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"Associated Enterprise" and "International transaction" – deciphering the evolving law of transfer pricing

I. Introduction

Chapter X of the Income-tax Act, 1961 ('the Act') lays down special provisions in relation to avoidance of tax. As part of this chapter, rudiments of transfer pricing ('TP') are elucidated in section 92 to section 92F of the Act. Recently, conflicting viewpoints of the taxpayer and tax authorities has been witnessed on the fundamental applicability of sections 92A and 92B of Act.

This chapter aims to analyse the law in the light of recent judgments and also deliberates on the amendments made in Section 92B *vide* Finance Act 2012 and Finance Act, 2014.

II. Associated Enterprise ('AE')

Identification of the AE sets the tone for undertaking a TP analysis. Any transaction is required to have regard to the arm's length principle if undertaken between two AEs.

Definition

The section 92A of the Act defines AE as below:

92A. (1) For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise—

(a) Which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or

(b) In respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

(2) For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year,—

(a) ……..

…….as may be prescribed.

Understanding

Simple reading of section 92A(1) gives an understanding that two enterprises become AEs, if one enterprise participates in the management, capital or control of other enterprise either directly, indirectly or through one or more intermediaries.

As one advances to read sub-section (2) of section 92A the understanding gathered could be that for the purposes of section 92A(1) two enterprises are deemed to be AEs if they satisfy one of the clauses (a) to (m) mentioned in this section.

The definition of section 92A(2) was explained *vide* Memorandum of Finance Bill 2002 as below:

""It is proposed to amend sub-section(2) of the said section to clarify that the mere fact of participation of one enterprise in the management or control or capital of the other enterprise or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associated enterprise unless the criteria specified in sub-section (2) are fulfilled."

The point of deliberation is that – *whether for constituting relationship as AEs section 92A(1) and 92A(2)of the Act are to be read separately or a unified reading of the same is required?* In other words, the following questions are vital to be contemplated:

- If two entities satisfy the provisions of section 92A(1) of the Act can they be termed as AEs irrespective of the fact that they do not meet either of the clauses mentioned in the following sub-section (2)?
- If two entities that meet any of the clauses (a) to (m) mentioned in section 92A(2) of the Act can be determined to be AEs irrespective of the fact that neither of the entities have any participation in other enterprise's management, control or capital?

Judgments

The above issues can be examined in light of following recent judgments.

1. Page Industries Ltd.[1]

Background: The taxpayer was engaged in the manufacturing and sale of ready-made garments. The taxpayer licensed the brand name 'Jockey' for exclusive manufacturing and marketing of Jockey readymade garments to Jockey International Inc. USA ('JII').

Assessment proceedings: The transfer pricing officer ("TPO") made an adjustment of approx. INR 20 crores using bright line method on the advertisement spend incurred by the taxpayer.

Aggrieved the taxpayer filed its objections before the Dispute Resolution Panel ('DRP').

DRP proceedings: The taxpayer contended that the transaction of the taxpayer with JII is not an international transaction since it is not undertaken between AEs. The taxpayer argued that since the conditions specified under section 92A(1) of the Act are not existing between it and JII they were not AEs as per law.

On the other hand, the tax authorities contended that the taxpayer and JII met clause (g) of section 92A(2) of the Act and therefore the transactions between them needs to comply with the arm's length principle. Consequently, the DRP upheld the TPO order.

ITAT observation: The Bangalore Income-tax Appellate Tribunal ('ITAT') decided this matter as follows:

- The taxpayer was merely a licensee of the brand name and owned the entire manufacturing facility, capital and employees by itself. Further, there was no participation of JII in taxpayer's management, capital or control of the taxpayer. Considering the memorandum mentioned above, ITAT emphasised that on the face, it appears that requirements of both sub-section (1) and (2) have to be met for constitution of AEs.
- Where two provisions of a statute exist then while interpreting law preference should be given to the one whose principle stands effective without making the other provision redundant. Drawing inference to this case if one were to conclude that the taxpayer and JII were indeed associated under section 92A(2) then provision of section 92A(1) would become superfluous.

1 Page Industries Ltd. vs DCIT [IT(TP)A No. 163/Bang/2015]

ITAT ruling: It was held that since the taxpayer and JII do not meet the parameters laid down in section 92(A)(1) they cannot be constituted as AEs and accordingly provisions of Chapter X do not get invoked.

2. Kaybee Private Limited[2]

Contrarily, in this case the Mumbai ITAT decided the case in the favour of the tax authorities.

Background: The taxpayer was engaged in running business centres by providing business amenities. In course of its business it received service charges towards certain purchases made on behalf of Kaybee Exim Pte Limited, Singapore ('Kaybee Singapore').

Assessment proceedings: The TPO contended that since taxpayer and Kaybee Singapore had a common person as director in tax payer and Chief Operating Officer ('COO') in Kaybee Singapore the two entities have common control and are thereby AEs by virtue of provision of section 92A(1).

The taxpayer contended that since none of the clauses as mentioned in section 92A(2) of the Act are met, they cannot be termed as AEs. In addition, the taxpayer relied on the explanation provided in memorandum to Finance Act, 2002.

ITAT observations/ruling

- The ITAT held that even if the conditions provided in clause (a) or (b) of section 92A(1) of the Act are independently satisfied then the two enterprises would be considered as AEs. In the present case since a common person had control by way of decision making in both entities they will be treated as AEs under section 92A(1).

3. Diageo India Private Limited[3]

ITAT observations/ ruling: Mumbai Tribunal held that whether two entities are AEs needs to be tested under section 92A(1) of the Act. Clauses of deeming fictions set out in section 92A(2) are only illustration of the manner in which 92A(1) has to be applied.

Corollary

Section 92A(1) lays emphasis on 'management', 'control' and 'capital' for triggering the AE relationship. As these terms are subjective in nature it was generally construed that the clauses of section 92A(2) clarify them. This understanding was strengthened by the amendment made to sub-section (2) and the opening words *"For the purposes of Sub – Section (1)"*.

However, this view has been negated by the decisions in case of Kaybee and Diageo and hence one needs to take appropriate safeguards in this context. Also, one cannot ignore that the facts related to each case is unique and subjective and there can be instances when courts' decisions may not squarely apply. Therefore, in addition to ensuring that the intent of the law is not forsaken a correlated analysis is to be undertaken after taking into consideration the individual facts and the provisions of law.

III. Amendment to section 92B by Finance Act, 2012 – prospective or retrospective?

Section 92B of the Act defines the term "international transaction" as a transaction between two or more AEs, either or both of which are non-residents, in the nature of purchase, sale or lease of intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profit, incomes, losses or assets of such enterprise.

2 Kaybee Private Limited vs. Income tax Officer (ITA No. 3749/Mum/2014)
3 Diageo India Private Limited vs. DCIT (ITA No. 8602/Mum/2010)

An explanation was inserted in section 92B by Finance Act 2012 to clarify the expression "international transaction" and "intangible property" with retrospective effect. Pursuant to this retrospective amendment, certain transactions like outstanding receivables, issuance of corporate guarantee etc. were brought under the ambit of TP regulations leading to substantial adjustment in the hands of taxpayer specifically at the assessment level.

Understanding

Generally, retrospective law that broadens the tax base is undesirable because it is contrary to the principles of natural justice and may be oppressive.

The Apex Court in its landmark judgment in the case of **Krishnamurthi & Co. Etc.**[4] held that though the legislature can make a law with retrospective provisions, the Courts could on an appropriate challenge expunge it on the ground of contravening fundamental rights.

Legislation can be categorised as:

i. Substantive law and

ii. Procedural law

Substantive law is a law which creates rights, obligations and duties; while procedural law determines how a proceeding concerning the enforcement of substantive law will occur. On substantive law, the general proposition is that amendments take effect prospectively, however, amendments made to procedural law, could be either retrospective or prospective depending on the facts of the case.

Amendment to section 92B of the Act is viewed as an amendment to substantive law since it results in enhancement of the scope of international transactions as envisaged under erstwhile section 92B of the Act. Accordingly, a normal presumption amongst the TP practitioners at large is against the retrospective applicability of such amendment. The premise behind such presumption is that the legislation introduced for the first time need not change the character of past transactions carried out upon the faith of the then existing law.

Judgments

1. Siro Clinpharm Private Limited[5] and Rusabh Diamonds[6]

ITAT ruling: It was held that explanation to section 92B of the Act inserted vide Finance Act, 2012 can only have prospective applicability effective from 1st April, 2012.

ITAT observations:

- TP provisions are inherently an anti-abuse legislation which only seeks to inculcate a degree of compliant conduct in the taxpayers and should not be construed as a source of income. Accordingly, any amendment in the said provisions can only be prospective as taxpayer cannot be told today as to how he should have behaved in the past.
- The subject amendment though stated to be clarificatory does increase the scope of international transactions under section 92B of the Act and hence should be treated as effective from assessment year ('AY') 2013-14 onwards only. The Tribunal relied on the high court ('HC') ruling of **New Skies Satellite BV**[7] wherein it was held that amendments though originally notified as clarificatory may turn out to be substantive in fact and such a substantive amendment is incapable of being given retrospective effect.

4 Krishnamurthi & Co. etc. vs. State of Madras & Anr. (1972 AIR 2455)

5 Siro Clinpharm Private Limited vs DCIT (ITA No. 2618/Mum/2014) & DCIT vs Siro Clinpharm Private Limited (ITA No. 2876/Mum/2014)

6 Rusabh Diamonds vs ACIT (ITA No. 2840/Mum/2014) & ACIT vs Rusabh Diamonds (ITA No. 2497/Mum/2014)

7 DIT vs New Skies Satellite BV (ITA 473/2012) & DIT vs New Skies Satellite BV (ITA 474/2012)

- It was also observed that the Tribunal can defy the specific words of the provisions of the statue and tinker with the date set out there in provided there is a binding judicial precedent which requires such action on their part. Conversely, if it is presumed that the insertion of explanation to Section 92B did not enlarge the scope of international transaction, there is no rationale to depart from the decision of the coordinate benches prior to such amendment on the subject issue.

Corollary

Taking cognizance of the above rulings and other related factors it is imperative that due consideration should be given to intent of the legislature, the memorandum to the relevant Finance Act, and hardship caused to the taxpayer in determining whether a provision is applicable prospectively or retrospectively. Though Parliament has authority to pass a retrospective law but such a retrospective amendment should not impair an existing right or obligation except where such an amendment is a procedural one.

IV. Deemed International transaction – Pre and Post Amendment in Finance Act, 2014

Understanding

Section 92B(1) of the Act defines the term 'international transaction' as the transaction between two or more AEs either or both of whom are non-residents. The said definition makes it crystal clear that at least one of the transacting entities must be non-resident in India for the transaction to qualify as an 'international transaction'.

Section 92B(2) of the Act creates a deeming fiction which extends the ambit of the term international transaction to include those transactions which an entity enters into with other entities which are not its AEs (hereinafter referred to as 'third party') provided either of the two conditions mentioned below are fulfilled:

- There exists a prior agreement in relation to the subject transaction between the third party and the AE of the entity

  or

- Terms of the relevant transaction are determined in substance between AE of India taxpayer and such third party

The rationale behind this clause was to prevent the taxpayers from escaping the rigours of TP provisions in situations where the transaction appears to be between independent parties when viewed in isolation, however, in substance is influenced by the AE.

Unlike section 92B(1) of the Act which clearly states that at least one of the transacting entities should be non-resident, there was an ambiguity and uncertainty on the applicability of the of section 92B(2) when both the transacting entities were resident in India.

The tax authorities have been invoking the deeming provisions in cases where transactions are entered into by Indian taxpayer with Indian third parties. On the other hand, the taxpayers contended that clause (2) of section 92B cannot be read in isolation of clause (1) of section 92B of the Act and deeming provision cannot be invoked unless either of the transacting parties is non- resident in India. There are judgments both in favour and against the treatment of such delineated transactions as 'international transaction'.

Judgments

In the following rulings it was held that a transaction between two resident entities cannot be brought under the ambit of the term international transaction by invoking the deeming fiction of section 92B(2) of the Act.

1. Astrix Laboratories Limited[8],
2. IJM (India) Infrastructure Limited[9]
3. Swarandhara IJMII Integrated Township Development Co. Pvt. Ltd.[10]

On the other hand, in the following rulings it was upheld that the transaction between two resident entities can be deemed as an international transaction under section 92B(2) of the Act on account of concerted agreement between the taxpayer, its AE and the 'third party':

1. Novo Nordisk India Private Limited[11]
2. G4S Security Services (India) Pvt Ltd.[12]

Finance Act 2014 brought out an amendment in sub clause (2) of section 92B with effect from 1 April 2015 to clarify that the residential status of the 'third party' is not relevant to invoke the deeming fiction under clause (2) of section 92B of the Act. Thus, a transaction which an entity enters into with an unrelated resident person would be deemed as an international transaction provided it fulfils the two conditions highlighted above.

Corollary

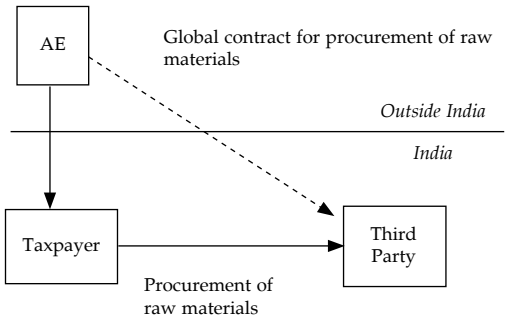
The amendment is expected to have a far reaching impact on the multinational groups. This is because it is a usual practice for multinational groups to enter into global supply agreements for all its group entities across the globe. The essence of such agreements is to get better prices, volume discounts and standardised quality products and services for all its group companies by identifying vendors through a centralised agreement. The vendors supply goods and services to all the group entities of the multinational group through their local counterparts. The price which those local counterparts demand from the group entities may or may not be decided on the basis of the global supply agreement.

While this amendment should reduce the ambiguity on this issue, at the same time it may be onerous for MNCs to monitor and analyse such arrangements carefully from TP perspective.

V. Triangular and Quadrangular arrangements

In triangular or tri-party agreements, the transaction between the taxpayer company and the other entity is governed by way of a tri-party agreement between the taxpayer company ('A'), its AE ('B') and the 'other entity' ('C'). Thus, it can be reasonably assumed that the terms of the transaction between A and C are in effect determined by B. A diagrammatic representation of triangular arrangement is shown below:

Triangular

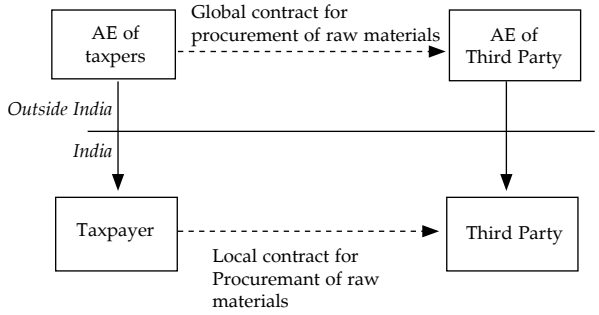


On the other hand in a quadrangular agreement, the AE ('A') of the taxpayer ('B') enters into an agreement with an independent third party ('C') (hereinafter referred to as 'first agreement'). In pursuance of the first agreement, B enters

8 Astrix Laboratories Limited vs ACIT (ITA No. 2181/Hyd/2011)
9 DCIT vs IJM (India) Infrastructure Limited (ITA No. 43/Hyd/2014)
10 Swarandhara IJMII Integrated Township Development Co. Pvt. Ltd vs DCIT (ITA No. 53/Hyd/2014)
11 Novo Nordisk India Private Limited vs DCIT (ITA TP No. 122/Bang/2014)
12 DCIT vs G4S Security Services (India) Pvt Ltd (ITA No. 321,3979 and 5351/Del/2009)

into an agreement with a local counterpart of C in India ('D') (hereinafter referred to as 'second agreement'). Thus, the transaction between B and D, both of whom are resident in India and are not AEs are governed by two separate agreements. If B & D do not enter into second agreement for the said transaction or terms of the agreement between B & D are in substance determined by first agreement, then the transaction between B & D would be deemed as an international transaction. A diagrammatic representation of Quadrangular arrangement is shown below:

Quadrangular Arrangement



However, if B & D enter into an independent agreement to determine the terms of the transaction between them, the transaction would fall outside the provision of section 92B(2) of the Act.

Judgments

1. Kodak India Private Limited[13]

ITAT Ruling/observation

- Mumbai ITAT gave a categorical finding that the terms of transaction between Kodak India, the taxpayer, and independent third party in India with whom Kodak India had entered into transaction with was not governed by the agreement which the parent entity of Kodak India had entered into with AE of the third party.
- The Hon'ble Bombay HC also rejected the appeal of the tax authorities against the above order on the premise that the tax authorities had not controverted the factual finding of Mumbai ITAT that the terms of the transaction between Kodak India and the independent third party have not been determined in substance by the AE of Kodak India.

2. Thomson Reuters India Private Limited[14]

ITAT Ruling/observation

- On similar facts, the Mumbai ITAT set aside the case to the file of the TPO to analyse the terms of the agreement between the Thompson Reuters, the taxpayer, and the Indian entity transacting with the taxpayer to see whether the terms of the agreement are in effect governed by the global agreement entered into by the AE of the taxpayer.

VI. Capital Financing

As discussed above, Finance Act 2012 retrospectively expanded the definition of international transactions defined under section 92B to include transactions in the nature of capital financing.

In the paragraphs below the authors have presented a review of various aspects of transfer pricing approach and related litigation on the issue of capital financing in the relation to issue of shares.

Definition

International transactions defined under Section 92B has been amended vide Finance Act 2012 by way of explanation to include:

13 CIT vs. Kodak India Private Limited (ITA No. 15/2014)

14 Thomson Reuters India Private Limited vs. ACIT (ITA No. 901/Mum/2014)

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

The charging section 92(1) states that:

***92.** (1) Any income4 arising from an international transaction shall be computed having regard to the arm's length price.*

Understanding

While assessing a taxpayer's case in the past the tax officers increasingly scrutinised arm's length determination of the following aspect of a financial transaction:

Particulars	Revenue Department's approach
- Issue of shares issued by the Indian taxpayer to its shareholder	- Regarding shares issued to be under-priced, treat the difference in pricing as extension of loan and impute notional interest

However, the mist around applicability of transfer pricing provisions on the same has been cleared by the Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd.[15] (Petitioner – taxpayer).

On the other hand, in a case where transaction undertaken is in the nature of transfer of shares the applicability of transfer pricing provisions on the same may be deliberated.

Judgements

As mentioned above, the Bombay High Court in its judgment after taking into consideration the legal provisions of section 92(1) of the Act, upheld that income [as defined under section (2)] arising from an International Transaction is a condition precedent for application of Chapter X of the Act.

It further held that neither the capital receipts received by the Petitioner on issue of equity shares to its holding company nor the difference in the fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act.

Tax can be charged only on income and in the absence of any income arising, the issue of applying the measure of arm's length principle ('ALP') to transactional value itself does not arise. Chapter X of the Act ensures that the transaction is charged to tax only after the same has been computed having regard to the ALP.

It also held that section 92(2) of the Act is not applicable in this case where there is no occasion to allocate any cost or expense between the petitioner and the holding company for any benefit, service or facility.

Relying on the above judgment, various benches of ITAT has relied and ruled on similar lines and held that issue of shares in the nature of capital transactions are beyond the scope of transfer pricing provisions:

- *Solvay Specialities India Pvt. Ltd. vs. DCIT (ITA No. 1702/M/2015 & ITA No. 630/M/2015)*
- *Supergems (India) Pvt. Ltd. vs, ACIT (ITA. No. 789/M/2013)*
- *Topsgrup Electronic Systems Ltd. vs. ITO (ITA No. 2115/Mum/2015)*

We further discuss the case of Visteon Asia Holdings Inc.[16] wherein the taxpayer (a US company) has sold its share in Indian company (Visteon Powertrain Control Systems India Pvt. Ltd.) to its Mauritian subsidiary (Visteon International Holdings Mauritius Ltd.).

The Hon'ble Chennai bench of ITAT in this case distinguished the applicability of transfer pricing

15 Vodafone India Services Ltd. vs. Union of India, ACIT, DCIT, DRP II (Writ Petition No. 871 of 2014)
16 Visteon Asia Holdings Inc. vs. Deputy Commissioner of Income-tax (ITA No. 723/Mds/2016)

provisions and demarcated the contrasting nature of transaction related to issue of shares and sale of shares.

The ITAT in this case upheld the adjustment using Discounted Cash Flow ('DCF') method made by the lower authorities. In the present the applicability of transfer pricing provisions were not questioned since the transaction under consideration was sale of share which gives rise to capital gain. Therefore, the taxpayer is liable to pay the appropriate capital gain tax.

Corollary

In the light of the above decisions it has been settled that transfer pricing provisions may not be applied in the absence of any income arising from a particular transaction, though the same qualifies to be an international transaction (strictly as per the definition). However in case of sale of shares wherein a capital gain arises for the taxpayer, the same falls under the purview of Chapter X of the Act.

However, one needs to be cautious that transactions in the nature of issue/sale of shares have to be looked at from the economic and commercial aspects of the inter-company arrangement along with the related statute.

VII. Issuance of corporate guarantee – Covered or outside TP provisions?

Financial arrangements between the multinational corporations have witnessed increased scrutiny from the tax department in the recent past majorly due to the amendment in section 92B of the Act. One such financial transaction where there has been constant litigation owing to divergent views of the co-ordinate benches and lack of clarity in the Act is 'issuance of corporate guarantee'.

Judgments

The Hon'ble Delhi bench in the landmark case of **Bharti Airtel**[17] held that issuance of guarantee is not an 'international transaction' under section 92B of the Act (even after the retrospective amendment to the definition of 'international transaction' by Finance Act, 2012) since it does not have any bearing on profits, income, losses or assets of the enterprises.

Hence, based on the said decision, if the taxpayer has not charged any guarantee fees and has not incurred any cost for provision of guarantee, the said transaction will be outside the purview of term 'international transaction' as defined under section 92B of the Act. The Tribunal also held that the impact on income, profit, losses and assets must be on real basis. Thus, issuance of guarantee could not be termed as 'international transaction' merely on the hypothesis that an impact could occur if the contacting entity default in its obligation.

Contrary to the finding of the Delhi bench in the case of Bharti Airtel, there has been several rulings, like **Prolifics Corporation Limited**[18] and **Hindalco Industries Limited**[19] wherein the ITAT have continued to treat corporate guarantee as an international transaction despite the taxpayer's reliance on the Bharti Airtel ruling during the course of ITAT proceedings.

Determination of ALP of the guarantee transaction where such transaction has been held to be an international transaction is matter of another debate. While TPOs have often resorted to bank guarantee rates and external website quotes for determination of ALP of guarantee transactions, the Tribunal in plethora of cases such as **Asian Paints**[20], **Everest Kanto Cylinders**[21], etc. has ruled that reliance on third party bank quotes and website quotes are not

17 Bharti Airtel Limited vs ACIT [2014] 63 SOT 113 (Del.)
18 Prolifics Corporation Limited vs DCIT (ITAT No. 237/Hyd/2014)
19 Hindalco Industries Limited vs DCIT (ITA No. 4857/Mum/2012)
20 ACIT vs Asian paints Ltd (ITA No. 1937/Mum/2010)
21 Everest Kanto Cylinder Ltd. vs. DCIT (ITA No. 542/Mum/2012)

a desirable practice for determination ALP of corporate guarantee fees. The Mumbai Bench in the case of **Glenmark Pharmaceuticals Limited**[22] has categorically held that bank guarantee quotes cannot be used to determine the ALP of corporate guarantee transaction due to the conceptual difference between the nature of two guarantees. In plenty of cases, the ITATs have applied the "rule of thumb" (i.e. guarantee commission rate ranging from 0.25% to 0.55%) for arriving at the ALP of guarantee transactions without resorting to any benchmarking exercise.

VIII. Is corporate guarantee a shareholder activity?

The concept of 'shareholder activity' which provides conceptual justification for exclusion of corporate guarantee in certain cases from the scope of TP adjustments has been explained in OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ('OECD TP Guidelines').

The OECD TP Guidelines defines the term 'shareholder activity' as an activity which is performed by a member of an MNE group (usually the parent company or a regional holding company) solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder. This type of activity would not be considered to be an intra-group service, and thus would not justify a charge to other group members.

Judgments

The concept of 'shareholder activity' was duly appreciated by the Ahmedabad Bench in the case of **Micro Ink Limited**[23] wherein the Bench held that issuance of corporate guarantee in the nature of 'shareholder activity' and not involving any cost to the holding company does not amount to a "provision for services" and accordingly the said transaction is to be excluded from scope of 'international transaction' under section 92B of the Act.

The Bench also held that even if issuance of corporate guarantee is accepted as 'provision of service', such service needs to be attuned with commercial reality as no independent enterprise would issue guarantee without underlying security. Such guarantee can only be motivated by shareholder or ownership consideration.

Corollary

The concept of corporate guarantee is still at a very nascent stage in India and a series of conflicting judgements on this issue have resulted in uncertainty and scepticism amongst the taxpayers. Therefore, it is imperative that the Government expeditiously comes up with some requisite clarity on this contentious issue. In the meanwhile, it is only wise for the taxpayer to seek support from various international guidelines before drafting their policies on the inter-company financial arrangement.

IX. Parting Note

The approach of the taxpayer as well as the tax authorities in dealing with the issues has been evolving over time.

The Indian transfer pricing fraternity has resorted to international guidelines and judicial precedents to address a specific issue in this domain. However, with the divergent judgments by courts on issues discussed above, the application of strait jacket formula has become obsolete.

22 Glenmark Pharmaceuticals Limited vs. ACIT (ITA No. 5031/Mum/2012) & ACIT vs. Glenmark Pharmaceuticals Limited (ITA No. 5488/Mum/2012)

23 Micro Ink Limited vs. ACIT (ITA No. 2873/Ahd/2010)