IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI J BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President), and
Amarjit Singh (Judicial Member)]

ITA No. 847/Mum/2016
Assessment year: 2011-12

Siro Clinpharm Pvt Ltd **…….……Appellant**
63, Lady Ratan Tata Medical and Research Centre
M K Marg, Cooperage, Mumbai 400 021
[PAN: AAECS8588A]

Vs.

Income Tax Officer
Ward 3(2)(2), Mumbai **……Respondent**

Appearances by
P J Pardiwala, Senior Advocate, *along with*
Madhur Agarwal and Jas Sanghavi *for the appellant*
Bharat Andhale *for the respondent*

Date of concluding the hearing	:	June	10, 2021
Date of pronouncement of the order	:	September	09, 2021

O R D E R

Per Pramod Kumar VP:

1. This appeal, filed by the assessee, is directed against the order dated 9th March, 2015 passed by the Assessing Officer under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), for the assessment year 2010-11.

2. This appeal raises an important question regarding, impact of judgments of Hon'ble non-jurisdictional High Courts in a situation in which these decisions canvass a view contrary to what has been decided by a coordinate bench of this Tribunal, in assessee's own case. Of course, we are only dealing with a situation in which we do not have the benefit of guidance by our Hon'ble jurisdictional High Court or Hon'ble Supreme Court, because, to reiterate the obvious, when we have the benefit of such a guidance, all we do is to humbly bow to the higher wisdom of the courts higher in the judicial hierarchy.

3. The backdrop in which this issue comes up for our consideration is as follows. In the first set of grounds of appeal, the assessee-appellant has raised the following grievances:

> **ADDITION ON ACCOUNT OF TRANSFER PRICING ADJUSTMENT OF RS.1,19,82,672/- IN RELATION TO CORPORATE GUARANTEES GIVEN ON BEHALF OF OVERSEAS SUBSIDIARIES OF THE APPELLANT:**

1.1 erred in confirming the transfer pricing adjustment of Rs. 1,19,82,672/- being corporate guarantee charges of 3% on account of corporate guarantees given by the Appellant to the bankers on behalf of its Associated Enterprises ('AEs') in addition to 1.75% already charged by the Appellant on its AEs which was not considered while benchmarking the Arm's length price thus making the overall corporate guarantee adjustment to 4.75%.;

1.2 erred in not appreciating that providing corporate guarantee is not an international transaction under Transfer Pricing regulation;

1.3 erred in observing that commercial expediency, business motives or business strategy are not included in the factors -for judging the comparability of the transaction;

1.4 erred in not appreciating that the Appellant is not engaged in the business of providing corporate guarantees.

1.5 erred in not appreciating that the corporate guarantee commission charged by the banks (1.75%) was independent of Corporate guarantee commission of 1.75% charged on the subsidiaries and hence the corporate guarantee charged by the Appellant is inherently at arm's length.;

1.6 erred in rejecting the determination of ALP made by the Appellant without satisfying the provisions of section 92C(3) of the Act;

1.7 erred in not considering 1.75% already charged by the Appellant as corporate guarantee commission on the AEs while confirming addition of 3% of the loan amount as guarantee commission and thus resulting in corporate guarantee of 4.75%;

4. Learned counsel submits that the above issue is covered, in favour of the assessee, by decisions dated 31st March 2016 in assessee's own case for the assessment years 2009-10 and 2010-11. It is pointed out that in both of these decisions, which are authored by one of us on the coram of this bench, the coordinate benches have held that the issuance of corporate guarantees does not constitute 'international transactions' under section 92B of the Act, and thus very foundational requirement of the arm's length price adjustment for the issuance of these corporate guarantees ceases to hold good in law. When learned counsel's attention was invited to the fact that a subsequent decisions of Hon'ble Madras High Court, in the case of **PCIT Vs Redington India Ltd [TCA No. 590-591 of 2019; judgment dated 10th December, 2020],** has not approved this line of reasoning, and even though it is a non-jurisdictional High Court judgment, the decisions of the Tribunal have to make way for higher wisdom of Hon'ble Courts above, it was submitted that the said decision, being a non-jurisdictional High Court decision, does not bind us. Our attention is invited to the fact that in the case of **Bank of India Vs ACIT [(2021) 122 taxmann.com 247 (Mum)]**, it has been held that the decisions of the non-jurisdictional High Courts do not bind the benches of the Tribunal. Learned counsel then takes pains to take us through the said decision, as also the coordinate bench decisions in assessee's own case, the reasoning in which remain unaffected by the Hon'ble Madras High Court decision in Redington's case *(supra).* We are thus urged to follow the coordinate bench decisions in assessee's own case and not be influenced by a non-jurisdictional High Court. Without prejudice to this line of argument, learned counsel submits that, in any event, quantification of ALP, even if upheld in principle, is erroneous and needs to be corrected. The arguments are addressed on this aspect of the matter as well.

5. Learned Departmental Representative, on the other hand, submits that once a higher judicial forum has decided the issue one way or the other, we are duty bound to follow the same. Learned Departmental Representative thus urges us to uphold the ALP adjustment in principle, though so far as quantification aspect is concerned, even as he relies upon the stand of the authorities below, he leaves the matter to us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. While on this issue, we may usefully take note of the observations of Hon'ble Supreme Court in the case of **ACCE v. Dunlop India Ltd. [(1985) 154 ITR 172 (SC)],** wherein the Their Lordships quoted, with approval, from the decision of House of Lords to the effect that "**We desire to add and as was said in Cassell & Co. Ltd. v. Broome [1972] AC 1027 (HL), we hope it will never be necessary for us to say so again that "in the hierarchical system of courts" which exists in our country, "it is necessary for each lower tier", including the High Court, "to accept loyally the decision of the higher tiers". "It is inevitable in hierarchical system of courts that there are decisions of the Supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary... But the judicial system only works if someone is allowed to have the last word, and that last word, once spoken, is loyally accepted**" and observed that. . . "**the better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system." The principle is thus unambiguous.** As a rule, therefore, judicial discipline warrants that the wisdom of a lower tier in the judiciary has to make way for higher wisdom of the tiers above. Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower authorities on account of the persuasive effect of these decisions and on account of the concept of judicial propriety. In the case of **CIT Vs Godavari Devi Saraf [(1979) 113 ITR 589 (Bom)]**, Hon'ble jurisdictional High Court took note of a non-jurisdictional High Court and held that the Tribunal, outside the jurisdiction of that Hon'ble High Court and in the absence of a jurisdictional High Court decision to the contrary, could not be faulted for following the same. Their Lordships observed that, "**It should not be overlooked that the Income-tax Act is an All-India statute……. Until a contrary decision is given by any other competent High Court, which is binding on a Tribunal in the State of Bombay, it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land**". Of course, these observations were in the context of a provision being held to be unconstitutional, an issue on which the Tribunal could not have adjudicated anyway, as evident from the observation "**Actually, the question of authoritative or persuasive decision does not arise in the present case because a Tribunal constituted under the Act has no jurisdiction to go into the question of constitutionality of the provisions of that statute**" but nevertheless the respect for the higher judicial forum was unambiguous. In **Tej International Pvt Ltd Vs DCIT [(2000) 69 TTJ 650 (Del)]**, a coordinate bench has, on this issue, observed that "**In the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above and, therefore, one a authority higher than this Tribunal has expressed an opinion on that issue, we are no longer at liberty to rely upon earlier decisions of this Tribunal even if we were a party to them. Such a High Court being a non-jurisdictional High Court does not alter the position…**". . There can, however, be exceptions to this situation on account of a variety of reasons, and these exceptions come into play only when the views are of non-jurisdictional High Court which, do not, legally

speaking, bind the lower tiers of judiciary. In our considered view, so far as the precedence value of a non-jurisdictional High Court's judgment is concerned, the position has been very well summed up by a coordinate bench decision, in the case of Bank of India *(supra)*, wherein, speaking through one of us (i.e. the Vice President), the coordinate bench has observed as follows:

> **While dealing with judicial precedents from non-jurisdictional High Courts, we may usefully take of observations of Hon'ble jurisdictional High Court in the case of CIT Vs Thana Electricity Co Ltd [(1994) 206 ITR 727 (Bom)], to the effect "The decision of one High Court is neither binding precedent for another High Court nor for the courts or the Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect". Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower authorities on account of the persuasive effect of these decisions and on account of the concept of judicial propriety-factors which are inherently subjective in nature. Quite clearly, therefore, the applicability of the non-jurisdictional High Court is never absolute, without exceptions and as a matter of course. That is the principle implicit in Hon'ble Supreme Court's judgment in the case of ACIT Vs Saurashtra Kutch Stock Exchange Ltd [(2008) 305 ITR 227 (SC)] wherein Their Lordships have upheld the plea that "non-consideration of a decision of Jurisdictional Court or of the Supreme Court can be said to be a mistake apparent from the record". The decisions of Hon'ble non-jurisdictional High Courts are thus placed at a level certainly below the Hon'ble High Court, and it's a conscious call that is required to be taken with respect to the question whether, on the facts of a particular situation, the non-jurisdictional High Court is required to be followed. The decisions of non-jurisdictional High Courts do not, therefore, constitute a binding judicial precedent in all situations. To a forum like us, following a jurisdictional High Court decision is a compulsion of law and absolutely sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety which is never absolute, as it is inherently required to be blended with many other important considerations within the framework of law, or something which cannot be, in deserving cases, deviated from.**
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> [Emphasis, by underlining, supplied by us]

8. No specific reasons for not following the non-jurisdictional High Court decision in Redington's case *(supra)* have been pointed out to us. It is not even the case of the assessee, and rightly so, that the issue decided by Hon'ble Madras High Court is not the same as we are called upon to decide in this case, that there are conflicting decisions of Hon'ble non-jurisdictional High Court on the issue or that there are any other good and sufficient reasons for not following this judicial precedent. There is nothing more than Bank of India decision *(supra)* to justify our taking a decision at variance with the decision of a non-jurisdictional High Court, but then this decision by the coordinate bench is on its own unique facts and it recognizes the fundamental principle that it is more of an exception that the decisions of the

non-jurisdictional High Court are not followed. At one place, this decision, inter alia, states that "**To a forum like us, following a jurisdictional High Court decision is a compulsion of law and absolutely sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety…..-which can…be, in deserving cases, deviated from**". Implicit in this observation is the fact that not following non-jurisdictional High Court decision is more of an exception than the rule. There have to be very strong and good reasons not to follow even non jurisdictional High Court decisions. It is not, therefore, open to us in the present situation, as has been contended by the learned counsel, to simply disregard this judicial precedent from Hon'ble Madras High Court, and follow the decision of the coordinate bench, in assessee's own case, in favour of the assessee. The fact that the decisions in assessee's own cases were authored by one of us, the claim that these decisions elaborately deal with certain aspects which may or may not have been examined by Hon'ble High Court and the apprehension that it may not have been argued on certain important facets, are wholly irrelevant. Once Their Lordships of a higher judicial forum express their esteemed views on any subject, the views expressed by us, in the past, on that issue, have to make way for the higher wisdom of Their Lordships. As for the facets not argued nor not considered, even if any, as is laid down by the apex Court in the case of **Ambika Prasad Mishra v. State of UP AIR 1980 SC 1762 : (1980) 3 SCC 719** (p. 1764 of AIR 1980 SC) "**Every new discovery nor argumentative novelty cannot undo or compel reconsideration of a binding precedent.....A decision does not lose its authority merely because it was badly argued, inadequately considered or fallaciously reasoned**...." Similarly, in the case of **Kesho Ram & Co. v. Union of India (1989) 3 SCC 151**, it was stated by the Supreme Court thus: "**The binding effect of a decision of this Court** *(as indeed any superior court)* **does not depend upon whether a particular argument was considered or not, provided the point with the reference to which the argument is advanced subsequently was actually decided in the earlier decision**". The more we ponder upon the correct course to be adopted in such matters as is before us, the more we are convinced with respect to the binding nature of decisions of even Hon'ble non-jurisdictional High Courts, unless there are specific good reasons not to do so. The doubts, if at all, and somewhat nightmarish doubts at that, arise about the manner in which Bank of India decision *(supra)* could be interpreted so as to destabilize the well settled norms of judicial discipline, but neither do we need to perpetuate an error, even if there be any, nor do we need to examine to that aspect any deeper at this stage. There is, thus, no legally sustainable justification, on the facts of this case, to disregard the views expressed by Hon'ble Madras High Court in Redington's case *(supra).* Given the important judicial developments by way of a binding legal precedent, directly on the issue, even if from a non-jurisdictional High Court, we cannot simply treat this issue as covered by decisions of the coordinate bench, and thus disregard the esteemed views expressed by a higher judicial forum.

9. Let us, in this light, revert to the issue in appeal before us.

10. The issue in this appeal pertains to the arm's length price adjustment in respect of the corporate guarantee issued by the assessee in respect of its associated enterprise, namely Siro Clinpharm Germany GmbH, to ABN Amro Bank for an amount of Rs 19.44 crores. The assessee has not charged any guarantee commission to its AE but has simply recovered the amount of Rs 36,06,578, being 1.75% of the facility which was charged to the assessee by the said bank. The Assessing Officer, on these facts and based on the inputs from the Transfer Pricing Officer, proposed to hold that an arm's length price adjustment computed @ 3% of the loan taken by the assessee will be in order as "in view of the considerable risk of the assessee in assuming, in the event of default by the associated enterprise, the assessee ideally

should have charged the guarantee fee at least @ 3% of the loan taken by the associated enterprise". Aggrieved by this proposed addition in the draft assessment order, assessee carried the matter before the Dispute Resolution Panel, but without any success. The DRP confirmed the action of the Assessing Officer by observing, inter alia, that "in the case of **Mahindra & Mahindra Ltd [TS-324-ITAT-2013(Mum)-TP]**, the Hon'ble Mumbai ITAT has upheld 3% rate for guarantee fee on guarantees given to the AE". The assessee is not satisfied and is in appeal before us.

11. Learned counsel's primary contention is that it is not an international transaction at all, and, to that extent, the issue is covered, in favour of the assessee, by decisions of the coordinate benches in assessee's own cases for the assessment years 2009-10 and 2010-11, wherein it is, inter alia, held that that issuance of a corporate guarantee is "outside the ambit of international transaction under section 92B(1) of the Act". However, in the case of Redington *(supra)*, Their Lordships of Hon'ble Madras High Court implicitly rejected this approach in accepting the findings of the Tribunal to the effect 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**" holding that "**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**". Once Their Lordships hold so and uphold the contention that 'corporate guarantee' constitutes an international transaction under section 92B, even in the pre-amendment assessment year that Their Lordships were dealing with i.e. assessment year 2009-10, it cannot be open to us to take a stand diametrically opposed to view so taken by Their Lordships. We humbly bow to, to borrow the words of House of Lords in Casell & Co *(supra)*, higher wisdom of the Hon'ble Courts above. As the things stand now, in the light of the above judicial development, the ratio of a series of decisions of this Tribunal, including in the cases of assesse's own case (reported as **177 TTJ 609**), in the case of **Micro Ink Ltd Vs ACIT [(2016) 157 ITD 132 (Ahd)]** and **Bharati Airtel Ltd Vs ACIT [(2014) 63 SOT 113 (Del)],** holding that issuance of corporate guarantees does not constitute 'international transaction' under section 92B does not hold good in law any longer. The fact that these words are of non-jurisdictional High Court, in view of anything contrary thereto having been expressed by Hon'ble jurisdictional High Court and for the detailed reasons set out in our analysis earlier, does not make any material difference. Many of these decisions are authored by one of us (i.e. the Vice President) but that does not make any difference either. Once a higher judicial forum has expressed it's views on an issue, our views have to make way for the same. We are bound to follow the views expressed by the Hon'ble Courts above, and it is this discipline which is true strength of hierarchical judicial system that exists in our country. We, therefore, hold that the issuance of corporate guarantee by the assessee did constitute an international transaction, and, to that extent, reject the plea of the assessee.

12. The next issue, thereafter, is whether determination of arm's length price at 3% is sustainable in law. Learned representatives fairly agree that as held by Hon'ble jurisdictional High Court 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.

13. 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 3% 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. To this limited extent, we uphold the plea of the assessee.

14. Ground no. 1 is thus allowed in the limited terms indicated above.

15. In ground no. 2, the assessee has raised the following grievance:

ADDITION ON ACCOUNT OF TRANSFER PRICING ADJUSTMENT OF RS.3,43,42,062/- IN RELATION TO PROVISION OF CLINICAL TRIAL SERVICES TO THE AE:

2.1 erred in confirming the transfer pricing adjustment of Rs. 3,43,42,062/- on account of clinical trial services provided by the Appellant to its AE;

2.2 erred in considering the entity level margin as margins earned from transactions with AEs instead of considering the AE level margins based on split Profit & Loss account;

2.3 erred in proposing variations to the amount of international transactions only and not at the entity level;

2.4 erred in not granting the benefit of +/- 5% as mentioned in second proviso to section 92(C)(2)of the Act;

2.5 erred in using Operating Profit/Operating Cost as Profit Level Indicator instead of Operating Profit/Operating Sales;

16. So far as this issue is concerned, the only dispute between the assessee and the TPO is on whether entity level margins are required to be compared, or whether margins on the basis of split profit and loss account are required to be compared with the margins on transactions

with AEs. The TPO has taken the entity level margins and when the objection was raised before the DRP, the DRP also confirmed the said action by observing as follows:

> **5.3.3 The first question to be considered for adjudication is use of margins related to AE transactions vs entity level margins. In the case of taxpayer, it is seen that German AE is similar in capability, functions and assets vis-a-vis Siro India, whereas Siro USA undertakes marketing functions. The FAR of both the AE are different as compared to the uncontrolled transactions. The Uncontrolled comparables take up host of activities which consists of marketing to clinical research. It is clear that the AE and Non AE functions do not match. Further, the research undertaken for AEs and Non AE's range from Comprehensive Clinical Project Management, Clinical Data Management & Biometrics (CDM&B), Medical monitoring and Safety management, Clinical Quality assurance, Clinical Trial Supplies Management, Regulatory Liaison and Consulting etc. The type of services provided and prices charged for each service will be vastly different in each of the above areas. The requirements of Comprehensive Clinical Project Management will be different from Medical monitoring and Safety management. The first requires mission mode approach whereas the latter refers to monitoring. The differentiation for such specialised areas in AE and non AE segments is not possible. Further, internal comparability requires higher degree of similarity of FAR, which is not possible in case of taxpayer. Hence, the use of Internal TNMM as canvassed by taxpayer is not in order.**
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> **5.3.4 In such a case when the activities undertaken are diffused and not possible to be categorised by types of services provided by taxpayer, a better comparison will be provided by entity level margins. The entity level margins will cover entire gamut of activities covered by taxpayer. Even in case of uncontrolled comparables, entity level margins would have covered entire spectrum activities comparable to that of taxpayer activities. Further TPO has proposed variation on the amount of International transactions only and not on the entity level. The calculation in the ALP cost has been worked out in relation to Rs. 17.96 Crs of AE transactions. (As per para 6.1.3 on page 5 of draft order.) In such case, we hold that TPO's approach of taking entity level margins tor comparison was in order.**

17. The assessee is aggrieved and is in appeal before us.

18. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

19. We find that it is a well settled legal position that when relevant segmental results are available, and the segment computations are not in dispute, the entity level results have to make way for the segmental profit computations. We have also noted that in a subsequent year, i.e. assessment year 2013-14, the TPO himself has accepted this approach of the assessee- as evident from the TPO's order placed at pages 73-79 f the paperbook, and the transfer pricing study report placed at pages 177-194 of the paperbook. There is thus no justification for disregarding segmental results for the present assessment year. In this view of

the matter, we uphold the plea of the assessee in principle, and remit the matter to the file to the assessment stage for reconsideration in the above light.

20. Ground no. 2 is thus allowed for statistical purposes in the terms indicated above.

21. In the result, the appeal is partly allowed in the terms indicated above. Pronounced in the open court today on the 9th day of September, 2021

Sd/-	**Sd/-**
Amarjit Singh	**Pramod Kumar**
Judicial Member	Vice President

Mumbai, dated the 9th 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 Registrar/Sr.PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai