

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

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.5027/Mum./2013
(Assessment Year : 2008-09)

M/s. Siddhayu Ayurvedic Research
Foundation Pvt. Ltd.
M.B. Agarwal, 204, Camy House
3, Dhus Wadi, Dr. C.H. Street
Mumbai 400 002 PAN – AAACS8335F

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-4(1), Mumbai

.....Respondent

Assessee by : Shri Yogesh Thar a/w
Shri Ayushi Madana

Revenue by : Shri Tejinder Pal Singh Anand

Date of Hearing – 01/06/2022

Date of Order – 17/08/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has filed by the assessee challenging the impugned order dated 23/04/2013, passed under section 250 of the Income Tax Act, 1961 (*'the Act'*) by the learned Commissioner of Income Tax (Appeals) – 15, Mumbai [*'learned CIT(A)'*], for the assessment year 2008-09.

2. In this appeal, the assessee has raised following grounds:

"GROUND TREATING THE INTEREST PAID TO BANK CORPORATE GUARANTEE GIVEN AS AN INTERNATIONAL TRANSACTION UNDER SECTION SB OF THE ACT

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) upholding the action Transfer Pricing Officer (TPO)/Assessing Officer (AO) in treating the interest paid to bank and corporate guarantee fee as "international transaction" u/s 92B of the Act.*

2. *He failed to appreciate and ought to have held that:*

a. *The Appellant was not into the business of providing finance or guarantee and hence these transactions were not "International Transactions" u/s 928 of the Act.*

b. *The transactions were on account of commercial expediency and hence did not warrant any addition under chapter X of the Act.*

The Appellant prays that the aforesaid transactions should not be treated as International Transactions 928 of the Act.

GROUND 2 ADDITION ON ACCOUNT OF ARM'S LENGTH ADJUSTMENT TO INCOME FROM GUARANTEE COMMISSION

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in computing the arms length price u/s 92C(3) for the corporate guarantees provided by the Appellant and thereby making an addition of notional guarantee fee of Rs. 31.50,000/-,*

2 *He failed to appreciate and ought to have held that the guarantee commission paid to the third party was out of the appellants own business obligation.*

3 *He further erred to appreciate and ought to have held that the aforesaid disallowance was made without any justification and such ad-hoc disallowance made by the Ld. AO and affirmed by the CIT(A) is bad is law and hence should not be called for.*

4. *The Appellant therefore prays that Arm's length adjustment made by the TPO/AO and confirmed by the CIT(A) be deleted or appropriately be reduced.*

GROUND 3: ADDITION ON ACCOUNT OF INTEREST PAID BY THE APPELLANT ON LOAN GIVEN TO ITS AE

1. *On the facts and circumstances of the case and in law, the CIT(A) erred in making an addition of Rs. 46,97,658/- being the amount of interest paid on behalf of its AE.*

2. *He failed to appreciate and ought to have held that the interest paid by the Appellant was on account of its own business obligation and hence should be allowed as business expense.*

3. He further failed to appreciate and ought to have held that the amount of interest paid by the Appellant was never claimed as an expense by the appellant and addition of the same interest expense to the income of the appellant would amount to double taxation.

4. Without prejudice, the Appellant submits that in case the addition of interest is upheld then such addition should be restricted to Rs 21,13,946/- equivalent to Appellant share in its AE, being 55% of share capital.

5. The Appellant therefore prays that Arm's length adjustment made by the TPO and confirmed by the AO be deleted.

GROUND 4: DISALLOWANCE OF SALES TAX PAYABLE

1. On the facts and circumstance of the case and in law the CIT(A) erred in disallowing a sum of Rs. 9,43,930/- being sales tax payable.

2. He failed to appreciate and ought to have held that the amount of sales tax expense is allowable as business expenditure u/s 37(1) of the Act.

3. The Appellant prays that disallowance made by AO and affirmed by the CIT(A) should therefore be deleted."

3. The first issue to be decided in present appeal, which is arising in ground no.3, is pertaining to transfer pricing adjustment on account of interest paid by the assessee on behalf of the associated enterprise.

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is engaged in manufacturing of ayurvedic medicines and herbal cosmetic products. It has also installed 3 wind turbine generators and sells electricity generated from the same. The assessee filed its return of income on 29/09/2008, declaring total income of Rs. Nil after setting off brought forward loss of Rs. 2,59,25,273. Accordingly, the total income was determined under section 115 JB and returned as Rs. 2,27,49,978. The assessee is holding company of its associated enterprise i.e. M/s PT Equity Commodities, Jakarta, Indonesia,

holding 55% of its share capital. During the year under consideration, assessee reported following international transaction entered into with its associated enterprise:

| <i>Sr. No.</i> | <i>Nature of transaction</i> | <i>FY 2007-08</i> | <i>Method adopted by the assessee</i> |
|----------------|---|--------------------|---------------------------------------|
| 1. | <i>Investment in Equity Share Capital of the subsidiary company M/s PT Equity Communities, Jakarta, Indonesia</i> | <i>7,12,13,196</i> | <i>CUP</i> |

5. The Assessing Officer made reference to the Transfer Pricing Officer ('TPO') for determination of arm's length price of the international transactions entered into by the assessee. During the course of transfer pricing assessment proceedings, it was observed that amount remitted of Rs. 7,12,13,196, represented USD 17,61,849. As the shares invested was 16,50,000 shares at 1 USD, accordingly the assessee was asked to show cause as to why the investment exceeding 16,50,000 USD was made and why the excess amount of 1,11,849 USD be not considered as not in accordance with the arm's length price and adjustment be made. In reply, assessee submitted that excess amount represents interest paid to bank on behalf of the associated enterprise. It was further submitted that associated enterprise had borrowed term loan on the security and guarantee provided by the assessee and the funds were utilised by the associated enterprise. The TPO vide order dated 22/09/2011 passed under section 92CA(3) of the Act observed that assessee had borne the interest and other charges in respect of the loan without any use of the fund and

without any compensation, which is not possible in a third-party scenario. Accordingly, the TPO held that the amount of Rs. 46,97,658 (equivalent to 1,11,849 USD @ 42) paid by the assessee on behalf of the associated enterprises is not at arm's length price. The TPO further held that as the assessee had not received the benefit of the loan, therefore the interest required to be paid by the assessee on such loan is treated at NIL. Accordingly, an adjustment of Rs. 46,97,658, was proposed by the TPO. In appeal, learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, assessee is in appeal before us.

6. During the course of hearing, learned Authorised Representative (*'learned AR'*) submitted that the interest paid by the assessee on behalf of the associated enterprise was not claimed and therefore no transfer pricing adjustment can be made in this regard. On the other hand, learned Departmental Representative (*'learned DR'*) vehemently relied upon the orders passed by the lower authorities.

7. We have considered the rival submissions and perused the material available on record. In the present case, the associated enterprise of the assessee is its subsidiary company in which assessee holds majority control i.e. 55% of the shareholding. Apart from the assessee, two other persons staying in Indonesia held balance 45% of shareholding of the said subsidiary company. The associated enterprise of the assessee was to invest in coal mine in Indonesia and therefore for said purpose funds were

required to be arranged by aforesaid 3 promoters, including the assessee company, respective of shareholding ratio. To fulfil this commitment of fund for the subsidiary company, the assessee had arranged 3 million USD Bridge Loan from the Bank of India, Singapore branch. Since this loan was arranged by the assessee to fulfill its commitment under the MOU with the other shareholders, the assessee had, inter-alia, borne the entire interest expenditure on the aforesaid loan. In the present case, the lower authorities on the basis that no benefit was received by the assessee by paying the interest on the loan, which loan was in fact utilized by the associated enterprise, treated the arm's length price of the interest to be Nil and accordingly made the addition of the entire amount of interest paid by the assessee on behalf of the associated enterprise.

8. As per the assessee, interest paid on behalf of the associated enterprise was not claimed by the assessee and therefore there should not be any transfer pricing adjustment in the present case. Before proceeding further to decide the validity of transfer pricing adjustment on this issue, it is relevant to note the object of provisions contained in Chapter X of the Act. Since participation of multinational group companies in the economic activities of the country had risen, and new complex issues had emerged from the transactions entered between two or more enterprises belonging to the same multinational group, therefore, possibility of manipulation of price charged or paid as such in their group concerns, could not be ruled out, which could lead to erosion of tax revenue to the country. Thus, with a

view to provide statutory framework, which can lead to computation of reasonable, fair and equitable profits and tax in India, in the cases of such multi-national enterprises, new provisions were introduced in the Act, i.e. Chapter X which provides for special provisions relating to avoidance of tax. As per the provision of section 92 of the Act, any income arising from international transaction shall be computed having regard to the arm's length price. Further, vide Explanation to section 92, it has been clarified that allowance of any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price. Thus, in view of the above, the provisions of Chapter X shall have the relevance when assessee has claimed any expenditure or earned any income from the international transaction, which due to assessee's dealing with associated enterprise has the possibility of being manipulated in order to reduce the taxable income within India. In such situation, the income or expenditure shall be computed / determined having regard to the arm's length price. In the present case, the Revenue though treated the arm's length price of interest paid by the assessee, on behalf of the associated enterprise, as Nil, however, has not disputed the fact that assessee has not claimed such expenditure and thus even when its value is considered at par, i.e. as paid by the assessee, same will not affect the income chargeable to tax in India. Therefore, in the present case, we are of the considered view that the payment of interest by the assessee, on behalf of the associated enterprise, which has not been claimed as expenditure, is revenue neutral and provisions of Chapter X of the Act are not applicable in

such a situation. Accordingly, we direct the TPO/Assessing Officer to delete the transfer pricing adjustment on account of interest paid by the assessee. As a result, ground No. 3 raised in assessee's appeal is allowed.

9. The issue arising in ground no. 2, raised in assessee's appeal, is pertaining to the adjustment on account of corporate guarantee.

10. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the course of transfer pricing assessment proceedings, it was observed that the assessee had provided corporate guarantee to its associated enterprise without any compensation/fees. The TPO vide order passed under section 92CA(3) of the Act observed that the assessee bears costs and risks in providing such guarantee, as it has pledged its shares as security and as the directors of the assessee company has provided guarantee for the loan availed by the associated enterprise, which an independent party would not have borne without any compensation. Therefore, the TPO imputed 2.5% of the loan funds amounting to Rs. 31,50,000, as guarantee fee receivable by the assessee for provision of corporate guarantee to the associated enterprise. Accordingly, the adjustment of the aforesaid amount was proposed by the TPO. In appeal, learned CIT(A) vide impugned order dismissed the appeal by the assessee on this issue. Being aggrieved, assessee is in appeal before us.

11. During the course of hearing, learned AR submitted that computation of guarantee commission should be restricted to 0.5% by placing reliance upon the decision of Hon'ble jurisdictional High Court in CIT vs. Everest Kento Cylinders Ltd., [2015] 378 ITR 57 (Bom.) On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

12. We have considered the rival submissions and perused the material available on record. During the course of hearing, the learned AR did not press other grounds raised by the assessee in respect of transfer pricing adjustment on account of corporate guarantee and only prayed that rate of guarantee commission for benchmarking should be restricted to 0.5%. We find that Hon'ble jurisdictional High Court in Everest Kento Cylinders Ltd. (supra) upheld charging of guarantee commission at the rate of 0.5%. Accordingly, respectfully following the aforesaid decision of Hon'ble jurisdictional High Court, we direct the TPO/Assessing Officer to compute the transfer pricing adjustment on account of corporate guarantee by charging guarantee commission at the rate of 0.5%. Accordingly, ground no. 2 raised in assessee's appeal is partly allowed.

13. In view of aforesaid findings, ground no. 1, raised in assessee's appeal, needs no separate adjudication.

14. Ground no. 4 raised in assessee's appeal was not pressed by the learned AR during the course of hearing. Accordingly, ground no. 4 is dismissed as not pressed.

15. In the result, appeal by the assessee is partly allowed.

Order pronounced in the open Court on 17/08/2022

Sd/-
PRAMOD KUMAR
VICE PRESIDENT

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 17/08/2022

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