

आयकर अपीलीय अधिकरण “K” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।
BEFORE SRI MAHAVIR SINGH, VP AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ IT (TP)A No. 2819/Mum/2017
(निर्धारण वर्ष / Assessment Year 2012-13)

M/s IL&FS Technologies Ltd. The IL&FS Financial Centre, Plot No.C-22, G-Block, Bandra Kurla Complex, Bandra (E), Mumbai- 400 051	बनाम/ Vs.	Dy. Commissioner of Income Tax, Circle- 14(2)(1), Room No.474, 4 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAACD2042C		
अपीलार्थी की ओर से/ Appellant by	:	Shri. Atul Nirawat, AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri. Sushil Kumar Mishra, DR

सुनवाई की तारीख / Date of hearing:	16.09.2021
घोषणा की तारीख / Date of pronouncement:	16.09.2021

आदेश / ORDER

महावीर सिंह, उपाध्यक्ष के द्वारा /

PER MAHAVIR SINGH, VP:

This appeal of assessee is arising out of the order of Dispute Resolution Panel-I, Mumbai [in short 'DRP'], in objection No. 70 vide direction dated 08.12.2016. The Assessment was framed by the Asst. Commissioner of Income Tax, Circle 14(2)(1), Mumbai (in short 'ACIT/AO') for the assessment year 2012-13 vide order dated 30.01.2017 under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'Act')..

2. The first issue in this appeal of assessee is against the order of Assessing Officer / TPO in making adjustment to the Arms' Length Price in regard to income transaction pertaining to corporate guarantee in total amounting to ₹1,20,60,000/-. For this, assessee has raised the following ground No.3:-

"3. That the Ld. AO/TPO has erred on facts and in law in making an addition/ adjustments of ₹1,20,60,000/- to the arm's length price of the 'international transactions' pertaining to following transactions on:-

a) Corporate guarantee issued on behalf of its AE (M/s land Registration systems, Inc., (equivalent to Approx 361 Million rupees) in connection with sanction/ issue of a bridge Loan being availed AE.

b) Surety/ guarantee/ Indemnity on behalf of its AE (M/s IL&FS Technologies Philippines, Inc., Philippines a wholly owned subsidiary of the company) for not less than Philippine sanction/issue of a Credit Facility being availed by AE.

c) Without prejudice, the proposed transfer pricing adjustment made by the Ld. Assessing Officer/ TPO by applying an incomparable rate of 2% which is unreasonably high and unjustified based on the rate charged by the commercial banks whose function, asset and risk ('FAR') profile is significantly different from the FAR of the appellant."

3. At the outset, the learned Counsel for the assessee stated that the Assessing Officer as well as the TPO has taken the Arm's Length computation for performance guarantee at the rate of 2% per annum for the for the full year but it should have been computed for the days in which these guarantees were enforced during the period under the proceedings. The learned Counsel stated that the Assessing Officer as well as TPO has computed the whole of the year whereas, the computation should have been made for the number of days in which these guarantees were enforce during the period under the proceedings. Secondly, he stated that the issue is covered by the decision of Hon'ble Bombay High Court in the case of CIT vs. Everest Kento Cylinders Ltd. (2015) 378 ITR 57 (Bom.), wherein it is held that corporate guarantee is a international transaction and while computing compensation for arms length price it should be considered as international transactions. But in Everest Kento Cylinders Ltd. (supra) Hon'ble Bombay High Court has considered the rate at 0.5% by observing as under:-

"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 ita1165.13 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. In view of the above discussion we are of the view that the appeal does not raise any substantial question of law and it is dismissed. "

4. In view of the above, we hold that this is international transaction and accordingly, we direct the AO to recompute the ALP by applying the rate at 0.5% on the transaction of corporate guarantee. We direct the AO accordingly. This issue of assessee's appeal is partly allowed.

5. The second issue in this appeal of assessee is against the order of the Assessing Officer and DRP making disallowance of expenses relating to exempt income by invoking the provisions of section 14A

of the Act read with Rule 8D of the Rules at ₹6,28,492/-. For this, assessee has raised the following ground No.4:

"4. That the Ld. Assessing Officer (Assessing Officer) erred on facts and in Law in proposing aggregate addition / adjustment of ₹6,28,492/- to disallowance under section 14A read with Rule 8D made in respect of the expenditure incurred by the appellant in relation to income, which does not form part of total income.

a) The Ld. Assessing Officer erred in law by not considering the fact that the investment made by the appellant in the shares of its subsidiary is done for controlling purpose and commercial prudence and not to earn exempt income.

b) The Ld. Assessing Officer erred in law by not considering the fact that the appellant has not earned any exempt income from the subsidiary company during the year."

6. At the outset, the learned Counsel for the assessee stated that there is no exempt income earned by the assessee during the year and no exempt income has been claimed in the return of income. The assessee before DRP as well as before Assessing Officer claimed that there is no exempt income earned by assessee during the year. Once, there is no exempt income, we find that disallowance cannot be made in view of the decision of Hon'ble Supreme Court in the case of Maxopp Investment Ltd. vs. CIT [2018] 402 ITR 640 (SC). Hence,



we delete the disallowance made by the Assessing Officer and DRP under section 14A of the Act read with Rule 8D of the Rules. This issue of assessee's appeal is allowed.

7. In the Result, the appeal of assessee is allowed.

Order pronounced in the open court on 16.09.2021.

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)
(उपाध्यक्ष / VICE PRESIDENT)

मुंबई, दिनांक/ Mumbai, Dated:16. 09.2021

सुदीप सरकार , व .निजी सचिव/ *Sudip Sarkar, Sr.PS*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील)/ The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि आयकर ,अपीलीय अधिकरण मुंबई ,/
DR, ITAT, Mumbai
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप सहायक/पंजीकार/Asstt. Registrar/ व .निजी सचिव/Sr. PS/
आयकर अपीलीय अधिकरणमुंबई , / ITAT, Mumbai