the fact that it has to be based on computation formula only. There is no dispute that we are dealing with assessment year 2008-09 i.e. starting point of application of Rule 8D of IT Rules. The assessee admittedly has not challenged the relevant computation @ .5% given in the above statutory computation formula. We conclude in these facts that both the lower authorities have acted as per law in invoking the impugned disallowance in relation to assessee's exempt income amounting to Rs.7.7 crores.

ITA Nos.2879 & 2985/Ahd/2014 Mastek Limited A.Y. 2008-09 More so when the assessee has not discharged prima facie onus even to justify its suo motu lump sum disallowance of Rs.2 lakhs only. The impugned disallowance is accordingly confirmed in principle.

14. Mr. Soparkar at this stage raises an alternate contention that both the lower authorities have erred in not excluding the average investment made in growth oriented debt funds and fixed maturity plan funds of Rs.1,558.26 lakhs yielding only taxable income. We find that this is more a computation exercise wherein investment made in relation to taxable income has to be excluded for the purpose of computing disallowance in question. We thus direct the Assessing Officer to frame consequential computation as per law. Assessee's instant substantive ground is taken as partly accepted for statistical purposes in the above terms.

15. We have already accepted assessee's second substantive ground regarding arms length price adjustment pertaining to performance guarantee (supra) in Revenue's appeal in preceding paras. Its cross appeal no.2985/Ahd/2014 is partly accepted in above terms.

16. The Revenue's appeal ITA No.2879/Ahd/2014 is dismissed whereas assessee's cross appeal ITA No.2985/Ahd/2014 is partly allowed. Order pronounced in the open court on this 19th day of March 2018.

Sd/-	Sd/-
PRAMOD KUMAR	S.S. GODARA
(Accountant Member)	(Judicial Member)

Ahmedabad, the 19 th day of March, 2018
PBN/*

Copies to:	(1)	The appellant	(2)	The respondent
	(3)	CIT	(4)	CIT(A)
	(5)	Departmental Representative	(6)	Guard File

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Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad