

**IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCH "B", HYDERABAD**

**BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER  
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No. 404/Hyd/2015  
Assessment Year: 2010-11**

Vivimed Labs Ltd., Hyderabad. PAN - AAACL 5827B (Appellant)	vs.	Dy. Commissioner of Income- tax, Circle – 17(2), Hyderabad. (Respondent)
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**ITA No. 479/Hyd/2015  
Assessment Year: 2010-11**

Dy. Commissioner of Income- tax, Circle – 17(2), Hyderabad. (Appellant)	vs.	Vivimed Labs Ltd., Hyderabad. PAN - AAACL 5827B (Respondent)
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	Assessee by :	Shri P. Murali Mohana Rao
	Revenue by :	Smt. U. Minichandran

Date of hearing	12-04-2017
Date of pronouncement	02-06-2017

**ORDER**

**PER S. RIFAUR RAHMAN, A.M.:**

This appeal is preferred by the assessee against the order passed u/s 143(3) r.w.s. 92CA(3) r.w.s.144C(13) of the Income Tax Act, 1961 (in short 'Act') dated 27/02/2015 relating to AY 2010-11.

2. Briefly the facts of the case are that the assessee filed its original return of income for the AY 2010-11 on 24/09/2010 u/s 139(1) of the Act, declaring total income of Rs. 10,30,93,600/- after claiming deduction of Rs. 4,65,41,901/- u/s 80IC in respect of its unit located in Haridwar. Assessee is engaged in the business of R&D –

Manufacturing of Specialized Chemicals & Pharmaceuticals. AO made a reference u/s 92CA to the TPO for determining Arm's length price. Accordingly, the TPO has passed the order u/s 92CA(3) of the Act, dated 30/12/2013 determining the ALP adjustment at Rs. 4,28,75,506/- which include the adjustments on account of interest received on advance given, corporate guarantee fee receivable and investment in subsidiary. The AO passed the draft assessment order u/s 143(3) r.w.s. 92CA(3) of the Act, dated 30/03/2014 determining the total income of the assessee at Rs. 14,67,04,072/- by making the following additions to the returned income as follows:

a)	Adjustment u/s 92CA in respect of international transactions relating to interest received on advances given.	Rs. 1,61,69,956/-
b)	Adjustment u/s 92CA in respect of international transactions relating to corporate guarantee fee receivable	Rs. 1,69,10,000/-
c)	Adjustment u/s 92CA in respect of investment in subsidiary companies.	Rs. 97,95,550/-
d)	Disallowance of bad debts written off	Rs. 7,34,963/-
		Rs. 4,36,10,469.

3. Aggrieved by the order of the AO/TPO, the assessee raised objections before the DRP.

4. As regards adjustment u/s 92CA in respect of international transactions relating to interest received on advances given, the facts are that as per the RPT Disclosure contained in the annual report, TPO has seen that the taxpayer has a balance of Rs. 12.528 crores against Vivimed Holding Ltd., Hong Kong. The TPO noticed that as per the ledger extract on interest received by assessee, opening balance was Rs. 11,56,18,453/- and the closing balance inclusive of interest of Rs. 94,27,950 is Rs. 12,52,80,067. The working of interest was shown as under:

6% on USD 1,500,000 (1 USD = Rs. 44.895) Rs. 40,40,550  
6% on USD 2,000,000 (1 USD = Rs. 44,895) Rs. 53,87,400

Rs. 94,27,950

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## 4.1 Before the DRP, the assessee submitted as under:

*“5.1.1 The assessee has given certain advances to Vivimed, Hong Kong, the outstanding balance as on 31.03.2010 is RS.12,52,80,067/-. The assessee has received interest of Rs.94,27,950/- which is 6% on the outstanding balance. The interest rate was determined by the assessee on the comparison of the rates charged in conformity with the guidelines prescribed by the RBI issued under FEMA, 1999 for external borrowings which could be relied upon for application of comparable uncontrolled price (CUP) for confirming the arm's length nature of interest received. Hence, it would be reasonable to conclude that the assessee's international transaction in relation to recipient of interest is consistent with the arms length standard as mandated by the Indian Transfer Pricing Regulations.*

*Since the international transaction entered between the AE is in foreign currency, the domestic prime lending rate would have no applicability and the international rate fixed being UBOR has to be considered and accordingly, we considered the same for the purpose of determining interest rate which is in conformity with the guidelines prescribed by the RBI issued under FEMA, 1999 for external borrowings. Therefore, Comparable Uncontrolled Price ("CUP") method was considered suitable for the purpose of analysis of international transaction with respect to receipt of interest from Vivimed Labs –UK.*

*7.0 In respect of transfer pricing adjustment of Rs.63,49,175/- u/s. 92CA of the IT Act, 1961 in respect of transaction relating to interest on advances given to AE, Vivimed USA, Inc, the assessee submitted that during the year under consideration the assessee has given advances of Rs. 5,18,30,000 to Vivimed, Hong Kong during the course of business operations for administrative convenience and the same is being disclosed in TP document.*

## 4.2 After considering the submissions of the assessee, the DRP gave directions as under:

*“1. Considering the fact that assessee already charged interest at 6% on the advances given to its AE, Vivimed Holding Ltd., Hong Kong, we direct the TPO to adopt LIBOR plus 200 basis points for computing the interest on loans/advances given to its AE and accordingly make the adjustment in excess of the interest already charged to AE i.e. Rs. 94,27,950/- in the current year.*

*2. On similar lines in respect of the loans/advances given to Vivimed Labs USA Inc and considering the fact that assessee has not charged any interest on the advances/loans given to its AE, we direct the TPO to adopt LIBOR plus 200 basis points for computing the interest on loans/advances given to its AE and accordingly make the adjustment.*

5. Adjustment u/s 92CA in respect of international transactions relating to corporate guarantee fee receivable, the DRP held as follows:

*9. The panel has gone through the submissions of assessee, the order of the TPO and the facts of the case. This panel is of the view that the corporate guarantee extended by the assessee company to its AE clearly falls under the definition of international transaction by virtue of the amendment to the relevant provisions of the law. The issue of corporate guarantee falling under the definition of international transaction is well settled and we decline to interfere in this regard. However, the TPO computed corporate guarantee fee @2% for a loan of RS.76.05 Crores to Vivimed Holdings Ltd., Hong Kong amounting to Rs.1.52 crores and the guarantee fee @2.70% for a loan of Rs.6.351 Crores to Vivimed Labs Europe Ltd amounting to Rs.0.171 crores which we feel is not correct and it being international transaction, the proper guarantee rate as held in the case of MIs Nimbus Communications Ltd. (TS-167-ITAT-2013 (Mum)-TP) would be 0.5%. Accordingly, we direct the TPO to recompute the fee to be charged on corporate guarantee for loan of Rs. 76.05 cores and loan of Rs. 6.651 crores at 0.5%.”*

6. Adjustment u/s 92CA in respect of investment in subsidiary it is observed that during the year under consideration, the assessee has made equity investment of Rs. 98,00,000/- in Vivimed Labs in USA Inc which is wholly owned subsidiary company (AE). This investment was made towards development of software product and new technology products. The assessee relied on Circular No. 14, dated 22/11/2011 and submitted that section 92B(1) is applicable only when income is chargeable and not for capital investment. He also relied on the following case laws:

1. Vodafone India Services (P) Ltd., Vs. Union of India [2014] 50 taxmann.com 300 (Bombay)

2. ITAT Hyderabad in the case of Prithvi Information Solutions Ltd. Vs. DCIT, ITA No. 472/Hyd/2014.

6.1 The DRP following the decision of Vodafone India Services Pvt. Ltd., (supra), directed the AO and TPO to follow the decision on the Hon'ble High Court.

7. As regards the addition of Rs. 7,34,963/- u/s 14A of the Act, the submissions of the assessee is that no disallowance u/s 14A is to be made as the investment is made out of the internal accruals of the company and the equity raised by the company for which the company has not incurred any cost to raise the funds.

7.1 The DRP rejected the ground by holding that in view of the decision of the Hon'ble Bombay High Court in the case of M/s Godrej & Boyce & Manufacturing Co. Ltd., 234 CTR 1 relied upon by the AO and the facts of the case, we decline to interfere on this issue.

8. Accordingly, the DRP made an adjustment of Rs. 58,51,172/- u/s 92CA of the Act, in relation to the following international transactions with AEs:

- 1) Interest received on advances given to AE's – Rs. 17,31,122/-
- 2) Corporate Guarantee Fee – Rs. 41,20,050/-.

9. Accordingly, the AO passed final assessment order as per the directions of DRP.

10. Aggrieved by the order of DRP, the assessee is in appeal before us raising the following grounds of appeal:

1. *Ground of objection towards addition of Rs. 17,31,122/- towards charging interest on advances of Rs. 51.83 million (ground Nos. 3 to 8).*

2. *Grounds of objection towards addition of Rs. 41,20,050/- towards charging corporate guarantee fees on corporate guarantee amount of Rs. 82.401 crores (Ground Nos. 9 to 18).*

3. *Grounds of objection towards addition of Rs. 7,34,963/- in respect of disallowance u/s 14A of the Act. (Ground Nos. 19 to 24.)*

10.1 The revenue has raised the following grounds of appeal:

*"1. The order of Honourable DRP is erroneous both in law and facts of the case.*

*2. Whether in facts and circumstances of the case, the Honourable DRP is correct in holding that the interest rate should be taken at LIBOR +2% when there is no rationality given by the DRP in deciding such a rate.*

*3. Whether in facts and circumstances of the case, the Honourable DRP is correct in law in holding that the fee chargeable on corporate guarantee given to its associate enterprise @ 0.5% only, when the corporate guarantee given by the assessee has helped AE to move from its own credit rating of BBB - to that of A+."*

11. As regards the ALP addition of Rs. 17,31,122/- in respect of transaction relating to interest on advance for investment, the Id. AR submitted that capital advances towards investment in the subsidiary companies is not an international transactions because income is not generated. For this proposition, he relied on the following case laws:

1. GSS Infotech Ltd. Vs. ACIT, Hyd., 497/Hyd/2015.

2. M/s Vijay Electricals Ltd. Vs. Addl. CIT, ITA No. 842/Hyd/2012, order dated 31/05/2013.

3. Dana Corporation RE, 321 ITR 178 (AAR)

4. DCIT (OSD), Vs. Cadila Healthcare Ltd., 39 Taxmann.com 51, (Ahmd.)

5. Amiantit International Holding Ltd., 322 ITR 678 (AAR).

12. Ld. DR relied on the orders of revenue authorities.

13. Considered the rival submissions and perused the material facts on record. The assessee has given advances to its AE's i.e. Vivimed USA & Hong Kong. It has charged interest in the case of Vivimed Holdings, Hong Kong based on LIBOR but did not charge any interest

on the advances given to USA. It has submitted that it is capital advances and were given for administrative convenience. Ld. AR submitted that capital advances towards investment in subsidiary is not an international transaction. He relied on some case laws. We find that these were advances given to AEs and not for any capital investment for which there is no allotment of shares. These are outstanding as advances. Assessee has also not submitted any comparative study on interest charged on the advances to Honk Kong. The coordinate bench in the case of Transport Corporation of India Ltd., in ITA No. 117/Hyd/2016, vide order dated 21/09/2016, held as follows:

*“7. Considered the submissions of both the counsels and perused the material facts on record. The transaction under consideration is international transaction as the assessee lent money to its AEs. The economic activities happening in the international market is important rather than economic impact if the loan is advanced in Indian rupees. It is fact that these transactions are compared with uncontrolled environment to determine ALP. The fact that advance was lent outside India the interest rate prevailing in the international market is relevant. The DRP/TPO argues that these loans were originated in Indian currency and recorded, as such, in the assessee’s books. Hence, it has to be analysed in the Indian ALP is not acceptable. The money lent outside India is always converted into foreign currency and accordingly recorded. But, how the AE had recorded. Obviously not in Indian currency. Since, actual utilisation of the funds were outside India, obviously, the ALP of this kind also to be determined applying the international market condition. Hence, we follow the consistent view of the various Tribunals, in particular, the case of PMP Auto Components (P) Ltd. Vs. DCIT [2014] 50 Taxmann.com 272 (Mum.) wherein the coordinate bench has held that the assessee is a tested party and economic/commercial as well as geographical condition in which the assessee is doing business are relevant to be considered for the purpose of determining the arm’s length price. Therefore, we direct the TPO to arrive at the ALP of these transactions applying LIBOR + 200 points. Accordingly this ground of the assessee is allowed.”*

13.1 Since the assessee has not carried/submitted any comparative study before finalizing the LIBOR rate, we find it appropriate to follow

the coordinate bench order and direct the AO to follow the direction of DRP to compute the interest rate at LIBOR + 200 points. Accordingly, ground raised by the assessee and revenue are dismissed.

14. As regards the ALP addition in respect of transaction relating to corporate guarantee of Rs. 41,20,050/-, the Id. AR submitted that the transaction relating to the corporate guarantee do not fall within the scope of the term 'international transaction'. It is given out of shareholders obligation for which it has not incurred any cost. For this proposition, he relied on the following cases:

1. Rusabh Diamonds Vs. ACIT, IT Appeal Nos. 2497, 2840 (Mum.) of 2014.
2. Micro Ink Ltd., ITA No. 2873/Ahd/10
3. Bharti Airtel Ltd. Vs. Addl. CIT, ITA No. 5816/Del/2012
4. Redington (India) Ltd. Vs. JCIT, ITA No. 513/Mds/2014
5. Videocon Industries Ltd. Vs. Addl. CIT, 55 Taxmann.com 263 (Mum)
6. M/s Four Soft Ltd., Hyd. Vs. The Dy. CIT, ITA No. 1495/H/2010
7. Siro Clinpharm Pvt. Ltd. Vs. DCIT, ITA No. 1269/Mum/15
8. Siro Clinpharm Pvt. Ltd. Vs. DCIT, ITA No. 2618/Mum/14

15. Ld. DR relied on the orders of revenue authorities.

16. Considered the rival submissions and perused the material facts on record. In the case of Four soft Ltd. (supra), the coordinate bench has held as under:

*21. We have considered the rival submissions and perused the materials available on record. We find that the TP legislation provides for computation of income from international transaction as per Section 92B of the Act. The corporate guarantee provided by the assessee company does not fall within the definition of international transaction. The TP legislation does not stipulate any guidelines in respect to guarantee transactions. In the absence of any charging provision, the lower authorities are not correct in bringing aforesaid transaction in the TP study. In our considered view, the corporate guarantee is very much incidental to the business of the assessee and hence, the same cannot be compared to a bank guarantee transaction of the Bank or financial*



*institution. In view of this matter, we hold that no TP adjustment is required in respect of corporate guarantee transaction done by the assessee company. Hence, we answer this question in favour of the assessee and allow the grounds raised by the assessee on this issue."*

16.1. However, the amendment to section 92B by the Finance Act, 2012, this amendment can only be prospective and not retrospective as held in the case of Siro Clinpharm Pvt. Ltd. in ITA No. 2618/Mum/2014. This provision is applicable from AY 2013-14 onwards. Hence, addition of corporate guarantee in this AY is deleted. Accordingly, the ground raised by the assessee is allowed and ground raised by revenue is dismissed.

17. As regards the disallowance of Rs. 7,34,936/- u/s 14A of the Act, the Id. AR submitted that section 14A will not apply where no exempt income is received or receivable during the relevant AY. For this proposition he relied on the following cases:

1. Prathista Industries Ltd., Vs. DCIT, ITA No. 1302/H/15
2. Cheminvest Ltd., [2015] 379 ITR 33 (Del.)
3. CIT Vs. Hero Cycles Ltd., 323 ITR 518 (P&H)
4. Relaxo Footwears Ltd. Vs. Addl. CIT, [2012] 50 SOT 102
5. Priya Exhibitors (P) Ltd. Vs. ACIT [2012], 54 SOT 356
6. M/s Vivimed Labs. Ltd., ITA No. 1882/Hyd/14
7. M/s Sun TV Networks Vs. ACIT, ITA No. 1340 & 1341/Mds/15
8. Madhucon Infra Ltd., Vs. ACIT, ITA No. 410/H/15.

18. Ld. DR relied on the orders of revenue authorities.

19. Considered the rival submissions and perused the material facts on record. In the case of Prathista Industries Ltd.(supra), the coordinate bench of this Tribunal has held as under:

*"6. Having regard to the rival contentions and the material on record, we find that section 14A clearly stipulates that the expenditure incurred for earning of any income which does not form part of the total income alone can be disallowed. In the case before us, when the assessee has not earned any exempt income, there can be no disallowance under section 14A of the Act. The Hon'ble Delhi High Court in the case of Cheminvest Ltd., reported in (2015) 378 ITR 33 (Del.) has held that section 14A will not apply where no exempt income is received or receivable during the*

*relevant assessment year. In view of the same, assessee's appeal on this ground is allowed."*

19.1 Since the assessee has not received any exempt income during the year, respectfully following the said decision, we direct the AO/TPO to delete the addition made on this count.

20. In the result, appeal of the assessee is partly allowed and the appeal of the revenue is dismissed.

Pronounced in the open court on 2<sup>nd</sup> June, 2017.

Sd/-  
**(P. MADHAVI DEVI)**  
**JUDICIAL MEMBER**

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

Hyderabad, Dated: 2<sup>nd</sup> June, 2017

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Copy to:-

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- 6) *Guard File*