

आयकर अपीलिय अधिकरण
मुंबई पीठ "के"
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एस. रिफौर रहमान, लेखा सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
आअसं. 2750/मुं/2014 (नि.व.2008-09)
ITA NO.2750/MUM/2014 (A.Y.2008-09)

Associated Capsules Pvt. Ltd.
1001, Dalamal House, 10th Floor,
Nariman Point, Mumbai – 400 021
PAN: AAACA4769K

..... अपीलार्थी /Appellant

Vs.

The Asstt. CIT, Central Circle -42,
Aaykar Bhavan, M.K.Road,
Mumbai- 400 020

..... प्रतिवादी/ Respondent

अपीलार्थी द्वारा/ Appellant by : Shri J.D. Mistry, Sr. Advocate with
Shri. Madhur Agarwal, Advocate
प्रतिवादी द्वारा/Respondent by : Shri Akhtar H. Ansari,
सुनवाई की तिथि/ Date of hearing : 22/07/2020
घोषणा की तिथि/ Date of pronouncement : 07/09/2020

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), Mumbai-38 (in short 'the CIT (A)') dated 31/01/2014 for the assessment year 2008-09.

2. The assessee in appeal has primarily raised three issues. The concise grounds of appeal filed by the assessee are as under:-

“1.0 Ground No.1

On the facts and circumstances of the case and in law, the Learned CIT(A) erred in upholding the action of the Asstt. Commissioner of Income Tax, Central Circle -42, Mumbai (HAO) in treating the provision of corporate guarantee by the appellant to its AE as an “international transaction”.

2.0 Ground No.2

On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals)-38, Mumbai (“CIT(A)”) erred in holding the rate of guarantee commission at 2.5% as the Arm’s Length Price on the guarantee amount of Rs.15,19,44,000/- without appreciating that the Associate Enterprise has availed the facility to the extent of Rs.2.48 crores.

3.0 Ground No.3

On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals)-38, Mumbai (“CIT(A)”) erred in upholding the order of the Asstt. Commissioner of Income Tax, Central Circle-42, Mumbai (“AO”) in making an addition of Rs.1,66,80,000/- to total income on account of unexplained paintings.”

2. Shri J.D. Mistry, appearing on behalf of the assessee submitted that in ground No.1 of the appeal, the assessee has assailed the findings of Assessing Officer and the CIT(A) in treating the provision of Corporate Guarantee by the assessee for its Associate Enterprise (AE) as International Transaction. The Id. Counsel for the assessee submitted that the Corporate Guarantee offered by the assessee on behalf of its AE is not an International Transaction and hence, no Arms Length Price (ALP) is required to be determined for said transaction. To support his contention, the Id. Counsel for the assessee placed reliance on the following decisions:-

(1) Bharti Airtel Ltd. vs. ACIT, 161 TTJ 428 (Del.)

(2) Micro Ink Ltd. vs. ACIT, 175 TTJ 8 (Ahd.)

(3) Redington (India) Ltd. vs. JCIT, 49 taxamann.com 146 (Chennai)

2.1. The Id. Counsel for the assessee submitted that without prejudice to his primary contention, if at all Corporate Guarantee is treated as an International Transaction, then the adjustment for the same should be restricted to 0.5% of the facility availed by the assessee appellant. The Id. Counsel of the assessee submitted that the total loan sanctioned by the bank in favour of Associated Enterprise (AE) was Rs.15.19 crores for which corporate guarantee was given by the assessee. However, the AE during the relevant period had availed loan facility only to the extent of Rs.2.48 crores. The AE had not taken benefit of the entire sanctioned amount, therefore, the ALP on corporate guarantee should be restricted to the extent facility availed. The Id. Counsel for the assessee pointed that this prayer was made before the CIT (A), however, no findings were given by the first appellate authority.

3. In respect of ground No.3, the Id. Counsel for the assessee narrating the facts submitted, that the assessee is a collector of paintings. The assessee had collection of rare paintings acquired over a long period of time. During the course of search action under section 132 of the Act on 17/4/2007 at the premises of the group companies and the residential premises of promoters certain costly paintings were seized. The assessee had furnished bills, vouchers and various other evidences in the form of magazine reports, etc. to establish that the paintings were acquired/purchased by the assessee either directly from the painters or from the galleries over the period of time. Out of 288 paintings found at the business premises of the assessee 71 paintings amounting to Rs.9,99,20,000/- were seized. The Revenue accepted the evidences furnished by the assessee in respect of majority of the paintings, however, the Assessing Officer was not convinced by the documents furnished by the assessee in respect of paintings (as per annexure to Assessment Order) valued at Rs.1,66,80,000/-. The Id. Counsel of the assessee

asserted that even otherwise the addition is unsustainable as the paintings in question were acquired prior to search block period, therefore, addition qua such paintings cannot be made in search block period. The Id. Counsel for the assessee submitted that similar additions in respect of paintings were made in the case of Ms. Kavita Singh, one of the promoters of the assessee company. The issue travelled to the Tribunal in ITA No. 1242/Mum/2012. The Tribunal vide order dated 08/12/2017 accepted the documentary evidences furnished by the assessee during search and assessment stage and deleted the addition. The case of the assessee is on same pedestal, therefore, the additions in the case of assessee deserves to be deleted on same analogy.

4. Per contra, Shri Akhtar H. Ansari, representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submitted that the Hon'ble Bombay High Court in the case CIT vs. Everest Kento Cylinders Ltd. reported as 378 ITR 57, has held that Corporate Guarantee to an overseas AE is an international transaction.

4.1. In respect of ground no.3 assailing addition on account of unexplained paintings, the Id. Departmental Representative submitted that the assessee has failed to bring on record cogent evidences to support date of purchase, cost of painting and from whom paintings were purchased. The documents produced by the assessee before the Assessing Officer and the CIT (A) were not genuine. The assessee failed to furnish confirmation from the painters from whom the paintings were allegedly purchased. The assessee neither furnished PAN details nor the addresses of the painters. The vouchers on which the assessee has placed heavy reliance are self-serving documents and hence, no reliance can be placed on self-generated evidence.

5. Controverting the arguments advanced by Id. Departmental Representative, the Id. Counsel for the assessee asserted that the details of the payments for purchase of paintings were provided to the Assessing Officer/CIT (A). Since some of the paintings were purchased long time back, the assessee could not trace the painters. The Id. Counsel for the assessee referring to Annexure I, II and III at pages 14 to 91 of the paper book, as a sample check explained from the documents on record the details of paintings seized, proof of payment for the said paintings, source of paintings and the date of purchase.

Without prejudice to the initial argument, the Id. Counsel for the assessee submitted that the additions have been made by the Revenue by adopting current value of the paintings. The assessee acquired these paintings over a period of time and were part of assessee's collection garnered gradually. The value of some rare paintings increased as the time elapsed. Therefore, for the purpose of addition, the purchase value should be considered and not the current value.

6. We have heard the submissions made by rival sides and have perused orders of the authorities below. We have also examined the documents placed on record by the assessee in the form of paper book and the decisions on which reliance has been placed.

7. The assessee in ground No.1 of the appeal has assailed addition made on account of Corporate Guarantee facility provided by the assessee for its overseas AE. The assessee is engaged in the business of manufacturing empty hard gelatine capsules. The assessee provided Corporate Guarantee of 2.4 million Euros (Equivalent to Rs.15,19,44,000/-) to its Croatian AE. The assessee did not make any adjustment on account of Corporate Guarantee facility provided to its AE. The Transfer Pricing Officer (TPO) held that the Corporate Guarantee is an international

transaction. The TPO applied CUP to bench mark the international transaction holding guarantee commission @3% and made adjustment of Rs.20,89,230/- . The assessee carried the issue in appeal before the CIT(A). The first appellate authority upheld the findings of TPO in treating corporate guarantee as international transactions. However, the rate of commission was reduced from 3% to 2.5%. Against the addition confirmed, the assessee is in appeal.

8. The Id. Counsel for the assessee in support of his submissions that corporate guarantee is not an international transaction has placed reliance on Tribunal decisions. The contentions raised by Id.Counsel are unsustainable in the light of decision rendered by Hon'ble Jurisdictional High Court in the case of Everest Kento Cylinders Ltd. (supra). Thus, we hold Corporate Guarantee facility provided to overseas AE by the assessee is an international transaction. In so far as the rate of commission is concerned, the Hon'ble High Court in the aforementioned decision has upheld corporate guarantee commission at 0.5%. The corporate guarantee rate in the present case is accordingly restricted to 0.5%. The ground No.1 of the appeal is partly allowed in the terms aforesaid.

9. In ground No.2 of the appeal, the assessee has assailed that the ALP of the corporate guarantee commission should be restricted to the extent of facility availed by assessee's A.E. The Id. Counsel for the assessee has pointed that as against the facility of Rs.15.19 crores, the AE of assessee has availed benefit to the extent of Rs.2.48 crores only. We find merit in the submissions made by the Id. Counsel. The Tribunal in catena of decisions has held that Bank Guarantee and Corporate Guarantee are at variance. In the case of Bank Guarantee financial and capital assets of the entity are taken as security by the Bank to cover the financial risk. Thus, the assets of the entity are blocked to meet the obligation in the case of default As a

consideration for extending guarantee facility, the Bank charges commission on the entire guarantee facility extended. Whereas, in the case of Corporate Guarantee there is no commitment of financial or capital assets of the entity. The guarantee is issued without any security or underlying asset. Corporate guarantee is extended by one corporate entity to a third party for or on behalf of its subsidiary/group entity/associated enterprise. It is in the nature of contingent liability. Keeping in view, the nature and extent of exposure and liability of guarantor in the case of corporate guarantee, it would be justified if guarantee commission is charged to the extent of actual exposure of facility availed instead of gross amount of facility extended. Similar view has been taken by the Tribunal in the case of M/s BS Limited vs. Asst. Commissioner of Income Tax reported as 94 taxmann.com 346 (Hyd.). The relevant extract of the order is reproduced herein below:

“14.2 Further, Id. AR submitted that the assessee has extended the corporate guarantee to the AE whereas AE has not utilized the full financial facility during the year, hence, the quantum cannot be determined in full value of corporate guarantee. We are in agreement with the assessee that corporate guarantee is contingent liability, relevant consequence depends upon future event. However, the quantum of exposure should be on the basis of actual exposure. In this case, it is not clear from the document submitted before us the actual exposure. Therefore, we find it appropriate to remit this issue back to the file of TPO/AO to determine the actual exposure of contingent liability for this AY and apply the rate of 0.53% as per the ratio of Glenmark Pharmaceuticals Ltd. (supra) on the actual contingent liability.”

In view of our above discussion, the ground No. 2 is allowed in principle. In the instant case, the assessee has purportedly availed facility of Rs.2.48 crores as against corporate guarantee of Rs.15.19 crores. For the purpose of determination of corporate guarantee commission in line with our observations and for the purpose to ascertain/verify the extent of corporate guarantee exposure, we deem it appropriate

to restore this issue to the Assessing Officer. The ground No. 2 of the appeal is allowed for statistical purpose in the above said terms.

10. The third ground of appeal is in respect of addition of Rs.1,66,80,000/- on account of unexplained paintings found during search operation at the premises of the assessee. There were in total 288 paintings which were inventoried having aggregate value of Rs. 19,39,92,950/-. The assessee was asked to explain source of purchase of the said paintings. Out of 288 paintings, 71 paintings having aggregate value of Rs.9,99,20,000/- were put under constructive seizure. The assessee furnished evidences in the form of bills, vouchers, magazines, etc. to show the purchase cost of the paintings, as well as the date of purchase of paintings. The Assessing Officer did not accept the explanation and the documents furnished by the assessee in respect of some of the paintings. The primary reasons for rejection of evidences by the Assessing Officer were:-

- (i) The description of the paintings mentioned on the vouchers do not match;
- (ii) Kutcha Bills furnished by the assessee do not have the description of the paintings;
- (iii) Vouchers furnished are without descriptions of the painters/artists;
- (iv) Evidence furnished in the form of old Magazines are not verifiable and therefore, difficult to ascertain genuineness.

The Assessing Officer thus, made addition of Rs.1,66,80,000/- in respect of 40 paintings (as per annexure to the assessment order) as unexplained investment. In first appeal, the CIT(A),, unconvinced with the explanations and contentions made on behalf of the assessee, confirmed the addition in toto.

11. The Id. Counsel for the assessee reiterated the submissions made before the authorities below. The Id. Counsel for the assessee was asked to demonstrate from

the documents on record that the descriptions of the paintings found at the premises of the assessee tally with the descriptions mentioned in the documents furnished. As a sample, the Id. Counsel explained that the first painting mentioned in the annexure to the assessment order is "Woman with Pots" by B. Prabha. The Id. Counsel referred to pages 16 and 110 to 116 of the paper book. At page 16 the details of the painting are given along with its image, location and the area where the painting is placed. In the description of the painting the name of artist is mentioned along with the medium of painting i.e. Oil on Canvass and the size of the painting i.e. 39 x 93 inches. At pages 110 to 116 is an article from magazine 'Inside Outside' October/November 1991 edition. The article titled 'Style Encapsulated' is on the collection of paintings by Associated Capsules Group. At page 111 is a photograph wherein the painting "Woman with Pots" can be seen placed at office reception. The edition of magazine in which the article was published indicates that the painting was purchased by the assessee prior to October/November, 1991. Since the painting is old and was not acquired during the block period, the addition cannot be made in respect of said painting. The reason given by Assessing Officer for rejecting the evidence furnished by the assessee is that it is difficult to ascertain that it is the same painting as shown in the old magazine. The addition has been made by the Assessing Officer purely on surmises and conjectures.

12. The next paintings taken as a test sample by the Id. Counsel for the assessee is at serial no.2 and 3 of the annexure to Assessment order i.e. paintings titled "2 Hands (Bronze)" and "2 Hands (Black)" by Shamshad. The Id. Counsel for the assessee referring to pages 19, 20 and 21 of the Paper Book submitted that the paintings were purchased from Lawrence Art Gallery on 19/12/1997. The invoice of the painting is at page 19 of the Paper Book. At pages 20 and 21 are the description of paintings

along with the image as well as the location of the office where paintings are placed. The Assessing Officer has rejected the documents furnished by the assessee on the ground that the description of the paintings does not match with the bill dated 19/12/97. A perusal of the invoice at page 19 of the paper book would show that the name of Artist 'Shamshad' is mentioned against 2 paintings. Both the paintings bear the signature of the artist on reverse. The Id. Counsel for the assessee pointed that in so far as title of the paintings is concerned, it may differ as the titles were given by the assessee. As regards size, medium and name of the Artist, there can be no dispute. The Id. Counsel for the assessee submitted that likewise for other paintings in respect of which additions have been made, evidences were furnished by the assessee. The Assessing Officer rejected the evidences merely on presumptions, without assigning any valid and sustainable reasons.

13. We have examined the evidences furnished by the assessee to substantiate genuineness of purchase of the paintings. We find that for similar reasons additions were made in the hands of Ms. Kavita Singh and another group concern M/s. ACG Arts and Properties Pvt. Ltd. in the assessment year 2008-09. The Co-ordinate Bench of the Tribunal in the case of Ms. Kavita Singh in ITA No.1242/Mum/2012 decided on 08/12/2017 deleted the addition qua unexplained investments in paintings. Since the number of paintings involved in the aforesaid appeal were comparatively less, the Co-ordinate Bench took pains to examine evidence in each of the paintings.

In the case of M/s. ACG Arts and Properties Pvt. Ltd. vs. DCIT, in ITA No.2749/Mum/2014 decided on 29/01/2020, the Tribunal restored the issue back to the file of Assessing Officer to decide the issue in the light of decision rendered in the case of Ms. Kavita Singh. The relevant extract of the order reads as under:-

“4. Upon due consideration, we find that the issue of addition on account of unexplained paintings, under similar factual matrix, was subject matter of appeal before this very bench in the case of Ms. Kavita Singh vide ITA No. 1242/Mum/2012 order dated 08/12/2017. In the said order, the bench at paras 6 to 9, appreciated the various documentary evidences furnished by the assessee in support of acquisition of paintings and adjudicated the matter substantially in assessee’s favor in the light of these evidences. Similar evidences are stated to have been placed before us in the paper-book and the assessee has drawn analogy by tabulating the same in the following manner: -

Sr.No.	Annexure	Evidence	No. of Paintings	Addition by A.O. (in Rs.)	ITAT order of Mrs. Kavita Singh-ITA No.1242/Mum/2012 dated 8 October, 2017 similar issue
		Prior to Block period (Annexure -I to III)			
1	Annexure-I	Magazines	11	1,20,00,000	
2	Annexure-II	Photographs	3	60,50,000	
3	Annexure-III	Vouchers, Bills	11	88,50,000	Page 6 &7, Para-7
4	Annexure IV	Panchnama	11	1,42,00,000	Page-6, Para-7
5	Annexure V	Low Value	5	2,55,000	Page-8, Para-9
6	Annexure VI	Vouchers, Bills (during the block period)	4	2,79,00,000	Page-8, Para-9

Since facts as well as circumstances of additions are pari-materia the same, we restore the matter back to the file of Ld. AO and direct him to re-appreciate the evidences furnished by the assessee in the light of adjudication rendered by us in the case of Ms. Kavita Singh (supra) with a direction to the assessee to substantiate his stand, in this regard. The Ld. CIT (A) has observed that many of the paintings were not reflected as part of stock-in-trade of the assessee. However, we find that the assessee has been saddled with addition on account of unexplained paintings on aggregate basis for various group entities and therefore, in such a case, few of the paintings would not be reflecting in the stock-in trade held by the assessee. With these observations, the matter stand remitted back to the file of Ld. AO as aforesaid.”

14. We have examined the evidence on record in respect of only three paintings, as test check. The Assessing Officer has failed to rebut the evidences furnished by the assessee. The Assessing Officer has rejected the evidences furnished by the assessee by making generic remarks. We find merit in the contentions of Id. Counsel, these

paintings were acquired by the assessee in assessment years much prior to the date of search. Hence, addition in respect of said paintings cannot be made in search proceedings. There are other 37 paintings in respect of which documents/evidences on record are required to be examined. The factual matrix, manner of addition and nature of evidence in the present case is similar to the case of Ms. Kavita Singh (supra). Taking into consideration entirety of facts, we deem it appropriate to restore this issue to the file of Assessing Officer with a direction to decide the issue in line with the Tribunal decision in the case of Ms. Kavita Singh (supra). The Assessing Officer while re-appreciating the evidences shall grant reasonable opportunity of hearing to the assessee, in accordance with law. Ergo, ground No.3 of the appeal is allowed for statistical purpose.

15. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on Monday, the 7th day of September, 2020.

Sd/-

(S.RIFAUH RAHMAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 07/09/2020

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai