

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 5868/Mum/2017

(Assessment Year 2011-12)

CO No. 320/Mum/2018

(Arising in ITA No.3716/Mum/2017 for A.Y. 2010-11)

Unimark Remedies Ltd.
501, E-Wing, Skypark CHS,
Oshiwara Garden Road,
Next to HDFC House,
Opp. S.V. Road,
Goregaon West,
Mumbai-400 104

(Appellant)

Vs.

ACIT
Circle-11(1)(2)
Aaykar Bhavan
M.K. Marg,
Mumbai-400 020

(Respondent)

PAN No. AAACU0589R

ITA No. 3716/Mum/2017

(Assessment Year 2010-11)

ACIT
Circle-11(1)(2)
Aaykar Bhavan
M.K. Marg,
Mumbai-400 020

(Appellant)

Vs.

Unimark Remedies Ltd.
501, E-Wing, Skypark CHS,
Oshiwara Garden Road,
Next to HDFC House,
Opp. S.V. Road,
Goregaon West,
Mumbai-400 104

(Respondent)

Assessee by : Shri Prateek Jain, AR
Revenue by : Shri Samuel Pitta, DR

Date of hearing: 29.08.2022
Date of pronouncement : 29.08.2022



ORDER

PER PRASHANT MAHARISHI, AM:

01. In these cases, three appeals pertaining to the same assessee involving common issue are heard together and disposed off by this common order.
02. ITA No.3716/Mum/2017 is filed by the Dy. Commissioner of Income Tax, 11(1)(2), (learned Assessing Officer) and CO No.320/Mum/2018 is filed by the assessee for A.Y. 2010-11 against the order of the Commissioner of Income-tax (Appeals)-58, [the learned CIT (A)], Mumbai, dated 22nd February, 2017.
03. In ITA No.3716/Mum/2017, the learned Assessing Officer has raised following grounds of appeal:-

"i. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of Rs. 60,89,028/- made by the AO u/s 14A r.w.rule 8D of the L.T. Rules without appreciating the fact that the assessee has claimed in the profit and loss account interest expense of Rs.38,07,55,000/- under finance cost, selling and general administrative expenses of Rs.34,26,000/- and personnel cost of Rs. 38,24,000/- or the fact that the assessee was unable to prove the direct nexus between its own funds or funds used for business purposes and investment made for earning exempt income or expenditure incurred for business purposes"



ii. (a) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of Rs.17.10.111/- made by the AO on account of non-reconciliation of AIR report without appreciating the fact that the assessee failed to reconcile this undisclosed income" (b)"On the facts and in the circumstances of the case, the learned CIT(A) erred in not appreciating the fact that the entries appearing in ITS details are not provided by the Department, but by third parties dealing with the assessee"

iii. "The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the A.O be restored." iv. "The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

04. In CO. No. 320/Mum/2017, assessee has raised following grounds of appeal:-

"1. On the facts and circumstances of the case and in law the Ld Commissioner of Income Tax (Appeals) (CITA) erred in restricting the adjustment @ 1.5% amounting to Rs. 35,44,373/- as corporate guarantee fees on corporate given to M/s Unimark Remedies Hong Kong Ltd (AE) on the basis of order u/s 92CA(3) on the grounds as contained in the order or otherwise.

2. On the facts and circumstances of the case and in law the CITA erred in confirming the addition to the extent Rs. 6,43,393/- by invoking the provisions of

section 14A r.w Rule 8D(iii) of the IT Act, 1961 as per the grounds stated in the order or otherwise.

3. On the facts and circumstances of the case and in law the CITA erred in confirming the action of the Ld. AO in adding the disallowance u/s 14A r.w Rule 8D amounting to Rs. 67,32,421/-in computing the book profits u/s 115JB of the IT Act,1961 on the grounds stated in the impugned order or otherwise."

05. The brief facts of the case shows that assessee is a company engaged in the business of manufacturing and trading of pharmaceutical and other health related products. It files its return of income on 30th September, 2010 at a loss of ₹14,65,11,657/-. As the assessee entered into international transaction with its Associated Enterprises, matter was referred to the Transfer Pricing Officer. During the course of assessment proceedings, the learned Transfer Pricing Officer on perusal of the records found that assessee has issued corporate guarantee on behalf of its Associated Enterprises of ₹6,738 lacs to standard chartered bank, Hongkong Ltd but assessee has not charged any commission on issue of such corporate guarantee. Therefore, the learned Transfer Pricing Officer found that it is an international transaction and made an addition of ₹70,88,745/- being 3% commission on the amount of guarantee. There were also certain other transfer pricing adjustment, however same were not in dispute before us, hence not dismissed.



06. The learned Assessing Officer further found that assessee has shown exempt income of ₹53,286/- as dividend income. The learned Assessing Officer questioned assessee as to why the disallowance under Section 14A read with Rule 8D of the Rules cannot be invoked, assessee did not furnish any reply and therefore, the learned Assessing Officer computed the disallowance of ₹67,32,421/-.Ld AO also made addition of Rs 1710111/- on AIR mismatch. Accordingly, the total income of the assessee is assessed at a loss of ₹12,62,82,337/-.
07. Assessee aggrieved, preferred the appeal before the learned CIT (A). On the issue of corporate guarantee, the learned CIT (A) held that ALP of guarantee commission of 3% is on higher side and therefore, he directed the learned Transfer Pricing Officer to compute the guarantee commission at the rate of 1.5% based on guarantee rate chart by State Band of India. Further, with respect to Section 14A of the Act, he deleted the addition with respect to interest expenditure, however, retained the disallowance of 0.5% of ₹6,43,393/-. The learned Assessing Officer also made an addition of ₹17,10,111/- on account of AIR information which was denied by the assessee before the learned Assessing Officer. The learned CIT (A) held that as assessee does not have any transaction with the payer of the income and there is no evidence that such sum is received by the assessee, he held that additions solely on the basis of AIR information cannot be made.



08. Therefore, the learned Assessing Officer is in appeal before us challenging the deletion of the addition partly under Section 14A of the Act and deletion of addition based on AIR information. The assessee is in appeal by Cross Objection against confirmation of disallowance under Section 14A of the Act with respect to administrative expenditure and confirmation of addition on account of corporate guarantee fee.
09. We have heard the rival contentions.
010. Coming to the appeal of the learned Assessing Officer, the first ground of appeal is in relation to the disallowance under Section 14A of the Act deleted by the learned Assessing Officer. The fact shows that assessee has received exempt income during the year of ₹53,286/-. Assessee did not offer any disallowance on its own. The learned Assessing Officer invoked the provisions of Rule 8D of the Rules and computed the disallowance of ₹67,32,421/-. The learned CIT (A) deleted the disallowance of interest holding that the amount of investment made by the assessee in tax free income earning investment is less than assessee's own non-interest bearing funds. However, the disallowance to the extent of administrative expenditure is confirmed. The claim of the assessee that exempt income earned by the assessee is merely ₹53,286/-, whereas disallowance far existed the same which is incorrect. It is an established fact that the disallowance of expenses for earning tax free



income cannot exceed the amount of exempt income. The amendment made to the provision of section 14A of the Act by Finance Act 2022, applies prospectively has held by Hon'ble Delhi High Court in PCIT vs. Era Infrastructure (India) Ltd. [2022] 141 taxmann.com 289 (Delhi). The issue before us is pertaining to A.Y. 2010-11. Therefore, we direct the learned Assessing Officer to restrict the disallowance under Section 14A of the Act to the exempt income earned by the assessee amounting to ₹53,286/-. Accordingly, ground no.1 of the appeal of the learned Assessing Officer, as well as ground no.2 of the Cross Objection of the assessee, are allowed.

011. Ground no. 2 of the appeal of the learned Assessing Officer is with respect to the addition deleted by the learned CIT (A) on account of AIR difference. The fact shows that there are three transactions with four parties amounting to ₹17,10,111/-, which were reflected in Form no. 26AS not claimed by the assessee as income. The learned Assessing Officer was explained that assessee does not have any dealing with those parties and tax credit is also not claimed by the assessee. The learned Assessing Officer made the addition. The learned CIT (A) deleted the addition stating that when the assessee does not have any transaction with these parties, the income could not have been taxed in the hands of the assessee. We find no infirmity in the findings of the learned CIT (A). The difference in Form no. 26AS with the books of account are triggered point for making further inquiry. When the



assessee has categorically saying that it has no financial transactions with those parties, without making any further inquiry the learned Assessing Officer could not have made addition. Accordingly, ground no.2 of the appeal of the learned Assessing Officer is dismissed.

012. Coming to ground no.1 of the appeal of the assessee with respect to benchmarking of corporate guarantee fee on corporate guarantee given to 100% subsidiary Unimark Remedies Hongkong Ltd., where the learned Transfer Pricing Officer computed the guarantee commission at the rate of 3% amounting to ₹70,88,745/-. The learned Transfer Pricing Officer found that State Bank of India has been offering financial guarantee of above ₹10 crores at the rate of 1.75% p.a. He further computed the adjustment of 1.25% on account of country foreign exchange and entity risk. Accordingly, Arms Length Price at the rate of 3% of the guarantee fee was determined and addition made. When the matter reached before the learned CIT (A), he examined the financial statements of the Associated Enterprises and thereafter, considered several judicial precedents and held that 1.5% of the guarantee commission is appropriate to reach at this conclusion. He held that 1.25% risk adjustment made by the learned Transfer Pricing Officer is not correct. Accordingly, upheld 1.5% of the guarantee commission.

013. Assessee is aggrieved and submits that the guarantee charged by the banks cannot be compared and used as



CUP for determining corporate guarantee. The learned Authorized Representative submitted that Hon'ble Bombay High Court in Everest Kento decision has held so and 0.5% is held to be Arm's Length Price of corporate guarantee fee. On careful consideration, we find that the Hon'ble Bombay High Court in ITA No.1165 of 2013 dated 8th March, 2015, considered where the transfer price adjustment on corporate guarantee was considered, wherein it has been stated that in case of commercial banks bank guarantees, bank guarantees are treated as blood of commerce however, in case of assessee who is guaranteeing on behalf of its subsidiary, the consideration of bank guarantee do not apply and 0.5% of the commission was held to be at Arm's length. Before us, it was not stated that there is no difference between the facts of the Hon'ble Bombay High Court and the assessee's case. Accordingly, we direct the learned Assessing Officer to consider 0.5% commission as Arms Length Price of the corporate guarantee. Accordingly, first ground of the cross objection of the assessee is partly allowed.

014. In the result, appeal of the learned Assessing Officer and Cross Objection of the assessee, are partly allowed.

015. For A.Y. 2011-12, the appeal is filed by the assessee against the order passed by the learned CIT (A). The only issue in this appeal is benchmarking corporate guarantee issued to the subsidiary. As in A.Y. 2010-11, the learned CIT (A) confirmed the adjustment at the rate of 1.5% as



the Arms Length Price of corporate guarantee fee. This issue has already been considered by us in cross objection of the assessee for A.Y. 2010-11, wherein 0.5% of corporate guarantee fee was considered as Arms Length Price of the guarantee fee. For similar reasons, we direct the learned Transfer Pricing Officer/ Assessing Officer to treat 0.5% of the corporate guarantee amount as Arms Length Price of corporate guarantee fee. Accordingly, the appeal of the assessee for A.Y. 2011-12 is partly allowed.

016. Accordingly, all three appeals including CO of the assessee are partly allowed.

Order pronounced in the open court on 29.08.2022.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 29.08.2022

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai