**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"J" BENCH, MUMBAI**

**BEFORE SHRI ANIKESH BANERJEE, JM &**
**MS PADMAVATHY S, AM**

**I.T.A. No. 6664/Mum/2024**
(Assessment Year: 2021-22)

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| **Wanbury Limited.**,<br>10th Floor, Sector 30-A,<br>BSEL Tech Park, B Wing, Opp.<br>Vashi Railway Station, Vashi,<br>Navi Mumbai-400705.<br>**PAN: AABCP5939P** | Vs. | **ACIT-15(3)(1),**<br>Room No. 430, 4th Floor,<br>Aayakar Bhavan, M.K. Road,<br>Mumbai-400020. |
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| **Appellant**) | : | **Respondent**) |

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| **Appellant /Assessee by** | : | Shri Madhur Agarwal, AR |
| **Revenue / Respondent by** | : | Shri Asif Karmali, Sr. DR |
| **Date of Hearing** | : | 11.03.2025 |
| **Date of Pronouncement** | : | 20.03.2025 |

O R D E R

**Per Padmavathy S, AM:**

This appeal by the assessee is against the order of assessment unit, income tax department (in short "AO") passed under section 143(3) r.w.s 144(13) of the Income Tax Act (the act) for assessment year (AY) 2021-22 dated 18.10.2024. The assessee raised the following grounds of appeal-

*"The following Grounds of Appeal are independent of, and without prejudice to, one another:*

*1. On the facts and circumstances of the case and in law, the Ld. AO erred in passing the assessment order under section 143(3) r.w.s 144C(13) r.w.s 1448 of the income-tax Act, 1961 (Act), which is barred by limitation, bad in law and ought to be quashed.*

*2. On the facts and circumstances of the case and in law, the Ld. AO failed to appreciate that time limit prescribed under section 153(1) r.w.s 153(4) would prevail over and above assessment time limit prescribed under section 144C of the Act.*

*3. On the facts and circumstances of the case, the Transfer Pricing Officer ("Learned TPO')/AO has erred in not considering the fact that levying corporate guarantee fees on associated enterprise ('AE') which is under liquidation would result in undue financial hardship to AE.*

*4. On the facts and circumstances of the case, the learned TPO/AO erred in not considering corporate guarantee extended to AE as in nature of shareholders activity and erred in making adjustment to arm's length price of corporate guarantee given to AE to the tune of Rs. 2,57,08,000 by computing guarantee commission at rate of 1.00%.*

*5. On the facts and circumstances of the case, the learned TPO/AO erred in determining the arm's length rate in respect of corporate guarantee at 1.00% per annum after arbitrarily reducing 0.5% from comparable bank rate computed by learned TPO/AO without any scientific basis on assumption is arbitrary and invalid.*

*6. On the facts and circumstances of the case, the learned TPO erred in determining rate of 1.00% per annum has contradicted its own view that corporate guarantee rates cannot be compared to bank guarantee rates.*

*7. On facts and circumstances of the case, the learned TPO erred in not appreciating the fact that the guarantee's were invoked by the banks (SBI London and BOI) in the past years therefore, guarantee ceased to exist in the earlier years and there was no guarantee existed at the beginning of the year in respect of the said banks. Once the guarantee itself ceased to exist, there was no international transaction.*

*8. On the facts and circumstances of the case, the learned TPO erred in benchmarking the corporate guarantee transaction undertaken in the past years in the assessment year under consideration.*

*9. On the facts and circumstance of the case, the learned TPO grossly erred in misinterpreting the fact that in order to benchmark a transaction, same has to be evaluated every year and thus, it cannot be held that once the guarantee is given in the past, it continues to have impact on every assessment year subsequently.*

*10. On the facts and circumstances of the case, the learned TPO erred in ignoring the fact that corporate guarantee has ceased to exist as SBI London and BOI have invoked corporate guarantee and thus, there is no service existing that is rendered by Appellant to these banks on behalf of its AE. Thus, corporate guarantee fees should be restricted to a rate between 0.2% to 0.5% of total guarantee of Rs. 74.77 cr.*

*11. On the facts and circumstances of the case, the learned TPO erred in disregarding the fact that in absence of corporate guarantee provided, the Appellant being the holding company would have provided the funds to the subsidiary by increasing the share capital and thus the guarantee provided should be treated as quasi-equity in nature for which arm's length compensation is not required.*

*12. On the facts and circumstances of the case, the learned AO/TPO has erred in computing notional income in form of corporate guarantee fee is against the real income theory.*

*13. On the facts and circumstances of the case, the learned TPO has erred in making adjustment of deemed interest on debt repayment amounting to Rs 19,56,209 to international transaction on account of deemed loan.*

*14. On the facts and circumstances of the case, the learned TPO erred in adopting 400 basis point as benchmark to Euribor as interest benchmark rate to arrive at Arm's length price for transaction without providing any basis to arrive at such price.*

*15. On the facts and circumstances of the case, the learned AO erred in levying interest under section 234A of the Act."*

2. The assessee is a company engaged in the business of marketing domestic branded drugs and pharmaceuticals products. The assessee also provides active pharmaceutical ingredient, contract research and contract manufacturing service. The assessee filed the return of income for AY 2021-22 on 15.03.2022 declaring

total income at Rs. Nil. The case was selected for any and the statutory notices were served on the assessee. The assessee has shown international transaction in the nature of guarantees with associated Enterprises (AE) and therefore reference was made the transfer pricing Officer (TPO) to determine whether the transaction with AE is at arm's length. The TPO proposed TP adjustment of Rs.2,57,08,000 towards corporate guarantee fees and adjustment of Rs.19,56,209 on account of interest on the deemed loan arising of the guarantee invoked. The assessee raised its objections before the DRP and the DRP confirmed the TP adjustment made. The assessee is in appeal against the final order of assessment passed by the AO pursuant to the directions of the DRP.

3. Ground number 1 and 2 pertain to the legal contentions of assessment order being barred by limitation. During the course of hearing the Ld. AR did not press for the adjudication of these grounds. Accordingly the grounds are dismissed as not pressed. Ground number 3 to 7 are with regard to the TP adjustment made towards corporate guarantee. The Ld. AR during the course of hearing submitted that the effective ground is ground number 7 and if the same is adjudicated in favour of the assessee the rest of the grounds would become academic. Accordingly we will first consider Ground No.7 for adjudication.

4. The assessee has provided corporate guarantee on behalf of its AE Cantabria Pharma SL based in Spain towards syndicate facility and bilateral loan facility. Under the terms of the above facility the assessee is liable to repay the sum under the loan agreement in case where the AE defaults to pay. The AE Cantabria Pharma SL failed to repay obligations to SBI London and therefore SBI London invoked the guarantee against the assessee vide letter dated 11.07.2012. One time settlement was agreed between the assessee and SBI vide letter dated 11.08.2017.

Further the AE also failed to repay to Bank of India and therefore Bank of India also invoked the guarantee. The assessee entered into one time settlement with BOI for settling the dues vide letter dated 31.07.2019. The assessee did not charge any guarantee commission to the AE since it was in support of the business operation to enable the AE to obtain borrowings from these banks. The AE Cantabria Pharma SL, has filed for a voluntary insolvency in the Commercial Court of Madrid Spain in Novenmber 2013 and considering the adverse financial position of the AE the assessee did not show any amount as recoverable in the books of accounts in relation to the guarantee invoked. The TPO did not accept the submissions made by the assessee in this regard and proceeded to make a TP adjustment @ 1% of guarantee amount by applying external CUP method to make a TP adjustment of Rs.2,57,08,000. Before the DRP the assessee submitted that the no guarantee fee can be charged when the liability is invoked by the lenders against the assessee. The assessee also submitted that considering the adverse financial position of the AE charging of any guarantee fee will result in adverse situation. The DRP rejected the contentions of the assessee and upheld the TP adjustment.

5. The ld AR made similar arguments before us. The ld AR submitted that the guarantees have been invoked by the SBI and BOI in the earlier years and not during the year under consideration. Therefore the ld AR argued that during the year under consideration there is no international transaction towards guarantee to AE. The ld AR further submitted that the assessee has entered into one time settlement with the lenders in 2017 and 2019 and accordingly accounted for the same as liability in the financials of earlier years. The ld AR also submitted that the outstanding liability towards the guarantee invoked is carried forward to the year under consideration since no payment is made towards the same by the

assessee. The ld AR took the bench through the financial statements in this regard (Note no.43 in page 27 of PB). The ld AR drew our attention to the decision of the coordinate bench of Delhi Tribunal in the case of JE Energy Ventures Pvt Ltd (TS-272-ITAT-2024 (Del)-TP) where it has been held that once the guarantee is invoked it ceases to be an international transaction and no TP adjustment could be made.

6. The ld DR on the other hand supported the orders of the TPO and the directions of the DRP.

7. We heard the parties and perused the material on record. The assessee has given guarantees on behalf of its AE to SBI London and BOI. Since the AE failed to make payments the lender banks invoked the bank guarantee in earlier years and one time settlement was agreed by the assessee with these banks in the years 2017 and 2019. The assessee has accounted for the settlements agreed as a liability in the books of accounts. The TPO treated the guarantee given as an international transaction and made a TP adjustment by applying 1% as guarantee fees. The primary contention of the assessee is that the guarantee once invoked by the lender banks ceases to be an international transaction and therefore no TP adjustment could be made towards guarantee fees. In this regard we notice that the Delhi Bench of the Tribunal in the case of JE Energy Ventures Pvt Ltd has considered a similar issue where it has been held that –

> *"6. Considered the rival submissions and material placed on record. We observed from the record that the assessee has provided primary guarantee to its step down foreign subsidiaries against the loan taken by them and obligations towards servicing of the loan to EXIM Bank for first loan of USD 50 Million in the Financial Year 2011-12 and for second loan of USD 45 Million in the Financial Year 2013-14. It is fact on record that the assessee always classified the above guarantee as share holder activities, not provided*

*any economic/commercial benefit to the lender as well as borrower and denied that this falls under the definition/category of corporate guarantee in the past. We observed that similar issue was considered by the coordinate bench in the AY 2013-14, in that AY, the assessee had received fee for providing corporate guarantee of Rs. 2.7 crores and with the similar facts on record, on appeal, the coordinate bench held that the services provided by the assessee to their step down subsidiary falls within the definition of Corporate Guarantee and remitted the issue back to the file of AO/TPO to bench mark the same as an international transaction. From the decision of coordinate bench, it is clear that the submissions of the assessee for performing shareholder services do not fall under corporate guarantee were rejected. Therefore, before us also, the assessee submitted the similar arguments and we are inclined to reject the same.*

*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 seized 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 seizes 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 enfore 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. Coming to the issue of method adopted by the TPO is proper or not, since we held that there is no international transaction existed relating to corporate guarantee in this assessment year, it is irrelevant at this stage to adjudicate on the issue of proper method adopted by the TPO or not. Accordingly, we direct the AO/TPO to delete the addition proposed in this AY. Accordingly, the ground no 1.2.3 raised by the assessee is allowed and all other grounds relating to the issue of corporate guarantee are dismissed."*

8. In assessee's case it is an undisputed fact that the AE has failed to pay the dues and that the lender banks have invoked the guarantee against the assessee in the years prior to the year under consideration. This factual position is supported by the liability shown in the financial statements and the one time settlement agreed between the assessee and the lender banks (page 322 of PB). Therefore we see merit in the submission that the facts in assessee's case are similar to the issue considered by the coordinate bench in the above case. Therefore respectfully following the above decision we hold that since the guarantee is already invoked

whereby the liability against the assessee has crystallized there exists no international transaction exists towards guarantee between the assessee and its AE for the year under consideration. Accordingly, the TP adjustments made towards guarantee fee is not sustainable and liable to be deleted. Ground No.7 of the assessee is allowed. Ground No.3 to 6 and 8 to 12 contending the TP adjustment towards guarantee fees have become academic in view of our decision in Ground No.7.

9. Ground No.13 and 14 raised by the assessee pertain to the TP adjustment made by the TPO towards interest on deemed loan towards debt repayment by the assessee on behalf of its AE. The assessee has given corporate guarantee for the credit facility availed by its AE from SBI London. Since the AE failed to repay the obligations, SBI London invoked the guarantee given by the assessee and an onetime settlement of Rs.5,29,13,425 was agreed between the assessee and SBI London. The assessee has made a provision towards the same in the books of accounts first time for the year ended 31.03.2017 and the provision is carried forward during the year under consideration also since the assessee has not made the actual payment to SBI. The TPO held that the assessee that the amount provided towards repayment of loan to SBI is on behalf of the AE and therefore the same is a deemed loan extended by the assessee to AE. Accordingly the AO charged interest @ 3.697 taking EURIBOR as the base to make a TP adjustment of Rs.19,56,209/-.

10. The ld AR submitted that the assessee has made only a provision towards guarantee invoked as per the one time settlement agreed with SBI to comply with the Accounting Standards and that the amount is still unpaid. The ld AR further submitted that until the amount is actually paid by the guarantor i.e. assessee, the

liability of the primary debtor (the AE in this case) and that of the guarantor (the assessee in this case) is coterminous and therefore cannot be deemed as a loan given by the assessee to AE.

11. The alternate argument of the ld AR is that the liability provided for by the assessee towards the one time settlement with SBI London is its own liability as per the terms of agreement and therefore cannot be deemed as a loan to the AE. Further the ld AR submitted that the AE has filed for insolvency in the Commercial Court of Madrid, Spain and the control of the AE has been handed over to the receiver vide court order dated 26.02.2014. The ld AR also submitted that since there is no scope for recovery of the dues from AE, the liability to repay to the lender has become assessee's own liability as per the contractual obligations. Therefore it is submitted that the liability cannot be held as arisen towards obligation on behalf of the AE and therefore no deemed interest can be imputed.

12. The ld DR on the other hand relied on the orders of the lower authorities.

13. We heard the parties and perused the material on record. The issue for our consideration is whether the liability created (provision made) by the assessee towards the one time settlement agreed with the lender Bank with respect to the corporate guarantee given by the assessee as a result of the failure of the AE to pay the dues to the lender bank. The argument of the ld AR is that the mere making of provision towards the one-time settlement agreed with the lender bank does not discharge the liability of the AE who is the principle debtor. It is further argued that unless the payment is made the liability of the assessee is co-extensive to that of the AE and therefore deeming the provision made as a loan to the AE is not correct. In this regard it is relevant to take note of section 140, 145 and 128 of the Indian Contract Act 1872, which is extracted below –

> ***"140.Rights of surety on payment or performance**.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the **surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.***
>
> *(emphasis supplied)*
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> ***145.Implied promise to indemnify surety.**—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but, no sums which he has paid wrongfully*
>
> ***128 - Surety's liability** - The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract"*

14. From the combined perusal of the above provisions it is clear that the surety i.e. assessee steps into the shoes of the creditor / lender only on the specific performance or payment and that the surety i.e. assessee can recover only the amount that is being actually paid. Until such time the actual payment is made, the liability of the assessee to the lender is coextensive with that of the AE and that the lender's right to proceed against the primary debtor i.e. AE does not cease. In assessee's case it is evident that the assessee has not yet made the actual payment towards the dues since the liability is still reflecting as outstanding in the books of accounts. Therefore as per the provisions of the Indian Contract Act 1872, until the settlement of dues the assessee does not get the right to recover the amount from the AE and accordingly the AE does not owe anything to the assessee towards the guarantee. In view of these discussions in our considered view, the AO is not correct in treating the provision made by the assessee towards one-time settlement to the lender as deemed loan to the AE since the assessee does not get the right to recover the amount until the actual payment towards dues is made to the lender. Accordingly the imputing interest on the deemed loan also does not survive. We therefore hold that the TP adjustment made towards the interest on the deemed

loan is liable to be deleted. The grounds raised by the assessee in this regard are allowed.

15. Ground No.15 of the assessee is with regard to levy of interest under section 234A of the Act. In this regard it is submitted by the ld AR that the assessee has filed the return of income within the time prescribed under section 139(1) of the Act and therefore no interest under section 234A can be levied. We accordingly direct the AO to examine the claim of the assessee based on evidences and give relief in accordance with law.

16. In result the appeal of the assessee is partly allowed.

*Order pronounced in the open court on 20-03-2025.*

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| ***Sd/-*** | ***Sd/-*** |
| **(ANIKESH BANERJEE)** | **(PADMAVATHY S)** |
| **Judicial Member** | **Accountant Member** |

**SK, Sr. PS*

**Copy of the Order forwarded to :**

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

BY ORDER,

(Dy./Asstt. Registrar)
**ITAT, Mumbai**