

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

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&  
SMT KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**ITA No.547/Mum/2022  
(Assessment Year :2017-18)**

M/s. Draegerwerk AG & Co. KGAA Moislinger Allee 53-55, D-23558, Lubeck, Lubeck, Foreign, Germany D-23558	Vs.	Assistant Commissioner of Income Tax, Int Tax Circle-2(1)(2) Aayakar Bhavan M.K.Road Mumbai- 400 020
<b>PAN/GIR No.AAFCD0262P</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri M.P. Lohia
Revenue by	Shri Raghuvveer M
<b>Date of Hearing</b>	<b>09/11/2022</b>
<b>Date of Pronouncement</b>	<b>09/11/2022</b>

**आदेश / ORDER**

**PER M. BALAGANESH (A.M):**

This appeal in ITA No.547/Mum/2022 for A.Y.2017-18 preferred by the order against the final assessment order passed by the Assessing Officer dated 25/01/2022 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 21/01/2022 for the A.Y.2017-18.

2. The assessee has raised the following grounds of appeal:-

*“Drangerwerk AG & Co. KGaA (hereinafter referred to as the Appellant) respectfully craves leave to prefer an appeal against the assessment order passed by the Assistant Commissioner of Income Tax Cercle- 2(1)(2) Mumbai dated 25 January 2022 (received on 25 January 2022) under the provision of*

*the section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act) thereafter referred to as the learned AO in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel-1. hereinafter referred to as the Hon'ble DRP] on the following grounds, each of which are without prejudice to one another. On the facts and in the circumstances of the case and in law, on the directions of the Hon'ble DRP, the learned AOI Assistant Commissioner of Income-tax, Transfer Pricing-1(2)(1), Mumbai (learned TPO) has*

#### **GROUPS OF APPEAL**

*Following grounds are without prejudice to each other.*

##### **GENERAL**

*erred in assessing the total income of the Appellant at INR 4,14,30,810 as against INR 2,92,72,680 as computed by the Appellant.*

##### **TRANSFER PRICING GROUNDS**

*Final order passed by not following the DRP directions in entirety is bad in law*

*2. erred in passing the final order under section 143(3) read with section 144C(13), not being in conformity with the directions issued by the Hon'ble DRP as per provisions of section 144C(10) r.ws. 144C(13) of the Income-tax Act, 1961 is bad in law and ought to be quashed.*

*Income from corporate guarantee not taxable in India under the India-Germany Double Taxation Avoidance Agreement ("DTAA)*

*3. erred in making an adjustment of INR 1,21,58,130 to the total income of the Appellant under Section 92CA(3) of the Act in respect of notional income arising from commission on provision of corporate guarantee given to AE;*

*4. erred in not following the directions of the Hon'ble DRP (dated 21 January 2022) pertaining to AY 2017-18 which, inter alia, held that notional income arising from commission on provision of corporate guarantee is not taxable in India and hence, no transfer pricing adjustment is warranted in respect of the same;*

*5. failed to appreciate that in absence of any income chargeable to tax in India, the transfer pricing provisions being machinery provisions, would not apply.*

*6. Erred in not considering the rectification application of the Appellant by considering disallowance/ addition of notional income arising from commission on provision of corporate guarantee is not taxable in India, and thereby the transfer pricing provisions being machinery provisions, would not apply.*

*7. Without prejudice to the above, erred in affirming the draft order holding that the notional income added on account of corporate guarantee commission is taxable in India under Article 21 (Other Income) of the India-Germany DTAA without considering the DRP directions which has held that as per the said Article. the right to tax such a transaction would vest with Germany:*

*Levy of interest and penalty*

*8. Erred in levying interest of INR 29,58,580 under Section 234B of the Act;*

*9. Erred in initiating penalty proceedings under Section 274 read with Section 270A of the Act.*

*The Appellant craves leave to add, delete, alter, vary, omit, substitute or amend any of the above grounds at any some before or during hearing before the Hon'ble Tribunal to decide the appeal according to law.*

3. We have heard rival submissions and perused the materials available on record. The assessee is a German-based provider of medical technology. It develops, produces and markets system solutions, equipment and services for the optimization of processes at the acute point of care, such as emergency care preoperative care, critical care and prenatal care. During the year under consideration, the assessee has supplied equipment and rendered certain services, the activities of which were carried out outside India. In addition, the assessee has provided corporate guarantee for a working capital term loan availed by its AE, Draeger India Private Limited ('DIPL), from HSBC bank. The said guarantee is continuing in nature and the assessee has not charged its AE any fee/ commission during the year in this regard.

3.1. During the transfer pricing assessment proceedings, the Id.TPO concluded that the corporate guarantee provided by the assessee to HSBC Bank, for the loan availed by DIPL, is an international transaction. The Id. TPO concluded that commission from such corporate guarantee would be taxable in India in the hands of the assessee under Article 21 of

the Double Taxation Avoidance Agreement ('DTAA') between India and Germany. For the purpose of benchmarking the impugned transaction, the Id.TPO considered the arm's length guarantee commission rate as 1.16%, being an average of the guarantee commission rates charged by certain banks and applied it on the maximum guaranteed amount of EUR 13,874,430. Accordingly, the Id.TPO proposed an adjustment of Rs. 1,21,58,130/- under Section 92CA(3) of the Act.

3.2. The assessee preferred objections before the Id. DRP against the adjustments made by the Id. TPO / Id. AO. The relevant objections No.6,7 & 8 are reproduced hereunder:-

Objection No. 6:

*Erred in concluding that the notional income added on account of corporate guarantee commission is taxable in India under Article 21 (Other Income) of the India- Germany DTAA without appreciating that as per the said Article, the right to tax such a transaction would vest with Germany;*

Objection No. 7:

*Erred in relying upon the decision of the Hon'ble Delhi Income-tax Appellate Tribunal in case of Johnson Matthey Public Limited Company ([2017] 88 taxmann.com 127) without appreciating that in the said case the relevant treaty was the India-UK DTAA which is not identical to the India-Germany DTAA applicable in the present case;*

Objection No. 8:

*Failed to appreciate that in absence of any income chargeable to tax in India, the transfer pricing provisions being machinery provisions, would not apply:*

3.3. The assessee submitted that during the year under consideration, it had not incurred any cost expenses for providing the corporate guarantee and hence had not charged its AE for the same. A copy of the guarantee letter submitted by the assessee to HSBC Bank was filed before the Id. TPO. The Id. TPO considered the corporate guarantee provided by the

assessee on behalf of its AE as an "international transaction" under Section 92B of the Act. Further, the Id.TPO concluded that since the underlying loan transaction (for which guarantee was issued) took place in India, the guarantee commission income would be said to accrue in India and therefore, included in the assessee's total income. The assessee submitted that the corporate guarantee was provided by it on behalf of its AE on account of business reasons to augment the group's worldwide business. It was submitted that the assessee has not incurred any cost/ expenditure for providing such guarantee and the benefits earned by its AE, being a wholly-owned subsidiary of the assessee, would directly/ indirectly flow to the assessee itself in the form of larger business and capital value appreciation. Further, it was also submitted that the assessee is not in the business of financing/ funding/ granting/ providing guarantees and the guarantee provided by the assessee to its AE was solely for its own benefit since it would result in expansion of business operations overseas i.e. India. Therefore, the assessee submitted that as the corporate guarantee was provided by it due to its ownership interest in the AE, such guarantee was in the nature of "shareholder activity" and hence, no compensation, in this regard, is warranted. The assessee further submitted that being the holding company, it would have had to provide the funds to its wholly-owned subsidiary by infusing equity capital. Hence, the provision of corporate guarantee does not lead to any additional risk for the assessee warranting a compensation. It was further submitted that there is no real financial burden on the assessee since provision of guarantee is only a contingent liability which has not crystallized. Further, there is no charge in the assets/ liabilities/ net worth of the assessee because of the corporate guarantee given. It was submitted that the impugned corporate guarantee was provided by the assessee to its AE in AY 2016-17 (i.e the preceding AY). Such guarantee

transaction was similarly disclosed in the Form 3CEB for AY 2016-17 and has also been acknowledged by the Id. TPO in the transfer pricing order of AY 2016-17 at Para 5.3. Further, no adjustment was made by the Id. TPO on account of such guarantee in the preceding year and the same was accepted to be at arm's length. As there is no change in the facts and circumstances of the case for the year under consideration, it is humbly submitted that the Id. TPO be directed to follow its own order for the preceding year and delete the proposed transfer pricing adjustment.

3.4. The Id. DRP held that issuance of corporate guarantee by the assessee to the bank to enable the Indian company to avail credit facilities from the bank would constitute an international transaction within the meaning of Section 92B of the Act.

3.5. We find that the Id. TPO in its order has stated that none of the Articles of the India- Germany DTAA deal with guarantee commission. Accordingly, the Id.TPO concluded that the transaction of guarantee commission would be covered under the residuary Article which deals with "Other Income" ie, Article 21 of the India-Germany DTAA. It was submitted before the Id. DRP that as per Article 21 on "Other Income" of the India-Germany DTAA , any income covered under the said Article shall be taxable only in the resident state of the taxpayer i.e, Germany in the present case. The only exception provided for this is in Para 2 and Para 3 of Article 21 which are not applicable in the instant case.

3.6. We further find that the Id. TPO relied on the decision of the Delhi Tribunal in case of Johnson Matthey Public Limited Company ([2017] 88 taxmann.com 127) to support its conclusion that guarantee commission would be taxable in India under Article 21 of the India-Germany DTAA. In

this regard, it is submitted that the aforementioned case of Johnson Matthey Public Limited Company is completely different on facts, as the relevant treaty in that case was the India-UK DTAA. The court in that case held that guarantee commission was taxable under Para 3 of Article 23 on "Other Income" of the India-UK DTAA which is differently worded from Article 21 of the India-Germany DTAA applicable in the present case. Unlike the India-Germany DTAA, the India-UK DTAA allows "Other Income" to be taxed in the source state. Therefore, the Id. TPO's reliance on the Delhi Tribunal ruling in case of Johnson Matthey Public Limited Company (supra) is ill- founded and incorrect. In view of the above, the assessee submitted that as the addition proposed by the Id. TPO on account of guarantee commission is not taxable in India under the provisions of the India-Germany DTAA, the same ought to be deleted.

3.7. We find that the Id. DRP had disposed of the objections No.6-8 raised by the assessee by observing as under:-

*"9.1 We have considered the submissions made by the assessee. As discussed and held in respect of objection no. 3 to 5, incidence of corporate guarantee is an international transaction. We also note that corporate guarantee was provided by the assessee to HSBC Bank to enable its Indian AE to avail loan facilities. The said guarantee was provided in India and loan in respect of which guarantee was given was also disbursed in India. Hence, it is clear that any income arising as commission for providing corporate guarantee accrues and arises in India. Section 5(2) of the Income Tax Act provides that the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which is received or is deemed to be received in India or accrues or arises or is deemed to accrue or arise to him in India in such year by or on behalf of such person. Thus, it follows that the assessee being a non-resident has earned income which falls within the scope of section 5(2). While taking this view we are fortified by the decision of Delhi bench of Hon'ble ITAT in the case of Johnson Matthey Public Limited Company ([2017] 88 taxmann.com 127). In the said case the foreign company, Johnson Matthey Plc had provided guarantees to support credit facilities extended to its Indian*

*subsidiaries and AE, JM IPL and JM CIPL by banks in India. Guarantees were provided to HSBC and Citibank on a global basis outside India include guarantee for the facilities extended to JM IPL and JM CIPL. It was held that as the act of the subsidiary in availing the loan that accrues the guarantee commission to the assessee took place in India, the income to the assessee accrues in India.*

*9.2 In view of above, the Panel is of considered opinion that income from providing corporate guarantee accrues in India and falls within the scope of section 5(2) of the Income Tax Act.*

*9.3 However, the Panel is also conscious of the fact that the assessee is a tax resident of Germany and DTAA has been signed between India and Germany. So, it has to be examined what are the provisions in India-Germany DTAA in this regard. The TPO in point 5 at page 7 of his order has concluded that such income would chargeable to tax as Other Income under Article 21 of India-Germany DTAA.*

*9.4 Article 21 of India-Germany DTAA reads as under:*

**"ARTICLE 21**

**OTHER INCOME**

***1. Items of Income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.***

*2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply:*

*3. Notwithstanding the provisions of paragraph 1, if a resident of a Contracting State derives income from sources within the other Contracting State in the form of lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any form or* 9.5 It is noted that para 2 and 3 of the

*are in nature of exceptions - giving conditions under which para 1 will not apply. The assessee's income does not fall within any of these exceptions. Hence para 1 of Article 21 is applicable. As per this para, the income of the assessee being a resident of a contracting state (Germany) shall be taxable only in that state (Germany).*

*9.5. It is noted that para 2 and 3 of the are in nature of exceptions – giving conditions under which para 1 will not apply. The assessee's income does not fall within any of these exceptions. Hence para 1 of Article 21 is applicable. As per this para, the income of the assessee being a resident of a contracting state (Germany) shall be taxable only in that state (Germany).*

*9.6 We also note that the case of Johnson Matthey PLC which is relied upon by the AO, as per which the income arising out of corporate guarantee was taxable in India, was given based on provision of India-UK DTAA. In the said DTAA Article 23 deals with other income and reads as under*

**"ARTICLE 23**

***OTHER INCOME***

*1. Subject to the provisions 2 of this Article, items of income beneficially owned by a resident of a Contracting State, wherever arising. other than income paid out of trusts or the estates of deceased persons in the course of administration, which are not dealt with in the foregoing Articles of this Convention, shall be taxable only in that State.*

*2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated the therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15 of this Convention, as the case may be, shall apply.*

*3. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention, and arising in the other Contracting State may be taxed in that other State.*

*(emphasis added)*

*9.7 Thus it is clear that under para 3 of Article 23 of India UK DTAA. Income of the kind of corporate guarantee charges which are to be treated as Other Income of a resident of a Contracting State (UK) arising in the other Contracting State (India) may be taxed in that other State (India). This is opposite of the situation under India Germany DTAA, as noted under para 9.5 above,*

*9.8 In view of the above discussion, the Panel holds the view that although there arises an income on account of corporate guarantee charges and the same is accruing and arising in India thereby falling within the scope of section 5(2) of the Income Tax Act, keeping in view the provisions of India - Germany DTAA, it is not taxable in India.*

*9.9. Based on the above discussion, Objection no. 6 and 7 of the assessee are allowed. Objection no. 8 raised by the assessee is rejected.*

3.8. We find the objection No.8 raised by the assessee before the Id. DRP is identical with objection Nos. 6 & 7 raised before the Id. DRP. When objection Nos. 6 & 7 are allowed in favour of the assessee by the Id. DRP, we do not find any justifiable reason for the Id. DRP to reject the objection No.8 raised before it. The Id. DRP having given categorical finding that as per the DTAA with Germany, guarantee commission which falls under 'other income' is taxable only in Germany as per Article 21. We find that decision relied by the Id. TPO on Delhi Tribunal in the case of Johnson Matthey Public Limited is factually distinguishable as it pertains to India UK DTAA wherein under Article 23, it specifically provided for taxability of other income in source state i.e. India. Whereas under India-Germany DTAA, Article 21 provides for taxability of other income only in Germany and not in India. We find that the Id. AO in final assessment order had held that objections raised by the assessee before the Id. DRP were rejected and accordingly, added the transfer pricing adjustment made on account of guarantee commission of Rs.1,21,58,130/-. This action of the Id. AO is merely erroneous in view of the fact that against

the categorical finding of Id. DRP on objections 6-7, which were allowed in favour of the assessee, the Revenue had not preferred any appeal before us. Hence, in view of the aforesaid observations we have no hesitation in directing the Id. AO to delete the transfer pricing adjustment made on account of guarantee commission income in the sum of Rs.1,21,58,130/-. Accordingly, the grounds raised by the assessee are allowed.

**4. In the result, appeal of the assessee is allowed.**

Order pronounced in open Court on 09/11/2022 by way of proper mentioning in the notice board.

**Sd/-**  
**(KAVITHA RAJAGOPAL)**  
JUDICIAL MEMBER

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 09/11/2022  
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,

(Sr. Private Secretary / Asstt. Registrar)  
ITAT, Mumbai