

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

**BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.1106/Mum/2017
(Assessment Year : 2012-13)**

M/s. Australia and New Zealand Banking Group Ltd., Cnergy, Unit A, 6 th Floor Appasaheb Marathe Marg Prabhadevi Mumbai – 400 025	Vs.	Deputy Commissioner of Income Tax-1(1)(2) Room No.136, 1 st Floor Scindia House N.M.Marg, Ballard Estate Mumbai – 400 038
PAN/GIR No. AAICA3008P		
(Appellant)	..	(Respondent)

Assessee by	Shri. P.J. Pardiwala Sr.Advocate with Shri Madhur Agrawal
Revenue by	Shri Milind Chavan
Date of Hearing	14/01/2022
Date of Pronouncement	13/04/2022

आदेश / O R D E R

PER M. BALAGANESH (A.M.):

This appeal in ITA No.1106/Mum/2017 for A.Y.2012-13 preferred by the order against the final assessment order passed by the Assessing Officer dated 14/12/2016 u/s.143(3) r.w.s. 144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 05/12/2016 respectively for the A.Y.2012-13.

2. The ground No.1 raised by the assessee is with regard to determination of Arm's Length Price (ALP) of the international transaction relating to processing fees received on account of guarantees issued to Indian companies based on counter guarantee from overseas branches. The ground No.2 raised by the assessee is challenging the rejection of Transactional Net Margin Method (TNMM) used by the assessee and adopting external Comparable Uncontrolled Price (CUP) method as the Most Appropriate Method (MAM).

3. We have heard rival submissions and perused the materials available on record. We find that assessee is a commercial bank having its head office in Melbourne, Australia. Australia and New Zealand Banking Group (ANZ) commenced its banking operations in India with the opening of its first branch in Mumbai pursuant to the receipt of the banking license from Reserve Bank of India (RBI). During the relevant year, ANZ has a single branch in India operating in Mumbai. It is involved in normal banking activities including financing of foreign trade and foreign exchange transactions. The list of Associated Enterprises (AEs) with whom the assessee had carried out international transactions are as under:-

- *The Australia and New Zealand Banking Group Limited - Singapore Branch (ANZ Singapore)*
- *ANZ Capital Private Limited (ANZ Capital)*
- *ANZ Support Services India Private Limited (ANZSS)*
- *ANZ Operations and Technology Private Limited (ANZOT)*
- *The Australia and New Zealand Banking Group Limited - Hong Kong Branch*
- *Australia and New Zealand Bank (China) Company Limited*
- *ANZ Bank (Vietnam) Limited*
- *ANZ Panin Bank*
- *The Australia and New Zealand Banking Group Limited - USA Branch*
- *The Australia and New Zealand Banking Group Limited - Melbourne Branch*
- *ANZ Royal Bank (Cambodia) Limited*
- *The Australia and New Zealand Banking Group Limited - Japan Branch*

- *The Australia and New Zealand Banking Group Limited - London Branch*
- *The Australia and New Zealand Banking Group Limited - Taiwan Branch*
- *ANZ Bank New Zealand Limited*

3.1. During the year, the assessee has issued guarantee to customer based on the counter guarantee issued by its AEs. The assessee had benchmarked this transaction using TNMM as the MAM. The assessee has earned an operating margin of 237.32% on operating costs for issuing guarantees on behalf of its AEs. During the year under consideration, the assessee has earned Rs.19,17,370/- for provision of the said services. The assessee chose seven comparables and applying single year updated margins of seven comparable companies arrived at the arithmetic mean of 3.07% applying Operating Profit / Operating Cost (OP/OC) as Profit Level Indicator (PLI). This arithmetic mean margin of 3.07% was compared with assessee's margin of 237.32% and accordingly, assessee concluded that its transaction is at arm's length.

3.3. The assessee was asked to provide the details relating to the amount of guarantee issued by it on behalf of the clients based on counter guarantee issued by overseas branches of ANZ. Assessee was also asked to provide back-up document in respect of the above transaction and the average rate at which guarantee fees has been charged by the assessee to its AEs. All these details were submitted by the assessee vide its submissions dated 28/10/2015, 16/12/2015, 17/12/2015 and 18/12/2015. The Id. TPO observed that assessee had earned processing fees for issuing guarantees on behalf of its AEs at an average rate of 0.02%. The Id. TPO observed that assessee had used comparables that are pertaining to support services industry which are not comparable with the activity of the assessee issuing guarantee for commission. Accordingly, the Id. TPO rejected those comparables and

also TNMM method adopted by the assessee and proceeded to benchmark the guarantee transaction using external CUP method. The Id. TPO observed that during the year, overseas branches of the assessee executed inter-bank guarantees / indemnities, against which the assessee issued guarantees on behalf of the clients of overseas branches. The assessee received a commission of USD 400 per transaction for guarantees issued by it on behalf of its overseas branches. The Id. TPO observed that under the CUP method, the guarantee fees is quantified through a comparison of arm's length guarantee fees rates charged by un-related third parties providing similar activities under similar terms and conditions. Accordingly, since internal CUP was not available, the Id. TPO obtained information u/s.133(6) of the Act from various banks seeking bank guarantee rates charged by the various banks to its customers. The said information obtained u/s.133(6) of the Act provided that the bank guarantee rates charged by the various third party banks ranged from 0.5% to 2% and the amount of fee charged decreased with increase in the guarantee amount. The discount or concession below these rates is also given depending upon the cash margin or security provided and the quality of credit rating of the borrower and other facilities obtained by the borrower. Accordingly, the Id. TPO benchmarked the guarantee fee transaction of the assessee by applying 1% rate and made an adjustment of Rs.10,94,55,035/- in the TP assessment as under:-

Particulars	Amount (INR)
Guarantee fees based on 1% of the guarantee amount	11,13,72,405
Less: Guarantee fees earned by the assessee	1,917,370
Adjustment amount	10,94,55,035

3.4. The very same TP adjustment was incorporated in the final assessment order passed by the Id. AO u/s.143(3) r.w.s. 144(C) (13) of the Act dated 14/12/2016 pursuant to the directions of the Id. DRP.

3.5. At the outset, we find that overseas branches of ANZ have clients who require guarantees to be issued to the beneficiaries in India. Since the beneficiaries are situated in India, the overseas branches of ANZ are situated in India. The overseas branches of ANZ request the assessee to provide such guarantees to the beneficiaries and in turn provide a back to back inter-bank guarantee / indemnity to assessee to cover any financial liability that assessee may incur in connection with guarantees issued to Indian beneficiaries on behalf of overseas ANZ branches. This is the prime function / activity carried out by the assessee with regard to the impugned international transaction. In case where the client of the overseas branch defaults and the guarantee would be invoked then, under the back to back guarantee issued to assessee, the overseas branch would make payments to assessee which would onward then make the payment to the beneficiary in India.

3.6. Hence, from the aforesaid modus operandi, it could be concluded that assessee acts as a beneficiary bank i.e. issue guarantee in India on behalf of clients of overseas branches of ANZ based on the counter guarantee issued by such overseas ANZ branches. Since assessee is acting as the beneficiary, the entire risk of discharging the bank guarantees is borne by overseas ANZ branch issuing the counter guarantee. The assessee merely provides support service in connection with processing of the guarantees, typing out the guarantee agreement based on swift message received and issuing the said agreement to the beneficiary. The aforesaid functions performed by the assessee are not

disputed by the lower authorities. When assessee is fully protected by overseas counter guarantee, we are unable to comprehend ourselves as to how CUP method could be applied therein as it would be impossible to make adjustment for the differences as per Rule 10B(1)(a) of the Income Tax Rules. In effect, we find that assessee is merely providing secretarial services or which can be loosely called as carrying out administrative functions. It is not in dispute that the assessee does not bear any risk in its books as it is fully protected by overseas counter guarantee / indemnity. In fact even assessee would not have to face the foreign exchange risk in view of the fact that whenever assessee is called upon to discharge the guarantee on behalf of the overseas branches, the assessee would first receive the monies from overseas branch because of the existing counter guarantee, and then discharge the same. The assessee is receiving processing fees from its AEs in foreign currency and the said fee is received immediately after the invoice is raised for the same, thereby the risk of exchange fluctuation would be very very negligible due to reduced time span involved therein. Given these undisputed facts, it would be appropriate to consider assessee as the tested party as it would be the least complex entity and its profitability could be reliably ascertained. Admittedly, the transaction which requires to be benchmarked is the receipt of processing fees by the assessee for the guarantees issued by rendering the aforesaid secretarial services. Hence, what is to be looked into is under similar terms and conditions and under similar circumstances what is the guarantee fee charged by the third party comparables from their AEs. This is what precisely assessee has done in the instant case. The assessee had taken into account the third party comparable margins and compared the same with its margins using Transactional Net Margin Method. For this purpose, the assessee had taken the third party comparables which are engaged in providing

liaisoning services, managerial services, marketing services, administrative services and information services. Effectively all these services could be loosely termed as business support services. Hence, when the data under CUP method is not available and data of margins under TNMM is readily available, then it would be appropriate to apply TNMM method as the Most Appropriate Method (MAM) in the facts and circumstances of the instant case.

3.7. We find that assessee had explained the entire transactions and the modus operandi applied by it in respect of the guarantee transactions before the Id. TPO which are evident vide letter dated 09/10/2015 together with the fee charged for each type of services rendered by it. These details are enclosed in pages 316 to 322 of the paper book filed before us. We also find the assessee vide its letter dated 28/10/2015 had filed a detailed annexure enclosed in pages 328-331 of the paper book listing the guarantees issued by it based on counter guarantee received from overseas branches of ANZ. The assessee also furnished the sample documents enclosing the copy of swift message received from ANZ New York advising the assessee to issue guarantee to Indian beneficiaries like Reliance Infrastructure Ltd., and providing counter guarantee.

3.8. The assessee also placed on record the copy of the swift message from assessee to ANZ New York confirming that guarantee has been issued to Reliance Infrastructure Ltd., confirming that guarantee has been issued by ANZ Mumbai. By all these documents, the Id. AR was vociferous in driving home the point that the entire risk of discharging the bank guarantees is borne by the overseas ANZ branch issuing the counter guarantees wherein the assessee merely provides support services in connection with processing of the guarantees. The Id. AR also referred to

page 380 of the paper book containing various swift messages received. The assessee also placed on record the reply letter dated 18/12/2015 filed before the Id. TPO in response to show-cause notice as to why 1% guarantee fee charged by third party Indian banks should not be considered as the arm's length price, placed reliance on the decision of the Mumbai Tribunal in the case of Asian Paints Ltd., vs. ACIT in ITA Nos. 2126 & 2178/Mum/2012 wherein specifically in the context of guarantee fees, this Tribunal had deleted the adjustment made as the said judgement was rendered simply relying on certain data from the market. The facts of the case before us squarely fit into the facts prevailing in the case of Asian Paints Ltd.

3.9. The assessee before the Id. DRP made an alternative submission that the fee of 1% proposed by the Id. TPO may be applied in respect of fresh guarantees issued during the year. The details of fresh guarantees issued during the year were also furnished before the Id. DRP in pages 577-579 of the paper book vide letter dated 27/04/2016. But we find that the Id. DRP had merely brushed aside the same and grossly erred in stating that no details were filed by the assessee.

3.10. In view of the aforesaid observations, we hold that TNMM method would be the Most Appropriate Method in the facts and circumstances of the instant case and CUP could not be applied herein because of non-availability of data. In any case in respect of adjustment made simply relying on 133(6) information from the market had been deleted by this Tribunal in the case of Asian Paints Ltd., referred to supra. It is also prudent to note that the same transactions were accepted by the Id. TPO upto A.Y.2012-13 in the case of the assessee. Hence, even going by the rule of consistency as has been held by the Hon'ble Supreme Court in the

case of Radhasoami Satsang reported in 193 ITR 321, there is no need for the Id. TPO to take a divergent stand when there is no change in the facts and circumstances during the year with that of earlier years. Hence, we direct the Id. TPO to delete the adjustment made in respect of guarantee fees in the sum of Rs.10,94,55,035/-. Accordingly, the ground Nos. 1 & 2 raised by the assessee are allowed.

4. The ground Nos.3 & 4 raised by the assessee were stated to be not pressed by the Id. AR at the time of hearing. Accordingly, the same are hereby dismissed as not pressed.

5. The ground No.5 raised by the assessee is challenging the initiation of penalty proceedings u/s.271(1)(c) of the Act. This in our considered opinion would be premature for adjudication at this stage, hence, dismissed.

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

Order pronounced on 13/04/2022 by way of proper mentioning in the notice board.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 13/04/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai