IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "K", MUMBAI

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.557/Mum/2012 (Assessment Year- 2007-08)

ACIT -2(1) Aayakar Bhavan, M.K. Road, Room No. 575, 5th Floor, M.K. Road, Mumbai-20.	**Vs.**	M/s Bombay Dyeing & Mfg. Co. Ltd. Neville House, J N Heredia Marg, Ballard Estate, Mumbai-400001 **PAN:AAACT2328K**
(Appellant)		(Respondent)

ITA No.588/Mum/2012 (Assessment Year- 2007-08)

M/s Bombay Dyeing & Mfg. Co. Ltd. Neville House, J N Heredia Marg, Ballard Estate, Mumbai-400001 **PAN:AAACT2328K**	**Vs.**	ACIT -2(1) Aayakar Bhavan, M.K. Road, Mumbai-20.
(Appellant)		(Respondent)

ITA No.6055/Mum/2014 (Assessment Year- 2008-09)

ACIT -2(1) Room No. 561, 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai-20.	**Vs.**	M/s Bombay Dyeing & Mfg. Co. Ltd. Neville House, J N Heredia Marg, Ballard Estate, Mumbai-400001 **PAN:AAACT2328K**
(Appellant)		(Respondent)

ITA No.6131/Mum/2014 (Assessment Year- 2008-09)

M/s Bombay Dyeing & Mfg. Co. Ltd. Neville House, J N Heredia Marg, Ballard Estate, Mumbai-400001 **PAN:AAACT2328K**	**Vs.**	ACIT -2(1) Aayakar Bhavan, M.K. Road, Mumbai-20.
(Appellant)		(Respondent)

Revenue by	:	Shri Saurabh Deshpande (DR)
Assessee by	:	Shri Yogesh A. Thar with Ms Ayushi Modani &Chaitanya Joshi (AR)
Date of hearing	:	02.04.2018
Date of Pronouncement	:	02.04.2018

Order Under Section 254(1) of Income Tax Act

PER BENCH:

1. These group of four appeals under section 253 of Income Tax Act are directed against the order of Ld. Commissioner of Income-Tax (Appeals)-15, Mumbai, [for short the ld. CIT(A)] dated 30.11.2011 & 28.03.2014 respectively for Assessment Years 2011-2012 & 2012-2013. In appeal appeals, the parties have raised common grounds of appeal. Thus, all appeals were heard together and are decided by a consolidated order. The assessee in its appeal ITA No. 588/Mum/2012 raised the following grounds of appeal:

GOUND I:
Disallowance u/s 14A: Rs 24,58,395/-

1. On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals)-15 ("the CIT(A)-15") erred in upholding part disallowance of a sum of Rs. 24,58,395/- u/s. 14A of the Income Tax Act, 1961 ("the Act").
2. He failed to appreciate and ought to have held that:

- Investments had been made out of own funds and internal cash accruals and has not incurred any expenditure in relation to tax -free income
- That own funds were sufficient to cover tax - free investments.
- No other expenses were incurred in relation to earning the dividend income.

3. The Appellant prays that the aforesaid disallowance u/s 14A be deleted.

Without Prejudice to Ground I
Ground II

1. The appellant also prays that on the basis of reasonableness the disallowances u/s 14A to be restricted to the extent of 1 % of exempt income.
2. The above view has been accepted by Commissioner of Income Tax (Appeals)'s in appellant's own case in the past years.

GROUND III:

Disallowances of interest on share holders deposits amounting to Rs. 1,37,70,563/- as it not at arms length

1. On the facts and circumstances of the case and in law, the CIT(A)-15 erred in confirming the action of Assessing Officer ("the AO") by making adjustment in adding interest @ 9.05% amounting to Rs 1,37,70,563/- with regards to shareholder deposits of Rs.15,21,60,920/- kept with associate company.

2. He failed to appreciate and ought to have held that:
- The following amount was receivable from associate company for royalty on technical know how and as per restructuring agreement it was converted into non interest bearing shareholders deposit.
- Non interest bearing shareholder's deposits made in earlier years is not an international transaction
- RBI and Government of Indonesia have given approval and accordingly, the same cannot be regarded as not being at Arm's length.
3. The Appellant prays that the aforesaid disallowance be deleted.

Without prejudice to GROUND III
GROUND IV:

1. The appellant also prays that ad hoc rate of interest charged is excessive and ought to be reduced having regard to international practices.

GROUND V:
Taxation of Long Term Capital Gain:

1. On the facts and circumstances of the case and in law, the CIT(A)-15 erred in confirming the action of AO in not assessing the long term capital gains arising on sale of capital asset which was converted to stock in trade on the alleged ground that the capital gain has not arisen during year under consideration based on the finding of the last assessment order for AY 2006-07 on the year of taxability of profit/gain on land conversion
2. He further erred in doubting the genuineness of agreement entered into with Scal Services Limited (SSL) for sale of asset on the alleged ground that SSL was a group company and not in the business of real estate.
3. He further erred in not assessing tax on capital gain and confirming the action of AO who has only taxed the business income relating to the same capital asset.
4. He failed to appreciate and ought to have held:
   - The capital gain on sale of capital asset which is converted into stock in trade is taxable in the year in which it is sold.
   - The Appellant had entered into valid legally enforceable agreement with SSL which was acted upon by both the parties.

5. The Appellant, therefore, prays that the AO be directed to assess the aforesaid capital gain in the year under consideration and allow the set off of brought forward capital loss against the same.

GROUND VI:
Long term capital loss on sale of investment not considered

1. On the facts and circumstances of the case and in law, the CIT (A)-15 erred in not directing the AO, to allow the long term capital loss amounting to Rs 1,90,49,831/- on sale of investments.
2. The Appellant prays that the AO be directed to allow the said long term capital loss and grant set off and/or carry forward thereof as per law.

2. The Revenue in its cross appeal has raised the following grounds of appeal:

> On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:
>
> 1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in directing that the expenses disallowed under section 14A amounting to Rs.2,96,54,962/- be not added to the book profit u/s.115JB of the Act under Clause 'f' of Explanation 1 to that section, contrary to the expressed provision to add any expenses relating to income u/s.10 of the Act.
>
> 2. Without prejudice to the fact that a sum of Rs.24,58,359/- has been upheld for disallowance under section 14A by the CIT(A), he has erred in directing to not add any amount in the computation of book profit under section 115JB by relying on the decision of the ITAT, Delhi in the case of Goetze (India) Ltd. Vs. CIT (32 SOT 101), the facts and context of which are different from the present case.
>
> 3. For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the AO restored.

3. At the outset of hearing, the Ld. Authorized Representative (AR) of the assessee submits that all the grounds of appeal raised by assessee as well as by Revenue in its cross appeal are covered by the decision of Tribunal in assessee's own case for earlier years or by various decisions of jurisdictional High Court. The Ld. AR of the assessee furnished a chart narrating the grounds of appeal and the preposition of law in favour of assessee in assessee's own case for A.Y. 2012-13. On going through the chart and the

decision of Tribunal in assessee's own case for A.Y. 2006-07 and 2012-13, the Ld. Departmental Representative (DR) for the Revenue fairly conceded that all the grounds of appeal are covered in favour of assessee and against the Revenue.

4. We have considered the submission of both the parties and perused the material available on record. Ground No. I & II relates to disallowance under section 14A r.w. Rule 8D. The Ld. AR of the assessee submits that Rule 8D cannot apply with the A.Y. prior to A.Y. 2008-09 in support of his submission, the Ld. AR of the assessee relied upon the decision of jurisdictional High Court in case of Godrej & Boyce Manufacturing Co. Ltd. (328 ITR 81) and decision of Hon'ble Delhi High Court in case of Maxopp Investments Ltd. (203 Taxman 364). In alternative, the Ld. AR of the assessee submits that the assessee has sufficient interest free fund available with it. The assessee on interest free fund of Rs. 402.68 Crore (share capital and reserve). The assessee made tax free investment only Rs. 7.57 Crore. Therefore, no interest disallowance under Rule 8D(ii) is warranted in support of his submission, the Ld. AR of the assessee relied upon the decision of Hon'ble Bombay High Court in case of HDFC Bank Vs. DCIT 383 ITR 529) (Bombay High Court) and CIT Vs. Reliance Utility and Power Ltd. [313 ITR 340 (B)]. In other alternative submission, the Ld. AR of the assessee submits that the disallowance under section 14A should not be restricted to exempt income. The assessee earned exempt income of Rs.

28,000/- only. Therefore, the disallowance under section 14A should not exceed to exempt income. In support of its submission, the Ld. AR of the assessee relied upon the decision of Joint Investment P. Ltd. Vs. CIT [372 ITR 694 (Del.) and Daga Global Chemicals Pvt. Ltd. Vs. ACIT in ITA No. 5592/Mum/2012 (Mum. Trib.) The Ld. DR for the Revenue relied upon the order of authorities below. However, the Ld. DR not disputed the amount of exempt income of Rs. 28,380/- earned by assessee during the relevant Financial Year. The Ld. DR for the Revenue also conceded that Rule 8D is not applicable for the A.Y. under consideration.

5. We have considered the rival submission of the parties and gone through the orders of authorities below. We have noted that the assessee earned exempt income of Rs. 28,380/- in the form of dividend income. The Hon'ble Delhi High Court in case of Joint Investment Pvt. Ltd. (supra) held that the window for disallowance indicated in section 14A is only to the extent of disallowing expenditure incurred by assessee in relation to tax exempt income. These proposition or portion of tax exempt income surely cannot swallow the entire amount. Thus, respectfully following the decision of Hon'ble Delhi High Court in Joint Investment Pvt Ltd (supra) the disallowance under section 14A is restricted to the exempt income/dividend income of Rs. 28,830/-. The Assessing Officer is directed accordingly.

6. In the result, Ground No. I & II of the appeal are allowed.

7. Ground No. III & IV relates to addition on account of Transfer Pricing Adjustment in relation to non-interest bearing shareholder deposit of Rs. 1,50,94,363/-. The Ld. AR of the assessee submits that this ground of appeal is covered in favour of assessee in assessee's own case for A.Y. 2012-13 in ITA No. 1617/Mum/2017 reported in 87 taxmann.com 213 (Mum.Trib.). The Ld. DR for the Revenue conceded the contention of Ld. AR of the assessee.

8. We have considered the submission of the parties. We have noted that similar ground of appeal was raised by assessee in appeal for A.Y. 2012-13. The Tribunal passed the following order on identical grounds of appeal:

> **7.** In view of these facts, it is clear that the technical know-how fees are recoverable for the period 1981 to 1995 by both the joint venture partners namely The Bombay dyeing & Mfg Co Ltd and Common Wealth textiles. The RBI has given its approval on treating the Outstanding entitlements on account of technical know-how fees for the period Jan 1981 to Dec 1995 estimated to US $ 32,00,692.48 (INR 15.22 Crores) as a shareholder deposit. RBI has given permission vide approval to obtain repayment of the said deposits on or before 2010 or earlier as the case may be. This repayment date is extended to 2015 by RBI. Copy of relevant letters issued by RBI is enclosed at Annexure-4 of the assessee's paper book. Under the facts of the case, we appreciate the argument of the assessee that the said interest free deposit cannot be considered as an international transaction for the previous year ended 31st March 2012 as the said transaction was entered into during the previous year ended 31 March 1998 with the approval of statutory authorities. The statutory permissions required under the foreign exchange laws of India, are equally applicable to controlled and uncontrolled enterprises i.e. they are universally applicable and hence the very restrictions for permissions would be deemed to encompass the principle of neutrality and hence, the standard of arms length is inherent in the provision of law. Hence the company has a contractual and statutory obligation with the PTFSI for not charging any interest on the shareholder deposits and thereby it cannot take any recourse for charging interest till the year 2015 by which PTFSI is required to make payment to the company. There has been no inflow or outflow relating to the above deposit during the Previous Year 2011-12 and hence it is outside the purview of transfer pricing provisions. We are of the view that the assessee cannot be asked to do something which is impermissible in law and expenditure incurred in compliance of law or the direction of the statutory authorities, the same is allowable. This view is supported by the case law relied on by the assessee of Hon'ble Bombay High

court in the case of *CIT* v. *Hukumchand Mills Ltd.* [1993] 202 ITR 474 . Further, another aspect argued by the learned Counsel is that interest and principal amount itself is doubtful of recovery, the question of taxing hypothetical interest does not arise. This view is also supported by the decision of Hon'ble Supreme Court in the case of *UCO Bank* v. *CIT* [1999] 237 ITR 889/104 Taxman 547. In view of the above discussion, we are of the considered opinion that no addition on account of transfer pricing adjustment can be made in relation to interest @ 8.39% amounting to Rs. 1,27,66,301/- in relation to non-interest bearing shareholder's deposits amounting to Rs. 15,21,60,920/- with an associate company. We reverse the orders of DRP and AO/TPO on this issue and allow this issue of the appeal of assessee.

9. Considering the decision of Tribunal in assessee's own case in identical grounds of appeal was allowed in favour of assessee on the same amount of share-holder deposits the Associate Company. Thus, respectfully following the decision of Tribunal in assessee's own case, Ground No. III & IV of appeal are allowed in favour of assessee with similar observation.

10. Ground No. V relates to taxation on Long Term Capital Gain. The Ld. AR of the assessee submits that he is not pressing this ground of appeal. Considering the submission of Ld. AR of the assessee, this ground of appeal is dismissed as not pressed.

11. Ground No. VI relates to Long Term Capital Gain on sale of investment not considered. The Ld. AR of the assessee submits that the Assessing Officer has not considered the Long Term Capital Gain on sale of investment. The assessee filed application under section 154 before the Assessing Officer for rectification of order. The assessee also raised ground of appeal before the Ld. CIT(A). The Ld. CIT(A) directed the Assessing Officer to dispose the application of the assessee filed under section 154 in accordance with law. However, the Assessing Officer has not passed any order despite direction

of the First Appellate Authority. On the other hand, the Ld. DR for the Revenue has no objection, if the Assessing Officer is directed to comply the direction of Ld. CIT(A).

12. We have considered the submission of the parties. Keeping in view that the Ld. CIT(A) has already given direction to the Assessing Officer for disposing of the application under section 154 of the Act, filed by assessee which has not been disposed of so far. The Assessing Officer is directed to consider the claim of assessee and pass the order in accordance with law. Needless to say that the Assessing Officer shall grant necessary opportunity of hearing before passing the order.

In the result, appeal of the assessee is allowed.

ITA No. 557/Mum/2012 for AY 2007-08.

13. The Revenue has raised the sole ground of appeal which relates to addition on disallowance under section 14A r.w.Rule 8D to the computation of book profit under section 115JB of Rs. 2,96,54,962/-. At the outset of hearing, the Ld. AR of the assessee submits that the ground of appeal raised by Revenue is also covered in assessee's own case for A.Y. 2012-13 in ITA No. 1716/Mum/2017 and by the decision of Special Bench in ACIT Vs. Vireet Investment (P.) Ltd. [82 taxmann.com 415 (Del. SB). On the other hand, the Ld. DR for the Revenue fairly conceded that this ground of appeal is covered in favour of assessee.

14. We have considered the rival submission of the parties and gone through the order of authorities below. We have noted that identical ground of appeal was raised by assessee in appeal for A.Y. 2012-13. The Tribunal passed the following order:

> **57.** The next issue in this appeal of assessee is against the order of DRP confirming the action of the AO/TPO making addition of disallowance under section 14A of the Act r.w.r 8D of the Rules, while computing book profit under section 115JB of the Act. For this assessee has raised following grounds: -
>
> GROUND NO. 9: ADDITION OF RS. 2,73,960/- BEING AMOUNT DISALLOWED U/S. 14A OF THE ACT WHILE COMPUTING BOOK PROFITS U/S.115JB OF THE ACT
>
> On the facts and in the circumstances of the case and in law the IA. AO, pursuant to the directions of the ld. DRP. erred in adding the disallowance made u/s. NA to the book profits on the alleged ground that expenditure pertains to earning exempt income.
>
> **58.** At the outset, the learned Counsel for the assessee stated that this issue is covered in favour of assessee and against Revenue by the decision of Special Bench of this Tribunal in the case of *Asstt. CIT* v. *Vireet Investments (P.) Ltd.* [2017] 165 ITD 27/82 taxmann.com 415 (Delhi - Trib.) (SB) wherein the Tribunal has clearly held that no disallowance under section 14A of the Act r.w.r 8D of the Rules can be made while computing book profit under section 115JB of the Act. The learned CIT Departmental Representative could not controvert the above proposition. Accordingly, we are of the view that this issue is covered by the special bench decision of this Tribunal in the case of *Vireet Investments (P.) Ltd.*(*supra*), respectfully following the same, we delete the disallowance and allow this issue of assessee's appeal.

15. Considering the decision of Tribunal in assessee's own case for A.Y. 2012-13 as refereed above and the decision of Special Bench in Vireet Investment (P.) Ltd. (supra), the Assessing Officer is directed to re-compute the book profit by following the decision of Special Bench in case of Vireet Investment (P.) Ltd. (supra).

16. In the result, appeal of the Revenue is dismissed.

ITA No. 6131/Mum/2014 AY 2008-09

17. Ground No. I relates to disallowance under section 14A r.w.Rule 8D. We have noted that this ground of appeal is identical to the ground no. I & II of the appeal for A.Y. 2007-08. We have already allowed the appeal for A.Y. 2007-08 on identical grounds directing the Assessing Officer to restrict the disallowance under section 14A to the extent of exempt income. Considering our decision for earlier year, this ground of appeal is also allowed with similar direction.

18. In the result, ground no. I of the appeal is allowed.

19. Ground No. II & III relates to addition on account of Transfer Pricing Adjustment in relation to non-interest bearing shareholders deposits of Rs. 1,50,94,363/-. These ground of appeal are identical to the ground of appal for A.Y. 2007-08. We have already allowed the identical ground of appeal for A.Y. 2007-08. Thus, following the principle of consistency, these grounds of appeal are allowed with similar direction.

20. In the result, ground no. II & III are allowed.

21. Ground No. IV relates to addition on account of Transfer Pricing Adjustment towards interest on outstanding balances of the Associate Enterprises for Rs. 44,21,973/-. The Ld. AR of the assessee submits that this ground of appeal is covered in favour of assessee in assessee's own case for A.Y. 2012-13. On going through the order of Tribunal for A.Y. 2012-13. The Ld. DR for the Revenue conceded that this ground of appeal is covered in favour of assessee.

22. We have considered the submission of both the parties and noted that similar ground of appeal was raised by assessee in appeal for A.Y. 2012-13. The co-ordinate bench of Tribunal passed the following order:

> **24.** We find from records that the AO has treated the debit balance outstanding on the year end as an "International Transaction" and have made proposed addition of notional interest. Now the question arises whether outstanding debit balance with the associate company cannot be regarded as an 'International Transaction' within the meaning of section 92B of the Act. Further, Ld Counsel drew our attention to section 92B of the Act which defines the term "international transaction" used in section 92(1) of the Act as under:—
>
> > "International transaction means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more enterprises."
>
> As will be observed from the above provision the outstanding debit balances with the associates is not directly covered within the ambit of 'international transaction'. Also, the terms "any other transaction having a bearing on the profits, income, losses or assets of such enterprises" must be interpreted ejusdem generis with the transactions mentioned in the preceding clause or at least analogous to it and therefore would not include the provision of guarantee for loans taken by associate enterprises. In view of the above, we are of the view that it is the real income and not the hypothetical income which is to be taxed and real income is to be ascertained from the realistic and practical point of view as held by Hon'ble Supreme Court in the case of *UCO Bank* (*Supra)*. Hence, we delete the disallowance and reverse the orders of the lower authorities.

23. Thus, considering the decision of Tribunal in assessee's own case on identical ground of appeal for A.Y. 2012-13. Therefore, respectfully following the decision of co-ordinate bench, this ground of appeal raised by assessee is allowed.

24. Ground No. V & VI relates to Long Term Capital Gain and Business Income. The Ld. AR of the assessee submits that he is not pressing these

grounds of appeal. Considering the submission of Ld. AR, Ground No. V & VI are dismissed as not pressed.

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

ITA No. 6055/Mum/2014 for A.Y. 2008-09 by Revenue

26. Ground No. 1 relates to deleting the addition on account of Transfer Pricing Adjustment towards this involve in guarantee on loan and advances to Associate Enterprises for Rs. 60,48,000/-. At the outset of hearing, the Ld. AR of the assessee submits that this ground of appeal is also covered in favour of assessee in assessee's own case for A.Y. 2012-13. The Ld. AR of the assessee further submits that corporate guarantee given to third party in favour of Associate Enterprises is not an international transaction as envisaged under section 92 of the Act. In support of his submission, the Ld. AR of the assessee relied upon the decision of Bharti Airtel Ltd. v. Addl CIT (63 SOT 113((Del.), Siro Clinpharm Private Ltd. v DCIT (ITA No. 2618 of 2014)(Mum.), Marico Ltd. v. ACIT (70 taxmann.com 214) (Mum.) & Videocon Industries Ltd. v. Addl. CIT (55 taxmann.com 263)(Mum.).On the other hand, the Ld. DR for the Revenue fairly conceded to the submission of Ld. AR of the assessee.

27. We have considered the submission of the parties and find that similar ground of appeal was raised by assessee before the Tribunal in appeal for A.Y. 2012-13. The co-ordinate bench of the Tribunal passed the following order:

16. We find that Delhi Tribunal in the case of *Bharti Airtel Ltd.* v. *Addl. CIT* [2014] 63 SOT 113/43 taxmann.com 150, held as under:

> "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 is, as discussed above, excluded.
>
> 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 intra AE international transaction has some impact on profits, income, losses or assets. Clearly, these conditions are not satisfied on the facts of this case.
>
> We have held that even after the amendment in Section 92 B'by amending *Explanation* to Section 92 B, a corporate guarantee issued for the benefit of the AEs, which does not involve any costs to the assessee, does not have any bearing on profits, income, losses or assets of the enterprise and, therefore, it is outside the ambit of 'international transaction' to which ALP adjustment can be made. As we have decided the matter in favour of the assessee on this short issue, we see no need to address ourselves to other legal issues raised by the assessee and the judicial precedents cited before us.
>
> For the reasons set out above, and as we have held that the issuance of corporate guarantees in question did not constitute ' international transaction' within meanings thereof under section 92B, we uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned ALP adjustment of Rs 33,10,161. The assessee gets the relief accordingly."

17. We further notice that the decision of Ahmedabad Tribunal in the case of *Micro Ink Ltd.* v. *Addl. CIT* [2016] 157 ITD 132/[2015] 63 taxmann.com 353 (Ahd. - Trib.), which has followed the decision of *Bharti Airtel* (*supra*) held that issuance of corporate guarantees was in the nature of shareholder's activity/quasi capital, thus, could not be included in the ambit of international transaction u/s. 92(1) of the Act. Further, Ahmedabad Tribunal has distinguished the decision of Hon'ble Bombay High Court in the case of *CIT* v. *Everest Kento Cylinders Ltd.* [2015] 378

ITR 57/[2015] 232 Taxman 307/58 taxmann.com 254, wherein the assessee had actually charged for corporate guarantee fee, unlike in the case of the assessee as well as in the case of *Micro Ink Ltd.* (*supra*), for providing corporate guarantee. The Mumbai Tribunal in the case of *Siro Clinpharm (P.) Ltd.* v. *Dy. CIT* (in ITA No. 2618/M/2014) dated 31-03-2016 for AY 2009-10 following the decision of *Mirco Ink Ltd.* (*supra*) has, inter alia, held that issuance of corporate guarantees will not fall within the ambit of international transaction u/s. 92(1) of the Act. Thus, following the decisions of the co-ordinates benches of the Tribunal (*supra*), we in the present case are of the view that the above transaction does not fall within the purview of international transaction as defined under section 92B of the Act.

18. Further, we are in agreement with the argument of the assessee that even if providing corporate guarantee falls within the definition of "international transaction", in our view, providing such corporate guarantee by a parent company to its wholly owned subsidiary without charging any commission/fees would still be regarded as being at arm's length price, if such corporate guarantee was provided by the parent company for the overall benefit of the business of the group and therefore, ultimately benefiting the parent company itself. Having regard to the direct or indirect commercial interest of the Company, corporate guarantee is given with a view to safeguard and to further business interest. Hence, relying on the Hon'ble Supreme Court's decision in case of *S.A. Builders Ltd.* v. *CIT* [2007] 288 ITR 1/158 Taxman 74, wherein it has been held that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure and having regard to the circumstances of the case.

19. Further we have also gone through the decision of the Mumbai Tribunal in the case of *Asstt. CIT* v. *Nimbus Communications Ltd.* [2013] 145 ITD 582/34 taxmann.com 298 (Mum. - Trib.), wherein it was held as under:

> "For the guarantee given to the bank against the financial assistance given to its AEs, no commission was charged by the assessee-company on the ground that the said AEs were not benefited by the guarantee so given and it was the assessee who benefited as a result of commercial benefits secured for future. In support of this stand of the assessee, the assessee has contended that business strategy should be taken into consideration while making any TP adjustments in respect of such transactions and has relied on the OECD Transfer Pricing Guidelines issued in 2010. As stated in para 1.59 of the said guidelines, the business strategies should also be examined in determining comparability for transfer pricing purposes and certain illustrations of such business strategies are also given therein. As stated in para 1.60 of the said guidelines which has been relied upon by the assessee, business strategies also could include market penetration schemes and taxpayer seeking to penetrate a market or to increase its market share might temporarily charge a price for its product that is lower than the price charged for otherwise comparable products in the same market. As explained further,

> a taxpayer seeking to enter a new market or expand (or defend) its market share might temporarily incur higher costs and hence achieve lower profit levels than other taxpayers operating in the same market. The relevant facts of the present case do not indicate that there was any such business strategy adopted by the assessee in not charging commission in respect of guarantees issued for its AEs. As a matter of fact, there is nothing to suggest that any such business strategy was adopted by the assessee with specific intention or motive and the case has been sought to be made out merely on the basis of commercial expediency by claiming that the assessee was benefited as a result of giving the guarantees in the form of commercial benefits secured for future."
>
> **20.** Thus, the above decision of the Mumbai Tribunal reiterates the proposition of the assessee that when the guarantee has been given by the assessee results in a direct or indirect benefit to the assessee itself, then there arises no need to charge any commission on the same. Thus, following the decisions of the co-ordinates benches of the Tribunal (*supra*), we, in the present case are of the view that the above transaction does not fall within the purview of international transaction as defined under section 92B of the Act and hence, the orders of the lower authorities are reversed. This issue of assessee's appeal is allowed.

28. Considering the decision of Tribunal in assessee's own case, we do not find any illegality or infirmity in the order passed by Ld. CIT(A) in deleting the adjustment in guarantee on loans and advances to Associate Enterprises.

29. In the result, ground of appeal raised by Revenue is dismissed.

30. Ground No.2 relates to directing the Assessing Officer to re-compute the addition based on average LIBOR method. The Ld. AR of the assessee submits that as the entire addition on interest on shareholder deposit is deleted by Tribunal in assessee's own case for A.Y. 2012-13. Hence, this ground of appeal raised by Revenue is liable to be dismissed by following the said order.

31. We have considered the submission of the parties. We have noted that we have already allowed the ground of appeal relates to addition on account of Transfer Pricing Adjustment in relation to non-interest bearing shareholder

deposit on the basis of decision of Tribunal in assessee's own case for A.Y. 2012-13. Thus, we do not find any merit in the ground of appeal raised by Revenue as the same has become infructuous.

32. In the result, this ground of appeal is dismissed.

33. Ground No. 3 & 4 relates to deleting the addition of disallowance under section 14A r.w.r 8D to the computation of book profit under section 115JB of the Act. We have noted that this ground of appeal is identical to the ground of appeal raised by Revenue in appeal for A.Y. 2007-08. As we have already dismissed the identical ground of appeal. Therefore, considering the principle of consistency, the Assessing Officer is directed to re-compute the book profit as per direction on ground no. 1 & 2 in ITA No. 557/Mum/2012 for A.Y. 2007-08.

34. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 2nd day of April 2018.

Sd/-	Sd/-
(R.C. SHARMA)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 02/04/2018

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER
(Asstt.Registrar)
ITAT, Mumbai