IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.	A.Y.	Appellant	Respondent
1950/Hyd/17	2013-14	Rain Industries Limited, *(Formerly known as Rain Commodities Limited)* Hyderabad [PAN: AABCP2276K]	Dy.Commissioner of Income Tax, Circle-3(1), Hyderabad
2020/Hyd/17	2013-14	Rain Cements Limited, *[Formerly known as Rain CII Carbon (India) Limited]* Hyderabad [PAN: AABCR8858F]	
1471/Hyd/18	2014-15		

For Assessee : Shri Nishant Thakkar, AR
For Revenue : Shri Rohit Mujumdar, DR

Date of Hearing : 07-06-2021
Date of Pronouncement : 24-08-2021

O R D E R

PER S.S.GODARA, J.M. :

The instant batch of three cases pertains to two assessees's group concerns M/s.Rain Industries Limited and M/s.Rain Cements Limited. These three appeals for AYs.2013-14 & 2014-15; seriatim-wise, arise against the DCIT, Circle-3(1), assessments dt.20-10-2017; 27-10-2017 and 14-05-2018 framed in furtherance to the Dispute Resolution Panel ('DRP')-1, Bengaluru's directions dt.06-09-2017 and 28-03-2018 in F.Nos.298, 299 & 41/DRP-1/BNG/2016-17 & 2017-18, involving proceedings u/s.143(3) r.w.s.144C(13) of the Income Tax Act, 1961 [in short, 'the Act']; respectively.

Heard both the assessees as well as the department. Case files perused.

2. A combined perusal of all these instant three case files suggest that the assessees have raised twin identical substantive grounds raised seeking to reverse the learned lower authorities' action making corporate guarantee's Arm's Length Price (ALP) adjustment of Rs.6,46,01,780/-, Rs.1,58,06,313/- and Rs.2,11,55,200/- u/s.92CA(2) of the Act; followed by Section 14A r.w. Rule 8D disallowance(s) of Rs.1,06,42,020/-, Rs.7,58,750/- and Rs.7,70,000/-; respectively. We therefore propose to dispose-of all the three instant appeals together for the sake of convenience and brevity.

3. Learned counsel's first and foremost argument raises a legal question as to whether a corporate guarantee forms an international transaction or not being a shareholder activity as per Micro Inc Ltd. Vs. ACIT (2015) 63 taxmann.com 353 (Ahd), Bharti Airtel Ltd Vs. ACIT (2014) 63 SOT 113 (Delhi) and ACIT Vs. Imami Ltd., ITA No.1958/Kol/2017, dt. 03-04-2019. And also that such a transaction involves no benchmarking as held in DCIT Vs. Dishman Pharmaceuticals and Chemicals Ltd. [103 taxmann.com 271] (Ahd), M/s.Ucal Fuel Systems Ltd., Vs. ACIT, ITA No.725/Mds/2015 and Aaradhana Realities Ltd., Vs. ACIT, ITA No.1942/M/2015 as well. All these legal arguments fail to convince us as per Hon'ble Madras high court's recent decision in Pr.CIT Vs. M/s.Redignton (India) Limited, dt.10-12-2020 in Tax Case Appeal Nos.590 & 591 of 2019 holds that Explanation to Section 92B inserted vide the Finance Act, 2012 with retrospective effect from 01-04-2002

also includes a corporate guarantee. We thus hold that the tribunal's all foregoing orders (supra) must make way for higher wisdom and decline the assessee's first and foremost legal plea. We further deem it appropriate to reproduce their lordships detailed discussion:

"68.From the Annual Report of the assessee, it was seen that the assessee had issued guarantees on behalf of its subsidiaries to the tune of Rs.464.36 crores and on behalf of others, to the tune of Rs.3.42 crores. The assessee was called to explain the same. The assessee stated that they had not issued any fresh guarantee during the Assessment Year 2009-10 and the guarantee is outstanding, is purely on account of the currency transition adjustment on restatement of guarantees outstanding at the closing rates prevailing on 31st March 2009 for disclosure in financial statement in compliance with the Accounting Standards. Further, the assessee stated that the outstanding guarantee issued by the assessee as on 31.03.2009 represents guarantee issued on behalf of the overseas subsidiaries in earlier years. Further, they stated that during the course of assessment proceedings in the relevant assessment years, the TPO made addition to the Corporate Guarantee issued during those years by adopting the bench mark rate based on the available internal comparable uncontrolled price charged by the bank at 0.85%. The assessee also issued Corporate Guarantee in favour of M/s.Parampara Wedding Cads and M/s. Baskar Digital Press. The TPO after taking note of the amended Section 92B, which was introduced with retrospective effect from 01.04.2002, examined the factual aspect and pointed out that though the assessee stated that they have not issued any fresh guarantee during the Assessment Year 2009-10, the guarantees were live and were not closed as on 31.03.2009 and the liability continued on the assessee as on 31.03.2009. Noting that providing such guarantee is one of the financial service rendered by the assessee for which it has to be remunerated appropriately and that concerned parties in whose favour these guarantees were extended, where Associated Enterprises of the assessee and the transactions were largely influenced by related parties, the Associated Enterprises benefited and consequently, the income would accrue only to such non-resident and to that extent, shifting of tax base from the country is bound to happen in such transaction and the assessee should have been remunerated appropriately. The Corporate Guarantee was to the tune of Rs.5574.13 lakhs and Bank Guarantee to the tune of Rs.40862.34 lakhs. Further, the TPO observed that there is no time period for expiry of the guarantee. Consequently, it will demand more

commission charges than the commission charged by the Banks. That apart, the assessee had taken maximum risk in providing Bank Guarantee to their subsidiaries and the entire credit risk is owned by the assessee, the Indian Company and it has to be reimbursed at maximum percentage of fees. Further, the TPO noted as to the manner in which the Bank's charge commission on guarantees extended and observed that the Bank will insist upon cash deposits / guarantee deposits / asset mortgage etc., to extend guarantees on behalf of their clients. Further, it was pointed out that if a situation arises that the Bank Guarantee has to be invoked, when the Associate Enterprise is not in good financial position, obviously, the assessee is at risk and they claim that there is no risk in providing guarantees cannot be accepted. The TPO drew a comparison between the Guarantees issued by the Bank and Guarantees issued by the assessee on behalf of the Associated Enterprise to the Bank. It has been recorded that the Associated Enterprises of the assessee have not provided any security to the assessee. In the agreement / contract between the Associated Enterprises and the assessee, no condition has been imposed on the Associated Enterprises to pay the amount to the assessee and even in some agreements if it is mentioned, in the event of the Associated Enterprises financially becoming weak, the risk undertaken by the assessee becomes greater. Further, invoking a guarantee provided to an Associated Enterprise is very difficult as it depends on the financial condition of the Associated Enterprise and the law governing such transactions in that country and the assessee is bound by the provisions of FEMA and RBI guidelines. Therefore, the TPO concluded that the Bank commission charges cannot be compared for the commission charges that has been payable to the assessee by the Associated Enterprises and it is a clear financial services rendered by the assessee to their Associated Enterprise, which has to be compensated by proper commission charges. Accordingly, the TPO held 2% shall be charged as commission and proposed an upward adjustment to the income of the assessee to the tune of Rs.817.25 lakhs. In respect of the guarantees given to unrelated parties, the TPO held that 2% should be charged as guarantee commission and proposed an upward adjustment of Rs.111.48 lakhs to the income of the assessee. The DRP after hearing the assessee, held that the TPO has not given cogent reasons for taking a different stand than the stand taken by the Department in the earlier years as the same guarantee is continuing during the year under consideration and therefore, there cannot be a different bench marking from that of the previous year. Accordingly, the DRP directed the TPO to adopt the same rate of guarantee commission as was adopted by the TPO in the preceding year.

69.The directions issued by the DRP were given effect to by the Assessing Officer vide Assessment Order dated 17.01.2014. The Tribunal held that the TP addition made against the Corporate and Bank Guarantee is not sustainable in law. This conclusion is by observing that the assessee has provided Corporate and Bank Guarantees for the overall interest of its business. It referred to the decision of the Delhi Tribunal in the case of Bharti Airtel Ltd., wherein it is held that Corporate Guarantee does not involve any cost to the assessee and therefore, it is not an international transaction even under the definition of the said term as amended by the Finance Act, 2012. The Tribunal is a final authority to render findings on fact. The Tribunal failed to give any reason as to how the decision in Bharti Airtel Limited would apply to the assessee's case. Furthermore, there was no record placed before the Tribunal by the assessee that they have not incurred any cost for providing Bank Guarantee. As observed earlier, the TPO has compared the nature of documentation executed by the assessee in favour of his Associated Enterprise to come to the factual conclusion that it is a financial service. This finding of fact has not been interfered by the DRP, but the DRP was of the view that the same treatment, which was given in the previous Assessment Year should be extended for the Assessment Year under consideration also and there is no reason given by the TPO for taking a divergent view. The finding that the very same transaction for the previous Assessment Year was subject matter of TP adjustment, has not been disputed by the Tribunal rather not even dealt with by the Tribunal. Therefore, the finding rendered by the Tribunal is utterly perverse.

70.The argument of the learned Senior counsel appearing for the assessee is that prior to the amendment brought about in Section 92B by Finance Act 2012, the Tribunal had decided that furnishing of a guarantee by an assessee was not an international transaction as it did not fall within any of the limbs of Section 92B. It is submitted that to get over the judicial pronouncement, the explanation was inserted. The argument is that Clause (c) of the Explanation supports the case of the assessee inasmuch as the Explanation makes it clear that giving of a Corporate Guarantee is not a service. Without prejudice to the said contention, it is submitted that only Corporate Guarantee is given by the assessee, which are in the nature of lending are covered under clause (c) of Explanation 1 to Section 92B. Further, it is submitted that the nature of transactions covered by Clause (e) specifically include even those transactions which may not have a bearing on the profit, income, losses or assets of such enterprises at the time of transaction are covered if they have such a bearing at any future date. It is argued that the language used in the Explanation makes it clear that in so far as the transactions that fall within the main part of Section 92B are concerned, such transactions must have

a bearing on profit, income, losses or assets of an assessee in the year in which the transaction is effected. In the assessee's case, the Corporate Guarantees represent a contingent liability and lay dormant and have no bearing on the current year's profits, income or losses of an assessee and Corporate Guarantee are not covered within the definition of international transaction. It is submitted that applying doctrine of fairness as explained by the Hon'ble Supreme Court of India in the case Vatika Township Private Limited, the explanation ought to be read as prospective in its application and retrospective in its effect such that it will also cover within its ambit guarantees issued prior to the introduction of the explanation by Finance Act 2012.

71.We find from the grounds of appeal filed by the assessee before the Tribunal, no ground was raised as regards the argument that the explanation added by Finance Act 2012, is to be construed as prospective in its application. Furthermore, the Tribunal has also not recorded in its order, more particularly, from Paragraph 92 that the assessee had argued on the issue regarding prospectivity / retrospectivity. Further, the assessee has not challenged the validity of the Explanation nor its applicability with retrospective effect. That apart, even before the DRP, such contention was not raised. The Hon'ble Supreme Court in Gold Coin Health Food Private Limited, while deciding the issue whether an amendment was clarificatory or substantive in nature or whether it will have retrospective effect held as follows:

14. The presumption against retrospective operation is not applicable to declaratory statutes In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended .....An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions

and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

72.A new Enactment or an Amendment meant to explain the earlier Act has to be considered retrospective. The explanation inserted in Section 92B by Finance Act 2012 with retrospective effect from 01.04.2002 commences with the sentence For the removal of doubts, it is hereby clarified that –

73.An Amendment made with the object of removal of doubts and to clarify, undoubtedly has to be read to be retrospective and Courts are bound to give effect to such retrospective legislation.

74.The learned Senior Standing counsel for the Revenue referred to the decision in Co-operative Company Limited vs. Commissioner of Trade Tax in Civil No.2124 of 2007 dated 24.04.2007, wherein it was held that when an amendment is brought into force from a particular date, no retrospective operation thereof can be contemplated prior thereto. The explanation in Section 92B specifically has been given retrospective effect and it is clarificatory in nature and for the purpose of removal of doubts. This issue was considered by this Court in the case of Sudexo Food Solutions India Private Ltd.

75.The concept of Bank Guarantees and Corporate Guarantees was explained in the decision of the Hyderabad Tribunal in the case of Prolifies Corporation Limited. In the said case, the Revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is an additional guarantee, provided by the Parent company. It does not involve any cost of risk to the shareholders. Further, the retrospective amendment of Section 92B does not enlarge the scope of the term international transaction to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfill the liability and therefore, there is always an inherent risk in providing guarantees and that may be a reason that Finance provider insist on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that this position indicates that provision of guarantee always involves risk and there is a service provided to the Associate Enterprise in increasing its creditworthiness in obtaining loans in the market, be from Financial institutions or from others. There may not be immediate charge on P & L account, but inherent risk cannot be

ruled out in providing guarantees. Ultimately, the Tribunal upheld the adjustments made on guarantee commissions both on the guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise.

76.In the light of the above decisions, we hold that the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and restore the order passed by the DRP".

4. Next comes equally important aspect of quantification of the impugned corporate guarantee adjustment. It transpires during the course of hearing that this tribunal's co-ordinate bench in former assessee M/s. Rain Industries Ltd's appeal(s) for AY.2008-09 and 2009-10 ITA Nos157/Hyd/2014 and 83/Hyd/2014 dt.04-12-2015 and 28-09-2016, respectively, has directed the learned lower authorities to adopt 0.53 commission rate as against that in issue @ between 1.30% to 2.10% in TPO's order(s) dt.31-10-2016. We thus adopt judicial consistency and direct the TPO to adopt 0.53% rate in both these assessees' cases in all these respective assessment years.

4.1. There is yet another equally important last aspect regarding quantification of the corporate guarantee adjustment itself in all these three assessment years. There is no dispute between the parties that the TPO herein had himself made it clear that "in case of guarantees covering more than one financial year the fee is charged by the banks at the beginning of the financial year on the outstanding amount". As against this, the Revenue fails to dispute that case law BS. Ltd., Vs. ACIT [94 taxmann.com 346] (Hyd), Manugraph India Ltd., Vs. DCIT (ITA No.4761/Mum/2013) and ACG Associated Capsules Pvt. Ltd. Vs. CIT (2012) [343 ITR 89] (SC) hold that such a

corporate guarantee adjustment could only be made to the extent of actually utilized amount during the year than that of the full value of the guarantee itself. We adopt the very reasoning herein as well and directing the TPO to re-compute the impugned adjustment after taking into consideration only the actually utilised amount of the corresponding corporate guarantees in these three cases. The assessees' identical first and foremost ground in all these three appeals is partly accepted in foregoing terms.

5. Next comes the latter identical issue of Section 14A r.w. Rule 8D disallowance. It emerges at the outset that the latter assessee, M/s.Rain Cements Ltd. has not derived any exempt income so far as its appeal ITA No.2020/Hyd/2017 is concerned. We thus quote the following case law :

i. CIT Vs. Chettinad Logistics Pvt. Ltd., [80 taxmann.com 221] (Madras);
ii. CIT Vs. Corrtech Energy Pvt. Ltd., [223 Taxman 130] (Guj);
iii. Cheminvest Ltd., Vs. CIT (2015) [378 ITR 33] (Del)

Their lordships hold that Section 14A read with Rule 8D applies only in relation to an assessee's exempt income than having any independent exigibility. It is an admitted fact that the assessee has not derived any exempt income in the relevant previous year. We therefore direct the Assessing Officer to delete the impugned disallowance for this precise reason alone.

This second assessee's former appeal ITA No.2020/Hyd/2017 raising these twin issues only is partly accepted in above terms.

6. We revert back to assessees' latter substantive ground in their remaining appeals ITA Nos.1950/Hyd/2017 and 1471/Hyd/2018. Learned counsel has submitted very fairly in former assessee's appeal that although it has derived exempt income thereby making corresponding investments in its sister concern i.e., M/s.Rain Commodities, USA, both the lower authorities have erred in law and on facts in not having recorded any satisfaction contemplated u/s.14A(ii) *qua* its books of accounts that no such expenditure had been incurred in the relevant previous year. He has quoted Hindustan Aeronautics Ltd. Vs. ACIT [125 taxmann.com 80] (Kar), CIT Vs. UP Electronic Corpn. Ltd. (397 ITR 113) (All) and CIT Vs. I.P.Support Services India (P) Ltd. [88 taxmann.com 418] (Del) that such a satisfaction is very much mandatory before disallowance computation mechanism envisaged under Rule 8D of the Rules comes into play. Learned counsel further emphasised that the Assessing Officer had not made any such disallowances upto AY.2011-12 in former assessee, M/s.Rain Industries cases as well. He lastly stated that the assessee had made the impugned investments from the non-interest bearing funds only. And more so in view of the fact that no disallowance has been made regarding direct and proportionate interest expenditure under rule 8D2(i) and (ii) of the Income Tax Rules.

6.1. The Revenue has drawn strong support from the learned lower authorities' action invoking the impugned disallowance.

7. We have given our thoughtful consideration to rival pleadings against and in support of the impugned Section 14A r.w. Rule 8D disallowance. It is not in dispute that the impugned investments have been made in group concerns/subsidiaries only which have yielded exempt income to the assessee. The fact also remains that the Assessing Officer has not recorded any satisfaction *qua* the assessee's books to this effect. Faced with this situation, we deem it appropriate to restore the instant case back to the Assessing Officer for his afresh adjudication thereof keeping in mind the assessees' fund position in its books of accounts *prima facie* followed by the non-utilization of interest bearing funds as per law. We order accordingly. The former assessee's appeal ITA No. 1950/Hyd/2017 raising these twin issues is partly allowed in foregoing terms.

8. We are now left with the latter assessee's appeal ITA No.1471/Hyd/2018 raising the second substantive ground of Section 14A Rule 8D disallowance of Rs.7,70,000/- *qua* its exempt income of Rs.30,69,895/-. Although the assessee has claimed to have sufficient non-interest bearing funds and not having incurred any direct or indirect expenditure for deriving the above stated exempt income, no such details to this effect form part of records before us. There is further no rebuttal to the fact that the impugned disallowance is much less than the exempt income itself as per hon'ble Delhi high court's decision in Joint Investments Pvt. Ltd. Vs. CIT 372 ITR 694 (Delhi). We

therefore deem it appropriate in these peculiar facts and circumstances to affirm the impugned disallowance. The latter assessee fails in its second substantive grievance. This last appeal ITA No. 1471/Hyd/2018 is partly allowed in above terms.

9. These twin assessees' appeals are partly allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 24th August, 2021

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 24-08-2021
TNMM

Copy to :

1.Rain Industries Limited, (formerly known as Rain Commodities Ltd), Rain Center 34, Srinagar Colony, Hyderabad.

2.Rain Cements Limited, [formerly known as Rain CII Carbon (India) Ltd], Rain Center 34, Srinagar Colony, Hyderabad.

3.The Dy.Commissioner of Income Tax, Circle-3(1), Hyderabad.

4.Dispute Resolution Panel (DRP), Bengaluru.

5.Director of Income Tax (IT & TP), Hyderabad.

6.Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.

7.D.R. ITAT, Hyderabad.

8.Guard File.