

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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER  
AND  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No. 7348/Mum/2017  
Assessment Year : 2013-14

Aegis Limited, Equinox Business Park, Tower 2, Peninsula Techno Park, Off BKC, LBS Marg, Kurla(W), MUMBAI [PAN : AAACE 8354 Q]	Vs.	Deputy Commissioner of Income Tax, Circle-6(1)(1), MUMBAI
(Appellant)		(Respondent)

Appellant By : Shri Rajan Vora &  
Shri Pranay Gandhi, ARs

Respondent By : Smt. Abhakala Chanda, CIT-DR

Date of Hearing : 20-11-2018	Date of Pronouncement : 06-02-2019
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**ORDER**

**Per Rajesh Kumar, Accountant Member:**

This is an appeal by assessee against the order of the  
Assessing Officer (AO) u/s. 143(3) r.w.s. 144C(13) of the

Income Tax Act [Act] passed in pursuance to the directions of the Id. Dispute Resolution Panel(hereinafter called DRP).

2. Ground Nos. 1 & 2 are general in nature and do not require any adjudication.

3. The issue raised in Ground Nos. 3 to 6 is against the Transfer Pricing [TP] adjustment of Rs 7,22 77,019/- on account of guarantee commission in respect of corporate guarantee provided by the assessee to its Associated Enterprises [AEs].

3.1. The facts in brief are that - assessee has given corporate guarantee to Axis Bank to extend foreign currency loan of USD 19,000,000 to its 100% subsidiary Main Street 741 (Pty) Ltd. The guarantee given was for Rs. 1,03,30,00,000/-. Similarly, assessee has given guarantees to Exim Bank, Deutsche Bank AG, Singapore Branch, ING Bank N.V., Singapore Branch, Macquerie Capital (Singapore) Pte. Ltd., for securing foreign currency loans to various bodies and entities. The Transfer Pricing Officer [TPO] determined the Arm's Length Price [ALP] of guarantee commission at 1.75% based on adhoc credit rating of assessee and its AE and

Dispute Resolution Panel [DRP] also upheld the order of the TPO in applying ALP at 1.75% but given partial relief by directing to compute the guarantee only for the period of guarantee as against the entire year.

3.2. At the outset, Ld. Counsel for the assessee submitted that the issue of guarantee commission is decided in favour of the assessee by the decisions of the Co-ordinate Benches of the Tribunal in A.Ys. 2009-10, 2010-11, 2011-12 & 2012-13, wherein the Co-ordinate Benches have held that guarantee commission of 1% of the outstanding guarantee amount should be charged to benchmark the guarantee commission.

3.3. We have heard the rival contentions and perused the decisions relied upon. Since this issue has already been decided by the various Co-ordinate Benches in favour of the assessee in the earlier years, we therefore ,respectfully following the same, direct the AO/TPO to apply the guarantee commission of 1%. Ground Nos. 3 to 6 raised by the assessee are allowed.

4. The issue raised in Ground Nos. 7 to 10 is against the TP adjustment of Rs. 20,07,35,929/- in respect of subscription and redemption of preference share capital.

4.1. The facts in brief are that – during the year under consideration, there was redemption of preference shares held in Essar Services (Mauritius) and there was no fresh subscription of preference shares. TPO re characterized the said transaction as interest free loan and applied interest @ 11.91%, using the bond rates and proposed a transfer pricing adjustment of Rs. 70.13 Crores. DRP in principle, upheld the assessment made by the TPO, however, the interest rate was reduced to London Inter-Bank Offered Rate [LIBOR]+300 basis points, following the earlier order, resulting into the reduction in transfer pricing adjustments to Rs. 20.07 Crores.

4.2. Ld. AR submitted before the Bench that the issue involved in Ground Nos. 7 to 10 has been decided in favour of the assessee by the decisions of the Co-ordinate Benches of the Tribunal in AYs. 2009-10, 2010-11, 2011-12 & 2012-13, wherein the Co-ordinate Benches have held that the subscription and redemption of shares cannot be re-

characterized as loan and therefore no interest should be charged on the said re-characterized loan. Ld. AR also submitted that the Co-ordinate Benches have held that the commercial expediency of transactions entered into by the assessee with its AE, cannot be questioned by the TPO, unless there are evidences and circumstances to doubt and it cannot be given different colours so as to expand the scope of TP adjustment by re-characterizing it as interest free loan.

