IN THE INCOME TAX APPELLATE TRIBUNAL,
AHMEDABAD I BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and S S Godara JM]

I.T.A. Nos.: 2933/Ahd/2011, 2841/Ahd/2012, 486/Ahd/14 and 273/Ahd/2015
Assessment years: 2007-08, 2008-09, 2009-10 and 2010-11

Shell Global Solutions International BV .....Appellant
[PAN: AAICS3589H]

Vs

Deputy Director of Income Tax
(International Taxation) -1, Ahmedabad .....Respondent

Appearances by
Rahul Mitra and Prashant Maheshwari *for the appellant*
RM Tiwari *for the respondent*

Order reserved on : August 18, 2016
Order pronounced on : November 17, 2016

O R D E R

Per Pramod Kumar, AM:

[1] These four appeals pertain to the same assessee, involve some common issues and were heard together. As a matter of convenience, therefore, all the four appeals are being disposed of by way of this common order.

[2] These appeals raise an interesting issue with respect to interplay of Article 9 of India Netherlands Double Taxation Avoidance Agreement [Indo-Dutch tax treaty, in short; 177 ITR (St) 72] and TP adjustments under the domestic TP law. This issue, which is common in all the appeals, is one of the facets, in addition to the erosion aspect, of assesseeÕs grievance with respect to armÕs length price adjustment, in the income from fees from technical services (FTS) received from its associated enterprise in India. These adjustments are as follows:

Assessment year	ALP adjustment (Rs)
2007-08	**8,53,03,582**
2008-09	**29,43,61,998**
2009-10	**28,13,51,356**
2010-11	**33,93,20,979**
Total	**100,03,37,915**

[3] The background in which the issue before us arises is as follows. The assessee before us is a company incorporated in, and tax resident of, the Netherlands. During the relevant previous years, the assessee had rendered certain technical services to its associated enterprises in India, i.e. Hazira LNG Port Limited and Hazira Port Private Limited. The consideration received by the assessee for rendering these services, which was subject

to tax @ 10% on gross basis in the hands of the assessee as fees for technical services under article 12 of India Netherlands Double Taxation Avoidance Agreement. The income so earned by the assesse, from rendition of technical services to Indian AEs, was subjected to armôs length price adjustments under the transfer pricing regulations, to the tune of Rs 100.03 crores, as detailed in the preceding paragraph and spread over these four assessment years.

[4] While the assessee did not raise any dispute with respect to mechanics and quantification of the ALP adjustments, and thatôs the reasons the facts relating to those aspects of the matter are not being set out here, the assessee did oppose theses ALP adjustments on the ground that by making these ALP adjustments, the Assessing Officer is eroding the Indian tax base. It was contended that the impugned ALP adjustments result in Indian tax base erosion, and are, therefore, contrary to the scheme of Section 92(3) read with circular no. 14 of 2001. This plea was explained, *inter alia*, as follows:

> The Appellant submitted before the DRP that application of armôs length principles for making TP adjustments under the aforesaid circumstances was not proper; and also against the principles and spirit of the TP provisions of India, since had the Appellant charged additional fees from its Indian AEs, namely HLPL and HPPL in order to comply with armôs length standards, then the said additional fees would have been taxed in India in the hands of the Appellant @ 10% on gross basis, while at the same time, the said additional fees would have been allowed or deducted in the hands of the payers, namely HLPL and HPPL for the purposes of computing their business profits, where such allowances or deductions would have obtained tax shields @ 33.99%, say 34%, in the hands of the said payers. Thus, application of armôs length principles would have resulted in the erosion of taxes payable in India to the extent of 24% (i.e. 34% - 10%) on an aggregate or cumulative basis, thus eroding the tax base of India, while the provisions of TP are meant to be applied for the reverse scenario, namely to check or protect the erosion of the tax base of the country.

[5] Grievance of the assessee was rejected by the Dispute Resolution Panel. The assessee is aggrieved and is in appeal before us.

[6] In the meantime, however, a special bench of this Tribunal, consisting of three members- including one of us, heard and adjudicated upon a similar issue relating to the theory or concept of ñbase erosionò in the case of **Instrumentarium Corporation Ltd Finland Vs ADIT [(2016) 71 taxmann.com 193 (SB)].** This assessee, in its capacity as an intervener, was also heard by the Special Bench, and the arguments of the assessee were duly considered and adjudicated upon by the special bench. The plea of the assessee, on the theory of base erosion and as argued by the assessee, was rejected. When these appeals came up for hearing before us, learned counsel fairly accepted that the base erosion issue is now stands covered against the assessee by the special bench decision and that he has nothing to add so far as the arguments on the base erosion issue, which have already been heard and adjudicated upon by the special bench, are concerned. He, however, added that while special bench decision does bind this division bench of the

Tribunal, and that is the reason he is not arguing on that aspect of the matter any further, he has legal submissions to make on the correctness of the special bench decision which he will make, if so necessary, before Hon'ble Courts above. As for this issue, (i.e. whether invoking transfer pricing provisions in case of an income in the hands of a non-resident enterprise, when it is tax deductible in the hands of an assessee in India and even when such an assessee is incurring losses, cannot be invoked as the same would amount to base erosion of tax base in India), as learned counsel fairly agrees, the issue is covered against the assessee by Special Bench decision in the case of Instrumentarium Limited *(supra).* The findings of the Tribunal, in this case, can be summarized as follows:

- Section 92(1) requires that any income arising from an international transaction shall be computed having regard to the arm's length price. To this extent, there is no dispute that the transactions are international transactions between the associated enterprises, and the income arising from these transactions is, therefore, required to be computed having regard to the arm's length price. The case of the assessee, however, at best is that the assessee is covered by the exclusion clause set out in section 92(3) which lays down the situation in which the provision of computation of income having regard to the arm's length price, as set out in section 92(1), will not apply. [Para 15]

- Section 92(3), to the extent relevant for present analysis, provides that the provisions of this section shall not apply in a case where the computation of income under sub-section (1) has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered into. [Para 16]

- In plain words, what this sub section holds is that where as a result of computation of income under section 92(1) on the basis of arm's length principle, either the income of the assessee is reduced or loss of the assessee is increased, the provisions of section 92(1) will not be pressed into service. In other words, where computation of income on the basis of arm's length price has the effect of lowering the profits or increasing the losses, such a computation on arm's length price shall not be resorted to. Take for example, a situation in which an enterprise sells a product to its AE at Rs 100 whereas its arm's length price is only Rs 90, the computation of income in the hands of such an enterprise will still be taken at Rs 100 and not at Rs 90. Adopting the arm's length price in such a situation will result in a situation in which, the computation of arm's length price will have the effect of lowering the profits or increasing the losses. Essentially, therefore, it refers to the computation of income in the hands of the assessee in respect of which computation of income is being done under section 92(1). [Para 17]

- In substance, fundamental contention of the assessee, however, is that a holistic view of the matter should be taken and the concept of lowering overall profits and increasing overall losses should be adopted not only for the assessee alone, but of all the related AEs as a whole- as taxable in India. Going a step further, what is implicit in the argument of the assessee is that the figures of income or losses should not be looked at, but on tax impact of such profits or losses. In effect thus, reducing the income chargeable to tax or increasing the loss should be de facto read as reducing the tax liability on income or increasing the tax shield for the losses. In effect, thus, not only the

actual tax impact but also the possible tax advantage, de hors the time value of money, should be taken into account. This interpretation, according to the assessee, will advance the intent of the Legislature and objectives of the transfer pricing. [Para 18]

- A plain reading of section 92(3), however, indicates that what is to be seen is impact on profits or losses for the year in consideration itself as it is to be computed on the basis of entries made in the books of accounts in respect of previous year in which the international transaction was entered into. There is thus no scope at all for taking into account the impact on taxes for the subsequent years. The tax shield available to the assessee's AE, as a result of accumulated losses- even if any, can only affect the income of the subsequent years, which, for the reasons noted above, are not relevant for the purpose of section 92(3). The manner in which the argument of the assessee is placed, a part of the section is being interpreted in isolation without appreciating the impact of the other part of the same section. Such an approach is clearly not permissible. This legal position apart, the arguments of the assessee also proceed on the fallacious logic inasmuch as the amount by which income of the assessee is increased by the arm's length price adjustments, under the Indian law, is not available for deduction in the hands of the corresponding Indian AE. There is no base erosion by the ALP adjustments in the hands of income of the non-resident company in respect of transactions with the Indian AEs. The base erosion could have, if at all, taken place at best in a situation in which the Indian AE was to actually allow the income to the non-resident company. That is not the case, and in such a situation, in any event, ALP adjustments would not have come into play at all. The deduction for the ALP adjustment will not be available to the Indian AE because there is no provision enabling deduction for ALP adjustments. Second proviso to section 92C(4) also constitutes a bar against lowering income of the non-resident AE, as a result of lowering the deduction in the hands of the Indian AE, rather than enabling a higher deduction in the hands of the Indian AE as a result of increasing non-resident AE's income.[Para 19]

- It must also be taken note of the fact that as far as the relevant years before the instant court are considered, base erosion has taken place because of assessee granting an interest free loan to Indian AE. It is so for the reason that if this transaction structure is to be accepted without ALP adjustment, while Indian tax administration will lose the taxability of interest in the hands of the assessee at the rate of 10 per cent, it will have nothing to lose in the hands of taxability of the Indian AE because admittedly the related Indian AE was incurring the loses. By not making the impugned ALP adjustments, the tax administration is certain to have its tax base eroded by 10 per cent of the arm's length interest. To what extent, this tax revenue will could have been offset by the increase of loss of the Indian AE is wholly academic because there is no way one can ascertain, at least at the assessment stage, as to whether this loss will be actually set off against the future profits of the Indian AE. [Para 20]

- The case of the assessee is that the approach adopted above is myopic because such an approach overlooks the tax shield available to the Indian AE in the form of accumulated losses. However, tax administration cannot be expected to have clairvoyance of whether or not Indian AE will actually make sufficient profits in the next eight assessment years which will subsume the losses incurred by the assessee by the AE. The benefit of tax shield, even if

any, is, therefore, wholly hypothetical. The approach adopted by the tax administration, therefore, can at the most be conservative, but certainly not myopic. In any case, that is what the law provides.The law has to be interpreted as it exists and not as it ought to be. The lawmakers may have preferred a bird in the hand over two in the bush but that is a policy issue. In any event, nothing in the world can match the exactitude of hindsight but the trouble is that it inherently comes a bit too late. If the assessee was to be so certain of the tax benefit to the Indian revenue by this transaction structure by way of interest free loan to Indian AE, the transaction would not have been structured in this manner; after all the underlying motive in the activities of the assessee is to maximise gains for its shareholder rather than broaden the tax base of Indian revenue. Of course, even this tax shield of accumulated losses is wholly academic inasmuch as the deduction has not been claimed, nor can it be claimed at this stage. [Para 21]

- The Indian transfer pricing regulations do not give any discretions to the tax administration for the application of arm's length price in computation of profits arising from international transactions. As there is no discretion with the tax administration, there is no occasion for any guiding principles in the use of discretion. So far as the Indian transfer pricing provisions are concerned, the use of arm's length price, in computation of income arising from international transactions between the AEs, is mandatory. The only rider is that these provisions are not to be applied only in the event of the exclusion clause in section 92(3) being satisfied, but then, this exclusion clause does not come into play on the facts of these cases at all. [Para 24]

- It is also useful to note that in the event of ALP adjustments, under the Australian Income Tax Assessment Act, 1936, consequential adjustments are permissible in certain conditions under section 136 AF of the said Act. No such adjustments are permissible under the Indian Income-tax Act, 1922. It is sufficient to take note of the fact that the situation in the Australian law, so far as this aspect of the matter is concerned, is materially different. When the relevant legal provisions are not in *pari materia*, the clarifications issued by the Austrailian Tax Officer(ATO) are not even relevant. Of course, even when the provisions were to be in *pari materia,* nothing really turns on these clarifications issued by the ATO. At best, the approach adopted in these clarifications could be taken as arguments in support of the assessee. [Para 25]

- When transfer pricing provisions were introduced on the statute, the CBDT vide circular dated 14 of 2001, inter alia stated that newly substituted section 92 is intended to ensure that profits taxable in India are not understated (or losses are not overstated) by declaring lower receipts or higher outgoings than those which would have been declared by persons entering into similar transactions with unrelated parties in the same or similar circumstances. The basic intention underlying the new transfer pricing regulations is to prevent shifting out of profits by manipulating prices charged or paid in international transactions, thereby eroding the country's tax base. The new section 92 is, therefore, not intended to be applied in cases where the adoption of the arm's length price determined under the regulations would result in a decrease in the overall tax incidence in India in respect of the parties involved in the international transaction. [Para 26]

- What the circular states is the intent of the Legislature and the fact that it is intent of the Legislature is stated in so many words. However, it is not an order, direction or instruction to the field authorities to the effect that section 92 is not to be applied when overall tax incidence in India, in respect of the parties involved in the international transaction, will decrease. Section 119 (1), which makes CBDT circulars binding on the field authorities, lays down that the CBDT may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board. What follows is that it is only the order, instruction or direction of the CBDT which binds the field authorities. There are certain situations, as envisaged in section 119(2), in which the CBDT circulars can relax the rigour of law but it is not even the case of the assessee, and rightly so, that the provisions of section 92 can be relaxed under section 119(2). The Board's understanding about the intent of Legislature, does not in any way fetter the field authorities. [Para 27]

- Having said that, the role of 'intent of legislature' at best comes into play only when there is any ambiguity in the words of the statute which are being sought to be interpreted. That is not the case here. If intention of the law is not implemented by the plain words of the statute, and unless there is an ambiguity requiring some violence with the words, such an intention, no matter how noble it is, is of no relevance in the judicial interpretation. [Para 28]

- Thus, even if it is indeed intent of the Legislature that transfer pricing provisions are not to be invoked in the cases where there is lowering of the overall profits of all the associated enterprises connected with the transactions, since the words of the statutory provision did not translate this intent into the law, it cannot be held that in the light of the legal provisions, as they stand embodied in section 92(3), transfer pricing provisions are not to be invoked when, as a result of structuring of transaction in a particular way, there is no erosion of Indian tax base. That is, of course, besides the fact that, mere possibility of a set off of future profits, against the losses incurred by the AE, cannot be taken into account into such a computation about overall tax impact, nor time value of money can be ignored in these computations. The vague generalities and uncertain contingencies also have no role in the computations of overall tax impact of structuring of a transaction. In this view of the matter, even if it is accepted that the transfer pricing provisions are not to be invoked when overall profitability is reduced by the way in which the impugned international transaction is structured by the assessee, it will have no impact on the present fact situation as a limited period entitlement, for set off of loss against future profits, cannot be adjusted against the profits which have escaped taxation, for the purpose of these computations of overall impact. The benefit of loss is not real; it is contingent upon an uncertain event i.e. profits being made so as to subsume these losses. When even basic facts about the assessee's dealings with the Indian AE are not furnished by the assessee, and had to be collected by the Assessing Officer from the secondary sources, it is difficult to have faith in these wholly unsubstantiated claims of the assessee; there is no material to support these claims either. [Para 29]

- Thus, bearing in mind entirety of the case, the base erosion argument cannot be accepted, in principle, nor is there anything in the facts on record to even support the factual elements embedded in the plea of the assessee. Therefore, this plea is rejected. [Para 33]

[7] Learned counsel, however, has more armoury in store. He seeks the treaty protection for the first time at this stage, and contends that, in view of the treaty protection available to the assessee, the impugned ALP adjustments cannot be made in the hands of the assessee. It is pointed out that there is no dispute about the assessee being a tax resident of the Netherlands, and, accordingly, being entitled to the protection of India Netherlands Double Taxation Avoidance Agreement [Indo-Dutch tax treaty, in short; 177 ITR (St) 72]. His basic argument is that Article 9 of the Indo Dutch tax treaty does not permit ALP adjustments except in the case of juridical double taxation and only in the hands of a domestic enterprise, and, as provisions of the tax treaties override the provisions of the Indian Income Tax Act, except to the extent these provisions are more beneficial to the assessee, no ALP adjustment can be made in the hands of the assessee. In other words, while he does not dispute ALP adjustments being in accordance with the provisions of the domestic TP legislation embodied in the Income Tax Act, he contends that such ALP adjustments are not permissible under Article 9 of the Indo Dutch Tax treaty. Learned counsel has rather reluctantly accepted that the stand taken by the assessee, i.e. the ALP adjustments, under article 9(1) can only be made in the hands of a domestic enterprise, donot prima facie emerge from a plain reading of the above treaty provisions. His contention that his view is supported by OECD Commentary, which has been held to be in the nature of *contempranea expositio*, and the views of a German scholar, late Prof Klaus Vogel. His argument is based on the theory that while article 23 provides relief from juridical double taxation, by granting exemption to income taxed in the other jurisdiction, the role of article 9 is to provide relief from economic double taxation. His emphasis is that, as noted in the OECD Commentary and in Prof Vogel's analysis, article 9(1) authorizes rewriting of the profits of the assessee so as to truly capture the profits arising to the assessee in the source jurisdiction. The corresponding adjustment, envisaged by article 9(2), relives the economic double taxation caused by adjustments due to such rewriting of profits. It is on this basis that the learned counsel urges us to hold that the impugned ALP adjustments cannot be made. Learned Departmental Representative opposes the stand of the assessee and submits that such an issue cannot be raised for the first time before the Tribunal. It is pointed out that as the assessee has not been able to show any fault in the stand of the authorities below, and has accepted that the same is now upheld by the Special bench decision in the case of Instrumentarium Limited *(supra)*- wherein the assessee was also one of the interveners, the appeals should be dismissed summarily. Without prejudice to this stand, on merits of the plea now raised by the assessee, he submits that once the assessee himself accepts that the wordings of Article 9 donot support his case, there is no occasion to refer to any commentary or scholarly analysis to find out the alleged scheme of the treaty which is not evident from plain and simple words. We are urged to confirm the orders of the authorities below and decline to interfere in the matter. In his brief rejoinder, learned counsel for the assessee reiterates his submissions

[8] So far as admission of the additional plea at this stage is concerned, we find that, in view of Hon'ble Supreme Court's judgment in the case of **NTPC Ltd vs CIT [(1998) 229 ITR**

383 (SC)] and bearing in mind the fact that this is purely a legal issue, it is required to be admitted for adjudication on merits. Having admitted this legal plea for adjudication, and for the reasons we will set out in a short while, we find it entirely devoid of any legally sustainable merits, and, accordingly, we reject the same. Before we move on to the arguments on merits, which essentially centre around interpretation of article 9 of Indo Dutch tax treaty, we consider it appropriate to set out the relevant article as follows:

ARTICLE 9- ASSOCIATED ENTERPRISE

(1) Where:

a. an enterprise of one of the States participates directly or indirectly in the management, control or capital of an enterprise of the other State; or

b. the same persons participate directly or indirectly in the management, control or capital of an enterprise of one of the States, and an enterprise of the other State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

(2) Where one of the States includes in the profits of an enterprise of that State – and taxes accordingly – profits on which an enterprise of the other State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the States shall if necessary consult each other.

[9] Coming to the merits of learned counselôs arguments, the underlying proposition, on which entire foundation of learned counselôs complex web of reasoning rests, is that it is only economic double taxation which can be addressed by article 9. While on this aspect of the matter, it is useful to take note of the fact that juridical double taxation refers to a situation in which the same person gets taxed in respect of the same income in more than one tax jurisdiction. Economic double taxation, on the other hand, refers to the situation in which the same income, though in different hands, gets taxed in more than one jurisdiction. The point of time when article 9 first saw light of the day, i.e. in the first half of the last century, it coincided with the óaffiliated companiesô which were as a norm under League of Nationsô first draft convention in 1927 treated as ópermanent establishmentô being taken out of the

definition of the ópermanent establishmentô. The emphasis, therefore, could indeed have been to check the underreporting of profits in the source jurisdiction by these affiliated companies, and, as such, any aggressive application of this principle could only have resulted in economic double taxation since subsidiaries and the parent companies are distinct entities. However, this article leaned upon the armsô length standards as a measure to address this malady, and, of course, the remedy being conceptual, the remedy was far sighted and much more comprehensive which could stand the test of time for long long time to come even in situations not envisaged at that point of time. It is not relevant today as to what was the malady sought to be addressed by the introduction of article 9 at that point of time, which may have only been economic double taxation, but what is relevant is whether the article 9 is worded wide enough to cover the contemporary transfer pricing legislation dealing with situations of economic as also juridical double taxation. As to the latter, in our humble understanding, there is no bar in the article 9 to leave out the cases of juridical double taxation. The distinction between economic double taxation and juridical double taxation does not find place there at all. As long as the conditions precedent in article 9 are attracted, the application of armsô length standards certainly comes into play. While it is true that the examples given in the commentaries and the analysis of some foreign scholars deal with the cases of economic double taxation, but that does not negate the fundamental position that, as is the specific mandate of the article, when ñ*conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises",* the addition profits by applying armsô length standards *(i.e. any profits which would, but for those conditions, have accrued to one of the enterprises, but by reason of those conditions, have not so accrued*) may be included in the profits of that enterprise and taxed accordingly. There is no, and there cannot be any, dispute about the fact that these conditions are satisfied on the facts of the present case, as indeed in every case covered by the Indian transfer pricing legislation. Once it is not in dispute that the arms length standards are, therefore, to be applied in computation of taxable profits, as is specific mandate of article 9, it is only axiomatic that the manner in which armsô length standards are to be applied is something which has not been defined by the treaties and the mechanism provided under the domestic law, therefore, must hold good. Article 9(1) does not, and cannot, provide the basis of the ALP adjustments as tax treaties restrict application of domestic law of taxation rather than create independent rights of taxation. Article 9(1) is thus, in a way, an enabling provision, and the TP mechanism under the domestic law is the machinery provision. The provisions of article 9(1) permit ALP adjustment in all situations in which the armsô length standards require higher profits in the hands of any ñone of the enterprises, but by reason of those conditions, have not so accruedò to be ñincluded in the profits of that enterprise and taxed accordinglyò. The provisions are clear and unambiguous. There is no occasion to read this provision as confined to enabling ALP adjustment in respect of only domestic entities. The mere fact that examples given by the analysis of article 9(1), whether in the OECD Commentary or in scholarly analysis, are confined to economic double taxation situations does not imply that the article 9(1) cannot be applied to other situations. The examples, by definition, can only be illustrative and not exhaustive. The fact that armsôlength standards were introduced by way of article 9 to tackle certain types of economic double taxation, even if that be so, does not fetter the application of these armsô length standards, in all dealings between the associated enterprises- as is unambiguous the scheme of article 9, including the cases resulting in juridical double taxation. As for the point that article 9(2) does not provide

corresponding relief for the ALP adjustments made under section 9(1) in the present case, the application of article 9(1) cannot be declined solely on that ground. In the case of taxation of FTS, which are taxed in both the treaty partner countries, an element of double taxation in inherent in the scheme of the treaties, and its taxation in the source country is not dependent on the relief granted by the residence state. As a corollary to this fundamental position, the taxability of higher quantum of FTS in the source state cannot be negated on the ground that no relief against such taxation is granted by the residence state. All the examples given by the assessee simply demonstrate as to how while the relief in the cases of economic double taxation due to application of armôs length standards under article 9(1) is available under article 9(2), no such relief is available, under article 9(2), in respect of the juridical double taxation caused by the application of armôs length standards. That does not, however, matter. The non availability of relief under article 9(2) does not fetter application article 9(1). In a situation in which the residence jurisdiction has yielded limited source taxation rights to a type of income of an assessee, the mere increase in quantum of such a taxable income in the source jurisdiction, due to application of armôs length principle, need not always be visited with corresponding adjustment under article 9(2) in the residence jurisdiction. In our humble understanding, the restriction to the effect that only economic double taxation can be remedied by the scope of article 9, as learned counsel urges us to infer, does not exist. In view of these discussions, as also bearing in mind entirety of the case, we see no merits in this new plea raised by the assessee.

[10] Given our above findings, it is not even necessary to take the judicial call on whether or not article 9 of the Indo Dutch tax treaty, or, for that purpose, OECD Model Convention, restricts or regulates the domestic transfer pricing legislation. That aspect of the matter is academic as on now, because, even if we are to hold that it does restrict or regulate the domestic law provisions on transfer pricing, the application of armôs length standard cannot be declined because it is a case of juridical double taxation and not economic double taxation. However, as we deal with this interplay between article 9 and transfer pricing legislation, it is important to bear in mind the fact that there is a school of thought that a domestic armôs length principle, which is what transfer pricing legislation represents, goes much beyond a tax treatyôs normal rule making scope since this armôs length principle governs taxation of an enterprise in general and the tax treaties do not restrict domestic law in this respect. The profit adjustment mechanism, envisaged in tax treaties, do not deal with supra national income determination, and, therefore, the provisions of tax treaties cannot be seen as restricting, or overriding, domestic law mechanism on this aspect. There is no conflict in the tax treaties and the transfer pricing legislation as such. It would be contrary to the sense and purpose of a double taxation avoidance agreement to prohibit this kind of adjustments of income as may be necessary. It is also useful to bear in mind the fact that article 9, in a way, was precursor to the present transfer pricing regime globally, even though this article also constitutes enabling provision for ALP adjustment under the domestic transfer pricing regulations. When we look at the historical developments with respect to development of article 9(1), we find it has been a long journey from its primitive applications in the PE situations, which invariably included subsidiaries at that point of time, to its equally valid application in the context of modern day complex business models. On the first principles, therefore, the transfer pricing legislation cannot be rendered ineffective on the basis of the limitations in the provisions of Article 9. This principle is statutorily recognized in

tax legislation in many jurisdictions, including in the fatherland of Dr Vogel himself- on whose commentary so much reliance has been placed by the learned counsel. Of course, a clear indication to that effect in Section 90 would certainly have helped clarifying this position and, to that extent, any anti abuse legislation, even if integral part of the Income Tax Act, must always, if so intended, clearly and unambiguously qualify the treaty superiority over the domestic law. That, however, does not seem to be the case. Section 90(2) does give a somewhat unqualified superiority to the treaty provisions over the provisions of the Income Tax Act which contain transfer pricing legislation as well. If an anti abuse law, whether a specific anti abuse regulation (SAAR) or a general anti abuse regulation (GAAR), is to apply only to a non treaty situation and does not extend to a treaty situation, it will infringe neutrality. That cannot have any sound conceptual justification and would be in gross deviation with the best practices globally. It is high time that the stand of the tax administration on this issue is clearly reflected in the legislation, and this kind of a litigation, as before us in these appeals, is avoided.

[11] In the result, the appeals are dismissed. Pronounced in the open court today on 17th day of November, 2016.

Sd/-	***Sd/-***
S S Godara	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Ahmedabad, the 17th day of November,2016.

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad