

**IN THE INCOME TAX APPELLATE TRIBUNAL
“K” Bench, Mumbai**

**Before Shri S. Rifaur Rahman, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA Nos.2927 & 2928/Mum/2018
(Assessment Years: 2010-11 & 2011-12)**

IL & FS Transportation Networks
Limited, The IL & FS Financial
Center, Plot No.C-22, Room No.
460, 4th Floor, G Block, Bandra-
Kurla Complex, Bandra (E),
Mumbai – 400 051

PAN – AABCC5460A

(Appellant)

Vs.

Addl. Commissioner of
Income-tax, Range -14(2),
[Earlier Addl. commissioner of Income-tax
Range-10(1), Mumbai]
Aaykar Bhavan, Maharshi Karve
Road, Marine Lines,
Mumbai – 400 020

(Respondent)

**ITA Nos.3145 & 3146/Mum/2018
(Assessment Years: 2010-11 & 2011-12)**

DCIT -14(2)(1),
432, 4th Floor, Aayakar Bhavan,
Mumbai – 400 020

(Appellant)

Vs.

M/s IL & FS Transportation Network
Ltd., IL & FS Financial Centre, 8th
Floor, C-22, G Block, B.K.C.
Bandra (E),
Mumbai – 400051
PAN – AABCC5460A

(Respondent)

Appellant by: Shri Sandeep Bhalla, A.R
Respondent by: Shri Sushil Kumar Mishra, D.R

Date of Hearing: 07.01.2021
Date of Pronouncement: 28.01.2021

ORDER

PER RAVISH SOOD, JM

The captioned cross appeal are directed against the
respective orders passed by the CIT(A)-56, Mumbai, dated 12.02.2018 and

13.02.2018 for A.Y 2010-11 and A.Y 2011-12. As common issues are involved in the aforesaid appeals, the same, therefore, are being taken up and disposed off by way of a consolidated order. We shall first take up the cross appeals for A.Y. 2010-11. The assessee in its appeal has assailed the impugned order on the following grounds:

- “1. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in setting aside the issue regarding disallowance u/s. 14A read with Rule ("r.w.r") 8D(2)(ii) regarding the disallowance of interest to the file of the Assessing Officer to examine the issue a fresh. The order passed by the Ld. Commissioner of Income-tax (Appeals) is bad in law.
2. On the facts and in the circumstances of the case and in law, the Appellant prays that disallowance u/s.14A r.w.r 8D(2)(ii) regarding the disallowance of interest amounting to INR 9,52,55,812 be deleted.
3. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in setting aside the issue regarding disallowance u/s. 14A r.w.r 8D(2)(iii) regarding the disallowance of administrative expenses to the file of the Assessing Officer to examine the issue a fresh. The order passed by the Ld. Commissioner of Income-tax (Appeals) is bad in law.
4. On the facts and in the circumstances of the case and in law, the Appellant prays that disallowance u/s. 14A r.w.r 8D(2)(iii) regarding the disallowance of administrative expenses amounting to INR 2,68,77,514 be deleted and the said disallowance be restricted to INR 88,26,166.

Disallowance under Transfer pricing

5. On the facts and in the circumstances of the case and in law prevailing on the subject, the Ld. Commissioner of Income-tax (Appeals) has erred in confirming the action of the Assessing Officer/Transfer Pricing Officer in making a transfer pricing adjustment of INR 2,36,59,502 in respect of the guarantee / counter guarantee given by the Appellant to various banks and other corporate bodies for and on behalf of the associate enterprise.
6. On the facts and in the circumstances of the case and in law prevailing on the subject, the Appellant submits that the international transaction of providing guarantee / counter guarantee to various banks and other corporate bodies for and on behalf of the associate enterprise is at arm's length and no adjustment was required to be made in respect thereof and the stand taken by the Assessing Officer/ Transfer Pricing Officer is incorrect and illegal and the Ld. Commissioner of Income-tax (Appeals) ought to have held as such.
7. The Id. TPO has erred in adopting an arbitrary approach of determination of yield of BB+ bonds at 9.77% and thereafter adding an ad-hoc 20% to determine the yield of BB rated bonds. Further, the TPO has erred in determination of the arm's length corporate guarantee rate at 3.046% in respect of the guarantee / counter

guarantee given/arran⁹e by the Appellant based on the said arbitrary approach. The Appellant submits that the said approach is arbitrary, ad-hoc & not justified.

8. Further, the Appellant prays that no addition by way of adjustment in respect or the international transaction is warranted and that the addition made by the Learned Assessing Officer upheld by the Ld. Commissioner of Income-tax (Appeals) amounting to INR 2,36,59,502 is not justified and be deleted.

General

9. Each one of the above grounds of appeal is without prejudice to the other.
10. The appellant reserves the right to add, alter of amend to the grounds of appeal.”

Further, the assessee had on two occasions raised before us the following additional grounds of appeal:

- “11 Without prejudice to Ground No.1 to Ground No.4, on the facts and circumstances of the case, the Appellant prays that the disallowance under Sec. 14A of the Act should be restricted to the extent of exempt income earned during the year.”

AND

- “12. The transfer pricing officer [TPO] / Commissioner of income-Tax [CIT(A)] has erred in not considering corporate guarantee charges recovered from its AE (Elsamex SA) amounting to Rs. 3,63,17,590 while making transfer pricing addition of Rs. 2,26,04,671 especially when charges recovered from the AE on account of stand by letter of credit (SBLC) were considered by the TPO when computing disallowances for SBLC given by ILFS Limited.
13. Without prejudice to the above ground, the appellant contends that the excess fees collected from its AE on account of SBLC amounting to Euro 42,951 (equivalent to INR 26,01,051) and on account of Letter of Comfort amounting to Euro 44,716 (equivalent to INR 27,08,026) be adjusted against the alleged addition made of INR 2,26,04,671, thereby restricting the transfer pricing adjustment to INR 1, 72,95,592.
14. The CIT(A) has erred in arriving at the Guarantee Fees charges 3.046% for corporate guarantee provided in foreign currency to its overseas AE (Elsamex SA) when the transfer pricing addition on interest on foreign currency loan to another AE (situated in Singapore) was deleted by the CIT(A) on the premise that the F/MMDA rates cannot be applied to foreign currency loan, hence, a similar position should apply to foreign currency guarantee provided to its AE.
15. Without prejudice to the above ground, the appellant contends that no show cause notice was issued for applying Fixed Income Money Market and Derivatives Association of India (FIMMDA) rates for benchmarking the guarantee transaction.
16. The appellant contends that the even if the Loss Given Default (LGD) approach is adopted for benchmarking corporate guarantee fees, as was done in AY 2011-12, no addition is warranted as total guarantee fee

charges recovered by the appellant from its overseas AE ranging from 2.25% to 3.6% is higher than the rate arrived at by adopting LGD approach.

17. Without prejudice to the above grounds, the appellant contends that the judicial precedents, including the jurisdictional High Court and co-ordinate bench of the Tribunal in group company's case have accepted that the corporate guarantee charge, if any, should be restricted to 0.5% and the appellant having recovered higher guarantee charges no transfer pricing addition is warranted."

On the other hand the revenue is aggrieved with the order of the CIT(A) on the following ground of appeal before us:

- "1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in advising the AO to follow the decision in the case of HDFC Bank, Mumbai vs. DCIT-2(3), Mumbai & Ors Dt. 25.02.20 16 r.w. CIT vs. HDFC Bank Ltd. (2014) 366 TTR 505 (Bom.)(HC) while calculating the disallowance u/s 14A r.w.r 8D, without considering the fact that the order of HDFC Bank did not address the aspect of determination of disallowance u/s 14A as per rule 8D which was applicable from A.Y. 2008-09 onward."
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in advising the AO to consider only those Investment made in the Non-Subsidiary company which have yielded dividend income for the purpose of the disallowance u/s 14A r.w.r. 8D(2)(iii) without appreciating that the CBDT Circular No. 5 of 2014 dt. 11.02.2014 clearly states that an amount equal to one-half percent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance-sheet of the assessee, on the first day and "till last day of the previous year" needs to be disallowed.
3. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in not appreciating that the CBDT circular does not differentiate between investment which have yielded dividend income during the year and investment which may yield divided income.
4. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the Disallowance of club expenses of Rs.4,79,225/- without appreciating the case laws relied upon by the AO, wherein it has been held that expenditure on account of payment of club expenses of the assessee company's executives is not an allowable business expenditure.
5. The appellant prays that the order of CIT(A) on the above ground be reversed and that of the assessing be restored.
6. The appellant craves leave to amend or alter any grounds which may be necessary."

On a perusal of the aforesaid additional grounds of appeal, we find that the assessee had sought an adjudication of the respective issues therein

involved, based on the facts available on record. As no new facts would be required to be looked into for the purpose of adjudicating the aforesaid issues, therefore, we admit the same in light of the judgment of the **Hon'ble Supreme Court** in **National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC)**.

2. Briefly stated, the assessee company which is an established ISO 9000:2001 surface transportation infrastructure company had e-filed its return of income for A.Y 2010-11 on 16.09.2010, declaring a total income of Rs. 492,98,20,007/-. The return of income filed by the assessee was initially processed as such under Sec. 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. Observing, that the assessee had during the year under consideration entered into international transactions with its Associate Enterprises (for short 'AEs'), a reference under Sec. 92CA(1) was made by the A.O to the Addl. CIT, Transfer Pricing Officer-1(6), (for short 'TPO'), Mumbai, for benchmarking the said transactions. As per order passed under Sec. 92CA(3), dated 29.01.2014 the TPO made a transfer pricing adjustment of Rs. 8,25,38,225/-, as under:

Sr. No.	Particulars	Amount
1.	Adjustment as regards the interest charged by the assessee on a loan advanced to its AE viz. I IPL, Singapore.	Rs. 5,88,79,175/-.
2.	Adjustment as regards providing of Letter of Comfort (LOC) and Standby Letter of Credit (SBLC) to foreign banks in respect of credit facilities provided to its AE, viz. ELSAMEX SA.	Rs. 2,36,59,502/-.

The AO after receiving the order passed by the TPO under Sec. 92CA(3), dated 29.01.2014, therein, passed a draft assessment order under Sec. 143(3) r.w.s 144C(1), dated 28.03.2014. As the assessee did not opt for filing of objections before the Dispute Resolution Panel (for short 'DRP'), therefore, the A.O framed the assessment vide his order passed under Sec. 143(3) r.w.s. 144C(3), dated 22.05.2014 and assessed the income under the normal

provisions at Rs. 501,28,37,460/- and determined the 'book profit' under Sec. 115JB at Rs. 497,12,68,707/-.

4. Aggrieved, the assessee assailed the order passed by the A.O under Sec. 143(3) r.w.s 144C(3), dated 22.05.2014 in appeal before the CIT(A). It was stated by the assessee that the A.O had erred in declining its claim for restricting the disallowance under Sec. 14A r.w. Rule 8D to an amount of Rs.88,26,166/- as against Rs.12,21,33,326/- that was offered in the return of income. On a perusal of the records, it was observed by the CIT(A) that the suo motto disallowance under Sec. 14A r.w Rule 8D of Rs.12,21,33,326/- offered by the assessee in its return of income was comprised of, as under :

Sr. No.	Particulars	Amount
1.	U/rule 8D(2)(i)	Nil
2.	U/rule 8D(2)(ii)	Rs. 9,52,55,812/-
3.	U/rule 8D(2)(iii)	Rs. 2,68,77,514/-
	Total	Rs. 12,21,33,326/-

It was observed by the CIT(A) that as against the aforesaid suo motto disallowance of Rs.12,21,33,326/- offered by the assessee in its return of income, it had in the course of the assessment proceedings sought scaling of the same to an amount Rs. 88,26,166/- under Rule 8D(2)(iii). It was noticed by the CIT(A) that the A.O had declined to consider the aforesaid revised claim of the assessee, for the reason, that as it was not raised on the basis of any revised return of income, the same, thus, in light of the judgment of the Hon'ble Supreme Court in the case of Goetz (India) Ltd. Vs. CIT (2006) 204 CTR 182 (SC) could not be admitted. However, the CIT(A) drawing support from the judgment of the Hon'ble High Court of Bombay in CIT Vs. Pruthvi Brokers and Shareholders (2012) 23 taxman.com 23 (Bom) held a conviction that the assessee's claim for reduction of disallowance under Sec. 14A did merit consideration by the A.O. Accordingly, the CIT(A) restored the matter to the file of the A.O and directed him to consider the aforesaid claim for reduction of disallowance that was raised by the assessee. The CIT(A) while restoring the matter to the file of the A.O also issued certain specific

directions/guidelines to be followed by the A.O while readjudicating the aforesaid issue, viz. (a) that the judgments of the Hon'ble High Court of Bombay in the case of HDFC Bank Ltd. Vs. DCIT-2(3), Mumbai & Ors., dated 25.02.2016 r.w CIT vs. HDFC Bank Ltd. (2014) 366 ITR 505 (Bom) be followed in the course of the 'set aside' proceedings; (b) that while computing the disallowance under Sec. 14A r.w. Rule 8D (2)(iii) only the investments which were made by the assessee in its non-subsidiary company that had yielded dividend income were to be considered; and (c) that the investments earning interest income were to be eliminated while computing the disallowance under Sec.14A r.w Rule 8D(2)(ii). Also, the CIT(A) taking cognizance of the order passed by the Tribunal in the assessee's own case for A.Y. 2008-09, directed the A.O that while re-computing the disallowance under Sec. 14A r.w Rule 8D, the observations recorded by the Tribunal on the issue as to whether or not the investments made by the assessee on account of business exigency in different companies and not for the purpose of earning dividend income be considered. Insofar the claim of the assessee that the A.O as per the mandate of law was obligated to record reasons for making the disallowance, the same, did not find favour with the CIT(A). In terms of his aforesaid observations, the CIT(A) directed the A.O to reconsider the assessee's claim for reduction of disallowance u/s 14A. As regards the assessee's claim that the A.O had erred in disallowing its claim for deduction of club expenses of Rs. 4,79,225/-, the CIT(A) observed that as the aforesaid disallowance was made by the A.O without examining as to whether or not the aforesaid expenditure was incurred wholly and exclusively by the assessee for its business purpose, thus, the same could not be sustained. As regards the transfer pricing adjustment of Rs. 2,36,59,502/- made by the A.O/TPO in respect of the guarantee/counter guarantee given by the assessee to the various foreign banks and other corporate bodies for and on behalf of its AE, viz. Elsamex S.A, it was observed by the CIT(A) that the TPO in his order had narrated the basis for computing the arm's length price. Observing, that the reasoning given by the TPO was more logical and credible as in comparison to a simpliciter reliance

placed by the assessee on a letter received from “Credit Analysis And Research Ltd” (for short “CARE”), the CIT(A) finding no infirmity in the transfer pricing adjustment made by the A.O/TPO, thus, confirmed the same. Accordingly, on the basis of his aforesaid observations the CIT(A) partly allowed the appeal of the assessee.

5. Aggrieved, both the assessee and the revenue have assailed the order of the CIT(A) in appeal before us. Adverting to the grievances of the assessee, we find that it had inter alia assailed the order of the CIT(A), on the ground, that the appellate authority instead of accepting its claim for reduction of the disallowance u/s 14A r.w Rule 8D to an amount of Rs. 88,26,166/- as against that offered by it in its return of income at Rs. 12,21,33,326/-, had erred in restoring the issue to the file of the A.O for reconsideration. In order to buttress its aforesaid claim, it was submitted by the Id. A.R that the Tribunal had in the assessee’s own case for the immediately preceding year i.e A.Y 2009-10 in ITA No. 2393 & 2568/Mum/2015, dated 19.12.2018, wherein identical facts were involved, had upheld the order of the CIT(A). Alternatively, it was submitted by the Id. A.R that the disallowance under Sec. 14A was liable to be restricted only to the extent of the exempt dividend income that was received or receivable by the assessee during the year under consideration. As regards the confirming of the transfer pricing adjustment of Rs.2,36,59,582/- in respect of the guarantee/counter guarantee given by the assessee to various foreign banks and other corporate bodies for and on behalf of its AE, viz. Elsamex SA, it was submitted by the Id. A.R that as the aforesaid transaction was at arm’s length, therefore, no adjustment was called for in the hands of the assessee. Taking us through the observations of the lower authorities in context of the aforesaid issue, it was submitted by the Id. A.R that the TPO while benchmarking the aforesaid transaction had erred in not considering the corporate guarantee charges of Rs. 5,67,28,794/- that were recovered by the assessee from its AE, viz. Elsamex SA. In order to buttress its aforesaid claim, the Id. A.R had drawn our attention to Page 180 of

the assessee's paper book (for short 'APB') wherein the details as regards the reimbursement of bank guarantee charges of Rs. 5,67,28,794/- by the AE, viz. Elsamex SA to the assessee company were provided. On the basis of his aforesaid contention, it was averred by the Id. A.R that no adjustment as regards providing of Corporate guarantee/Letter of Comfort (LOC) and Stand By Letter Of Credit (SBLC) to the foreign banks by the assessee, for and on behalf of its AE, viz. Elsamex SA, was liable to be made.

6. Per contra, the Id. Departmental Representative (for short 'D.R') in order to support the disallowance made by the A.O under Sec.14A r.w. Rule 8D relied on the CBDT Circular No. 5 of 2014, dated 11.02.2014. As regards the transfer pricing adjustment made in respect of the Corporate guarantee that was given by the assessee to the various foreign banks and other corporate bodies for and on behalf of its AE, it was submitted by the Id. D.R that in the backdrop of the claim of the assessee's counsel that the TPO/CIT(A) had failed to consider the amount of the bank guarantee charges reimbursed by the AE, viz. Elsamex SA to the assessee company, the matter may be restored to the file of the CIT(A) for fresh adjudication after carrying out necessary verification.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. We shall first deal with the observation of the CIT(A), wherein, he had directed the A.O to consider the assessee's claim for reduction of the disallowance u/s 14A r.w Rule 8D to an amount of Rs. 88,26,166/-, as against that suo motto offered by it in its return of income at Rs. 12,21,33,326/-. As noticed by us hereinabove, the A.O was of the view that in light of the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs. CIT (2006) 204 CTR 182 (SC), in the absence of a revised return of income, the seeking of reduction of the disallowance that was suo motto offered by the assessee in its return of

income was not tenable. In fact, the A.O was of the view that in case the assessee wanted to raise the aforesaid claim, then, it was obligated to do so by filing a revised return of income. On the contrary, the CIT(A) relying on the judgement of the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers and Shareholders (2012) 23 taxman.com 23 (Bom), had observed, that as there was no embargo on considering of the aforesaid claim of the assessee in the course of the appellate proceedings, thus, the contention of the assessee did merit acceptance. Accordingly, the CIT(A) restored the issue to the file of the A.O, with a direction to examine the assessee's claim for reduction of the disallowance u/s 14A r.w Rule 8D to an amount of Rs. 88,26,166/-, as against that was suo motto offered by it in its return of income at Rs. 12,21,33,326/-. As is discernible from the order of the CIT(A), we find that he had while restoring the aforesaid issue directed the A.O to follow certain directions, viz. :

- “(a) Follow decision in the case of HDFV Bank, Mumbai Vs. DCIT-2(3), Mumbai & Ors dated 25.02.2016 r.w CIT Vs. HDFC Bank Ltd. (2014) 366 ITR 505 (Bom).(HC)
- (b) Investments made in the non-subsiary company which have yielded dividend income can only be considered for the purpose of the disallowance under Sec. 14A r.w. rule 8D(2)(iii)
- (c) Investment earning interest income is to be eliminated in computation of disallowance under Sec. 8D(2)(ii).

8. As both the assessee and the revenue are aggrieved with the observations of the CIT(A) w.r.t the issue of disallowance u/s 14A r.w Rule 8D, we shall, therefore, deal with the same. On a perusal of the respective grounds of appeal raised by both the parties, we find, that the assessee is inter alia aggrieved with the order of the CIT(A) on the issue of disallowance u/s 14A, for the reason, that instead of accepting its claim for restricting the disallowance u/s 14A r.w Rule 8D to an amount of Rs. 88,26,166/- as against that which was suo motto offered in the return of income at Rs. 12,21,33,326/-, the CIT(A) had restored the matter to the file of the A.O for reconsideration. As is discernible from the records, the assessee in the course of the assessment proceedings had sought reduction of the disallowance u/s 14A on

two counts, viz. (a). that the disallowance of interest expenditure offered by the assessee in its return of income U/rule 8D(2)(ii) of Rs.9,52,55,812/- be reduced to Nil; AND (b). that the disallowance of administrative expenditure offered by the assessee in its return of income U/rule 8D(2)(iii) of Rs.2,68,77,514/- be restricted to Rs.88,26,166/-. As observed by the CIT(A), the assessee had sought for reduction of the disallowance u/s 14A on the basis of exhaustive reasons. On a perusal of the assessment order, we find that the assessee vide its letter dated 13.03.2014 filed with the A.O had given multiple reasons for reduction of the aforesaid disallowance u/s 14A, viz. (i) that as per the terms of NHA I the assessee on being awarded a project was compelled to incorporate a separate "Special Purpose Vehicle" (SPV) for executing the project and being a promoter had to invest as equity holder as per the terms of the concessionaire agreement; (ii) that the investments made by the assessee company to the extent of its net worth were out of its own funds, internal accruals or opening balances of internal accruals; (iii). that the borrowings were not utilised for equity investments of domestic companies; (iv). that the capital gains from the equity investments were taxable etc. In our considered view, the exhaustive contentions that were raised by the assessee to buttress its aforesaid claim for reduction of the disallowance under Sec. 14A were required to be verified and could not have been accepted by the CIT(A) on the very face of it. Insofar support drawn by the Id. A.R on the order passed by the Tribunal in the assessee's own case for the immediately preceding year i.e A.Y 2009-10, ITA No. 2393/Mum/2015 is concerned, the same being distinguishable on facts would not assist the case of the assessee in context of the issue under consideration. Accordingly, finding no infirmity in the restoring of the issue pertaining to the assessee's claim for reducing the disallowance under Sec. 14A r.w. Rule 8D by the CIT(A), we uphold his order to the said extent. However, before parting, we may herein observe that the claim of the assessee that the disallowance under Sec. 14A is liable to be restricted to the extent of the exempt income received or receivable by the assessee during the year in question, the same, merits acceptance. Our

aforesaid view is fortified by the judgement of the **Hon'ble High Court of Delhi** in **Joint Investments Pvt. Ltd. Vs. CIT (2015) 372 ITR 694 (Del)**. We, thus, in terms of our aforesaid observations uphold the restoration of the aforesaid issue by the CIT(A) to the file of the A.O, with a rider that the disallowance be restricted to the extent of the exempt income received or receivable by the assessee during the year under consideration.

9. We shall now deal with the claim of the revenue that the CIT(A) while directing the A.O to reconsider the assessee's claim for reduction of disallowance u/s 14A, had erred, in directing the A.O to follow the decisions of the Hon'ble High Court of Bombay in the case of HDFC Bank, Mumbai Vs. DCIT -2(3), Mumbai and Others, dated 25.02.2016 r.w. CIT Vs. HDFC Bank Ltd, (2014) 366 ITR SOT (Bom), for the reason, that the said judicial pronouncements did not address the aspect of determination of disallowance under Sec. 14A as per Rule 8D that was applicable only w.e.f A.Y. 2008-09. We are afraid that the aforesaid claim of the revenue does not find favour with us. At the outset, we may herein observe that the judgment of the Hon'ble High Court in the case of HDFC Bank Ltd. Vs. DCIT (2016) 383 ITR 529 (Bom) pertains to A.Y 2008-09, and the issue before the Hon'ble High Court was the disallowance made by the A.O in the case of the assessee before them u/s 14A r.w Rule 8D vide his order passed u/s 143(3), dated 22.12.2010. Be that as it may, the principle laid down by the Hon'ble High Court in its aforesaid judgments was that in a case where the assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in tax-free securities, it was to be presumed that investment made by the assessee was out of the interest-free funds available with it and no disallowance was warranted u/s 14A. In our considered view, the CIT(A) had rightly directed the A.O to consider the aforesaid judicial pronouncements in the course of the 'set aside' proceedings. As regards the claim of the revenue that the CIT(A) was in error in directing the A.O to consider only those investments made in non-subsidiary company which had yielded dividend

income for the purpose of disallowance under Sec. 14A r.w. Rule 8D(2)(iii), as the same was contrary to the CBDT Circular No. 5 of 2014, dated 11.02.2014, we are unable to persuade ourselves to accept the same. Similar reliance placed by the revenue on the aforesaid CBDT Circular No. 5 of 2014, dated 11.02.2014 was rejected by the **Hon'ble High Court of Madras in Redington India Ltd. Vs. Addl. CIT (2016) 97 CCH 219 (Mad)** and by the **Hon'ble High Court of Delhi in PCIT Vs. IL & FS Development Company Ltd. (2017) 399 ITR 483 (Del)**. At the same time, we in light of the judgment of the **Hon'ble Supreme Court in Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC)** are unable to subscribe to the observation of the CIT(A), wherein he had inter alia directed the A.O to consider only those investments made in non-subsidiary companies which had yielded dividend income for the purpose of disallowance under Sec. 14A r.w Rule 8D(2)(ii). Accordingly, the aforesaid observation/direction of the CIT(A) is expunged and the latter's order is modified to the said extent. In terms of our aforesaid observations the **Grounds of appeal Nos. 1 to 4** raised by the assessee company are dismissed, while for the **additional ground of appeal No. 12** raised by the assessee is allowed. The **Grounds of appeal Nos. 1 to 3** raised by the revenue are partly allowed in terms of our aforesaid observations..

10. We shall now deal with the claim of the assessee that the CIT(A) had erred in confirming the transfer pricing adjustment of Rs.2,36,59,502/- made by the A.O/TPO in respect of the guarantee/counter guarantee that was given by the assessee to various banks and other corporate bodies for and on behalf of its AE, viz. Elsamex SA. As observed by us hereinabove, the aforesaid AE, viz. Elsamex SA had availed various fund based/non-fund based facilities from various foreign banks outside India, to facilitate which, the assessee had given Corporate guarantee and provided Letter of Comfort and Stand By Letter of Credit to the foreign banks. In respect of the aforesaid transactions, the assessee based on the market practice and mutual agreement had charged the AE a guarantee fee @ 1% per annum. It was the

claim of the assessee before the lower authorities that as the entire equity of its AE, viz. Elsamex SA was taken over by it and its other associate concerns, it was, thus, in their best interest to ensure that the aforesaid AE had the requisite funds for carrying out its business activities. Accordingly, to facilitate funding of the AE, viz. Elsamex SA it was submitted by the assessee that it had provided guarantees, Letter of Comfort, SBLC to foreign banks for and on behalf of the said AE. In order to impress upon the lower authorities that the guarantee fees charged to the AE @ 1% was justified, it was submitted by the assessee that it had also recovered from its AE viz. Elsamex SA, the guarantee charges (ranging between 1.25% to 2.60% depending upon the nature of guarantee/letter of comfort/SBLC) of the banks that had issued the guarantee/SBLC in favour of the AE. Accordingly, it was the claim of the assessee before the lower authorities that the total guarantee charges levied on the AE, viz. Elsamex SA ranged between 2.25% to 3.60%. As is discernible from the order passed by the TPO under Sec. 92CA(3), dated 29.01.2014, we find that the assessee for the purpose of benchmarking the aforesaid international transaction of providing guarantee/counter guarantee to the various banks and the other corporate bodies for and on behalf of its AE, had used external CUP to arrive at the arm's length price of the guarantee charges. It was stated by the assessee before the TPO that its credit rating as per the letter received from "Credit Analysis & Research Ltd." (for short 'CARE') was a "BBB +", while for the credit rating of its AE, viz. Elsamex SA was "BB". In the course of the proceedings the TPO called for information under Sec. 133(6) from CRISIL about the average yield on the long term instruments during the year under consideration i.e F.Y. 2009-10, which was furnished, as under:

Ratings	F.Y. 2009-10		
	1-2 years	2-3 years	5 years
AAA	6.81%	7.55%	8.25%
AA+	7.20%	7.98%	8.71%
AA	7.43%	8.21%	8.94%
AA-	7.77%	8.49%	9.24%
A+	8.16%	8.89%	9.62%

A	8.63%	9.38%	10.15%
A-	9.46%	10.38%	11.06%
BBB+	9.77%	10.73%	11.43%
BBB	10.68%	11.60%	12.28%
BBB-	11.86%	12.69%	13.37%

On the basis of the aforesaid details, it was gathered by the TPO that the yield from “BBB” grade corporate bond i.e “Investment grade bonds” was 9.77% for the year under consideration i.e F.Y. 2009-10. However, as the yield rates for “BB” and “D” ratings were not available, therefore, the same was derived by the TPO by applying the following principles:

“As per the FIMMDA (Fixed Income Money Market and Derivatives Association of India), bonds and debentures, which are not rated by a rating agency or have become ‘unrated’ during their tenor, but a corresponding rated bond of the issuer exists, then:

1. The unrated bonds will be valued by marking up the credit spread by a minimum of 20% over the equivalent rated bond of similar tenure.
2. For the above purpose, “corresponding” would mean, if the unrated bond has maturity of ‘t’ years, the rated bond should have a maturity not less than to – 0.5 years.”

Accordingly, the yield on “BB” rated bonds were taken at 20% more than the BBB rated bonds [120% of 10.68 = 12.816%]. The benefit of 3.046% per annum [12.816% minus 9.77%] that had accrued to the AE was treated by the TPO as the arm’s length price. In the backdrop of his aforesaid deliberations, the TPO made the transfer pricing adjustment for the aforesaid transaction after considering the difference between 3.046% and the actual cost borne by the AE i.e the cost payable to the assessee as well as to the bank, as under:

Sr. No.	Particulars	As per TPO @ 3.046%	As charged by assessee	Difference	Conversion Rate	Amount in INR
		Euro	Euro			
1.	Stand By Letter of Credit	25,777	68,728	(42,951)	60.56	Nil
2.	Letter of Comfort	8,550	53,266	(44,716)	60.56	Nil
3.	Corporate Guarantee	5,55,695	1,82,434	3,73,261	60.56	2,26,04,671
	Guarantee fee on L/C Given by IL & FS Transportation Networks Limited	5,90,022	3,04,428	2,85,594		2,26,04,671
4.	Stand By Letter of Credit Given by IL & FS Limited	81,205	63,787	17,418	60.56	10,54,831
	Total Bank Guarantee Fee	6,71,227	3,68,214	3,03,012		2,36,59,502

11. In the backdrop of the aforesaid facts, the solitary contention which had been raised by the Id. A.R before us is that the TPO/CIT(A) had erred in failing to appreciate that over and above the corporate guarantee charges of 1%, the assessee had also recovered bank guarantee charges from its AE of Rs.5.67 crores (approx.), which are in the range of 1% to 2.6%. In order to fortify his aforesaid claim the Id. A.R had taken us through Page 180 of the 'APB', wherein the details as regards the reimbursement of bank guarantee charges of Rs. 5,67,28,794/- by the AE viz. Elsamex SA to the assessee are provided, which reads as under:

Reimbursement for Bank Guarantee Charges

Date	Amount	Details of Payment
16/06/2009	Rs. 8,85,827/-	Paid to IL&FS for Counter Guarantee given to the bank on behalf of Elsamex SA.
13/07/2009	Rs. 75,16,817/-	Commitment charges as levied by Axis Bank for Documentary credit (L/C) on behalf of Elsamex SA..
13/08/2009	Rs. 8,65,075/-	Paid to IL&FS for Counter Guarantee given to the bank on behalf of Elsamex SA.
30/09/2009	Rs. 8,65,074/-	Paid to IL&FS for Counter Guarantee given to the bank on behalf of Elsamex SA.
30/11/2009	Rs. 22,26,611/-	Renewal of Bank Guarantee on behalf of Elsamex SA
31/12/2009	Rs. 9,30,794/-	Paid to IL&FS for Counter Guarantee given to the bank on behalf of Elsamex SA.
15/01/2010	Rs. 72,79,800/-	Stand by letter of Credit/Bank Guarantee @2% on 5 Mn Euro on behalf of Elsmex SA
26/02/2010	Rs. 5,38,087/-	Paid to IL&FS for Counter Guarantee given to the bank on behalf of Elsamex SA.
31/03/2010	Rs. 3,52,09,197/-	Paid to IL&FS for Additional Counter Guarantee given to the bank on behalf of Elsamex SA.
31/03/2010	Rs. 4,11,512/-	Paid to IL&FS for Counter Guarantee given to the bank on behalf of Elsamex SA.
Total	Rs. 5,67,28,794/-	.

In the backdrop of the aforesaid facts, it is the claim of the Id. A.R that the TPO/CIT(A) while benchmarking the aforesaid international transaction of providing of guarantee/counter guarantee by the assessee to the various foreign banks and other corporate bodies for and on behalf of its aforesaid AE, viz. Elsamex SA, had failed to take into account the aforesaid amount of Rs.5,67,28,794/- that was recovered by the assessee from the AE by way of reimbursement of bank guarantee charges.

12. We have deliberated at length on the aforesaid issue. As observed by us hereinabove, it is the claim of the Id. A.R that the aforesaid bank guarantee charges of Rs. 5.67 crore that were recovered by the assessee from its AE, viz. Elsamex SA were not considered by the TPO while benchmarking the transaction of providing of guarantee/counter guarantee by the assessee to the various foreign banks and other corporate bodies for and on behalf of its aforesaid AE. It is further stated by the Id. A.R that if over and above the corporate guarantee charges of 1% charged by the assessee to its AE, the aforesaid bank guarantee charges of Rs. 5.67 crores recovered from the AE (which are in the range of 1.25% to 2.6%) are taken into consideration, then, no transfer pricing adjustment would be called for in the hands of the assessee. On being confronted with the aforesaid facts, the Id. D.R fairly submitted that the matter may be restored to the file of the TPO for considering the aforesaid claim of the assessee. In the backdrop of the aforesaid facts, we are of the considered view that as the aforesaid claim was not raised by the assessee before the lower authorities, therefore, in all fairness the matter requires to be restored to the file of the TPO for fresh adjudication after considering the same. Accordingly, we 'set aside' the issue to the file of the TPO, with a direction to consider the aforesaid claim of the assessee in the course of the 'set aside' proceedings. Needless to say, the assessee shall be afforded a reasonable opportunity of being heard in the course of the 'set aside' proceedings. The **Grounds of appeal Nos. 5 to 8 AND additional grounds of appeal no(s). 12 to 17** are allowed for statistical purposes in terms of our aforesaid observations.

13. We shall now advert to the claim of the revenue that the CIT(A) had erred in deleting the disallowance of club expenses of Rs.4,79,225/- made by the A.O, without appreciating that the said expenditure was not allowable as a business expenditure. On a perusal of the assessment order, we find that the assessee had claimed deduction of club expenses aggregating to Rs.4,79,225/- incurred by it during the year under consideration, as under:

Nature of expenditure	Amount (Rs.)
Bombay President Gold Club	2,98,250
The Gaekwad Baroda Club	1,13,274
Other	67,701
Total	4,79,225

However, the same were disallowed by the A.O, for the reason, that as membership of the club was a personal privilege entitling the member to use and enjoy the property of the club and all other amenities, benefits and facilities provided therein, it was, thus, not allowable as a business expenditure. Apart from that, we find that the A.O drawing support from a judgement of the Hon'ble High Court of Kerala in *Framatone Connector Oen Ltd. Vs. DCIT (2007) 294 ITR 559 (Ker)*, had also opined, that as aforesaid expenditure was in the nature of a capital expenditure, therefore, the same resulting in an enduring benefit was not to be allowed as a deduction. On appeal, the CIT(A) observed that as the A.O had without examining as to whether or not the aforesaid expenses were incurred by the assessee wholly and exclusively for its business had disallowed the same, thus, not finding favour with the view therein taken, the CIT(A) had vacated the said disallowance.

14. Before us, the Id. D.R relied on the assessment order. It was submitted by the Id. D.R that as the club expenses were not in the nature of business expenses, thus, the same had rightly been disallowed by the A.O. Per contra, the Id. A.R relied on the order of the CIT(A) in context of the aforesaid issue under consideration.

15. We have deliberated at length on the aforesaid issue, and find, that the issue pertaining to allowability of club expense as a revenue expenditure is squarely covered by the Judgment of the **Hon'ble High Court of Bombay** in the case of **Otis Elevator Company India Ltd. Vs. CIT (1992) 195 ITR 682 (Bom)**. In the said case, the Hon'ble High Court had approved the view taken by the Tribunal that the payment of club membership is allowable as a revenue expenditure. Also, we find, that a similar view had been arrived at by

the Hon'ble High Court of Punjab and Haryana in the case of **CIT Vs. Patyala Vs Groz Beckert Asia Limited (2013) 351 ITR 196 (P&H)** and by the Hon'ble High Court of Karnataka in **CIT vs. Infosys Technologies (No.1)(2012) 349 ITR 582 (Kar)**. Accordingly, on the basis of our aforesaid observations, we are of the considered view that the CIT(A) had rightly allowed the assessee's claim for deduction of the club membership fees of Rs.4,79,225/- as a revenue expenditure. Also, we concur with the observation of the CIT(A) that the rejection of the assessee's claim for deduction of club membership expenses by the A.O, de hors any verification on his part that as to whether or not the said expenditure was incurred by the assessee wholly and exclusively in the course of its business, also, cannot be sustained. The **Ground of appeal No. 4** raised by the revenue is dismissed.

16. The **Grounds of appeal Nos. 9 and 10** raised by the assessee AND **Grounds of appeal Nos. 5 & 6** raised by the revenue being general in nature are dismissed as not pressed.

17. The appeal of the assessee and that of the revenue are partly allowed for statistical purposes.

A.Y. 2011-12

ITA No. 2816/Mum/2016 – (Assessee's appeal)
ITA No. 3146/Mum/2018 – (Revenue's appeal)

18. We shall now take up the cross-appeals for A.Y. 2011-12. The assessee had raised before us the following grounds of appeal:

- “1. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in setting aside the issue regarding disallowance u/s. 14A read with Rule ("r.w.r") 8D(2)(ii) regarding the disallowance of interest to the file of the Assessing Officer to examine the issue a fresh. The order passed by the Ld. Commissioner of Income-tax (Appeals) is bad in law.
2. On the facts and in the circumstances of the case and in law, the Appellant prays that disallowance u/s. 14A r.w.r 8D(2)(ii) regarding the disallowance of interest amounting to INR 2848,50,067 be deleted.
3. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in setting

aside the issue regarding disallowance u/s. 14A r.w.r 8D(2)(iii) regarding the disallowance of administrative expenses to the file of the Assessing Officer to examine the issue a fresh. The order passed by the Ld. Commissioner of Income-tax (Appeals) is bad in law.

4. On the facts and in the circumstances of the case and in law, the Appellant prays that disallowance u/s.14A r.w.r 8D(2)(iii) regarding the disallowance of administrative expenses amounting to INR 5,42,28,196 be deleted and the said disallowance be restricted INR 1,28,91,432

Disallowance under Transfer pricing

5. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in setting aside the issue of determination of arm's length price in respect of international transaction of provision of guarantee / counter guarantee by Appellant to various banks and other corporate bodies for and on behalf of the associate enterprise to the file of the Ld. Assessing Officer/ Transfer Pricing Officer to examine the issue a fresh. The order passed by the Ld. Commissioner of Income-tax (Appeals) is had in law.
6. On the facts and in the circumstances of the case and in law prevailing on the subject. the Appellant submits that the international transaction of ' providing guarantee / counter guarantee to various banks and other corporate bodies for and on behalf of the associate enterprise is at arm's length and no adjustment was required to be made in respect thereof and the stand taken by the Assessing Officer/Transfer Pricing Officer is incorrect and illegal and the Ld. Commissioner of Income-tax (Appeals) ought to have held as such.
7. The Ld. TPO has erred in determination of the arm's length corporate guarantee rate at 2.58% in respect of the guarantee / counter guarantee given/arrange by the Appellant, based on the average corporate guarantee fee rate charged by the commercial banks as against the corporate guarantee issued by the Indian Holding Company to its AE, subsidiary company. The Appellant submits that the said approach is arbitrary, ad-hoc & not justified.
8. On the facts and in the circumstances of the case and in law, the Appellant prays that no addition by way of adjustment in respect of the international transaction is warranted and that the addition made by the Ld. Assessing Officer amounting to INR 3,89,69,865 is not justified and be deleted.
9. On a without prejudice basis, the Appellant submit that guarantee fee charged by the banks from the Appellant has also been recovered from the Associated Enterprises. The Appellant has recovered these charges from the Associated Enterprise over and above the guarantee fee and same should be reduced from the Guarantee fees computed by the Ld. Assessing Officer.

General

10. Each one of the above grounds of appeal is without prejudice to the other.
11. The Appellant reserves the right to add, alter or amend to the grounds of appeal."

Further, the assessee had raised before us the following additional ground of appeal:

- "5. Without prejudice to Ground No.1 and Ground No.4, on the facts and circumstances of the case, the Appellant prays that the disallowance under Sec. 14A of the Act should be restricted to the extent of exempt income earned during the year."

On the other hand the revenue is aggrieved with the order of the CIT(A) on the following ground of appeal before us:

- "1. On the facts and circumstances of the case and in law, the Id. CIT(A) erred in advising the AO to follow the decision in the case of HDFC Bank, Mumbai vs DCIT-2(3), Mumbai & Ors Dt. 25.02.2016 r.w. CIT vs HDFC Bank Ltd. (2014) 366 ITR 505 (Bom.)(HC) while calculating the disallowance u/s 14A r.w.r 8D, without considering the fact that the order of HDFC Bank did not address the aspect of determination of disallowance u/s 14A as per rule 8D which was applicable from A.Y. 2008-09 onward.
2. on the facts and circumstances of the case and in law, the Ld CIT(A) erred in advising the AO to consider only those Investment made in the Non- subsidiary company which have yielded dividend income for the purpose of the disallowance u/s 14A r.w.r. 8D(2)(iii) without appreciating that the CBDT Circular No. 5 of 2014 dt. 1102.2014 clearly states that an amount equal to one-half percent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance-sheet of the assessee, on the first day and "till last day of the previous year" needs to be disallowed.
3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that the CBDT circular does not differentiate between investment which have yielded dividend income during the year and investment which may yield divided income.
4. On the facts and circumstance of the case and in law, the Id. CIT(A) erred in going beyond his power u/s 251(1)(a) by setting aside the case to AO/TPO to conduct fresh benchmarking for determination of arm's length price of fee for corporate guarantee, letter of comfort, standby letter of credit provided to banks on behalf of AE, Elsamex SA, after giving opportunity of being heard to the assessee.
5. On the facts and circumstance of the case and in law, the Ld. CIT(A) erred in directing the AO/TPO to conduct fresh benchmarking for determination of arm's length price of fee for corporate guarantee, letter of comfort, standby letter of credit provided to banks on behalf of AE, Elsamex SA, ignoring the fact that for similar guarantees provided by the assessee on behalf of its AE, Elsamex S.A. in A.Y. 2012-13, the CIT(A) has upheld methodology used by the TPO to

benchmark Corporate Guarantee fee using bank guarantee rates with discount and restricted fee 1.80% instead of 2% proposed by the TPO.

6. On the facts and circumstance of the case and in law, the Ld. CIT(A) erred in directing the AO/TPO to conduct fresh benchmarking for determination of arm's length price of fee for corporate guarantee, letter of comfort, standby letter of credit provided to banks on behalf of AE, Elsamex SA, ignoring the fact that for similar guarantees provided by the assessee on behalf of its AE, Elsamex SA in A.Y. 2010-11, the CIT(A) has upheld action of TPO of charging of fee @ 3.046%.
7. The appellant prays that the order of CIT(a) on the above ground be reversed and that of the assessing be restored.
8. The appellant craves leave to amend or alter any grounds which may be necessary."

19. Briefly stated, the assessee had e-filed its return of income for A.Y 2011-12 on 18.09.2011, declaring an income of Rs. 4,86,67,22,043/- under the normal provisions of the Act. The return of income filed by the assessee was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

20. The A.O while framing the assessment inter alia made certain additions in the hands of assessee, viz. (i) transfer pricing adjustment of Rs.3,89,69,865/- as regards the international transaction of providing of guarantee fees by the assessee to its AE, viz. Elsamex SA; and(ii) declining of the claim of the assessee that the disallowance under Sec.14A of Rs.33,90,78,263/- that was offered on a suo motto basis in the return of income be restricted to Rs.1,28,91,432/-. Accordingly, the A.O assessed the income of the assessee at an amount of Rs. 490,56,91,908/-.

21. Aggrieved, the assessee assailed the assessment order before the CIT(A). Observing, that the issue pertaining to the disallowance made under Sec. 14A during the year under consideration remained the same as was there in the case of the assessee for immediately preceding year i.e A.Y. 2010-11, the CIT(A) following his order for the preceding yea, thus, on the same terms directed the A.O to follow the directions which were given while disposing off the assessee's appeal for the preceding years, viz. A.Y. 2010-

11. As regards the transfer pricing adjustment in respect of the international transaction of providing of guarantee/counter guarantee by the assessee to the various banks and other corporate bodies for and on behalf of its AE, viz. Elsamex SA, it was observed by the CIT(A) that the assessee had explained the basis for charging 1% guarantee fees from the AE, however, the TPO on the basis of the corporate guarantee fee that was charged by the banks, which worked out at 2.58%, had made an adjustment towards the arm's length price of the aforesaid transaction under consideration. Observing, that the **Hon'ble High Court of Bombay** in the case of **CIT(A) Vs. Glenmark Pharmaceuticals (ITA No.1302 of 2014)** and **M/s Everest Kento Cylinder Vs. DCIT (LTU)-1, Mumbai (ITA No. 1042/ Mum/2015)**, had observed, that for computing the arm's length price of guarantee commission, no comparison can be made between guarantee issued by commercial banks as against the corporate guarantee issued by a holding company for the benefit of its AE, as subsidiary company, thus, observed that the comparison made by the TPO was in conflict with the aforesaid orders of the jurisdictional High Court. In the backdrop of the aforesaid facts, the CIT(A) restored the matter to the file of the AO/TPO, with a direction to conduct fresh benchmarking keeping in view the aforesaid judicial pronouncements.

22. Aggrieved, both the parties have assailed the order of the CIT(A) in appeal before us. Insofar the grievance of the assessee and the revenue pertaining to the observations of the CIT(A) as regards the assessee's claim for reducing the disallowance under Sec. 14A r.w. Rule 8D, we find that the facts and the issue therein involved remains the same as were there before us in the cross-appeals for the immediately preceding year i.e A.Y. 2010-11. Accordingly, our aforesaid observations and reasoning given while disposing off the respective grounds pertaining to the aforesaid issue in the cross-appeals for A.Y. 2010-11 shall apply *mutatis mutandis* for disposal of the said issue in the present appeal for A.Y 2011-12. The **Grounds of appeal Nos. 1 to 4** raised by the assessee are dismissed AND **Grounds of appeal Nos. 1**

to 3 raised by the revenue are partly allowed in terms of our aforesaid observations.

23. We shall now deal with the grievance raised by both the parties, as regards the observation of the CIT(A) pertaining to the transfer pricing adjustment in respect of the international transaction of provisions of guarantee/counter guarantee by the assessee to various banks and other corporate bodies for and on behalf of its AE, viz. Elsamex SA. On a perusal of the order of the CIT(A), we find, that taking cognizance of the fact that the TPO had benchmarked the transaction of providing of guarantee/counter guarantee by the assessee to various banks and other corporate bodies for and on behalf of its AE, viz. Elsamex SA by adopting the average corporate guarantee fee of 2.58% charged by the banks, it was observed by the CIT(A) that the aforesaid exercise carried out by the TPO was not in conformity with the judgments of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Glenmark Pharmaceuticals (ITA No.1302 of 2014)** and **M/s Everest Kento Cylinder Vs. DCIT (LTU)-1, Mumbai (ITA No. 1042/ Mum/2015)**. The CIT(A) was of the view that as held by the Hon'ble jurisdictional High Court, for the purpose of computing the arm's length price of guarantee commission, no comparison can be made between guarantees issued by commercial banks as against the corporate guarantee issued by holding company for the benefit of its AE. In the backdrop of his aforesaid observation, the CIT(A) had restored the issue to the file of the A.O/TPO, with a direction to conduct a detailed transfer pricing analysis after excluding the rates applied by commercial banks, and conduct a fresh benchmarking keeping in view the aforesaid judicial pronouncements of the Hon'ble Jurisdictional High Court. Finding no infirmity in the aforesaid course of action adopted by the CIT(A), we uphold his order to the said extent. Insofar, the claim of the revenue that the CIT(A) had exceeded his powers under Sec.251(1)(a) by 'setting aside' the matter to the file of the A.O/TPO for carrying out a fresh benchmarking and determining the arm's length price of the guarantee fees, we are unable to

concur with the same. On a perusal of the order of the CIT(A), we find that as observed by him, instead of quashing the addition on a mere technical ground i.e a wrong basis of comparison adopted by the TPO, the CIT(A) had in all fairness restored the issue to the file of the A.P/TPO, with a limited direction and a defined line of action for carrying out a fresh benchmarking and determining the arm's length price of the aforesaid international transaction. In light of the aforesaid limited purpose for which the matter had been restored with specific directions to the file of the AO/TPO, we are unable to persuade ourselves to agree with the department that the CIT(A) by so doing had exceeded the jurisdiction vested with him under Sec. 251(1)(a) of the Act. Accordingly, in terms of our aforesaid observations the **Grounds of appeal Nos. 5 to 9** raised by the assessee AND **Grounds of appeal Nos. 4 to 6** raised by the revenue are dismissed.

24. The **Grounds of appeal Nos. 10 & 11** raised by the assessee and the **Grounds of appeal Nos. 7 and 8** raised by the revenue being general in nature are dismissed.

25. The appeal of the assessee is dismissed and that of the revenue is partly allowed in terms of our aforesaid observations.

26. Resultantly, the appeal of the assessee for A.Y 2010-11 is partly allowed for statistical purposes and that for A.Y 2011-12 is dismissed. The appeal of the revenue for A.Y 2010-11 and A.Y 2011-12 are partly allowed, in terms of our aforesaid observations.

Order pronounced in the open court on 28.01.2021

Sd/-

S. Rifaur Rahman
(ACCOUNTANT MEMBER)

Sd/-

Ravish Sood
(JUDICIAL MEMBER)

Mumbai, Date: 28.01.2021

*PS: Rohit

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "K" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai.