

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 4607/Mum./2019
(Assessment Year : 2013-14)

Peri (India) Pvt. Ltd.
1406, DLH Park, S.V. Road
Goregaon (West), Mumbai 400 062
PAN – AAECP4115E

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-13(1)(2), Mumbai

..... Respondent

Assessee by : Shri M.P. Lohia
Revenue by : Shri Tejender Pal Singh

Date of Hearing – 08.02.2022

Date of Order – 14/03/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal filed by the assessee is listed for hearing pursuant to order dated 15.09.2021 passed by the Tribunal in MA No. 133/Mum/2021 in ITA No. 4607/Mum/2019, whereby order dated 05.03.2021 passed under section 254(1) of the Income Tax Act, 1961 ('the Act') in ITA No. 4607/Mum/2019 was recalled for the limited purpose of *de novo* adjudication of grounds no. 2 to 6 in the assessee's appeal.

2. The grounds no. 2 to 6 in assessee's appeal are as under:

"2. erred in determining the arm's length price of the international transaction of payment of corporate guarantee fees as NIL by considering it as shareholder activity and making transfer pricing adjustments of INR 7,23,100;

3. failed to appreciate that guarantee has been specifically included in the definition of international transaction while holding that it is a shareholder activity;

4. erred in not considering the fact that corporate guarantee fee has been determined considering average cost of interest that AE has paid on its non-liquid financing instruments obtained from independent third parties;

5. failed to appreciate that guarantee was provided to Appellant for the entire amount of credit! OD facility irrespective of the same being partly utilized by the Appellant.

6. failed to appreciate that payment of corporate guarantee is linked to transaction of import of goods and hence should be aggregated with the said transaction."

3. The brief facts of the case for deciding the aforesaid grounds are as under: The assessee is a Private Limited Company and was incorporated on 28.12.2006. The assessee is a 100% subsidiary of PERI GmbH Germany and provides design and supply of form work and scaffolding systems to Companies engaged in construction and infrastructure business. The assessee also provides technical support and services to customers in India for the use of formwork and scaffolding systems.

4. During the relevant assessment year, the assessee entered into following international transactions with its associated enterprises ("A.Es."):

Sl. No.	Nature of International Transaction	Amount (Rs.)
1.	Import of finished Goods	31,24,94,189
2.	Payment for Technical support	68,33,887

	<i>Services</i>	
3.	<i>Payment for purchase of finished goods (Mockup)</i>	<i>40,55,905</i>
4.	<i>Payment for availing business support services</i>	<i>70,25,425</i>
5.	<i>Interest on Trade Credit</i>	<i>27,89,245</i>
6.	<i>Payment for Corporate guarantee fees to A.E.</i>	<i>7,23,100</i>
7.	<i>Reimbursement of Actual Expenses</i>	<i>47,24,507</i>
8.	<i>Recovery of Expenses</i>	<i>13,15,916</i>
	<i>TOTAL:-</i>	<i>33,29,36,749</i>

5. In the transfer pricing analysis, the assessee conducted combined benchmarking of international transactions pertaining to payment for technical services, purchase of finished goods (Mockup), payment of corporate guarantee fees, payment for availing business support services and payment of interest on trade credit, on the basis that these transactions form an integral part of assessee's principal business of import of material for resale. Further, by adopting combined transaction approach, assessee compared its margin from its principal business activity with margins earned by other comparable companies in the same industry and claimed the international transactions to be at arm's length price ("ALP").

6. The Assessing Officer ("the AO") made reference to Transfer Pricing Officer ("the TPO") for the determination of ALP of the international transactions entered into by the assessee. The TPO vide order dated 26.10.2016 passed under section 92CA(3) of the Act rejected the combined benchmarking analysis conducted by the assessee on the basis that the said international transactions are not interrelated and are independent

transactions which warrant independent benchmarking. Further, the TPO after considering the details filed by the assessee, during the course of assessment proceedings, held that the provision of corporate guarantee to be only a Shareholder's obligation, which is not in the nature of any service being rendered by the AE. Accordingly, the TPO, inter-alia, held the ALP of international transaction pertaining to 'Payment of Corporate Guarantee fees' to be NIL and made an adjustment of Rs. 7,23,100.

7. The AO passed the assessment order dated 06.01.2017 under section 143(3) read with section 144C(3) of the Act, inter-alia, on the basis of adjustment proposed by the TPO.

8. In appeal, the Commissioner of Income Tax (Appeals) ("*the CIT(A)*") vide impugned order dated 26.02.2019, inter-alia, dismissed the appeal filed by the assessee and upheld the adjustment proposed by the TPO / AO in respect of international transaction pertaining to 'Payment of Corporate Guarantee fees'. Being aggrieved, the assessee is in appeal before us.

9. During the course of hearing, Shri. M.P. Lohia, learned Authorised Representative ("*learned A.R.*"), appearing for the assessee, submitted that provision of guarantee is specifically mentioned in the definition of 'international transaction' provided in Explanation (i) to section 92B of the Act inserted by Finance Act, 2012 with retrospective effect from 01.04.2002. Further, the said international transaction was also duly reflected in financials, transfer pricing study report and Form 3CEB filed by

the assessee. Learned A.R. submitted that fees for corporate guarantee paid by the assessee at the rate of 2% is also in conformity with Safe Harbour Rules and thus is at ALP.

10. On the other hand, Shri. Tejinder Pal Singh, learned Departmental Representative vehemently relied upon the order passed by the TPO/AO.

11. We have considered the rival submissions and perused the material available on record. In the present case, the assessee had availed a credit facility (overdraft, short term loan, Letter of Credit) from Deutsche Bank. Peri GmbH (i.e. the A.E.) had issued the corporate guarantee to Deutsche Bank of Euro 5,00,000 (approx. Rs. 2,84,40,000) on behalf of the assessee. During the relevant financial year, the assessee had paid an amount of Rs. 7,23,100 to its A.E. at the rate of 2% in respect of fees for corporate guarantee provided by the A.E. on behalf of the assessee. As per the assessee, the guarantee commission was charged based on the average cost A.E. pays on its non-liquid financial instruments to third party banks / financial institutions. The A.E. charges guarantee fee at the rate of 2% to all the A.Es. on behalf of whom corporate guarantee has been given by the A.E. to the third-party banks.

12. The said transaction with A.E. was also reported by the assessee in its financial statements and Form 3CEB forming part of the paper book. It is not disputed that the definition of 'international transaction' provided in Explanation (i) to section 92B of the Act specifically includes 'provision of guarantee' as one of the international transaction. Further, the controversy

whether provision of corporate guarantee is an international transaction has also now been settled by decisions of various Courts. Recent being the decision rendered by the Co-ordinate bench of the Tribunal in Siro Clinpharm (P.) Ltd. v. ITO: ITA No. 847/Mum./2016, wherein the Tribunal following the decision of Hon'ble Madras High Court in Pr. CIT v. Redington India Ltd. [2021] 430 ITR 298 held that issuance of corporate guarantee constitutes an international transaction.

13. As is evident from the facts of the present case, the TPO/AO/CIT(A) considered the provision of corporate guarantee only as a shareholder's function being not in the nature of any service rendered by the A.E. and thus no payment was required to be paid to the A.E. As the TPO/AO rejected the combined benchmarking analysis conducted by the assessee and did not consider the said transaction as an international transaction, as claimed by the assessee, and benchmarked the same accordingly, we are of the view that matter be remanded to TPO only to benchmark the transaction of 'Payment for Corporate Guarantee Fees' as an international transaction.

14. Further, as regards the reliance placed by learned A.R. on the order passed by the Co-ordinate Bench in Kodak India (P) Ltd. v. Addl. CIT: 155 TTJ 697 as affirmed by Hon'ble Jurisdictional High Court in [2016] 288 CTR 46 in support of the submission that the matter should not be remanded, we find that the said decision is distinguishable on facts. As in the present case, TPO/AO wrongly treated 'Provision of Corporate Guarantee' as a

shareholder's functions instead of treating the same as an international transaction under the provisions of Explanation (i) to section 92B of the Act and accordingly computed the ALP of the same at NIL. This is not a case where TPO computed the ALP by applying incorrect benchmarking method. Rather, in the present case, the TPO/AO erred in characterisation of the transaction resulting in erroneous conclusion and benchmarking. It is also not been disputed by the assessee that 'Payment for Corporate Guarantee Fees' is an international transaction as per Explanation (i) to section 92B of the Act. Thus, in view of the settled legal position and also the relevant statutory provisions, we deem it appropriate to restore the matter to the TPO/AO only to benchmark the transaction of 'Payment for Corporate Guarantee Fees' after considering the same as an international transaction. Needless to mention that before passing the order the AO/TPO shall grant opportunity of hearing to the assessee.

15. In the result, grounds no. 2 to 6 raised in assessee's appeal are allowed for statistical purpose.

Order pronounced in the open court on 14/03/2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 14/03/2022

Copy of the order forwarded to:

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai