IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.5129/Mum./2017
(Assessment Year : 2013–14)

Australia and New Zealand Banking Group Ltd.
Unit–A, 6th Floor, Cnergy Centre
Appasaheb Marathe Marg ……. Appellant
Prabhadevi, Mumbai 400 025
PAN – AAICA3008P

v/s

Dy. Commissioner of Income Tax
International Taxation
Circle–1(1)(2), Mumbai .....Respondent

Assessee by : Shri Madhur Agrawal, Advocate
Revenue by : Shri Milind Chavan, Sr. DR

Date of Hearing – 02/06/2022	Date of Order – 10/08/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the final assessment order dated 19/05/2017, passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 ('*the Act*') by the Assessing Officer, for the assessment year 2013–14.

2. In its appeal, assessee has raised following grounds:

"Ground 1: Determination of the arm's length price (ALP) of the international transaction relating to processing fees received on account of guarantees issued to Indian companies based on counter-guarantee from overseas branches

That on the facts and in the circumstances of the case and in law, the learned AO, based on the directions of the Hon'ble DRP, erred in making the transfer pricing adjustment of Rs 7,96,36,154, by re-computing the arm's length price (ALP) of the international transaction undertaken by Australia and New Zealand Banking Group Limited, Mumbai Branch (ANZ Mumbai) relating to processing fees received on account of guarantees issued by ANZ Mumbai to Indian beneficiaries (based on the corresponding back to back guarantee provided by the overseas associated enterprises (AE's)).

Ground 2: <u>Rejecting the Transactional Net Margin Method (TNMM) used by the Appellant and adopting External Comparable Uncontrolled Price (COP) method as the most appropriate method</u>

That on the facts and in the circumstances of the case and in law, the learned AO. based on the directions of the Hon'ble DRP, erred in determining the arm's length price of the international transaction undertaken by ANZ Mumbai relating to processing fees received on account of guarantees issued by ANZ Mumbai to Indian beneficiaries (based on the back to back guarantee provided by the overseas AEs) on account of the following:

a) In rejecting the TNMM used by the Appellant without appreciating that the Appellant provides administrative support services, by issuing local guarantees based on the instructions and counter guarantee received from the AE without undertaking risk on the overseas third party requesting the guarantee.

b) In adopting external CUP method as the most appropriate method to determine the ALP of the international transaction, by using information received/collected from third party Indian banks under section 133(6), and without any comparability analysis concluding that the functions performed, assets used and risks undertaken by ANZ Mumbai are comparable with the activities carried on by the banking companies from whom data was collected by the AO under section 133(6).

c) Without prejudice to the above, in concluding that the Appellant should have charged 1% of the guarantee amount without any cogent and reasonable comparability exercise prescribed under Rule 10B of the Income-tax Rules 1961 read with Section 92C of the Income-tax Act, 1961.

d) Without prejudice to the above, not appreciating the fact that in cases where ANZ Mumbai has directly provided guarantee to the third party Indian clients which are not backed by a counter guarantee from the overseas AE, though these transactions are not comparable to those where ANZ Mumbai provides only administrative support services based on the counter guarantee received from AE, ANZ Mumbai has earned an average fee of only 0.51% from such third party Indian clients.

Ground 3: Reimbursement of expenses to Head Office treated as royalty

That on the facts and in the circumstances of the case and in law, the learned AO, based on the directions of the Hon'ble DRP, erred in considering the Appellant's Permanent Establishment in India (ie. ANZ Mumbai) and the Head Office (HO) in Australia as separate and distinct entities for all income-tax purposes, and thereby treating the following payments made by ANZ Mumbai to its HO, taxable as fees for technical services/ royalties under Article 12 of the India-Australia Double Taxation Avoidance Agreement (IA Treaty):

a) Reimbursement of the actual cost incurred by the HO towards the software customization expenses for ANZ Mumbai amounting to Rs. 5,44,09,826; and

b) Reimbursement of the actual cost incurred by HO towards the employees of ANZ Mumbai amounting to Rs 33,71,423.

Ground 4: Erroneous computation of total tax payable

Without prejudice to the above grounds, the learned AO erred in computing the total tax liability of the Appellant.

Ground 5: Erroneous computation of surcharge and education cess on the income taxable under the provisions of IA treaty

The learned AO erred in levying surcharge and education cess on the income of the Appellant taxable under the provisions of IA treaty.

Ground 6: Non-grant of taxes deducted at source

The learned AO has erred in not granting the full credit for tax deducted at source under the provisions of Income-tax Act, 1961.

Ground 7: Erroneous computation of interest under section 234B and 234C of the Act

The learned AO erred in computing consequential interest under section 2348 of the Act as well as consequential interest under section 234C of the Act.

Each of the grounds of appeal is referred to separately, and may kindly be considered independent of each other."

3. The only grievance of the assessee in the present appeal is against transfer pricing adjustment relating to processing fees received on account of guarantees issued to Indian beneficiaries (based on the

corresponding back-to-back guarantee provided by the overseas associated enterprises).

4. The brief facts of the case pertaining to this issue, as emanating from the record are: The assessee is a banking company and is resident of Australia for the purpose of the Double Taxation Avoidance Agreement entered into between India and Australia. For the year under consideration, the assessee e-filed its return of income on 29/11/2013 declaring total income of Rs. 340,61,83,860, which was subsequently revised on 31/03/2015 declaring total income of Rs. 335,10,37,050.

5. During the year under consideration, the assessee, inter-alia, entered into international transaction with its associated enterprise in respect of processing fees on account of local guarantees issued based on counter guarantee received from the overseas branches. As per the assessee, the overseas branches of assessee have clients who require guarantees to be issued to the beneficiaries in India. Given that the beneficiaries are located in India, the overseas branches of the assessee request the Indian branch to provide such guarantees to the beneficiary and in turn provide a back-to-back inter-bank guarantee/indemnity to Indian branch to cover any financial liability that Indian branch may incur in connection with guarantees issued to Indian beneficiaries on behalf of overseas branches. Further, in case, the client of the overseas branch defaults and the guarantee would be invoked; then, under the back-to-back guarantee issued to Indian branch, the overseas branch would make

the payment to Indian branch, which would then onward make the payment to the beneficiary in India. During the course of transfer pricing assessment proceedings, assessee submitted that it does not face any default/credit risk as it is secured by a back-to-back guarantee issued by its overseas branches. As per the assessee, it provided low-risk administrative support services in relation to the back-to-back guarantees. The Indian branch received Rs. 15,39,624 as processing fees for issuing guarantees in India, which was secured by counter guarantees issued by the overseas branches of the assessee. The assessee benchmarked the above transaction by adopting Transactional Net Margin Method ('TNMM') as the most appropriate method with Profit Level Indicator of operating profit on operating cost. The assessee selected 6 companies as comparable with single year updated margin of -3.78%. As the assessee computed its own margin at 894.70% over the operating costs incurred by it, accordingly, it claimed that the international transaction of receipt of processing fees is at arm's length price ('ALP').

6. The Transfer Pricing Officer ('*TPO*') vide order dated 28/10/2016 passed under section 92CA(3) of the Act applied Comparable Uncontrolled Price ('*CUP*') as the most appropriate method for benchmarking the impugned international transaction. The TPO also collected information under section 133(6) from various banking companies in respect of commission received by them for guarantees issued to 3rd parties against counter guarantee issued by a foreign bank. Accordingly, the TPO came to the conclusion that Indian branch should have charged 1% as the

guarantee fee of the guaranteed amount. Thus, an adjustment of Rs. 7,96,36,154 was proposed by the TPO. In conformity, the Assessing Officer, inter-alia, passed the draft assessment order under section 143(3) with section 144C(1) of the Act.

7. The learned Dispute Resolution Panel ('DRP'), vide direction dated 18/04/2017 issued under section 144C(5) of the Act, following the directions issued in assessee's own case for assessment year 2012–13 rejected the objections filed by the assessee. In conformity, the Assessing Officer, inter-alia, passed the impugned final assessment order. Being aggrieved, the assessee is in appeal before us.

8. During the course of hearing, Shri Madhur Agarwal, learned counsel for appearing for the assessee submitted that similar issue has been decided in favour of the assessee by the Co–ordinate Bench of the Tribunal rendered in assessee's own case.

9. On the other hand, Shri Milind Chavan, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

10. We have considered the rival submissions and perused the material available on record. We find that the Co–ordinate Bench of the Tribunal in assessee's own case in M/s. Australia and New Zealand Banking Group Ltd. v/s DCIT, in ITA No. 1106/Mum/2017, vide order dated 13/04/2022,

for the assessment year 2012–13, while deleting the transfer pricing adjustment made in respect of guarantee fees, observed as under:

> *"3.5. At the outset, we find that overseas branches of ANZ have clients who require guarantees to be issued to the beneficiaries in India. Since the beneficiaries are situated in India, the overseas branches of ANZ are situated in India. The overseas branches of ANZ request the assessee to provide such guarantees to the beneficiaries and inturn provide a back to back inter-bank guarantee / indemnity to assessee to cover any financial liability that assessee may incur in connection with guarantees issued to Indian beneficiaries on behalf of overseas ANZ branches. This is the prime function / activity carried out by the assessee with regard to the impugned international transaction. In case where the client of the overseas branch defaults and the guarantee would be invoked then, under the back to back guarantee issued to assessee, the overseas branch would make payments to assessee which would onward then make the payment to the beneficiary in India.*
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> *3.6. Hence, from the aforesaid modus operandi, it could be concluded that assessee acts as a beneficiary bank i.e. issue guarantee in India on behalf of clients of overseas branches of ANZ based on the counter guarantee issued by such overseas ANZ branches. Since assessee is acting as the beneficiary, the entire risk of discharging the bank guarantees is borne by overseas ANZ branch issuing the counter guarantee. The assessee merely provides support service in connection with processing of the guarantees, typing out the guarantee agreement based on swift message received and issuing the said agreement to the beneficiary. The aforesaid functions performed by the assessee are not disputed by the lower authorities. When assessee is fully protected by overseas counter guarantee, we are unable to comprehend ourselves as to how CUP method could be applied therein as it would be impossible to make adjustment for the differences as per Rule 10B(1)(a) of the Income Tax Rules. In effect, we find that assessee is merely providing secretarial services or which can be loosely called as carrying out administrative functions. It is not in dispute that the assessee does not bear any risk in its books as it is fully protected by overseas counter guarantee / indemnity. In fact even assessee would not have to face the foreign exchange risk in view of the fact that whenever assessee is called upon to discharge the guarantee on behalf of the overseas branches, the assessee would first receive the monies from overseas branch because of the existing counter guarantee, and then discharge the same. The assessee is receiving processing fees from its AEs in foreign currency and the said fee is received immediately after the invoice is raised for the same, thereby the risk of exchange fluctuation would be very very negligible due to reduced time span involved therein. Given these undisputed facts, it would be appropriate to consider assessee as the tested party as it would be the least complex entity and its profitability could be reliably ascertained. Admittedly, the transaction which requires to be benchmarked is the receipt of processing fees by the assessee for the guarantees issued by rendering the aforesaid secretarial services. Hence, what is to be looked into is under similar terms and*

conditions and under similar circumstances what is the guarantee fee charged by the third party comparables from their AEs. This is what precisely assessee has done in the instant case. The assessee had taken into account the third party comparable margins and compared the same with its margins using Transactional Net Margin Method. For this purpose, the assessee had taken the third party comparables which are engaged in providing liasoning services, managerial services, marketing services, administrative services and information services. Effectively all these services could be loosely termed as business support services. Hence, when the data under CUP method is not available and data of margins under TNMM is readily available, then it would be appropriate to apply TNMM method as the Most Appropriate Method (MAM) in the facts and circumstances of the instant case.

3.7. We find that assessee had explained the entire transactions and the modus operandi applied by it in respect of the guarantee transactions before the ld. TPO which are evident vide letter dated 09/10/2015 together with the fee charged for each type of services rendered by it. These details are enclosed in pages 316 to 322 of the paper book filed before us. We also find the assessee vide its letter dated 28/10/2015 had filed a detailed annexure enclosed in pages 328-331 of the paper book listing the guarantees issued by it based on counter guarantee received from overseas branches of ANZ. The assessee also furnished the sample documents enclosing the copy of swift message received from ANZ New York advising the assessee to issue guarantee to Indian beneficiaries like Reliance Infrastructure Ltd., and providing counter guarantee.

3.8. The assessee also placed on record the copy of the swift message from assessee to ANZ New York confirming that guarantee has been issued to Reliance Infrastructure Ltd., confirming that guarantee has been issued by ANZ Mumbai. By all these documents, the ld. AR was vociferous in driving home the point that the entire risk of discharging the bank guarantees is borne by the overseas ANZ branch issuing the counter guarantees wherein the assessee merely provides support services in connection with processing of the guarantees. The ld. AR also referred to page 380 of the paper book containing various swift messages received. The assessee also placed on record the reply letter dated 18/12/2015 filed before the ld. TPO in response to show-cause notice as to why 1% guarantee fee charged by third party Indian banks should not be considered as the arm's length price, placed reliance on the decision of the Mumbai Tribunal in the case of Asian Paints Ltd., vs. ACIT in ITA Nos. 2126 & 2178/Mum/2012 wherein specifically in the context of guarantee fees, this Tribunal had deleted the adjustment made as the said judgement was rendered simply relying on certain data from the market. The facts of the case before us squarely fit into the facts prevailing in the case of Asian Paints Ltd.

3.9. The assessee before the ld. DRP made an alternative submission that the fee of 1% proposed by the ld. TPO may be applied in respect of fresh guarantees issued during the year. The details of fresh guarantees issued during the year were also furnished before the ld. DRP in pages 577-579 of the paper book vide letter dated 27/04/2016. But we find that the ld.

DRP had merely brushed aside the same and grossly erred in stating that no details were filed by the assessee.

3.10. In view of the aforesaid observations, we hold that TNMM method would be the Most Appropriate Method in the facts and circumstances of the instant case and CUP could not be applied herein because of non-availability of data. In any case in respect of adjustment made simply relying on 133(6) information from the market had been deleted by this Tribunal in the case of Asian Paints Ltd., referred to supra. It is also prudent to note that the same transactions were accepted by the ld. TPO upto A.Y.2012-13 in the case of the assessee. Hence, even going by the rule of consistency as has been held by the Hon'ble Supreme Court in the case of Radhasoami Satsang reported in 193 ITR 321, there is no need for the ld. TPO to take a divergent stand when there is no change in the facts and circumstances during the year with that of earlier years. Hence, we direct the ld. TPO to delete the adjustment made in respect of guarantee fees in the sum of Rs.10,94,55,035/-. Accordingly, the ground Nos. 1 & 2 raised by the assessee are allowed."

11. The learned Departmental Representative could not show us any reason to deviate from the aforesaid order and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the Co–ordinate Bench of the Tribunal in assessee's own case cited (supra), we uphold the plea of the assessee and delete the impugned transfer pricing adjustment. Accordingly grounds no. 1 and 2 raised in assessee's appeal are allowed.

12. The learned counsel wish to not press grounds no. 3, 5 and 6. Accordingly, aforesaid grounds are dismissed as not pressed.

13. Ground No. 4 raised in assessee's appeal is general in nature and same needs no separate adjudication.

14. Ground No. 7 raised in assessee's appeal is pertaining to computation of interest under section 234B and 234C of the Act, which is

consequential in nature. Thus, ground no. 7 is allowed for statistical purpose.

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

Order pronounced in the open court on 10/08/2022

Sd/-	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 10/08/2022

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.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai