

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER  
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 859/MUM/2014  
(Assessment Year : 2008-09)

Thomas Cook (India) Limited,  
Thomas Cook Building,  
Dr.D.N.Road, Fort,  
Mumbai 400 001  
PAN:AAACT 4050C

... Appellant

Vs.

The Addl. Commissioner of  
Income Tax -1(3)  
Mumbai.

.... Respondent

ITA No. 768/MUM/2014  
(Assessment Year : 2008-09)

The DCIT-1(3),  
Room No.564, 5<sup>th</sup> Floor,  
Aaykar Bhavan, MK Road,  
Mumbai 400 020

Vs.

Thomas Cook (India) Limited,  
Thomas Cook Building,  
Dr.D.N.Road, Fort,  
Mumbai 400 001

Assessee by : Shri Dhanesh Bafna &  
Shri Arpit Agarwal  
Revenue by : Shri Sanjeev Jain

Date of hearing : 25/04/2016  
Date of pronouncement : 29/04/2016

**ORDER****PER G.S. PANNU,AM:**

The captioned cross-appeals filed by the assessee and Revenue pertaining to A.Y. 2008-09 are directed against an order passed by Ld. CIT(A)-15, Mumbai dated 18/11/2013, which in turn arises out of an order passed by the Assessing Officer under section 143(3) r.w.s. 144C(1) of the Income Tax Act, 1961 (in short 'the Act') dated 10/01/2012. Grounds of appeal raised by the assessee as well as Revenue read as under:-

**Assessee's Grounds of Appeal:-**

***"Ground 1: Transfer pricing adjustment of Rs. 18,05,400/- in relation to corporate guarantee on behalf of a foreign subsidiary.***

*On the given facts and circumstances of the case and in law, the Learned Commissioner of Income- tax (Appeals) ('CIT(A)') erred in upholding the action of the Assessing Officer (the AO') in making addition of Rs. 18,05,400/- to the total income of the Appellant on account of transfer pricing adjustment of guarantee commission on corporate guarantee issued by the Appellant on behalf of a foreign subsidiary.*

*The Appellant prays that the learned AO be directed to delete the aforesaid adjustment.*

***Ground 2: Disallowance of claim of Depreciation on data cables of Rs. 10,07,779/-***

*On the facts and circumstances of the case, the learned Commissioner of Income-tax (Appeals) ('CIT(A)') erred in upholding the action of the Assessing Officer making an adjustment of Rs 10,07,779/- to the total income of the assessee on account of 'excessive claim of depreciation on data cables by applying rate of depreciation of 15% applicable to the block of 'plant and Machinery' as against the rate of 60% (i.e. rate applicable to the block' Computer') .*

***Ground 3: Disallowance of claim of Depreciation on Jodhpur Property of Rs 1,86,692/-***

*On the given facts and circumstances of the case and in law, the Learned the learned Commissioner of Income-tax (Appeals) ('CIT(A)') erred in upholding the action of the Assessing Officer (' the AO') in making addition of Rs. 1,86,692/- to the total income of the Appellant on account of 'excessive claim of depreciation on Jodhpur property'.*

*The Appellant submits that since such expenses are of capital in nature and the depreciation claim should be allowed as deductions in computing the total income.*

### Revenue's Grounds of Appeal:-

*1. "Whether on the facts and circumstances of the case whether the CIT(A) is right in allowing depreciation on printers & scanners at the rate of 60% instead of 15% relying upon the decision of Hon'ble Kolkata ITAT in Samiran Majumdar {280 ITR (AT) 74 (Kolkata)}."*

*2. "Whether on the facts and circumstances of the case whether the CIT(A) is right in allowing depreciation on Switches & Routers at the rate of 60% instead of 15% relying upon the decision of Hon'ble ITAT, Special Bench, Mumbai in the case of Datacraft India Ltd. [ITA No. 7462 & 754/Mum/2007]."*

2. Before we proceed to adjudicate the respective Grounds of appeal, the background of the case is that the assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of tour operator, travel agent, authorized dealer in foreign exchange, global service card and call centre. The Assessing Officer finalized an assessment under section 143(3) r.w.s. 144C(1) of the Act dated 10/01/2012 determining the total income at Rs.38,86,56,425/-. Some of the disallowances/additions made by the Assessing Officer were carried in appeal before the CIT(Appeals) , who has allowed partial relief. In this background, both Revenue and assessee are in appeal before the Tribunal on the respective grounds of appeal.

3. First, we may take up the appeal of the assessee, wherein the first issue is in relation to an addition of Rs.18,05,400/- made to the

total income on account of transfer pricing adjustment with respect to the corporate guarantee issued by the assessee on behalf of its foreign associated enterprise. In this context, brief facts are that the assessee was found to have entered into certain international transactions with its associated enterprise within the meaning of section 92B of the Act and consequential reference under section 92CA(1) was made by the Assessing Officer to the Transfer Pricing Officer (TPO) for determination of arm's length price of such transactions. In an order passed by the Transfer Pricing Officer under section 92CA(3) of the Act dated 30/09/2011, the Transfer Pricing Officer found that assessee had not charged any fee for providing corporate guarantee on behalf of its associated enterprise and, therefore, he determined an amount of Rs.18,05,400/- being adjustment required to be made to the returned income on this count. During the year under consideration, the assessee had provided a corporate guarantee on behalf of its associated enterprise M/s. Thomas Cook Mauritius Operations Co. Ltd. for banking facilities availed by it from HSBC bank to the extent of Rs.6,01,80,000/-. The stand of the Transfer Pricing Officer was that in the absence of any guarantee fee commission earned by the assessee from such transaction, the same could not be said to have been recorded at an arm's length price. The Transfer Pricing Officer referred to the information gathered from Allahabad Bank and the State Bank of India with respect to the rate of guarantee commission fee and accordingly determined a rate of 3%, that was liable to be charged as an arm's length rate as guarantee commission fee. On this basis, the Transfer Pricing Officer worked out an addition of Rs.18,05,400/- being 3% of

Rs.6,01,80,000/-. The Assessing Officer determined the income accordingly in terms of section 92CA(4) of the Act. The CIT(Appeals) has also affirmed the aforesaid action and accordingly assessee is in further appeal before us.

3.1 It is noted that before the lower authorities, assessee had resisted the aforesaid action on various grounds. Firstly, the stand of the assessee was that providing of a corporate guarantee on behalf of the associated enterprise is not an 'international transaction' within the meaning of section 92B of the Act. Secondly, the claim made was that the corporate guarantee was given on behalf of a step-down subsidiary and, therefore, it was a strategic requirement of business and was a shareholder activity. Thirdly, it was pointed out that the providing of corporate guarantee has not resulted to in any interest savings for the associated enterprise and that assessee had also not incurred any cost in respect of such corporate guarantee. Apart therefrom, assessee also opposed the adoption of 3% rate as a measure to determine arm's length rate and instead contended that a rate of 0.50% was quite justified.

4. Before us, the assessee has primarily argued that the rate of 3% adopted by the income-tax authorities in order to determine the arm's length rate of the impugned international transaction was untenable and instead pointed out that in the following decisions of the Tribunal rate of 0.50% has been considered to be arm's length rate on account of fee for providing corporate guarantee.

- (1) M/s.Everest Kento Cylinders Ltd. vs. DCIT,ITA No.542/Mum/2012 order dated 23/11/2012.
- (2) Aditya Birla Minacs Worldwide Ltd. vs. DCIT, 56 taxman.com 317 (Mum-Trib)
- (3) M/s. Godrej Household Products Ltd. vs. Addl. CIT, ITA No.7369/Mum/2010 order dated 22/11/2013
- (4) ACIT vs. Nimbus Communications Ltd., ITA No.3664/Mum/2010 dated 12/06/2013.

It was also pointed out that so far as the decision of the Tribunal in the case of Everest Kento Cylinders Ltd.(supra) is concerned, the same has since been affirmed by the Hon'ble Bombay High Court vide ITA No.1165 of 2013 dated 8<sup>th</sup> May, 2015 also and in this manner, it is sought to be made out that application of a rate of 0.50% to determine the arm's length rate towards guarantee commission fee would be justified.

5. On the otherhand, Ld. Departmental Representative has pointed out that the rate of 0.50% being canvassed by the assessee is not an absolute situation, inasmuch as, in certain other decisions of the Tribunal adjustment on account of guarantee commission fee has been approved even @ 3%. In this connection attention has been invited to the decision of the Tribunal in ITA NO.6394/Mum/2012 dated 21/08/2013, wherein rate of 3% has been approved. Our attention was also invited to the decision of the Tribunal in the case of Technocraft Industries (India) Ltd., vs. Addl. CIT, in ITA Nos.7519& 7990/Mum/2011 dated 8/01/2014, wherein rate of 2.08% has been approved.

6. We have carefully considered the rival submissions. Be that as it may, the only dispute that the assessee has contested before us relates to the application of the rate of 3% take by the Transfer Pricing Officer to determine the arm's length rate of the international transaction of provision of corporate guarantee on behalf of the associated enterprise. Therefore, we confine ourselves to examine the veracity of the arm's length rate adopted by the income-tax authorities. In the present case, assessee company issued corporate guarantee on behalf of the it's associated enterprise which enabled it's associated enterprise to avail banking facilities from HSBC Bank in Mauritius. The Hon'ble Bombay High Court in the case of Everest Kento Cylinders Ltd.(supra) was considering a somewhat similar situation, where in the matter of guarantee commission fee the adjustment made by the income-tax authorities was based on instances of commercial banks providing guarantees. The Hon'ble Bombay High Court has explained that instances of commercial banks providing guarantees could not be compared to instances of issuance of corporate guarantee. As per Hon'ble Bombay High Court, when commercial banks issue bank guarantees, the same is quite distinct in character, than the situation where a corporate issues guarantee to the effect that, if a subsidiary associated enterprise does not repay a loan, the same would be made good by such corporate. Keeping the said ratio of the Hon'ble Bombay High Court in mind, it is quite clear that the manner in which the Transfer Pricing Officer has proceeded to determine the arm's length rate based on the probable rate being charged by the commercial banks is not justified. In this view of the matter, we are unable to approve

3% rate of guarantee commission fee determined as arm's length rate by the income-tax authorities. In the alternative, the addition that is required to be sustained is the position canvassed by the assessee before the Transfer Pricing Officer i.e. adoption of 0.50% as arm's length rate for the purpose of determining the arm's length income on account of guarantee commission fee in the present case. The Ld. Departmental Representative had referred to certain decisions of the Mumbai Tribunal, wherein a rate higher than 0.50% has also been approved in order to determine the guarantee commission fee. All those decisions are based on the probable rates at which the guarantees are issued by the commercial banks, and in view of the judgment of Hon'ble Bombay High Court in the case of Everest Kento Cylinders Ltd.(supra), such an approach cannot be upheld since the instant is a case, where a corporate guarantee has been issued by holding company for the benefits of its step-down subsidiary associated enterprise. Considering the entirety of facts and circumstances of the case and on the basis of the material available on record, we, therefore, proceed to uphold the rate of 0.50% for the purpose of determining the arm's length rate of the guarantee commission fee. In this view of the matter, we set-aside the order of CIT(Appeals) and direct the Assessing Officer to determine the addition in view of our aforesaid direction. Thus, on this aspect assessee partly succeeds.

7. The second Ground in the appeal relates to the action of the income-tax authorities in allowing depreciation @15% on data cable and other computer peripherals as against assessee's claim of

depreciation of 60%. In this context, it was a common point between the parties that the aforesaid issue is identical to the issue dealt with by the Tribunal in the assessee's own case for assessment year 2007-08 vide order in ITA Nos.858& 738/Mum/2014 dated 30/09/2015. Following the aforesaid precedent, it is hereby directed that Assessing Officer shall allow depreciation @ 60% in terms of the decision of the Tribunal dated 30/09/2015 (supra). Thus, on this aspect assessee succeeds.

8. The next ground is with regard to the disallowance of the claim of depreciation of Rs.1,86,692/- on Jodhpur property. On this point also, it was a common point between the parties that similar issue has been decided against the assessee for assessment year 2007-08 vide order dated 30/09/2015(supra) by following earlier decision of the Tribunal for assessment year 2006-07 in ITA No.9156/mum/2010 dated 31/12/2013. Consequently, the Ground of appeal No.3, raised by the assessee is dismissed.

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

10. So far as the appeal of the Revenue is concerned, the same relates to the action of the CIT(Appeals) in allowing depreciation on Printer, Scanners, Switches, routers @ 60% as against 15% allowed by the Assessing Officer. In this context, it was a common point between the parties that the aforesaid dispute is identical to the appeal of the Revenue for assessment year 2007-08, which has been adjudicated by the Tribunal in favour of the assessee vide order dated 30/09/2015

(supra). As a consequence, the aforesaid Ground raised by the Revenue is dismissed.

11. Resultantly, whereas the appeal of the assessee is partly allowed, that of the Revenue is dismissed.

Order pronounced in the open court on 29<sup>th</sup> April , 2016.

Sd/-

(SANDEEP GOSAIN)  
JUDICIAL MEMBER  
Mumbai, Dated 29/04/2016

Sd/-

(G.S. PANNU)  
ACCOUNTANT MEMBER

Vm, 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,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**