

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

**[Coram: Pramod Kumar (Vice President),
and Ravish Sood (Judicial Member)]**

ITA No. 7183/Mum/19
Assessment year: 2015-16

Dorf Ketel Chemicals India Pvt LtdAppellant
*#3, Dorf Ketel Towers, Ramchandra Lane,
Kanchpada, Malad West, Mumbai 400 064
[PAN: AAACD3819P]*

Vs

Assistant Commissioner of Income Tax
Central Circle 8(2), MumbaiRespondent

Appearances by

Nirmala Solanki *for the appellant*
Anand Mohan *for the respondent*

Date of concluding the hearing : June 2, 2021
Date of pronouncing the order : September 1, 2021

O R D E R

Per Pramod Kumar, VP:

1. This appeal, filed by the assessee, is directed against the order dated 31st October 2018 passed by the Assessing Officer, under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2015-16.

2. Grievances raised by the appellant are as follows:

Ground 1

On the facts and circumstances of the case and in law, the learned AO erred in referring the "Limited Scrutiny" case of Appellant to the Transfer Pricing Officer travelling beyond the scope of enquiry in limited scrutiny case selected under CASS, as addition made by the Learned AO on account of corporate guarantee commission of Rs.74,85,211/- which is an International Transaction, was not the reason for selection of limited scrutiny, Thus, assessment framed by the Learned AO is Invalid and void, as it is beyond the jurisdiction.

Ground 2

Without Prejudice to the above, the Learned AO as well as DRP grossly erred in ignoring the plea of the Appellant that principle of natural justice was not followed and no opportunity to present its case before the Transfer Pricing Officer (TPO) for benchmarking rate adopted by TPO at 1.16% as against 0.5% of Corporate Guarantee Commission charged by the Appellant to its Associate Enterprises (AEs).

Ground 3

Without Prejudice to the above, the Learned AO, DRP as well as TPO grossly erred in making/directing transfer pricing addition/adjustment u/s 92CA(4) of the Act of Rs.74,85,211/- in respect of corporate guarantee provided by the Appellant to the Bank as co-guarantor on behalf of its AEs.

Ground 4

Without Prejudice to the above, the learned AO, DRP as well as TPO grossly erred determining the Arm's Length Price at R5.1,36,41,138/- adopting rate at 1.16% in respect of corporate guarantee commission as against Rs.61,55,927/- charged at 0.5% by the Appellant to its AEs.

Ground 5

Without Prejudice to the above, the Learned AO, DRP as well as TPO grossly erred on facts and in law in ignoring the fact that Appellant has commercial and economic interest in its AEs, also the fact that the corporate guarantees given by the appellant to AE was an activity incidental to its business, in the nature of pure business consideration and an owner-shareholder activity, and hence no transfer pricing adjustment was warranted in this regard.

Grounds 6

Without Prejudice to the above, the Learned AO, DRP as well as TPO grossly erred on facts and in law in not appreciating the fact that the guarantee commission of Rs.74,85,211/- does not accrue nor can be deemed to accrue, nor is received nor can be deemed to have been received, to/by the Appellant from its AEs.

Ground 7

Without Prejudice to the above, the Learned AO, DRP as well as TPO grossly erred on facts and in law in not appreciating that the granting of corporate guarantee is not an international transaction under the Indian Transfer Pricing Regulations and granting of corporate guarantee to the AE is only an assistance to the AE, which does not cost anything to the appellant and such assistance does not have any bearing on its profits, income, loss or assets and therefore it is outside the ambit of International transaction u/s 92B(1) of the Act.

Ground 8

Without Prejudice to the above, the learned AO, DRP as well as TPO grossly erred on facts and in law in adopting bank guarantee rates obtained from State Bank of India,

Union Bank of India and Citi bank for benchmarking of the guarantee commission, without appreciating the fact that the said data was not available in public domain and is not applicable to the specific facts of the appellant's case. Also TPO erred in taking rates from banks without considering the credit rating of the borrower.

Ground 9

Without Prejudice to the above, the Learned AO, DRP as well as TPO grossly erred on facts and in law in not appreciating fact that a commercial bank issuing bank guarantee was not comparable to a situation against corporate entity issuing guarantee to a bank guaranteeing that if the subsidiary/AE does not repay a loan, the same would be made good by such corporate guarantee.

Ground 10

Without Prejudice to the above, the Learned AO as well as DRP grossly erred on facts and in law in rejecting additional evidence submitted by the Appellant during the course of Proceedings before DRP, substantiating the correct approach for selection of method as 'Interest saving method' for computing ALP for benchmarking Corporate Guarantee Commission as against 'External cup method' followed by TPO for benchmarking corporate guarantee commission charged by Appellant to its AEs.

Ground 11

Without Prejudice to the above, the Learned AO, DRP as well as TPO grossly erred on facts and in law in disregarding the decision of the Supreme Court, Jurisdictional High Court and various decisions of the Tribunals, limiting the guarantee commission adjustment within the range of 0.2% to 0.5%.

Ground 12

The Learned AO erred in initiating penalty u/s 271(I)(c) of the Act on addition made u/s 92CA(4) of the Act of Rs.74,85,211/- for furnishing inaccurate particulars of income.

3. Learned representatives fairly agree, even as learned Departmental Representative rather dutifully relied upon the stand of the authorities below, that the issue is now covered, in favour of the assessee, by Hon'ble jurisdictional High Court's judgment in the case of **CIT Vs Everest Kento Cylinders Ltd [(2015) 58 taxmann.com 152 (Bom)]**, rejected similar comparison of corporate guarantees with bank guarantees and upheld determination of arm's length price at 0.5% by observing as follows:

In the matter of guarantee commission, the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. No doubt these are contracts of guarantee, however, when they are Commercial banks that issue bank guarantees which are treated as the blood of commerce being easily

encashable in the event of default, and if the bank guarantee had to be obtained from Commercial Banks, the higher commission could have been justified. In the present case, it is assessee company that is issuing Corporate Guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and accordingly we are of the view that commission charged cannot be called in question, in the manner TPO has done. In our view the comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company.

4. We see no reasons to take any other view of the matter than the view so taken by Hon'ble jurisdictional High Court. We, therefore, reject the determination of arm's length price by the authorities below and direct the Assessing Officer to adopt 0.5% as an arm's length consideration for the corporate guarantee issued by the assessee in favour of its AE. We have noted that even though the authorities below did take note of the aforesaid judgment of Hon'ble Bombay High Court but justified the rate of 1.16% nevertheless on the basis that there is a downward adjustment of .5% from the average bank guarantee rate of 1.66% but that is not really acceptable inasmuch as once Hon'ble High Court holds that 0.5% consideration charged for issuance of corporate guarantee is reasonable, and there is nothing to show that such a consideration is unreasonable in this case, the same cannot be disturbed. This innovative method of downward adjustment by 0.5% in effect brings back parity with the bank guarantee charges but that is precisely what Their Lordships had unequivocally disapproved. We, therefore, uphold the plea of the assessee, and direct the Assessing Officer to delete the impugned ALP addition of Rs 74,85,211. The assessee gets the relief accordingly.

5. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 01st day of September, 2021.

Sd/-
Ravish Sood
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 01st day of September, 2021

Copies to: (1) The appellant (2) The respondent
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registra/Sr.PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai