

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD**

BEFORE

**SHRI R.K. PANDA, VICE PRESIDENT
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER**

आ.अपी.सं / **ITA No.318/Hyd/2023**
(निर्धारण वर्ष / Assessment Year: 2018-19)

Asst. Commissioner of Income Tax, Central Circle – 1(3), Hyderabad.	Vs.	M/s. NCC Limited, Sy.No.64, 9 th Floor, NCC House, Madhapur, Shaikpet, Hyderabad, Telangana. PAN : AAACN7335C.
अपीलार्थी / Assessee		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Sri C.S. Subrahmanyam, C.A.
राजस्व द्वारा/Revenue by: Ms. TH Vijaya Lakshmi, CIT-DR.

सुनवाई की तारीख/Date of hearing: 20.11.2023
घोषणा की तारीख/Pronouncement on: 24.11.2023

ORDER

PER LALIET KUMAR, J.M.

This appeal is filed by the Revenue feeling aggrieved by the order of Commissioner of Income Tax (Appeals) – 10, Hyderabad dt.17.03.2023 invoking proceedings under sections 143(3) r.w.s. 144C(3) r.w.s 144B of the Income Tax Act, 1961 (in short, “the Act”) for the A.Y. 2018-19.

2. The grounds raised by the Revenue reads as under :

“1. The Ld. CIT(Appeals) erred both in law and on facts of the case in granting relief to the assessee.

2. Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) is justified in directing to charge corporate guarantee fee @ 0.53% relying on decision of the CIT(A)/ DRP for earlier assessment years without undertaking an independent comparability analysis for the year under consideration.

3. Whether on the facts and circumstances of the case and in law, the CIT(Appeals) is justified in directing to charge the corporate guarantee fee at 0.53% contravening the India Transfer Pricing Regulations, which prescribe that the data to be used for the purpose of comparability analysis should relate to the year in which the international transactions has taken place?

4. Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) is justified in directing to adopt corporate guarantee fee @0.53% relying on earlier orders without appreciating the fact the the TO has conducted a comparability analysis and arrived at the arm's length price?

5. The CIT(A) erred in deleting the disallowance of expenditure made u/s. 14A of the Income Tax Act, read with Rule 8D of the Income Tax Rules.

6. The Ld CIT(A) erred in ignoring the explanation to Section 14A w.e.f. 01.04.2022 which clearly stipulates that the provisions of this section shall apply and shall deemed to have always applied in a case where the income, not forming part of the total income under this Act has not accrued or arisen or has not been received during the previous year relevant to an assessment year.

7. The LD CIT(A) ought to have appreciate that the Explanation to Section 14A inserted w.e.f. 01.04.2022 is clarification in nature.

8. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary.”

3. The brief facts of the case are that the assessee is engaged in the infrastructure sector, primarily in the construction of industrial and commercial building, flyovers, environment projects etc. Assessee filed return of income for A.Y. 2018-19 on 28.11.2018 declaring total income of Rs. 221,14,62,190/ -. The case was selected for scrutiny. The notice u/s 143(2) of Income Tax Act, 1961 (the Act) was issued on 22.09.2019. It was duly

served upon the assessee. Subsequently, notice u/s 142(1) was issued on 15.12.2020 which was served on the assessee. The case was also referred to the TPO for determining ALP and the adjustment of Rs.22,80,06,000/- was determined on account of ALP. Subsequently the assessment was completed by making certain additions / disallowance including addition on account of TP adjustment at Rs.22,80,06,000/- and disallowance u/s 14A of the Act at Rs.10,23,73,985/-. Thus, assessment was completed u/s 143(3) r.w.s. 144C(3) of the Act assessing the total income of Rs.361,27,68,435/-.

4. Feeling aggrieved with such assessment order, assessee filed appeal before the Id.CIT(A), who partly allowed the appeal of assessee.

5. Aggrieved with the order of Id.CIT(A), Revenue is now in appeal before us on the grounds mentioned hereinabove.

6. The Revenue has raised as many as 8 grounds. Out of them, grounds 1 and 8 are general in nature and require no adjudication. In the remaining grounds 2 to 7, ground nos. 2 to 4 are related to the corporate guarantee and ground nos.5 to 7 are related with respect to the disallowance u/s 14A of the Act.

7. **GROUND 2 TO 4**

Before us, Id. DR submitted that these grounds are with respect to a corporate guarantee. In this regard, Id. DR has drawn our attention to the order of Id.CIT(A), where the Id.CIT(A) had passed the order treating the corporate guarantee as an international transaction, however, had restricted it to 0.53% instead of 1.8% as determined by the TPO. For the above said

purposes, the ld.CIT(A) had relied upon the order of Tribunal passed in the case of the assessee for A.Ys. 2012-13 to 2014-15 and 2016-17 vide order dt.27.09.2021. The ld. DR further submitted that the order passed by the ld.CIT(A) is contrary to the order passed by the TPO and therefore, the order is required to be dismissed.

8. Per contra, the ld. AR relied upon the order of TPO and also submitted that the issue has already been settled by the Tribunal in the case of M/s. Aurobindo Pharma Limited.

9. We have heard the rival submissions and perused the material on record. In the case of M/s. Aurobindo Pharma Limited, the Tribunal had taken the corporate guarantee at 0.5% as against 1% determined by the DRP. In para 8.3 of the order passed in the case of M/s. Aurobindo Pharma Limited (ITA 485/Hyd/2022 dt.27.04.2023) the Tribunal has held as under :

“8.3. We have considered the submissions and found that the charges paid by the assessee cannot be compared for the purposes of determining the ALP of corporate guarantee commission. In our view, no third party would provide similar type of services/corporate guarantee on behalf of its AE and expose itself to the risk of giving the corporate guarantee. Therefore, the charges paid by the assessee to SBI cannot be compared for the purpose of determining the ALP of corporate guarantee commission. The Co-ordinate Bench in the case of Vivimed Labs vide its decision dated 12-04-2022 had adjudicated corporate guarantee commission @0.5% of the qua the extent of the amount of the assessee’s corporate guarantee actually utilised in these four assessment years. Thereafter, the similar view had been taken by various Tribunals restricting the addition to 0.5% of on the amount guaranteed as a corporate guarantee commission. Recently, Delhi Tribunal in the case of Havells India Ltd. Vs. ACIT (LTU) in ITA No.6509/Del/2018 dt.09.05.2022 had also echo the above said view and held that the addition of 0.5% on the amount guaranteed would be the appropriate benchmark to determine the ALP. Similar decision was also passed by the Bangalore and Pune Bench of the Tribunals in the case of GMR Infrastructure Ltd in ITA No.344/Pun/2022 dt.25.05.2022 and Jain Irrigation Systems in ITA 822/Pun/2022 dt.22.12.2022, respectively. Respectfully following the view taken by the Delhi, Bangalore and Pune Tribunals in the above cited cases and also in the case of Vivimed Labs (supra), we partly allow the ground of the assessee and restrict the addition to the tune of 0.5% on the amount

guaranteed as corporate guarantee commission. Thus, ground nos. 1 to 4 are partly allowed.”

10. In the present case, the assessee is not aggrieved with the finding recorded by the Id.CIT(A) whereby the interest payable on corporate guarantee was restricted to 0.53%. However, the Revenue is in appeal before us challenging the order and claiming that 1.8% should be applied as against 0.53% as applied by the Id.CIT(A). As the Id.CIT(A) had decided the issue on the basis of the order passed by the Tribunal in the case of assessee in A.Ys. 2012-13 2016-17 to 17-18 and further this Bench in the case of M/s. Aurobindo Pharma Limited (supra) also applied 0.50% as corporate guarantee, therefore, we do not find any merit in the appeal of the Revenue and uphold the order of Id.CIT(A) whereby the Id.CIT(A) has restricted the interest payable on corporate guarantee at 0.53% instead of 1.8% as determined by the TPO. Thus, these grounds of the Revenue are dismissed.

11. The other grounds i.e., grounds 5 to 7 raised by the Revenue are with respect to Section 14A of the Act. In this regard, Id. DR submitted that the Id.CIT(A) had elaborately discussed the issue in para 6 at page 17 to 20 of his order. Id. DR relied upon the amendment to Section 14A of the Act by insertion of explanation by the Finance Act, 2022 and submitted that the amendment is retrospective in nature and applicable to all the appeals arising before the various authorities.

12. On the other hand, the ld. AR relied upon the decision of co-ordinate Bench of the Tribunal in the case of its sister concern i.e., NCC Infrastructure Holdings Limited in ITA 144/Hyd/2023 dt.12.06.2023 whereby the Tribunal has held that the amendment to section 14A of the Act was introduced by the Finance Act, 2022 is not retrospective and it is prospective in nature. The Tribunal in the case of NCC Infrastructure Holdings Limited (supra) had elaborately discussed the issue and decided the issue in favour of the assessee. For the completeness, we are reproducing the relevant portion of the said order, which is to the following effect :

“6. We have gone through the record in the light of the submissions made on either side. There are no contrary findings of the authorities to the plea taken by the assessee that during the year under consideration, the assessee did not earn any exempt income. The basis for making the addition that the assessee incurred interest expenditure in respect of the amounts that were used for making investment also. In that process, learned CIT(A) relied upon the amendment to section 14A of the Act by insertion of explanation by Finance Act, 2022 and also to the decision of the Guwahati Bench of the Tribunal, referred above.

7. In the case of Era Infrastructure (India) Ltd., (supra) Hon'ble Delhi High Court considered the effect of amendment made by the Finance Act, 2022 to section 14A of the Act by insertion of a non obstante clause and explanation after the proviso, subsequent to the decision of the Hon'ble Delhi High Court in the case of PCIT vs. IL&FS Energy Development Co. Ltd., (2017) 84 taxmann.com 186, Hon'ble Delhi High Court and also the memorandum of Finance Bill, 2022 accordingly to clauses 5 to 7 thereof. The Hon'ble High Court analysed the same in the light of the decision of the Hon'ble Supreme Court in the case of Sedco Forex International Drill. Inc. vs. CIT (2005) 149 Taxman 352 reiterated in M.M. Aqua Technologies Ltd. vs. CIT (2021) 129 taxmann.com 145 and held that the amendment of section 14A of the Act which is 'for removal of doubt' cannot be presumed to be retrospective even where such language is used, if it alters or changes law as it earlier stood.

8. Thereupon the Hon'ble High Court followed the decision of IL&FS Energy Development Co. Ltd., (supra) and concluded that no disallowance under section 14A of the Act can be made if the assessee had not earned any exempt income during the year under consideration. Hon'ble High Court, however, was pleased to clarify that the orders passed in the case of Era

Infrastructure (India) Ltd., (supra) shall abide by the final decision of the Hon'ble Supreme Court in the SLP filed in the case of IL&FS Energy Development Co. Ltd., (supra). The decision in Era Infrastructure (India) Ltd., (supra) was followed by the Hon'ble Delhi High Court in the case of Delhi International Airport (P.) Ltd., (supra).

9. *We are not in agreement with the submissions made on behalf of the Revenue that since the Tribunal at Hyderabad is not bound by the decisions of the other Hon'ble High Courts, the findings of the learned CIT(A) following the provisions of law has to be upheld. It is pertinent to note that learned CIT(A) himself followed the decision of the Guwahati Bench of the Tribunal in the case of Williamson Financial Services Limited (supra). In the absence of any decision of the Hon'ble jurisdictional High Court/Hon'ble Supreme Court, the decisions of other Hon'ble High Courts will constitute the binding precedent to be followed by the Tribunal.*

10. *With this view of the matter, we allow the appeal of assessee, and in view of the direction of the Hon'ble Delhi High Court the orders now passed in this appeal shall abide by the final decision of the Supreme Court in the SLP filed in the case of IL&FS Energy Development Co. Ltd., (supra). Subject to the above observation, the appeal of assessee stands allowed."*

13. Respectfully, following the above decision, ground nos.5 to 7 are also decided against the Revenue and accordingly, the appeal of the Revenue is dismissed.

14. In the result, the appeal of Revenue is dismissed.

Order pronounced in the Open Court on 24th November, 2023.

Sd/- (R.K. PANDA) VICE PRESIDENT	Sd/- (LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 24th November, 2023.

TYNN/sps

Copy to:

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2	Asst. Commissioner of Income Tax, Central Circle – 1(3), Hyderabad.
3	Dispute Resolution Panel (DRP), Bengaluru.
4	Director of Income Tax (IT & TP), Hyderabad.
5	Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
6	DR, ITAT Hyderabad Benches
7	Guard File

By Order