



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"K" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI N.K. PRADHAN, ACCOUNTANT MEMBER**

IT(TP)A no.1049 & 1050/Mum./2017  
(Assessment Year : 2009-10 & 2010-11)

JBF Industries Ltd.  
Express Tower, 8<sup>th</sup> Floor  
Nariman Point, Mumbai 400 021  
PAN – AAACJ2575J

..... Appellant

v/s

Dy. Commissioner of Income Tax  
Circle-4(2)(2), Mumbai

..... Respondent

Assessee by : Shri S.D. Jaithwar a/w  
Ms. Mamata Mathkar and  
Shri Pravin Prajapati  
Revenue by : Shri Anand Mohan

Date of Hearing – 13.08.2019

Date of Order – 30.08.2019

**ORDER**

**PER SAKTIJIT DEY. J.M.**

Captioned appeals have been filed by the assessee challenging two separate orders passed by the learned Commissioner of Income Tax (Appeals)-56, Mumbai, confirming penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment years 2009-10 and 2010-11.

2. Brief facts are, the assessee is an Indian company. During the previous year relevant to the assessment year under consideration, the assessee had entered into various international transactions with its Associate Enterprises (AE). Noticing the aforesaid, the Assessing Officer made a reference to the Transfer Pricing Officer for determining the arm's length price of the international transactions. After considering the submissions of the assessee and material on record, the Transfer Pricing Officer passed orders under section 92CA(3) of the Act proposing transfer pricing adjustment in both the assessment years. In addition to the transfer pricing adjustment proposed by the Transfer Pricing Officer, the Assessing Officer also made separate additions. The additions made in different assessment years are as under:-

<i>Sr. no.</i>	<i>Particulars</i>	<i>Addition in A.Y. 2009-10</i>	<i>Addition in A.Y. 2010-11</i>
1.	<i>Corporate Guarantee Commission for Subsidiary</i>	<i>₹ 2,73,82,833</i>	<i>₹ 1,46,35,607</i>
2.	<i>Interest on unallocated share capital</i>	<i>₹ 2,45,47,852</i>	<i>₹ 3,56,53,807</i>
3.	<i>Interest on loan to subsidiary company</i>	<i>₹ 1,02,08,742</i>	<i>₹ 17,96,950</i>
4.	<i>FCCB loss</i>	<i>₹ 11,40,49,785</i>	<i>-</i>
5.	<i>Purchase of PTA from subsidiary company</i>	<i>-</i>	<i>₹ 44,02,141</i>
	<i>Total Addition</i>	<i>₹ 17,61,89,212</i>	<i>₹ 5,64,88,505</i>

3. Against the additions made in the draft assessment orders, the assessee raised objections before learned DRP and after the Assessing Officer passed the final assessment orders in pursuance to the directions of learned DRP, the assessee preferred appeals before the Tribunal. During the pendency of the aforesaid appeals of the assessee before the Tribunal, the Assessing Officer on the basis of additions made in the assessment orders initiated proceedings for imposition of penalty under section 271(1)(c) of the Act and ultimately passed orders imposing penalty under section 271(1)(c) of the Act for assessment years 2009-10 and 2010-11. Though, the assessee challenged imposition of penalty under section 271(1)(c) of the Act before learned Commissioner (Appeals), however, he sustained the penalty imposed under section 271(1)(c) of the Act. Against such imposition of penalty, the assessee is in appeal before the Tribunal.

4. The learned Authorised Representative submitted, in the meanwhile, the Tribunal has disposed off the quantum appeals of the assessee by deleting most of the additions made by the Assessing Officer. The learned Authorised Representative submitted, only in respect of transfer pricing adjustment relating to corporate guarantee commission and interest on loan to subsidiary, additions have been sustained by the Tribunal. As regards transfer pricing adjustment made on account of corporate guarantee, the learned Authorised

Representative submitted, during the year under consideration, there was no clarity on the issue as to whether provision of corporate guarantee comes within the definition of international transaction as per section 92B of the Act. The learned Authorised Representative submitted, by virtue of an amendment made to section 92B of the Act by Finance Act, 2012, with retrospective effect from 1<sup>st</sup> April 2002, all types of guarantee were brought within the definition of international transaction, thus he submitted, when the transactions were entered into between the assessee and the AE the amendment could not have been foreseen. Therefore, as per the prevailing judicial precedents, the assessee had a bona fide belief that provision of corporate guarantee would not come within the definition of international transaction, hence, did not charge any guarantee commission to the AE. Thus, he submitted, since non-charging of guarantee commission is for a bonafide reason, it will not lead to either furnishing of inaccurate particulars of income or concealment of income requiring imposition of penalty under section 271(1)(c) of the Act. Insofar as the addition on account of interest on loan to subsidiary, the learned Authorised Representative submitted, though the assessee initially did not offer any interest income on the loan to subsidiary, however, subsequently, in the course of assessment proceedings, the assessee had offered to tax interest on loan to subsidiary. Therefore, there is no reason to impose penalty under section 271(1)(c) of the Act.

5. The learned Departmental Representative submitted, since the assessee had offered guarantee fee @ 0.50% and 0.75% in the assessment years 2008-09 and 2011-12 respectively, there is no reason why it did not at all offer it to tax in the assessment year 2009-10 and offered it at a reduced rate of 0.25% in the assessment year 2010-11. He submitted, the aforesaid conduct of the assessee clearly demonstrates that it considered provision of corporate guarantee to the AE as an international transaction. Therefore, by not offering corporate guarantee commission to tax in the assessment year 2009-10 and offering it at a reduced rate in the assessment year 2010-11, assessee has furnished inaccurate particulars of income leading to concealment of income. As regards interest on loan to subsidiary, the learned Departmental Representative submitted, the assessee initially did not offer it to tax and only in the course of assessment proceedings offered the interest income to tax at LIBOR +2%. Therefore, there is furnishing of inaccurate particulars of income.

6. We have considered rival submissions and perused the material on record. It is a fact on record that major part of the additions made on account of transfer price adjustment or even otherwise has been deleted by the Tribunal while deciding assessee's quantum appeals for the impugned assessment years in ITA no.838/Mum./2014 and ITA

no.431/Mum./2015, dated 19<sup>th</sup> June 2019. The only additions made by the Assessing Officer which were partly sustained by the Tribunal are on account of corporate guarantee commission and interest on loan to subsidiary. Insofar as the addition made on account of corporate guarantee commission is concerned, it is evident, from the stage of transfer pricing proceedings till the hearing of appeals before the Tribunal, the assessee had consistently taken a stand that provision of corporate guarantee to the AEs does not come within the purview of international transaction as defined under section 92B of the Act. It is the claim of the assessee that only after amendment of section 92B of the Act by Finance Act, 2012 with retrospective effect from 1<sup>st</sup> April 2002, provision of corporate guarantee is treated as international transaction under section 92B of the Act. Therefore, non-offering of corporate guarantee fee as income is due to bonafide reason. We find merit in the aforesaid submission of the assessee. Though, it may be a fact that the assessee had offered corporate guarantee fee charged at different rates in assessment years 2008-09, 2010-11 and 2011-12, however, fact remains, in certain judicial precedents it was held that provision of corporate guarantee is not an international transaction under section 92B of the Act. Therefore, at the relevant point of time, there was lack of clarity on the issue which might have led the assessee to entertain a bonafide belief that the corporate guarantee provided to the AE does not require charging guarantee commission.

Therefore, the assessee can be given the benefit of doubt in this regard. Undisputedly, by virtue of an amendment made to section 92B of the Act by Finance Act, 2012, all types of financial guarantees were brought within the purview of 92B of the Act with retrospective effect. Keeping in view the change in legal position due to statutory amendment, the assessee had made alternative submissions in the quantum proceedings offering guarantee commission @ 0.5% which has been accepted by the Tribunal. However, at the time of providing corporate guarantee, the assessee could not have visualized such amendment to the statute. It is also relevant to observe, though, the Assessing Officer had charged guarantee fee @ 2.25% per annum, however, the Tribunal accepting assessee's claim reduced it to 0.5%. Thus, keeping in view the overall facts and circumstances of the case, we are of the opinion that neither there is furnishing of inaccurate particulars of income or concealment of income to levy penalty under section 271(1)(c) of the Act.

7. Insofar as levy of penalty due to addition on interest on loan to subsidiary, undisputedly, the assessee in the course of proceedings before the Assessing Officer and the Transfer Pricing Officer has voluntarily offered interest income charged @ LIBOOR +2%. However, the Transfer Pricing Officer did not accept the claim of the assessee and charged interest @ 10.5%. While deciding the quantum appeals of

the assessee, the Tribunal directed the Transfer Pricing Officer to compute interest @ LIBOR +2%. Thus, assessee's claim was accepted. From the aforesaid facts, it is very much clear that the assessee has neither furnished inaccurate particulars of income nor has concealed the particulars of income. That being the case, there is no basis for imposition of penalty under section 271(1)(c) of the Act in respect of the addition relating to interest on loan to subsidiary company. In fact, there is no addition as the assessee itself has offered interest income on loan to subsidiary charged @ LIBOR +2% which has been accepted by the Tribunal. In view of the aforesaid, we delete the penalty imposed under section 271(1)(c) of the Act in respect of additions made on account of corporate guarantee commission and interest on loan to subsidiary. As regards the other additions, since, they have been deleted by the Tribunal while deciding the quantum appeals of the assessee, as referred to above, penalty imposed under section 271(1)(c) of the Act in respect of such additions would not survive. Accordingly, penalty imposed under section 271(1)(c) of the Act in both the assessment years is deleted. Grounds raised are allowed.

8. In the result, both the appeals are allowed.

Order pronounced in the open Court on 30.08.2019

**Sd/-**  
**N.K. PRADHAN**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 30.08.2019**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai