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

BEFORE SHRI A.T. VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.1455/Kol/2018

(निर्धारणवर्ष / Assessment Year:2014-15)

DCIT, Circle-6(2), Kolkata	**Vs.**	**M/s Emami Limited** 687, Emami Tower, Anandapur, E.M. Bypass, Kolkata-700107.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAACH 7412 G**		
(Appellant)	**..**	**(Respondent)**

Appellant by :Dr. P.K. Srihari, CIT DR

Respondent by : Shri Akkal Dudhwewala, ACA

सुनवाईकीतारीख/ **Date of Hearing : 19/09/2019**

घोषणाकीतारीख/**Date of Pronouncement : 23/10/2019**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Revenue, pertaining to assessment year 2014-15, is directed against the order passed by the Commissioner of Income Tax (Appeal)-22, Kolkata, which in turn arises out of a fair assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short the 'Act') dated 19/12/2017.

2. Although in this appeal, the Revenue has raised a multiple grounds of appeal but at the time of hearing the main grievance of the Revenue has been confined to the two grounds (issues) namely;

i) Transfer pricing adjustment of Rs. 5,79,08,930/- by substituting CUP Method instead of TNMM applied by the assessee. It covers ground Nos. 1 to 4 raised by the Revenue.

ii) Fees for Corporate Guarantee issued to Associate Enterprise(AE) Rs. 43,53,232/-. It covers ground Nos. 5 to 10 raised by the Revenue.

3. Now, we shall take these main grounds/ issues one by one.

4. The first ground/issue raised by the Revenue relates to Transfer pricing adjustment of Rs. 5,79,08,930/- by substituting CUP Method instead of TNMM applied by the assessee.

5.When this appeal was called out for hearing, learned counsel for the assessee invited our attention to the order dated 15.06.2018, passed by the Division Bench of this Tribunal in assessee's own case in ITA No.1065 and 1066/Kol/2017, for A.Y.2011-12 &2012-13, whereby the issue of CUP method Vs. TNMM has been discussed and upheld that TNMM is most appropriate method (MAM). Learned counsel for the assessee submitted that the present appeal is squarely covered by the aforesaid order of the Tribunal, a copy of which was also placed before the Bench.

6. Learned Departmental Representative relied upon the orders of the TPO/AO.

7. We see no reasons to take any other view of the matter than the view so taken by the Division Bench of this Tribunal in assessee's own case vide order dated 15.06.2018. In this order, the Tribunal has inter alia observed as follows:

> *"26. We have heard learned arguments on both sides, perused the material available on record, and before we proceed to record our view and opinion on the issue under consideration, it is worthwhile to quota here the relevant provisions of Rule 10B of Income Tax Rules. Clause (a) of sub-rule (1) of Rule 10B defines the comparable uncontrolled price method (CUP-Method) as follows:*
>
> *"Rule 10B. Determination of arm's length price under section 92C.*
>
> *(1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the*

following methods, being the most appropriate method, in the following manner, namely:

(a) comparable uncontrolled price method, by which,—

(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;

(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;

(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction;"

We note that ld TPO/AO in the assessee`s case under consideration has ignored the conditions prescribed in sub-clause (a) (ii) of sub rule (1), which states that comparable uncontrolled price method, by which, such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market. In order to make applicable, the Comparable uncontrolled price method (CUP-method), these conditions are essential to fulfill.

We note that in assessee`s case under consideration, no adjustments have been made by ld TPO on account of differences in market and economic conditions of countries in which products have been sold to independent third parties. The ld TPO has failed to take into account the profile of consumers, preference amongst consumers, purchasing power, etc. In the assessee`s case under consideration, the assessee had sold its products to independent third parties in different countries like Kenya, Congo, Angola, Uganda, Sri Lanka, USA, etc. The prices at which the products were sold to third party distributors in these countries are being compared by the Ld. TPO with those sold to assessee's wholly owned subsidiaries in Bangladesh, Dubai and UK without any adjustments to the difference in economies of these countries. It is a settled position that for application of the CUP method, highest degree of comparability is required. The CUP cannot be applied without adjustments on account of differences in market and economic conditions of countries in which products have been sold to independent third parties. For that we rely on the judgment of the Coordinate Bench Mumbai in case of Internet India Private Limited (2010) 39 SOT 93, wherein it was held as follows:

"We heard both parties. From the submissions made by the assessee the economic and market conditions of Thailand and Vietnam are totally different. The ld. CIT (A) has held that both the countries are located in Far East Asia and have similar demographical constitution.....
We find that the TPO and the CIT(A) have assumed similarity of markets and economic conditions and have made adjustments only for the volume discount,

credit offered and a small adjustment of credit risk. They have completely ignored the disparate economic and market conditions of Thailand and Vietnam and have made no adjustment for the same ..."

In the assessee`s case under consideration, the ld TPO/AO has ignored the disparate economic and market conditions of Kenya, Congo, Angola, Uganda, Sri Lanka, USA, and have made no adjustment for the same. The Prices of small packaged products per unit are usually higher than per unit price of large size products in order to promote higher sales and achieve economies of scale and ld AO/TPO has not made adjustment on that account. These factors could materially affect the price in the open market and the ld TPO/AO has ignored them. It was noted by the ld CIT(A) that in few instances [12 products out of 56, as picked up for comparison by the Ld.s TPO] have been sold at a price which is higher than those sold to Non-AE. These products were later eliminated by the Ld. TPO without assigning any reason.

27 We note that ld TPO/AO has failed to do adjustment on account of market preference and customer preference. In addition to this, the market strategy to sale the product has not been taken into account, for instance, the ld TPO, vide his order para No.12.3 serial No.1 of the table, he compared "Emita Skin Care Body lotion-All purpose:444:ml" with "Emita Skin Care Body Lotion- Rose & Glycerine :100ml". We note that there are huge difference in terms of volume, that is, "444ml Vis-à-Vis 100ml". There is difference in terms of quality that is, "All Purpose Vis-à-Vis "Rose &Glycerine". There could be difference on account of customer preference, normally the customer prefers to buy the product, where he gets 1+1, that is, where he gets one free unit, on purchase of one unit. There is market preference also, the market for the same product in USA is different than in Bangladesh. We note that ld TPO/AO failed to do necessary adjustment on account of customer preference, market preference and market strategy to sale the product in different geographical area, therefore, the application of CUP method in the assessee`s case under consideration fails.

We note that theassessee had sold over 250 different products to AEs. The Ld. TPO however selectively shortlisted only 56 products to conduct benchmarking analysis under CUP Method. Even in respect of these 56 products, the Ld. TPO, later on, noted that 12 products were showing that the prices at which assessee had sold products to its AE's were higher. Accordingly, the Ld. TPO made adjustment with reference to prices of 44 products. The Ld. TPO however, conveniently missed out to benchmark the remaining 194 (250 - 56) products sold to AEs & non-AEs. We note that Compared Products by Ld TPO are not same. Even though both the compared products appear to be similar in terms of basic function i.e. cream, lotion, powder, etc but their labeling, packaging, ingredients are different. It is by now well settled principle that CUP requires high degree of comparability and where the product mix, material, composition etc. are not identical, application of CUP fails. In most of the instances, where compared products were of dissimilar sizes, Ld. TPO calculated FOB Rate of goods sold to AE and Non-AE of different sizes based on proportionate price per unit. This methodology is devoid of any merit, as in FMCG sector the pricing of product, as per unit/quantity is never done proportionately. The rationale is that in FMCG sector packaging cost, transportation cost, handling cost, marketing cost can never be proportionate to the unit size of the product. Prices of small packaged

products per unit are usually higher than per unit price of large size products in order to promote higher sales and achieve economies of scale. It should be noted that in some instances the Ld. TPO has made an ad hoc 3% revision on account of larger size difference. The arbitrary rate of 3% adopted by the Ld. TPO has no empirical basis or logic whatsoever but is a pure estimation based on Ld. TPO's conjectures & surmise.

28. We note that no cogent reasons given by the ld. TPO for rejecting the TP Study Memorandum and the selection of TNMM Method as the most appropriate method (MAM). The assessee has undertaken a sound comparability analysis in respect of the aforesaid transactions in view of the requirements laid down under sections 92A to 92F of the Act and rules 10A to 10E of the Rules, in order to compute its income having regard to ALP and has also maintained necessary information and documents to support the same. The TP documentation and determination of arm's length margin for the aforesaid transactions had been done as per the procedure laid down in the Act. We note that the assessee selected TNMM method, as the most appropriate method, in order to benchmark the transaction involving sale of goods in view of facts and circumstances of the case and availability of reliable data. We note that the assessee has been consistently exporting goods to its AEs located abroad. In all the earlier years, the transactions involved sale of goods were benchmarked under the TNMM Method, as evident from the TP study report for the earlier Assessment Years 2010-11 & 2011-12. In none of the past assessments, the Revenue has rejected the TP analysis and the transactions were accepted to be at arm's length under the TNMM method, therefore it was imperative for the Ld. TPO to bring on record the change in facts or law and give cogent reasoning before departing from the settled position and rejecting the application of TNMN Method. It is a well settled legal position that factual matters which permeate through more than one assessment year, if the Revenue has accepted a particular's view or proposition in the past, it is not open for the Revenue to take a entirely contrary or different stand in a later year on the same issue, involving identical facts unless and until a cogent case is made out by the Assessing Officer on the basis of change in facts. For that we rely on the order of the Hon'ble Supreme Court in Radhasoami Satsang vs. CIT 193 ITR 321 (SC).

29. The cornerstone of Transfer Pricing principle is the comparability analysis of a controlled transaction with an uncontrolled transaction which is substratum of arriving at Arm's length price. The controlled and uncontrolled transactions are comparable if none of the differences between the transactions materially affect the factor being examined in a given methodology, whether determination of prices or for profit margin and for such determination a reasonable accurate adjustment can be made to eliminate the material effects of any such differences. Rule 10B(2) of Income Tax Rules, provides the comparability of the transaction with uncontrolled transaction which has to be judged with reference to specific characteristics of the property transferred or services provided; FAR analysis; contractual terms; conditions prevailing in the markets, that is, economic conditions in which respective parties transact or operate including geographical locations, size etc. Thus, comparison of attributes of the transaction is carried which would affect conditions in Arm's length dealing. Rule 10B (3) specifically provides as under:-

"An uncontrolled transaction shall be comparable to an international transaction or a specified domestic transaction if-

(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or

(ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences".

This, Rule specifically recognizes that reasonably accurate adjustment should be made to eliminate the material effects of differences, if any. Sub-rule (2) lays down the factors for determining comparability whereas; sub-rule (3) lays down the standard of comparability. The standard comparability not necessarily entails complete identity between the two transactions but sufficient similarity. It can be held to be sufficient similar if the differences between them is not material so as to effect price or profit in the open market and if there is one such thing, then such a material difference needs to be eliminated through adjustments. The factors governing the price or profit in a transaction may depend upon business strategies, market conditions, competitions, market penetration schemes, geographical locations, climatic conditions, etc. Guidelines issued by OECD also recognized the business strategies adopted by the companies which have a bearing on profitability levels. Para 1.60 and 1.62 of OECD guidelines for the sake of ready reference are reproduced hereunder:

"Para 1.60 of the Guidelines states as under:

"Business strategies also could include market penetrate schemes. A taxpayer seeking to penetrate a market or to increase its market share might temporarily charge a price for its product that is lower than the price charged for otherwise comparable products in the same market. Furthermore, a taxpayer seeking to enter a new market or expand (or defend) its market share might temporarily incur higher costs (e.g. due to start-up costs or increased marketing efforts) and hence achieve lower profit levels than other taxpayers operating in the same market".

Further, para 1.62 of the OECD Guidelines states as under:

"When evaluating a taxpayer's claim that it was following a business strategy that temporarily decreased profits in return for higher long-run profits, several factors should be considered. Tax administrations should examine the conduct of the parties to determine if it is consistent with the professed business strategy …. Another factor to consider is whether the nature of the relationship between the parties to the controlled transaction would be consistent with the taxpayer bearing the costs of the business strategy. For example, in arm's length dealings a company acting solely as a sales agent with little or no responsibility for long-term market development would generally not bear the costs of a market penetration strategy …."

Thus, business strategies, market penetration, increase or save its market share are relevant and material factors determining prices and profit. All these factors

have to be taken into consideration while eliminating the material effects which warrants some kind of reasonable accurate adjustments. Therefore, after going through the facts of the assessee`s case under consideration, it seems to us that selective application of CUP Method by TPO is ad hoc, and without any cogent basis, hence the entire approach followed by the Ld. TPO in rejecting the TP study memorandum of assessee for application of TNMM method is unjustified. For the reasons set out above, we find no infirmity in the order passed by the ld CIT(A). That being so, we decline to interfere in the order of ld CIT(A), his order on this issue is hereby upheld and grounds of appeal raised by the Revenue is dismissed"

8. As the issue is squarely covered in favour of the assessee by the decision of the coordinate bench, in assessee`s own case (supra) and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings of the co-ordinate bench. Respectfully following the above binding precedent, we uphold the order of ld CIT(A) and appeal of Revenue is dismissed.

9. The second issue raised by the Revenue relates to Fees for Corporate Guarantee issued to AE @ 2.225% of Rs. 43,53,232/-.

10. When this appeal was called out for hearing, learned counsel for the assessee invited our attention to the order dated 03/04/2019, passed by the Division Bench of this Tribunal in assessee's own case in ITA No.1958/Kol/2017, for A.Y.2013-14, whereby the issue of fee for corporate guarantee issued to AE @ 2.225% has been discussed and adjudicated in favour of assessee. Learned counsel for the assessee submitted that the present issue is squarely covered by the aforesaid order of the Tribunal, a copy of which was also placed before the Bench.

11. Learned Departmental Representative relied upon the orders of the TPO/AO.

12. We see no reasons to take any other view of the matter than the view so taken by the Division Bench of this Tribunal in assessee's own case vide order dated 03/04/2019. In this order, the Tribunal has inter alia observed as follows:

"9.After giving our thoughtful consideration to the submission of the parties and perusing the judicial decisions relied upon by the Ld. AR, we find that the issue involved, in respect to corporate guarantee, in the present appeal is no longer res integra.We note that financial guarantee is a promise made by a person (the guarantor) to a lender(guaranteed party) promising to pay the lender the money owed to it by the borrower (obligor) on whose behalf the guarantee is given, if the borrower fails to pay back the debt due to the lender.A guarantee to a lender that a loan will be repaid, guaranteed by a company other than the one who took the loan, is called a corporate guarantee.

The ld Counsel for the assessee submitted before us that extending corporate guarantee for borrowings by subsidiaries was a shareholder activity, that it was not an international transaction, that no fee was warranted since no cost was incurred, and that bank guarantees were not comparable to corporate guarantees since the business of the bank was different from that of a corporate.

Before us, ld DR for the Revenue submitted that there are plethora of judicial pronouncements wherein it has been held that the corporate guarantee is in the nature of service provided by the taxpayer to its associate enterprises(AEs) and hence should bear a charge. The judgments have explicitly held that after the Income Tax Act,1961 was amended by the Finance Act, 2012 to include 'guarantee' within the definition of "international transaction" with retrospective effect from 01.04.2002, the corporate guarantee should be benchmarked from arm's length perspective.

10. However, after hearing both the parties, we note that thereareplethora of judicial pronouncementswherein it has been held that corporate guarantee does not constitute an international transaction and accordingly there should not be a charge.We note that in assessee's case under consideration, the assessee, in order to avoid protracted litigation made an estimated adjustment of Rs.51,50,327/- @ 1% of the corporate guarantee amount as fees for corporate guarantee, for income tax purposes. However, the TPO rejected the method adopted by the assessee and recomputed the arm's length price by making upward adjustment.

We note that the assessee has extended this corporate guarantee as a shareholder activity hence the adjustment should not be made. The primary object of the assessee is to help the subsidiary company and protect its interest and there is no object of the assessee company to earn the interest income by furnishing the corporate guarantee to the associated enterprises. We note that in the judgment of the Co-ordinate Bench of ITAT Ahmadabad, in the case of Micro Link Limited vs. ACIT [TS-568-ITAT-2015] (Ahd) wherein the Co-ordinate Bench has held that corporate guarantee does not constitute international transaction as per section 92B of the Act as amended by the Finance Act, 2012. The relevant extracts of the judgment is reproduced as under:

"On a conceptual note, thus, there is a valid school of thought that the corporate guarantees can indeed be a mode of ownership contribution, particularly when as is often the case, "where such a guarantee is given, it compensates for the inadequacy in the financial position of the borrower; specifically the fact that the subsidiary does not have enough shareholders funds. There can be number of reasons, including regulatory issues and market conditions in the related jurisdictions, in which such a contribution, by way of a guarantee, would justify to

be a more appropriate and preferred mode of contribution vis-a-vis equity contribution ... "

" ... In other words, these guarantees were specifically stated to be in the nature of shareholder activities. The assessee's claim of the guarantees being in the nature of quasi capital, and thus being in the nature of a shareholder's activity, is not rejected either. The concept of issuance of corporate guarantees as a shareholder activity is not alien to the transfer pricing literature in general.."

".... We have noticed that the 'OECD' Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations specifically recognizes that an activity in the nature of shareholder activity, which is solely because of ownership interest in one or more of the group members, i.e. in the capacity as shareholder "would not justify a charge to the recipient companies". It is thus clear that a shareholder activity, in issuance of corporate guarantees, is taken out of ambit of the group services. Clearly, therefore, as long as a guarantee is on account of, what can be termed as 'shareholder's activities', even on the first principles, it is outside the ambit of transfer pricing adjustment in respect of arm's length price. "

" .... We are in agreement with these views. There can thus be activities which benefit the group entities but these activities need not necessarily be 'provision for services'. The fact that the OECD considers such activities in the services segment does not alter the character of the activities. While the group entity is thus indeed benefited by the shareholder activities, these activities do not necessarily constitute services ... "

" .... The issuance of financial guarantee in favour of an entity, which does not have adequate strength of its own to meet such obligations, will rarely be done. The very comparison, between the consideration for which banks issue financial guarantees on behalf of its clients with the consideration for which the corporate issue guarantees for their subsidiaries, is ill conceived."

" ... These guarantees do not have any impact on income, profits, losses or assets of the assessee. There can be a hypothetical situation in which a guarantee default takes place and, therefore, the enterprise may have to pay the guarantee amounts but such a situation, even if that be so, is only a hypothetical situation, which are, as discussed above, excluded. When an assessee extends an assistance to the associated enterprise, which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under section 92B (1) of the Act .... "

11. We rely on the judgment of the Co-ordinate Bench of ITAT, Delhi in the case of Bharti Airtel Ltd. vs. ACIT in I.T.A. No. 5816/Kol/2012, wherein the definition of international transaction in view of the amendments, vide Finance Act, 2012, had been discussed and it was held that the provision of corporate guarantee is not an international transaction. The relevant extract of the judgment is reproduced as under:

"Para 23 .... The issue whether giving a corporate guarantee amounts to an 'international transaction' has not been raised or discussed in the cases where ALP adjustments have been upheld and therefore those decisions cannot be put against the taxpayer ..... "

"Para 27.... The Explanation inserted vide Finance Act 2012 is to be read in conjunction with the main provision and in harmony with the scheme of provision under section 92B of the Act. It is essential that in order to be an 'international transaction' providing corporate guarantee should have a bearing on the profits, income losses or assets of the enterprise ...:"

"Para 31…. The contents of the Explanation fortifies, rather than mitigates, the significance of expression 'having a bearing on profits, income, losses or assets' appearing in section 92B(1) of the Act ... "

"Para 33 .... The onus is on the tax authorities to demonstrate that the transaction is of such nature as to have 'bearing on profits, income, losses or assets of the enterprise' and has to be on real basis even if in present or in future, and not on contingent or hypothetical basis ...."
"Para 32.... There can be a situation in which a guarantee default takes place and therefore, the enterprise may have to pay the guarantee amount but such a situation even if that be so is only a hypothetical situation ....."

"Para 32 ..... When an assessee extends an assistance to the associated enterprise which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets and therefore it is outside the ambit of international transaction under section 92B(1) of the Act. ..."

"Para 35 .... In the case of GE Capital Canada -vs- The Queen, the tax court of Canada has indeed dealt with ALP determination of the guarantee fees, but then it was done in the light of their domestic law provisions which are quite at variance with the Indian transfer pricing legislation ....."

Similar views have been held by various coordinate benches, including jurisdictional as under:
i).Tega Industries Ltd Vs. DCIT [ITA No.912/2012 dated 03.08.2016-(kol-trib]
ii)Marico Ltd Vs. ACIT TS-411-ITAT-2016(MUM-TP)
iii). TVS Logistics Services Ltd.[TS-324-ITAT-2016, (CHNY)-TP]
iv)manograph India Ltd. [TS324-ITAT2016(MUM)-TP]
v)Siro Clinpharm Pvt Ltd Vs. DCIT (ITS-185-ITAT2016(MUM)-TP]
vi) Apollo Health Street Ltd Vs. DCIT [TS-184-ITAT2014 (HYD)-TP]

Therefore, based on the above mentioned precedents, we note that the provision of corporate guarantee is not an international transaction. Hence, respectfully following the judgment of the co-ordinate benches cited above, we confirm the findings of the ld. CIT(A)."

13. As the issue is squarely covered in favour of the assessee by the decision of the coordinate bench, in assessee`s own case (supra) and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings of the co-ordinate bench. Respectfully following the above binding precedent, we uphold the order of ld CIT(A) and appeal of Revenue is dismissed.

14. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Court on 23.10.2019

Sd/-	**Sd/-**
(A.T.VARKEY)	**(A.L.SAINI)**
न्यायिकसदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;
दिनांक/ Date: 23/10/2019
(*SB, Sr.PS*)

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By Order

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