

आयकरअपीलीयअधिकरण, 'डी'न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI**

श्री जी मंजूनाथा, लेखा सदस्य के समक्ष, श्री अनिकेश बनर्जी, न्यायिक सदस्य एवं
**BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A No.:753/Chny/2017
निर्धारण वर्ष/Assessment Year: 2012 – 2013

M/s. Doosan Power Systems India
Private Limited,
16th Floor, DLF Square,
Jacaranda Marg, DLF Phase – II,
Gurgaon – 122 002. Haryana
PAN : AABCB 5946J

The Assistant Commissioner of
Income Tax (OSD),
Vs. Corporate Range – 1,
6th Floor, Wanaparthi Block,
121, Aayakar Bhawan,
M.G. Road, Chennai – 600 034.

(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

अपीलार्थीकीओरसे/Appellant by
प्रत्यर्थीकीओरसे/Respondent by

: Shri. Shri Sandeep Bagmar, Advocate
: Dr. S. Palani Kumar, CIT

सुनवाई की तारीख/Date of Hearing : 14.06.2022
घोषणा की तारीख/Date of Pronouncement : 17.06.2022

आदेश /ORDER

PER ANIKESH BANERJEE, JM:

This appeal filed by the assessee is directed against final assessment order passed by the learned Assistant Commissioner of Income Tax (OSD), Corporate Range-1, Chennai (in brevity "the AO") under section 143(3) r.w.s. 144C(13) r.w.s. 92CA of the Income Tax Act, 1961 in pursuant to the direction of the learned Dispute Resolution Panel – 2, Bangaluru (in brevity "the DRP"),

dated 21-11-2016 issued u/s 144C r.w.s.92CA of the Act pertaining to Assessment Year 2012-2013.

2. The assessee has raised the following grounds of appeal that are reproduced, as under:

[1] The Learned Assistant Commissioner of Income Tax (OSD), Corporate Range I, Chennai ("Ld. AO") erred on the facts and in law in passing the impugned assessment order pursuant to the directions of the Hon'ble Dispute Resolution Panel ("Hon'ble DRP") confirming the adjustment of Rs. 175,975,701 and computing the total income of the Appellant for Assessment Year ("AY") 2012-13 at Rs. 702,195,540 as against the returned income of Rs. 526,219,838.

[2] On facts and in law. the Ld. AO and the Hon'ble DRP erred in raking an adjustment of Rs. 171,748,949 in the assessment order passed under section 143(3) r.w.s. 144C(13) r.w.s. 92CA of the Income Tax Act. 1961 ("the Act") on account of difference in the arm's length price in relation to international transaction of "reimbursement of bank guarantee charges" instead of adjustment of Rs. 170,748,949 proposed by the Learned Deputy Commissioner of Income Tax, Transfer Pricing Officer - 1 (2), Chennai (Ld. TPO") in the order passed under section 92CA(3) of the Act. In making the adjustment, the Lei. AO. the Hon'ble DRP and the Ld. TPO:

2.1. erred in ignoring that the amount paid was in the nature of reimbursement and the actual amount paid by the Associated Enterprises ("AEs") to the third parties was recovered from the Appellant on cost to cost basis.

2.2. erred in ignoring back to back evidences submitted by the Appellant during the assessment proceedings substantiating that the reimbursement of bank guarantee

charges to the AEs was made on cost to cost basis.

2.3.without prejudice. erred in disregarding the First proviso to Section 92C(2) of the Act by not computing the arithmetical mean of rates identified by the Ld. TPO and cherry picking the lowest rate charged/ levied by public sector banks for providing guarantee services as the arm's length rate, with a prejudice intention of making an adjustment.

2.4.without prejudice. failed to appreciate that the upfront guarantee fees of USD 3,825,332 was paid @ 1.8 percent for a guarantee period of approximately 5 years, thereby ignoring the fact that only Rs. 200.308.357 was charged to the Profit & Loss account and the balance amount was recorded as a prepaid expense in the books of accounts during the financial year.

2.5.erred in inappropriately applying Comparable Uncontrolled Price (CUP") Method for making an adjustment to the international transaction of reimbursement of bank guarantee charges thereby disregarding Rule I ()[3 and Rule 1 0C of the Income Tax Rules, 1962.

[3] The Ld. AO, the Hon ble DRP and the Ld. TPO erred on the facts and in law in characterising amount receivable from the AEs in relation of provision of engineering design and consultancy services, beyond a period of 30 days as an "unsecured loan" and notionally imputing interest using SBI prime lending rate of 14.06 percent for the purpose of proposing an adjustment of Rs. 4,226,752 to the income of the Appellant.

[4] Without prejudice. the Ld. AO, the Hon'ble DRP and the Ld. TPO grossly failed to appreciate that the international transaction of provision of engineering design and consultancy services was denominated in foreign currency and thus, a foreign currency denominated rate should be

used to determine the arm's length rate of interest, for the purpose of making an adjustment.

- [5] On the facts and in the circumstances of the case, the Ld. AO erred in levying interest under section 2348 of the Act.

3. The brief fact of the case is that the assessee, M/s. Doosan Power Systems India Private Limited (in brevity "the DPSIPL) is a subsidiary company of Doosan Heavy Industries and Construction Co. Ltd, South Korea (in brevity "the DHICCL), AE of the assessee-company. The assessee-company is engaged in business of designing, building, installation and maintaining engineering plans with specialization in thermal and coal power plant. During the assessment year the learned Transfer Pricing Officer (in brevity "the TPO") suggested the adjustment related to transaction with its AE. The learned TPO suggested upward adjustment on interest receivable amount of Rs.42,26,752/- and downward adjustment on excess guarantee fees paid amount of Rs.17,07,48,949.78. The assessee preferred the objection before the learned DRP. Accordingly, they filed the objection. The learn DRP upheld the order of learned TPO. Finally, the final order was passed for the assessment year 2012-.13 by adjusting both the amounts. Aggrieved assessee filed an appeal before us for further consideration.

4. The assessee filed five grounds of appeal as mentioned above. Ground No.1 is general in nature. Here, we firstly adjudicate Ground No.2. The learned counsel of the assessee first pointed out our attention to the order of the learned TPO in page number 13 point number 10 which is extracted as under:

“Reimbursement of Bank Guarantee Charges for Kudgi Project:

The assessee has availed Guarantee of USD 193,044,524.82 (193,044,524.82 *47.8933) or INR 9245539340.56 and paid the guarantee fee of Rs 384,185,137.

An analysis carried out in the public domain to find out rates levied by the banks which provide guarantee services resulted in the following data:

Sl.No	Name of the Bank	Rate (pa)
[1]	Bank of Baroda	3.00%
[2]	Central Bank of India	2.00%
[3]	Corporation Bank	1.75%
[4]	Indian Overseas Bank	3.04%
[5]	State Bank of India	1.30%
[6]	Axis Bank Limited	2.50%
[7]	Deutsche Bank	1.00%
[8]	HDFC Bank Limited	1.80%
	Arithmetic Mean	2.05%

As discussed above, the ALP of the guarantee fee provided by the assessee company to its AE is taken as 1% (lowest value) on the value of the guarantee. The excessive guarantee fee paid in exceed of 1% is disallowed as "excessive" This was 'also discussed with the authorized representative on 27.12.2016 and 29.01.2016. The Authorised Representative contented that the benefit endures over a period and hence the fee has to be proportionally considered. But the entire payment has been made

during current year only. Hence it has to be measured at ALP during current year only.

ALP Computation of guarantee fee:

Actual Guarantee Fee Paid @ 1.8%	Rs 38,41,85,137.00
Guarantee Fee @ 1 %	Rs 21,34,36,187.22
Excess Guarantee Fee Disallowed	Rs 17,07,48,949.78

The ALP for fee payable/accrued has not been determined by the assessee company in accordance with section 92C (3). Hence the downward adjustment to the guarantee fee of the assessee amounting to Rs. Rs 17,07,48,949.78 is to be made towards excess."

4.1. Against the order of the TPO, the learned counsel filed an objection before the learned DRP. The observation of the learned DRP as per the order page 6, point- 5.1 is extracted as under:

"5.1 It was submitted by the assessee that for undertaking the projects in India, the Assessee was required to provide bank guarantee to the project owner (i.e. NTPC) for successful completion of the projects. DPSI, on its own, being a new entrant and not having a good market standing, approached DHIC to obtain bank guarantee for guaranteeing the performance and advances of these projects. For providing such guarantee to NTPC, banks charged arrangement fees and guarantee commission separately from the parent Company of the Assessee i.e. DHIC. Counter guarantee commission is separately charged by K-Sure. DHIC recovered such guarantee commission from the Assessee on cost to cost basis and no mark up was charged by

DHIC. Accordingly, this transaction is in the nature of pure reimbursement and hence, the same must be considered to be at arm's length.

5.2 The TPO has observed that the assessee has availed guarantee of Rs. 924,55,39,340/and paid the guarantee fee of Rs. 38,41,85,137/- to the AE. The TPO also found that the lowest rate of 1% is charged by the bank providing guarantee service. In case of the assessee the guarantee fee works out to 1.8% of the guarantee amount availed. Thus, the TPO disallowed the amount of guarantee fees paid by the assessee in excess of 1 %.

5.3 The submission of the assessee has duly been considered. The assessee was required to provide bank guarantee for undertaking its projects to the project owner i.e. NTPC. The AE of the assessee company, Doosan Heavy Industries and Construction (DHIC) has obtained the bank guarantees for the project and in turn charged the assessee guarantee fee. The assessee has claimed that the AE has incurred this expenditure on behalf of the assessee and recovering the same from it on cost to cost basis. As per assessee, no mark-up has been charged on such expenditure incurred by its AE and so these are mere reimbursements without any element of income. However, the assessee has not established with supporting evidence either before TPO or before this Panel that the expenses were mere reimbursement. Copies of three

'Reimbursement Invoice' dated 10.05.2012 from the AE and copies of advice from ICICI bank dated 6 & 14th March, 2012 issued to the AE have been filed by the assessee in the paper book. It is noticed that though the assessee claims to have paid the guarantee commission during the FY 2011-12, the invoices of the AE are dated 10-05-2012 which is after the end of the relevant FY. Further, these reimbursement invoices specify that the assessee has to make the payment by May 24, 2012. The reimbursement invoice on arrangement fee dated May 10, 2012 reads as under:

"Please note that following arrangement fee, which is U\$4,050,000,00 for ICICI Bank, has been proportionally splited for the amount issued for the mentioned project out of total amount of the facility approved by ICICI Bank."

Thus, it is seen that the AE of the Assessee has availed / arranged bank guarantee from ICICI bank for other purpose also including for the project of the Assessee. Though, it is mentioned that the charges are split proportionally, there is no details as regards to the number of such guarantees and the rate being charged by the Banbk. The Assessee has not brought on record details and evidence with reference to the terms and conditions of the bank to show that the amount charged to the Assessee was

in fact the amount charged by the Bank. The total amount as per three reimbursement invoice is found to be USD 7,648,917.06 which converted in Indian rupees becomes Rs.37,86,21,393/- (at the rate of Rs.49.5 for USD as mentioned in invoice). As Assessee has made payment of Rs.38,41,85,137/-, the difference remains unexplained. Moreover, no reconciliation of the amount paid by the Assessee linking the same to the amount of guarantee and demand raise by the Bank, has been furnished to substantiate the claim of the Assessee that the transaction is a mere cost to cost reimbursement. Under the facts and circumstances, the approach of the TPO to apply the lowest rate of guarantee of the bank, apparently under CUP method, cannot be faulted with. Therefore, the action of the TPO to disallow the excess of guarantee fee paid over 1% is upheld and the objection of the Assessee is rejected."

4.2. As per the argument of the learned counsel, the assessee was required to provide bank guarantee for undertaking its projects to the project owner NTPC. The assessee company had obtained the bank guarantees for the project from its AE intern charge the assessee guarantee fee. The learned counsel has claimed that the AE had incurred this expenditure on behalf of assessee and recovering the same from it on cost to cost basis. The corporate guarantee rate was 1.8% as per scheduled rate is ICICI Bank. There is no extra cost. This is a back-to-back payment related to

the corporate guarantee. The assessee filed and paper book which contains Page Numbers from 1 to 41. The said corporate guarantee was only related to KUDGI project of NTPC. Accordingly the ICICI Bank charged arrangement fees at the rate of 1.8% on USD 225 million that the total amount is in USD 40,50,000.00. The same amount was reimbursed by the assessee to its AE. In this respect the learned counsel of the assessee drew our attention to Page No.1 of Paper book related to the request letter for issuing bank guarantee by the assessee, advice on arrangement fees in Page No. 3 issued by ICICI Bank, Guarantee Note in Page No.4, issued by ICICI Bank, Reimbursement invoice in Page No.10 onwards, Contract Agreement from Page Nos.11 to 30 and insurance on BG from KSURE Corporation to protect the bank guarantee, in Page Nos.34 to 39.

4.3. The learned Departmental Representative pointed out that the particular invoice is related to subsequent year. The reimbursement invoice issued by AE to the assessee was on 10.05.2012. Accordingly the learned Departmental Representative relied on the order of the learned DRP and TPO.

4.4. The learned counsel of the Assessee confirmed that, considering the objection of the learned Departmental Representative the amount was charged on proportionate basis. In

this year they charged approximately 20,00,00,000/- proportionate basis related to this transaction with AE.

5. We have heard both the parties and had pursued the orders of the lower authorities and have carefully considered the documents available on records. The demand related to download adjustment amounting to Rs.17,07,48,949.78 for the excess guarantee fee is disallowed for payment to AE by the assessee. As per the learned counsel of the Assessee, the learned TPO had applied a rate of 1% on value of guarantee despite the arithmetic mean of 2.05% for compatibles. From the documents, it is to substantiate that the guarantee fee paid by the assessee is to its principal abroad on cost to cost basis. No markup was allowed nor any profit element was found in this transaction. This is back to back transaction only which was reimbursed to the principal abroad, AE. Accordingly, we direct the learned AO to delete the addition related to excess guarantee paid amounting to Rs. 17,07,48,949.78.

5.1 In the result the Ground No.2 of the appeal is allowed.

6. Here, we are adjudicating the Grounds Nos. 3 and 4 related to the appeal of the assessee. Both the revenue authorities accepted the addition on upward adjustment of TP related interest receivable amount to Rs.42,26,752/-. The fact is that the assessee

company has not charged interest to its AE. The charging interest is an international transaction and the ALP interest which the assessee had not charged from its AE. The Id. TPO found out that assessee-company has some un-réalisable receivables which are outstanding beyond the allowable period of 30 days. The delay range from 9 days to 374 days is pertaining to receivables from AE, Korea, UK, and USA. The learned TPO took it as loan transaction in international transaction for which interest is chargeable. The Learned TPO on the basis of PLR of SBI calculated ALI @14.06% and computed TP upward adjustment amount to Rs.42,26,752/- on outstanding receivable.

6.1. The learned counsel argued on the issue and relied upon the judgement of the Coordinate Bench of ITAT, Chennai bearing IT(TP)A 5/CHNy/2018 in the case of M/s. Doosan Power Systems India Private Limited, Gurgaon Vs. The Deputy Commissioner of Income Tax, Chennai. The respectful observation of the said order of the following paragraph is extracted as under:

“14. This view is also further supported by the decision of the ITAT, Delhi in the case of Bharti Airtel Services Limited Vs. DCIT in ITA No.161/Del/2017, where even before amendment to definition of international transactions, it was held that the AE receivable constitute a separate international transactions which requires to be benchmarked. The Bench further held that in case

of the rate of interest rate applicable to transactions giving rise to receivables denominated in foreign currency should be applied and in such case, international LIBOR rate should be considered for the purpose of imputing interest. Therefore, considering the facts and circumstances of the case and also by following the ratio laid down in the case laws discussed herein above, we are of the considered view that the AE receivable beyond specified credit period constitute separate international transactions and the same needs to be benchmarked and hence there is no error in findings recorded by the AO / DRP to hold that it is an international transaction. But when it comes to the rate at which such interest is to be imputed, it is a well settled principle of law that international LIBOR rate is an appropriate rate for imputing interest on AE transactions, because transactions giving rise to receivables were denominated in foreign currency and accordingly, we direct the AO to apply LIBOR + 300 BPS for imputing interest on AE receivables. Accordingly, ground taken by the Assessee is partly allowed."

6.2. From the above discussion, we respectfully observe the direction of the Coordinate Benches of ITAT Chennai, when it comes to rate. The Learned TPO took the rate as 14.06%. It is a well settled principle of law that the international LIBOR rate is appropriate for any international transaction. We direct the Assessing Officer to apply the LIBOR +300 BPS for imputing interest

on the receivables. Thus, the grounds taken by the assessee is modified accordingly.

7. In the result the appeal of the Assessee bearing I.T.A. No.753/Chny/ 2017 is partly allowed.

Order pronounced in the court on 17th June, 2022 at Chennai.

Sd/-

(जीमंजूनाथा)

(G. MANJUNATHA)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(अनिकेश बनर्जी)

(ANIKESH BANERJEE)

न्यायिकसदस्यएवं /JUDICIAL MEMBER

चेन्नई/Chennai,

दिनांक/Dated, the 17th June, 2022

IA, Sr. PS

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF