

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : H : NEW DELHI

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1450/Del/2022
Assessment Year: 2018-19

JE Energy Ventures P. Ltd., Vs ACIT,
Plot No.1A, Sector-16A, Circle 5(1)(1),
Industrial Area, GB Nagar.
Noida (Uttar Pradesh) – 201 301.

PAN : AAACE0653L

(Appellant)

(Respondent)

Assessee by : Shri K.M. Gupta, Advocate &
Ms Kashish Gupta, CA
Revenue by : Shri Zafarul Haque Tanveer, CIT-DR
Date of Hearing : 09.12.2024
Date of Pronouncement : 13.12.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 28.04.2022 of the Asstt. Commissioner of Income Tax, Circle Circle 5(1)(1), Gautam Budh Nagari (hereinafter referred to as the Ld. AO) passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) for the assessment year 2018-19.

2. The assessee is one of the 'venture business' segments of the Jubilant Bhartia group and through its alliance with international companies, provides business, marketing and technical support related to oil and gas services, power and infrastructure services. The assessee had provided two loan arrangements through corporate guarantee for its AEs in 2011 and 2014 which were defaulted by the AE in May, 2016. The corporate guarantee was provided in favour of EXIM Bank and the assessee had admitted a liability of guarantee that the guarantee shall not exceed the amounts realized first by investments of JEPL in its subsidiary JEHBV and assets and investments held by its subsidiary JEHF or through its step down subsidiaries. Due to default of JEBV and JEHBV to whom loan guarantee of 50 million and 45 million respectively were provided their loans were classified as non-performing assets and bankruptcy proceedings were initiated in the Amsterdam District Court. The EXIM Bank served notice of revocation of these two corporate guarantees as well as counter corporate guarantees on March 30, 2016 and called upon the assessee to pay a sum aggregating USD946,08,119 equivalent to INR 615,36,98,958/-. During assessment proceedings, the TPO accepted that corporate guarantee has been invoked by EXIM Bank and was of the view that on invocation of corporate guarantee the same became the loan and, accordingly, considered it to be an international transaction and benchmarked the same arriving at arm's length carrying the fee @ 7.36% (LIBOR + 570 basis points) and proposed to enhance the income of the assessee by Rs.45,29,12,243/-. The DRP sustained the

addition relying its finding in assessee's case for AY 2013-14 wherein corporate guarantee was considered to be an international transaction.

3. The ld. counsel has submitted that the invocation of corporate guarantee is a transaction between the assessee and an unrelated entity which is EXIM Bank, therefore, provisions of section 92A cannot be invoked and there was no requirement of transfer pricing analysis. It was submitted that the assessee has so far not made any payment to EXIM Bank on account of AE. Thus, the assumption of the TPO that the assessee is liable to pay interest cost is not correct. It was submitted that thus, there was no question of any reduction in income or increase of loss out of this transaction of guarantee.

4. It was submitted that in assessee's own case for AY 2017-18 the coordinate Bench has held vide ITA No.513/Del/2022 that as the guarantee has been invoked, so, there is no more any international transaction in existence from AY 2017-18 onwards.

5. The ld. DR has relied the orders of the ld. tax authorities below.

6. We have given thoughtful consideration to the matter on record and have gone through the audited financial statement of the assessee for AY 2018-19 and the tax audit report for AY 2018-19, copy of which is available at pages 1-45 of the paper book. It can be appreciated that in notes to the standalone financial statements for the year ending 31st March, 2018, in the context of the

present issues of corporate guarantee, a contingent liability note has been given. It is mentioned that although EXIM Bank has invoked the corporate guarantee, the liability of the company is yet to be ascertained and crystalised. Thus, during the relevant financial year the assessee has not incurred any expenditure on account of the two bank guarantees.

7. Then the order of the coordinate Bench in the case of the assessee for AY 2017-18 is also relevant wherein, with regard to the corporate guarantee transaction, vide order dated 05.07.2024, the coordinate Bench has concluded that:-

“7. The issue has to be analyzed based on the facts of each year, coming to the real issue in this year under consideration are, the assessee has given corporate guarantee to its step down subsidiaries while availing the loan by them in the past. In order to bench mark the transaction, it has to be evaluated every year and it cannot be held that once the guarantee is given in the past, it continued to have impact on every assessment year subsequently. In this case, the assessee has given guarantee towards the loan and primary obligation of servicing the loan to the bank when they granted loan to the step down subsidiaries. No doubt the assessee also collected fees for providing the guarantee in the past, as per records, the assessee has collected Rs. 2.7 crores in the AY 2013-14. It was adjudicated in AY 2013-14 that this transaction falls within definition of the international transaction. However, the facts are different in this AY considering the fact that the step down subsidiaries had not serviced the obligation towards the loan taken by them and the same were classified as non-performing assets (NPA) by EXIM bank. The same was intimated to the assessee on May 2016 and initiated the recovery proceedings from the assessee being the primary guarantor. The assessee being the holding company, it is aware of the situation prior to the intimation received from the bank ie., in the previous year itself. Once the situation is apparent and recovery proceedings are commenced, the guarantee ceased to exist at the beginning of the year itself. It is not something happens over night. The banks classify the loan as NPA after providing several opportunities and discussions. This process must have commenced prior to the intimation of default by the bank in the month of May 2016. That being so, the corporate guarantee provided by the assessee ceases to exist in the beginning of the

*year itself. Therefore, in our considered view, in the beginning of the year, there was no existence of any guarantee to the EXIM bank and it is also relevant to notice that the assessee has not recovered any fees for guarantee, as in the past, during the year under consideration and the EXIM bank has initiated the recovery proceedings from the assessee. The liability of the assessee towards the guarantee are restricted to the extent of its investments in the subsidiaries and to the extent of recovery of the assets held by the subsidiaries. Therefore, the liabilities of the assessee was converted from guarantor to the actual liabilities to the extent of default by the step down subsidiaries, absolutely nothing left for the assessee itself to recover from its subsidiaries till the bank recovers their dues. Similar submissions were made by the Ld DR and are not in agreement of the views. Further, no doubt, as per the submissions of the Ld DR, the statutory provisions may cause hardship or inconvenience but court has no choice but to enforce it, irrespective of the situation, the transaction has to be bench marked. **After considering the facts on record, what is relevance is whether the guarantee existed at the commencement of the impugned AY, in this case, in our opinion, the assessee was aware as well as the intimation received from the bank in the month of May itself, therefore, there was no guarantee existed as soon as the intimation of classification of NPA. It is crystallized/non-existence of the guarantor in the beginning of the year itself, therefore, we cannot presume that the corporate guarantee existed, hence, there is no possibility that the assessee has continued the guarantee, in our view for this AY, there is no international transaction. Therefore, the TPO was wrong in initiating proceedings to bench mark corporate guarantee as there is no international transaction at the first place.***

8. Taking into consideration the foresaid conclusion of the coordinate bench we are of the considered view that certainly once the international transaction arising out of the guarantee given for the benefit of AE goes, then what is left is a transaction between the assessee and the EXIM Bank only, which are unrelated parties. The vital constituent of an international transaction is that the same should be between associated enterprises. However, Section 92B(2) of the Act outlines the circumstances under which a transaction between two persons would be deemed to be between the associated enterprises.

9. What is important is to be examined now is if for the purpose of section 92B(2) of the Act, the assessee's transaction with EXIM Bank is an independent transaction or a prior agreement between the assessee and its AE, makes the assessee's transaction with EXIM Bank a deemed international transaction .

10. In this context, if the copy of guarantee deeds are examined, copy of which is placed at pages 117 to 147 of the paper book, it is apparent that in the deed of guarantee the assessee is referred as guarantor and the AE as borrower. Thus without doubt the foundation to the deed of guarantee, between the assessee and EXIM Bank, is the loan agreement between the EXIM Bank and AE, who are referred as borrower in the deed of guarantee. Thus, for the purpose of section 92B(2), the assessee's transaction with EXIM Bank is, no doubt, the outcome of a prior agreement in relation to the relevant transaction of guarantee between the assessee and the EXIM Bank.

11. Thus, the finding of a coordinate Bench in favour of the assessee holding that there is no more any international transaction left with regard to assessee providing guarantee to AE is actually not relevant to examine the alleged international transaction of loan, between the assessee and the AE, arising out of invocation of guarantee by the EXIM Bank. In this context we are of considered view that this question of deemed loan would be dependent on discharge of debt of AE towards EXIM Bank after any payment is made by assessee or any recovery is enforced by EXIM Bank by any other mode of recovery of the

guarantee amount. As the AE for whom the assessee entered into bank guarantee has not been benefitted by discharge of its debt and liability and same still stands. Thus actually so far there is no crystallized liability of the assessee.

12. At the same time, no cost or expense has been allocated or apportioned by the assessee in the books by the assessee on account of invocation of guarantee, so to say that such cost or expense allocated or apportioned in any way has the effect of reducing the income chargeable to tax or increasing any loss as the case may be to be computed on the basis of entries made in the books of account in respect of the previous year in which this alleged international transaction of deemed loan was entered into.

13. In this context we would also like to mention that Section 140 and Section 141 of the Indian Contract Act, 1872 deals with the **principle of subrogation** with regard to the rights of a surety or guarantor. It states that if the debt guaranteed by the surety becomes due or if the principal debtor fails to perform a guaranteed duty, the surety, upon payment or performance of the guaranteed debt, is entitled to all the rights that the creditor had against the principal debtor. In other words, once the surety has paid the guaranteed debt, they are subrogated to the rights of the creditor against the principal debtor. This means that the surety can exercise all the rights that the creditor had against the principal debtor, such as the right to recover the amount paid from the principal debtor, and any security held by the creditor for the debt. The surety can also

take legal action against the principal debtor to recover the amount paid as a guarantee. However, subrogation is the assumption of another party's legal right to collect debts or damages, but that does create a new debt in the books of guarantor.

14. Thus, we are of the considered view that ld. tax authorities below have fallen in error in proceeding with a proposition that the guarantee once invoked by the EXIM Bank became a debt towards the EXIM Bank on account of AE so as to treat the same as loan to AE and to charge an arm's length interest on the same. Consequently, the grounds of the assessee are sustained. **The appeal of assessee is allowed** and the impugned enhancement is quashed.

Order pronounced in the open court on 13.12.2024.

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 13th December, 2024.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi