आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, CHENNAI

डॉ.ओ.के. नारायणन, उपाध्यक्ष एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE Dr. O.K.NARAYANAN, VICE-PRESIDENT
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.513/Mds/2014
निर्धारण वर्ष /Assessment Year : 2009-10

Redington (India) Limited, "Redington House", Centre Point, Plot Nos. 8 & 11, Thiru.vi.ka.Industrial Estate, Guindy, Chennai – 600 032. PAN AABCR0347P	v.	The Joint Commissioner of Income-tax, Company Range-V(3), Chennai.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.619/Mds/2014
निर्धारण वर्ष /Assessment Year : 2009-10

The Deputy Commissioner of Income-tax, Company Circle-V(3), Chennai.	v.	Redington India Limited, 95, Mount Road, SPL Guindy House, Guindy, Chennai – 600 032.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Assessee by : Shri Percy Pardiwalla, Senior Advocate,
Shri Nishant Thakkar, Advocate
& Shri B. Ramakrishnan, FCA

Department by : Shri Shaji P. Jacob, IRS, Addl. CIT

सुनवाई की तारीख/Date of Hearing : 13th May, 2014
घोषणा की तारीख/Date of Pronouncement : 07th July, 2014

आदेश /O R D E R

PER Dr.O.K.NARAYANAN, VICE-PRESIDENT

These are cross appeals filed by the assessee and by the Revenue. The relevant assessment year is 2009-10. These appeals arise out of the assessment order passed under sec.143(3) read with sections 92CA(4) and 144C(5) of the Income-tax Act, 1961.

2. The assessee, M/s. Redington (India) Limited ('Redington India' for short) provides end-to-end supply chain solutions for all categories of Information Technology(IT) products. It also carries on business in office automation products. The assessee provides supply chain solutions primarily in India, Middle East and Africa. Those solutions are mainly provided in IT products, like Personal Computers(PC), peripherals, PC building blocks, networking products, software products and enterprise solution products. The assessee also

deals in non-IT items, like telecom products, gaming consoles and titles, digital lifestyle products and consumer durables etc.

3. The assessee company filed its return for the impugned assessment year on a taxable income of ₹125,57,70,310/-. In the course of assessment proceedings, the Assessing Officer found that the assessee had entered into international transactions exceeding ₹15 crores. Accordingly, the case was referred to Transfer Pricing Officer(TPO) for the determination of Arm's Length Price(ALP) in respect of those international transactions. The TPO examined the overseas transactions entered into by the assessee company in the previous year relevant to the assessment year under appeal.

4. The assessee, M/s. Redington India is having a wholly owned subsidiary company by name, M/s. Redington Gulf FZE('RGF Gulf' for short). The subsidiary company, M/s. RGF Gulf is engaged in the same line of business carried on by the assessee company, of distributing IT products like PCs, printers, scanners, displays, cameras, copiers, consumables, other

peripherals and accessories. M/s. RGF Gulf is mainly focusing its operations in Middle East and African countries.

5. In the previous year relevant to the assessment year under appeal, the assessee company had initiated setting up of certain wholly owned subsidiary companies. The object was to attract investments to expand its business operations in Middle East and African countries and also for quoting its shares in stock-exchanges abroad. In this series, the assessee company has first set up a wholly owned subsidiary company in Mauritius in July, 2008 by name, M/s. Redington International Mauritius Ltd. ('RIML Mauritius' for short). The assessee company made an initial investment of US$ 25000 equivalent of ₹ 10.78 lakhs. The said newly set up subsidiary M/s. RIML Mauritius, in turn, set up its own wholly owned subsidiary in Cayman Islands by name, M/s. Redington International (Holdings) Limited ('RIHL Cayman' for short).

6. After the above incorporation exercises, the assessee company transferred its entire shareholding in M/s. RGF Gulf to M/s. RIHL Cayman on 13th November, 2008. This

transfer was made without any consideration. Once this transfer of shareholding was made, RGF Gulf became a step down subsidiary of RIML Mauritius and the assessee company.

7. As the shares were transferred without consideration, the assessee company took the stand that it is not an international transaction. It stated that in order to come under the purview of an international transaction, the transaction must generate income. In the present case, the transfer of shares was made without consideration and, therefore, no income was generated. The income does not arise in the hands of the assessee company under sec.45 of the Act, which deals with taxation of capital gains. Sec.45 comes into operation only when a transfer takes place for consideration and profits or gains arise out of such transaction. Since there is no consideration involved in the impugned transfer of shares, the question of computing profits or gains does not arise. The computation is impossible. The assessee explained that since the transfer of shares was made without consideration, charging sec.45 is not attracted. The assessee also relied on sec.47 in support of its stand on the ground that the transfer is a gift. Sec.47 provides that certain

transactions are not to be regarded as transfer for the purpose of capital gains taxation. Among such excluded transfers, clause (iii) of sec.47 provides that any transfer of a capital asset under a gift or will or an irrevocable trust may not be regarded as a transfer.

8. Apart from relying on the law stated in sections 45 & 47(iii), the assessee also took the view that the transfer of shares held by the assessee in its subsidiary, M/s. RGF Gulf to its step down subsidiary M/s. RIHL Cayman Islands does not dilute or diminish the value of the asset base of the assessee company. As the transfer is only an appropriation within the same group and the assessee company is having the ultimate control as the holding company, nothing has gone out of the group, as such and, therefore, it is not possible to construe the impugned transfer of shares as transfer of a capital asset generating capital gains. On the basis of the above premises, the assessee did not offer the transfer of shares as an international transaction.

9. But the TPO, on the basis of detailed discussion made in his order, held that the transfer of shares made by the

assessee company is an international transaction coming under the purview of transfer pricing regulations. Accordingly, the TPO determined the ALP of M/s. RGF Gulf shares at ₹865,40,04,100/-.

10. The TPO has also observed that the assessee company had issued guarantees on behalf of its subsidiaries to the tune of ₹ 464.36 crores and on behalf of other companies to the extent of ₹ 3.42 crores. The Assessing Officer, in the light of the amendment brought in by the Finance Act, 2012, with retrospective effect from 1st April, 2002, held that corporate guarantees have to be treated as international transactions and, therefore, ALP determination is called for. The total of corporate and bank guarantee charges debited by the assessee to the extent of ₹ 9,28,73,000/- was treated by the TPO, as ALP adjustment factor for the purpose of addition. The TPO has also made a downward adjustment of trademark license fees to be added to the total income to the extent of ₹ 1,89,33,150/-.

11. Thus, the TPO suggested three items of ALP adjustments by way of addition to the returned income of the assessee company under the provisions of TP regulations. He

passed his order under sec.92CA(3) with those suggestions. Sec.92CA(3) empowers the TPO to determine the ALP in relation to international transactions.

12. As required by law, on receipt of the order passed by the TPO under sec.92CA(3), the Assessing Officer framed his draft assessment order incorporating the ALP adjustments suggested by the TPO. In addition to the ALP adjustments, the Assessing Officer has also pointed out that two items of expenditure claimed by the assessee could not be allowed as deductions. He incorporated these two items also as non-TP additions .

13. Thus, the Assessing Officer has worked out the total and taxable income of the assessee, under two categories. He added a sum of ₹ 9,28,73,000/- towards corporate and bank guarantee charges and ₹ 1,89,33,150/- towards trademark license fees, as directed by the TPO in the nature of ALP adjustments. The Assessing Officer further added two disallowances made by him; one relating to bad debts of ₹3,25,47,000/- and the other relating to factoring charges of

₹17,07,56,151/-. The total business income of the assessee was thus determined at ₹ 157,08,79,610/- as against the returned income of ₹ 125,57,70,310/-. Under the second category, the Assessing Officer has made the addition of long term capital gains arising out of the transfer of shares as ALP adjustment suggested by the TPO. The gross amount suggested by the TPO was ₹ 865,40,04,100/-. The Assessing Officer modified the above gross amount by setting off the indexed cost of acquisition and determined the long term capital gains adjustment at ₹ 610,15,75,820/-.

14. The above draft assessment order was framed by the assessing authority on 31st March, 2013. The draft assessment order was communicated to the assessee company, as required by law.

15. The assessee company filed its objections against all the additions proposed by the assessing authority before the Dispute Resolution Panel, at Chennai. The DRP, after examining the case in detail, agreed with the ALP adjustments suggested by the TPO. The DRP agreed with the TPO that

transfer of shares made by the assessee company amounted to international transaction falling within the jurisdiction of TP regulations. They also agreed with the view of the TPO that corporate and bank guarantee charges as well as trademark license fees are amenable to ALP adjustments.

16. But the DRP directed to give a marginal relief in the capital gains addition proposed against the transfer of shares. They accepted the argument of the assessee company that in view of the buy-back agreement between the Venture capital fund(PE fund) and the assessee, the PE investment was relatively risk-free. Consequently, the DRP agreed that to the extent of the risk premium, the market price of the shares would be less than what was paid by the PE fund. The DRP estimated this risk factor at 10% and directed the Assessing Authority to allow 10% adjustment by way of reduction in the ALP of RGF Gulf shares. This relief is worked out at ₹ 88.51 crores.

17. But it is seen that the DRP has not discussed anything in their order on the issues raised by the assessee company on non-TP additions relating to bad debts and factoring charges.

18. Once the DRP delivered their directions under sec.144C(5), the Assessing Officer framed the final assessment order on 17th January, 2014 incorporating the three items of ALP adjustments suggested by the TPO subject to the nominal modification directed by the DRP Chennai and also by incorporating non-TP additions of two items proposed by himself.

19. It is against the above order, that the assessee has come in appeal before the Tribunal.

20. The first and second grounds raised by the assessee are general in nature, in as much as, the contentions are that the order of the Assessing Officer in pursuant to the directions of the DRP is erroneous, bad in law, prejudicial to the assessee and contrary to the facts and circumstances of the case. So also, is the contention that the Assessing Officer has usurped the jurisdiction of the DRP while passing the order on two non TP issues, which the DRP has not at all dealt with all (disallowance of bad debts and factoring charges) and, therefore, the order passed by the assessing authority is bad in law, in view of the peremptory language of sec.144C(13) of the Act.

21. Coming to the specific issues, the assessee has raised six set of grounds.

22. The first issue raised by the assessee is on the transfer of shares. As it was a voluntary transfer of shares of M/s. RGF Gulf, without consideration to the step down subsidiary, M/s. RIHL Cayman, it is the case of the assessee that the transaction is a gift and therefore covered by the exclusion contained in sec.47(iii) of the Act. That the authorities below have erred in holding that a corporate entity cannot make a gift for the reason that love and affection are the pre-requisites for making a gift. That the lower authorities have erred in holding that sec.47(iv) would be applicable to the transfer and sec.47(iii) does not have any application. The assessee contends that the lower authorities have erred in concluding that there was no business rationale in setting up overseas subsidiary companies. That the lower authorities ought to have appreciated that gift and transfer of property without consideration are synonyms, as held by the Hon'ble Madras High Court in the case of CIT v. Bharani Pictures (129 ITR 244). That the voluntary transfer of shares without consideration is not

covered by Chapter X(special provisions relating to avoidance of tax), of the Act. Therefore, it is the case of the assessee that the ALP addition of ₹610,15,75,820/- made by the assessing authority is unlawful and requires to be deleted.

23. We heard Shri Percy Pardiwalla, the learned senior advocate appearing for the assessee.

24. According to the learned senior counsel, the brief facts of the issue are as follows:

- The assessee company and its group concerns mainly operate in Middle East and African countries. It has a plan to expand its business operation in that geographic area. It also has a plan to quote its shares in an overseas stock exchange. While those expansions were contemplated, a Private Equity Fund(PE fund) by name, M/s. Investcorp(IVC), evinced interest to invest in the overseas operations of the assessee group. It was in 2008. The assessee group thought that the funds invested by the PE could be used for expansion, so that listing of shares in

overseas stock exchanges would be more easy. Listing of shares usually take three years.

- The wholly owned subsidiary company of the assessee, M/s. RGF Gulf has set up a Free Zone Enterprise(FZE) in Jabel Ali Free Zone Authority(JAFZA), Dubai. The regulations governing FZE do not permit more than one shareholder for an enterprise operating under JAFZA. Therefore, it was not possible for the PE fund to invest the money directly into RGF Gulf. To come over the impasse, the assessee company undertook certain corporate exercises.
- It incorporated a wholly owned subsidiary in July, 2008 in Mauritius by name, M/s. RIML Mauritius. Another wholly owned step down subsidiary was incorporated by M/s. RIML Mauritius in July, 2008 in Cayman Islands known as, M/s. RIHL Cayman. The assessee company gifted its shareholdings in RGF Gulf to M/s. RIHL Cayman on 13.11.2008. This transfer was made in compliance with Dubai FZA Regulations. The transaction also complied with the local requirements of law in respect of gift in UAE.

Such a transaction was necessitated to facilitate PE investment in assessee's overseas business.

- In the above factual matrix, the lower authorities have treated the voluntary transfer of shares of M/s. RGF Gulf by the assessee company without consideration to M/s. RIHL Cayman, as a capital gains transaction. They held it is not a gift and, therefore, not covered by sec.47(iii) to claim exclusion from long term capital gains. The TPO exceeded his jurisdiction by treating the gift of shares of M/s.RGF Gulf to its step down subsidiary, M/s. RIHL Cayman, as a taxable transaction subject to Transfer Pricing provisions. The lower authorities have relied on the retrospective amendment made to sec.92B by the Finance Act, 2012, to hold the gift as an "international transaction". In computing the value of shares transferred by the assessee, the TPO has adopted the price paid by M/s. IVC, the PE fund on allotment of shares in RIHL Cayman, as the comparable. M/s. IVC has infused a sum of US$ 65 millions into M/s. RIHL Cayman for fresh allotment of shares. The fresh infusion of funds by M/s. IVC and

allotment of shares in M/s. RIHL Cayman, resulted in M/s. IVC, the PE fund, holding a stake of 27.17%. The TPO extrapolated the said shareholding and determined an amount of US$ 174.23 millions, as representing 100% of the value of M/s. RIHL Cayman before infusion of the fresh capital by M/s. IVC, and on that basis determined the ALP of RGF Gulf shares transferred by the assessee company.

- The DRP upheld the adjustment made by the TPO in respect of the transfer of shares, stating that a gift as generally understood is made out of love and affection by natural persons; that corporate entities cannot make gifts, as the term “gift” in sec.47(iii) is used in conjunction with the word “will”; that transfer of capital assets between a holding company and a subsidiary company would be governed by specific provisions of sections 47(iv) and 47(v) rather than sec.47(iii).

25. In the above scenario, the learned senior counsel explained before the Tribunal what is the rationale in setting up of overseas subsidiaries :

- The setting up of overseas subsidiary was driven by commercial reasons mainly to raise funds for the expansion of business operation of the assessee group in Middle East and African countries.
- The one shareholder restriction under Jabel Ali FZA Regulations was a road block in raising funds from Venture funds. Accordingly, it was necessary for the assessee company to set up an intermediate holding company, which will hold the shares of M/s. RGF Gulf, so that Venture capital funds could invest their funds. For this purpose, two holding companies, one in Cayman Islands and the other in Mauritius were set up.
- M/s. RIHL Cayman was set up in Cayman Islands for a specific reason. M/s. IVC, the PE fund was interested in investing in the overseas operations of the assessee. M/s.IVC could invest only through investment vehicles and, they incorporated and established a specific investment vehicle by name, M/s. IVC-GOF-RG('IVC' for short) in Cayman Islands. M/s. IVC preferred an entity set up in Cayman Islands to invest funds in the business of the

assessee. It is also relevant that, stock exchanges in Asia prefer companies incorporated in Cayman Islands. Given the fact that the ultimate object was to boost Middle East and African operations and listing of shares in overseas exchange, the Cayman Islands, was found beneficial. Therefore, a Cayman Island company was obviously chosen as a desired investment vehicle to which shares of RGF Gulf could be transferred and the PE fund, M/s. IVC could infuse funds satisfying its own restrictions in investing funds. As the proposed investment was to come from M/s. IVC out of its Middle East and Africa focussed funds, investment into the assesse company, as such, was not commercially feasible.

- M/s. RIML Mauritius was set up in Mauritius again for best commercial reasons. The funds raised by the PE fund, M/s. IVC was specifically Middle East and Africa focussed. M/s. RIHL Cayman alone cannot be used as a vehicle for the expansion of assessee's operations. Therefore, the assessee decided to have M/s. RIML Mauritius as an overseas holding company into which non-Middle East and

African investments also could be consolidated. Since Mauritius is centrally located for, European, Middle East and African markets, that location was selected.

- So also, the PE fund, M/s. IVC had put a precondition for investing into M/s. RIHL Cayman. That is, M/s. RIHL Cayman would require to be listed within three years failing which it was open for M/s. IVC to exit by selling the shares to the assesees group for a price which would guarantee an Internal Rate of Return (IRR) of atleast 7%.
- The assessee group was saddled with a liability to reacquire the shares of M/s.RGF Gulf from the PE fund, M/s. IVC, if the shares of M/s. RIHL Cayman were not listed in an overseas stock exchange within three years. The shares of RGF Gulf would have to be bought back at a premium, to ensure a minimum return of 7% to M/s. IVC. Given that the assessee is an Indian listed company and that it controlled its business globally, it would not be viable to the assessee company to expose itself to fund the Middle East and African operations.

- The assessee was not able to secure the listing of M/s. RIHL Cayman within the period of three years and had to reacquire the shares from M/s. IVC at a premium in the year, 2012. The reacquisition was funded by the assesse, infusing fresh funds into M/s. RIML Mauritius and also by borrowing funds from overseas. Had the assesse company been not insulated itself by setting up these two subsidiary structures, the burden of reacquiring the shares of M/s. RIHL Cayman from M/s. IVC would have totally fallen on the assesse itself; which would badly affect the financial health and commercial stability of the flagship company of M/s. Redington group.

26. The learned senior counsel contended that the above explanations justified the setting up of subsidiary companies. The exercise was based purely on commercial and business expediency and there was no motive to avoid tax, as alleged by the lower authorities.

27. The learned senior counsel further emphasised on the fact that all the above transactions including setting up of

subsidiary companies in Mauritius and Cayman Islands were approved/cleared by the Regulators, like RBI, SEBI Stock Exchanges and also by assessee's Bankers.

28. After explaining that subsidiary structures were set up for business and commercial expediency and that the transfer of shares made to RIHL Cayman was a transaction in the nature of gift, the learned counsel dwelt up on the question whether a corporate body could make a valid gift or not. All the lower authorities have concluded that a corporate body cannot make a gift to another, as the precondition to make a gift is natural love and affection. The lower authorities have not accepted the claim of the assessee made under sec.47(iii). They held that gifts can be made only to natural persons. The lower authorities have also relied on the Ruling of Authority for Advance Rulings (AAR) in the case of Orient Green Power Pte. Ltd.(346 ITR 557).

29. The learned senior counsel dissented from the above view. He stated that the above conclusion arrived at by the lower authorities is a gross error in law. He relied on sec.2(xii) of the erstwhile Gift-tax Act, 1958 which defines gift as

voluntary transfer of property by one person to another without consideration. Person includes a company as well, as provided in sec.2(xviii) of that Act.. He also pointed out to sec.45 of the said Act, which granted exclusion from levy of gift tax in respect of certain entities which included a company in which the public are substantially interested and a company or companies involved in a scheme of amalgamation. He, thereafter referred to sec.56(2)(viia) of the Income-tax Act, inserted by the Finance Act, 2010, wherein it provides that where a company, not being a company in which the public are substantially interested, receives, without consideration shares in excess of ₹ 50,000/-, the shares shall be treated as its income of the previous year in which the shares was received. He also referred to sec.115(WB)(2)(O) of the Income-tax Act, in the context of Fringe Benefits Tax, which provided that a corporate body can also make gift. Sec.540 of the Companies Act, 1956, recognizes that property belonging to a company could be disposed of by its officers by way of gifts.

30. The learned senior counsel relied on the provisions of the Transfer of Property Act, 1882, to support his argument

that a corporate body can make gift to another corporate body as like any other person. Sec.5 of the T.P.Act, 1882, defines the expression “transfer of property”. “Transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and “to transfer property” is to perform such act. The section further provides that “living person” includes among other things a company. Sec.122 of the TP Act, 1882 defines a “gift”. “Gift” is defined as the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. The learned senior counsel submitted that a combined reading of sections 5 & 122 of the T.P.Act, 1882 declares beyond any doubt that a company can make gift like any other person and there is no need of any attributes like “love and affection”.

31. The learned senior counsel has relied on the decision of Mumbai ‘D’ Bench, ITAT, in the case of DP World (P) Ltd. v. DCIT(140 ITD 694), in which it was held that a corporate

body can make gift. The Tribunal has held that there is no requirement in the Transfer of Property Act, 1882 that “gift” can be made only within natural persons out of love and affection. Hence, a donor company if permitted by its Articles of Association to make gift, it can do so under sec.82 of the Companies Act, 1956. Gift of shares of an Indian company to a foreign company without consideration has to be treated as gift within the meaning of sec.47(iii) of the Act. He also referred to ruling of AAR in the case of Deere and Company, In re (337 ITR 277), wherein it was held that “love and affection” are not required in order to make a gift.

32. In the light of the above statutory provisions governing the concept of gift under various enactments, the learned senior counsel submitted that there is no basis to come to a conclusion that the gift can be made only by a natural person and that too with the accompaniment of love and affection.

33. The next attempt made by the learned senior counsel is that the transfer of shares having been explained as a

gift, the same should be exempt under sec.47(iii) of the Act. He explained that sec.47(iii) provides that sec.45 shall not apply to the transfer of a capital asset under a gift. There is no restriction provided in the Act, which prohibits a company from claiming exemption under sec.47(iii). If the intention was to exempt only individuals under that section, the legislature would have specifically stated so as in so many other sections dealing with exemption from capital gains like sections 54, 55 etc. Sec.47(iii) does not restrict the exemption to the gifts made only to the residents. If it was so, a specific stipulation would have been made in the Act, as provided in sec.47(iv) and (v). When there is no such restriction, sec.47(iii) should be read in its natural way to see that gifts made to non-residents also qualify for exemption under sec.47(iii). The learned counsel insisted that literary interpretation should be adopted in this context, as there is no ambiguity in the law. For that matter, the learned senior counsel has relied on the following decisions.

1. Sarala Birla vs. CWT 176 ITR 98(SC)
2. CIT vs. Central Bank of India Ltd. ,185 ITR 6(Bombay)

3. CIT v. National Agricultural Co-operative Marketing Federation of India Ltd., 236 ITR 766(SC)

4. M/s. Grace Mac Corporation vs. ADIT, 134 TTJ 257(ITAT-Delhi

34. In the light of the above, the learned senior counsel submitted that the transaction of gifting shares of M/s.RGF Gulf to M/s. RIHL Cayman is exempt under sec.47(iii) of the Act.

35. The learned senior counsel, without prejudice to his earlier proposition that the impugned transaction is exempt from the levy of capital gains tax under sec.47(iii) of the Act, further contended that the computation of capital gains for charge of tax would fail for the reason that the transaction was undertaken without consideration. He explained that there is no dispute regarding the fact as reconfirmed by the DRP that transfer of shares was voluntary and without consideration. Even if, such transaction is not regarded as a gift, the transaction having been admitted as made without consideration, is not chargeable to tax as the computation provisions would fail to operate. Reliance is placed on the decision of the Hon'ble Supreme Court rendered in the case of CIT vs. B.C. Srinivasa Setty, 128 ITR 294. He explained that charging provisions and computation provisions

form an integrated code, which has been highlighted by the Hon'ble Supreme Court in the above case as well as in the following cases:

PNB Finance Ltd. v. CIT, 307 ITR 75(SC)

CIT v. Infosys Technologies Ltd., 297 ITR 167(SC)

CIT v. Official Liquidator, Palai Central Bank Ltd., 150 ITR 539(SC)

36. The learned senior counsel has also placed reliance on the rulings given by AAR in the cases of Dana Corporation, 227 CTR 441; Amiantit International Holding Ltd, 230 CTR 19(AAR) and Goodyear Tire and Rubber Company, 334 ITR 69(AAR).

37. After explaining that the computation provisions would fail and as such, the charging sec.45 would not become active, the learned senior counsel argued on another aspect of the disputed transaction. The learned senior counsel argued that the full value of consideration for the purpose of capital gains taxation should be in fact the actual consideration received by the assessee. If there is no actual consideration, it is not permissible in law to substitute with fair value/ or estimated value

of the property. In the present case, after admitting the fact that transfer of shares was made voluntarily and without any consideration, the lower authorities have adopted the fair value on a deemed basis adopting the value of shares allotted to the PE fund while infusing funds to M/s. RIML Mauritius. This value substitution is absolutely against the law. The learned counsel has relied on the following decisions in support of the above proposition :

CIT v. George Henderson and Co. Ltd., 66 ITR 622(SC)

CIT v. Smt. Nilofer I. Singh, 309 ITR 233 (Delhi)

CIT v. Gillanders Arbuthnot & Co., 87 ITR 407(SC)

Tej Pratap Singh v. ACIT, 307 ITR (AT) 244(ITAT Delhi)

38. The learned senior counsel, accordingly, submitted that it is a settled legal position that the computation of capital gains for charge of tax would fail in the event of transaction being undertaken without consideration.

39. The learned senior counsel also advanced his arguments against the observation of the lower authorities that sec.47(iv) would be the correct provision of law applicable to the

assessee's case and not sec.47(iii). On the basis of that conclusion, the lower authorities have held the view that once the assessee does not satisfy the conditions laid down in sec.47(iv), the transaction cannot be said to be exempt from capital gains transaction. The learned senior counsel explained that sec.47(iv) is applicable only in such cases, where the capital asset is transferred by a holding company to its wholly owned subsidiary company, which should be an Indian company. In the present case, the assessee has gifted its shares to a step down subsidiary, M/s. RIHL Cayman. It is not an Indian company. Sec.47(iv), cannot therefore, be applied in this case. He further explained that the conclusion of the Assessing Officer that setting up an intermediary company, M/s. RIML Mauritius was to frustrate the legislative intent enacting sec.47(iv), is erroneous for the reason that both M/s. RIML Mauritius and M/s. RIHL Cayman are not Indian companies. The learned senior counsel further explained that sec. 47(iv) and (v) do not apply to a gift. A gift involves a voluntary transfer of capital asset of one person to another without consideration. But the transactions contemplated in sec.47(iv) and (v) are transfers made out of

contractual obligation and supported by consideration. A transaction without consideration is not conceived under sec.47(iv) & (v). Sec.47(iv) & (v), presuppose a consideration for the transfer. Under sec.47(iii) exemption is meant for a transfer made without consideration. He, therefore, submitted that the specific section applicable to the present transaction is sec.47(iii) and not sec.47(iv) of the Act. He explained that sec.47(iv) does not control sec.47(iii) and each provision or each clause operates in its own field. An exemption that is clearly available under one provision, cannot be defeated by referring to another provision and stating that the conditions prescribed by the other provisions have not been satisfied.

40. When the transfer of shares in the present case is a gift, the transaction will not attract Transfer Pricing provisions. The lower authorities have applied the provisions of Transfer Pricing to the transaction of gift of shares relying on the definition of the term “international transaction”, as amended by the Finance Act, 2012, with retrospective effect 1st April, 2002. The legislative amendment made by the Finance Act, 2012, was to include “business re-organizations” within the ambit of “international

transactions". It has the effect of contributing to the returned and assessed income with consequence of penal provisions. The amendment is substantive and not clarificatory in nature. Therefore, if at all the amendment is relied on, the amendment cannot be retrospective. As far as the facts of the present case are concerned, the learned senior counsel explained that the gift of shares of M/s. RGF Gulf to M/s. RIHL Cayman resulted in a change in the holding structure of the entities within the same Redington group. It does not constitute a "business restructure or reorganization", which is generally understood to be a restructure or reorganization of the value of an enterprise involving reorganization of the functions, risks and/ or assets of the enterprise group. This view is supported by the Transfer Pricing guidelines issued by OECD. The inference made by the Assessing Officer that sec.92 of the Act, is a charging section, is erroneous. It is a machinery provision. It is provided for determining ALP in certain cases. It is applicable only if the transaction results in taxable income in the hands of the tax payer in India. In case, the transaction does not result in taxable income, Transfer Pricing Regulations would not be applicable.

The above proposition is reflected in Memorandum to Finance Bill, 2001 and also in the CBDT instruction No.12/2001 dated 23.8.2001.

41. The learned senior counsel concluded his argument on this issue by reiterating that gift of shares is exempt under sec47(iii) of the Act, and in any case, the transaction having been undertaken without consideration, the computation provision would fail and consequently the charging section as well. Even if, for the argument sake, the transaction is treated as an international transaction, it would not be subject to Transfer Pricing provisions, as the transaction did not give rise to any income in India.

42. In support of his argument that Transfer Pricing provisions would apply only to those international transactions, which are liable to income tax in India, the learned senior counsel has relied on the following decisions:

Vanenburg Group B.V. (289 ITR 464-AAR)
Dana Corporation (227 CTR 441-AAR)
Amiantit International Holding Ltd. (230 CTR 19-AAR)
Goodyear Tire and Rubber Company (334 ITR 69-AAR)

Praxair Pacific Ltd. (855 of 2009-AAR)
VNU International BV (871 of 2010-AAR)
Deere and Company (337 ITR 277-AAR)
Whirlpool Tour Holdings Ltd. v. DIT (140 TTJ 155-Delhi, ITAT)

43. After concluding his arguments, on the non-applicability of Transfer Pricing provisions, the learned senior counsel raised another alternative ground in respect of the computation of ALP attempted by the TPO. The TPO has adopted CUP method to determine the ALP and the comparable price adopted by the TPO is the price paid by the PE fund, M/s. IVC towards fresh allotment of shares made by M/s. RIHL Cayman. The learned counsel contended that even if gift of shares is considered as an international transaction, which is required to be tested at Arm's length, the same cannot be compared with the price at which the funds were infused by the PE fund, M/s. IVC. This is because the assessee's investment objective is long term and to develop the Middle East and African business, whereas M/s. IVC being a PE fund would typically hold on to the investment only for a short period of three to five years. They would make an exit thereafter. This is very clear from the

terms of the investor agreement entered into between the assessee and the PE fund, M/s. IVC. Further there is a stipulation in the agreement for a minimum risk free return of 7% against the funds invested by the PE fund. The fair value of a risk free investment is higher than that of a risk bearing investment. The agreement provides the PE fund, M/s. IVC a right in the management of M/s. RIHL Cayman. Such a right is not ordinarily available for a shareholder having only 27.17%. This management right further justifies that the price paid by the PE fund, M/s. IVC was higher because of the functional and economic difference existed between the objectives of the assessee company and the PE fund. The price paid by the PE fund, cannot be considered as comparable under the CUP method for valuing the transaction. The CUP method can be applied only in a case, where difference arising on account of such functional and economic differences can be adjusted for, with reliable accuracy in order to eliminate the effect on the ALP. The economic and functional differences between the investment objectives of M/s. IVC and the assessee are significant in character and cannot be adjusted with reliable accuracy to make

them comparable. Therefore, it was not proper on the part of the TPO to treat the investment price of M/s. IVC as comparable for the purpose of CUP method.

44. On the question of valuation vis-a-vis ALP, the argument of the learned senior counsel, is that the appropriate price to be fixed in the present case, is the Discounted Cash Flow(DCF) method. The Tribunal has held in various decisions that the DCF method is an appropriate method for valuation of shares of a company. The learned senior counsel has placed reliance on the following decisions:

Ascendas (India) (P.) Ltd., DCIT, 143 ITD 208(Chennai)

Mahindra Holidays & Resorts India Ltd. v. JCIT(LTU),
62 SOT 25(Chennai)

45. With the above detailed arguments, the leaned senior counsel has summed up his contentions on the issue of gift of shares for the following reliefs:

- The transaction of gift of shares is a valid gift and, therefore, exempt from capital gains in the light of specific exemption under sec.47(iii) of the Act.

- Without prejudice to the above, the DRP having accepted that the transaction is undertaken without consideration, the transaction would not result in any chargeable capital gains, as the mechanism for computation fails to operate.
- As the transaction of gift of shares is not chargeable to tax in India, the T.P. provisions would not be applicable.
- Without prejudice to all the above, even if the transaction needs to be tested for ALP, the price paid by the PE fund, M/s. IVC for allotment of shares in M/s. RIHL Cayman cannot be regarded as comparable under the CUP method. Even if adjustments are made for eliminating differences on account of economic and functional differences, the DCF method would be the most appropriate method for valuation of shares of a company.

46. After concluding the arguments on the question of ALP adjustment with reference to gift of shares, the learned senior counsel moved on to explain the second issue raised by the assessee company. During the previous year relevant to the assessment year under appeal, the assessee company had outstanding corporate guarantees granted in favour of its

Associate Enterprise(AE) in the past. The assessee has not granted any fresh guarantee during the previous year relevant to the assessment year under appeal. The assessee does not charge anything on its AE against the corporate guarantees provided by it, as the assessee considers the same to be in the nature of a shareholder activity. In the course of ALP determination, the TPO has made an adjustment towards commission at 2% of the value of the outstanding corporate guarantees. The TPO relied on the definition of the term "international transaction" as amended by the Finance Act, 2012, with retrospective effect from 1st April, 2002 to include guarantee in its ambit. The TPO has made this adjustment, notwithstanding that the corporate guarantees issued in the earlier assessment years were already subject to transfer pricing adjustment at the rate of 0.85% of the value of corporate guarantees. The DRP in their order upheld the addition made on account of corporate guarantee but directed that the adjustment should be restricted to 0.85% of the value of corporate guarantees issued rather than 2% proposed by the TPO.

Accordingly, the Assessing Officer has re-determined the ALP adjustment of the corporate guarantees.

47. Regarding the above issue, the learned senior counsel contended that corporate guarantee granted by the assessee company is not an "international transaction". The assessee has not granted any new guarantee in the previous year. Therefore, the reliance placed by the TPO on the definition of the term "international transaction" as retrospectively amended by the Finance Act, 2012, is erroneous and bad in law. The corporate guarantees provided by the assessee company to its AEs enable them to secure credit in their respective overseas jurisdictions and to comply with the laws, in those jurisdictions. Such corporate guarantees granted by the assessee to the AEs enabled them to secure funds for their working on competitive rates in the relevant jurisdictions. In the absence of such locally sourced funding, the assessee would have to support its AEs business operations by providing funds through equity or otherwise. Accordingly, the transaction can be said to be one of quasi-equity or shareholder activity. The well-being of the AEs is of deep interest to the assessee; especially, where the business

of the subsidiary generates synergies for the assessee. It is in the best interest of the group that the assessee has provided corporate guarantees to its AEs. The learned senior counsel relied on the decision of the ITAT, Delhi Bench, rendered in the case of Bharti Airtel Ltd. v. ACIT (43 taxman.com 150), wherein it has held that providing corporate guarantee does not involve any cost to the assessee and it is not an "international transaction", even under the definition of the said term as amended by the Finance Act, 2012, as it does not have any bearing on profits, income, losses or assets of the assessee company.

48. As an alternative contention, the learned senior counsel argued that guarantees are provided to the assessee on behalf of AEs as an integral business activity of the assessee relating to supply of general management and distribution of logistic business, worldwide. Therefore, the transaction must be tested under the combined transaction TNMM approach rather than on a stand-alone basis. The ITAT, Pune Bench in the case of Demag Cranes & Components (India) (P.) Ltd. v. DCIT, 56 SOT 187(Pune) and ITAT, Delhi Bench in the case of McCann

Erikson India Pvt. Ltd. v. Addl.CIT (24 Taxmann.com 21) have held that TNMM applied on an entity-wide basis is the most appropriate method for Benchmarking transactions that are not independent of the business carried on by an assessee. The learned senior counsel submitted that the adjustment made against the corporate guarantee may be deleted.

49. The third issue raised by the assessee and argued by the learned senior counsel is in respect of ALP adjustment made by the lower authorities against trademark/license fee. In the previous year relevant to the assessment year under appeal, the assessee had made a payment of ₹ 1,89,33,150/- towards trademark and license fee for the use of trademark **"REDINGTON",** to its AE, Redington Distribution Pte. Ltd., Singapore(RDPL, Singapore). The TPO determined the ALP of the said trademark/license fee at nil. But he made the adjustment on the ground that there is no genuine reason for paying trademark/license fee to RDPL Singapore. An ALP adjustment is not contemplated only on the opinion of the TPO that there was no commercial justification for such payments. In fact, the TPO has exceeded his jurisdiction by dwelling into

commercial justification for the payment of trademark/license fee. It is not the prerogative of the Revenue Authorities to dwell into commercial rationale and justification for the transaction entered into by an assessee. The learned senior counsel contended that the Revenue Authorities are not justified in analyzing the commercial justification and rationale to determine, whether the assessee ought to have incurred an expenditure or not. In support of this general principle, he has relied on the judgment of the Hon'ble Supreme Court in the case of S.A.Builders vs. CIT (288 ITR 1). Alternatively, he submitted that the transactions need not to be tested independently for ALP determination, as the same is already at Arm's length under the combined transaction TNMM approach.

50. The learned senior counsel confined his arguments to the three transfer-pricing issues discussed in paragraphs above. Even though two more issues are raised in the grounds of appeal; one relating to bad debts and the other relating to factoring charges, the learned senior counsel submitted, at the time of hearing, that the assessee company is not pressing those two issues. The additions towards bad debts and factoring

charges have been made by the Assessing Officer as non-TP items. As the assessee does not press the grounds raised against the said two additions, the relevant grounds need not be adjudicated.

51. The sixth and the last issue raised by the assessee in the present appeal is in respect of not giving credit against TDS and levy of interest under sections 234B and 234D. The learned senior counsel submitted that directions be given to Assessing Officer to revisit the verification of TDS available to the credit of the assessee. He fairly submitted that levy of interest is consequential, but the arithmetic be computed correctly.

52. Shri Shaji P. Jacob, the learned Commissioner of Income-tax, appearing for the Revenue, argued the case at length and contended that the TPO has rightly proceeded under the provisions relating to transfer pricing and brought three disputed items under the purview of ALP determination. The learned Commissioner contended that subject to certain modifications, the DRP has upheld the order of the TPO. The

TPO as well as the DRP have discussed the issue in an extensive manner referring to the statutory provisions, facts of the case and the case laws and have come to a formidable conclusion that all the transactions objected to by the assessee are well within the jurisdiction of the TPO to make ALP adjustments.

53. The Commissioner, first of all explained that the transfer of shares made by the assessee company is a case coming under the purview of Chapter X of the Act, discussing the special provisions relating to avoidance of tax. In the present case, the assessee company by way of transferring its shares in its subsidiary, M/s. RGF Gulf to its step down subsidiary, M/s. RIHL Cayman has not only avoided the payment of tax but also made schemes to avoid tax perpetually, through a series of corporate re-structures undertaken during the period relevant to the assessment year under appeal.

54. The assessee company was already carrying on its Middle East and African operations through its wholly owned subsidiary, M/s. RGF Gulf. If the assessee had an intention to

expand its business in those countries, it would have been a convincing option, if the assessee company directly pumps funds into its wholly owned subsidiary, M/s. RGF Gulf. There would be no apprehension regarding the violation of one-shareholder regulation of FZA. Regarding the number of shareholders, M/s. RGF Gulf is the wholly owned subsidiary company of the assessee and the assessee is the sole shareholder in that subsidiary and even if the assessee company pumps more funds to its subsidiary company for the purpose of financing and expanding its operations, still the assessee company would be the lone shareholder in M/s. RGF Gulf.

55. But the assessee opted a circuitous route. The assessee set up a new wholly owned subsidiary in Mauritius in July, 2008 by name, M/s. RIML Mauritius. The said M/s. RIML Mauritius, in turn, set up another wholly owned subsidiary in Cayman Islands by name, M/s. RIHL Cayman. The assessee company transferred without consideration its entire shareholding in M/s. RGF Gulf to M/s. RIHL Cayman in November, 2008 and subsequently, M/s. RGF Gulf became a step down subsidiary of M/s.RIML Mauritius. Immediately,

thereafter, on 18th November, 2008, a PE fund, M/s. IVC invested USD 65 millions equivalent to ₹ 325.78 crores in M/s. RIHL Cayman for 27.17% stake. This works out to the enterprise value of USD 239 millions equivalent to 1197.87 crores, as on that date. Thereafter, the step down subsidiary issued and allotted 59,035 equity shares to the employees of the parent company and its subsidiaries under an Employee Share Purchase Scheme(ESPS). M/s. RIML Mauritius, in that way held 69.94% stake in the step down subsidiary, M/s. RIHL Cayman as on 31.3.2009.

56. Thereafter in the financial year 2011-12, the assessee company acquired the shares in its step down subsidiary, M/s. RIHL Cayman from the PE fund, M/s. IVC. The purchase is made through its subsidiary, M/s. RIML Mauritius. The consideration of 25.97% stake is USD 113 millions equivalent to ₹ 576.41 crores. The enterprise value of M/s. RIHL Cayman on the day of this transaction comes to ₹ 2219.52 crores.

57. The learned Commissioner explained that through the method stated above, the assessee has transferred its shares in M/s. RGF Gulf without consideration to one of its AE, M/s. RIHL Cayman and a PE fund, M/s. IVC had invested USD 65 millions for 27.17% stake in M/s. RIHL Cayman. On this point, it is to be seen that M/s. RIHL Cayman is a newly incorporated company and it did not have any asset base, as such. The value of M/s. RIHL Cayman is entirely depending upon the shares of M/s. RGF Gulf. In fact the transfer of assessee's shareholding in M/s. RGF Gulf amounts to assessee's contribution to the capital of M/s. RIHL Cayman. The assessee has always contended that there was no reduction in the asset base of the group, as the transfer was only an inter-group arrangement. But this contention could not be accepted by the TPO, first of all on the legal ground that each company is a separate legal entity located in different territory jurisdiction, and also any such disposal has to be subject to capital gains tax, which the assessee company has failed to do. A capital asset belonging to a resident was transferred to a non- resident without any consideration. Secondly, the income from such transfer of

shares is directed to the non-resident and not to the resident. Therefore, this is a clear case of tax evasion.

58. The learned Commissioner submitted that because of the reasons stated above, it is a sham transaction arranged by the assessee company. It is clear from the fact that the newly formed subsidiary, M/s. RIHL Cayman and M/s. RIML Mauritius do not have any commercial substance or relevance and they were set up only with the object of avoiding capital gains tax.

59. In this context, the TPO is justified in relying on the decision of the Supreme Court in the case of McDowell & Co. Ltd. (154 ITR 148).

60. The learned Commissioner contended that the arguments of the learned senior counsel regarding the failure of sec.45 vis-à-vis sec.48 are not acceptable. Sec.45 is the charging section of capital gains. Sec.48 is computation provision. Sec.48 would fail only if there is not at all any means to compute the value of the asset transferred. That part of the consideration must be a vacuum. Here, it is not the case. The shares transferred by the assessee company to M/s. RIHL

Cayman do have a defined value. The asset and business base of the assessee company are the strength of that value. It is on that basis, the PE fund, M/s. IVC has pumped funds into M/s. RIHL Cayman. Therefore, it is futile to argue that the transaction did not have any valuable consideration. When the value of the shares is computable, there is no question of failure of computation provision under sec.48. When sections 45 & 48 are read together as an integrated code, the result does not defeat the present case. Therefore, the argument of the learned senior counsel that the case of the Revenue fails at the threshold of sec.45 itself, is not sustainable in law.

61. The learned Commissioner further argued that even though literally, the assessee would prefer to call the transfer as a gift, the assessee company itself has stated in its notes to accounts that the transfer has not diminished the asset base of the group. The transaction was from one company to another company of the same group. The asset base of the company group as a whole is steady. If that is the case, there was no gift at all; and, therefore, the question of exclusion under sec.47(iii) does not arise.

62. The learned Commissioner further explained that even if the assessee is taking shelter under the provisions of sec.47, what exactly applied to the assessee company is sec.47(iv), which reads that any transfer of a capital asset by a company to its subsidiary company is not regarded as transfer, if the parent company or its nominees hold the whole of the share capital of the subsidiary company.

63. The learned Commissioner concluded that the gift of shares claimed by the assessee company was a scheme to avoid payment of tax in India. The transaction was not in the form of a gift. Capital gains is computable, as both sections 45 and 48 are operative. The TPO has rightly invoked the Transfer Pricing provisions.

64. In support of his argument, the learned Commissioner has relied on the decision of the Kolkata 'C' Bench in the case of DCIT v. General Electrical Co. PLC UK (119 Taxman 137). He has also relied on the decision of the ITAT, Delhi 'I' Bench rendered in the case of M/s. Premier

Exploration Services Pvt. Ltd. (ITA No.4935/Del./2011), and Orient Green Power Pte. Ltd. (24 taxman.com 137-AAR).

65. The learned Commissioner also supported the action of the TPO in bringing corporate and bank guarantee charges and trademark license fees into the fold of APL adjustments, in view of the amendment made in sec.92B of the Act, with retrospective effect from 1st April, 2002.

66. As far as the appeal filed by the Revenue is concerned, there is only one issue that the DRP has erred in its finding that the PE fund investment was relatively risk-free investment and thereby allowing a deduction of 10% towards risk adjustment allowance.

67. The learned Commissioner contended that there was no basis to measure the volume of risk free environment and in such circumstances, the DRP ought not have ordered a modification of 10% only on the basis of a theoretical explanation. He, therefore, submitted that the entire adjustment made by the TPO against the transfer of shares may be upheld.

68. The learned senior counsel appearing for the assessee, submitted that the contentions raised by him regarding the transfer of shares in the appeal filed by the assessee equally hold good against the appeal filed by the Revenue.

69. We heard both sides in detail and perused the materials including the paper books filed before us and also considered volumes of case laws relied on by both the sides.

70. Out of the three issues of TP adjustments made in the impugned assessment, let us first consider the issue of transfer of shares made by the assessee company.

71. M/s. RGF Gulf is the wholly owned subsidiary of the assessee company. The assessee company has transferred its shares in M/s. RGF Gulf to M/s. RIHL Cayman, which is a step down subsidiary. It is a fact that the transfer of shares was made without consideration. It is for this reason that the assessee company contends that the transfer is a gift. As it is a gift, it is the case of the assessee, that if at all it is treated as a transfer of capital asset for the purpose of capital gains taxation, it is

exempt under sec.47(iii) of the IT Act, 1961. The case of the Revenue is that a company cannot make a gift and also even if it is treated as a gift, it is not eligible for exemption provided under sec.47(iii), as correct provision of law applies to the case of the assessee is sec.47(iv) of which the condition has not been satisfied by the assessee company.

72. Gift is definitely a transfer of property. The mother law governing the subject matter of transfer of property is Transfer of Property Act, 1882. Sec.5 of the Transfer of Property Act, 1882, defines the term "transfer of property", as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself , or to himself and one or more other living persons; and " to transfer property" is to perform such act. This is the master definition of "transfer of property". Other forms of transfers like gift are subject to this master provision. The law provides in the same sec.5 of the TP Act, 1882 that "living person" includes a company or association or body of individuals, whether incorporated or not. Thus, TP Act, 1882 considers a company not only as a person but literally speaking as a "living person"; a

person with life. The same expression “person” provided in sec.5 is transplanted in sec.122 of the TP Act, which defines a “gift”. “Gift” is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee. When the provisions of law contained in sections 5 & 122 of the TP Act read together, it emerges that a company being a living person can transfer property by way of gift.

73. As per sec.122 of the TP Act, 1882 the following are the ingredients of a gift valid in law:

- Transfer of existing movable or immovable property
- Transfer made voluntarily
- Without consideration
- By donor to the donee
- Accepted by the donee.

74. The essential ingredients of a valid gift are the existence of the property, voluntary nature of the transfer and absence of consideration. As a pre-condition for making a valid

gift, the law does not prescribe any attributes like "love and affection".

75. Transfer of property as the general law contemplates is the transfer of both existing property and future property. But in a gift, the transfer must be of an existing property. The meaning given to the expression "gift" in the erstwhile Gift Tax Act, 1958 is the same. A gift is defined in the said Act in sec.2(xii), as the transfer by one person to another person of any existing movable or immovable property made voluntarily and without consideration in money or money's worth. The "gift" for the purpose of Gift Tax Act, 1958, is further qualified, as a property in money or monies worth. Sec.2(xviii) of the Gift Tax Act, 1958 defines a person which includes a company, as well. In the Gift Tax Act also, there is no attributes like "love and affection".

76. In the light of the law explained above, there is nothing against a company making gift of its property to another company. A transfer without consideration when claimed as a gift is always a gift. It is not possible to give any other colour.

There is nothing anywhere in law, which prescribes that only natural persons can make gift on the ground of "love and affection". Therefore, we find that the lower authorities have erred in law in concluding that the assessee being a corporate body cannot make a gift.

77. Traditionally, in majority of the gift deeds, it is a common recital usually found that a person is making the gift "out of love and affection". Therefore, the lower authorities in their capacity as Assessing Officers while dealing with a number of cases falling under the Gift Tax Act, 1958 might have gone through a number of such documents, and they developed an inherent impression that the gift is to be made only by natural persons and that too, out of love and affection. This long lasting impression might have influenced the lower authorities to come to their conclusion.

78. The ITAT, Mumbai in the case of DP World (P) Ltd. vs. DCIT (140 ITD 694) had considered a similar issue. The Tribunal held that corporate body can make a gift. There is no requirement in the TP Act, 1882, that a gift can be made only

between natural persons out of love and affection. The Tribunal held that as long as the donor company permits by its Articles of Association, it can do so under sec.82 of the Companies Act, 1956. The Tribunal held that gift of shares of an Indian Company to a foreign company without consideration has to be treated as gift within the meaning of sec.47(iii) of the IT Act. The Hon'ble Supreme Court in the case of Ku. Sonia Bhatia vs. State of UP & Ors., 1981 SCR(3) 239, has held that one should not try to confuse the purpose of making a gift with consideration. Love, affection, spiritual benefits and many other factors may be the intention of the donor to make a gift. But, these filial considerations cannot be called or held to be legal considerations, as understood by law. The Hon'ble High Court of Delhi in the case of Vodafone Essar Ltd. & Others vs. Vodafone Essar Infrastructure Ltd., 163 comp. case 119, has held that there is no legal impediment to a company transferring property to another company, by gift. The Hon'ble AAR in rulings given in the case of Deere & Co. (337 ITR 277) have held that "love and affection" are not required to make a gift. They

held that a corporate body construed as not having natural love and affection can also make a valid gift.

79. The learned senior counsel, appearing for the assessee has also referred to various other enactments in which contextual reference has been made to show that a company can make gift to another person. He has referred to sec.115(WB)(2)(O) of the IT Act, pertaining to Fringe Benefits Tax and sec.540 of the Companies Act, 1956. We are not going deep into those incidental provisions available in other enactments. The term "gift" is not defined in the Income-tax Act, 1961. Therefore, the nearest enactments, that may be relied on for the purpose of deciding the issue under the Income-tax Act, is the Transfer of Property Act, 1882 and the erstwhile Gift Tax Act, 1958. As reflected in the discussions already made, it is clear that a company is a person both for the purpose of TP Act, 1882 and GT Act, 1958 and a company can make a gift to another company, which is valid in law. Accordingly, we accept the legal capacity of the assessee company to gift its shares in RGF Gulf to RIHL Cayman.

80. Once it is found that the transfer of shares made by the assessee company to its step down subsidiary, RIHL Cayman, is a valid gift, the next question to be considered is, whether the assessee is justified in claiming exemption from levy of capital gains tax under sec.47(iii) of the IT Act. Sec. 47(iii) specifically provides that sec.45 shall not apply to the transfer of a capital asset made under a gift. There is no restriction provided under the Act, which prohibits a company from claiming exemption under sec.47(iii). If that was the intention, as rightly argued by the learned senior counsel, the legislature would have specifically stated in sec.47(iii) that the exemption is available for the individuals alone, as the law has specifically provided such conditions in other provisions relating to capital gains tax like sec.54, 54F etc. When there is no such specific rider in sec.47(iii) in respect of a person eligible for claiming exemption under sec.47(iii), there is no need to read down the law to make an interpretation that a company cannot claim exemption under sec.47(iii). That view is not permissible in law.

81. The lower authorities have alternatively held that the appropriate section applicable to the present case is sec.47(iv);

and not sec.47(iii) as claimed by the assessee company. Sec.47(iv) provides that any transfer of a capital asset, by a company to its subsidiary company is not to be regarded as a transfer of capital asset for levy of capital gains tax, if the parent company or its nominees hold the whole of the share in the capital of the subsidiary company and the subsidiary company is an Indian company. In order to apply the provisions of law stated in sec.47(iv), it is mandatory that the subsidiary company is an Indian company. In the present case, the step down subsidiary, RIHL Cayman is not an Indian company. The argument of the Revenue crashes at the threshold itself. The conclusion of the Assessing Officer that setting up an intermediary company M/s. RIML Mauritius was to frustrate the legislative intent of enacting sec.47(iv), is still unacceptable for the simple reason that the subsidiary, RIML Mauritius and the step down subsidiary, RIHL Cayman, both are not Indian companies. Gift is a transfer of capital asset of one person to another, without consideration. The transaction contemplated in sec.47(iv) / (v) is a transfer arising out of contractual obligation. The transfer must also be enriched by consideration. The

transfer without consideration is not the subject matter of sec.47(iv) / (v). The law stated in those sections presupposes a consideration for the transfer while sec.47(iii) is applicable only to a transaction without consideration.

82. In the facts and circumstances of the case, we find that the transfer of shares made by the assessee company without consideration was a valid gift and as the transaction was a gift, the transfer of shares cannot be regarded as transfer of capital asset for the purpose of capital gains taxation, as provided in sec.47(iii) of the Act. Therefore, we accept the contention of the assessee company that the transfer of shares made by the assesse company to its step down subsidiary, RIHL Cayman is a gift eligible for exemption under sec.47(iii). Accordingly, no capital gains tax is imputable to the said transfer of shares.

83. Another issue to be considered is, whether sec.45, which is the charging section of capital gains taxation, could be invoked in the present case or not. The transfer of shares was without consideration. This has been well confirmed by the DRP

in their order. When there is no consideration involved in a transfer, the computation provisions contained in sec.48 fail. In the scheme of capital gains taxation, sec.45 is the charging section. Sec.45 provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save or otherwise provided in sections xxxxx be chargeable to tax under the head "Capital gains". Sec.48 provides the mode of computation of income chargeable under the head "Capital gains". Capital gains is computed by deducting the cost of acquisition of the asset with cost of improvement if any and the expenditure incurred in connection with the transfer from the value of consideration received or accruing as a result of a transfer. Therefore, the essential ingredients necessary for computing the capital gains under sec.48 are the value of full consideration and cost of acquisition of the asset. The above two ingredients are inescapable.

84. The Hon'ble Supreme Court in the case of CIT vs. B.C.Srinivasa Setty, 128 ITR 294, has held that charging provisions and computation provisions together constitute an integral code. Where there is a case, that computation

provisions cannot be applied at all, it is evident that such a case is not intended to fall within the charging section. In the present case, there is no consideration in the transfer of shares made by the assessee. When the fundamental ingredient for computing the capital gains is missing, the computation provisions provided in sec.48 cannot be applied. The inevitable consequence is that the case does not fall within the charging sec.45 of the IT Act.

85. The Hon'ble Supreme Court has followed their decision in the case of B.C.Srinivasa Setty, 128 ITR 294, in a later decision rendered in the case of PNB Finance Ltd. Vs. CIT, 307 ITR 75. In the said case also, the Hon'ble Supreme Court held that where computation provisions do not apply, capital gains cannot be computed.

86. The principle laid down by the Hon'ble Supreme Court in the case of CIT vs. B.C.Srinivasa Setty, 128 ITR 294, has been followed by the Hon'ble AAR in a series of rulings given by them in matters relating to international taxation. In the case of Dana Corporation, 227 CTR 441, the Hon'ble AAR observed that sec.45 must be read with sec.48 and if the

computation provisions cannot be given effect to, for any reason, charging sec.45 fails. In the case of Amiantit International Holding, 230 CTR 19, the Hon'ble AAR, held that if the consideration in the transaction is such that it is incapable of being valued in definite terms or it remains unascertainable on the date of occurrence of taxable event, the question of applying sec.45 read with sec.48 of the IT Act, does not arise. In the case of Goodyear Tire and Rubber Co., 334 ITR 69, the Hon'ble AAR, held that where consideration is incapable of being valued in definite terms or it remains unascertainable on the date of occurrence of taxable event, the question of applying sec.45 read with sec.48 of the IT Act, would not arise.

87. As far as the present case is concerned, as the transfer of shares was made without consideration, the foremost ingredient of computation provisions is missing and as such, capital gains cannot be computed under sec.48. This leads to a situation, where sec.45 cannot be invoked and charge of capital gains taxation fails. Therefore, in the present case, even otherwise, as it was a transfer without consideration, no levy of capital gains tax can be made.

88. In the present case, the authorities have computed the consideration attributable to the transfer of shares applying the ratio of the cost incurred by M/s. IVC, the PE fund in acquiring the shares of RIHL Cayman. That value is only a substitute value. The full value of consideration for the purpose of computation of capital gains tax should be the actual consideration received by the transferor. This de facto, value of the consideration cannot be made good by transplanting valuation reflected in another transaction.

89. Sec.92 provides that any income arising from an international transaction shall be computed having regard to the ALP. The computation of the ALP, therefore, is dependent on the income arising to an assessee from an international transaction. In the present case, the shares were transferred by way of gift and no income arose in the hands of the assessee. As such, ALP determination does not extend to this transaction. The gift of shares made by the assessee company cannot therefore, be subjected to TP provisions. The Hon'ble AAR has held in the following cases that TP provisions would apply only to

those international transactions, which are liable to income tax in India:

Vanenburg Group B.V. (289 ITR 464)
Dana Corporation (227 CTR 441)
Amiantit International Holding Ltd. (230 CTR 19)
Praxair Pacific Ltd. (855 of 2009)
VNU International BV (871 of 2010)
Goodyear Tire and Rubber Company (334 ITR 69)

90. Therefore, as far as the issue of transfer of shares is concerned, TP provisions do not apply.

91. The addition made by the Assessing Officer arising out of the ALP adjustment against the transfer of shares is accordingly deleted.

92. The next TP issue raised by the assessee is the addition made by the Assessing Authority on account of corporate and bank guarantees. Corporate and bank guarantees issued by the assessee company in favour of its associates were outstanding in the impugned previous year. The assessee did not charge any consideration for those guarantees provided by it. The TPO has made the ALP

adjustment by way of commission on the outstanding amount of corporate and bank guarantees. The TPO has proposed 2% commission. The DRP in the light of adjustments made in the earlier assessment years, modified it to 0.85%.

93. The assessee has not granted any new guarantee in the previous year relevant to the assessment year under appeal. Therefore, reliance placed by the TPO on the definition of the term "international transaction" as retrospectively amended by the Finance Act, 2012, does not seem to be proper. The corporate and bank guarantees provided by the assessee company enable its associates to secure credit in their overseas jurisdiction. It is necessary for the associate concerns to depend on local source of funds for supporting their business activities. It is seen therefore, that the assessee has provided the corporate and bank guarantees for the over-all interests of its business.

94. The ITAT, Delhi Bench, in the case of Bharti Airtel Ltd. vs. Addl. CIT, 43 Taxmann.com 150, has held that providing of 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. This is because, the guarantee provided by an assessee does not have any bearing on profits, income, loss or assets of the assessee.

95. In view of the nature of corporate and bank guarantees given by the assessee company and in the light of the above order of the ITAT, Delhi Bench, we hold that the TP addition made against corporate and bank guarantees is not sustainable in law. The addition is therefore deleted.

96. The third TP issue raised by the assessee is against the addition made by way of ALP adjustment in the case of trademark/license fees. The assessee has made a payment of ₹1,89,33,150/- towards trademark/license fees to its AE, Redington Distribution Pte. Ltd., Singapore. The payment was made for using the trade-mark "**REDINGTON".** The TPO determined the ALP of the trade-mark/license fee at Nil. He held so, on the ground that there is no genuine rationale for making such a payment as trade-mark/license fees.

97. We think that this adjustment made by the TPO is not proper. The assessee is exploiting the trademark **"REDINGTON"** for the purpose of carrying on its business. Therefore, there is nothing uncommon in assessee's making payment to the use of the trade-mark to M/s. Redington Distribution Pte. Ltd., Singapore. It is not necessary for the TPO to go beyond this plausible explanation, since it is a widely accepted business practice around the world. This is not an unique case for the assessee company alone. Further, it is for the assessee to decide the dynamics of its business. The assessee is the best judge to decide on such issues. The Hon'ble Supreme Court in the case of S.A. Builders vs. CIT (288 ITR 01) has held that any expenditure incurred by the assessee, if justified by commercial expediency, is an expenditure allowable for the purpose of taxation and what is commercial expediency is a matter to be decided by the assessee. In the facts and circumstances of the case, the said addition is deleted.

98. All the three TP issues raised by the assessee in the present appeal have been decided in favour of the assessee and those three additions are deleted.

99. The learned senior counsel appearing for the assessee company has also, alternatively argued, on the subject matter of selecting the Most Appropriate Method for working out the ALP. In respect of the value of the transfer of shares, the contention is whether CUP method or DCF method is to be followed. Regarding the corporate and bank guarantees and payments towards trademark, the contention is whether combined approach under TNMM method would be acceptable or not. But, as the additions have already been deleted, these alternative grounds have become academic and do not call for any adjudication.

100. The assessee has raised two grounds against non-TP additions made by the Assessing Officer; one against bad debts and the other against factoring charges. As already mentioned elsewhere in this order, it was stated at the time of hearing, before the Bench that the assessee is not pressing those grounds. Accordingly, the grounds raised by the assessee against the additions of bad debts and factoring charges are dismissed, as not pressed. Those additions made by the assessing authority are confirmed.

101. Another issue raised by the assessee is that the lower authorities have erred in not giving credit for taxes deducted at source. We direct the assessing authority to verify the details of the TDS credit available to the assessee and give the assessee company proper credit for such TDS. The assessee company shall be given an effective opportunity for producing details and evidences available with them.

102. The last issue raised by the assessee is against the levy of interest under sections 234B and 234D. Obviously levy of interest is consequential and the final computation of interest will depend upon the revised income determined in the light of the order passed by the Tribunal. The Assessing Officer may give the assessee an opportunity to present its case, before levying the interest.

103. The Revenue has filed its appeal against the 10% relief granted by the DRP in the valuation of shares transferred by the assessee company to RIHL Cayman. Since it is already concluded that the transaction is outside the purview of TP provisions, the appeal filed by the Revenue fails.

104. In result, the appeal filed by the assessee is partly allowed and the appeal filed by the Revenue is dismissed.

Orders pronounced on Monday, the 07th of July,2014 at Chennai.

Sd/-	Sd/-
(विकास अवस्थी)	(डॉ.ओ.के. नारायणन)
(Vikas Awasthy)	(Dr. O.K.Narayanan)
न्यायिक सदस्य/Judicial Member	उपाध्यक्ष/Vice-President

चेन्नई/Chennai,
दिनांक/Dated, the 07th July, 2014.

mpo*

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.