IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.	A.Y.	Appellant	Respondent
1719/Hyd/16	2012-13	NCC Limited, Hyderabad [PAN: AAACN7335C]	Asst.Commissioner of Income Tax, Central Circle-1(1), Hyderabad
435/Hyd/18	2013-14		
2154/Hyd/18	2014-15		Asst.Commissioner of Income Tax, Circle-16(1), Hyderabad

For Assessee : Shri C.S.Subramanyam, AR
For Revenue : Shri Rajendra Kumar, CIT-DR

Date of Hearing : 16-07-2021
Date of Pronouncement : 19-08-2021

O R D E R

PER S.S.GODARA, J.M. :

These three assessee's appeals for AYs.2012-13, 2013-14 & 2014-15 arise against the ACIT, Central Circle-1(1) & Circle-16(1), Hyderabad's assessment(s) dated 28-11-2016, framed in furtherance to the Dispute Resolution Panel ('DRP')-1, Bengaluru's directions dt.31-10-2016 (AY.2012-13) and CIT(A)-4, Hyderabad's separate orders dt.07-12-2017 passed in case No.0059/2017-18/ACIT,CC-1(1)/CIT(A)-4/Hyd/17-18 for AY.2013-14 and dt.20-07-2018 in case No.10185/2017-18/ACIT,Cir.16(1)/CIT(A)-4/Hyd/18-19 for AY.2014-15 involving proceedings u/s.143(3) r.w.s.144C in first and foremost and u/s.143(3) r.w.s.92CA(3) of the Income Tax Act,

1961 [in short, 'the Act'] in latter twin assessment years; respectively.

Heard both the parties. Case files perused.

2. It transpires at the outset that ITA No.2154/Hyd/2018 (AY.2014-15) suffers from 24 days delay in filing, stated to be attributable to the reason(s) beyond its control as per condonation petition/affidavit.

No rebuttal has come from the departmental side. The impugned delay is condoned therefore.

3. We next notice that the assessee's identical sole substantive grievance as per the main as well as additional grounds in all these appeals challenges correctness of learned lower authorities' action making Arm's Length Price (ALP) adjustment(s) of Rs.26,76,17,306/-, Rs.18,77,00,000/- and Rs.21,35,60,000/-; assessment year-wise, respectively regarding its corporate guarantee(s).

4. Learned counsel vehemently contended during the course of hearing that the authorities below have erred in law and on facts in making the impugned ALP adjustments involving varying sums of money. He sought to buttress the point that such a corporate guarantee is purely a shareholder activity not forming any international transaction u/s.92B of the Act so as to trigger Chapter-X mechanism in motion. He also invited our attention to the legislative amendment vide Finance Act, w.e.f.01-04-2002 and pinpointed that the first and foremost assessment year herein is AY.2012-13 whereas the foregoing Explanation is only prospectively applicable from AY.2013-14 onwards for latter twin assessment years.

Learned counsel has also filed written submissions to the following effect:

"For all the above three years the common ground before the Hon'ble ITAT is, addition on account of Transfer Pricing adjustment towards Corporate Guarantee fee. NCC Ltd, the parent provided Corporate Guarantee to the bankers of the overseas subsidiary companies. These Corporate Guarantees enabled subsidiary companies to raise loan funds to meet the working capital requirements of the subsidiaries in the respective countries.

The TPO for all the assessment years took objection to the provision of Corporate Guarantee to the overseas subsidiaries without a fee. A TP adjustment of 0.53% of the Corporate Guarantees provided to the subsidiaries was added to the total income of NCC Ltd. (For AY 2012-13 a higher addition was made which was subsequently corrected by the learned DRP and brought it to 0.53%)

Prayer

The TP addition is prayed for deletion for all the above three assessment years on the two following grounds.

1. *Provision of Corporate Guarantee is not an international transaction U/s.92B, prior to and after the amendment to Sec.92B by the Finance Act 2012.*
2. *The activity of providing corporate guarantee to the subsidiary by the parent company is a shareholders activity which is to be excluded from the purview of the transfer pricing regulations.*

International transaction

The above adjustment arising on account of provision of Corporate Guarantee to the overseas subsidiaries was subject matter of number of appeals decided by the Hon'ble Tribunal, The Corporate Guarantee provided by the NCC Ltd to the bankers of the subsidiaries is a kind of a contingent assurance to the bankers that in case the subsidiary defaults to honor the obligations, the parent shalt step into the shoes of subsidiary and honor the obligations towards the bank. This kind of parent company guarantee is given to enable the subsidiary to raise funds to organise its business. As per explanation C to Sec.92B a transaction of Corporate Guarantee is considered as an international transaction. The operating portion of sub-section 1 requires that such transactions should have bearing on the profit and loss account of the assessee. NCC Ltd has not charged any fee on account of this transaction to its subsidiary nor NCC Ltd has incurred any expenditure towards issuing such letter of guarantee. By providing such guarantee the subsidiary can enjoy the loan facilities extended by the bank. As the condition precedent to qualify as an

international transaction of having impact on the profit and loss account failed, the provision of corporate guarantee does not fit into the definition of international transaction before the amendment to Sec.92B by Finance Act 2012 or after such amendment. Hence, adjustment for all the three years in dispute is unjust and should be deleted.

Shareholders activity

The parent company NCC Ltd had made a contribution towards the capital of overseas subsidiaries. As the shareholder of the overseas subsidiaries of NCC Ltd is also obliged to provide necessary capital to carryon the business activities by the subsidiary. NCC Ltd as the shareholder should either contribute or enable a line of credit being available to the overseas subsidiaries. This kind of activity is recognised as shareholders activity towards its subsidiaries because it is considered necessary solely because of the ownership interest. The OECD transfer pricing guidelines recognises that an activity in the nature of shareholders activity would not justify a charge to the recepient companies. Accordingly a shareholder activity is taken out of the ambit of group services.

If the parent company fails to organise enough loan funds to the overseas subsidiaries, it has to contribute capital as a shareholder to the overseas entity, to provide adequate resources, to enable the overseas subsidiary to carryon the business. Hence, the nature of activity of provision of Corporate Guarantee to the overseas subsidiary is a shareholder activity.

We pray the Hon'ble Tribunal to take the above submission on record and kindly delete the addition on account of transfer pricing adjustment."

5. We find no merit in the assessee's foregoing contentions. There is no dispute that this tribunal's various earlier co-ordinate bench decisions (2015) 63 taxmann.com 353 (Ahd-trib), Micro Ink Ltd Vs. ACIT, Bharti Airtel Ltd., Vs. Addl.CIT, (2014) 63 SOT 113 (Delhi) and (2017) 86 taxmann.com 254 (Hyd) Bartronics India Ltd, Vs. DCIT had indeed held a corporate guarantee to be purely a shareholder activity than forming an international transaction u/s.92B of the Act. This legal proposition is no more *res integra* in view of the PCIT Vs. M/s.Redington (India) Limited, TCA Nos.590 & 591 of 2019,

dt.10-12-2020 (Madras) taking note of not only the foregoing legislative positions (supra) but also holding that the same carried retrospective effect as well. Their lordships' detailed discussion to this effect reads as under:

"67.The next issue is with regard to the Corporate Guarantee and Bank Guarantee.

68.From the Annual Report of the assessee, it was seen that the assessee had issued guarantees on behalf of its subsidiaries to the tune of Rs.464.36 crores and on behalf of others, to the tune of Rs.3.42 crores. The assessee was called to explain the same. The assessee stated that they had not issued any fresh guarantee during the Assessment Year 2009-10 and the guarantee is outstanding, is purely on account of the currency transition adjustment on restatement of guarantees outstanding at the closing rates prevailing on 31st March 2009 for disclosure in financial statement in compliance with the Accounting Standards. Further, the assessee stated that the outstanding guarantee issued by the assessee as on 31.03.2009 represents guarantee issued on behalf of the overseas subsidiaries in earlier years. Further, they stated that during the course of assessment proceedings in the relevant assessment years, the TPO made addition to the Corporate Guarantee issued during those years by adopting the bench mark rate based on the available internal comparable uncontrolled price charged by the bank at 0.85%. The assessee also issued Corporate Guarantee in favour of M/s.Parampara Wedding Cads and M/s. Baskar Digital Press. The TPO after taking note of the amended Section 92B, which was introduced with retrospective effect from 01.04.2002, examined the factual aspect and pointed out that though the assessee stated that they have not issued any fresh guarantee during the Assessment Year 2009-10, the guarantees were live and were not closed as on 31.03.2009 and the liability continued on the assessee as on 31.03.2009. Noting that providing such guarantee is one of the financial service rendered by the assessee for which it has to be remunerated appropriately and that concerned parties in whose favour these guarantees were extended, where Associated Enterprises of the assessee and the transactions were largely influenced by related parties, the Associated Enterprises benefited and consequently, the income would accrue only to such non-resident and to that extent, shifting of tax base from the country is bound to happen in such transaction and the assessee should have been remunerated appropriately. The Corporate Guarantee was to the tune of Rs.5574.13 lakhs and Bank Guarantee to the tune of Rs.40862.34 lakhs. Further, the TPO observed that there is no time period for expiry of the guarantee. Consequently, it will demand more

commission charges than the commission charged by the Banks. That apart, the assessee had taken maximum risk in providing Bank Guarantee to their subsidiaries and the entire credit risk is owned by the assessee, the Indian Company and it has to be reimbursed at maximum percentage of fees. Further, the TPO noted as to the manner in which the Bank's charge commission on guarantees extended and observed that the Bank will insist upon cash deposits / guarantee deposits / asset mortgage etc., to extend guarantees on behalf of their clients. Further, it was pointed out that if a situation arises that the Bank Guarantee has to be invoked, when the Associate Enterprise is not in good financial position, obviously, the assessee is at risk and they claim that there is no risk in providing guarantees cannot be accepted. The TPO drew a comparison between the Guarantees issued by the Bank and Guarantees issued by the assessee on behalf of the Associated Enterprise to the Bank. It has been recorded that the Associated Enterprises of the assessee have not provided any security to the assessee. In the agreement / contract between the Associated Enterprises and the assessee, no condition has been imposed on the Associated Enterprises to pay the amount to the assessee and even in some agreements if it is mentioned, in the event of the Associated Enterprises financially becoming weak, the risk undertaken by the assessee becomes greater. Further, invoking a guarantee provided to an Associated Enterprise is very difficult as it depends on the financial condition of the Associated Enterprise and the law governing such transactions in that country and the assessee is bound by the provisions of FEMA and RBI guidelines. Therefore, the TPO concluded that the Bank commission charges cannot be compared for the commission charges that has been payable to the assessee by the Associated Enterprises and it is a clear financial services rendered by the assessee to their Associated Enterprise, which has to be compensated by proper commission charges. Accordingly, the TPO held 2% shall be charged as commission and proposed an upward adjustment to the income of the assessee to the tune of Rs.817.25 lakhs. In respect of the guarantees given to unrelated parties, the TPO held that 2% should be charged as guarantee commission and proposed an upward adjustment of Rs.111.48 lakhs to the income of the assessee. The DRP after hearing the assessee, held that the TPO has not given cogent reasons for taking a different stand than the stand taken by the Department in the earlier years as the same guarantee is continuing during the year under consideration and therefore, there cannot be a different bench marking from that of the previous year. Accordingly, the DRP directed the TPO to adopt the same rate of guarantee commission as was adopted by the TPO in the preceding year.

69.The directions issued by the DRP were given effect to by the Assessing Officer vide Assessment Order dated 17.01.2014. The Tribunal held that the TP addition made against the Corporate and Bank Guarantee is not sustainable in law. This conclusion is by observing that the assessee has provided Corporate and Bank Guarantees for the overall interest of its business. It referred to the decision of the Delhi Tribunal in the case of Bharti Airtel Ltd., wherein it is held that Corporate Guarantee does not involve any cost to the assessee and therefore, it is not an international transaction even under the definition of the said term as amended by the Finance Act, 2012. The Tribunal is a final authority to render findings on fact. The Tribunal failed to give any reason as to how the decision in Bharti Airtel Limited would apply to the assessee's case. Furthermore, there was no record placed before the Tribunal by the assessee that they have not incurred any cost for providing Bank Guarantee. As observed earlier, the TPO has compared the nature of documentation executed by the assessee in favour of his Associated Enterprise to come to the factual conclusion that it is a financial service. This finding of fact has not been interfered by the DRP, but the DRP was of the view that the same treatment, which was given in the previous Assessment Year should be extended for the Assessment Year under consideration also and there is no reason given by the TPO for taking a divergent view. The finding that the very same transaction for the previous Assessment Year was subject matter of TP adjustment, has not been disputed by the Tribunal rather not even dealt with by the Tribunal. Therefore, the finding rendered by the Tribunal is utterly perverse.

70.The argument of the learned Senior counsel appearing for the assessee is that prior to the amendment brought about in Section 92B by Finance Act 2012, the Tribunal had decided that furnishing of a guarantee by an assessee was not an international transaction as it did not fall within any of the limbs of Section 92B. It is submitted that to get over the judicial pronouncement, the explanation was inserted. The argument is that Clause (c) of the Explanation supports the case of the assessee inasmuch as the Explanation makes it clear that giving of a Corporate Guarantee is not a service. Without prejudice to the said contention, it is submitted that only Corporate Guarantee is given by the assessee, which are in the nature of lending are covered under clause (c) of Explanation 1 to Section 92B. Further, it is submitted that the nature of transactions covered by Clause (e) specifically include even those transactions which may not have a bearing on the profit, income, losses or assets of such enterprises at the time of transaction are covered if they have such a bearing at any future date. It is argued that the language used in the Explanation makes it clear that in so far as the transactions that fall within the main part of Section 92B are concerned, such transactions must have

a bearing on profit, income, losses or assets of an assessee in the year in which the transaction is effected. In the assessee's case, the Corporate Guarantees represent a contingent liability and lay dormant and have no bearing on the current year's profits, income or losses of an assessee and Corporate Guarantee are not covered within the definition of international transaction. It is submitted that applying doctrine of fairnessas explained by the Hon'ble Supreme Court of India in the case Vatika Township Private Limited, the explanation ought to be read as prospective in its application and retrospective in its effect such that it will also cover within its ambit guarantees issued prior to the introduction of the explanation by Finance Act 2012.

71.We find from the grounds of appeal filed by the assessee before the Tribunal, no ground was raised as regards the argument that the explanation added by Finance Act 2012, is to be construed as prospective in its application. Furthermore, the Tribunal has also not recorded in its order, more particularly, from Paragraph 92 that the assessee had argued on the issue regarding prospectivity / retrospectivity. Further, the assessee has not challenged the validity of the Explanation nor its applicability with retrospective effect. That apart, even before the DRP, such contention was not raised. The Hon'ble Supreme Court in Gold Coin Health Food Private Limited, while deciding the issue whether an amendment was clarificatory or substantive in nature or whether it will have retrospective effect held as follows:

14. The presumption against retrospective operation is not applicable to declaratory statutes In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended …….An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a

retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

72.A new Enactment or an Amendment meant to explain the earlier Act has to be considered retrospective. The explanation inserted in Section 92B by Finance Act 2012 with retrospective effect from 01.04.2002 commences with the sentence For the removal of doubts, it is hereby clarified that –

73.An Amendment made with the object of removal of doubts and to clarify, undoubtedly has to be read to be retrospective and Courts are bound to give effect to such retrospective legislation.

74.The learned Senior Standing counsel for the Revenue referred to the decision in Co-operative Company Limited vs. Commissioner of Trade Tax in Civil No.2124 of 2007 dated 24.04.2007, wherein it was held that when an amendment is brought into force from a particular date, no retrospective operation thereof can be contemplated prior thereto. The explanation in Section 92B specifically has been given retrospective effect and it is clarificatory in nature and for the purpose of removal of doubts. This issue was considered by this Court in the case of Sudexo Food Solutions India Private Ltd.

75.The concept of Bank Guarantees and Corporate Guarantees was explained in the decision of the Hyderabad Tribunal in the case of Prolifies Corporation Limited. In the said case, the Revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is an additional guarantee, provided by the Parent company. It does not involve any cost of risk to the shareholders. Further, the retrospective amendment of Section 92B does not enlarge the scope of the term international transaction to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfill the liability and therefore, there is always an inherent risk in providing guarantees and that may be a reason that Finance provider insist on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that this position indicates that provision of guarantee always involves risk and there is a service provided to the Associate Enterprise in increasing its creditworthiness in obtaining loans in the

market, be from Financial institutions or from others. There may not be immediate charge on P & L account, but inherent risk cannot be ruled out in providing guarantees. Ultimately, the Tribunal upheld the adjustments made on guarantee commissions both on the guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise.

76.In the light of the above decisions, we hold that the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and restore the order passed by the DRP".

5.1. We adopt the foregoing detailed discussion *Mutatis Mutandis* and hold that the learned lower authorities have rightly treated the assessee's corporate guarantee(s) in all the three impugned assessment years as an international transaction falling u/s.92B of the Act.

We therefore decline the assessee's multifaceted submission in light of its main as well as additional ground touching upon the impugned issue.

6. Learned counsel lastly submitted very fairly that the assessee no more wishes to raise any other substantive ground regarding quantification of the impugned corporate guarantee adjustment. Rejected accordingly.

No other argument has been raised before us.

7. These three assessee's appeals are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 19th August, 2021

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 19-08-2021

TNMM

Copy to :

1.NCC Limited, Survey No.64, NCC House, Madhapur, Hyderabad.

2.Assistant Commissioner of Income Tax, Central Circle-1(1), Hyderabad.

3.Assistant Commissioner of Income Tax, Circle-16(1), Hyderabad.

4.CIT(Appeals)-4, Hyderabad.

5.Pr.CIT-4, Hyderabad.

6.Dispute Resolution Panel (DRP), Bengaluru.

7.Director of Income Tax (IT & TP), Hyderabad.

8.Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.

9.D.R. ITAT, Hyderabad.

10.Guard File.