4.3. We have heard the rival contentions and perused the decisions relied upon. Since this issue has already been decided by the various Co-ordinate Benches in favour of the assessee in the earlier years, we, therefore, respectfully following the same direct the AO/TPO to do it accordingly. Ground Nos. 7 to 10 raised by the assessee are allowed.

5. The issue raised in Ground Nos. 11 to 13 is against the disallowance of interest expenses u/s. 36(1)(iii) of the Act amounting to Rs. 1,25,18,107/-.

5.1. The facts in brief are that – assessee has advanced money to subsidiaries/group concerns which were Rs. 10.51 Crores as on 31-03-2013. The assessee has own funds of

Rs.22.93 Crores as on the said date. The AO held that the assessee has not established the commercial expediency for advancing interest free loans to sister concerns/subsidiaries and the DRP has confirmed the order of AO.

5.2. Ld. AR submitted before the Bench that the issue involved in Ground Nos. 11 to 13 has also been decided in favour of the assessee by the decisions of the Co-ordinate Benches of the Tribunal in AYs. 2009-10, 2010-11, 2011-12 & 2012-13 under similar facts, wherein the Co-ordinate Benches have held that where the assessee has substantial own funds, then presumption is that assessee has given advances to its sister concerns from its own funds. Thus, following the ratio laid down by the Hon'ble Jurisdictional High Court in the cases of CIT Vs. Reliance Utilities Ltd[313 ITR 340] (Bombay High Court) and CIT Vs. HDFC Bank Ltd., in ITA No. 330 of 2012) (Bombay High Court), dt. 23-07-2014, the issue has been decided in favour of assessee.

5.3. We have heard the rival contentions and perused the decisions relied upon. Since this issue is also squarely covered by the decisions of various Co-ordinate Benches in

favour of the assessee in the earlier years i.e., 2009-10 to 2012-13, we, therefore, respectfully following the same direct the AO/TPO to delete the disallowance. Ground Nos. 11 to 13 raised by the assessee are allowed.

6. The issue raised in Ground Nos. 14 to 16 is against the disallowance u/s. 14A of the Act to the tune of Rs. 1,17,74,975/- computed @ 0.5% of average value of investments on account of administrative expenses.

6.1. The facts in brief are that - assessee had made investments of Rs. 235.5 Crores in AGC Networks Ltd. The said investments were made in AY. 2011-12 and AY. 2012-13 out of assessee's own funds. The assessee earned dividend of Rs. 16.01 Crores from the said investment for the year under consideration from the said investments. AO invoked the provisions of Section 14A and made a disallowance of Rs. 4.42 Crores as per Rule 8D(2)(ii) and 8D(2)(iii). The DRP in principle upheld the disallowance u/s.14A, however, deleted the addition proposed as per Rule 8D(2)(ii) as the assessee has sufficient own funds for investment.

6.2. Ld. AR submitted before the Bench that the issue of investments-in-question has also been decided in favour of the assessee by the decisions of the Co-ordinate Benches of the Tribunal in AYs. 2011-12 & 2012-13, wherein the Co-ordinate Benches have held that no disallowance was made by the AO in the earlier two years. Ld. AR also submitted that the AO has failed to record any satisfaction for making disallowance u/s. 14A of the Act, which is a pre-condition for invoking the provisions of Section 14A of the Act and therefore, disallowance of Rs. 1.17 Crores should be deleted. The Ld. Counsel for the assessee without prejudice also submitted that if at all the disallowance is to be made, the same should be made in proportion of exempt income to total income (i.e., 1.77%) out of miscellaneous expenses incurred by the assessee. If the same principle is applied, the disallowance u/s. 14A works out to Rs. 3.89 Lakhs. Ld. AR also drew our attention to the working of the said amount, attached in the Appendix-I. Ld. AR in defense of his argument, argued that no disallowance is to be made, where the assessee has not incurred any expenses for earning

exempt income as per rules and relied on the following decisions:

- i. Godrej & Boyce Manufacturing Company Ltd., [394 ITR 449] (SC);
- ii. CIT Vs. Central Bank of India [264 ITR 522] (Bombay High Court);
- iii. State Bank of Indore Vs. CIT [193 CTR 62] (Madhya Pradesh High Court);
- iv. Eicher Ltd., [101 TTJ 369] (Delhi ITAT);
- v. Wimco Seedings Limited Vs. DCIT [107 ITD 267];

6.2.i. Ld. AR also relied on the following decisions, on the issue of non-recording of satisfaction:

- i. Maxopp Investment Limited [402 ITR 640] (SC);
- ii. Godrej & Boyce Manufacturing Company Ltd., [394 ITR 449] (SC);
- iii. Reliance Capital Asset Management Ltd., (ITA No. 487 of 2015), dt. 19-09-2017 (Bombay High Court) affirmed by Hon'ble SC (98 Taxmann.com 361) (SC);

- iv. Arun Gruh Ltd., [168 ITD 518], dt. 15-12-2017  
(Mumbai Tribunal);
- v. Leena Kasbekar [166 ITD 440], dt. 28-07-2017  
(Mumbai Tribunal);

6.3. Ld. DR on the other hand argued that the application of Section 14A of the Act is mandatory and therefore the provisions of Section 14A of the Act cannot be substituted by any arbitrary calculation as been proposed by the Ld. AR.

6.4. We have heard the rival contentions and perused the decisions relied upon. We observe that in this case, the assessee has not made any *suo motu* disallowance towards exempt income which was to the tune of Rs. 16.01 Crores during the year so there is no reasons to go into the satisfaction by the AO before invoking provisions of 14A rule 8D. Undisputedly, no investment was made during the year in the subsidiary companies. Ld. DRP deleted the disallowance u/s. 14A r.w. rule 8D(2)(ii) by recording a finding on facts that assessee's own funds were more than the investment in the subsidiary companies. Therefore, no disallowance u/s. 14A

r.w. Rule 8D(2)(ii) is required to be made by following the decision of the Hon'ble Supreme Court in the case of Godrej & Boyce Manufacturing Company Ltd., [394 ITR 449] (SC). Whereas the DRP sustained the addition of Rs.1,17,74,975/- under Rule 8D(2)(iii) towards administrative expenses. In our view, the ratio laid down in the decision of Hon'ble Supreme Court in the case of Maxopp Investment Limited [402 ITR 640] (SC) (supra) is that no satisfaction is required to be recorded, where no disallowance is made by assessee towards exempt income. We therefore of the view that the provisions of Section 14A r.w. Rule 8D(2)(iii) are applicable in this case and DRP was right in sustaining the disallowance of Rs. 1,17,74,975/-.

7. The issue raised in Ground No. 17 is *qua non*-grant of foreign tax credit of Rs. 1,84,04,025/-.

7.1. After hearing both the parties and perusing the facts of the case, we observe that the assessee filed rectification application dt. 24-11-2017, this is pending for disposal. So we feel it fit and proper to direct the AO to dispose the same. Accordingly the AO is hereby directed to decide the rectification application filed by the assessee.

8. The issues raised in Ground Nos. 18 & 19 are consequential in nature, needs no adjudication.

9. The issue raised in Ground No. 20 is regarding initiating penalty proceedings u/s. 271(1)(c) of the Act, which is premature, hence the same is dismissed.

10. In the result, the appeal of assessee is partly allowed.

*Order pronounced in the open court on 06.02.2019*

Sd/-  
(SAKTIJIT DEY)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-  
(RAJESH KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 06.02.2019

TNMM

Copy of the Order forwarded to :

1. *The Appellant*
2. *The Respondent*
3. *Dispute Resolution Panel (DRP), Mumbai*
4. *Addl. Commissioner of Income Tax (Transfer Pricing), Mumbai*
5. *DR, ITAT, Mumbai*
6. *Guard file*

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asst. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai