

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,  
*IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “C” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and  
**Shri, M. Balaganesh, Accountant Member**

**ITA No.208-209/Kol/2018**  
Assessment Years :201-12 & 2013-14

DCIT, Circle-4(2), 4 <sup>th</sup> Floor, R.No. 11B, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700 069	<b>V/s.</b>	M/s Manaksia Ltd. Bikaneer Building, 8/1, Lalbazar Street, Kolkata-700001 <b>[PAN No.AAACH 6882 J]</b>
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Ravi Tulsian, FCA
राजस्व की ओर से/By Revenue	Shri Sanjay Paul, Addl. CIT-SR-DR
सुनवाई की तारीख/Date of Hearing	12-11-2018
घोषणा की तारीख/Date of Pronouncement	30-11-2018

**आदेश /O R D E R**

**PER S.S.Godara, Judicial Member:-**

These two Revenue's appeals for assessment years 2011-12 and 2013-14 arise against Commissioner of Income Tax (Appeals)-22, Kolkata's separate order; both dated 28.11.2017 passed in case(s) No.27/CIT(A)-22/11-12/14-15/Kol. &102/CIT(A)-22/13-14/16-17/Kol; respectively involving proceedings u/s 143(3) r.w.s.144C of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. It emerges at the outset that the Revenue raises identical twin substantive grounds in both these appeals. Its first substantive ground is that CIT(A) has erred in law as well as on facts in deleting arm's length price adjustment of ₹2,97,86,393/- and ₹89,22,433/- (assessment year-wise); respectively in respect of assessee's corporate guarantee provided to its

overseas associate enterprises "AE" as proposed by the Transfer Pricing Officer and added in the course of the assessment in issue. We find that the instant as to whether a corporate guarantee amounts to an international transaction within the meaning of sec. 92B of the Act or not is no more *res integra*. This tribunal's co-ordinate bench's decision in assessee own case for assessment year 2012-13 ITA No.980/Kol/2017 decided on 28.09.2018 has adjudicated this very issue in it's favour as follows:-

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

*The Id. 'CITCA) 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. CITCA), 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 Id. 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, losses or assets of such enterprises" u/s. 92B 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 Id 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 Id. CIT(A) on this issue and dismiss this ground of the revenue. Accordingly, Ground No. 2 of the revenue is dismissed. "

3. Learned Departmental Representative vehemently during the course contends that a corporate guarantee is very much an international transactions *post facto* amendment in sec. 92B of the Act with retrospective effect dated 01.04.2002 (supra). He fails to dispute the fact that the learned co-ordinate bench hereinabove has considered amended provision as well. There is no dispute that the CIT(A) has adopted judicial consistency in following his findings on the every issue in earlier assessment years attending finality upto this tribunal as well. There is no distinction on facts or law indicated at the Revenue's behest in the impugned assessment year. We

therefore affirm the CIT(A)'s findings under challenge deleting corporate guarantee's arm's length price adjustment(s) in both the impugned assessment years.

4. Next comes the Revenue's latter substantive ground seeking to revive transfer pricing adjustment of ₹2,44,17,630/- and ₹9,25,64,000/- (assessment year-wise) in respect of assessee's loans given to its overseas associate enterprises. Suffice to say, the above co-ordinate bench's decision in assessment year 2012-13 has also adjudicated the very recurring issue in taxpayer's favour as follows:-

*"4.1 Ground No.1, is against the deletion of upward adjustment of Rs.697,64,000/-, 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), Euro Asian 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 Id. CIT(A), the assessee submitted that it has charge 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 Tribunal 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 ITATS in the case of Kohinoor Foods Ltd vs. ACIT (67 SOT 108).*

*4.2 The Id. CIT(A) while determining the ALP of interest on loan given to AE, held that (Comparable Uncontrolled Price ) CUP is the Most Appropriate Method (MAN). He disagreed with the order of the Id. 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 mater, 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. ACT 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 benchmarked against LIBOR, 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 Id. TPO in the case is held to be unjustified and not sustainable. The ground of appeal stands allowed accordingly.'*

As the Id. 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 ITAT has in a number of cases including M/s EIH Ltd. vs. DIT (supra) followed the same principles. Hence the order of the Id. CIT(A) on this issue is upheld and Ground No.1 of the revenue is dismissed.”

5. We notice herein as well that the Revenue fails to suggest any exception on facts or law involved in all these assessment years. We thus adopt the above co-ordinate bench's detailed reasoning mutatis mutandis to affirm the CIT(A)'s findings under challenge qua this latter issue as well.

6. These two Revenue's appeals are dismissed.

Order pronounced in the open court 30/11/2018

Sd/-  
(लेखा सदस्य)  
(M.Balaganesh)  
(Accountant Member)  
Kolkata,  
\*Dkp, Sr.P.S

Sd/-  
(न्यायिक सदस्य)  
(S.S.Godara)  
(Judicial Member)

दिनांक:- 30/11/2018 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. आवेदक/Assessee-M/s Manaksia Ltd., Bikaneer Building, 8/1, Lalbazar St. Kolkata-001
2. राजस्व/Revenue-DCIT, Circle-4(2) 4<sup>th</sup> Floor, Room No.11B, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।