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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SMT KAVITHA RAJAGOPAL, JM

ITA No. 1590/MUM/2022

(Assessment Year 2017-18)

Crayon Group AS City of Joy, 720, Ecstasy Business Park, JSD, Mulund West, Mumbai- 400 080	Vs.	ACIT Office of the Assistant Commissioner of Income Tax, International tax Circle 2(1)(1), Room No. 1713, 17th Floor, Air India Building, Nariman Point, Mumbai- 400 021
(Appellant)		**(Respondent)**

PAN No. AAGCC2226B

Assessee by	:	Ms. Bhavya Bansal Goyal/ Mit Gaglani, ARs
Revenue by	:	Ms. Samruddhi Dhananjay Hande, SR AR

Date of hearing: 21.04.2023
Date of pronouncement : 05.07.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Crayon Group As (the assessee/appellant) against the assessment order passed by The Assistant Commissioner Of Income Tax Circle 2 (1) (1), Mumbai (the learned AO) under section 143 (3) read with section 144C (13) of The Income Tax Act, 1961 (The Act) dated 27/4/2022 in pursuance of direction of the learned Dispute Resolution Panel – 1, Mumbai – 3 (the learned DRP)

dated 24/3/2022 wherein the transfer pricing adjustment proposed by the learned Asst Commissioner Of Income Tax, Transfer Pricing, 1 (3) (1), Mumbai (the learned TPO) was incorporated.

02. Assessee filed its return of income on 30/11/2017 at ₹ 16,235,646 which was assessed at ₹ 23,935,646 with only adjustment ease as per the transfer pricing officer's order of ₹ 77 lakhs.

03. The assessee aggrieved with that order has preferred an appeal before us raising following grounds of appeal: –

"***1. <u>Ground No. 1:</u>***

The Assessment Order passed by the Ld. AO pursuant to the directions of the Hon'ble DAP under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 is erroneous and bad in law and in facts.

2. <u>Ground No. 2:</u>

The Hon'ble DRP, the Ld. AO and the Ld TPO have erred in law and in facts in computing an upward Transfer Pricing ('TP') adjustment of Rs. 77,00,000 with regard to the Arm's Length Price of the International transactions undertaken by the Appellant by disregarding the methodology adopted by the Appellant in its Transfer Pricing documentation maintained in accordance with section 92D of the Income-tax Act, 1961 read with Rule 10D of the

Income-tax Rules, 1962 and the detailed arguments/elaborate submissions made by the Appellant during the course of the assessment proceedings before the learned TPO and the Hon'ble DRP.

3. Ground No 3:

With respect to the international transaction in the nature of receipt of interest income by the Appellant from its AE the Hon'ble DRP, the Ld. AD and the td. TPO have erred in law and in facts by concluding the said international transaction to be at non-arm's length and computing an upward transfer pricing adjustment of Rs 67,50,000 on the same.

3.1 Ground No.3.1:

The Honble DRP, the Ld. AO and the Ld TPO have erred in law and in facts by disregarding the contentions of the Appellant that if the mirror of the same transaction was already concluded to be at arm's length by selecting the AE as the tested party, the same transaction cannot again be concluded to be at non-arm's length by changing the tested party.

3.2 Ground No 3.2:

With respect to the international transaction of Interest, the Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by completely disregarding the above argument of the Appellant and not discussing the above issue in their respective orders.

3.3 Ground No 3.3:

The Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by disregarding the contentions of the Appellant that computing the said adjustment would lead to a reduction in the income chargeable to tax in India and would accordingly violate the provisions contained in section 92(3) of the Act.

3.4 Ground No 3.4:

The Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by concluding that no automate set-off of the said adjustment would be available to the AE and accordingly the deduction of the AE would be only restricted to 6.5% i.e., the actual rate of interest charged by the Appellant to the AE whereas the income of the Appellant in India would be computed at 11%.

3.5 Ground No 3.5:

The Hon'ble DRP, the Ld. AO and the Ld TPO have erred in law and in facts by disregarding that if the interest income of the Appellant is computed at 11% and the corresponding expenditure allowed to the AE of the Appellant is only to the extent of 6.5%, on the differential amount of Rs. 67,50,000 there would be double

taxation in India which is not the intention of the Indian Taxation Regime.

4. Ground No.4:

With respect to the international transaction in the nature of corporate guarantee, the Hon'ble DRP, the Ld. AO and the Ld TPO have erred in law and in facts by concluding the said international transaction to be at non-arm's length and computing an upward transfer pricing adjustment of Rs 9,50,000 on the same.

4.1 Ground No.4.1:

The Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by disregarding the contentions of the Appellant that if the mirror of the same transaction was already concluded to be at arm's length during the assessment proceedings of the AE, the same transaction cannot again be concluded to be not at arm's length during the assessment proceedings of the Appellant.

4.2 Ground No 4.2:

The Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by completely disregarding the above argument of the

Appellant and not discussing the above issue in their respective orders.

4.3 Ground No 4.3

The Hon'ble DRP, the Ld. AD and the Ld. TPO have erred in law and in facts by disregarding the contentions of the Appellant that no benefit in terms of a discounted interest rate was observed by the AE due to the corporate guarantee given by the Appellant to Tata Capital since even despite the said guarantee, Tata Capital charged a rate of interest of 11% p.a. to the AE.

4.4 Ground No 4.4:

without prejudice to Ground no. 4.3, the Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by using an adhoc rate of 1% which was computed by allowing a discount of 0.5% on the arithmetic mean of naked bank guarantee quotes of three banks, for computing the transfer pricing adjustment and therefore by not following the methodology laid down in the Act and in the Rules.

4.5 Ground No 4.5:

Without prejudice to Ground no. 4.3, the Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by disregarding the contentions of the Appellant that a letter of comfort which was issued by the Appellant to

Tata Capital in relation to the channel credit finance facility availed by the AE of the Appellant from Tata Capital was very different than a bank guarantee transaction and therefore bank guarantee rates should not be used as a benchmark for the said transaction.

4.6 Ground No.4.6:

The Hon'ble DRP, the Ld. AO and the Ld TPO have erred in law and in facts by disregarding the contentions of the Appellant that computing the said adjustment would lead to a reduction in the income chargeable to tax in India and would accordingly violate the provisions contained in section 92(3) of the Act.

4.7 Ground No 4.7:

The Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by disregarding the contentions of the Appellant that the corporate guarantee transaction was in the nature of a shareholder activity and accordingly did not warrant a compensation.

5. Ground No 5:

The Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by disregarding the contentions of the Appellant that even if any income by way of guarantee fees is warranted to the Appellant by no means it could be charged to tax in

India since the agreement for avoidance of Double Taxation between India and Norway (the country of residency of the Appellant) does not discuss about the taxability for transactions in the nature of corporate guarantees.

6. Ground No 6:

The Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by disregarding the contentions of the Appellant that computing an adjustment in the hands of the Appellant but not allowing a corresponding deduction in the hands of the AE of the Appellant would lead to double taxation in India which is not the intention of the Indian Taxation Regime.

7. Ground No 7:

The Hon'ble DRP, the Ld. AO and the Ld. TPO have erred in law and in facts by disregarding the judicial precedents relied upon by the Appellant in support of its contentions.

8. Ground.No.8:

The Hon'ble DRP and the Ld. AO have erred in law and in facts by initiating penalty proceedings u/s 270A of the Act mechanically for under-reporting and misreporting without recording any adequate satisfaction for such initiation.

The Appellant prays that the additions made by the ld. AO/TPO and upheld by the Hon'ble DRP be deleted and consequential relief be granted."

04. Brief facts of the case shows that assessee is a foreign company incorporated in Norway engaged in the business of distribution of software licenses across various types of licensing programs offered by the vendors. The company also offers training, deployment and associated consulting services including software asset management services.

05. It filed its return of income on 30/11/2017 declaring a total income of ₹ 16,235,646/–. The return was selected for the scrutiny.

06. As the assessee has entered into international transaction, reference was made by the learned assessing officer to the learned transfer pricing officer on 3/5/2019 for determination of arm's-length price with reference to the international transaction reported in form number 3CEB filed by the assessee. The learned TPO passed transfer pricing assessment order under section 92CA (3) of The Income Tax Act 1961 [The Act] on 7/1/2021 wherein arm's-length price of the international transaction was determined and adjustment of (i) ₹ 6,750,000 on interest income on compulsorily convertible debenture and (ii) ₹ 950,000 on account of corporate guarantee issued to its associated enterprises without charging any guarantee commission was made. Accordingly total adjustment of ₹ 77 lakhs was made.

07. Consequently the learned assessing officer passed a draft assessment order under section 144C of The

Income Tax Act on 23/6/2021 incorporating the above adjustment of ₹ 77 lakhs and determining the total income of the assessee at ₹ 23,935,646/– against the returned income of ₹ 16,235,646/–.

08. Assessee preferred an objection before the learned dispute resolution panel which confirmed the adjustment proposed by the learned transfer pricing officer by passing a direction on 24/3/2022.

09. Consequent to that the final assessment order was passed under section 143 (3) read with section 144C (13) of the act on 27/4/2022 at the total income of ₹ 23,935,646/–.

010. The assessee is aggrieved with the assessment order wherein the transfer pricing adjustment of ₹ 77 lakhs was made and is in appeal before us.

011. We put the dispute with respect to the determination of arm's-length price of the two international transactions as under:-

A) Corporate Guarantee commission

Assessee has issued Corporate guarantee to its AE crayon software exports India private limited to Tata capital for the channel finance availed by its associated enterprises amounting to ₹ 19.50 crores against which the guarantee of ₹ 9.50 crores was issued by assessee in favour of TAT Capital. Assessee did not charge any corporate guarantee fees to its AE. Assessee submitted

that the provision of corporate guarantee is a shareholders' activity and further it has not incurred any cost in providing the said corporate guarantee in the form of the cost for the same was not debited to crayon India. No guarantee fee is chargeable as there is no benefit enjoyed by crayon India. Assessee also submitted that issuing a corporate guarantee is also not an international transaction. The learned transfer pricing officer rejected the transaction as shareholders' activity and confirmed that it's an international transaction. Therefore he proceeded to benchmark the same. The learned TPO was of the view as that there is no comparable price available, so he took the average of the average bank rates available which is 1.533% and applying a discount on the same, he considered the ALP guarantee rate at the rate of 1%. Accordingly an adjustment of ₹ 950,000/– was made. The learned dispute resolution panel upheld the above giving the reason that the bank guarantee rates vary generally between 1% to 3% and therefore it would be appropriate to charge a corporate guarantee fee of 1% from the associated enterprise.

B) Interest Income on Compulsorily convertible Debentures :-

i. The assessee has invested in compulsorily convertible debentures issued by one of its AE amounting to ₹ 15 crores. The assessee was receiving interest income at the rate of 6.5% on

the above CCD and during the year it received ₹ 9,750,000 as interest income. For benchmarking of the above international transaction, assessee stated that when the same associated enterprise availed a channel finance facility from an unrelated third-party at the interest rate of 11% per annum therefore an internal cup is available. It was further stated that prime lending rate of state bank of India as on 1 January 2017 is 14% and therefore an external cup is also available. Therefore in the transfer pricing study report assessee stated that as the AE has paid interest at the rate of 6.5% to the assessee which was lower than the internal cup as well as the external cup specified, the transaction is at arm's-length. It was also the claim that ALP of Interest payment in the hands of Indian AE is undisturbed therefore same should also be accepted in the hands of Foreign entity i.e. Assessee. The learned transfer pricing officer rejected the contention of the assessee and considering the internal cup of 11% computed an adjustment of ₹ 6,750,000/– to the total income of the assessee. Before the learned dispute resolution panel assessee stated that the charging higher rate of interest on compulsorily convertible debentures by the assessee [Foreign Entity] to the associated Enterprises [Indian Entity] result in erosion in tax base of taxpayers in India since the tax applicable on the additional income by way of arm's-length

adjustment shall be lower than the tax benefit available to the associated enterprise with respect to the said expenditure. It was also the claim of the assessee that AE will get a tax benefit of 30% whereas the assessee will suffer tax only at the rate of 10% on gross basis. The learned DRP rejected all those contentions of the assessee. It held that assessee was in receipt of the interest income at the rate of 6.5% on CCD during the current financial year. The assessee itself has benchmarked this transaction under the cup as most appropriate method and third-party comparable data used of associated enterprises for internal cup and SBI rate for external cup. The assessee has availed channel finance facility from an unrelated third party for which the interest rate is at the rate of 11% which can be considered as an internal cup. The assessee has himself submitted that AE has been charged interest at the rate of 11% per annum by Tata capital; the interest income chargeable on CCD by the assessee is less than the rate charged by the third-party to its associated enterprise. Accordingly the learned dispute resolution panel confirmed that interest rate at the rate of 11% charged by the Tata capital to its associated enterprise as arm's-length price of the interest rate.

012. The learned authorized representative contested the above adjustments. She referred to her written submission in detail.

013. Her Written submission with respect to the arm's-length price of interest on compulsorily convertible debenture is as under:-

"Submissions with respect to Ground 3-Adjustment of Rs 67,50,000

The appellant has issued compulsorily convertible debentures ("CCD") at an interest rate of 6.5% to its Indian AE. The TPO/DRP has however made an adjustment using the SBI PLR @ 11% at that time completely disregarding the fact that the transaction has been benchmarked using the Indian AE as the tested party (please refer TP report of Assessee on page 63 of Paper book). Furthermore, this international transaction has also been upheld to be at an arm's length in the TP order of the Indian AE (please refer page of 130 of PB).

Main points in support ground No. 3 are:

I. Mirror report

1. The Indian Transfer Pricing Laws contained in Chapter X of the Income Tax Act, 1961("the Act") do not contemplate determination of ALP in two different ways in the hands of payee (i.e. Assessee in the instant case- Crayon Group AS) and the payer (i.e. AE in the instant case) and if it is done, the same would

produce anomalous result which was never intended by the Legislature.

2. We would like to invite your attention to the fact that the international transaction of payment of interest on CCDs issued by AE for AY 2017-18 was held to be at ALP in the hands of the AE for the same AY.

Thus, having admitted that the interest payments on CCDs were at Arm's length in the hands of the AE for AY 2017-18, it was unsustainable on the part of the TPO to change the tested party in the said case and conclude that the same international transaction was not at Arm's length from the perspective of the Assessee.

The Tribunal in the case of AT & S Austria Technologie & Systemtechnik Aktiongesellschaft [TS- 117-ITAT-2020(Kol)-TP] [Page 1-29 of the case laws compilation] deletes TP-adjustment in respect of interest on loans/advances, reimbursement of costs and corporate guarantee fees received by non-resident Assessee [tax resident of Austria] from its Indian subsidiary [AE] for AY 2013-14. Regarding interest on loans/advances, observes that the transactions were held to be at ALP in the hands of the Indian-AE for same AY and thus holds that "it was unsustainable for the TPO to hold that the same international transactions as aforesaid resulted in shifting of profit out of Indian tax jurisdiction in the

hands of the Assessee for the same assessment year as mentioned herein above and to make Arm's length price adjustment in the hands of the Assessee (AT & S Austria) in respect of the said interests" ITAT noted that TPO's approach to benchmark the same international transaction in two different ways in the hands of two different AEs for the same AY signifies contradiction of his own stand and arbitrariness in his action.

In the case of M/s. UE Development India Pvt. Ltd. ITA No. 949/2017 [Page 30-41 of Case laws compilation). Karnataka HC dismisses Revenue's appeal against ITAT order deleting TP adjustment after noting that transaction's ALP was accepted in AEs hands for AY 2008-09. ITAT had relied on co-ordinate bench rulings in earlier AYS to hold that mirror transactions ALP adjustment cannot be done i.e. if one transaction is treated as at arm's length, no adjustment can be made on the other related corresponding transaction of AE. He relies on Softbrands ruling wherein it was held that 'unless an ex- facie perversity in the findings of the learned Income Tax Appellate Tribunal is established by the appellant, the appeal at the instance of an assessee or the Revenue under Section 260-A of the Act is not maintainable"; Thus, HC dismisses the appeal opining that no substantial question of law arises in the present case.

II. Indian AE as Tested party:

It is a well established fact that tested party has to be the least complex entity and one for which more reliable data is available. The OECD TP guidelines provide that the tested party ought to be the enterprise with a higher degree of comparability vis-a-vis the uncontrolled transactions. Para 3.18 of OECD TP guidelines provides as follows "The choice of the tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis."

The Madras HC in the case of Virtusa Consulting Services Private Limited v DCIT, Chennai (Page 52-90 of case laws compilation) held that the principles for selection of tested party had been drawn out and the tested party normally should be the least complex party to the controlled transaction.

Since, the assessee has used the Indian AE as the tested party for benchmarking its international transaction, same is in line with the functional analysis and judicial precedents of least complex entity being the tested party.

III. Tax base erosion

It is submitted that for every additional monetary unit in nature of interest charged by the Assessee to AE, AE will get a tax shield of 30%, whereas the Assessee will suffer tax only @ 10% on gross basis. There is thus base erosion of the Indian tax revenue to the extent of 20%, and this base erosion defeats the very intent and objective of introducing the transfer pricing provisions in India and CBDT circular No. 14 of 2001. Elaborating upon the factual elements embedded in this proposition, it is submitted that while the receipts in the hand of the Assessee are taxable at 10%, expenditure so incurred will be fully deductible in the hands of the resident subsidiary, and as such will reduce taxability which is otherwise at 30%. The net effect will be that the international transactions of the foreign parent company being subjected to Arm's length price adjustment, the Indian tax base will stand eroded by 20% of such an ALP adjustment.

Same is explained in the illustration below:

Table 1: Tax paid in the hands of Indian subsidiary

Particular	If the interest is ₹100	If the interest is ₹150
Taxable profit before interest	200	200
Interest paid	100	150
Net Income	100	50

Tax @ 30%	30	15

Table 2: Tax paid in the hands of Foreign Country

Particular	If the interest is ₹100	If the interest is ₹150
Income from AE	100	150
Withholding tax by AE @10%	10	15

As can be seen from the tables above, if the income of the foreign company is increased to Rs.150 under the Arm's length scenario, it shall have the effect of lowering the profits of the AE by Rs. 50. Further, the tax revenue to the Indian Government exchequer drops from Rs. 40 i.e Rs. 30+ Rs. 10 to Rs. 30 i.e. Rs. 15+ Rs. 15 leading to a tax base erosion which was never the intention of the Indian TP Regulations.

In the case of Cummins Inc (ITA No.2181/PN/2013 Pune ITAT [Page 42-51 of case laws compilation] noted Assessee's main plea before lower authorities that cost allocation based on cost estimates was an accepted method for the purpose of determining ALP and if the actual cost allocation results in any erosion of overall base of India, then no adjustment is required to be made to the value of international transaction. ITAT observed that, "where the Assessee is a foreign company and is recipient of internet mail charges and desktop/laptop service charges from the

Indian entities, then in cases where it is held that the Assessee should have been charged higher amounts from the Indian entities, then the same would result in reduction of overall tax base of India. In such circumstances, the Indian Transfer Pricing provisions are not to be applied".

IV. Corresponding adjustment will be available

Without prejudice to our other submissions, if the contention of the TPO/DRP is accepted there would be Double taxation of the amount of adjustment. The same will have to be given a relief under the mechanism of corresponding adjustment under article 9(2) of the DTAA and under the press release dated 27 November 2017. Hence, this is a completely futile exercise.

OECD Transfer Pricing Guidelines para 4.32 (on page 135 of case law compilation) describes the mechanism of corresponding adjustment available under article 9(2). We have attached Article 9(2) under the India-Norway Treaty on page 131 on case laws compilation. Further, the government has issued a press release dated 27 November 2017 on page 133 of case laws compilation, which emphasizes the intention of the Indian government to allow for corresponding adjustment. Hence, double taxation due to a transfer pricing adjustment will lead to an absurd situation which is never the intention of the legislature."

014. Written submission of the assessee with respect to the arm's-length price of the corporate guarantee is as under:-

Submissions with respect to Ground 4 and 5- Adjustment of Rs 9,50,000

Grounds 4 and 5 relate to addition on account of guarantee commission fee in the hands of the foreign assessee. The Appellant also issued a corporate guarantee amounting to Rs. 9,50,00,000 to Tata Capital for a channel finance credit facility availed by the AE from Tata Capital amounting to Rs. 19.50,00,000. Considering that the said activity was performed by the Appellant for its AE in the capacity of at shareholder, it warranted no compensation from the AE and accordingly no compensation was charged. Accordingly, the above-mentioned international transactions were concluded to be at arm's length in accordance with the Indian Transfer Pricing Regulations.

The case of the AE i.e., Crayon India was first selected for scrutiny and during the said assessment proceedings the learned TPO AO accepted the methodology adopted for both the aforementioned international transactions and concluded the said international transactions to be at arm's length. Subsequently, the case of the Appellant was also

selected for scrutiny and the Id. TPO/AO concluded the same international transactions to be at non-arm's length during the assessment proceedings despite the fact these international transactions were already concluded to be at arm's length during the assessment proceedings of the AE of the Appellant. The TPO has computed guarantee commission at 1% in the TP Order using average of bank rates as per page 41 of the appeal set. Our main submissions are same as the transaction of interest,

i. Mirror transaction and hence no adjustments;

ii. Indian AE as tested party.

iii. Corresponding adjustment

Please refer to our written submissions above for these points it remains the same.

Without prejudice, we also like to submit the following points in support of no adjustment required for the guarantee fee commission:

i. Corporate Guarantee in not an international transaction

Since there is no impact on the profit, income, loss or assets of either of the company due to this transaction, the transaction is out of the ambit of the definition of international transaction as has been held by various case laws even after the amendment to Section 92B as amended by Finance Act 2012:

S No.		Case Law	Summary Ruling	
		Bharti Airtel Ltd (2014) Delhi ITAT	Even after the amendment to Section 92B, since corporate guarantee issued for benefit of AE does not involve any costs to Citation assessee and it does not have any bearing on profits, income, losses or assets of enterprise, it has to be kept outside ambit of 'international transaction' to which ALP adjustment can be made (Para 35 & 36) Para 35 specifically says that "As for the decisions dealing with quantum of ALP adjustment in the guarantee charges, in none of these cases the scope of 'international transactions' under section 92B(1) has come up for examination"	
		Micro Ink Ltd. [2015]	Para 44 & 48- Issuance of corporate guarantee by assessee on behalf of its subsidiary	

			company is in nature of quasi capital or shareholder activity and not in nature of 'provision for services' and, therefore, said transaction is to be excluded from scope of 'international transaction' under section 92B. Even after insertion of Explanation to section 92B, since issuance of corporate guarantee does not have 'bearing on profits, income, under section 92B, in respect of which an arm's length price adjustment can be made.	
		Videocon Industries Ltd. V. Addl. CIT [2015]	Corporate bank guarantee given to AEs which does not involve any cost and which has no bearing on profits, income, losses or assets of Associated Enterprises will be outside purview of international transaction.	

	Tega Industries Ltd.	Corporate Guarantee issued by a parent for a SPV is a shareholder activity and therefore deleted the transfer pricing adjustment	
	EIH Ltd.	Corporate Guarantee provided by holding to its subsidiary in a matter of commercial prudence to protect the interest and fulfill the shareholder obligation as any financial	

		incapacitation of the subsidiary would jeopardize the investment of the holding company.	

WITHOUT PREJUDICE TO ABOVE THAT COMMISSION ON CORPORATE GUARANTEE IS NOT AN INTERNATIONAL TRANSACTION, we humbly submit that even if an addition is made on account of commission for corporate guarantee the following should be considered:

- The bank rates can not be considered as a comparable Arm's Length rate to corporate guarantee rate. Reliance is placed on the decision of
  - CIT vs. Everest Kanto Cylinders Read BOM HC-58 taxmann.com 254
  - CIT Vs. Glenmark Pharmaceuticals Ltd. BOM HC -43 taxmann.com 191
- The rates should be taken at best at 0.5% as has been held by various judicial precedents as well:

	Case Law	Citation	Rate
	Dabur India Ltd. Vs. ACIT	[TS-82-ITAT-2021 (Del)-TP]	.30%
	Manugraph India Ltd. Vs. DCIT	TS-113-ITAT-2015 (Mum)-TP	0.50%
	Everest Kanto Cylinders Vs. DCIT	58 taxmann.com 254 [BOM HC]	0.50%
	Asian Paints Ltd. {upheld by BOM HC}	[TS-297-ITAT-2013 (Mum)-TP]	0.20%
	Thomas Cook (India) Ltd. (2016)	69 taxmann.com 443 (Mumbai Trib.)	0.20%
	Godrej Hosehold products Ltd. 92014)	41 taxmann.com 386 (Mum. Trib)	0.50%
	Nimbus Communications Ltd.	42 taxmann.com 139 (Mum)	0.50%
	M/s Reliance Industries Ltd.	TS-260-ITAT-2013 (Mum)-TP	0.38%
	Prolifics Corporation Ltd, Hyderabad	ITA No.237/Hyd/2014	0.53%

015. Submission with respect to ground no.6

Secondary adjustment under section 92CE and corresponding adjustment under Article 9(2) of the DTAA:

Without prejudice to submissions in other grounds, if the proposed adjustments with respect to international transactions of Guarantee commission and Interest income on CCDs are made to the profits of the Assessee, then we request you to grant corresponding adjustments in books of the AE to prevent double taxation of the same income.

If the contention of the TPO/DRP is accepted there would be Double taxation of the amount of adjustment. The same will have to be given a relief under the mechanism of corresponding adjustment under article 9(2) of the DTAA and under the press release dated 27 November 2017.

OECD Transfer Pricing Guidelines para 4.32 (on page 135 of case law compilation) describes the mechanism of corresponding adjustment available under article 9(2). We have attached Article 9(2) under the India-Norway Treaty on page 131 on case laws compilation. Further, the government has issued a press release dated 27 November 2017 on page 133 of case laws compilation, which emphasizes the intention of the Indian government to allow for corresponding adjustment. Hence, double taxation due to a transfer pricing adjustment will lead to an absurd situation which is never the intention of the legislature. Further,

the sub section (1) of the Section 92CE of the Act requires the Assessee to make a secondary adjustment, if there is a primary adjustment made by the Assessing officer and it has been accepted by the Assessee. The secondary adjustment is defined in clause (v) of sub section (3) of Section 92CE of the Act as "secondary adjustment" means an adjustment in the books of account of the Assessee and its associated enterprise to reflect that the actual allocation of profits between the Assessee and its associated enterprise are consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the Assessee."

The sub section (2) of Section 92CE of the Act provides that "where as a result of primary adjustment to the transfer price, there is an increase in the total income or reduction in the loss, as the case may be, of the Assessee, the excess money which is available with its associated enterprise, if not repatriated to India within the time as may be prescribed, shall be deemed to be an advance made by the Assessee to such associated enterprise and the interest on such advance, shall be computed as per Clause (1) of Rule 10CB of the Income Tax Rules, 1962 ("the Rules") in which excess money should be repatriated to India not later than 90 days from the

date of the order of Assessing Officer or the appellate authority, as the case may be."

In plain words, what the sub-section (2) & (3) of Section 92CE of the Act states is that if the above proposed primary adjustments in respect of international transactions are made, the AE of the Assessee shall also be required to make adjustments in its books to reflect the actual allocation of profits between the Assessee and its AE for removing the imbalance between cash account and actual profit of the Assessee. Further, provisions of sub section (2) of the Section 92CE of the Act mandates to the AE to repatriate the excess money to the Assessee arising on account of such primary adjustment. Non repatriation of such excess money by the AE to the Assessee within period of 90days will be treated as an advance in the hands of the AE and it will attract interest as per rule 10CB of the Rules. "

016. Assessee has also submitted various Judicial Precedents to support her claim.

017. The learned departmental representative relied upon the orders of the learned transfer pricing officer and direction of the learned dispute resolution panel.

018. We have carefully considered the rival contention and perused the orders of the lower authorities. We

have also considered the judicial precedents cited before us.

019. Ground number 1, 2 and 7 are general in nature. Further ground number 8 is with respect to the initiation of penalty proceedings. These grounds do not require any adjudication and therefore those are dismissed.

020. Now we come to ground number 3 with respect to the adjustment of ₹ 6,750,000 made by the learned transfer pricing officer where the assessee has issued compulsorily convertible debentures at an interest rate of 6.5% to its associated enterprises situated in India. Assessee has adopted cup as the most appropriate method for benchmarking the international transaction. It was the claim of the assessee that its Indian associated enterprises has paid interest to Tata capital at the rate of 11% and further the above international transaction has also been accepted by the learned transfer pricing officer at arm's-length price in the transfer pricing order of its Indian associated enterprises, Therefore , it is unsustainable on the part of the learned transfer pricing officer to change the tested party in the said case and conclude that the same international transaction is not at arm's-length from the perspective of the assessee. First of all assessee as selected cup as the most appropriate method and therefore there cannot be any tested party in that

method. Tested party is the first step of determination of arm's-length price only in margin based methods and not in price based methods. CUP is the price based method. Further, in the case of associated enterprises, it has paid lower interest to its foreign AE i.e. assessee then the comparable interest payable to the third-party, therefore, no adjustment was made in the hands of Indian AE. Thus, the assessee cannot take shelter under the transfer pricing assessment in case of Indian AE. Further the learned assessing officer has also adopted the state bank of India prime lending rate at the rate of 11% as the arm's-length price of the international transaction of interest chargeable on compulsorily convertible debentures. There is a basic difference between financial instrument of compulsorily convertible debentures and bank lending rates. Financing under channel financing scheme by NBFC i.e. TTA Capital cannot be compared with the subscription of CCD in an AE. Therefore the approach of the assessee as well as the approach of the learned TPO and DRP is not correct for determination of arm's-length price of this international transaction. Further, as we do not have appropriate data to determine the arm's-length price of this international transaction in accordance with the provisions of section 92CA (3) of the act, same cannot be determined by us here also. Therefore in the interest of justice, we set-aside this issue back to

the file of the learned assessing officer/transfer pricing officer with a direction to the assessee to benchmark the international transaction by adopting the most appropriate method based on the functions, assets and risks involved in the transaction. The learned TPO may examine the same and decide the issue in accordance with the law. Accordingly ground number 3 of the appeal is restored back to the file of the learned AO/TPO.

021. With respect to the ground number 4 and 5 relating to adjustment of ₹ 950,000 on account of corporate guarantee commission fee. The assessee has issued a corporate guarantee amounting to ₹ 9.5 crores in favour of TATA Capital for a channel finance credit facility availed by the AE amounting to ₹ 19.5 crores. The assessee did not charge any guarantee commission. The learned TPO and the learned dispute resolution panel has upheld the guarantee commission at the rate of 1% considering the bank guarantee rates. The assessee has contended before us that the corporate guarantee is not an international transaction as well as even if the corporate guarantee is required to be remunerated in the hands of the assessee then such a rate cannot exceed 0.5%. Several judicial precedents were pressed into service. Firstly on introduction of explanation under section 92B with retrospective effect from 1/4/2002 by The Finance Act 2012, the contention that corporate guarantee is not an

international transaction is not sustainable. Further arm's-length price of an international transaction cannot be decided on the basis of judicial precedents rendered in case of other parties because economic factors, Timing factors and commercial consideration differs. Similarly the bank guarantee rates cannot be considered for benchmarking corporate guarantee fee, therefore benchmarking of the ld AO and DRP is also incorrect. It depends on the creditworthiness of the parties and the benefit arising out of the same in the hands of parties to the transaction. The benefit is also required to be distributed between the issuer of guarantee and in whose favour such guarantee is issued. Before us also the relevant data for benchmarking corporate Guarantee fees in accordance with provision of section 92CA (3) were not provided. Accordingly, as neither the assessee nor the TPO/DRP has employed any of the factors required to be considered for benchmarking as per mandate of section 92CA (3) of the Act, we set-aside ground number 4 and 5 back to the file of the learned assessing officer with a direction to the assessee to show the benchmarking of corporate guarantee fee by either adopting interest saving approach, comparable corporate guarantee fee rates, cost of providing the guarantee and any other approach. The learned AO/TPO may examine the same and determine Arms' length price of the

international Transaction. Accordingly Ground no 4 and 5 are allowed with above directions.

022. In view of our decision in Ground No 3 to 5 , Ground no 6 becomes infructous, and hence, same is dismissed.

023. In the result appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court 05.07.2023.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 05.07.2023
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai