आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

श्री डी.टी.गरासिया, न्यायिक सदस्य तथा

श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER
AND SHRI O.P. MEENA, ACCOUNTANT MEMBER

आ.अ.सं./ **T.P.A. Nos. 607 & 622/Ind/2015**
निर्धारण वर्ष /**A. Ys.: 2009-10 and 2010-11**

Dy. CIT- 1(1), Indore.	**Vs.**	**M/s. Agrawal Coal Corporation Private Limited, Indore.**
अपीलार्थी /**Appellant**		प्रत्यर्थी /**Respondent**

आ.अ.सं./ **T.P.A. Nos. 601 & 602/Ind/2015**
निर्धारण वर्ष /**A. Ys.: 2009-10 and 2010-11**

M/s. Agrawal Coal Corporation Private Limited, Indore.	**Vs.**	**Dy. CIT-1(1), Indore.**
अपीलार्थी /**Appellant**		प्रत्यर्थी /**Respondent**

स्था.ले.सं./**PAN No. AACCA8468K**	

विभाग की ओर से/ Department by	Shri Lal Chand, CIT DR
निर्धारिती की ओर से/ Assessee by	Shri Dhinal Shah and Shri Ajay Tulsiyan, CA

सुनवाई की तारीख/**Date of hearing**	**18.01.2017**
उद्घोषणा की तारीख/**Date of pronouncement**	**09.03.2017**

आदेश /O R D E R

PER O.P. MEENA, ACCOUTANT MEMEBR.

These cross appeals of Revenue and assessee are filed against the separate orders of ld. Commissioner of Income-tax (Appeals)-I, Indore [hereinafter referred to as the CIT (A)] dated 10.04.2015 and 15.05.2015 and pertain to assessment years 2009-10 and 2010-11 respectively. The grounds of appeal for A.Y. 2009-10 and 2010-11 taken by the Revenue and the Assessee are as under:

T.P.A. No.607/Ind/2015 (Revenue's Appeal):A.Y. 2009-10:

On the facts and in the circumstances of the case, the ld. CIT (A) -

(i) erred in deleting adjustment to the international transaction of purchase for coal and payment of freight of Rs. 9,73,14,004/- stating that contradictory view was taken by the TPO. The CIT (A) has ignored the fact that the TPO clearly established in the TP order as to how the AE was not capable of entering into long term contracts.

(ii) Erred in concluding that there was no incentive or low incentive to the assessee on shifting of income to Singapore. The CIT (A) has overlooked that there is substantial difference between the tax rate in Singapore and India, and has ignored the fact that TPO clearly pointed out the intention of shifting of profit to low tax jurisdiction.

(iii) erred in deleting the aforesaid addition while ignoring Para 5.1 of TP order. From the said Para of the TP order, it was evident that beneficial long term contracts had been given to AE by the

assessee resulting in significant diversion of income to the Singapore entity.

(iv) erred in deleting the aforesaid addition while observing that the TPO failed to show any evidence for proving incorrect FAR analysis. The CIT(A) has not appreciated the facts mentioned by the TPO in Para 5.1 to 5.7 in TP order wherein specific defects in the FAR analysis have been pointed out by the TPO.

(v) erred in deleting the aforesaid addition while ignoring the TPO's categorical findings that all activities relating to identifying vendors, negotiating purchase terms, setting quality standards for purchase of goods and procurement of goods required for the purpose of selling it to the end customers were performed by the assessee; and in respect of long term contracts, purchases were made before the confirmed orders of third party and AE had earned huge margins on such long term contracts.

(vi) erred in deleting the aforesaid addition while overlooking that each assessment year is different year and each international transaction has to be benchmarked independently taking into account prevailing facts and circumstances. If the facts are changed substantially, then it will affect the decision of the TPO. In the present case, the decisions taken by the TPO in different assessment years were changed due to substantial change in facts.

(vii) erred in reducing the guarantee commission rate of 2.806% to 0.53% relying on the various decision of ITAT, ignoring the fact that there are some ITAT decisions wherein the corporate guarantee commission rate of 3% has been approved.

(viii) erred in reducing the guarantee commission rate of 2.806% to 0.53% relying on the various decision of ITAT, ignoring the fact that as per the safe harbor rules introduced with effect from 18.09.2013 the corporate guarantee fee in respect of guaranteed amount less than Rs.100 crores is determined at the rate of 2% as per 10TC and 10TD. Similarly, if the guarantee amount is more than Rs. 100 crores, then the rate of guarantee commission is determined at 1.75%.

(ix) erred in giving the aforesaid relief while overlooking that the TPO demonstrated as to how the guarantee fee is chargeable @ 2.806%. Whereas, while adopting the rate of 0.53%, the basis adopted by CIT(A) is not specific and general.

(x) erred in giving the aforesaid relief while ignoring that the TPO did not take bank guarantee rates as CUP, but used US Bond data rate for benchmarking.

(xi) erred in deleting the addition of Rs. 64,00,000/- made on account of unexplained cash credit received from those parties who were already hit by section 68 in the immediately preceding assessment year.

(xii) erred in deleting the addition of Rs. 1,05,95,837/- made on account of disallowance of interest made to certain parties who not existed in A.Y.2008-09 which has been rightly done by the AO to keep the issue alive.

T.P.A.No.601/Ind/2015:(Assessee's Appeal) (A.Y. 2009-10)

On the facts and circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the CIT(A) – 1, Indore (hereinafter referred to as "CIT(A) :, on the following grounds, which are without prejudice to each other :

Transfer Pricing Adjustments

1. **Ground No.1-Addition made while computing arm's length price for provision of corporate guarantee by appellant on behalf of its Associated Enterprise ('AE')**

   1.1 On the Facts and in the circumstances of the case and in the Law, the learned CIT(A) erred in computing arm's length price at Rs. 26,88,160/- for guarantee commission to be charged by Appellant from its AE in relation to provision of corporate guarantee without considering the FAR analysis submitted by the Appellant.

   1.2 On the Facts and in the circumstances of the case and in the law, the learned CIT(A)/Transfer pricing Office('TPO') / Assessing Officer ('AO') erred in not appreciating the fact that provision of corporate guarantee is in the nature of shareholder activity undertaken by the Appellant.

   1.3 On the facts and in the circumstances of the case and in the Law, the learned CIT(A)/TPO/AO erred in not appreciating the fact that the Appellant is not in the business of lending / financing / providing guarantees and that said guarantee was given in the business interest of the Appellant only and accordingly there is no need to charge compensation from the AE.

   1.4 On the facts and in the circumstances of the case and in the law, the learned CIT(A)/TPO/AO erred in holding that the Appellant should be compensated for the benefit which has been accrued to the AE by way of corporate guarantee ignoring the fact that the Appellant had neither incurred any

financial cost nor blocked any funds for giving the said guarantee.

1.5 Without prejudice to the above, on the facts and in the circumstances of the case and in the law, the learned CIT(A)/TPO/OA erred in considering the transaction of corporate guarantee as an international transaction under section 92B of the Act disregarding the fact that the Appellant has not incurred any expenditure in providing the said corporate guarantee and thereby did not have any bearing on its profits, income, losses or assets and ,accordingly, transfer pricing provisions do not apply to the said transaction.

1.6 Without prejudice to the above, on the facts and in the circumstances of the case and in the law, the learned CIT(A)/ TPO /AO erred in not appreciating the facts that the explanation to section 92B inserted by Finance Act, 2012 cannot extend scope of transaction retrospectively and accordingly, transfer pricing provision cannot apply to the said transaction.

Without prejudice to the above

1.7 Without prejudice to above, the learned CIT (A) erred in summarily rejecting the comparability analysis undertaken by the Appellant to benchmark the transaction of provision of corporate guarantee to the AE and adopting the arm's length price at 0.53% in an arbitrary and ad hoc manner without recording a finding as regards to Most Appropriate Method for benchmarking the transaction of providing corporate guarantee.

1.8 Without prejudice to the above, the learned CIT (A) /TPO/AO erred in summarily rejecting contention of the Appellant that the AE cannot be expected to pay 100% of the interest cost saving and thereby arm's length guarantee commission should be restricted to 50% of interest rate saving only and thereby arm's length guarantee commission should be Rs.14,22,000/- as against Rs.20,09,760/- as computed by the learned CIT(A).

2. Ground No. 2-Addtion made under section 14A of the Income Tax Act 1961 read with rule 8D for Rs.4,99,340/-.

2.1 on the facts and in the circumstances of the case and in the law, the Learned CIT (A) erred in upholding the AO's action of making additional disallowance of Rs.4,99,340/- u/s 14A holding that the assesse has not objected to the fact related to non-business investment made into shares of associate companies nor raised objection on the calculation of such disallowance. It is submitted that on the facts and in the circumstances of the case, disallowance already made by the appellant in its return of income at Rs.2,44,192/- was also excessive and the further disallowance made by the AO and sustained by the Learned CIT(A) is patently wrong and uncalled and requires to be deleted.

3. "Ground No.3- disallowance made out of the colliery and office general expenses for Rs. 8,15,000/-.

3.1 The ld. CIT (A) erred in upholding the AO's action of making disallowance of Rs. 8, 15,000/- on ad hoc basis. On the facts and in the circumstances of the case, it is submitted that these expenses are properly incurred for the purpose of the business of the appellant and are allowable. Hence, it is prayed that the same may very kindly be now allowed.

T.P.A.No. 622/Ind/2015 (Revenue`s Appeal): A.Y. 2010-11:

On the facts and in the circumstances of the case, the ld. CIT (A) -

(i) erred in deleting adjustment to the international transaction of purchase for coal and payment of freight of Rs. 1,84,66,325/- stating that contradictory view was taken by the TPO. The CIT (A) has ignored the fact that the TPO clearly established in the TP order as to how the AE was not capable of entering into long term contracts.

(ii) erred in concluding that there was no incentive or low incentive to the assessee on shifting of income to Singapore. The CIT (A) has overlooked that there is substantial difference between the tax rate in Singapore and India, and has ignored the fact that TPO clearly pointed out the intention of shifting of profit to low tax jurisdiction.

(iii) erred in deleting the aforesaid addition while ignoring Para 5.1 of TP order. From the said Para of the TP order, it was evident that beneficial long-term contracts had been given to AE by the

assessee resulting in significant diversion of income to the Singapore entity.

(iv) erred in deleting the aforesaid addition while observing that the TPO failed to show any evidence for proving incorrect FAR analysis. The CIT (A) has not appreciated the facts mentioned by the TPO in Para 5.1 to 5.7 in TP order wherein specific defects in the FAR analysis have been pointed out by the TPO.

(v) erred in deleting the aforesaid addition while ignoring the TPO's categorical findings that all activities relating to identifying vendors, negotiating purchase terms, setting quality standards for purchase of goods and procurement of goods required for the purpose of selling it to the end customers were performed by the assessee; and in respect of long term contracts, purchases were made before the confirmed orders of third party and AE had earned huge margins on such long term contracts.

(vi) erred in deleting the aforesaid addition while overlooking that each assessment year is different year and each international transaction has to be benchmarked independently taking into account prevailing facts and circumstances. If the facts are changed substantially, then it will affect the decision of the TPO. In the present case, the decisions taken by the TPO in different assessment years were changed due to substantial change in facts.

(vii) erred in reducing the guarantee commission rate of 2.806% to 0.53% relying on the various decision of ITAT, ignoring the fact that there are some ITAT decisions wherein the corporate guarantee commission rate of 3% has been approved.

(viii) erred in reducing the guarantee commission rate of 2.806% to 0.53% relying on the various decision of ITAT, ignoring the fact that as per the safe harbor rules introduced with effect from 18.09.2013 the corporate guarantee fee in respect of guaranteed amount less than Rs.100 crores is determined at the rate of 2% as per 10TC and 10TD. Similarly, if the guarantee amount is more than Rs. 100 crores, then the rate of guarantee commission is determined at 1.75%.

(ix) erred in giving the aforesaid relief while overlooking that the TPO demonstrated as to how the guarantee fee is chargeable @ 2.806%. Whereas, while adopting the rate of 0.53%, the basis adopted by CIT (A) is not specific and general.

(x) erred in giving the aforesaid relief while ignoring that the TPO did not take bank guarantee rates as CUP, but used US Bond data rate for benchmarking.

(xi) erred in deleting the addition of Rs. 73,15,000/- made on account of unexplained cash credit received from those parties who were already hit by section 68 in the immediately preceding assessment year.

(xii) erred in deleting the addition of Rs. 94,11,950/- made on account of disallowance of interest made to certain parties who not existed in A.Y.2008-09 which has been rightly done by the AO to keep the issue alive.

(xiii) erred in deleting the addition of Rs. 94,11,950/- made on a/c of disallowance of interest to certain parties whose identity was not established and jurisdictional ITAT, Indore in the case of Agrawal Coal Corporation Limited vide appeal no. ITA-151/Ind./2009 for the AY 05-06, had held that the production of Directors of the companies from whom credits have been received should be one of the important criteria for accepting the transaction and in the instant case, Directors of credit recipient companies were not produced /appeared.

T.P.A.No.602/Ind/2015 :(Assessee's Appeal) (A.Y. 2010-11)

On the facts and circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the CIT(A) – 1, Indore (hereinafter referred to as "CIT(A) :, on the following grounds, which are without prejudice to each other :

Transfer Pricing Adjustments

1. Ground No.1-Addition made while computing arm's length price for provision of corporate guarantee by appellant on behalf of its Associated Enterprise ('AE')

1.1. On the facts and in the circumstances of the case and in the Law, the learned CIT (A) erred in computing arm's length price at Rs. 20, 09,760/- for guarantee commission to be charged by Appellant from its AE in relation to provision of corporate

guarantee without considering the FAR analysis submitted by the Appellant.

1.2. On the Facts and in the circumstances of the case and in the law, the learned CIT(A)/Transfer pricing Office('TPO') / Assessing Officer ('AO') erred in not appreciating the fact that provision of corporate guarantee is in the nature of shareholder activity undertaken by the Appellant.

1.3. On the facts and in the circumstances of the case and in the Law, the learned CIT (A)/TPO/AO erred in not appreciating the fact that the Appellant is not in the business of lending / financing / providing guarantees and that said guarantee was given in the business interest of the Appellant only and accordingly there is no need to charge compensation from the AE.

1.4. On the facts and in the circumstances of the case and in the law, the learned CIT (A)/TPO/AO erred in holding that the Appellant should be compensated for the benefit which has been accrued to the AE by way of corporate guarantee ignoring the fact that the Appellant had neither incurred any financial cost nor blocked any funds for giving the said guarantee.

1.5. Without prejudice to the above, on the facts and in the circumstances of the case and in the law, the learned CIT(A)/TPO/OA erred in considering the transaction of corporate guarantee as an international transaction under section 92B of the Act disregarding the fact that the Appellant has not incurred any expenditure in providing the said corporate guarantee and thereby did not have any bearing on its profits, income, losses or assets and ,accordingly, transfer pricing provisions do not apply to the said transaction.

1.6. Without prejudice to the above, on the facts and in the circumstances of the case and in the law, the learned CIT(A)/ TPO /AO erred in not appreciating the facts that the explanation to section 92B inserted by Finance Act, 2012 cannot extend scope of transaction retrospectively and accordingly, transfer pricing provision cannot apply to the said transaction.

Without prejudice to the above

1.7. Without prejudice to above, the learned CIT (A) erred in summarily rejecting the comparability analysis undertaken by the Appellant to benchmark the transaction of provision of corporate guarantee to the AE and adopting the arm's length price at 0.53% in an arbitrary and ad hoc manner without recording a finding as regards to Most Appropriate Method for benchmarking the transaction of providing corporate guarantee.

1.8. Without prejudice to the above, the learned CIT (A) /TPO/AO erred in summarily rejecting contention of the Appellant that the AE cannot be expected to pay 100% of the interest cost saving and thereby arm's length guarantee commission should be restricted to 50% of interest rate saving only and thereby arm's length guarantee commission should be Rs.14,22,000/-as against Rs.20,09,760/- as computed by the learned CIT(A).

2. Ground No. 2-Addtion made under section 14A of the Income Tax Act 1961 read with rule 8D for Rs.6,18,584/-.

2.1 on the facts and in the circumstances of the case and in the law, the Learned CIT (A) erred in upholding the AO's action of making additional disallowance of Rs.6,18,584/- u/s 14A holding that the assesse has not objected to the fact related to non-business investment made into shares of associate companies nor raised objection on the calculation of such disallowance. It is submitted that on the facts and in the circumstances of the case, disallowance already made by the appellant in its return of income at Rs.2,79,221/- was also excessive and the further disallowance made by the AO and sustained by the Learned CIT(A) is patently wrong and uncalled and requires to be deleted.

3. Ground No.3- disallowance made out of the colliery and office general expenses for Rs. 5,65,263/-.

3.1 The ld. CIT (A) erred in upholding the AO's action of making disallowances of Rs. 5,65,263/- on adhoc basis. On the facts and in the circumstances of the case, it is submitted that these expenses are properly incurred for the purpose of the business of the appellant and are allowable. Hence, it is prayed that the same may very kindly be now allowed.

Now we will deal with the TPA No. 607/Ind/2015 for A.Y. 2009-10, revenue appeal

2. Ground No. (i) to (vi) of Revenue for both assessment year relate to deletion of TP adjustment of international transaction in relation to purchase for coal and payment of freight, of Rs. 9,73,14,004/- for assessment year 2009-10 and Rs. 1,84,66,325/- for assessment year 2010-11 stating that contrary view was taken by the TPO, no or low incentive for shifting of profit , and TPO failed to show that FAR was incorrect. The facts relating to assessment year 2009-10 are discussed hereunder.

2.1. The brief facts of the case are that returns of income declaring total income of Rs. 26,30,32,460/-(A.Y. 2009-10) and Rs. 55,94,94,650/- (A.Y. 2010-11) were e-filed by the assessee company on 30.09.2009 and 13.10.2010 respectively. The same were processed u/s 143(1) and were picked up in scrutiny through CASS. On verification of records, the AO observed that the assessee has entered into international transactions as defined u/s 92B. Accordingly, after seeking the prior approval of the CIT-II, Indore, the cases were referred to the Transfer Pricing Officer, Ahmedabad (for short- TPO) to determine the "arm's length price" u/s 93CA(3)

of the Income-tax Act, 1961, in respect of "international transactions" entered into by the assessee during the financial years 2008-09 and 2009-10. The TPO, after examination of the company's transfer pricing documentation and economic analysis contained therein, passed an order dt.30.01.2013 for assessment year 2009-10 and dt. 28.01.2014 for assessment year 2010-11 u/s 92CA(3) of the Income-tax Act, 1961, therein determining the Arm's length price margin in respect of Coal purchased from its AE at Rs. 9,73,14,004/- for assessment year 2009-10 and Rs. 1,84,66,325/- as Arm's length price difference for the assessment year 2010-11. The assessee was asked to show cause as to why aforesaid adjustment, should not be made to the income of the assessee for the previous years under consideration as mentioned in the order of TPO dated 30.01.2013 and 28.01.2014 for assessment year 2009-10 and 2010-11 respectively in respect of coal purchase from its AE and corporate guarantee given to its AE. The assessee submitted a detailed submission reiterating the submissions made before the TPO in the proceedings u/s 92CA (3) of the Income-tax Act, 1961. It was claimed in the submission of the

assessee company that the assessee should be allowed benefit of the ((+/ (-)) 5% range around the Arm's Length Price in accordance with the provisions of Section 92C (4) of the Act. The submission was not found acceptable due to the reasons given in detail in the orders of TPO giving detailed working of Arm's length adjustment in respect of Coal Purchase from its AE and the AO made the additions to the total income on account of the adjustments in the arm's length pricing.

2.2. The matter carried to the ld. CIT(A) and the ld. CIT(A) has deleted the additions for A.Y. 2009-10 by observing as under:

> *"5.1 Since long appellant is engaged in business of coal trading & has also entered in business of power generation. This is first year when appellant has significant related party international transactions with Agarwal Coal Corporation (S) Pte. Ltd., Singapore (ACCSPL). During this year, appellant has reported transactions of coal purchases & freight, of a total of Rs.126.01 crore with its AE, ACCSPL and submitted CUP analysis of such transactions with its AE and benchmarked the same with other unrelated purchases made by it, and AO has accepted the same.*
>
> *5.2 AO has also accepted the fact that ACCSPL is an independent business unit based at Singapore doing trading of coal and not merely a marketing branch of appellant at Singapore. The AO has thereafter objected to only long term purchase contracts for purchase of coal, entered into in May'*

2007 by ACCSPL with Adani Global Pte. Ltd, for a period of 1-1/2 yrs. The AO was of the view that such AE (ACCSPL) was not having functional capability to enter into such long term contracts with third parties and AO expressed the view that such contracts were in reality entered into by appellant, although signed in name of its AE, as appellant alone was having marketing, transport & other support system to fulfill terms of such long term contracts. AO has raised question on salary expenses and capability of marketing manpower of appellant's AE i.e. ACCSPL. AO has also argued that appellant's AE was not having any storage facility and therefore it was capable of making purchases only when sale order was in hand and therefore AE was having no capability to enter into any long-term contracts, for purchases. Therefore AO conclude that appellant has not done proper FAR analysis and has not properly benchmarked services {offices, marketing intangibles and infrastructure) provided by appellant i.e. ACCPL to its AE i.e. ACCSPL, in fulfilling the terms of long-term purchase contract. AO therefore attributed 7 % profits of AE to appellant out of total of 15.71 % profits on such long term purchase contracts. Profit attributable to appellant was thus calculated by AO at Rs.9,73,14,004/-.

5.3 In such decision of AO there was an inherent contradiction. Having accepted the appellant's AE as an independent trading concern at Singapore & having ruled out the AE as only a marketing arm, AO wanted to now contradict himself in going back from his previous decision while saying that the limited purpose of long term purchase contracts, appellant's AE was merely a marketing arm, while for other purchases, it was a full-fledged trader. Such half way approach is not permissible in law. If appellant's AE was

considered by AO himself as capable of handling all other purchases & sales, there was no basis to state that they were not capable to handle long-term purchase contracts.

5.4. Such inherent contradiction has arisen because of lack of analysis of such long-term contract. Firstly such long-term contract is signed between AE and a third party or independent party, on which appellant has no control. Hence appellant was not capable to influence a third party contract, especially when terms of contract bind AE & Third party & AO failed to show that terms of contract were in any way applicable to appellant also. When a third party enters into contract with AE, they go by commercial considerations & examine whether AE was having capability & manpower 'to fulfill terms of contract and only then they sign on dotted line. Secondly and more importantly, such long-term purchase contract signed by AE does not change its nature of being a "coal trader" where their basic activity is purchase & sale of coal. Entering into a contract merely secure the two parties to the contract from botheration of sale of stock of coal to the seller and botheration of rate fluctuation to the buyer. However, such contract does not in any way hamper other trading needs, whereby appellant's AE can request & defer lifting of coal, till it gets a potential buyer.

5.5 In view of previously mentioned discussion, I hold that artificial division of long-term purchase contracts of AE from other purchases of AE, based on lack of functional capability of AE, cannot be sustained because of five reasons.

Firstly, since long-term contract is entered by AE with a third party, functional capability must have been proven to such third

party by AE, as that requires test of commercial expediency, which is heavier than test of taxation. Moreover, legal obligation to fulfill terms of contact rested on the shoulders of AE and not on appellant.

Secondly, it is not permissible in law to hold that appellant's AE was capable of trading in coal but was not capable to enter in long-term purchase contracts, as that is inherently contradictory. A trader in coal can enter into any kind of purchase, which in their understanding is beneficial to them and that is why appellant has made both random market purchases as well as contract-based purchases. TPO cannot therefore speak in same breath that appellant's AE was functionally capable to handle all its purchases & sales except for the purchases made on the basis of long-term contract and only for handling such contract based purchases, it cannot be selectively held to be functionally incapable. If the TPO was convinced that staff of appellant's AE was capable of handling random coal purchases from various parties not based on contract, there was no justification to hold that such staff was incapable to handle contract based purchases of coal. Having held that appellant's AE was independent trading concern, TPO cannot stop half way and say that AE was trading concern for all purchases & sales but it was merely a marketing arm for contract bases purchases. If AE was functionally capable to handle all purchases & sales, holding it incapable selectively for handling contract based purchases was not justified on the part of TPO. Moreover onus was on TPO to show how FAR analysis given by. appellant was incorrect but TPO failed to show any specific data from financial accounts to prove that appellant provided any functional support or allowed use of its assets or bore any risk for its AE. A presumption cannot take the place of an- evidence, no matter however strong the presumption might be.

Thirdly, since long term, agreement was, with third

party or independent party, appellant was not capable to influence such contract and AO has not adduced any proof or evidence that such contracts were in any way influenced by appellant.

Fourthly any business can entail profits & losses and appellant's AE might have hit jackpot by garnering more profit in long term purchase contracts in this year, but we cannot forget that such business decisions could lead to losses also and in fact rate of profit from such long term purchase contract has gone down substantially in next two years and that is why TPO changed his stand in next two year::" whereby such artificial term. of long term contract is reduced from 12 months to 4 months and then to zero months in next two years. That inconsistent approach of TPO arises from two basic conflicts namely whether to treat appellant as merely a branch of appellant in Singapore or a full-fledged coal trader and secondly having held it as coal trader, whether it is possible to segregate various transactions of appellant's AE into two-more profitable transactions and less profitable /loss making transactions.

Fifthly since appellant's AE is at Singapore. which is not a tax heaven and income generated there is also subjected to tax, may be at a little lesser rate, that does not give any major incentive to appellant 'to shift the profit from India to Singapore, which is visible from the fact that TPO found the international transactions of Rs.126.01 crore of coal purchases & freight between appellant & its AE to be at arm's length as per CUP method. TPO also could not show any material or evidence to doubt the long-term contract of AE with third party. TPO also could not

give any sustainable arguments to reject functional analysis conducted by appellant.

Considering all the five arguments given above, I find no basis to sustain artificial bifurcation of profit arising to AE from one particular purchase contract and I find no basis to allocate any part of such profit to appellant. The transfer pricing adjustment of Rs. 9,73,14,004/- made by TPO is hereby deleted."

Observations made in assessment year 2010-11:

"6.1 This issue is decided in favour of appellant in assessment year 2009-10. The difference in present case is only that the TPO this year changed his own definition of segregating the long-term purchases contracts. While in assessment year 2009-10, TPO took such period on his own accord as "12 months" to define a long-term purchase contract, this year for the reasons best known to TPO, he reduced such period to "4 months". Such inconsistent approach of TPO is reason enough to reject the transfer pricing adjustment of Rs. 1,84,66,325/- especially when such long term contract entered into by AE of the appellant was a third party contract which cannot be influenced by appellant and no proof was adduced by TPO that any functional support or other support was provided by assessee to its AE in order to fulfill such contract. In view of the same and also on the basis of details reasons given in order for assessment year 2009-10, ground nos. 1 & 2 of appeals are allowed."

2.3. Being, aggrieved the Revenue has filed this appeal before the tribunal. The ld. DR submitted that the Ld. CIT(A) has erred in deleting the adjustment of Rs. 9,73,14,004/- (A.Y. 2009-10) and Rs 1,84,66,325/- (A.Y. 2010-11) stating that the contradictory view was taken by the TPO. The AE has entered into long term contracts requiring considerable financial and infrastructural capability, experience and market standing not available with the AE. It is not compatible with the functional characterization of the AE as per assessee itself. In relation to such long-term contracts, purchases have been made before the confirmed orders of third parties and huge margins have been made by the AE on such long-term contracts. Such purchases under long-term contract are at variance with the characterization of or functions attributed to the AE and offer clear evidence of beneficial long term contracts having been given to the AE by the assessee company resulting in significant diversion of income to the Singapore entity. The AE did not have significant manpower expenses signifying that some of the services attributed to

the AE were being rendered by the assessee company. Since the entire sales by the AE were being made in India, the Indian company would have rendered the sales and marketing service in relation to the long-term contracts as the AE did not have the commensurate manpower and risk taking ability for entering into and executing such long-term contracts. Thus, the view taken by the TPO was not contradictory as interpreted by the Ld. CIT (A). The AE did not have functional and risk capability to execute long-term contracts as per the detailed discussion made by the TPO in his order, the AE was characterized as providing only limited marketing support functions as an extended marketing arm in relation to long-term contracts. In relation to routine low risk trading transactions, the AE was characterized by the Assessing Officer as limited/low risk trader. Thus, there was no contradiction in the order of the TPO as alleged by the Ld CIT (A) in his order. The prices of commodities like coal significantly fluctuates widely and such long term purchase contracts thus cannot be entered into and executed by limited

low risk trader without any significant sales and marketing infrastructure and associated risk taking capability.

2.3.0. The ld. DR further submitted that the ld. CIT (A) was of the view that there was no incentive for the assessee to shift the income to the Singapore when there is a substantial difference between the tax rates in Singapore and India. Nevertheless the tax avoidance as a motive need not be established in transfer pricing proceedings as held by 5 member special ITAT Bangalore bench in the case of *Aztec Software And Technology* vs. *ACIT (2007 107 lTD* 141 *Bang, 2007* 294 *ITR* 32 *Bang).* The unambiguous language of the IT Act, the international transaction has to be carried out at Arm's length price and the Assessing Officer/TPO is neither supposed to enquire in the tax structures of the tax jurisdiction involved nor required to demonstrate the shifting of income to other tax jurisdiction.

2.3.1. The ld. DR submitted that the AE did not have functional and risk taking capability to enter into and execute long-term contracts. Such long-term contracts were thus indeed entered into by the assessee company with the AE

acting only as extended marketing arm of the assessee company. Subsequently, such long-term contracts were transferred to the AE leading to significant diversion of income to the Singapore. The AE being functionally incompetent to enter into such long term contracts, it is clear that the long term contracts being actual transactions of the assessee company have been routed through the books of the AE to look as if the transaction has been carried out by the AE. The OECD also acknowledges this fact in para 1.39 of its guidelines which states that,

2.3.2. *"1.39 Associated enterprises are able to make a much greater variety of contracts and arrangements than can unrelated enterprises because the normal conflict of interest which would exist between independent parties is often absent, associated enterprises may and frequently do conclude arrangements of a specific nature that are not or are very rarely encountered between unrelated parties. This may be done for various economic, legal, or fiscal reasons dependent on the circumstances in a particular case. Moreover, contracts within an MNE could be quite easily altered, suspended, extended, or terminated according to the overall strategies of the MNE*

as whole and such alterations *may even be made retroactively. In such instances tax administrations would have to determine what is the underlying reality behind a contractual arrangement in applying the arm's length principle."*

2.3.3. Thus, though the long-term contracts were executed between the AE and the third party, the marketing intangibles, infrastructure of the assessee company was utilized by the AE, and the AE acted only as an extended marketing arm providing marketing support services. The Ld. CIT (A) has overlooked the basic objective of the transfer pricing regulation when holding that the assessee company could not have influenced the long-term contract executed by the AE with the third party. It was pointed out by the TPO in his order that the AE had no capacity to hold or stock any supply and hence it was not possible for it to enter into contract with the supplier without the confirmed order of the third party. Clearly, such a contract was entered into by the assessee and was routed though the books of Singapore entity as the contract involved huge margins. Since the Singapore entity prima facie did not have any marketing network also, it has utilized the local

network of the Indian party to sell coal in respect of these contracts. Such arrangement was possible only because of the special relationship enjoyed by the AE with the assessee company. The Final Report on Action Plan 8-10 of BEPS project has also lead emphasis on accurately delineating the actual transaction. The legal contractual financial risk was also to be borne by Assessee Company in view of corporate guarantee being extended by the assessee company to the AE.

2.3.4. The ld. DR also submitted that the specific defects in the FAR analysis were pointed out by the TPO, it was submitted that the AE did not have significant labor expenses signifying that the assessee company was rendering such services attributed to the AE. It was found that there were five employees with the company who were handling the coal trading transactions. The manpower did not appear to have necessary credentials for conducting significant marketing activity and having capacity to undertake long-term contracts. All the sales had happened to India and hence, the attribution of functions entirely to the AE in respect of its marketing activities was not found correct. It is seen that while the

source of coal is same as it is for the assessee company, the destination of the coal sale is also India. Hence, the AE has not made any sale to any party independently outside the country. It was claimed by the assessee company that the setup of the AE was ready in December 2006 and the AE was able to secure financial credit facilities for itself on the strength of its own operations. This claim is found to be erroneous. The assessee has contended that it has capability to enter into long-term contracts and as proof, enclosed copies of the long-term contracts. The functional characterization of the AE in the TP document is that it makes back to back sale and purchase transactions and does not hold inventories. In its FAR analysis, the assessee has termed the AE as a trader who purchases material directly from the third parties based on receipt of confirmed purchased order and hence, it does not maintain any inventories of coal. However, the perusal of the sale and purchase invoices of the Singapore entity reveals that it has engaged itself in entering into contracts, which would involve arrangement with coal suppliers to supply coal on a long-term basis. This arrangement was without a

corresponding confirmed order of the selling parties and hence clearly beyond the functional scope of the AE. Accordingly, the FAR of the AE in relation to the long-term contract as drawn by the assessee company was incorrect and faulty. The functional characterization of the AE in the TP document is that it makes back to back sale and purchase transactions and does not hold inventories. However, the assessee has failed to furnish any document to support the TP document study that there was a back-to-back supply agreement with the customer on the strength of which the company entered into the long-term purchase contract. Such defects in the FAR as drawn by the assessee in its TP Study report has been completed ignored by the Ld. CIT (A) while holding that the TPQ has failed to show any evidence for providing incorrect FAR analysis.

2.3.5. The ld. DR also submitted that the ld. CIT (A) has ignored the TPOs categorical finding that all activities relating to identifying vendors, the assessee company in relation to long-term contracts performed negotiating purchase terms, setting quality standards for purchase of goods etc. It is a

clear case of selective trading in the hands of the AE to ensure higher margins in their hands as the AE falls in a low tax jurisdiction. All the clients pertaining to third party sale of the AE are in India only and the AE did not have infrastructure to secure orders independently with its own effort. It is thus clear that the infrastructure facilities, marketing intangibles, and financial guarantees of the assessee company have been utilized for the conduct of these long-term contracts and hence the assessee is liable to suitable remuneration on these contracts. The assessee company has argued that it has selected CUP method for benchmarking the transactions and the same have been accepted as being proper in the case of the assessee. Hence, any further exercise on this account is unwarranted. The TPO has followed the method prescribed in all the transactions where CUP is MAM. It is only in some transactions where additional services have been rendered by the assesse or additional risks have been adopted by the assessee, that the quantum of such service has been benchmarked. Such transactions pertain to the contracts between the AE and the independent parties and not the

contracts between the two related parties. The related party contracts have been accepted to be at arm's length. In respect of un-related party contracts, the assessee has performed significant services on behalf of the AE for which it should have been remunerated.

2.3.6. The ld. DR with regard to the ld. CIT (A)'s observation that the TPO has changed his stance in next two years. It was contended that the TP proceedings for each assessment year have to be carried out separately in accordance with the facts of the year under consideration. Such factual differences were brought out by the assessee company in its reply to show cause notice issued by the TPO in TP proceedings for AY: 11-12, which forms the part of the TP order.

2.4. On the other hand, ld. Authorized Representative of the assessee submitted that the TPO has questioned the technical and financial capability of the AE i.e. Agarwal Singapore to execute so called long-term contracts executed by it with third parties. It was argued that the assessee had filed a detailed

submission to the learned TPO as well as learned CIT(A), same has been summarized as under:-

> "The AE had the capacity to independently execute coal contracts and was independently engaged in coal trading;
>
> The functional profile of employees employed by the AE had requisite qualifications and were capable of independently undertaking coal trading;
>
> The AE had business presence in Singapore as well as credit facility from bank for undertaking its trading operations;
>
> The AE had entered into various contracts with different duration of delivery contracts for purchase of coal, which justified significant activity in Singapore;
> The AE was incorporated in Singapore and its legal substance cannot be ignored;
>
> The AE had also paid taxes on income earned in Singapore and was accordingly, not located in tax heaven;
>
> The AE has sufficient information exchange facilities in terms of subscription to online index rates for coal as well as Baltic Index for freight based on which it is able to track the rates of coal and shipping."

2.4.1. The ld. AR further submitted that the ld. TPO has rightly concluded that although the AE was an independent coal trader, but has capacity to execute only short term coal contracts and did not have the capacity to execute so called

long term coal contracts of more than four months independently and these contracts were executed only with the infrastructure and support of the assessee. Accordingly, the TPO has contended that the assessee had provided marketing support services to the AE for procuring only long term coal contracts and hence, the exceptional/additional profits earned by the AE due to these alleged long term coal contracts were attributed to the operations of the Appellant and hence, the Appellant was required to charge 100% of exceptional profits earned by AE from alleged long term coal contracts for providing these services. In this regard, the ld. AR submitted that the learned TPO, in its order, has characterized the AE as marketing service provided for alleged long term contract is incorrect as the learned TPO has argued the same in its show cause notice and however, while passing the final order, has changed his stand completely and have concluded that the assessee had provided marketing support services to the AE. Accordingly, the following observation of the learned DR in its submission is factually incorrect:

"….Since the AE did not have functional and risk capability to execute long term contracts as per the detailed discussion made by the TPO in his order, the AE was characterized as providing only limited marketing support functions as an extended marketing arm in relation to long term contracts…"

2.4.2. Further, the ld. AR submitted that the assessee has entered into coal trading transactions with its AE, being a separate legal entity and further, the AE had the required infrastructure along with employees to execute all types of coal contracts on its own without any support from the assessee. This re-characterization of the assessee's business as a marketing support entity for its AE is without any basis and are only based on conjectures and surmises. There are no specific reasons or evidences or documents for determining alleged short term / long terms contracts as pointed by the learned DR in arriving at the above inferences. Thus, based on the above analysis, it is evident that both the Appellant and AE are independent entity undertaking different functions of an independent entrepreneur. The above functions undertaken

by the Appellant do not involve undertaking marketing for the AE. Hence, as the Appellant is not undertaking marketing activities or any marketing function for the AE, it can never be considered as a marketing support services entity for its AE. Its primary function is to undertake trading in coal and in this regards, undertakes all functions required to be undertaken by an independent entrepreneur.

2.4.3. The ld. AR contended that the AE being an independent entrepreneur, the AE has employed well-experienced and competent personnel for undertaking its operations and performing functions required to be performed by an independent entrepreneur. Secondly, conducting trading business as such requires no technical qualifications and only experience in the field is more relevant for doing business. Further, employees employed by AE have competent and well-experienced personnel who are capable of undertaking functions of an independent entrepreneur and is not dependent on the Appellant. Further, as total number of transactions undertaken by AE during the subject AY is limited, the employee strength was sufficient to take care of

the compliances around these transactions. Hence, the argument of the learned DR that technical services have been rendered by the staff of the assessee to the AE is incorrect and without any basis.

2.4.4. Further, the learned DR's observation that although the AE employed qualified staff and infrastructure to enter into short term coal contracts, they were not capable of securing long-term coal contracts for sales made to third parties. Therefore, the learned DR had assumed that the staff and infrastructure of the Appellant had been utilized while securing alleged long-term contracts. The said observations are also without any basis as employees of AE were competent, well-experienced, and accordingly executed alleged short term as well as long-term contracts with third parties independently without any support from the Appellant.

2.4.5. The Ld. A.R. submitted that the sample copy of purchase and sales invoices executed by Singapore personnel of AE with third parties have also been submitted which substantiates that AE secured orders on its own and contracts were undertaken independently with third parties without any

support from the assessee. Therefore, it would be appreciated that the arguments made by the learned DR are without any material or evidences to support and hence, should not be considered.

2.4.6. The Ld. A.R. submitted the Ld. D.R. has questioned the learned CIT(A) for holding that there was no incentive for the assessee to shift the income to the Singapore as there is not a huge difference between the tax rates in Singapore and India. It was submitted that the learned CIT(A) has provided detailed rationale and justification in the order of assessment year 2009-10 wherein one of the reason provided is as under (page 43 of the CIT(A) order):

> *"…. Fifthly since appellant's AE is at Singapore, which is not a tax heaven and income generated there is also subjected to tax, may be at a little lesser rate, that does not give any major incentive to appellant to shift the profit from India to Singapore, which is visible from the fact that TPO found the international transaction of Rs 126.01 crore of coal purchases and freight between appellant and its AE to be at arm's length as per CUP method. ……"*

2.4.7. The Ld. A.R. contended that in view of above facts and coupled with the fact that there is no substantial difference between the tax rates of India and Singapore, it would be appreciated that argument made by the learned DR is without any basis. Further, it was reiterated that Agarwal group has established a company in Singapore i.e. Agarwal Singapore due to various commercial reasons such as:

- Singapore is globally recognized as a commercial hub for undertaking commodity business in Asia Pacific region;
- Shipping/ Logistics and intermediary service providers are located in Singapore; and
- Singapore is also recognized as Global financial hub and hence, AE is able to avail finance at competitive rate.

  -Additionally, the Indian parties who intends to procure coal prefers to import coal from outside India vis-à-vis purchase from Appellant or any Indian third party suppliers due to following reasons:

- Indian importers can avail buyers credit facilities at a lower rate of interest for import finance;
- Indian importers, prefer to source coal from outside India to avail foreign exchange fluctuation benefit/ hedge;

2.4.8. Therefore, it was contended that the aforementioned facts substantiate that it is prudent for the Group to have an

independent entity in Singapore and there is no intention to shift the profit to Singapore.

2.4.9. The ld. AR stated that it is contended by the Revenue that the AE did not have functional and risk taking capability to enter into and execute alleged long-term contract and the assessee thus indeed entered into such contracts with the AE acting only as extended marketing arm of the assessee. Subsequently, alleged long-term contracts were transferred to the AE leading to significant diversion of income to the Singapore. The ld. AR asserted that the ld. TPO has not substantiated what are the additional infrastructure facility that are required for undertaking alleged long term coal contracts, whereas it would be appreciated that the infrastructure and set up required for undertaking so called short term as well as long term coal contracts are identical and further, the same personnel employed by AE had the necessary experience as well as qualification to undertake so called long term as well as short term coal contracts. Hence, if the AE had the capacity to execute short-term coal contracts, it validly possessed the capacity to undertake alleged long-

term coal contracts also. Thus, the contention of the learned TPO that AE had capacity to undertake short term coal contracts but not long term coal contracts is without any basis or evidences.

2.4.10. With regard to contention that the AE did not have the capacity to enter into alleged long term coal contracts and these contracts were undertaken by the Appellant but routed through AE, the ld. AR submitted that the observation of the revenue is without any basis and are based on surmises and presumptions only. All the contracts, including long-term coal contracts were entered by the AE independently with third parties in its own name, without any support from Appellant and hence, there is no question of any of these contracts being transferred by Appellant to AE.

2.4.11. Further, the ld. AR submitted that during the AY 2009-10, the learned TPO had considered the coal contracts having tenure of more than 1 year as long term and remaining contracts having maturity period of less than 1 year as short term. However, during the AY 2010-11, the learned TPO without providing any reasons has changed his stand and

considered period of 120 days i.e. 4 months as long term instead of 1 year. Accordingly, there is no consistent basis on which the learned TPO has determined contract to be long term or short-term contract. Hence, the action of the learned TPO of changing limit of 365 days to 120 days only suggest that the action of the TPO is arbitrary in nature only and hence, cannot be accepted.

2.4.12. The Ld. A.R. submitted that the leaned DR has referred to Action 8 – 10 of the BEPS project and has argued that the said guidance also clarifies that transfer pricing outcomes should be consistent with the economic activity conducted by the MNE Groups. In this regard, the learned DR has highlighted that the AE did not have storage facility to store the coal and hence, it was not possible for the AE to enter into contract with supplier. Instead, the same had been entered into by the Appellant and routed through the AE. With respect to the same, it was submitted by the Ld. A.R. that the AE had entered into contract with supplier to procure agreed quantity of coal at agreed price over a mutually agreed period. Once the AE receives the order from its customers, it places

the order with the supplier to supply the coal directly to customer's place. Given the same, considering the operating model of the AE, it is submitted that it does not require storing facility at all. Hence, the contention of the learned DR, which is without providing any material or evidence, cannot be accepted.

2.4.13. Further, the Ld. A.R. submitted that there is no difference between the FAR analysis reported in the TP report vis-à-vis the conduct of parties and hence, there was no reason to delineate the actual transaction of the Appellant by giving reference to Action 8-10 of BEPS project.

2.4.14. With regard to contention that the technical competency of AE does not reflect its capability to manage its own logistics and shipping needs, the Ld. A.R. has reiterated that the AE has sufficient information exchange facilities in terms of subscription to online index rates for coal as well as Baltic Index for freight based on which it is able to track the shipping freight. Accordingly, based on the information received from these online facilities only, AE undertakes its own logistics and shipping. Additionally, reference is also

invited to the para 4.2.1 of the transfer pricing documentation wherein it has been clearly mentioned that AE is responsible for selection of shipper for exporting coal. Further, AE has independently entered into shipping contracts for third parties for shipment of coal. Thus, this fact substantiates that the AE is clearly undertaking shipping functions required for undertaking its coal trading business. In addition, Singapore is a trading hub for commodity markets and all major shipping lines have their presence in Singapore. Hence, it is easier for the AE to procure ships from Singapore and accordingly, it undertakes shipping functions for transporting of coal traded by it.

2.4.15. The ld. AR reiterated that the AE had entered into contract with supplier to procure agreed quantity of coal at agreed price over a mutually agreed period and once the AE receives the order from its customers, it places the order with the supplier to supply the coal directly to customer's place. It was therefore, contended that the learned TPO/ DR has failed to understand the operating mechanics as well as difference between contract and purchase order and merely proceeded to

assume that the AE had placed purchase order well before the order received from the customer. Accordingly, the alleged contention of the learned DR/ TPO is factually incorrect and cannot be accepted.

2.4.16. The ld. AR also placed reliance on the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations issued by Organization for Economic Co-Operation and Development ('OECD Guidelines') wherein it was held that the characterization of the transactions undertaken by the Appellant with its AE could not be ignored. Further, the learned TPO has neither disputed the commercial terms and conditions of the valid contracts undertaken by the Appellant with its AE and filed with the learned TPO earlier nor have drawn an adverse inference from the said contracts. Thus, in absence of any finding that contracts undertaken by Appellant with its AE are sham transactions, the commercial transactions undertaken by Appellant with its AE cannot be ignored. Further, the profits earned by the AE from sales made to third parties are also under valid contracts and it cannot be ignored while computing ALP of an international transaction.

2.4.17. The ld. AR referred Para 1.64 of OECD Guidelines, which lay emphasis on the fact that it is desirable for the tax authorities to recognize and appreciate the actual transactions undertaken by a taxpayer and the same should not be disregarded barring exceptional circumstances. The relevant extracts are provided below for ready reference: ***"D.2 Recognition of the actual transactions undertaken tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapter II. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how***

the transaction should be structured."(Emphasis supplied)

2.4.18. The Ld. A.R. has claimed that this position has also been accepted and regarded by several courts of law in the Indian judicial system, wherein it has been held that it is necessary for the tax authorities to accept and recognize a transaction as such and not to dictate or govern the terms thereof. The Ld. A.R. also placed reliance on following judicial precedents: **Abhishek Auto Industries Limited (2010) 136 TTJ 530, AIA Engineering Ltd vs Add CIT – (50 SOT 134) (2012) (ITAT Ahmedabad), Mastek Ltd. vs Addl CIT, (2012) (53 SOT 111) (ITAT Ahmedabad), LGE&C – NCC vs Income-tax officer, (2014) (37 taxmann.com 402) (ITAT Hyderabad)**

2.4.19. The Ld. A.R. further relied in the case of Hon`ble High Court ruling in the case of **CIT v. EKL Appliances Limited (2012) (345 ITR 241)** (Del) wherein the **Hon'ble High Court** has affirmed the use of OECD guidelines and stressed that the revenue authorities cannot dictate to an Assessee on how to conduct its business. The relevant extracts of the decision is reproduced as under:

"17. The significance of the aforesaid guidelines lies in the fact that they recognize that ***barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions****. The reason for characterization of such re-structuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured.""* ***... It has been held by our courts that it is not for the revenue authorities to dictate to the Assessee as to how he should conduct his business and it is not for them to tell the Assessee as to what expenditure the Assessee can incur ..."*** **(Emphasis supplied)**

2.4.20. The Ld. A.R. also placed reliance on the ruling of **Hon'ble ITAT (Mumbai Bench)** in case of **Dresser-Rand India Pvt. Ltd vs. Additional Commissioner of Income Tax Range 6(2),Mumbai (2011) (53 SOT 173) (ITAT Mumbai)**, wherein Hon'ble ITAT held that the TPO cannot question the business and the commercial expediency of the businessman. The role and the responsibility of the TPO under the Indian TP regulations are restricted to determination of the arm's length price of the international transaction. The relevant extract from the said ruling is reproduced below for reference:

> *"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the Assessee did not need these services at all, as the Assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the Assessee has qualified accounting staff, which could have handled the audit work, and in any case, the Assessee has paid audit fees to external firm. Similarly, the Transfer*

Pricing Officer was of the view that the Assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an Assessee and what is not. ***An Assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer."***

2.4.21. Further, reliance is also placed on the case of **DCIT, New Delhi Vs M/s Elka Appliances (2011) (45 SOT 7)**, wherein Hon'ble Delhi ITAT held as under –

> *"14.2 In this regard, learned Commissioner of Income Tax (Appeals) further mentioned that it is an acknowledged fact that transfer pricing has more to do with economic principles and business conditions that prevail in an uncontrolled situation. He further referred to certain OECD guidelines issued in this regard.* ***He observed that TPO has completely disregarded the business and commercial strategy / realities behind the transaction and acted in a completely mechanical manner without giving regard to the economic circumstances surrounding the transaction and the business decision taken by the Assessee. Further learned Commissioner of Income Tax (Appeals) opined that TPO cannot question the judgment of the Assessee as to when it is necessary and expedient to expand its business, when and from whom or from which sources the technology or technical knowhow***

is to be taken and at what cost etc., or what steps should be taken to meet the needs of the market forces and to face the competitors etc. *Learned Commissioner of Income Tax (Appeals) held that royalty payment was incurred for genuine business purpose and the disallowance were uncalled for and unjustified."*

2.4.22. In view of above, the Ld. A.R. stated that the allegations made by the learned Dr. that the long term contracts entered by the AE are on the strength of the Appellant are completely baseless and without any merits. Further, the learned TPO has not produced any evidence, which substantiate that the Appellant has assisted the AE in securing contracts with third parties or has transferred any third party contracts to the AE.

2.4.23. In view all the above, the Ld. A.R. submitted that it would be appreciated that all the allegations made by the learned DR are completely based on his conjectures and presumptions only and hence, there is no reason to disregard the nature and terms of transactions.

2.4.24. The Ld. A.R. submitted that the contention of the revenue that the AE did not possess functional capability as well as holding capacity to store the coal and hence, for performance of alleged long term contract, infrastructure and marketing intangible of the assessee has been utilized. It was submitted that these observations are also without any basis as in coal trading industry it is not necessary to have holding capacity or storage facilities. As AE is engaged in high sea trading, it did not require any holding capacity or storage facilities. Further, as AE had employed competent and well-experienced employees for undertaking its coal trading business, it had the capacity to undertake short term as well as long-term commodity contracts. Additionally, it is submitted that as AE had capacity to execute alleged long term contract, it executed alleged long term coal contracts for purchase of coal independently with a third party. Copy of such so called long term contract executed by AE with third party have been submitted to the learned TPO for which he has not disputed that the contracts were not entered by AE. The learned TPO has accepted that AE did enter into both

short term as well as long-term coal contracts in its own name.

2.4.25. In this regards, it was submitted that the learned TPO has nowhere observed that the AE did not have any substance or place of business in Singapore. The learned TPO has himself held that AE had necessary infrastructure and employees in Singapore, which even executed short-term coal contracts, and it is only that for long-term coal contracts, that learned TPO has observed that the AE did not have capacity to undertake them.

2.4.26. It was further contended that while the learned TPO has accepted all the reported international transactions of the Appellant at the arm's length price, but the TPO has alleged that the Appellant has rendered some additional services and borne additional risks and for which the learned TPO has quantified the transaction amount and made adjustment accordingly. In this regard, it was submitted that the learned TPO has merely assumed the transaction of provision of services by the Appellant to its AE and for which has not provided any evidence or proof to show the existence of any

agreement, understanding or arrangement between the Appellant and its AE regarding the same.

2.4.27. Without prejudice to the above, the Ld. A.R. quoted the provision of section as under:

> Section 92(1) of the Act states that – *"Any income arising from an international transaction shall be computed having regard to the arm's length price…"*
>
> Further, Sec 92C (1) of the Act states that – "*The arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely:*
>
> *(a) Comparable uncontrolled price method;*
>
> *(b) resale price method;*
>
> *(c) cost plus method;*
>
> *(d) profit split method;*
>
> *(e) transactional net margin method;*
>
> *(f) such other method as may be prescribed by the Board….."*

2.4.28 Considering the aforesaid provisions, arm's length price of any international transaction has to be arrived at using one of the most appropriate method prescribed above.

Against the said legal provisions, the learned TPO has merely assumed an international transaction and further, has proceeded to assume an arm's length price without considering any of the prescribed method. Given the same, it would be appreciated that such action of the learned TPO, which lacks the legal validity, cannot be accepted.

2.4.29 The learned DR has contended that there were factual differences between the years under consideration and AY 2011-12 that is the primary reason for accepting the transactions at arm's length price in later year. In this regard, it was submitted that there is no difference in the business and operating model of the Appellant and the AE. Further, the there is no change in the inter-company as well as third party arrangements. Accordingly, the contention of the learned DR that there were differences in both the years is factually incorrect.

2.4.30 Further, it was claimed that during AY 2011-12, the gross margin earned by Agarwal India was higher than the gross margin earned by Agarwal Singapore from alleged long term contracts and hence, there was no basis to support the

learned DR's allegation that so called long term highly profitable contracts have been routed through AE to shift the profit outside India. Basis the same, the learned TPO had not made an adjustment in AY 2011-12 and there was no other reason such change in business or operating model as indicated by the learned DR. It was also stated that the AY 2009-10 and 2010-11 were exceptional years for commodity business and it was the primary reason that AE had earned higher margins and there was no intention at all to shift the profit outside India and it is supported by the fact that AE has earned lesser margins in subsequent years. Therefore, it may be appreciated that the learned TPO has made adjustment in AY 2009-10 and 2010-11 merely based on his surmises and presumptions that profit would have been shifted to AE through routing of transactions and hence, contentions of the learned DR cannot be accepted.

2.4.31 In the light of the detailed reasons stated above, it was submitted that the AE had the requisite infrastructure and staff to undertake independent coal trading business; it had entered into alleged long term as well as short-term coal

contracts on its own without any support from the Appellant. Further, there were no materials or evidences provided by the TPO to substantiate its arguments that the Appellant had routed the so-called long-term contracts through the AE.

2.4.32 The Ld. A.R. contended that the learned CIT (A) has considered all the facts of case and pursuantly, by providing detailed rationale in its order has reversed the action of the learned TPO as it was merely without any merits and basis to support.

2.5. We have considered the facts, rival submissions, perused the orders of the lower authorities, and gone through the material available on record. It is seen from the grounds of appeal that the Revenue has agitated against the deletion of adjustment to the international transaction of purchase for coal and payment of freight of Rs. 9,73,14,004/- for A.Y. 09-10, and Rs. 1,84,66,325/- for A.Y. 10-11 stating that contradictory view was taken by the TPO and also holding that the TPO failed to show any evidence for proving incorrect FAR analysis and also erred in overlooking that each assessment year is different assessment year and each

international transaction has to be bench marked independently. We find that the assessee is engaged in the business of coal trading and has also entered in business of power generation. During the year under consideration, the assessee has significant related party in the international transaction on account of purchase and freight of coal amounting to Rs.126.01 crores with its AE i.e. Agrawal Coal Corporation (S) Pte. Limited, Singapore (in short ACCSPL). It is seen that the assessee has submitted CUP analysis of such transaction with its AE and benchmarked the same with other own related purchases made by it and the AO has accepted the same. We find that the AO has also accepted the fact that ACCSPL is an independent business entity base at Singapore doing trading of coal and not merely a marketing of the assessee at Singapore. We note that the TPO had accepted that the AE was an independent coal trader, and it has capacity to execute only short term coal contract and did not have the capacity to execute long term coal contract i.e. contracts which were executed for more than 12 months from the date of signing independently. Hence, according to TPO,

these contracts were executed only due to infrastructure and support of the assessee. Accordingly, the TPO has come to conclusion that the assessee has not done proper FAR analysis and has not properly benchmarked services provided by the assessee to its AE in fulfilling the long-term purchase contract. In view of these facts, the TPO has attributed 7% profit of AE to the assessee out of total 15.71 % profit on such long term purchase contract earned by the AE, which has resulted into an adjustment at Rs. 9,73,40,004/-for A.Y. 09-10 and Rs. 1,84,66,325/- for A.Y. 10-11. We find that the AO has accepted the AE of the assessee as an independent trading concern at Singapore and on the other hand, the AO considering the AE as for the limited purpose of long term purchase contract was merely marketing arm, while for other purchases it was a full-fledged traders. Therefore, we find force in the CIT (A)'s observation that the assessee's AE was considered by the TPO himself as capable of handling purchases and sales, there was no basis to state that the AE was not capable to handle long-term purchase contract. We find that so called long-term contract is signed between the AE

and third party or independent party on which the assessee had no control. Therefore, we are not able to subscribe the view of the TPO/AO that the assessee has applied his influence over the long-term contract of AE with third party and therefore, same is without any basis. The Ld. A.R. of the assessee has contended that there is no concept of short and long-term contract merely because there is time gap in execution of a particular contract cannot make the contract as a long-term contract, as such the time gap is purely un-intentional and was never fixed while entering into contract. We also find that the AO has considered long-term contract period of 1-1/2 years from the date of their signing for the assessment years 2009-10. However, in A.Y. 10-11, the TPO has arbitrarily held that contract executed after four months are long-term contracts in respect of contracts executed after 12 months as held in assessment year 2009-10 for which no basis has been given by the TPO for reducing the duration of long-term contract from 12 months to 4 months. Thus, there is inherent contradiction in the approach of the TPO for the assessment year 2009-10 and 2010-11. We find that the TPO

has not given any plausible reasons to bifurcate the transaction as long term and short-term contract; whereas such long-term purchase contract signed by the AE does not change its nature of being a coal trader where there is a basic activity is purchase and sale of coal. We also find that the AO was not able to bring on record to demonstrate any evidence to show that the assessee was capable to influence the third party contract. We are therefore, of the view that the third party contract entered into with the AE were on account of commercial consideration and the capability and man power of the AE to fulfill the contract. The ld. AR referred Para 1.64 of OECD Guidelines, which lay emphasis on the fact that it is desirable for the tax authorities to recognize and appreciate the actual transactions undertaken by a taxpayer and the same should not be disregarded barring exceptional circumstances. The relevant extracts of which as under :

> ***"D.2 Recognition of the actual transactions undertaken tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the***

associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapter II. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured."(Emphasis supplied)

2.5.1. We further find that the TPO has neither disputed the commercial terms and conditions of the valid contracts undertaken by the Appellant with its AE and filed with the learned TPO earlier nor have drawn an adverse inference from the said contracts. Thus, in absence of any finding that contracts undertaken by the assessee with its AE are sham transactions, the commercial transactions undertaken by the

assessee with its AE cannot be ignored. Further, the profits earned by the AE from sales made to third parties are also under valid contracts and same cannot be ignored while computing ALP of an international transaction. The Ld. A.R. relied in the case of CIT vs. EKL Appliances Limited (2012) 345 ITR 41(DEL) [2012] 24 taxmann.com 199 (Delhi)/[2012] 209 Taxman 200 (Delhi)/[2012] 345 ITR 241 (Delhi)/[2012] 250 CTR 264 (Delhi) wherein it was held in para 17 as under:

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

taxation if the other tax administration does not share the same view as to how the transaction should be structured.

2.5.2. Therefore, we are of the view that The TPO cannot dictate its own terms as to how the business of the assessee is run. Similar finding were given by coordinate of Hon`ble tribunal in Dresser-Rand India Pvt. Ltd. vs. Addl. CIT (2011) 53 SOT 173 (Mum) wherein it was held that the TPO cannot question the business and commercial expediency of business man. The role and responsibility of TPO under the Indian TP regulation are restricted to determination of the arm`s length price of the international transaction.

2.5.3. We find that the onus was on the TPO to show how FAR analysis given by the assessee was incorrect but the TPO has failed to show any specific data from financial accounts to prove that the assessee provided any functional support or allowed use of its assets or borne any risk for its AE, mere allegation on the basis of presumption is not tenable in law.

2.5.4. The revenue has contended that Action 8-10 of BEPS Project guidance clarifies transfer pricing outcome should be in consistent with economic activity conducted by the MNE. We find that the assessee AE had entered in to contract with supplier to procure agreed quantity of coal at agreed price over mutually agreed period of time. Once the AE received order from its customers it places order with supplier to supply of coal directly to customers place. Therefore, there was no requirement of storage facility. Thus, we do not find any difference in TP Report and the conduct of parties, hence, there is no delineation of transfer by giving reference of Action 8-10 of BEPS Project. The Ld. A.R. has reiterated that the AE has sufficient information exchange facilities in terms of subscription to online index rates for coal as well as Baltic Index for freight based on which it is able to track the shipping freight. Accordingly, based on the information received from these online facilities only, AE undertakes its own logistics and shipping. The Ld. A.R. has also invited our attention to the para 4.2.1 of the transfer pricing documentation wherein it has been clearly mentioned that AE is responsible for selection

of shipper for exporting coal. Further, AE has independently entered into shipping contracts for third parties for shipment of coal. Thus, this fact substantiates that the AE is clearly undertaking shipping functions required for undertaking its coal trading business. In addition, Singapore is a trading hub for commodity markets and all major shipping lines have their presence in Singapore. Hence, it is easier for the AE to procure ships from Singapore and accordingly, it undertakes shipping functions for transporting of coal traded by it.

2.5.5. We find that the AE is located in Singapore, which cannot be said as a tax heaven as it has a rate of tax as 17 %. Therefore, there was no major incentive to shift profit from India to Singapore, which is visible from the fact that TPO found an international transaction of Rs.126.01 crores of coal purchases in freight between the assessee and its AE to be at arm's length as per CUP method. It is also seen that the tax returns of the AE were submitted before the TPO during the proceedings before him as appearing at page 115 of the paper book. In the written submission, it was submitted by the ld. Authorized Representative of the assessee that Agrawal India

had incurred certain additional expenditure compared to Agrawal Singapore i.e. customs duty, foreign exchange fluctuation loss Stevedoring charges etc. and after adjustment gross margin of Agrawal India worked out to 11.43 %, which is higher than gross margin earned by the Agrawal, Singapore i.e. 10.94% (Pages at 850 and 851 of P.B.III). We also find that the TPO has himself has mentioned in para 5.5 of the order of paper book page 92 of P.B-I that margin of Agrawal India after excluding foreign exchange loss is 9.50%. Therefore, we do not find that there was any intention of the assessee to shift its profit to the AE. We also find that assessment year 2009-10 and assessment year 2010-11 were exceptional years for commodity business and this was the main reason that the AE has earned higher margin whereas during assessment year 2011-12, there was no reason to shift the profit outside India. The gross margin earned by the assessee from alleged long term contract was higher than the gross margin earned by the AE. Therefore, the TPO has not made any adjustment in assessment year 2011-12. In view of these facts, it appears that there was no intention to shift profit to AE by the

assessee. Therefore, the adjustment made for the assessment year 2009-10 and 2010-11 are based only on surmises and assumption, whereas on same set of facts, no adjustment is made in assessment year 2011-12.

2.5.6. As regards allegation of the TPO, that financial long term contract had been given to the AE which results in significant diversion of income, however, we find that the long term coal contracts were entered by the AE independently with third party in its own name without any support from the assessee and there is no question of any contracts being transferred by the assessee to its AE. In support of this contention, the Ld. Counsel for the assessee has placed reliance of catena of decisions placed at Legal Paper book-III from pages 647 to 651. The Ld. AR relied on the case of Abhishek Auto Industries Limited vs. Dy. CIT, (2011) 9 Taxman. Com 27 (Del), wherein it was held that where operating margin earned by the assessee from AE was higher than the margin earned by the assessee in domestic segment, it could be said that the transaction of the assessee with its AE adhered to arm's length standard. We find that the TPO

has discussed in para 5 of his order, the functional analysis of both the companies in which it was claimed that ACCSPL is responsible for undertaking management functions relating to strategy, finance, legal and regulatory affairs, designing the policy and allocation of funds with respect to its operations, ACCSPL formulates its own policy and corporate strategy, design to market, where it operates and, accordingly, undertakes the management functions. However, the TPO was of the view that the AE has made sales in India and majority of purchases were being made from companies having linked with Indian Companies. Hence, the functional analysis in this regard was not found to be correct based on evidence on record. However, we find that the AO has not brought on record the evidence filed by which it can be concluded that functional analysis undertaken by the assessee was incorrect. Further, we find that the assessee is a trader and not a manufacturer. Therefore, there is no question of maintaining any inventory of goods. The contention of the TPO that AE did not have significant man-power expenses is not supported with the evidence on record as the profit and loss account of

the AE shows that it has incurred expenditure on account of salary amounting to 22,000 Singapore Dollars equivalent to Rs. 8 lakhs to Rs. 10 lakhs.

2.5.7. We find that the AE had entered into a contract with the supplier to procure agreed quantity of coal at agreed price offered for a mutually agreed period and once the AE receives the order from its customers, it places the order with the supplier to supply the coal directly to suppliers' place. The assessee has placed reliance on para 1.64 of DECP Guidelines, wherein it has been laid down that the characterization of the transaction undertaken by the assessee with its AE cannot be ignored barring exceptional circumstances, whereas in the case of the assessee the TPO has neither disputed the commercial terms and conditions of the valid contract undertaken by the assessee with its AE and not have drawn any adverse inference from the said contract. Therefore, the TPO is not entitled to dis-regard the actual transaction and substituted other transactions. This position has been accepted by the various Tribunals. In the case of Abhishek Industries, (2010) 136 TTJ 530, AIA Engg. Ltd. vs. Addl. CIT,

50 SOT 134 (Ahm.Trib), Mastek Limited vs. Addl. CIT, (2012) 53 SOT 111 (Ahm.), LGEC – NCC vs. ITO, (2014) 37 taxmann.com 402 (I.T.A.T. Hyd.). The assessee has further relied on the decision of CIT vs. EKL Appliances Limited, (2012) 345 ITR 241(Del), wherein the Hon'ble High Court has affirmed the use of OECD guidelines and stressed that the revenue authorities cannot dictate to an Assessee on how to conduct its business. We find that it has been held by our courts that it is not for the revenue authorities to dictate to the Assessee as to how he should conduct his business and it is not for them to tell the Assessee as to what expenditure the Assessee can incur.

2.5.8. Therefore, we are of the considered opinion that the assessee has sufficient infrastructure in support of his own, who were competent enough to execute the contracts entered into which were mainly in the nature of trading contract. Therefore, we do not find any reason that the assessee's man-power labor or infrastructure has been used by the AE for its execution of work. Further, the AO has failed to bring any evidence contrary to suggest that FAR analysis undertaken by

the assessee was incorrect. In the light of aforesaid discussion, we find that the ld. CIT(A) has deleted the adjustment made by the ld. TPO mainly on the following grounds :- as mentioned in para 5.5 of CIT(A)'s order as under :-

> *"5.5 In view of aforesaid discussion, I hold that artificial division of long term purchase contracts of AE from other purchases of AE, on the basis of lack of functional capability of AE, cannot be sustained because of five reasons.*
>
> *Firstly, since long-term contract is entered by AE with a third party, functional capability must have been proven to such third party by AE, as that requires test of commercial expediency, which is heavier than test of taxation. Moreover, legal obligation to fulfill terms of contact rested on the shoulders of AE and not on appellant.*
>
> *Secondly, it is not permissible in law to hold that appellant's AE was capable of trading in coal but was not capable to enter in long-term purchase contracts, as that is inherently contradictory. A trader in coal can enter into any kind of purchase,*

which in their understanding is beneficial to them and that is why appellant has made both random market purchases as well as contract-based purchases. TPO cannot therefore speak in same breath that appellant's AE was functionally capable to handle all its purchases & sales except for the purchases made based on long-term contract and only for handling such contract-based purchases, it cannot be selectively held to be functionally incapable. If the TPO was convinced that staff of appellant's AE was capable of handling random coal purchases from various parties not based on contract, there was no justification to hold that such staff was incapable to handle contract based purchases of coal. Having held that appellant's AE was independent trading concern, TPO cannot stop half way and say that AE was trading concern for all purchases & sales but it was merely a marketing arm for contract bases purchases. If AE

was functionally capable to handle all purchases & sales, holding it incapable selectively for handling contract based purchases was not justified on the part of TPO. Moreover onus was on TPO to show how FAR analysis given by. appellant was incorrect but TPO failed to show any specific data from financial accounts to prove that appellant provided any functional support or allowed use of its assets or bore any risk for its AE. A presumption cannot take the place of an-evidence, no matter however strong the presumption might be.

Thirdly, since long term, agreement was, with third party or independent party, appellant was not capable to influence such contract and AO has not adduced any proof or evidence that such contracts were in any way influenced by appellant.

Fourthly any business can entail profits & losses and appellant's AE might have hit jackpot by

garnering more profit in long term purchase contracts in this year, but we cannot forget that such business decisions could lead to losses also and in fact rate of profit from such long term purchase contract has gone down substantially in next two years and that in why TPO changed his stand in next two year:" whereby such artificial term. of long term contract is reduced from 12 months to 4 months and then to zero months in next two years. That inconsistent approach of TPO arises from two basic conflicts namely whether to treat appellant as merely a branch of appellant in Singapore or a full-fledged coal trader and secondly having held it as coal trader, whether it is possible to segregate various transactions of appellant's AE into two-more profitable transactions and less profitable /loss making transactions.

Fifthly since appellant's AE is at Singapore. which is not a tax heaven and income generated there is also subjected to tax, may be at a little lesser rate, that does not give any major incentive to appellant 'to shift the profit from India to Singapore, which is visible from the fact that TPO found the international transactions of Rs.126.01 crore of coal purchases & freight between appellant & its AE to be at arm's length as per CUP method. TPO also could not show any material or evidence to doubt the long-term contract of AE with third party. TPO also could not give any sustainable arguments to reject functional analysis conducted by appellant.

Considering all the five arguments given above, I find no basis to sustain artificial bifurcation of profit arising to AE from one particular purchase contract and I find no basis to allocate any part of such profit to appellant. The transfer pricing adjustment of Rs. 9, 73, 14,004/- made by TPO is hereby deleted."

2.5.9. We have given our careful thoughts to above findings and fully subscribe the same. In the light of the above facts and circumstances, we do not find any infirmities in the findings of the ld. CIT (A). When a the AE is capable to entered in to contract whether it is for short term , then there is no reason as to why it cannot entered in to long term contract. Further, TPO is not able to bring any documentary evidence on record that the assessee on behalf of its AE enters the long-term contract. Further, the TPO has reduced the period of long term contract from 12 months to 4 months in assessment year 2010-11, without any reason, then there is no consistency in the approach of the TPO. The TPO has the FAR analysis as reproduced in TPO order does not show major variation in risk assumed while comparing the types of function performed by the assessee and its AE. It has been held by various courts as cited by the ld. A.R. and OECD Guidelines as referred to above in his submission above and as per T.P. study report that where TPO neither disputed validity of contract undertaken by the assessee with its AE, therefore, its transaction cannot be

disregarded. We also find that on same long term contract, the assessee had earned higher margin than AE and on which no adjustment is made by TPO for assessment year 2011-12. Therefore, the adjustment made by the TPO for the year under appeal are without any sound and logical basis. In view of these facts, and considering the finding of ld. CIT (A) as reproduced above, we do not find any reason to deviate and interfere the same. Accordingly, the grounds of appeal taken by the Revenue are dismissed. Therefore, the Ground Nos. (i) to (vi) for both the A.Y. 09-10 and A.Y. 10-11 of the assessee appeal are dismissed.

3. Ground No. (vii) to (x) of Revenue as extracted above for both A.Y. 2009-10 and A.Y. 2010-11 are against the ld. CIT (A)'s action in reducing the guarantee commission rate from 2.806% to 0.53% relaying on various decisions of ITAT and ignoring some decisions of ITAT which approves 3% rate of guarantee commission and 1.75 % to 2% rate prescribed by safe harbor Rules introduced w. e. f. 18.09.2013; whereas guarantee amount is less than Rs. 100 crores and more than Rs. 100 crores. Whereas the

Assessee's Ground No. 1.1 to 1.8 as reproduced above are directed against the decision of CIT(A) in computing arm`s length price at Rs. 26,88,160/- (A.Y. 2009-10) and Rs. 20,07,760/- (A.Y. 2010-11) for guarantee commission without considering FAR analysis of the assessee and not appreciating the facts that corporate guarantee is in the nature of share holder activity of the assessee and the assessee is not in business of lending/financing and providing guarantees and the said guarantee was given in the business interest of the assessee. These grounds of computing arm's length price for provision of corporate guarantee by the assessee on behalf of its Associated Enterprise ('AE') are common for both the assessment years under appeal. Hence, these are being considered together for sake of convenience and brevity.

3.1. The facts and figures relating to A.Y. 2009-10 are being discussed, which are equally applicable for A.Y. 2010-11. Succinctly, facts as culled out from the orders of lower authorities are that the assessee has given financial guarantee

to UCO Bank on behalf of its AE i.e. ACCSPL for an amount of Rs. 50.72 Crores. In the TPSR, the assessee stated that "as it is" non- based credit limit , interest rate and bank charges will remain unaffected due to corporate guarantee given by the assessee (in short ACCPL). Further, ACCPL has not paid any guarantee commission to UCO bank in relation to providing corporate guarantee on behalf of ACCSPL. Further, the assessee has not given any security to UCO bank against corporate guarantee provided on behalf of its AE. In TPSR, the assessee has categorized that service as remote and passive benefit service and a shareholder activity and hence, concluded that this cannot be treated as chargeable service required to be remunerated at arm`s length price. The assessee submitted that the guarantee is given for the company to raise funds for working capital. However, the AO has observed that the assessee has not charged any commission from AE's for providing guarantee, whereas the entity is non-rated/financially weaker and relies on assessee`s creditability for its loans/limits/ guarantees , and thus, a substantial portion of risk is transferred to the assessee during the course

of assumption of guarantees. The TPO; after examination of the company's transfer pricing documentation and economic analysis contained therein, passed an order dated 30.01.2013 for assessment year 2009-10 and 28.01.2014 for assessment year 2010-11 u/s 92CA(3) of the Income-tax Act, 1961, therein determining the Arm's length price margin in respect of Corporate guarantee given to its AE at Rs.85,91,058/- for assessment year 2009-10 and Rs. 28,44,000/- on account of Corporate Guarantee given by the assessee company to its AE for assessment year 2010-11. The assessee submitted a detailed submission reiterating the submissions made before the TPO in the proceedings u/s 92CA (3) of the Income-tax Act, 1961. However, these were not found acceptable due to the reasons given in detail in the orders of TPO giving detailed working of Arm's length adjustment in respect of corporate Guarantee to its AE. Accordingly, the AO made the additions to the total income on account of corporate guarantee adjustments as per arm's length price.

3.2. Being, aggrieved the assessee filed an appeal before the ld. CIT (A). The ld. CIT(A) noted that there is no dispute on the

fact that the assessee has given financial guarantee to UCO Bank on behalf of the AE for an amount of Rs. 50.72 crores. The assessee has argued that it is a non-fund based credit limit, interest rate and bank charges will remain unchanged due to the corporate guarantee given by the ACCSPL. Further, it was argued that the assessee has not given any Guarantee Commission or charges to UCO Bank in relation to giving corporate guarantee on behalf of ACCSPL. In TP study, the assessee has categorized the service as remote and passive benefit service and a shareholder activity and hence concluded that transaction cannot be treated as a chargeable service required to be remunerated at arm's length price. The ld. CIT(A) observed as under :-

> "*6.1 This issue is considered by different tribunals and they came to conclusion that bank guarantee provided by appellant to AE involves express guarantee or implied guarantee, which increases creditworthiness of AE's, if provided by main company, as in present case. In case of default, Guarantor has to fulfill the liability. Therefore, there is always an inherent risk in providing guarantees.*

There may not be any immediate charge on P & L a/c of main company, but inherent risk cannot be ruled out in providing guarantees, as held in cases of M/s. Prolific Corporation Limited, (2015) 68 SOT 104 (Hyd. Trib.) (URO), Aditya Birla Minacs Worldwide Limited, (2015) 56 taxmann.com 317 (Mumbai Trib.) and Glenmark Pharmaceuticals Limited, (2014) 62 SOT 79 (Mum. Trib.) in M/s Prolifics Corporation Limited, it was held that Section 92B of the Income-tax Act is amended retrospectively w.e.f. 01.04.2002, hence ALP of corporate guarantee has to be determined, as it falls within scope & ambit of international transactions and they directed to adopt the corporate guarantee rate of 0.53%, which is considered as arm's length rate in many decisions of tribunals. Respectfully following the same, an amount of Rs. 26.88,160/- is confirmed out of addition arrived at by TPO of Rs. 85,91,058/- because as elaborately discussed in case of Glenmark Pharmaceutical Limited, Bank guarantee rate cannot be applied here, as working of that rate have

different basis. Therefore, appellant gets a relief of Rs. 59,02,898/-. "

Thus, ld. CIT (A) has reduced the commission rate to .53% from 2.86% applied by the AO/TPO. On similar findings the ld. CIT(A) for A.Y. 2010-11 has held as under :-

> *" 7. Ground no.3 of appeal is against making addition of Rs. 28,44,000/- as arm's length price for guarantee commission to be charged by appellant from AE. This issue was partly allowed in A.Y. 2009-10. Following the same decision in A.Y> 2011-12, the benefit of bank guarantee of US $ 8 million or Rs. 37.92 crores given by appellant through UCO Bank to the AE, is calculated at 0.53% of Rs. 37.92 crores, as was done in A.Y. 2009-10, following the detailed decision in case of M/s. Glenmark Pharmaceuticals Limited, (2014) 62 SOT 79 (Mum. Trib.). As a result Rs. 20,09,760/- (0.53% of Rs. 37.92 crores) is held as benchmark guarantee fees, in place of Rs. 28,44,000/- arrival at by TPO. Therefore, transfer pricing adjustment for providing bank guarantee to its AE is confirmed to the extent of Rs. 20,09,760/- and appellant gets a relief of Rs. 8,34,240/-."*

3.3. Being aggrieved the assessee as well as revenue has filed this appeal before the tribunal. The Ld. D.R. submitted that the Ld. CIT (A) has erred in reducing the guarantee commission rate to 0.53% by stating that the same is considered to be as the ALP rate in the many decision of

Tribunal. The basis adopted by the Ld. CIT (A) is not case specific but general. In the present case, the TPO has not benchmarked the ALP of corporate guarantee by mechanically picking up the bank guarantee rates as external/internal CUP but rather carried out elaborate exercise using US bond data for benchmarking. Such benchmarking exercise has been completely ignored by the Ld. CIT (A). In addition, the Hon'ble ITAT in the case of *Mahindra and Mahindra vs. Addl CIT/Range* 2(2), [2013) 40 *Taxmann.com (Mumbai- Trib.)* approved the rate of corporate guarantee fee at 3%. Similarly in the case of *Tecnimont ICB Pvt Ltd vs Dep. ClT-9(3)* (2013] 37 *Taxmann.com* 415 *(Mumbai-Trib.)* approved the corporate guarantee rate of 3%. Further reliance can also be placed on the safe harbor rules wherein the corporate guarantee fee in respect of guaranteed amount of less than Rs 100 Crores is determined at the rate of 2% as per rule 10TC and 10TD. Accordingly, the Ld. CIT (A) erred in reducing the guarantee commission rate to 0.53% as against the corporate guarantee fee determined by the TPO by proper benchmarking using US bond data as external CUP.

3.4. On the other hand, The Ld. A.R. submitted that the ld. CIT(A) has relied on certain judicial precedents to arrive at the arm's length rate of guarantee commission for the transaction under consideration for determining the arm's length rate of guarantee commission. The Ld. A.R. relied on the decision **Hon'ble Bombay High Court in case of Everest Kanto Cylinders Ltd [2015] (58 Taxmann.com 254)** (refer page 356 to 361 of legal paper book) wherein it has been specifically accepted 0.50% as arm's length rate for charging corporate guarantee commission rate. Further, there are ample rulings of Hon'ble ITAT **(refer page 361 to page 440 of legal paper book)** which have also been upheld 0.50% as arm's length rate for charging guarantee commission.

3.4.1. It was further submitted that Safe Harbour rules are not applicable to the assessee as the CBDT had clarified vide its letter dated no. F. No. 500/139//2012-FTD-1 dated 20 December 2013 that Safe Harbour rates or margin specified therein are not to be considered as benchmark by AO or TPO in cases not covered by the Safe Harbor Rules.

Hence, Safe Harbor rate cannot be considered as benchmark rate in the case of the assessee.

3.4.2. Further, the ld. A.R. argued that the AE cannot be expected to pay 100 percent of its (potential) interest cost savings otherwise borrowers would have no economic incentive to enter into the guarantee arrangement with the guarantor. Given the facts of the guarantee arrangement, the ld. AR submitted that it is reasonable to apply a 50:50 split between the assessee and AE for sharing of the benefit derived by the later. In support of his contention, the Ld. A.R. also placed reliance on following decisions:

DSM Anti-Infective India Limited vs. ACIT [2014] (50 Taxmann.com 239) (Chandigarh ITAT),

New Zealand Transfer Pricing guidelines General Electric Canada Inc. v/s Her Majesty, the Queen (Canada Supreme Court)

3.4.3. Further, it was submitted that neither there is any contradictory ruling to DSM Anti-Infective (as mentioned above) nor the learned DR has brought out any contradictory ruling to negate the argument that 50:50 split should be used to derive the arm's length price of the transaction.

3.4.4. Based on all of the above, the Ld. A.R. submitted that all the arguments and contention of the learned DR are without any basis nor the ld. CIT (A) in its order has categorically dealt with in any material evidence and it and hence, it should not be considered.

3.5. We have considered the facts, rival submissions and perused the material available on record. We find that the assessee has given financial guarantee to UCO Bank on behalf of its AE i.e. assessee ACCSPL for an amount of Rs. 50.72 crores as mentioned in its TPSR. The assessee has stated that it is a non-fund base credit limit interest rate and Bank charges will remain unaffected due to the corporate guarantee given by the assessee. It was further claimed that the assessee has not given any guarantee commission or charges to UCO Bank in relation to giving corporate guarantee on behalf of its AE. We find that the Bank guarantee provided by the assessee on behalf of its AE, involves express guarantee and implied guarantee, which increases creditworthiness of AE. In the case of defaulter, the guarantor is required to fulfill the liability. Therefore, the

assessee has assumed the risk while giving guarantee for AE. We find that the assessee has given guarantee to its AE to raise funds for working capital. However, the assessee has not charged any commission from the AE for providing guarantee whereas the entity is non-rated financially weak and relies on the AE's credibility for its loans/limits/guarantee and, therefore, the substantial portion of risk is transferred to the assessee. Further, there is a direct benefit accruing to the AE's in the form of charges of lesser interest in the case of credit taken against this guarantee. The current OECD guidelines as well as the cases decided by the U. S. and Canada Tax Courts have held that providing of guarantee by the guarantor is a service rendered and the guarantor is justified in charging suitable guarantee fee for such services.

We find that the ld. CIT (A) has held that there may not be any immediate charge of profit and loss account of the main company but inherent risk cannot be ruled out in providing guarantee. In support of this view, the ld. CIT(A) has also placed reliance Prolofix Corporation Limited, (2015) 68 SOT 104 (Hyd), Aditya Birla World Wide, 56 Taxman. 317 (Mum)

and Glenmark Pharmaceuticals Limited, (2014) 62 SOT 79 (Mum). On the basis of these decisions, the ld. CIT(A) has upheld the guarantee commission rate at 0.53% as reasonable. Therefore, charging of bank guarantee commission is upheld.

We also find that the transaction relating to provision of guarantee and payment of commission for services by the AE would fall within the definition of terms of international transaction under the provisions of Section 92B of the Act. Thus, the transaction would also fall within the definition of the terms transaction as defined u/s 92F of the Income-tax Act, 1961. We also note that the provisions of guarantee is required for taking a loan for which borrower does not have the sufficient assets base. Thus, we are of the opinion that by providing guarantee to the AE, the AE has benefitted. Therefore, transactions with its AE are required to be bench marked and therefore, adjustment on account of provision of bank guarantee commission are required be done hence, finding of TPO as well as ld. CIT (A) to this extent is upheld.

3.5.1 We find that the ld. CIT (A) has adopted corporation guarantee at 0.53 %, which was considered as arm's length rate in the case of Prolofix Corporation Limited, (2015) 68 SOT 104 (Hyd) as well as in many decisions of the Tribunal as referred in above para. Therefore, the ld. CIT(A) has reduced the guarantee commission rate of 2.806% to 0.53 and consequently, the addition was reduced tor s. 26,88,106/- as against the addition made by the AO at Rs. 85,91,058/- in A.Y. 2009-10 and Rs.20,09,760/- for A.Y> 2010-11. The Revenue is contending that the reduction of guarantee commission rate is not justified, as in some of the cases, corporate guarantee has been approved at 3 % and as per safe harbor rule, where guarantee amount is less than Rs. 100 crores is determined at 2%, as per rules 10TC and 10TD, whereas the ld. Authorized Representative of the assessee has contended relying on the decision of Hon'ble Mumbai High Court in the case of **Godrej Consumer Products Ltd. vs. ACIT 10(2) Mumbai [2016] 69 taxmann.com 436(Mumbai – Trib),** wherein it was held as under :-

"*On a perusal of the aforesaid letter of HSBC, it is evident that for financial guarantee, the commission charged by the bank is at 0.50 per cent per annum. It is further relevant to note, in case of CIT v. Everest Kento Cylinders Ltd. [2015] 378 ITR 57/232 Taxman 307/58 taxmann.com 254 (Bom.), the Jurisdictional High Court while accepting the commission rate of 0.5 per cent on corporate guarantee provided by the assessee to its AE observed that corporate guarantee cannot be equated to bank guarantee. Following the aforesaid decision, the Tribunal' Mumbai Bench, in Godrej Household Products Ltd. [2014 41 taxmann.com 386(Mum-Tribunal) held that the rate of guarantee commission of 0.5 per cent as the arm's length price of the corporate guarantee provided by the assessee to its AE.*"

3.5.2. We find that ld. CIT(A) has considered guarantee rate at 0.53% following the Tribunal's decision in the case of Prolofix Corporation Limited (supra) and others referred above, whereas the Hon'ble Court more or less has also held the rate to 0.50% as reasonable. Therefore, respectively following the above decision of Hon`ble High Court, and coordinated bench of tribunal and considering the facts of present case, we are of the

considered opinion that charging of guarantee commission at the rate of 0.53% as upheld by the ld. CIT (A) is appears to be reasonable, hence, no interference is required in the findings of the ld. CIT (A), hence, the same can be held as arm's length rate. The assessee has further placed reliance on various decisions copy of which is available at pages 361 and 440 of legal paper book which have upheld at 0.50 % as arm's length rate for charging guarantee commission. We also find that safe harbor rules are not applicable to the assessee as clarified by the CBDT vide F. No. 500/139/2012-FTD-I dated 20th December, 2013, which specifies that safe harbor rates or margin specified therein are not to be considered as bench mark by the AO or TPO in the cases are not covered by the Safe Harbor Rules. Considering these facts and circumstances and considering the decisions of Hon'ble Bombay High Court in the case of Everest Kanpur Cylinders Co(supra), we are of the considered view that Corporate guarantee rate as adopted by the ld. CIT(A) at 0.53% on the basis of

various decisions of the Tribunal is reasonable. Accordingly, the same is upheld. Therefore, the grounds no. (vii) To (x) for A.Y. 2009-10 and (vii) to (x) for A.Y. 2010-11 of the Revenue and Ground Nos. 1.1. to 1.8 for A.Y. 2009-10 and ground No. 1.1 to 1.8 for A.Y. 2010-11 of the Assessee are dismissed. Thus, the appeal of the assessee as well as Revenue is dismissed on this issue.

4. Ground nos. (xi), (xii) & (xiii) of Revenue's appeals for assessment years 2009-10 and 2010-11, relate to deletion of addition of Rs. 64,00,000/- being unexplained cash credit u/s 68 and interest of Rs. 1,05,95,837/- on certain parties (2009-10) and Rs. 73,15,000/- on account of cash credit and Rs. 94,11,950/- on account of disallowance of interest. (For assessment year 2010-11).

4.1. Briefly, stated facts of the case are that the AO noted that the assessee has taken unsecured loan from 12 parties as detailed below :-

	A.Y. 2009-10		A.Y. 2010-11	
Name of the loan party	Fresh Loans taken	Interest paid	Fresh loans taken	Interest paid
Aereo Deal Comm.P.Ltd.	5,00,000	35,42,603	16,35,000	39,24,303

Chamak Trexim	59,00,000	33,24,768		44,09,496
Anchanan Vanijya P.Ltd.	-	4,20,000		
Kamal Nayan Commercial P.Ltd.	-	1,80,000		
Reward Consultants Pvt. Ltd.		3,24,000	-	4,05,000
Khatu Vanijya P.Ltd.	-	6,00,000		
Pushpak Trading & Consultancy P.Ltd.	-	6,92,466		
Ranchhod Agencies P.Ltd.		1,68,000		
Prathmesh Vanijya P.Ltd.		2,40,000		
Lambodar Barter P.Ltd.		5,64,000		
Paradise Garments P.Ltd.		3,00,000	-	3,75,000
Optimates Textiles		2,40,000	-	2,98,151
Total	**64,00,000**	**1,05,95,837**		**94,11,950**

4.1.1. The AO issued show cause notice as to why the same should not be added in the line of addition made for assessment year 2008-09. The assessee filed the reply of show cause notice, which has been reproduced by the AO in his assessment order. The AO observed that since the order of the CIT (A) for assessment year 2008-09 has not been accepted by the Department and appeal is filed before the Tribunal, the said addition was made after detailed inquiry and investigation, hence, the AO made the addition of the above amounts in the respective assessment years and disallowed the interest thereon as appearing in the above table for the respective assessment years. Accordingly, on similar lines and grounds, the interest was also disallowed.

4.2. Being aggrieved, the assessee filed an appeal before the

ld. CIT (A). The ld. CIT(A) noted that the assessee had received cash credit from all the twelve parties in assessment year 2008-09 and also received fresh credit from two parties, namely, M/s. Aereo Deal Comm.Pvt.Ltd. In addition, Chamak Trexim Private Limited. The ld. CIT (A) further observed that the ld. CIT (A)-II, Indore, has deleted the above additions made u/s 68 of the Act in respect of all the above parties in assessment year 2008-09. Accordingly, relying on said decision and looking to the facts that two out of the twelve parties have provided fresh loans this year and the assessee has filed copies of returns of such parties for assessment year 2009-10. Therefore, there is no reason to differ from the decision of the ld. CIT (A)-II, Indore, for assessment year 2008-09 in assessee's own case. Accordingly, the said addition of Rs. 64,00,000/- together with disallowance of interest of Rs. 10,59,587/- was deleted and on similar facts following the aforesaid findings, the ld. CIT(A) also deleted the addition of Rs. 73,15,000/- and interest of Rs. 94,11,950/- for assessment year 2010-11.

4.3. Being aggrieved, the Revenue filed this appeal before the

Tribunal. The ld. DR relying on the findings of the AO submitted that the addition made by the AO on account of cash credit and disallowance of interest thereon may be upheld as the assessee has not been able to substantiate the genuineness of the transaction.

4.4. The Ld. Counsel for the assessee submitted that this Tribunal in assessee's own case for assessment year 2008-09 in I.T.A.No. 294/Ind/2012 dated 27.06.2016 has endorsed the action of the ld. CIT(A) deleting the addition made u/s 68 of the Act and also consequential disallowance of interest paid to those parties, the details of parties are appearing in para 21 on page 67 of the order of the Tribunal in assessee's own case. The name of the parties from which fresh loan taken is also appearing therein, since the addition in respect of parties has been deleted by the ld. CIT(A) following the decision of his predecessor CIT(A) and same has also been upheld by this Tribunal, therefore, the ld. CIT(A) was justified in deleting the addition. Accordingly, the findings of the ld. CIT (A) may be upheld.

4.5. We have considered the rival submissions, facts and

perused the material available on record. We find that on similar facts and circumstances in the case of the assessee, the ld. CIT(A) for assessment year 2008-09 has deleted the additions made u/s 68 in respect of the above parties, which have also been confirmed by this Tribunal in I.T.A.No. 294/Ind/2012 dated 27.06.2016 as per findings given in para 21 to 38 (Page 67 to 89). The same is, therefore, accordingly, reproduced as under :-

"21. We find that during the year under consideration the assessee has received unsecured loan aggregating to Rs. 6,69,00,000/- from 12 Kolkata based companies, the details of which are as under :-

S.No.	***Name***	***Opening Balance***	***Loan Taken***	***Interest paid***	***TDS on interest***	***Amount Repaid***	***Balance***
1.	*Aereo Dealcomm. Pvt Ltd.*	*98,73,663*	*3,26,00,000*	*33,04,583*	*6,80,745*	*42,93,663*	*4,08,03,838*
2.	*Chamak Trexim Pvt Ltd.*	*3,91,86,415*	*25,00,000*	*59,19,345*	*12,19,384*	*78,86,415*	*384,99,961*
3.	*Reward Consultants Pvt. Ltd.*	*16,39,608*	*12,00,000*	*3,76,804*	*77,622*	*1,39,608*	*29,99,182*
4.	*Pushpak Trading & Consultancy Pvt. Ltd*	*-*	*50,00,000*	*2,41,803*	*49,881*	*-*	*51,91,922*
5.	*Savera Distribution Pvt. Ltd.*	*-*	*50,00,000*	*3,10,656*	*63,995*	*-*	*52,46,661*
6.	*Paradise Garments P. Ltd.*	*-*	*25,00,000*	*31,762*	*6,543*	*-*	*25,25,219*
7.	*Khatu Vanijya Pvt Ltd.*	*-*	*50,00,000*	*34,631*	*7,134*	*-*	*50,27,497*
8.	*Panchnan Vanijya Pvt. Ltd.*	*-*	*35,00,000*	*25,615*	*5,277*	*-*	*35,20,338*
9.	*Kamal Nayan Commercial Pvt. Ltd.*	*-*	*15,00,000*	*7,992*	*1,646*	*-*	*15,06,345*
10.	*Ranchhod Agencies Pvt. Ltd.*	*-*	*14,00,000*	*7,746*	*1,595*	*-*	*14,06,151*
11.	*Prathmesh Vanijay Pvt Ltd.*	*-*	*20,00,000*	*21,721*	*4,474*	*-*	*20,17,247*
12.	*Lambodar Barter Pvt*	*-*	*47,00,000*	*37,909*	*7,809*	*-*	*47,30,100*

	Ltd.						
	TOTAL		***6,69,00,000***	***1,03,20,567***			

22. During the assessment proceedings, the AO has tried to verify the aforesaid unsecured loan. Notices were issued u/s 133(6) to the lenders calling for documentary evidences in support of the amounts advanced. Secondly, the Income-tax Inspectors were deputed personally to visit and make enquiries. The Commission was also issued to DDIT, Kolkata u/s 131 of the Act and Income tax inspectors were again deputed to personally visit and make enquiries at Kolkata and lastly the assessee was directed to furnish documentary evidences in support of the unsecured loan. The AO has issued notices directly u/s 133(6) to lenders calling for documentary evidence in support of the amounts advanced. The lender companies, in return, filed the various documents in the form of confirmations, income tax returns, bank statements etc. Income Tax Inspectors were deputed by the AO to make enquiries at Kolkata, who vide report dated 10.12.2010 confirmed existence of most of the lenders. Thereafter, Commission was issued to DDIT, Inv., Kolkata under section 131 of the Act, who independently conducted investigation and sent his report dated 20.12.2010 and most of the parties appeared and filed documentary evidences as required by DDIT (Inv), Kolkata, thereby confirming the transaction with the assessee. The Income-tax Inspectors were again deputed to personally visit and make enquiries at Kolkata and collected certain information directly from the banks and filed another report dated 23.12.2010. The assessee has also submitted the confirmation letters alongwith PAN, Company's Master details with the Registrar of Companies, copy of income tax returns, auditor's report of the creditor companies, Bank statements reflecting receipt and payment of the said loan amount and Form No.16A issued on tax withheld on interest paid. The assessee has placed on record requisite documents, which proved the identity, source of credit

including existence and creditworthiness and genuineness of the loan. The AO has made the extensive enquiry.

23. The assessee has taken loan from Aereo Dealcomm. Private Limited. The assessee has submitted documentary evidence like confirmation, bank statement, income tax return, audited accounts, TDS certificate, Master data of the Company with Registrar of Companies, Memorandum of Association. The existence of the Company was inspected by the Inspector on 10.12.2010 and the AO has not disputed about the existence. During the course of investigation, statement of accountant was recorded by the Inspector, wherein he has confirmed the loan transaction in assessment year 2002-03. The source of fund of Creditor Company was examined. The AO has also examined the opening balance, which stands accepted, since no addition was made in the assessment year 2007-08. The Company has also shown the interest income of Rs.47.83 lacs and profit of Rs. 11.20 lacs in assessment year 2008-09 reflecting a healthy financial position.

24. During the course of hearing, the ld. Authorized Representative for the assessee submitted that in assessment year 2007-08, the opening balance of the company was Rs. 98,73,663/- which has been accepted by the department as no addition was made in that year and this year interest was paid of Rs. 33,04,583/-. We find that the loan receipt from this company were repaid in February, 2010. The inspector has confirmed that the accountant of this company of whom statement was also recorded by the Inspector, has confirmed having advanced unsecured loan to the assessee. The DDIT has also issued summons u/s 131 and in response to that the Company has filed the copy of the audited annual account, photocopy of the bank statement and confirmation. Therefore, the Inspector and DDIT have confirmed the existence of such company. The assessee has also filed copy of the assessment order for assessment year 2002-03 of the said lender company, wherein the

shareholder funds being shareholder capital and share premium account was examined and found to be verifiable. AO found that the said lender company had share capital of Rs.47,75,000/- and it has received share premium of Rs. 4,29,75,000/- on account of share allotment. The AO of the lender company has also verified the shareholder on test check basis and shareholders' bank accounts were also verified. Therefore, we are of the view that the assessee has proved the identity, creditworthiness of this lender company and also the genuineness of the transaction with the said company with sufficient evidence.

25.In the case of Chamak Trexim Private Limited, the assessee has filed documentary evidence like confirmation, bank statement, income tax return, audited report, TDS certificate, Master data of the Company with Registrar of Companies, Memorandum of Association. The existence of the Company was inspected by the Inspector on 10.12.2010. The statement of the accountant of this company was recorded wherein, he confirmed the loan transaction of the assessee. In assessment year 2004-05, source of funds of this creditor company was examined and verified by the AO in its assessment proceedings u/s 143(3). The opening balance from the said company was accepted. The company has shown the interest income of Rs. 85.30 lacs and profit of Rs. 14 lacs in assessment year 2008-09 and the entire loan was repaid in February, 2010.

26.Out of twelve companies, the six lender companies, viz., Khatu Vanijya Private Limited, Panchanan Vanijya Private Limited, Kamalnayan Commercial Private Limited, Ranchhod Agencies Private Limited, Prathmesh Vanijya Private Limited and Lambodhar Barter Private Limited merged with M/s. Middleton Good Private Limited in April, 2009. In respect of these six companies, the assessee has filed documentary evidence like confirmations, bank statements, income tax returns, audited reports, TDS certificates, Master data of the Company with Registrar of Companies, Memorandum of

Association, the copy of merger order passed by the Hon'ble Calcutta High Court, which have been also placed on record. The existence of these companies have been accepted by the Inspector in his report dated 10.12.2010. The AO has also not disputed the existence of this company. The Inspector recorded statement of brother of the Director, wherein he confirmed the loan transaction with the assessee. The inspector also reported that loan transactions are genuine. The fact that the companies were merged pursuant to the order of the Hon'ble High Court after all regulatory compliances, establishes the identity and existence of the erstwhile creditors.

Similarly, in all the other cases, namely, Reward Consultants Private Limited, Pushpak Trading & Consultancy (P) Limited, Savera Distribution Private Limited and Paradise Garments Private Limited, the assessee has filed documentary evidence like confirmations, bank statements, income tax returns, audited reports, TDS certificates, Master data of the Company with Registrar of Companies, Memorandum of Association. In the case of Reward Consultants Private Limited, on inquiry made by the Inspector, it was informed that the present occupant has purchased the office from one Shri O.P. Agrawal who was the key person of M/s. Reward Consultants Pvt. Limited. This lender company had turnover of Rs. 1.66 crores, gross interest of Rs. 32.54 lacs and net profit of Rs. 9.43 lacs in assessment year 2008-09. Opening balance from the said company stands accepted, since no addition was made in the AY 2007-08. The entire loan was repaid in September, 2010. The said creditor company also responded to the notices issued u/s 133(6) by the AO. Similarly, in Pushpak Trading & Consultancy (P) Limited, it had shareholder's funds of Rs. 13.47 crores as on 31.3.2008. The entire loan was repaid in March, 2009. The said company is a registered NBFC. The said creditor company also responded to the notices issued u/s 133(6) by the AO and also in response to the notice issued u/s 131 by the DDIT (Inv) Kolkata. Similarly, in the case of Savera Distribution Private Limited, it

had shareholders funds of Rs. 13.66 crores. Further, the company had shown the turnover of Rs. 2.34 crores and interest income was Rs. 18.72 lacs. The said creditor company also responded to the notices issued u/s 133(6) by the AO. Similarly, in the case of Paradise Garments Private Limited, it had shown the turnover of Rs. 1.14 crores, interest income at Rs. 59.29 lacs and its taxable income was Rs. 18.50 lacs in assessment year 2008-09. The company had shareholders fund of Rs. 7.62 crores as on 31.03.2008. The entire loan was repaid in February 2011. On enquiry, the Inspector was informed by the current occupant of the premises that the company was in existence at the given address a year back and was now shifted to some other place. Thus the existence of the creditor cannot be disputed. The said creditor company also responded to the notices issued u/s 133(6) by the AO. Therefore, we are of the view that in respect of all the twelve companies, the assessee was able to prove not only the identity and creditworthiness but also the source of the funds. Moreover, the assessee has also submitted all the evidences, which were required by the AO.

Section 68 of the Income-tax Act, 1961, which is reproduced as under :-

> *"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."*

27. In terms of the aforesaid provisions of section, 68 of the Act the primary onus to explain the nature and source of the amount so found to be credited is on the assessee. The expression 'nature' encompasses bringing on record, evidence about nature of the receipt, be it loan, advance, share application money, etc. The expression `source' envisages establishing the identity and creditworthiness of

the source/ person from whom the amount is received. However, once reasonable explanation is furnished by the assessee, the onus, shifts to the Revenue.

28. We find that in the case of Orissa Corporation (P) Limited, 159 ITR 78, in the context of requirement of the assessee to discharge primary onus under section 68 of the Act, observed that the assessee having given the names and addresses of the creditor who were income-tax assessees, the mere fact that such creditors did not respond pursuant to notice under section 131 of the Act could not be used against the assessee. The Hon'ble Supreme Court observed as under:

> *"In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."*

29. Similarly, in the case of CIT vs. Metachem Industries, 245 ITR 160 (MP), Jurisdictional High Court has observed as under :-

> ***"3.*** *We have heard the learned counsels for the parties. Section 68 of the Act says that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the ITO, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. Therefore, according to section 68, the first burden is on the assessee to satisfactorily explain the credit entry in the books of account of the previous year. If the explanation given by the assessee is satisfactory, then that entry will not be charged with the income of the previous year of the assessee. In case the explanation offered by the assessee is not satisfactory or the source offered by the assessee-firm is not satisfactory, then in that case the amount should be taken to be the income of the assessee. In the present case, the Assessing Officer did not feel satisfied with the explanation given by the assessee and, accordingly, assessed all the three credit entries to the account of the assessee as the income."*

The Hon'ble Court further held that once satisfactory explanation is adduced by the assessee, then, addition cannot be made and the amount may be taxed in the hands of the person who has deposited the amount. The relevant observations of the Court are as under:

"5. *So far as the responsibility of the assessee is concerned, it is satisfactorily discharged. Whether that person is income-tax payer or not or from where he has brought this money is not the responsibility of the firm. The moment the firm gives satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is*

discharged and in that case that credit entry cannot be treated to be income of the firm for the purposes of income-tax. It is open for the Assessing Officer to take appropriate action under section 69 of the Act against the person who has not been able to explain the investment. In the present case, there is the concurrent finding of both the Commissioner (Appeals) as well as of the Tribunal that the firm has satisfactorily explained the aforesaid entries."

30. *We find that in the case of S. K. Bothra & Sons, HUF v. ITO: 347 ITR 347, the assessee took loan from two persons. During the course of assessment proceedings, the assessing officer issued notice under section 131 of the Act to such parties which were duly responded. The assessing officer, however, added these loan amounts as unexplained credit simply based on the report of the Inspector and held the same as not genuine. The appeal preferred by the assessee was dismissed by the CIT(A) as well as by the Tribunal.*

On further appeal before the High Court, while setting aside the matter to the assessing officer, the Court observed as under:

"…….

In such circumstances, we find substance in the contention of Mr. Khaitan that the order of assessment cannot be supported as the materials collected by the Assessing Officer through the Inspector which were relied upon were neither disclosed to the appellant nor was the appellant asked to explain the report submitted by the Inspector.

It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But

the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee.

In the case before us, the assessee by producing the loan-confirmation certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements.

We find substance in the contention of Mr. Khaitan that on the basis of the report submitted by such Inspector, the Assessing Officer could not straightway arrive at the conclusion that the transactions were not genuine without giving further opportunity to the appellant to explain the alleged information disclosed by the Inspector to the Assessing Officer.

…….”

31. We also find that in the case of CIT v. Kishori Lal Construction Ltd.: 191 Taxman 194, Hon'ble Delhi High Court has observed as under:

“ After considering the arguments of both the sides, we find ourselves in favour of the submission made by learned counsel for the respondent. As mentioned above, the assessee had produced the following which would clearly demonstrate it has discharged its initial burden:-

(a) The identity of M/s. Yadav and Company, by filing their confirmation and their assessment particulars.

(b) Genuineness of the transaction by pointing out that the assessee had sold shares to M/s. Yadav and Company in the immediately preceding year (which has been accepted by the Department) and that the payment received during the relevant previous year was against the debt due from M/s. Yadav and Company.

(c) Creditworthiness of the creditor by pointing out that the amount was received by way of cheques drawn on the bank account of M/s. Yadav and Company maintained with Union Bank of India, Moti Bagh Branch, New Delhi, which, despite denial by the Yadavs, was, as per bank records, found to be opened and operated by Sh. O.P. Yadav/Mohinder Singh Yadav.

The initial burden thus discharged, it was for the revenue to establish that the transaction in question was bogus. This would be so even if there is a denial by the creditors that the credits were not genuine as held by the Supreme Court in CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78. Mere denial by Yadavs that account in question was not operated by them would not automatically lead to the inference that assessee deposited in the said account and, therefore, it became its unaccounted income. The CIT(A) as well as the ITAT have rightly pointed out that the necessary exercise which was to be undertaken by the Assessing Officer was not carried out. It was for the Assessing Officer to probe the matter further. He could not simply pass on the buck to the assessee asking him to produce Sh. O.P. Yadav or Sh. Mohinder Singh Yadav. It is the Department which had reopened the assessment on the basis of the statements of the Yadavs. The Department was relying upon the said statements. When the premises of M/s. Yadav and Company were searched by the Department in 2002 and the statements of aforesaid two persons were recorded, it is clear that Yadav and Company was very much in existence. More interestingly, M/s. Yadav and Company even assessed to Income-tax. In the case of assessee, the assessment was completed in December, 2003. In such a scenario, it would not have been difficult for the Assessing Officer to find the whereabouts of Yadavs particularly having

regard to the statement of the assessee that it had no dealing with M/s. Yadav and Company after assessment year 2000-01 and was thus unaware of its present whereabouts. Live link between the bank account of M/s. Yadav and Company and the assessee has not been established."

32. We find that in the case of CIT v. Data Ware (P) Limited: ITA No. 263 of 2011, the Hon'ble Kolkata High Court held that once the assessee furnished PAN of the creditor, the assessing officer must enquire from the assessing officer of the creditor. The Court observed as under:

> *"Both the Commissioner of Income Tax (Appeal) and the Tribunal below have in details considered the fact that the share application money was paid by account payee cheque, the creditor appeared before the Assessing Officer, disclosed its PAN number and also other details of the accounts but in spite of that the Assessing Officer did not enquire further from the assessing officer of the creditor but instead, himself proceeded to consider the profit and loss account of the creditor and opined that he had some doubt about the genuineness of such account. In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established. We find that both the Commissioner*

of Income Tax(Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities. The appeal is thus devoid of any substance and is summarily dismissed."

33. On going through the above case laws and applying them on the facts of the assessee's case, we find that the same are squarely applicable to the assessee's case. We find that in the instant case the assessee had, during the course of assessment proceedings, filed all the relevant details/ documents/ information, required by the assessing officer, as were necessary to substantiate the identity and credit-worthiness of the creditor companies and also the genuineness of transaction.

34. The AO has not been able to rebut, in any manner, voluminous documentary evidences placed on record. In fact, disregarding the documents placed on record, the assessing officer, proceeded to make addition under section 68 of the Act, simply by cherry picking certain parts of the reports of the Inspectors of Income Tax/ Investigation Wing, without appreciating that the reports considered along with ex-parte material/ documents collected/ received from creditors, established, beyond any doubt, the ingredients of section 68 of the Act.

35. Most pertinently, the AO has not specifically dealt with any of the voluminous material/ documents available on record. In the assessment order, the assessing officer has simply reproduced the reports furnished, submissions of the assessee and discussion on case laws, without dealing with the same and specifying their applicability vis-a-vis the facts of various creditors.

36. We find that in assessment year 2005-06 in the case of Agrawal Coal Corporation 19 Taxman.com 209 (ITAT Indore), of the same assessee, relied upon by the Ld. Departmental Representative, the creditors were not

traceable, which is not the fact in the present cases. On the contrary, in the present case all the creditors not only responded to the notices issued u/s 133(6), but most of them were also found existing by the Inspectors and most of them also presented before the DDIT (Investigation) Kolkata. Therefore, the facts are clearly distinguishable. Moreover, in the case of CIT vs. Navodaya Castles Pvt. Ltd., also the party was not present and the summons issued u/s 131 returned unserved. In that case, the assessee was asked to produce the shareholders to substantiate the claim of genuineness but the assessee was unable to produce them. But, in the instant case, we have gone through the case records and we found that the AO has made the various enquiries himself. Moreover, he has also deputed the Inspector and in most of the cases, the Inspectors confirmed the existence of the creditors. Thereafter, if the AO had any doubt, he should have issued show cause notice to the assessee to produce the creditors before him. The AO did not require the assessee to produce the creditors. Therefore, we have to decide the matter as per the facts available on record.

37. The entire addition under section 68 of the Act is, thus, without any basis and is legally unsustainable.

38. The view of the ld. CIT(A) that the loan taken by the assessee from twelve companies aggregating to Rs. 6,69,00,000/- was explained, is proper and does not require any interference and the addition was rightly deleted by the ld. CIT(A) and has also rightly deleted the disallowance of interest of Rs. 1,03,20,567/- on the above loans. Ground Nos. 2 to 4 of the Revenue are dismissed."

4.5.1. In the light of above facts, we have no reason to deviate from the findings given by the Tribunal for assessment year 2008-09 as the parties involved therein are

same and facts are identical. Further the parties from whom fresh loans were taken during the year have also filed copies of returns of income before the AO. Hence, no addition on account of cash credit and disallowance of interest thereon required to be made. Accordingly, the addition on account of cash credit u/s 68 and disallowance of interest thereon for the assessment year 2009-10 and assessment year 2010-11 is deleted. Accordingly, ground nos. (xi), (xii) and (xiii) taken by the Revenue for both the assessment years are dismissed.

5. In the result, both the appeals of the Revenue are dismissed.

6. Ground No. 2 taken by the assessee in T.P.A. No. 601/Ind/2015 and T.P.A. No. 602/Ind/2015 relates to addition us 14A read with Rules 8D.

6.1. The brief facts of the case are that during the relevant assessment year, the assessee has made investment of Rs. 5,13,38,344/- out which Rs. 89,60,719/- were found to have been invested in group companies from preceding years. The assessee was asked to explain as to why disallowance u/s.

14A should not be made. It was explained that the assessee has not incurred any expenditure to earn tax-exempt income nor made any new investment in any quoted shares during the year. The assessee has also not earned dividend income during the year. The assessee has huge fund of Rs. 73.75 Crores as on 31.03.2009 in its balance sheet and also has interest free funds which are being deposit in bank in form of FDRs on which interest income i.e. earned and shown as income from other source. Since the assessee has free funds, it has no sense of borrowings of fund for investment in shares just for earning exempt income and paying interest thereon. The assessee has already disallowed Rs. 2,44,192/- on account of 0.5% of its average investment as per Rule 8D read with section 14A of the Act. It was also submitted that CIT (A) has deleted disallowance made in A.Y. 2008-09 and restricted disallowance to 0.5% as per rule 8D of average investment excluding the investment made in overseas associated concern. The assessee submitted that no disallowance to be made on the interest paid at Rs. 7,53,91,207/- and interest received is at Rs. 30,80,01,521/- on FRDs and other interest

receipts are at Rs. 1,81,80,091/- However, the AO was of the view that disallowance u/s. 14A has to be made even if there is no exempt income in any particular year as the assessee has made investment from whom exempt income and dividend earned in earlier years and intention of the assessee is earn tax free income. Accordingly the AO without pointing out any single expenditure having relation with earning of exempt dividend income, mechanically invoked sub-section (2) of section 14A of the Act and computed disallowance of Rs.7,43,532 by applying provisions of Rule 8D of the Rules and disallowed Rs. 4,99,340/- after deducting disallowance of Rs. 2,44,192/- made by the assessee in the following manner:

S. No.	**Particulars**	**Amount (in Rs.)**
1	Direct expenditure	Nil
2	Interest expenditure incurred during the year (Rs.4.35 crores) attributed in the ratio of average value of investments resulting in exempt income to average value of total assets	4,99,340
3	½ % of average value of investments Rs.	2,44,192

	4,88,38,344	
	Total	**7,43,532**
	Less: already disallowed by the assessee	**2,44,192**
	balance disallowance	**4,99,340**

6.2. Facts apropos the ground no. 2 for assessment year 10-11 are that the AO made a disallowance of Rs. 6,18,584/- u/s 14A which was made over and above the disallowance of Rs. 2,79,221/- made suo-motu by the assessee in its return of income filed for the impugned year. The AO worked out the disallowance u/s 14A mechanically by applying rule 8D in respect of investment made by the assessee in shares of its overseas-unlisted associate company and investment made in mutual funds. The assessee has received dividend income of Rs. 12,80,657/- in respect of investments in mutual fund which was claimed exempt. The AO rejected the contention of the assessee that the investment in shares of overseas associate company i.e. Agrawal Coal Corp(S) Pte Ltd., Singapore of Rs. 89,60,719/- does not attract the provisions of section 14A as the said investment is a strategic investment which also does not yield any exempt income, as the dividend

as and when received will not be exempt. In respect of other investment in quoted and unquoted mutual fund it was explained that the same was made out of own capital and reserves as the total investment made by the assessee stood at Rs. 579.95 Lacs as against its reserves and share capital of Rs. 11268.85 Lacs. It was also explained that the assessee has no net interest out flow, on the contrary the assessee has earned a net interest income of Rs. 2048.06 Lacs. It was also explained that for the purpose of its coal trading business the assessee has to open LC / BG. The buyer line credit facility is allowed to the assessee at a very low rate of interest, which can only be used for business purposes. The role over of buyer's credit is secured by 100% margin of FDR and for this reason; the interest earned on FDR has a direct nexus with the interest paid on LC/BG and buyer line credit facility. The above contentions of the assessee were rejected by the AO. The ld. CIT(A) confirmed the disallowance stating that the assessee has not raised any objection to the calculation of the disallowance made under rule 8D given in the body of the assessment order. The relevant discussion is in Para 10 on

page 54 of the order of the Learned CIT (A). The assessee has challenged the said findings through its ground no. 2.

6.3. The matter carried to the ld. CIT(A) and the ld. CIT(A) has observed that the appellant has neither objected to the facts related to non business investment made into share of associates companies nor the appellant has raised any objection to connection of such disallowance under Rule 8D, accordingly confirmed such disallowance made by the AO.

6.4. Being, aggrieved the assessee filed this appeal before the tribunal. The Ld. A.R. submitted the AO made disallowance of Rs. 4,99,340/- over and above the disallowance of Rs. 2,44,192/- made suo-motu made by the assessee by applying Rule 8D. The AO has rejected the contention of the assessee that investment of Rs. 89.60 Crores in overseas associates company M/s. Agarwal Coal Corp(S) Pte. Ltd. Singapore does not attract provision of section 14A, as the said investment is strategic investment, which does not yield exempt income, as the dividend as and when received will not be exempt. As regards other investment in quoted and unquoted mutual fund, the investment was made out of own capital and

reserves as the total investment made by the assessee are stood at Rs. 513.38 Lakhs as against reserves and share capital of Rs. 7663.01 Lakhs. It was also explained that the assessee has net interest outflow, and on the contrary, the assessee has earned a net interest income of Rs. 2507.90 Lakhs. It was also claimed that for the purpose of coal trading business the assessee has to open LC/B G for which the assessee has to keep FDRs for securities by 100% margin , hence, interest earn on FDRs has direct nexus with interest paid on LC/BG and the buyers line credit facility. The Ld. CIT (A) while confirming the addition ignored the submissions of the assessee in statement of facts as appearing at page No 13 to 15 of SOF filed with CIT (A) and copy of which is filed before tribunal. The Ld. A.R. also pointed out that similar disallowance made in immediate A.Y. 2008-09 were deleted by the CIT(A) holding that provision of section 14A are not applicable in respect of investment made in overseas associate company, as the dividend as and when received will not be exempt income in the hands of the assessee. The Ld. CIT (A) has also held that fixed deposits has also inextricable nexus

and link with business operation of the assessee and therefore, interest earn thereon was business income. Accordingly, CIT (A) deleted the disallowance u/s. 14A in respect of interest and restricted the disallowance @0.5% of the average investment after excluding investment made in foreign company. This finding of CIT (A) also endorsed by Hon`ble Tribunal vide order dated 27th June 2016. The Ld. A.R. has placed reliance of the said order of tribunal and finding therein with case laws quoted therein and order of ld. CIT (A) for the assessment year 2008-09.

6.5. We have heard the rival submissions of both the parties and have perused the material available on record. We have considered the submission of the ld. A.R. that there was a business compulsion and exigencies on the part of the assessee to have deployed such huge amount in the fixed deposit with Bank as indicated in the Balance sheet itself for obtaining mainly Letter of Credits and Buyers Line credit, which would be in principle otherwise not available. We also find that there been no business compulsion, the assessee company would have never deployed such huge amount in

fixed deposit yielding low interest rate, which was further subject to tax, and this amount could very well be otherwise utilized for earning higher interest income or in other high returning yield avenues. That the assessee had perforce to make FDRs for obtaining LC. Thus, we find that the AO has not appreciated that there was absolutely no case for making any disallowance u/s 14A. We also find that the assessee that out of the total investment of Rs.5.13 Crores at the year end the amount of Rs.89.61 Lakhs was invested in equity shares of Overseas Associate Company, in the same business line, the dividend income from which as and when received could not be exempt in the hands of the assesse. We further find that the business, commerce and economic strategy of the assessee and its visions and targets when considered would indicate that these were strategic investments in the overseas company from which no exempt income has been earned. Considering these facts, we find that the AO's action in considering such amount of investment in working out disallowance under Rule 8D was no way justified and was against the provisions of section 14A of the

Act. We also find that the Tribunal has dealt with the issue for the assessment year 2008-09 in I.T.A. No. 294/Ind/2012 vide order-dated dtd. 27th June 2016. The relevant para no 71 to 77 of said order is reproduced as under:

> "65. the matter carried to the ld. CIT (A) and the ld. CIT (A) partly allowed the ground by observing as under:-
>
> *"7. Next ground No. 5.1 and 5.2 are directed against disallowance of interest u/s 14A as per amount worked out in accordance with provisions of Rule 8D of 1962. The AO has discussed this issue on page 37 to 42 of the assessment order and working of disallowable interest and proportionate other expenses in para 6.9 on page 42 as already extracted above. The AO has made such disallowance ignoring appellant's objection that borrowed funds were not utilized for purposes of investment. He has arrived at this conclusion based on analysis of Balance sheet made in para 6.4 where he has identified investment in fixed and current assets at Rs. 55042.3 lacs against share capital reserve and surplus current liability and provision etc. aggregating at Rs. 39530.78 lacs. He has thus considered such investment at Rs 463.38 lacs against unsecured and secured Loan obtained by the appellant Rs.15974.90 lacs. The AR of the appellant apart from written submission firstly emphasized that the question of disallowance of interest u/s 14A with reference to investment yielding exempt income can be considered only and if there is interest expenditure incurred by*

the appellant whereas in the case of the appellant there was net interest receipt of Rs.922.25 Lacs and thus there was evidently no claim for deduction of interest. He further invited attention to the Schedule 8of the Balance sheet included in Paper Book 'A' on page 26 which is reproduced hereunder for appreciation of fact.

SCHEDULE -8 CASH & BANK BALANCES

Cash in Hand	15,16,938	15,23,226
Balances with. Scheduled Banks		
A) In Current Accounts	0,58,87,157	1,42,32,493
B) In Fixed Deposit Accounts (Uco Bank & SBI pledged with bark against L/C, Buyers Line of Credit & OD Loan)	278,07,94,799	178,11,31,933
C In Fixed Deposit accounts (Pledged with. Govt. Dept. as security	15,81,192	50,78,607
	284,97,80,086	180,19,66,259

7.1 The AR emphasized that a mere glance of the Schedule revealed that a much larger amount than the aggregate of secured and unsecured loan of Rs.159.17 crore, the investment in Fixed Deposit alone yielding interest was Rs. 278.04 crores. Thus in no way it can be considered that the borrowed funds were utilized for making investment yielding exempt income. He went to stress that there was a business compulsion and exigencies on the part of the appellant to have deployed such huge amount in the fixed

deposit with Bank as indicated in the Balance sheet itself for obtaining mainly Letter of Credits and Buyers Line credit, which would be in principle otherwise not available. The AR also emphasized had there been no business compulsion, the appellant company would have never deployed such huge amount in fixed deposit yielding interest rate about 9% also which was further subject to tax and this amount could very well be otherwise utilized for earning higher interest income or in other high returning yield avenues. It was also emphasized that had the appellant not made any fixed deposits, its borrowings would have also been nil and on the contrary it would have surplus funds and would not have incurred any interest cost and thus it was summed up that in the factual peculiar facts of the appellant's case, which the AO not cared to appreciate, there was absolutely no case for making any disallowance u/s 14A. It was also pointed out by the AR that out of the total investment of Rs.463.38 crore at the year end the amount of Rs.89.61 lacs was invested in equity shares of Overseas Associate Company, in the same business line, the dividend income from which as and when received could not be exempt in the hands of the appellant company and hence AO's action in considering such amount of investment in working out disallowance under Rule 8D was no way justified and was against the provisions of section 14A of the Act.

7.2 The appellant's contention and carefully considered facts available on record are found to carry sufficient force on merits. It has been clearly indicated in Schedule 8 of Balance sheet itself that fixed deposits were pledged with Bank against letter of Credit (LC), Buyers' Line of Credit

and over draft loan facility. Thus, this fixed deposit has an inextricable nexus and link with the business operation of the appellant and as stated by AR that such investment of fixed deposit was inevitable in the line of appellant's business where overseas purchases were involved. Thus there is sufficient merit in the contention of the appellant whichever way the issue is examined that by and large investment cannot be said to be made out of interest bearing borrowed funds in view of huge amount of shareholders fund exceeding Rs.60 crore and in alternative there were no net interest deduction claimed was pressed by the appellant as deduction from which disallowance u/s 14A could be considered.

7.3 Further still there is apparent merit in appellant's contention in respect of investment in Overseas Associate Company at Rs.89.61 lacs that such amount could not be considered for working out disallowance under Rule 8D of IT Rules, 1962 as the said investment is not an investment in respect of which the appellant will ever receive any exempt income. Thus in the peculiar facts and circumstances of the case and the above discussion made by AR, the disallowance u/s 14A in respect of interest, worked out at Rs 3,23,640/- by the AO is directed to be deleted and the disallowance in respect of expenses worked out at Rs 1,71,633/- @ .5% of the average investments is directed to be worked out after excluding investment made in Overseas Associate Company. The ground of appeal is accordingly partly allowed."

6.5.1. In the light of above discussion, we are of the considered view that disallowance made on account of interest in respect of investment in Overseas Associate Company at Rs.89.61 lacs that such amount could not be considered for working out disallowance under Rule 8D of IT Rules, 1962 as the said investment is not an investment in respect of which the assessee will ever receive any exempt income. Thus in the peculiar facts and circumstances of the case and the above discussion and respectfully following the decisions of Tribunal as quoted above for A.Y. 2008-09 and by ld. CIT (A)for A.Y. 2008-09, the disallowance -u/s 14A in respect of interest, worked out at Rs. 4,99,340/- by the AO is directed to be deleted. Accordingly, disallowance are restricted to Rs. 2,44,192/- @ .5% of the average investments as made suo-motu by the assessee. Similarly, disallowance for A.Y. 2010-11 are restricted to Rs. 2,79,221/- @ 0.5% of average limit as suo

motu made by the assessee. This ground of appeal of assessee is allowed.

7. **Ground No.3 - disallowance made out of the colliery and office general expenses for Rs. 8,15,000/- for A.Y. 2009-10 and Rs. 5,65,263/- for A.Y. 2010-11.**

7.1. Briefly, stated facts of the case are that the assessee has claimed expenses because of general expenses and colliery, which were found supported by self-made vouchers and some of them were not verifiable. Accordingly the AO disallowed expenses @ 10% of two expenses of Rs. 61.63 Lakhs and Rs. 19.85 Lakhs , which worked out to Rs. 8,15,000/-. Similarly, the AO made disallowance of Rs. 5,65,263/- by 10% of total expenses claimed at Rs. 34,20,221/- and Rs. 22,32,409/- under the head Colliery expenses and office general expenses respectively which comes out to Rs. 5,65,263/- is disallowed out of above expenses and added back to the total income of the assessee.

7.2. In appeal the learned CIT (A) confirmed the AO's action of making disallowances of Rs. 8,15,000/- and 5,65,263/- for the assessment years 2009-10 and 2010-11 on ad-hoc basis.

7.3. The Ld. A.R. submitted that these expenses are properly vouched and duly supported by vouchers. The ld. A.R. submitted that the AO has failed to appreciate that the books of accounts maintained by the assessee are being duly audited, which the assessing officer has not rejected. With respect to the vouchers/bills produced for verification during the assessment proceedings, the assessing officer had simply made the bald allegation, without pointing out the specific defects, if any, relating to these vouchers/bills. The assessing officer failed to appreciate that correlation of increase in expenses with increase in turnover is not the only criteria for making disallowance. The AO has lost sight of the fact that the general expenses of Rs. 19.85 Lakhs decreased from 19.92 Lakhs previous year and expenses under the head colliery decreased to Rs. 61.62 from 62.13 from last year. The AO made the disallowance merely on the conjecture and surmises, on an ad-hoc basis, which is not permissible in law. The Ld. A.R. for the assessee relied on the following decisions: J. J. Enterprises vs. CIT: 254 ITR 216 (SC), Friends Clearing Agency P. Ltd. v. CIT: 332 ITR 269 (Del.), Dwarka Prasad

Agarwal v. ITO: 52 ITD 239 (Cal). The ld. A.R. further submitted that the CIT(A) has deleted such disallowance during A.Y. 2008-09 which were also endorsed by the Hon`ble tribunal vide order dtd. 27th June 2016. Therefore, the Ld. CIT (A) grossly erred in deviating from the stand taken by his predecessor on same set of facts. Therefore, it was urged upon that to delete such disallowance following the earlier order of tribunal.

7.4. The Ld. D.R. relied on the orders of lower authorities.

7.5. We have heard the rival contentions of both the parties. We find that the CIT (A) deleted the disallowance made fully in appeal order. We find that the AO while making the disallowance has ignored the fact that expenses relating to colliery were reduced to Rs. 61.62 Lakhs from Rs. 62.13 Lakh in previous year. Similarly, expenses under the head of office expenses have reduced to Rs. 19.85 from 19.92 Lakh. Further such disallowance made in A.Y. 08-09 were deleted by ld. CIT (A), therefore, on same set of facts, the confirmation of such disallowance is not justified.

Further, no specific defects were pointed out by the AO. We also note that the Tribunal has also upheld the disallowance deleted by the CIT (A) in A.Y. 2008-09. of which relevant para 85 is reproduced as under:

> "85. *We have heard the rival contentions of both the parties. We find that the disallowance made was deleted fully in appeal order by the CIT (A). We find that the Ld. CIT(A) has observed that while making the disallowance the AO has ignored the fact that there was nearly fivefold increase in net taxable income from Rs. 7.3 crores to Rs. 43.92 corers and also the fact that there was an overall increase of nearly two fold in the GP rate from 3.45% to 6.8% and therefore the AO should not have resorted to such unwarranted ad hoc disallowance of Rs. 8.5 Lacs when the assessee has over nearly fivefold increase in its taxable income. Such disallowances are not found to be justified and proper in the facts and circumstances of the case. We uphold the action of the ld. CIT(A). Our interference is not called. Ground no.8 is also rejected."*

7.5.1. Therefore, we do not find any reason by the CIT(A) to deviate his own order for A.Y. 2008-09. Respectfully following the order of this Tribunal, we are also of the view that the AO should not have resorted to such unwarranted ad hoc disallowance of

Rs. 8.15 Lacs. Hence, such disallowances are not found to be justified and proper in the facts and circumstances of the case. Therefore, we delete the disallowances so made by the AO. Respectfully following the order of this Tribunal (supra), we allow the ground no. 3 taken in both the assessment years.

8. In the result, the Departmental appeals for both A.Y. 09-10 and A.Y. 10-11 is dismissed and assessee's appeals for A.Y. 09-10 and A.Y. 10-11 are partly allowed.

The order has been pronounced in open court on the 9th March, 2017.

Sd/-	**Sd/-**
(डी.टी.गरासिया)	(ओ.पी.मीना)
न्यायिक सदस्य	लेखा सदस्य
(D.T.GARASIA)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

दिनांक /**Dated : 09.03.2017**

CPU*