

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

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member)

ITA No. 184/Kol/2018
Assessment Year: 2012-13

Asstt. Commissioner of Income Tax, Circle-5(2), Kolkata.....Appellant
Vs.

M/s. Hindusthan National Glass & Industries.....Respondent
2, Red Cross Place
Kolkata - 700 001
[PAN : AAACH 7557 G]

Appearances by:

Shri Akkal Dudhewala, A/R, appeared on behalf of the assessee.

Shri P.K. Srihari, CIT Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : November 28th, 2019

Date of pronouncing the order : December 31st, 2019

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the revenue is directed against the order of the Learned Commissioner of Income Tax (Appeals) – 22, Kolkata, (hereinafter the “Id.CIT(A)”), passed u/s. 250 of the Income Tax Act, 1961 (the ‘Act’), dt. 24/11/2017, for the Assessment Year 2012-13.

2. Only three issues arise in this appeal. The first issue is regarding the deletion of the Transfer Pricing (TP) adjustment made by the Assessing Officer on the account of corporate guarantee extended by the assessee company to its Associate Enterprise (AE), on the ground that it is not an international transaction, prior to the amendment to Section 92B of the Act, by the Id. CIT(A)

The second issue is regarding the question of disallowance to be made u/s 14A of the Act and the third issue is on the computation of deduction u/s 80IC of the Act *vis-a-vis* sales tax subsidy and write back of expenses which was earlier allowed as a deduction.

3. 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. The first issue is as to whether the corporate guarantee extended by the assessee company to its AE is an international transaction as per the definition to Section 92B of the Act for the Assessment Year 2012-13. This Bench of the Tribunal in the case of *M/s.*

Tega Industries Ltd. vs. ACIT in ITA No. 404 & 2527/Kol/2017, order dt. 23/08/2019, held as follows:-

"4. There is further no dispute that the legislature has introduced Explanation to section 92B of the Act vide Finance Act, 2012 w.e.f 1-4-2002. This tribunal's yet another decision in DCIT v. Manaksia Ltd. [IT Appeal No. 208-209 (Kol.) of 2018, dated 30-11-2018] concludes that the above stated explanation inserted in the statutory provision is made clarificatory in nature. Relevant discussion to this effect reads as under:-

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

The Id. 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. v. 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 ITA No. 980/Kol/2017 Assessment Year: 2012-13 M/s. Manaksia Limited 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 Id. 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. 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."

ITA No. 980/Kol/2017 Assessment Year: 2012-13 M/s. Manaksia Limited 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 v. 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 v. 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."

5. We adopt the above detailed discussion mutatis mutandis to conclude that assessee's corporate guarantee (s) in issue do not amount to international transactions u/s. 92B of the Act. Both the corresponding transfer pricing adjustment in question stand deleted. This first identical issue in both the appeals is decided in assessee's favour.

5. Respectfully following the same, we uphold the order of the Id. CIT(A) and dismiss Ground Nos. 1 to 9 of the revenue.

6. Ground No. 10 is on the issue of disallowance u/s 14A of the Act.

The Id. CIT(A) has at para 9 sub-para 5 held as follows:-

"5. Out of the total investments of Rs.18,088.66 lacs, I agree with the Ld. ARs that the sum of Rs.6,356.04 lacs which pertained to investment in foreign subsidiary, was only capable of yielding taxable income and therefore the same could not be considered for the purposes of Section 14A of the Act. Out of the remaining sum of Rs. 1,732.62 lacs, investments to the tune of Rs.11,565.29 lacs was made in shares of two subsidiary companies and two group/associate companies. The investments in these companies belong to HNG group of which the appellant was the flagship. I find that the appellant was the promoter- shareholder of all these subsidiaries / group companies. As such I find merit in the AR's submissions that these investments were made for strategic business purposes and not for the purpose of earning tax free income in form of dividend. For instance, HNG Float Glass Limited in which the appellant held more than 47% was its extended arm, set-up with the objective of diversifying the float glass & other glass allied items. Similarly I note that Glass Equipment Pvt Ltd was set-up as to pursue vertical integration and pursue the business of manufactures & sale various machines, equipments & spares which are used in the glass industry, Similarly investments were also made in other associate companies, such as Quality Minerals Ltd and Brabourne Commerce Pvt Ltd. Through, holding these shares, the appellant was able to exercise management control over the affairs at these companies.

6.1. This decision is against the proposition of law laid down by the Hon'ble Supreme Court in the case of *Maxopp Investment Ltd. v. CIT (2018) 402 ITR 640* and hence has to be reversed. Nevertheless, the second argument of the assessee that no disallowance can be made under Rule 8D(2)(ii) of the Income Tax Rules, 1962 ('Rules'), where own funds, which are not interest bearing, are more than the investment by applying the proposition of law laid down that, the presumption in such cases is that, interest free funds have been invested in non-interest bearing investments [**HDFC Bank Ltd. v. Deputy Commissioner of Income-tax -2(3), Mumbai [2016] 383 ITR 529 (Bombay)*], [**CIT vs. Rasoi Ltd. (ITA No. 109 of 2016) dt. 15/02/2017*]. The Id. CIT(A) at page 46 fist para of his order, held that the proposition of law in the above referred judgments, are squarely applicable to the assessee's case and as the assessee has own surplus funds which are not interest bearing and which were sufficient to meet the cost of investments, no disallowance can be made under Rule 8D(2)(ii) of the Rules r.w.s. 14A of the Act. The Id. D/R could not controvert this factual findings. Hence we uphold the same and dismiss Ground No. 10 of the revenue.

7. Ground No. 11 is on the issue of computation of deduction u/s 80IC of the Act.

8. The ld. CIT(A) has followed the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Meghalaya Steels Ltd. (384 ITR 217)* and directed the Assessing Officer to include the subsidiary received on sales tax as profits for the purpose of computation of deduction u/s 80IC of the Act. Though, the ld. CIT D/R controverted the findings of the ld. CIT(A), we are of the considered opinion that the judgment of the Hon'ble Supreme Court referred above applies on all fours to the facts of the case and hence we uphold the findings of the ld. CIT() on this issue.

9. Coming to the issue of write back of expenses, we agree with the finding of the ld. CIT(A) that the expenses in question were allowed as a deduction from profit in earlier years and when the same are written back, they should be included in the profits eligible for deduction u/s 80IC of the Act. Thus, this ground of the revenue is dismissed.

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

Kolkata, the 31st day of December, 2019.

Sd/-
[S.S. Godara]
Judicial Member
Dated : 31.12.2019
{SC SPS}

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

**1. M/s. Hindusthan National Glass & Industries
2, Red Cross Place
Kolkata - 700 001**

2. Asstt. Commissioner of Income Tax, Circle-5(2), Kolkata

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches