आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
" D" BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

आयकर अपील सं./**ITA No.91/AHD/2018**
निर्धारण वर्ष/Asstt. Year: 2012-2013

Lambda Therapeutic Research Ltd. Lambda House, Opp. Gujarat High Court, S.G. Highway, Gota, Ahmedabad-382481. **PAN: AAACL4089R**	Vs.	D.C.I.T., Circle-2(1)(2), Ahmedabad.

And

आयकर अपील सं./**ITA No. 409/AHD/2018**
निर्धारण वर्ष/Asstt. Year: 2012-2013

A.C.I.T., Circle-2(1)(2), Ahmedabad.	Vs.	Lambda Therapeutic Research Ltd. Lambda House, Opp. Gujarat High Court, S.G. Highway, Gota, Ahmedabad-382481. **PAN: AAACL4089R**

(Applicant)		**(Respondent)**

Assessee by :	Shri Tushar Hemani, Sr. Advocate with Shri Parimalsingh B Parmar
Revenue by :	Shri Purushottam Kumar, Sr.D.R

सुनवाई की तारीख/**Date of Hearing : 21/03/2022**
घोषणा की तारीख /**Date of Pronouncement: 29/04/2022**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned cross appeals have been filed at the instance of the Assessee and the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-2, Ahmedabad, dated 17/11/2017 arising in the matter of assessment order passed under s. 143(3) r.w.s. 144C of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2012-2013.

ITA No. 91/Ahd/2018, an appeal by the Assessee for A.Y. 2012-13

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

1. The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of the AO of disallowing employee's contribution towards ESIC amounting to Rs.2,29,053/- u/s 36(l)(va) of the Act.

2. The learned CIT(A) has erred both in law and on the facts of the case in holding that giving loan which is in the nature of "quasi capital", is an "international transaction" falling within the purview of transfer pricing provisions.

3. Alternatively and without prejudice, the learned CIT(A) has erred both in law and on the facts of the case in confirming the action of the AO of making an addition of Rs.43,04,408/- as proposed by TPO on account of interest free loans and advances to Lambda Therapeutic Ltd., UK.

4. Alternatively and without prejudice, the learned CIT(A) has erred in confirming the marking up of LIBOR rate by average comparable rate and by Forex risk.

5. The learned CIT(A) has erred both in law and on the facts of the case in holding that Corporate Guarantee given to associate enterprise is an "international transaction" falling within the purview of transfer pricing provisions.

6. Alternatively and without prejudice, the learned CIT(A) has erred both in law and on the facts of the case in confirming the adoption of Cost Plus Method as the most appropriate method for benchmarking the guarantee transaction.

7. Alternatively and without prejudice, the learned CIT(A) has erred both in law and on the facts of the case in confirming the upward adjustment to the extent of Rs.6,45,748/- @ 24.7% markup on account of corporate guarantee given to associate enterprise while determining arm's length price under the provisions of transfer pricing.

8. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

9. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s.234A/B/C of the Act.

10. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in initiating penalty u/s.271(l)(c) of the Act.

The appellant craves leave to add, amend, alter, edit, delete, modify change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

3. The first issue raised by the assessee in ground No. 1 of its appeal is that the learned CIT-A erred in confirming the addition of Rs. 2,29,053/- on account of late payment of employees contribution towards ESIC.

4. At the outset, we note that the learned Counsel for the assessee before us submitted that the impugned issue has been covered against the assessee by the order of the Hon'ble Gujarat High court in case of CIT vs. Gujarat State Road Transport Corporation reported in (2014) 366 ITR 170 (Guj), where it was held as under:

> ***8.*** *In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it is held that with respect to the sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or funds on or before the "due date" mentioned in explanation to section 36(1)(va). Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account / ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation to section 36(1)(va) of the Act i.e. date by which the concerned assessee was required as an employer to credit employees' contribution to the employees' account in the Provident Fund under the Provident Fund Act and/or in the ESI Fund under the ESI Act.*

4.1 Therefore, respectfully following the same we confirm the addition made by the AO in this regard. Accordingly the ground of appeal raised by the Assessee is hereby dismissed.

5. The second issue raised by the assessee vide ground No. 2 to 4 in its appeal is that the learned CIT-A erred in confirming the addition of Rs. 43,04,408 made by TPO/AO on account of interest free loan advances provided to its AE.

6. The facts in brief are that the assessee in the present case is a limited company and engaged in the business of facilitating the clinical research services to the pharmaceuticals industries. The assessee in the year under consideration has provided interest-free loans and advances to its associated enterprises as detailed under:

S.No.	***Transaction***	***Associated Enterprises***	***Amount (₹)***
1.	*Advance extended for setting up clinical lab*	*Jina Pharma Inc, USA*	*6,65,000*
2.	*Advance extended for setting up business*	*Lambda Therapeutic, canada*	*1,65,41,845*
3.	*Loan given received back*	*Lambda Therapeutic Limited, UK*	*81,81,000*
4.	*Loan given received back*	*Lambda Therapeutice reseach Z.O.O. Poland*	*1,87,77,001*

6.1 The assessee has not charged any interest from these associated enterprises on the amount of loans and advances provided to them on the reasoning that:

i. It has not charged any interest from such associated enterprises in the earlier years.

ii. It has provided loans to the associated enterprises as a measure of commercial expediency to set up the business, to meet the need of working capital requirement and for the repairs and renovations. As a result, the assessee has got the benefit from such associated enterprises by getting the business from the foreign markets besides getting the higher valuation of the AE.

iii. In many cases, these interest free loans were provided in the nature of quasi capital.

6.2 In view of the above, the assessee before the AO/TPO contended that there cannot be any adjustment of the notional interest under the provisions of section 92C read with rule 10B of the Income Tax Rules.

6.3 However, the AO/TPO disagreed with the contentions of the assessee by observing that the transaction of advancing the interest-free loans to the associated enterprises is an international transaction which requires to be determined at the arm length price in pursuance to the provisions of section 92C of the Act. The AO accordingly has worked out the amount of interest with respect to the AE's based in USA at LIBOR plus 337 bps, with respect AE based in Canada at CAD LIBOR plus 579.2 bps, with respect AE based in UK at GBP LIBOR plus 435 BPS and with respect to the AE based in Europe EURIBOR plus 390 bps and made the upward adjustment aggregating to ₹ 2,17,41,980/- to the total income of the assessee.

7. Aggrieved assessee preferred an appeal to the Ld. CIT-A. The assessee before the ld. CIT-A submitted that interest free loans and advances given to the associated enterprises based in foreign countries were in the nature of quasi capital which is akin to shareholders fund. While making equity investments in the foreign subsidiaries, there was the need of taking prior approval from the RBI but no such approval was required for giving loans and advances to foreign subsidiary.

8. Furthermore, there was no cost incurred by the assessee on such loans and advances given to the foreign subsidiaries as there was surplus fund available with it.

9. The assessee also submitted that it was able to achieve lot of business from the countries outside India as a result of establishment of the foreign subsidiaries. Therefore, the transaction for advancing the loan to the foreign subsidiaries should not be seen in isolation rather the other benefits received by the assessee from these foreign countries should also be taken into consideration. As such, the interest-free loans and advances have been given as a measure of commercial expediency. In other words, the business transactions carried out by the assessee with these foreign subsidiaries have resulted the benefit exceeding the notional cost of interest as worked out by the AO/TPO. Had these foreign subsidiaries not been

formed, then the assessee was supposed to take the services from other companies which would have resulted increase in cost and sharing of secret business information. As such the assessee was able to cut down its cost as well as to maintain the confidentiality of critical business information.

10. The assessee also contended that the AO himself in his order has admitted the fact that these subsidiaries were also engaged in the business of clinical research services to the pharmaceutical industries as these companies are special-purpose vehicle to carry out business activities of the assessee.

11. The learned CIT (A) after considering the submission of the assessee and the assessment order, observed that the associated enterprises were set up for the development of the business and reducing its cost on the technical clinical research work which has resulted the benefit to the assessee. Further, the purpose of advancing loan to such AEs was to hold and control of equity and gaining businesses from them. Accordingly the learned CIT-A was pleased to delete the addition made by the AO on account of adjustment for the interest on the advances given to the AEs namely "Jina Pharmaceuticals, INC USA", Lambda Therapeutic Research, SP Z.O.O Poland" and Lambda Therapeutic Research Inc Canada by observing that the assessee was able to generate the business and income from such AEs which is more than the notional interest cost on advances.

11.1 The learned CIT (A) also found that the advances given to the AE namely "Lambda Therapeutic Research, SP. Z.O.O. Polland" and Lambda Therapeutic Research Inc Canada were eventually partly converted into share capital. Thus it can be inferred that the advances were made by the assessee for acquiring the equity in the associated enterprise. Therefore, no further adjustment on account of interest is required to be made.

11.2 However, the learned CIT(A), with respect to the advance given to the associated enterprises namely "Lambda Therapeutic Ltd, UK" found that there was

no benefit accrued to the assessee from such AEs. Accordingly, the learned CIT (A) confirmed the upward adjustment made by the AO/TPO for the interest amounting to ₹ 43,04,408/- on account of interest free advances made to these AEs. Hence the learned CIT (A) allowed the grounds of appeal of the assessee in part.

12. Being aggrieved by the order of the Ld. CIT-A both the assessee and the Revenue are in appeal before us. The assessee is in appeal before us against the confirmation of the addition made by the AO for the amount of interest of ₹ 43,04,408/- with respect to the interest free loans and advances given to its UK AE whereas the Revenue is in appeal against the deletion of the addition made by the AO for the amount of interest of ₹ 1,74,37,572/- with respect to the interest free loans and advances given to M/s Lambda Poland and M/s Jina Pharma USA and Lambda Therapeutic Research Canada respectively. The ground of appeal of the Revenue in ITA No. 409/AHD/2018 stands as under:

> *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs. 2,17,41,980/- made by the TPO on account of loans/advances extended to various AEs.*

13. The Ld. AR before us filed a paper book running from pages 1 to 197 and submitted that the impugned issue has been covered in favour of assessee by the order this tribunal in the own case of the assessee for the Assessment Year 2010-11 bearing ITA No. 3492/Ahd/2015.

14. On the other hand, the Ld. DR contended that the transaction of advancing interest-free loans to the associated enterprises should be seen as separate and independent transaction and the same should not be seen in the context of the revenue generated by the assessee through the associated enterprises. It is because each transaction entered between the assessee and the associated enterprises has to be evaluated to determine the ALP independently and separately.

15. Both the ld. AR and DR before us vehemently supported the order of the authorities below to the extent favorable to them.

16. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we find that the issue on hand is cover in favour of the assessee by the order of the co-ordinate bench of this tribunal in ITA No. 3592/Ahd/2015. The relevant observation of the co-ordinate bench reads as under:

> *10. We have heard the rival contentions of both the parties and perused the materials available on record. The dispute in the case on hand before us revolves whether the amount of interest free loans and advances provided to the associated enterprises should be subject to the adjustment on account of notional interest under the transfer pricing provisions as provided under section 92C of the Act. The assessee in the case on hand has provided interest-free advances to its four associated enterprises as discussed above.*
>
> *10.1 From the preceding discussion, we find that the assessee along with its associated enterprises has been carrying out clinical research activities as a whole. These activities are interconnected with each other. These activities of clinical research can be understood better in the manner as detailed below:*

Phase	***Primary goal***	***Undertaken at***
Preclinical	*Testing of drug in non-human subjects, to gather efficacy, toxicity and pharmacokinetic information*	*India, Canada, since Inception*
Phase O	*Pharmacodynamics and Pharmacokinetics particularly oral bioavailability and half-time of the drug*	*India, Canada, and Poland since Inception*
Phase I	*Testing of drug on healthy volunteers for dose-ranging*	*India, Canada and Poland since Inception*
Phase II	*Testing of drug on patients to assess efficacy and safety*	*India, Canada and Poland since Inception*
Phase III	*Testing of drug on patients to assess efficacy, effectiveness and safety*	*India, Canada and Poland since Inception*
Phase IV	*Postmarketing surveillance-watching drug use in public.*	*UK and India since Inception.*

> *10.2 On perusal of the activities of the assessee along with its group associated enterprises, it is revealed that there are different activities which are carried out by the different associated enterprises. For example, the preclinical phase activity is carried out in India and Canada. Similarly, the phase-0 activities carried out in India, Canada and Poland so on and so forth. In other words, the project of the research activity can be ended upon the completion of process of the different phases as discussed above.*
>
> *10.3 Once the activities of the assessee and its associated enterprises are so interrelated and interconnected then the transactions should be seen in aggregation for working out the ALP. In this regard we find Para 3.9 of OECD Transfer Pricing Guidelines which reiterates that though ideally the arm's length principles should be applied on a transaction by transaction basis, there are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated*

adequately on a separate basis. OECD guidelines provide a number of illustrations to substantiate 'closely linked or continuous' test which are as detailed under;

1. *Ongoing business relations such as a long-term supply contract.*
2. *Right to use intangible property coupled with supply of components.*
3. *Transactions in a range of closely-linked products: This includes business strategy to have a portfolio approach i.e. goods with low and high margins may be transacted together in order to offer a full range of products to customers (cars and spare parts, printers and cartridges etc.).*
4. *Routing of a transaction through another associated enterprise (AE). OECD guidelines suggests that it may be more appropriate to consider the transaction (of which the routing is a part) in its entirety, rather than considering the individual parts of transaction on a separate basis.*

10.4 We further find that the US Treasury Regulations also provide the similar view as under;

> *"US Treasury Regulations even provide for aggregating transaction between different legal entities for benchmarking. Where a US parent has three overseas subsidiaries engaged in administration, marketing and distribution relating to a single product of US parent, then to ensure that economies of integration are well captured in comparability analysis, the regulations provide that the combined effect of all controlled transactions between these companies should be considered."*

10.5 We further find that the Para 3.13 of OECD Commentary also deals with the topic of Intentional set offs where it was mentioned that the Intentional set-offs generally occur between AEs in respect of controlled transactions wherein when one enterprise provides benefit to another enterprise within the group that is balanced to some degree by different benefits received from that enterprise in return.

10.6 This view is also considered in the judgment of Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India (P.) Ltd. vs. CIT reported in [2015] 55 taxmann.com 240 (Delhi) as under;

> ***Bundled/Inter-Connected Transactions***
>
> ■ *Clubbing of closely linked transactions, which would include continuous transactions, may be permissible and not excluded. Aggregation of closely linked transactions or segregation by the assessee should be tested by the Assessing Officer/TPO on the benchmark and the exemplar; whether such aggregation/segregation by the assessee should be interfered in terms of the four clauses stipulated in section 92C(3), read with the rules. It would, among other aspects, refer to the method adopted and whether reliability and authenticity of the arm's length determination is affected or corrupted.[Para 82]*

10.6 Now proceedings further, we find that the associated enterprise based in UK has got the business from the USA for which the clinical study was conducted in India. The assessee for such activity received its service charges from the USA company. The details of the same stand as under:

S.N.	***Name of Sponsor***	***Study held on***	***Drug Name***	***Country of Origin***	***Country of Sponsor***	***No. of Patient Enrolled***	***Currency***	***Quote Value***
1.	*Stason Pharma*	*India*	*Diclofenac Epolamine Patch*	*UK*	*USA*	*Q80*	*USD*	*USD 377,700*
2.	*Par Pharmac*	*India*	*Mesalamine Tablets 1.2g comparision*	*UK*	*USA*	*250*	*INR*	*USD 1,178,530*

	euticals, INC		with Placebo and Lialda 1.2					

10.7 Indeed, the assessee has advanced interest-free loan to its associated enterprises based in the UK. Now the question arises whether any adjustment is required under the transfer pricing provision on account of such interest erosion advances. The answer stands in negative for the reason that the assessee got such huge business from its associated enterprises based in the USA. In the absence AE in UK the assessee would have taken services from third party which would have led to more cost than the notional interest income. In other words, the transaction for advancing the interest-free loans to the associated enterprises has to be seen in the context of the benefit received by it from such associated enterprises. As such the transaction of interest free loans/ advances viz a viz the benefit received by the assessee are intrinsically linked which has to be evaluated after aggregating both the transactions. The transaction of interest free advances cannot be viewed without considering the benefit derived by the assessee from the associated enterprises. On analyzing the notional interest added by the TPO under the transfer pricing adjustment with the benefit derived by the assessee, the interest cost appears to be negligible. The amount of interest cost stands at ₹ 26,19,740/- whereas the amount of gross receipt generated by the assessee stands at USD 1,556,230 which is far more than the interest expenses after converting in India rupees.

10.8 Likewise, we also note that the assessee has derived the benefit from its associated enterprises namely Jina Pharmaceuticals located at USA for ₹ 3.56 crores in the year under consideration against the interest expenses of ₹ 1,14,87,233/-. The details stand as under:

Revenue Details Year Wise Year Wise

	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	
Project Number	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	Grand Total
010-12					5,016,650	4,212,650			9,229,300
022-10				21,488,475	7,439,597				28,928,072
033-12							8,985,249		8,985.249
039-11					506,850				506,850
053-11				442,500					442,500
056-09		2,650,400	2,196,800						4,847,200
063-12					891,800	891,800			1,783,600
069-1 1	•				603,200				603,200
072-10				8,336,100					8,336,100
073-10				10,306,570					10,306,570
081-11					16,471,482				16,471,482
085-08	3,452,600	3,366,200							6,818,800
089-06	2,041,500								2,041,500
089-09									1,296,885

091-10				350,672					350,672
05-1 1 m				331,875	110,625				442.500
118-11					9,292,500				9,292,500
139-07	4,089,000			425,000					4,514,000
140-07	4,680,400								4,680,400
159-1 1					8,681,900				8,681,900
162-11					11,228,300			-	11,228,300
179-12						200,000			200,000
196-08		673,050	221,950						895,000
238-08			18,223,340	(8,923,447)					9,299,893
250-13								3,019,285	3,019,285
277-09			902,565						902,565
294-07	1,487,860								1,487,860

10.9 However, we find that the assessee has not demonstrated any benefit derived from its associated enterprises namely Lambda USA whereas it has advanced interest free loan of EURO 49,999/-. Thus, the question arises whether there is a need to make any adjustment on account of notional interest under the provisions of section 92C of the Act. In this regard we note that admittedly there was no benefit accrued to the assessee in the year under consideration but considering the interrelated activities carried out by the assessee along with associate enterprises, in our considered view it is not necessary that the benefit will arise in the year in which such loans and advances were provided without interest. A drug normally takes 8 to 10 years' time for its development. Furthermore, this associated enterprise was set up for the activities which are directly connected with the assessee as discussed/elaborated in the preceding paragraph. In our view, the generation of the benefit in terms of money in the year under consideration only cannot be a criteria for making any adjustment under the transfer pricing provisions in the given facts and circumstances. Such income may arise in subsequent years.

10.10 It is also important to note that the assessee has given advances to Lambda Therapeutic Research Z.O.O. Poland which have been converted into equity. Thus, what is inferred is this that the loans and advances were given primarily as the investment in equity. In such cases there cannot be any adjustment on account of interest free loans/advances. In holding so we draw support and guidance from the order of this Hon'ble tribunal in the case of Micro Inks Ltd. vs. ACIT reported in [2013] 144 ITD 610 where it was held as under;

> *"In the present case, there are two important factors pertaining to this interest free loan, and both these aspects deserve to be examined in detail. The first important aspect of this interest free advance is that the loan was said to be in the nature of quasi-capital, and it was so given out of EEFC (Exchange Earners Foreign Currency) account, because while the assessee could have given loan up to US $ 50 million, it was not open to the assessee to subscribe to the equity capital without the permission of the Reserve Bank of India. There was, thus, indeed a technical problem in subscribing to the capital directly. It is also important to note that*

immediately upon obtaining the permission of the Reserve Bank of India, which assessee did obtain at later stages, the advances were converted into shares. Except for an amount of US $10,000, entire advances received by the step down subsidiary were converted into shares. It is also not in dispute that when RBI permission to convert loan into equity was sought, it was sought effective from the date on which remittance was made. The second very important aspect of this interest free loan is that the entity receiving the interest free advances 'M' USA, existed only to facilitate the marketing of assessee's products in US markets. The relationship on account of lending of money cannot, thus, be considered in isolation without these crucial business considerations. [Para 15]
It is only elementary legal position that what could not have been done directly could not have done indirectly also. There is, thus, not much of a merit in the stand of the revenue authorities that in the absence of a specific mention about conversion of loan into equity, it cannot be presumed that the interest free loans could not have been in the nature of quasi-capital. [Para 16]"

10.11 It is also significant to note that the Ld. CIT-A in his order has given a finding that there was no benefit derived by the assessee with respect to the amount of interest free loans and advances given to UK AE. However, on perusal of the details submitted by the assessee, we note that there was the benefit derived by the assessee from such associated enterprises which has been elaborated somewhere in the preceding paragraph. Thus, such finding of the Ld. CIT-A is factually incorrect. At the time of hearing the Ld. DR has also not controverted the fact of benefit derived by the assessee.

10.12 In view of the above and after considering the facts in totality, we hold that no adjustment under the transfer pricing provisions is required to be made with respect to the interest free loans and advances by the assessee to its associated enterprises in the given facts and circumstances. Hence, the ground of appeal of the assessee is ***allowed*** *and the ground of appeal of the revenue is* ***dismissed.***

16.1 **Before us, no material** has been placed on record by the Revenue to demonstrate that the decision of Tribunal as discussed above has been set aside / stayed or overruled by the higher Judicial Authorities. Before us, Revenue has not placed any material on record to point out any distinguishing feature in the facts of the case for the year under consideration and that of earlier years nor has placed any contrary binding decision in its support. Thus, respectfully following the order this tribunal in own case of assessee the ground of appeal raised by the assessee is hereby allowed whereas ground of appeal of the revenue is hereby dismissed.

17. The next issue raised by the assessee vide ground no. 4 to 8 of its appeal is that the learned CIT (A) erred in confirming the upward adjustment of Rs. 6,45,748 made by the TPO/AO with respect to corporate guarantee provided by the assessee.

18. During the year under consideration, Axis Bank of India has issued a standby letter of credit for ₹ 32.75 crores in favour of assessee's AE namely M/s Lambda Therapeutic Research Inc (Canada) on the request of the assessee. For which the Axis bank has charged a commission @ 0.90% of credit limit from the assessee. The assessee claimed that the corporate guarantee provided to AE is in the nature of Shareholder activity and an intragroup activity carried out because of ownership interest. Therefore the provision of transfer pricing will not apply in the case on hand.

18.1 However the TPO observed that due to the standby letter credit issued to the AE i.e. M/s Lambda Therapeutic Research Inc (Canada) got direct benefit and incurred low interest charges on loans taken from Canadian Imperial Bank of Commerce. Thus, the act of the assessee for issuing the corporate guarantee is in the nature of financial services provided by it to its AE for which it has incurred cost in the form of commission paid to Axis Bank (India). Therefore, the same needs to be determined at arm length for the purpose of transfer pricing. Accordingly, the TPO worked margin of 24.7% on cost i.e. ₹ 6,95,149/- by employing CPM as most appropriate method and made upward adjustment of ₹ 35,09,517/- (28,14,368 + 24.7%) to the total income of the assessee.

19. Aggrieved assessee preferred to appeal to the learned CIT (A), who partly deleted the upward adjustment made by the AO by observing as under:

International taxation of Corporate Guarantee

The TPO has made upward adjustment of Rs.35,09,517/- on the Corporate Guarantee given by appellant company through Axis Bank India Limited, to enable the AE M/s. Lambda Therapeutic Research [Canda) to take foreign currency loan from other bank viz. with Canadian Imperial Bank of Commerce (CIBC). The TPO has observed that no service fee was charged by the appellant company from the AE. Therefore, he had opted 24.7% of 0.9% of the credit facility applying CPM method to make the TP adjustment for the above charges. The TPO has adopted the margin of 24.7% based on the normal gross profit in the case of banking entity in offering such services. Appellant has contended that it has already paid fee of Rs.28J4,368/- @ 0.9% as a fee for providing the corporate guarantee. The appellant relying on the various judicial pronouncements has stated that corporate guarantee commission given by assessee for its subsidiary company should be benchmarked by taking rate of 0.5%. The TPO in his order u/s. 92CA{3) has discussed the rational for adopting the profit margin of 24.7% on cost plus method in banking entities. I agree with the findings of the TPO that services of guarantee fee etc. falls

*in the domain of financial services and the risk assumed by the appellant in the present fact of the case is similar to the entities engaged in the business of providing financial services. !n the arm's length scenario, when the appellant company has incurred the cost to the tune of 0.9% of credit extended which is Rs.2*6rl 4,368/-, it would be expecting return equal to what is earned by such entities engaged in providing financial services. The TPO was required to make upward adjustment of 24.7% of Rs.26,14,368/-, which is Rs.6,45,748/-. However, he has made adjustment" of Rs.35,09,5171- including the fee of Rs.26,14,368/- paid by appellant. In view of above, the upward adjustment is restricted to Rs.6,45,748/-.*

20. Being aggrieved by the order of the learned CIT (A), both the Assessee and the Revenue are in appeal before us. The assessee is in appeal against the confirmation of upward adjustment for ₹ 6,45,748/- whereas the Revenue is in appeal for addition deleted of ₹ 26,14,368/- only by the ld. CIT-A. The relevant ground of the Revenue's appeal in ITA No 409/Ahd/2018 reads as under:

The Ld.CIT(A) has erred in law and on facts in restricting the addition of Rs.35,09,517/- to Rs.6,45,748/- made by TPO on account of Corporate Gurantee Fee.

21. The learned AR before us submitted that the corporate guarantee furnished by the assessee on behalf of its subsidiary is in the nature of quasi capital/shareholder activity. Therefore the same needs to be excluded from the scope of international transaction. Further the issue on hand is covered in favour of the assessee by the order of this tribunal in own case of the assessee for the Assessment year 2013-14 bearing ITA No. 2114/Ahd/2017.

22. The Learned DR before us submitted that the assessee for furnishing the bank guarantee to the AE has incurred the cost. Likewise, the AE has got the benefit of low interest on the loan obtained by it after procuring the bank guarantee from the assessee. Accordingly, the learned AR contended that impugned transaction for furnishing the bank guarantee is an international transaction which needs to be benchmarked under the provisions of the Act. The learned DR also contended that the facts of the case Micro ink ltd. Vs. ACIT are distinguishable from the facts of the case on hand. As per the learned DR there was no bank guarantee involved in the case of Micro ink ltd. whereas in the case on hand the assessee has furnished the bank guarantee after incurring the cost.

23. Both the ld. AR and DR before us vehemently supported the order of the authorities below to the extent favorable to them.

24. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that identical issue came before this tribunal in own case of the assessee for the Assessment year 2013-14 bearing ITA No. 2144/Ahd/2017 and others where coordinate bench decided the issue partly in the favour of the assessee. The relevant finding reads as under:

> *52. We have heard the rival contentions and perused the materials on record. At the outset we note that the fact of issue on hand has been elaborated in previous paragraph, therefore we are not inclined to repeat the same for the sake of brevity. Hence we proceed to adjudicate the same accordingly.*
>
> *52.1 The provisions of section 92B of the Act defines the parameters of what constitutes an international transaction. Although the ambit of international transaction was wide enough, yet due to judicial interpretation, certain classes of transactions were being left out of the transfer pricing net. To tackle the same, by the Finance Act of 2012 an Explanation to Section 92B[2] of the Act was brought on the statute with retrospective effect from 1st April 2002. The explanation is clarificatory in nature and added certain categories of transactions, inter alia, the transaction as specified under clause (c) of explanation (i) to section 92B of the Act within the ambit of international transactions which is reproduced as under:*
>
> *[Explanation.—For the removal of doubts, it is hereby clarified that—*
>
> *(i) the expression "international transaction" shall include—*
>
> *(a) ************
>
> *(b) *************
>
> *(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;*
>
> *52.2 It can be seen that the guarantee was included within the ambit of international transaction vide the Finance Act 2012 with retrospective effect. Thus there remains no ambiguity to the fact that corporate guarantee extended by the assessee to its AE is an international transaction and therefore the same has to be benchmarked at the arm length price. However, we note that the different benches of the ITAT have taken different view. Some of them held that the transaction of corporate guarantee is an international transaction whereas some of them held that the transaction of corporate guarantee is outside the purview of the international transaction including the Ahmedabad tribunal in the case of Micro Ink Ltd. vs. Addl. CIT reported in [2015] taxmann.com 353, wherein it was held that the corporate guarantee is not international transaction. At the time of hearing, the learned AR heavy relied on this order of the tribunal.*

52.3 However, we find that the facts of the order of this tribunal in the case of Micro Ink Ltd. (Supra) are distinguishable from the facts of the case on hand. In that case, there was no cost incurred by the assessee (Micro Ink Ltd.) in providing the corporate guarantee to the AE. Furthermore the assessee (Micro Ink Ltd.) provided guarantee to its AE's without involving any bank. Conversely, in the case on hand, the assessee has extended the guarantee by involving the Axis Bank of India after incurring the cost. Indeed, such cost was reimbursed by the AE of the assessee on actual basis and the same was added by the assessee in the computation of income. Thus, what is inferred is this that the assessee has given corporate guarantee to its AE after availing the services from the bank viz a viz incurring the cost there on which was given in the course of the business. Accordingly, we hold that the corporate guarantee given in the case on hand is the international transaction which requires to be benchmarked at the arm length price. In holding so we draw support and guidance from the order of Hyderabad Tribunal the case of Infotech Enterprises Ltd. vs. Addl. CIT reported in 41 taxmann.com 364 wherein it was held as under:

> ***13.*** *We have heard both the parties and perused the material available on record. In the present case though the immediate transaction is that of the assessee and CITI Bank India the benefit of the guarantee is for the US Subsidiary and hence the assessee has rendered a service to its US subsidiary for which it must charge fees at an arm's-length. This same logic was applied in Asstt. CIT v. Nimbus Communications [2013] 34 taxmann.com 298 (Mum.). We also note the introduction of retrospective amendment in Section 92B Explanation (i)(c) which specifically covers such guarantee payments. Furthermore the decision of Swarnadhara IJMIT Integrated Township Development Co. (supra) (Tax Sutra) was in an altogether different factual matrix concerning the assessee (an Indian Joint Venture) reimbursing corporate guarantee fees paid by its Malaysian AE. We draw support from the order of Mumbai Tribunal in Glenmark Pharmaceuticals v. Asstt. CIT [ITA No.5031/Mum/2012 dated 13-11-2013) which has analyzed this issue in detail and held that 0.53% corporate guarantee rate in that case was appropriate. We therefore set aside the issue to the TPO to decide the quantum of corporate guarantee rates in the instant case following the method adopted in Glenmark Pharmaceuticals (supra).*

52.4 In this regard we also find support and guidance from the order of the Bangalore ITAT in case of Advanta India Ltd. vs. ACIT reported in 64 taxmann.com 251 where it was held as under:

> ***29.*** *In the case of Bharti Airtel Ltd. (supra), it was an undisputed position that the issuance of the guarantee did not cost the assessee anything and it was for this reason that the coordinate bench concluded that the issuance of guarantee did not have any "bearing on the profits, income, losses or assets or such enterprise" thus taking it out of the ambit of international transaction which could be subjected to arm's length price adjustment. That was a case in which the assessee had issued a comfort letter to the banker and it was the consideration for issuance of this comfort letter which was sought to be subjected to the ALP adjustments.*
>
> ***30.*** *However, material facts of the case in the present case are different inasmuch as it is an admitted position that the assessee did incur costs on issuance of this guarantee (i.e. payment of Rs 4,39.005 to the ICICI Bank in this respect), and, for that reason, the issuance of guarantee indeed had a bearing on the profits and income of such enterprise. It cannot, therefore, be said that the issuance of guarantees, on the facts and in the circumstances of this case, did not constitute an 'international transaction'.*

52.5 The next aspects arises for the determination of the benchmark in order to working out the ALP of the impugned international transaction. The AO in the case on hand has adopted CPM method for working out the ALP using the data of banks obtained from the money control.com. The relevant finding of the TPO/AO reads as under:

1.4 Since such services in the nature of guarantee fee etc falls in the domain of financial services, the functional profile of the assessee company and the risk assumed by the assessee company in the present facts of the case is thus similar to the entities engaged in the business of providing financial services. In the arm's length scenario, when the assessee company had incurred the cost to the tune of 0.71% of the credit extended, it would be expecting return equal to what is earned by such entities engaged in providing financial services. For the purpose of identifying the valid comparables, the Google database was queried to identify top 10 private sector entities engaged in extending banking and other financial services. Such entities were identified from information available at www.moneYControl.com. The average margin (OP/OC) of such entities was computed at 24.1 % using data available on Capitaline database as under:

SrNo.	Company Name	Total Income [201303]	Profit Before Tax|201303]	Total Cost	Margin
1	Kotak Mah. Bank	9203.15	1972.03	7231.12	27.3%
2	Karur Vysya Bank	4694.99	72f.44	3969.55	18.3%
3	Federal Bank	6832.01	1193.76	5638.25	21.2%
4	HDFC Bank	41917.49	9750.62	32166.87	30.3%
5	ICIC1 Bank	48421.3	11389.69	37031.61	30.8%
6	Induslnd Bank	8346.19	1575.87	6770.32	23.3%
7	Axis Bank	33733.68	7552.7	26180.98	28.8%
9	South ind.Bank	4769.22	655.85	4113.37	15.9%
10	City Union Bank	2462.39	403.02	2059.37	19,6%
12	Yes Bank	9551.43	1925.73	7625.7	25.3%
					24.1%

***6.5** Applying the mark-up of 24.1% on the amount of Rs 2352607/- paid to the Axis Bank, the ALP of international transaction of corporate guarantee extended to the AE was determined at Rs 29,19,586/- and accordingly, the assessee company was issued with the show-cause notice as mentioned in Para 3 of the order.*

52.6 From the above, it is revealed that the TPO/AO has treated the assessee as if it was engaged in the business of financial services and accordingly the ALP was determined by comparing with the average margin earned by the banks on cost. Admittedly, the assessee is not carrying out any financial activity and therefore we are not convinced with the basis adopted by the authorities below.

52.7 Moving ahead, we note that there is no difference between the banks or a corporate entity as far as corporate guarantee is concerned. Both have to consider the functions performed, assets employed and risks assumed. In case of default by the borrower, the corporate guarantor is exposed to the same risk of a bank. In case of an AE the risk would not be as high as in case of an outsider. Therefore, the rate charged by the bank for providing the corporate guarantee should be a benchmarked for working out the ALP for the corporate guarantee extended by the assessee to its AE. In the case on hand, the bank has charged .79% of the amount of the corporate guarantee as fees from the assessee which has been reimbursed to the assessee by the AE. This fees in absolute amount works out at ₹23,52,607/- only. However, the assessee has not added any markup on this international transaction with its AE. In the interest of justice and fair play, we are of the view that a sum of ₹ 1,17,630/- being 5% of the fees paid to the bank for the corporate guarantee of ₹ 23,52,607/- will be sufficient to add as margin of the assessee.

*52.8 Regarding the revenue appeal, we note that the assessee has already made the disallowance of ₹ 23,52,607/- in its computation of income and further addition of the same amount to the total income of the assessee will lead to the double addition which is unwanted under the provisions of law. Accordingly, we are of the view that the decision of the learned CIT (A) for deleting the addition of ₹ 23,52,607/- does not require any interference. Hence, the ground of appeal of the assessee is **partly allowed** whereas the ground of appeal of the revenue is **dismissed.***

25. From the above case of the assessee, we find that the assessee has claimed the reimbursement of the actual charges incurred by it in providing the corporate guarantee from the associated enterprise. As such, no fee was charged by the assessee on account of corporate guarantee provided by the assessee. Thus the ITAT has directed to make the upward adjustment for Rs. 1,17,630/- being 5% of the cost incurred by the assessee in providing the corporate guarantee to the associated enterprise. However, in the case on hand, there is no clarity arising from the order of the authorities below whether the assessee has claimed reimbursement of the actual expenses incurred by it in providing the corporate guarantee from the associated enterprises. If nothing has been charged by the assessee by way of reimbursement from the associated enterprises, then addition that needs to be sustained is actual cost incurred by the assessee in providing the corporate guarantee +5% markup of such charges in the light of the ITAT finding as given above otherwise only 5% has to be added. With this observation, the ground of

appeal of the assessee is partly allowed and the ground of appeal of the Revenue is hereby is also partly allowed subject to the above direction.

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

Coming to ITA No. 409/Ahd/2018 an appeal by the Revenue for the Assessment year 2012-13

26. The Revenue has following ground of appeal:

1. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.2,17,41,980/- made by the TPO on account of loans/advances extended to various AEs.*
2. *The Ld.CIT(A) has erred in law and on facts in restricting the addition of Rs.35,09,517/- to Rs.6,45,748/- made by TPO on account of Corporate Gurantee Fee.*

The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary.

27. The first issue raised by the Revenue is that the learned CIT-A erred in deleting the upwards adjustment to the tune ₹ 1,74,37,572/- (wrongly written as Rs. 2,17,41,980.00) made on account of interest free loan and advances provided to the AE.

28. At the outset, we note that the issue raised by the Revenue has been decided along with the ground of appeal raised by the assessee in ITA No. 91/Ahd/2018 where the issue has been decided in favour of the assessee and against the Revenue vide paragraph no. 16 of this order. Hence, respectfully following the same, the ground of appeal Raised by the revenue is hereby dismissed.

29. The second issue raised by the Revenue is that the learned CIT-A erred in erred in restricting the upwards adjustment to the tune of ₹ 6,47748/- out of total addition of Rs. 35,09,517/- made on account of corporate guarantee extended to the AE.

30. At the outset we note that the issue raised by the Revenue has been decided along with the ground of appeal raised by the assessee in ITA No. 91/Ahd/2018 where the issue has been decided in partly in favour of the revenue vide paragraph no. 24 to 25 of this order subject to the direction. Hence, the ground of appeal raised by the Revenue is hereby partly allowed.

In the result appeal of the Revenue is partly allowed.

31. In the combined result, the appeal of the assessee and the Revenue are partly allowed.

Order pronounced in the Court on 29/04/2022 at Ahmedabad.

Sd/-	**Sd/-**
(SIDDHARTHA NAUTIYAL)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 29/04/2022
Manish