IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Accountant Member & Smt. Madhumita Roy, Judicial Member)

ITA No. 980/Kol/2017
Assessment Year: 2012-13

Deputy Commissioner of Income Tax, Circle-4(2), Kolkata……Appellant

M/s. Manaksia Limited……Respondent
Bikaneer Building
8/1, Lalbazar Street
Kolkata – 700 001
[PAN: AAACH 6886 J]

Appearances by:
Shri Ravi Tulsiyan, FCA, appeared on behalf of the assessee.
Shri Goulen Hangshing, CIT, Sr. D/R. appearing on behalf of the Revenue.

Date of concluding the hearing : September 11th, 2018
Date of pronouncing the order : September 28th , 2018

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the assessee is directed against the order of the Learned Commissioner of Income Tax (Appeals)-22, Kolkata, (hereinafter the 'Ld. CIT(A)'), dt. 28/02/2017, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2011-12, on the following grounds:-

> *"1. Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in deleting upward adjustment of Rs.6,97,64,000/- towards arm's length interest on loan given to associated enterprise.*
>
> *2. Whether on facts and in the circumstances of the case, the ld. CIT(A) in deleting fee of Rs.2,93,66,000/- towards providing corporate guarantee on loans availed by foreign associated enterprise.*
>
> *3. Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in deleting disallowance u/s 14A read with Rule 8D.*
>
> *4. Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in deleting a sum of Rs.9,69,178/- towards accrued interest on loan.*
>
> *5. That the appellant craves for leave to add, delete, amend or modify any ground before or at the time of appellate proceedings."*

2. The ld. D/R, Shri Goulen Hangshing, relied on the order of the Assessing Officer as well as the order of the TPO and submitted that the ld. CIT(A) has erred in

accepting the contentions of the assessee that the interest on loan given to Associate Enterprises (AE) is to be benchmarked against US LIBOR.

2.1. On the issue as to whether corporate guarantee is an international transaction or not, as the term 'guarantee' was inserted in the definition of international transaction in Section 92B of the Act, by inserting an explanation to the Finance Act, 2012, *w.r.e.f.* 01/04/2002, the ld. D/R submitted that the amendment is retrospective and thus the arm's length price has to be computed on this transaction. On merits, he relied on the order of the ld. Transfer Pricing Officer (TPO).

2.2. On the issue of disallowance u/s 14A r.w.r. 8D, he relied on the order of the Assessing Officer and submitted that the disallowance was rightly made under Rule 8D(ii) of the Income Tax Rules, 1962.

2.3. On the addition of Rs.9,69,178/-, towards accrued interest on loan, he relied on the order of the Assessing Officer and submitted that under accrual system of accounting, the same has to be brought to tax.

3. The ld. Counsel for the assessee, on the other hand submitted that all the four issues are covered in favour of the assessee and that the order of the ld. CIT(A) was in line with the decisions of various Courts and Tribunals on the issue. For the proposition that interest on loan given to AE should be benchmarked against LIBOR and basis points (bp) and for the propositions that providing corporate guarantee to AE, prior to the amendment brought out by Finance Act, 2012, is not an international transactions and that this amendment in question is not retrospective in nature, he relied on the decision of the ITAT 'C' Bench of the Tribunal in the case of *M/s. EIH Ltd. vs. DCIT (ITA No.153/Kol/2016 & ITA No.110/Kol/2016; order dt. 12/01/2018)*. On the issue of disallowance u/s 14A r.w.r. 8D, and accrual interest, he relied on the order of the ld. CIT(A) and submitted that the assessee has sufficient interest free funds to make the investment, and that on real income theory no interest accrued to the assessee

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

4.1. Ground No. 1, is against the deletion of upward adjustment of Rs.6,97,64,000/-, towards Arm's Length interest on loan given to associated enterprises.

During the course of assessment proceedings, the Assessing Officer made a reference to the Transfer Pricing Officer (TPO) for calculation of arm's length interest rate in respect of loan advanced by the assessee company to its Associate Enterprise (AE), EuroAsian Ventures FZE. The TPO arrived at arm's length interest rate of 20.15%, by applying Comparable Uncontrolled Price (CUP) method and benchmarking the same against local interest rates and accordingly calculated the upward adjustment at Rs.6,97,64,000/-. Before the ld. CIT(A), the assessee submitted that it had charged interest @ 5% on the loan given to its AE i.e. EuroAsian Ventures FZE, which is at arm's length when benchmarked against LIBOR and hence no adjustment on this account was called for. He further relied on the decision of the Chennai Bench of the Tribunal in the case of *Siva Industries & Holdings Ltd. vs. ACIT (145 TTJ (Chennai) 497)* and other decisions of the Tribnal for the proposition that if the loan advanced to an AE is denominated in foreign currency then interest rate thereon should be benchmarked against international rates being LIBOR and not against the domestic lending rate. Further, reliance was placed on the decision of the Delhi Bench of the ITAT in the case of *Kohinoor Foods Ltd. vs. ACIT (67 SOT 108).*

4.2. The ld. CIT(A) while determining the ALP of interest on loan given to AE, held that (Comparable Uncontrolled Price) CUP is the Most Appropriate Method (MAM). He disagreed with the order of the ld. Transfer Pricing Officer that US LIBOR cannot be considered as a benchmark against US Dollar denominated loan. At para 4 of his order, he held as follows:-

> *"4. Having examined the matter, it is to be said that the case law relied upon by the appellant, namely the judgment of ITAT(Delhi) in case of* ***Kohinoor Foods Ltd. vs. ACIT*** *applicable in the case at hand, and covers the matter. The matter is well covered by the general consensus among the Hon'ble ITAT Benches that international transactions involving cross- border country loans to AE can be bench marked against LlBOR, as also supported by the RBI's circular that a spread ranging from 1 % - 2% over LIBOR is reasonable {or advancing loans. Therefore, in deciding the matter, it is held that an interest rate of LIBOR plus 2% can ,be held to be Arm's length rate of interest, and as for the case at hand, the interest charged by the assessee from its AE is*

higher than LIBOR plus 2%, the adjustment made by the ld. TPO in the case is held to be unjustified and not sustainable. The ground of appeal stands allowed accordingly."

As the ld. CIT(A) has followed the propositions of law laid down by different benches of the Tribunal on this issue, we find no infirmity in the same. The Kolkata Bench of the ITAT has in a number of cases including *M/s. EIH Ltd. vs. DCIT (supra)* followed the same principles. Hence the order of the ld. CIT(A) on this issue is upheld and Ground No. 1 of the revenue is dismissed.

5. Ground No. 2, is on the issue of determination of ALP on corporate guarantee on loans availed by AE.

The ld. CIT(A) held that the TP Provisions do not apply to the transactions of providing corporate guarantee prior to the amendment brought in by way of an explanation to Section 92B of the Act, by Finance Act, 2012. Further at page 45 he held that the methodology applied by the TPO in computing the ALP of the transactions was without reasonable and justifiable basis.

We find that the findings of the Ld. CIT(A), are in line with the decision of the Kolkata 'C' Bench of the Tribunal in the case of *M/s. EIH Ltd. vs. DCIT (supra)* wherein it was held as follows:-

"12.11. Coming to the alternate plea of the assessee that, in the facts and circumstances the corporate guarantee is not an International Transaction u/s. 92B of the Act, we note that term 'guarantee' was inserted in the definition of 'international transaction' in section 92B by inserting an Explanation in the Finance Act, 2012 with retrospective effect from 01/04/2002. The Explanation states that-
"For the removal of doubts, it is hereby clarified that (i) the expression "international transaction" shall include ....
(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business."
The Explanation states that it is clarificatory in nature and is 'for the removal of doubts'. Thus, it does not alter the basic character of definition of 'international transaction' under the main section 92B. Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'. Clauses (a) (b) and (d) do not cover guarantee, lending or loans. Other two, (c) and (e) deal with (i) capital financing, and (ii) business restructuring or reorganization. Clause (c) refers to lending or guarantee. But the Explanation which is for removal of doubts or is clarificatory, cannot be read independent of Section 92B(1). Section 92B(1), provides those transactions as international transactions which are in the nature of purchase, sale or lease of tangible or intangible property (explained by clauses (a) and (b) of the Explanation), or provision of services, (explained by clause (d) of the Explanation), or lending or

borrowing money (explained by Clause (c) of Explanation). The plain reading of provisions of sec. 92B(1) of the Act indicate that the various transactions mentioned in section 92B(1) of the Act, (i.e. purchases, sales, provision for services, lending or borrowing or any other transaction) should have bearing on the profits, incomes, losses or assets of such enterprises. In our opinion, the condition precedent of a transaction having a bearing on profits, incomes, losses, or assets would apply to each of the aforesaid transactions namely purchase, sale, or lease of tangible or intangible property or provision of services, or lending or borrowing money or any such transaction. This understanding of ours gets further clarified by way of insertion of Explanation in section 92B(1) by the Finance Act 2012 with retrospective effect from 01.04.2002 vide clause (a) to (d). We find that in the said explanation, clause (e) alone has been carved out as an exception wherein, the transaction thereon has been specifically mandated to be an international transaction where a transaction of business restructuring or reorganization, entered into by an enterprise with an AE irrespective of the fact that it has bearing on the profits, incomes, losses, or assets of such enterprises at the time of transaction or at any future date.

12.12. Thus, we hold that when a parent company extends an assistance to the subsidiary, being associated enterprise, such as corporate guarantee to a financial institution for lending money to the subsidiary, which does not cost anything to the parent company, and which does not have any bearing on its profits, income, losses or assets, it will be outside the ambit of international transaction under section 92B(1) of the Act. In this regard, we would like to hold that issuance of corporate guarantee by the assessee to its AE would have 'influence on the profits , incomes, losses or assets of enterprise' but not necessarily have 'any impact on the profits, incomes, losses or assets' as admittedly no consideration was received by the assessee in respect of this corporate guarantee from its AE. We find that the Ahmedabad Tribunal in the case of Micro Ink in ITA No. 2873/Ahd/2010 had observed that if a subsidiary (AE in the instant case) could not borrow money from third party sources on its own standing and the guarantee provided by the parent (assessee in the instant case) enables it to make such borrowing, then the guarantee could be said to be a shareholder function, not warranting a guarantee fee. This ratio would squarely be applicable to the facts of the instant case before us.

12.13 The Ld. CIT, DR's reliance in the case of Everest Kanto Cylinder Ltd. (supra) would not come to the rescue of Revenue because in that case, the parent company charged a fee of 0.5% on the AE for rendering this service. On this factual aspect, the Tribunal as well as the Hon'ble High Court held that it is an international transaction. Since in the case in hand, the assessee has not charged a penny from the AE, so the facts of the case are different and case law is distinguishable and, therefore, the Hon'ble High Court's order cannot come to the rescue of the Revenue. We find that the ld. AR pointed out that in the said case, the Hon'ble Bombay High Court did not answer the specific question as to whether the issuance of corporate guarantee is inherently within the ambit of definition of 'international transaction' irrespective of whether or not such transactions have any "bearing on profits, income, lossess or assets of such enterprises" u/s. 92 B of the Act. We also note that the Ahmedabad Bench of this Tribunal supra after considering the decision of the Hon'ble Bombay High Court in Everest Kanto Cylinder Ltd. (supra) observed as under:

"We are unable to see, in the judgment of Hon'ble Bombay High Court, any support to the proposition that issuance of corporate guarantee is inherently within the ambit of definition of 'international transaction' under section 92B irrespective of whether or not such transactions have any 'bearing on profits' incomes, losses, or assets of such enterprises'. Revenue, therefore, does not derive any help from the said decision."

12.14. The ld CIT DR would have had a case where a fee has been charged for the intra service which has been rendered (in the context of corporate guarantee), and, therefore, the assessee or the Court has treated it as an international transaction, then the charge of corporate guarantee has to be in accordance with Arm's Length principle. This means that the price for corporate guarantee should be that which would have been paid and accepted by independent enterprises in comparable circumstances. In that case transfer pricing adjustments are required. In that case, it has to be determined what will be the ALP of corporate guarantee commission paid by associate enterprise to the parent company providing corporate guarantee. Since that is not the case before us, we need not go into it.
12.15. We also find that this very same issue came up for adjudication by this tribunal in assessee's own case for the Asst Year 2010-11 in ITA No. 530/Kol/2015 dated 9.6.2017 , wherein by placing reliance on the decision of co-ordinate bench of Mumbai Tribunal in the case of
a) Marico Ltd vs ACIT reported in (2016) 70 taxmann.com 214 (Mumbai Trib) wherein it was held that corporate guarantee was not an international transaction ; and
b) Siro Clinpharm P Ltd vs DCIT in ITA No. 2618/Mum/2014 dated 31.3.2016 , wherein it was held that the Explanation introduced by Finance Act 2012 can be made applicable only from Asst Year 2013-14 onwards.
12.16. Moreover, we find that though the Explanation was introduced by Finance Act 2012, the rules were notified only on 10.6.2013. Hence the assessee cannot be expected to report this transaction also as an international transaction in its transfer pricing study and the audit report thereon.
12.17. In view of the aforesaid findings and respectfully following the various judicial precedents, we allow the Grounds 1.1. to 1.4 raised by the assessee."

5.1. Consistent with the view taken therein, we uphold the order of the ld. CIT(A) on this issue and dismiss this ground of the revenue. Accordingly, Ground No. 2 of the revenue is dismissed.

6. Ground No. 3 is on the disallowance made u/s 14A r.w.r. 8D.

6.1. After considering rival submissions, we find that the ld. CIT(A) considered the disallowance u/s 14A r.w.r. 8D(ii) and came to a factual conclusion that the assessee has adequate interest free funds totalling to Rs.49,367.68 Lakhs to justify the investment of Rs.40.02 Lakhs. He applied the decision of the Hon'ble Bombay High Court in the case of *CIT vs. HDFC Bank Ltd. [366 ITR 505]* and other decisions and held that no disallowance can be made u/s 14A r.w.r. 8D(ii).

6.1. We find no infirmity in this finding of the ld. CIT(A) and uphold the same. Ground No. 3 of the revenue is dismissed.

7. Ground No. 4, is against the action of the Assessing Officer in adding the sum of Rs.9,69,178/-, towards accrued interest.

7.1. The amounts given to three parties, namely, Smt. Sadhna Bhagwat, Ranglal Modi & Sons and Durga Prasad Agarwal, have become non-realisable. Once these loans have become Non-Performing-Assets and when the realization of the principal itself is uncertain, the question of recognizing interest does not arise. The ld. CIT(A), in our view, rightly applied the 'real income theory' and deleted the addition. We find no infirmity in this action of the ld. CIT(A) and uphold the same. Accordingly, Ground No. 4 of the revenue is dismissed.

8. In the result, appeal of the revenue is dismissed.

Kolkata, the 28th day of September, 2018.

Sd/-	Sd/-
[**Madhumita Roy]**	[**J. Sudhakar Reddy**]
Judicial Member	Accountant Member

Dated : 28.09.2018
{SC SPS}

Copy of the order forwarded to:

1. ***M/s. Manaksia Limited***
Bikaneer Building
8/1, Lalbazar Street
Kolkata – 700 001
2. ***Deputy Commissioner of Income Tax, Circle-4(2), Kolkata***

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches