आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य एवं
माननीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

आयकरअपील सं. ITA No.1446/Chny/2024
(निर्धारणवर्ष / Assessment Year: 2016-17)

Dae Won Kang Up Co Limited C/o. Daewon India Autoparts Private Ltd. Survey No.477 & 489, No.99, Papparambakkam Village, Tiruvalluvar Tk.- 602 025.	बनाम/ Vs.	**DCIT** International Taxation-1(1) Chennai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AADCD-7280-P**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी कीओरसे/ **Appellant by**	:	Dr. M.S. Vasan (Advocate) & Dr. Divya Abhishek (CA) - Ld. ARs
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri Ashwin D Gowda (Addl. CIT) - Ld. Sr. DR

सुनवाई की तारीख/**Date of Hearing**	:	22-10-2024
घोषणा की तारीख /**Date of Pronouncement**	:	19-11-2024

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2016-17 arises out of an order passed by Learned Commissioner of Income Tax (Appeals), Chennai-16 [CIT(A)] on 29-03-2024 in the matter of an assessment framed by Ld. AO u/s.143(3) of the Act on 22-02-2019. Previously, Ld. AO passed a draft order on 27-12-2018. The grounds raised by the assessee read as under: -

1. The Assessment Order passed by the Assessing Officer ("AO" or "the DCIT") is bad in law to the extent not able to conclude under which head of the double tax treaty "the Guarantee Fee" is taxable.
2. The Ld. CIT(Appeals)("CIT(A)") grossly erred in concluding that "availing the loan by the subsidiary" that triggers the accrual of income in India, which is against the spirit of international commentary and judicial precedence exist in this regard.
3. The Ld CIT(A) not appreciated the legal position that the taxation of the Guarantee fee is with respect to a loan provided from a foreign country to the Indian Subsidiary and therefore, does not accrue or arise in India, unless the same is considered as Deemed to accrue or arise, as in the case of Interest.
4. The Ld.AO/CIT(A) erred in wrongly assuming that the income from "Guarantee Fee" amounting to Rs.12,761,619/- earned by the non-resident foreign company which is resident of South Korea has accrued or arisen in India without proper reference to the provisions of Double Taxation Avoidance Agreement (DTAA)" Distributive Rules.
5. The Ld AO and CIT(A) have blindly concluded on taxability of the guarantee income as "Other Income" by reference to a decision of ITAT Delhi in Johnson Mathey Public Ltd dealing with Article 23(3) of Indo-UK DTAA, which is different from the Other Income Article 22(1) under India-Korea DTAA which provides the right of taxation only to Korea.
6. Useful reference should have been made to the decision of ***ITAT (DELHI) in Lease Plan India Private Ltd (ITA 6461 and 6462/Del/2015)*** dealing with India-Netherlands DTAA distinguishing the decision of Johnson Mathey Public Ltd (as followed by the CIT(A)).
7. AO/CIT(A) omitted to consider that the income could rightfully be Business Income under Article 7 of DTAA, this particular income does not fall under miscellaneous income at all and cannot be brought under Article 22 under "Other Income", the said principle is clearly laid in jurisdictional ***high court decision in Bangkok Glass Industries Pvt Ltd Vs ACIT (257 CTR 356),***
7.1. Article 22 -Other Income of the Indo-South Korea treaty, clearly specify, "I. 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.
8. Consequential relief of interest impact under 234B to be given.

As is evident, the sole issue that arises for our consideration is taxability of guarantee fees in terms of Indo-Korea Treaty vis-à-vis the provisions of Income Tax Act.

2. The Ld. AR advanced arguments to support the case of the assessee and referred to various Articles of the Treaty. Reference has been made to various judicial decisions, the copies of which have been placed on record. The Ld. Sr. DR also advanced arguments and supported the orders of lower authorities. Having heard rival submissions and upon perusal of case records, our adjudication would be as under.

Assessment Proceedings

3.1 The assessee is non-resident corporate entity based in South Korea. The assessee is stated to be engaged in manufacturing of suspension springs and seats. During assessment proceedings, it transpired that the assessee received 'royalty income' and 'fees for technical services' which was offered to tax. However, the assessee received corporate guarantee fees for Rs.127.61 Lacs during the year which was claimed to be exempt. The fees were received from Deawon India Auto Parts Pvt. Ltd. (DIAPL) in connection with guarantee extended by the assessee to financial institutions for loans granted to DIAPL. DIAPL was a subsidiary of the assessee and it availed loan in India. Accordingly, the Ld. AO held that guarantee fees accrued in India which would be taxable in India in terms of provisions of Sec.5(2) and Sec.9(1)(i). As per Sec.9(1)(i), all income accruing and arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India or through or from any asset or source in India or through or from any asset or source of income in India or through the transfer of capital asset situated in India would be taxable in India.

3.2 The Ld. AO also held that guarantee fees were not in the nature of interest income and the same is not covered under Article-11 of the treaty. The assessee was not a party to loan agreement between the lender and Indian subsidiary. The guarantee fee was also not in the nature of business income since the assessee was predominantly engaged in manufacturing business and not in the business of providing guarantee fees to earn income on regular basis. The guarantee agreement was entered into for limited purpose of enabling the

subsidiaries to avail loans and guarantee fees was consequential in nature. Therefore, the same would also not be covered under Article-7 of the treaty.

3.3 The assessee defended its stand on the ground that it routinely extended guarantee as an inevitable part of its business operation. It was integral part of business of the assessee without which its ability to expand across the globe and making its subsidiaries operational and profitable would be seriously hampered. The extending of guarantee was primarily driven by business interest of the assessee company and guarantee fees was charged to compensate for the underlying risk in Korea which would not fall within the purview of Sec.5 and Sec. 9.

3.4 However, Ld. AO rejected the same on the ground that Indian subsidiary was located in India and the loan was utilized to earn the business income in India. From the business income earned in India, the subsidiary company paid the guarantee fees to the assessee company. Therefore, the same accrued / arose in India. Finally, the amount of Rs.127.61 Lacs was brought to tax.

Appellate Proceedings

4.1 During appellate proceedings, the assessee reiterated its stand and stated that such guarantee devolves a 100% contractual obligation and financial liability on the assessee company to compensate the lending banks in the event of failure by the subsidiary. Thus, it imputes a huge business risk and liability on the assessee company in Korea for which it charges a fee from its subsidiaries. Therefore, the same would be in the nature of business income. The assessee submitted that the said fees could be covered under Article-22 of the Treaty which applies to other income. As per this Article, such income shall be taxable in the

contracting state i.e., Korea. The assessee also stated that this income is not taxable in India as Business income in view of Article-7 which mandate existence of a permanent establishment of non-resident company in India. In such a case, Ld. AO could not resort to other income clause as held by Hon'ble High Court of Madras in the case of Bangkok Glass Industry Co. Ltd.

4.2 However, Ld., CIT(A) observed that the situs of income was from India. This income accrued to the assessee in India and from the definition of interest u/s 2(28A), it was apparent that the guarantee fees was to be considered as interest income. Therefore, the same would be taxable in India either as business income or income from other source. However, in terms of Article 11(3), such fees would not be interest income. Therefore, it was to be considered whether the same could be treated under other income Article. In the case of **Johnson Matthey Pacific Ltd. (TCA No.727/2018 dated 28-05-2024)**, it was held by Hon'ble High Court of Delhi that the bank guarantee fees would not fall within the expression interest and in the absence of any specific provision dealing on corporate guarantee fee, the same shall be taxable as per the provision of domestic law. In the present case, Article-22 speaks about other income. Thus, this article was not specific and to say that guarantee fees would fall under other income would be too far-fetched. Therefore, the domestic provisions would apply and accordingly the impugned addition was upheld. Aggrieved, the assessee is in further appeal before us.

Our findings And Adjudication

5. It emerges that the assessee has charged fees from its subsidiary entity (DIAPL) in connection with guarantee extended by the assessee to

financial institutions for loans granted by those institutions to DIAPL. DIAPL has availed loan in India. In the case law of **Johnson Matthey Pacific Ltd. (TCA No.727/2018 dated 28-05-2024),** Hon'ble Delhi High Court has not concurred with the decision of Mumbai Tribunal in **Capgemini SA vs. DCIT (72 Taxman.com 58)** and held that such fees would accrue and arise in India. The foundational stone of such payment was to seek guarantee and indemnification facilities. These services were offered for their own commercial benefit. The payment was regular in nature. The guarantee charges were indelibly connected with the extension of services by the assessee in India for the benefit of its subsidiaries. The only parties to the agreement were the assessee and their corresponding Indian subsidiary. The obligation to pay was incurred in India and the same was in respect of services utilized in India. Accordingly, it was held that such fees accrued in India only and liable to tax consequently.

6. At the same time, in paras 20 to 22 of the decision, the Hon'ble Court, considering the term 'interest' as defined in Article-12 of India-UK DTAA, observed that guarantee charges were not received by the assessee in respect of any debt owned to it by its Indian subsidiary. It also could not possibly be acknowledged to be income derived from claims that the assessee may have had against its Indian subsidiaries. The charges were received in connection with the credit facilities which were extended by overseas branches of foreign banks to its Indian subsidiaries. To provide the same, the assessee charge the subsidiary as per agreement. The assessee was neither a party to the loan agreement nor it had any privity of contract that could be said to exist. The charges received was a remuneration for the assurance that the

assessee had offered to lending entities. The Indian subsidiary owed no debt to the assessee. It was finally held that such charges could not be classified as interest under Article-12 of the treaty. We find that interest has similarly been defined in India-Korea DTAA and therefore, the aforesaid decision would apply so far as the question whether the charges could be termed as interest is concerned. Respectfully following this decision, we would hold that such charges would accrue / arise in India and the same could not be classified as interest under the treaty.

7. Proceeding further, in the aforesaid decision, the question whether the charges could be classified as Business income under Article-7 has not been examined. However, from the fact, it would emerge that the assessee has extended this guarantee for its own commercial benefit. The guarantee has been extended on behalf of its subsidiaries from which the assessee is earning royalty income and fees for technical services. Therefore, extending this guarantee for the benefit of subsidiaries would be in the interest of the assessee entity. Viewed from this angle, such fees as accrued to the assessee could very well be said to be in the nature of business income which would be covered under Article-7 of the treaty which postulate taxation of such income in contracting state unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. The same is not the case here. Therefore, considering the impugned fee as business income, the same is not liable to be taxed in India as per more beneficial provisions of the treaty.

8. Lastly, Article-22 of the treaty is in the nature of residuary provisions which read as under: -

ARTICLE 22
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 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 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.

This article provide that items not specifically dealt with in the foregoing articles would be taxable only in contracting state i.e., Korea. A bare perusal of the same would show that taxing right of such income has been granted to the contracting state. Therefore, even if it is assumed that the impugned payment was not business income but residuary income for the assessee then the same would be covered under Article-22 for which taxation right would be with contracting state i.e., Korea.

9. Finally, considering the facts and circumstances of the case, we would hold that the impugned payment would not be taxable in India for the assessee unless it was shown that the assessee entity has PE in India. In the absence of such a finding, the impugned addition is liable to be deleted. We order so.

10. The appeal stands partly allowed in terms of our above order.

Order pronounced on 19th November, 2024

Sd/-	**Sd/-**
(MANU KUMAR GIRI)	**(MANOJ KUMAR AGGARWAL)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

चेन्नई Chennai; दिनांक Dated : 19-11-2024
DS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT Chennai.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF