IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, KOLKATA

BEFORE SHRI RAJESH KUMAR, AM
AND
SHRI PRADIP KUMAR CHOUBEY, JM

ITA No.1330/KOL/2024
(Assessment Year:2017-18)

Assistant Commissioner of Income Tax, Circle-5(1) Aayakar Bhawan, 8thFloor, P7, Chowringhee Square, Kolkata700069 West Bengal, **(Appellant)**	**Vs.**	**Emami Limited** 13thFloor, Acropolis 1858/1 Rajdanga Main Road, East Kolkata Township, Kolkata 700107 West Bengal **(Respondent)**

PAN No. AAACH7412G

Assessee by	:	Shri Akkal Dudhewala, AR
Revenue by	:	Shri Ranu Biswas, DR

Date of hearing: 18.03.2025
Date of pronouncement : 01.042025

O R D E R

Per Rajesh Kumar, AM:

This is an appeal preferred by the Revenue against the order of the National Faceless Appeal Centre, Delhi (hereinafter referred to as the "Ld. CIT(A)"] dated 15.03.2024 for the AY 2017-18.

02. At the outset, we note that there is a delay in filing the appeal by the Revenue by 30 days for which the condonation petition was filed. Having perused the contents of the condonation petition, we find that the delay in filing the appeal was due to some administrivia reasons which we find to be bonafide, genuine and sufficient. Accordingly, the

delay in filing the appeal is condoned and appeal is admitted for adjudication.

03. The issue raised by the Revenue in ground no.1 to 6 is in respect of corporate guarantee challenging the appellate order wherein the ld. CIT (A) has partly deleted the addition made by the ld. AO/ Transfer Pricing Officer to the tune of ₹34,85,222/- in respect of international transaction, qua corporate guarantee by the assessee to its Associated Enterprises.

04. After hearing the rival contentions and perusing the materials available on record, we find that the issue is similar to the issue as has been decided in A.Y. 2013-14 and A.Y. 2014-15 by the co-ordinate Bench of the Tribunal in assessee 's own case and the ld. CIT (A) by following the same held that the corporate guarantee fee of 1% charged by the assessee is to be at arms' length. The finding of the ld. CIT (A) on this issue is extracted below:-

"Having perused the findings of the Ld. TPO, it is noted that his analysis of ascertaining the stand-alone credit rating of the AE at CCC had no rationale basis. Even the identification of loan comparables to arrive at margin of 400 bps is found to have been done without citing the relevant FAR and Economic Analysis undertaken by him. It is accordingly noted that the benchmarking exercise carried out by the TPO suffered from fundamental infirmity and hence cannot be accepted. It is further noted that, my predecessor in appellant's own case for earlier AYs 2013-14 & 2014-15 had found the CG fee of 1% charged by the assessee to be at arm's length. I also note that various High Courts and the Hon'ble Tribunal have held the arm's length price of corporate guarantee fees to be in the range of 0.20% to 0.50%, and some of the relevant citations are as follows:

1. *PCIT v. Redington (India) Ltd. (2021) 430 ITR 298 (Mad HC)*
2. *CIT v. Asian Paints (India) Ltd. [2016] 75 faxmann.com 152 (Bom. HC)*
3. *Berger Paints India Ltd. v. DCIT [2022] ITA Nos.917 & 918/Kol/2017 (ITAT Kolkata)*
4. *Electrosteel Castings Ltd v. DCIT [2019] IT(SS)A No.47-60/Kol/2014 (ITAT Kolkata)*

In view of the above, the CG fee of 1% charged by the assessee is held to be at arm's length and accordingly the transfer pricing adjustment of Rs.34,85,222/- made by the Ld. TPO being unsustainable is directed to be deleted. These grounds are therefore allowed."

05. Considering the facts of the case and the order passed by the Tribunal in assessee's own case in A.Y. 2013-14 and 2014-15, we do not find any infirmity in the order of ld. CIT (A) and accordingly uphold the order of ld. CIT (A) by dismissing the ground nos.1 to 6 in Revenue's appeal.

06. The issue raised in ground no.7 to 11 is against the deletion of arm's length price adjustment of ₹2,14,32,920/- by ld. CIT (A) as made by the ld. Transfer Pricing Officer/ AO on account of eligible / non-eligible units between the assessee and its Associated Enterprises.

07. We find that the facts in brief are that the ld. Transfer Pricing Officer has made a transfer pricing adjustment of ₹1,79,47,698/-, in relation to Inter-Unit transfer of eligible units at Abhoypur and Pantnagar. The ld. Transfer Pricing Officer noted that the inter-unit transactions involving transfer of raw materials between eligible units and non-eligible unit were undertaken on cost-to-cost basis without any mark-up to increase the eligible profit of the eligible unit for claiming of higher exemption of the profit. Accordingly, the Transfer Pricing Officer computed the adjustment at ₹91,71,780 and ₹87,75,918/- respectively for both eligible unit and non-eligible unit.

08. The ld. CIT (A) deleted the said adjustment by observing and holding as under:-

"It is well known that higher or lower profit of a business unit in comparison to other units can be as a result of the cumulative effect of several factors. For instance, from the facts of the present case, it is noted that the major factor for higher profitability of eligible units was that it was manufacturing products such as Kesh King, Zandu Balm, Boroplus, Navratna which have higher contribution margins in comparison to the

products manufactured at non-eligible units viz Fair and Handsome, Vasocare, Xtra Thanda etc. I am in agreement with the appellant that it is their prerogative and decision to manufacture higher margin products at units enjoying fiscal incentives and that such commercial decision taken by them cannot be questioned by the Assessing Officer. The reliance placed by the appellant on the decision of jurisdictional ITAT, Kolkata in the case of DCIT vs M/s Century Plyboards (I) Ltd. (ITA No. 2149/Kol/2019) is found to be of relevance. The relevant findings noted in this regard are as follows:-

> *"19. We note that the case of the AO is that the profits derived by the assessee from the eligible business are more than the ordinary profits of other business and therefore he estimated at what could be a reasonable profit from such eligible business and such profit be taken as reasonably deemed to have been derived from the eligible business for the purposes of computing the deduction u/s 80-IE of the Act. We find that in the entire assessment order, there is no material or any evidence which has been brought out to say that the course of business of the eligible unit has been so arranged that the business transacted has produced to the assessee more than the ordinary profits. Instead the AO proceeded only on surmises. In our opinion, when the assessee has placed the audited stand alone accounts of the "Cent Ply" unit at Assam before the AO and still if the AO was of the view that the profits of the units set up in backward areas should be lower than other units in developed areas, then the onus lay on the AO to establish the same with cogent material and corroborative evidence on at least find fault or infirmity in the books produced by the assessee. We however note that the AO clearly failed to do so. Nothing tangible was brought on record to support such reasoning. Instead the disallowance was made on the last ray of assessment purely on suspicion.*
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> *20. According to us, the fact that high profits were earned by the eligible unit in comparison to other businesses by itself cannot lead to conclusion that the deduction claimed u/s 80IE was excessive. In this regard, it would first be relevant to examine theprovisions of sub-section (10) of section 80-1A of the Act which empowers the AO of the assessee having eligible business to scale down the profits which provision has been incorporated by sub-section (6) of section 801E by virtue of which sub-section (5) and sub section (7) to (12) of section 801A has been incorporated in to section 801E of the Act. The relevant extracts of the provision of section 801A(10) of the Act is as follows:*
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> *"(10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom:"(Emphasis Given by us)*
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> *21. In terms of the above provision, it is only where it appears to the AO that owing to the close connection between the assessee carrying on eligible business and any other closely connected person, the course of business is so*

arranged that the business transacted between them produces to the assessee more than the ordinary profits, which might be expected to arise in such eligible business; that he shall compute the amount of profits as may be reasonably deemed to have been derived therefrom. A bare reading of the relevant provision indicates that in order to invoke the same, it is of utmost importance on the part of the AO to first demonstrate that the transactions between the assessee and the other related person were arranged' with a view to produce more profit to the assessee carrying on eligible business. The noteworthy point is that we are dealing with a deeming provision and a deeming provision or a legal fiction is one whose mandate does not exist but for such provision. Because of such deeming provision alone, the given imaginary state of affairs is taken as reality notwithstanding the fact that it is at variance with the reality and the other relevant provision of the enactment. It has been settled that the scope of a deeming provision should be restricted to what is expressly stated in such a provision. With this background that sub-section (10) is a deeming provision and it must be strictly construed. So, we revert to the point under consideration that in such a scenario, the burden lays on AO to show that in the course of business between these closely connected persons was arranged in such a manner so as to produce more than ordinary profits in the hands of a person carrying on the eligible business. Such an arrangement between the related parties as contemplated section 801A(10) of the Act has to be necessarily proved by the AO with tangible evidence. And unless such 'arrangement' or 'manipulation' is shown to exist by the AO, there can be no question of discarding the declared actual profit and substituting it with a reasonable profit. Thus, from the discussion, it is clear that there is a condition precedent before the AO invokes the deeming provision for estimating the reasonable amount of profit of the eligible unit. First the AO has to discharge the burden that assessee has made an 'arrangement' between it and the related parties and due to such an arrangement, it lead to higher profit of the eligible unit. Therefore, the high profit must necessarily be the consequence of such an arrangement between the assessee and the related parties, which has been exposed by the AO. So first of all, the mere higher profit earned by such eligible assessee can be no reason to conclude that the assessee transacted in such an 'arranged manner with its related persons so as to produce more profits to it. To put it simply, if such an 'arrangement is a 'cause the higher profit is its effect. Hence, what is relevant for invoking sub-section (10) of section 80 IE read with section 801E(6) of the Act is the prevalence of a situation where the higher profit has resulted due to 'arrangement between the assessee and its closely connected person and not where the higher profit resulted due to the assessee's effectively managing the business. In this regard, we find merit in the Id. AR's reliance on the judgment of the Hon'ble Bombay High Court in Schmetz India (P) Ltd.'s case (supra) in which it has been held that merely because an assessee makes extra ordinary profit, it would not lead to the conclusion that the same was organized/arranged for the purpose of claiming higher deduction uls 10A of the Act. The case of the assessee is further supported by the decisions of the coordinate Benches of this Tribunal in AT Kearney India (P.) Ltd. v. Addl. CIT [2014] 50 taxmann.com 26/[2015] 153 ITD 693/[2014] 66 SOT 140 (ITAT Delhi) and Zavata India (P.) Ltd. v. ITO [2013] 31 taxmann.com 147/141 ITD 456 (Hyd. - Trib.)"

It is noted that similar issue was adjudicated and decided in favour of the assessee by the Hon'ble ITAT, Guwahati in the case of Greenply Industries Ltd Vs ACIT in ITA No. 359/Gau/2019 wherein it was held as under:-

> *"48. We observe that the eligible units run by the assessee claiming deduction of prof its under section 801A(10) of the Act, purchased raw material, namely Vineer from non-eligible units located at Kriparampur and Rajkot Unit The assessee while furnishing the annual audited accounts along with the relevant report on Form 3CEB adopted the CUP method for computing the arm's length price of the transactions between the eligible and non-eligible units. But subsequently during the course of proceedings before the Id. TPO, the assessee has adopted TNMM method to compute the arm's length price. It is not in dispute that the percentage of total purchase of veneer at Rudrapur eligible units and Tizit eligible unit is 5.82% and 9.33% of the total cost operation. The operating profit margin of Rudrapur Unit is 19.35 and that of Tizit Unit is 17.64. Even after making the arm's length adjustment, the operating profit of the two units would remain 18.49 and 16.43 respectively. We also note that the purchase of veneer from non-eligible units had a nominal impact upon the operating margins of the eligible units due to very low volume of purchases. Eligible units were earning higher prof it than the benchmark rate of 4.65%.*
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> *49. We further find that the Id. TPO failed to take note of the fact that the eligible units were newly established in the industrial area developed by Uttranchal Pradesh, Industrial Development Corporation Ltd., which is stated to have modern and better infrastructural facilities resulting into lower cost of production. Source of most of the raw material requirement of the eligible units is local vendors which is not so in the case of non eligible units. Eligible units were not dependent upon the non-eligible units and earned prof it due to incentives available to them in the form of central excise duty exemption, refund of excise duty, absence of cascading impact on VAT, infrastructure facilities, etc.*
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> *50. In view of the above stated facts and circumstances of the case as rightly observed by the Id. CIT(Appeals), the impugned transfer pricing adjustment was deleted by the Id. CIT(Appeals) by observing as follows: -*
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> *51. The above finding of the Id. CIT(Appeals) stands uncontroverted by the Id. representatives to the extent that the Id. TPO had agreed with the TNMM method adopted by the assessee. The reasons given for TPO adjustment is very general in nature merely referring to the profit margin of the eligible units to the non-eligible units. Ld. TPO has not given any analysis to demonstrate that how the purchase of any material by eligible units from non-eligible units could have yielded extra profits. We, therefore, are in conformity with the finding of the Id. CIT(Appeals) that no downward adjustment of profit of eligible units be sustained."*

Having regard to the facts as discussed above and respectfully following the decisions (supra), the Ld. AO / TPO is directed to delete the transfer pricing adjustment of Rs.91,71,780/- and Rs.87,75,918/- made in relation to the inter-unit transactions of the eligible units at Abhoypur and Pantnagar. These grounds are therefore allowed."

09. We find that the ld. CIT(A) has passed a very reasonable order by following the decision of the co-ordinate Benches in the case of DCIT vs M/s Century Plyboards (I) Ltd.*(supra)* and Greenply Industries Ltd Vs ACIT (*supra*) and deleted the transfer pricing adjustment. Considering the facts, we are inclined to uphold the order of ld. CIT (A) by dismissing the appeal of the Revenue. The appeal of the Revenue is dismissed.

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

Order pronounced in the open court on 01.04.2025.

Sd/-	Sd/-
(PRADIP KUMAR CHOUBEY)	(RAJESH KUMAR)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Kolkata, Dated: 01.04.2025
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT,
5. Guard file.

BY ORDER,

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