IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.	A.Y.	Appellant	Respondent
595/Hyd/2020	2016-17	NCC Limited, Hyderabad [PAN: AAACN7335C]	Asst.Commissioner of Income Tax, Circle-16(1), Hyderabad
596/Hyd/2020	2017-18		

For Assessee : Shri C.S.Subramanyam, AR

For Revenue : Smt. S.Praveena &
Shri A.Venkata Rao, DRs

Date of Hearing : 17-08-2021
Date of Pronouncement : 27-09-2021

O R D E R

PER S.S.GODARA, J.M. :

These two assessee's appeals for AYs.2016-17 and 2017-18 arise against the CIT(A)-4, Hyderabad's order(s) dated 21-09-2020 and 04-09-2020 in appeal Nos.10823 & 10710 / 19-20 / DCIT,Cir-16(1) / CIT(A)-4 / Hyd / 20-21, involving proceedings u/s.143(3) r.w.s.144C(3) & 143(3) (for AY.2017-18) of the Income Tax Act, 1961 [in short, 'the Act']; respectively.

Heard both the parties. Case files perused.

2. The assessee's first and foremost substantive ground in former year 2016-17's appeal ITA No.595/Hyd/2020

challenges correctness of both the lower authorities' action making Arm's Length Price (ALP) adjustment of Rs.29,68,60,000/- representing corporate guarantee adjustment involving its overseas Associated Enterprises (AEs). It transpires during the course of hearing that the very issue had arisen in assessee's cases ITA Nos.1719/Hyd/2016, 435/Hyd/2018 & 2154/Hyd/2018 for preceding assessment years i.e. AYs. 2012-13, 2013-14 & 2014-15 wherein the co-ordinate bench has upheld an identical adjustment vide following detailed discussion:

"5. We find no merit in the assessee's foregoing contentions. There is no dispute that this tribunal's various earlier co-ordinate bench decisions (2015) 63 taxmann.com 353 (Ahd-trib), Micro Ink Ltd Vs. ACIT, Bharti Airtel Ltd., Vs. Addl.CIT, (2014) 63 SOT 113 (Delhi) and (2017) 86 taxmann.com 254 (Hyd) Bartronics India Ltd, Vs. DCIT had indeed held a corporate guarantee to be purely a shareholder activity than forming an international transaction u/s.92B of the Act. This legal proposition is no more res integra in view of the PCIT Vs. M/s.Redington (India) Limited, TCA Nos.590 & 591 of 2019, dt.10-12-2020 (Madras) taking note of not only the foregoing legislative positions (supra) but also holding that the same carried retrospective effect as well. Their lordships' detailed discussion to this effect reads as under:

"67.The next issue is with regard to the Corporate Guarantee and Bank Guarantee.

68.From the Annual Report of the assessee, it was seen that the assessee had issued guarantees on behalf of its subsidiaries to the tune of Rs.464.36 crores and on behalf of others, to the tune of Rs.3.42 crores. The assessee was called to explain the same. The assessee stated that they had not issued any fresh guarantee during the Assessment Year 2009-10 and the guarantee is outstanding, is purely on account of the currency transition adjustment on restatement of guarantees outstanding at the closing rates prevailing on 31st March 2009 for disclosure in financial statement in compliance with the Accounting Standards. Further, the assessee stated that the outstanding guarantee issued by the assessee as on 31.03.2009 represents guarantee issued on behalf of the overseas subsidiaries in earlier years. Further, they stated that during the course of assessment proceedings in the relevant assessment years, the TPO made addition to the Corporate Guarantee issued during those years by adopting the bench mark rate based on the available

internal comparable uncontrolled price charged by the bank at 0.85%. The assessee also issued Corporate Guarantee in favour of M/s.Parampara Wedding Cads and M/s. Baskar Digital Press. The TPO after taking note of the amended Section 92B, which was introduced with retrospective effect from 01.04.2002, examined the factual aspect and pointed out that though the assessee stated that they have not issued any fresh guarantee during the Assessment Year 2009-10, the guarantees were live and were not closed as on 31.03.2009 and the liability continued on the assessee as on 31.03.2009. Noting that providing such guarantee is one of the financial service rendered by the assessee for which it has to be remunerated appropriately and that concerned parties in whose favour these guarantees were extended, where Associated Enterprises of the assessee and the transactions were largely influenced by related parties, the Associated Enterprises benefited and consequently, the income would accrue only to such non-resident and to that extent, shifting of tax base from the country is bound to happen in such transaction and the assessee should have been remunerated appropriately. The Corporate Guarantee was to the tune of Rs.5574.13 lakhs and Bank Guarantee to the tune of Rs.40862.34 lakhs. Further, the TPO observed that there is no time period for expiry of the guarantee. Consequently, it will demand more commission charges than the commission charged by the Banks. That apart, the assessee had taken maximum risk in providing Bank Guarantee to their subsidiaries and the entire credit risk is owned by the assessee, the Indian Company and it has to be reimbursed at maximum percentage of fees. Further, the TPO noted as to the manner in which the Bank's charge commission on guarantees extended and observed that the Bank will insist upon cash deposits / guarantee deposits / asset mortgage etc., to extend guarantees on behalf of their clients. Further, it was pointed out that if a situation arises that the Bank Guarantee has to be invoked, when the Associate Enterprise is not in good financial position, obviously, the assessee is at risk and they claim that there is no risk in providing guarantees cannot be accepted. The TPO drew a comparison between the Guarantees issued by the Bank and Guarantees issued by the assessee on behalf of the Associated Enterprise to the Bank. It has been recorded that the Associated Enterprises of the assessee have not provided any security to the assessee. In the agreement / contract between the Associated Enterprises and the assessee, no condition has been imposed on the Associated Enterprises to pay the amount to the assessee and even in some agreements if it is mentioned, in the event of the Associated Enterprises financially becoming weak, the risk undertaken by the assessee becomes greater. Further, invoking a guarantee provided to an Associated Enterprise is very difficult as it depends on the financial condition of the Associated Enterprise and the law governing such transactions in

that country and the assessee is bound by the provisions of FEMA and RBI guidelines. Therefore, the TPO concluded that the Bank commission charges cannot be compared for the commission charges that has been payable to the assessee by the Associated Enterprises and it is a clear financial services rendered by the assessee to their Associated Enterprise, which has to be compensated by proper commission charges. Accordingly, the TPO held 2% shall be charged as commission and proposed an upward adjustment to the income of the assessee to the tune of Rs.817.25 lakhs. In respect of the guarantees given to unrelated parties, the TPO held that 2% should be charged as guarantee commission and proposed an upward adjustment of Rs.111.48 lakhs to the income of the assessee. The DRP after hearing the assessee, held that the TPO has not given cogent reasons for taking a different stand than the stand taken by the Department in the earlier years as the same guarantee is continuing during the year under consideration and therefore, there cannot be a different bench marking from that of the previous year. Accordingly, the DRP directed the TPO to adopt the same rate of guarantee commission as was adopted by the TPO in the preceding year.

69.The directions issued by the DRP were given effect to by the Assessing Officer vide Assessment Order dated 17.01.2014. The Tribunal held that the TP addition made against the Corporate and Bank Guarantee is not sustainable in law. This conclusion is by observing that the assessee has provided Corporate and Bank Guarantees for the overall interest of its business. It referred to the decision of the Delhi Tribunal in the case of Bharti Airtel Ltd., wherein it is held that Corporate Guarantee does not involve any cost to the assessee and therefore, it is not an international transaction even under the definition of the said term as amended by the Finance Act, 2012. The Tribunal is a final authority to render findings on fact. The Tribunal failed to give any reason as to how the decision in Bharti Airtel Limited would apply to the assessee's case. Furthermore, there was no record placed before the Tribunal by the assessee that they have not incurred any cost for providing Bank Guarantee. As observed earlier, the TPO has compared the nature of documentation executed by the assessee in favour of his Associated Enterprise to come to the factual conclusion that it is a financial service. This finding of fact has not been interfered by the DRP, but the DRP was of the view that the same treatment, which was given in the previous Assessment Year should be extended for the Assessment Year under consideration also and there is no reason given by the TPO for taking a divergent view. The finding that the very same transaction for the previous Assessment Year was subject matter of TP adjustment, has not been disputed by the Tribunal rather not even dealt with by the

Tribunal. Therefore, the finding rendered by the Tribunal is utterly perverse.

70.The argument of the learned Senior counsel appearing for the assessee is that prior to the amendment brought about in Section 92B by Finance Act 2012, the Tribunal had decided that furnishing of a guarantee by an assessee was not an international transaction as it did not fall within any of the limbs of Section 92B. It is submitted that to get over the judicial pronouncement, the explanation was inserted. The argument is that Clause (c) of the Explanation supports the case of the assessee inasmuch as the Explanation makes it clear that giving of a Corporate Guarantee is not a service. Without prejudice to the said contention, it is submitted that only Corporate Guarantee is given by the assessee, which are in the nature of lending are covered under clause (c) of Explanation 1 to Section 92B. Further, it is submitted that the nature of transactions covered by Clause (e) specifically include even those transactions which may not have a bearing on the profit, income, losses or assets of such enterprises at the time of transaction are covered if they have such a bearing at any future date. It is argued that the language used in the Explanation makes it clear that in so far as the transactions that fall within the main part of Section 92B are concerned, such transactions must have a bearing on profit, income, losses or assets of an assessee in the year in which the transaction is effected. In the assessee's case, the Corporate Guarantees represent a contingent liability and lay dormant and have no bearing on the current year's profits, income or losses of an assessee and Corporate Guarantee are not covered within the definition of international transaction. It is submitted that applying doctrine of fairnessas explained by the Hon'ble Supreme Court of India in the case Vatika Township Private Limited, the explanation ought to be read as prospective in its application and retrospective in its effect such that it will also cover within its ambit guarantees issued prior to the introduction of the explanation by Finance Act 2012.

71.We find from the grounds of appeal filed by the assessee before the Tribunal, no ground was raised as regards the argument that the explanation added by Finance Act 2012, is to be construed as prospective in its application. Furthermore, the Tribunal has also not recorded in its order, more particularly, from Paragraph 92 that the assessee had argued on the issue regarding prospectivity / retrospectivity. Further, the assessee has not challenged the validity of the Explanation nor its applicability with retrospective effect. That apart, even before the DRP, such contention was not raised. The Hon'ble Supreme Court in Gold Coin Health Food Private Limited, while deciding the issue whether an amendment was clarificatory or substantive in nature or whether it will have retrospective effect held as follows:

14. The presumption against retrospective operation is not applicable to declaratory statutes In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended …….An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

72.A new Enactment or an Amendment meant to explain the earlier Act has to be considered retrospective. The explanation inserted in Section 92B by Finance Act 2012 with retrospective effect from 01.04.2002 commences with the sentence For the removal of doubts, it is hereby clarified that –

73.An Amendment made with the object of removal of doubts and to clarify, undoubtedly has to be read to be retrospective and Courts are bound to give effect to such retrospective legislation.

74.The learned Senior Standing counsel for the Revenue referred to the decision in Co-operative Company Limited vs. Commissioner of Trade Tax in Civil No.2124 of 2007 dated 24.04.2007, wherein it was held that when an amendment is brought into force from a particular date, no retrospective operation thereof can be contemplated prior thereto. The explanation in Section 92B specifically has been given retrospective effect and it is clarificatory in nature and for the purpose

of removal of doubts. This issue was considered by this Court in the case of Sudexo Food Solutions India Private Ltd.

75.The concept of Bank Guarantees and Corporate Guarantees was explained in the decision of the Hyderabad Tribunal in the case of Prolifies Corporation Limited. In the said case, the Revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is an additional guarantee, provided by the Parent company. It does not involve any cost of risk to the shareholders. Further, the retrospective amendment of Section 92B does not enlarge the scope of the term international transaction to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfill the liability and therefore, there is always an inherent risk in providing guarantees and that may be a reason that Finance provider insist on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that this position indicates that provision of guarantee always involves risk and there is a service provided to the Associate Enterprise in increasing its creditworthiness in obtaining loans in the market, be from Financial institutions or from others. There may not be immediate charge on P & L account, but inherent risk cannot be ruled out in providing guarantees. Ultimately, the Tribunal upheld the adjustments made on guarantee commissions both on the guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise.

76.In the light of the above decisions, we hold that the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and restore the order passed by the DRP".

5.1. We adopt the foregoing detailed discussion Mutatis Mutandis and hold that the learned lower authorities have rightly treated the assessee's corporate guarantee(s) in all the three impugned assessment years as an international transaction falling u/s.92B of the Act.

We therefore decline the assessee's multifaceted submission in light of its main as well as additional ground touching upon the impugned issue".

3. Learned counsel failed to pin point any distinction on any legal and factual aspect. We thus decline assessee's instant first and foremost grievance in AY.2016-17's ITA No.595/Hyd/2020.

4. Next comes the assessee's second substantive grievance in AY.2016-17's and former substantive ground in AY.2017-18 appeal challenges correctness of the lower authorities' action invoking Section 36(1)(va) r.w.s.43B ESI/PF disallowance of Rs.14,14,41,324/- and Rs.3,42,98,657/-; respectively. There does not appear to be much a dispute about the clinching fact that the assessee had very much deposited the said employees' contribution before the due date of filing return u/s.139(1) of the Act. Learned lower authorities' case on the other hand is that the impugned employees' contribution is covered u/s.36(1)(va) of the Act rather than Section 43B applicable in case of employer's contribution.

We notice in this factual backdrop that the legislature has not only incorporated necessary amendment in Sections 36(1)(va) as well as u/s. 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 01-04-2021 only. It is further not an issue that the foregoing legislative amendments have proposed employers' contribution/disallowance u/s.43B as against employee's contribution u/s.36(va) of the Act; respectively. However, keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 01-04-2021 only, we hold that the impugned disallowance is not sustainable in view of all these latest developments. The impugned ESI/PF disallowance is deleted therefore.

4.1. The assessee succeeds on the instant latter issue in the corresponding substantive grounds raised in both these instant appeals.

5. We are now left with the assessee's third and second substantive grounds in both these assessment years seeking to reverse sponsorship fee(s) paid disallowance of Rs.17,30,400/- each; respectively. The CIT(A)'s detailed discussion upholding the impugned disallowance reads as under:

"6. Ground nos. 11 to 13 are with regard to disallowance of sponsorship fees under section 37(1) of the Act. The AO has stated the following on this issue in the assessment order,

"Assessee has debited an amount of Rs 50 Lakhs towards 'Sponsorship Fees'. The details have been called for and the assessee submitted that as part of business development, the company has partnered with M/s The New Indian Express Group for promotion of 'Devi Uttar Pradesh Awards' to be conferred upon 10 exceptional women who have displayed dynamism and innovation in their line of work.

The expenditure incurred is a contribution made by the assessee company for empowerment of women. Though, it is a noble cause, but this contribution has no relation to the business activity of the assessee company. There is no nexus between the contribution made and the income generated for the business of the assessee Company.

As per provisions of section 37 of the Income Tax Act,
"37(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly or exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head 'Profits and gains of business and profession'.

In view of the above, as the expenditure incurred is not wholly and exclusively for the purpose of business of the assessee Company, the same is disallowed."

6.1 During the appellate stage, the appellant Company has made the following submission on this issue.

"The Company co-sponsored an event for identifying and awarding women for their achievements in their life. The event was titled" Devi Awards " sponsored by Indian Express in partnership with the State

Govt, of Uttar Pradesh. These awards are an yearly event to identify exceptional woman in all the fields such as medicine, woman's rights, singing, lyrists etc.

NCC Ltd operates in the state of Uttar Pradesh through a regional office with above 25 sites executing projects of Government and semi-Government agencies. The State of Uttar Pradesh contributes approximately &.2000 Cr towards the revenue of the company. The details of the projects are enclosed

The company employs not less than 200 Women in its rolls.

All the above factors particularly the presence and the activities in Uttar Pradesh are taken into consideration to sponsor the event. The expenditure is intrinsically linked to the business of the company, hence, the Hon'ble CIT is requested to direct the Assessing officer to delete the addition."

It is clear from the submission made by the appellant's AR that the expenditure of Rs 50 Lakhs towards 'sponsorship fees' is in the nature of charity and only an application of profit. It is most definitely not a business expenditure incurred Wholly and exclusively incurred for purpose of business, as the AO has correctly noted in the assessment order. The appellant has failed to show that there is a direct nexus between the expenditure made and the business income generated by the appellant Company. Therefore, it is held that the AO has correctly made this disallowance. Thus, these ground of appeal are dismissed".

6. We find no merit in the assessee's instant last substantive grievance. This is for the reason that it has failed to pin point even a distinct direct nexus between its day to day business activity viz-a-viz the impugned alleged sponsorship fee paid to the eligible women for their life time achievements. This tribunal's Third Member's decision in ITA No.2157/MAS/2011, M/s.Hyundai Motors India Ltd. Vs. DCIT, after considering the hon'ble apex court's landmark decision Sassoon J.David and Company (P) Ltd [118 ITR 26] (SC), holds that any expenditure claim raised u/s.37 of the Act ought to be wholly and exclusively incurred for the purpose of the concerned business only. We therefore find no reason to interfere with the impugned disallowance made in both the

lower proceedings. The assessee's corresponding grounds in these instant twin assessment years to this effect stand declined. Its appeals ITA Nos.595/Hyd/2020 and 596/Hyd/2020 are partly accepted.

These assessee's twin appeals are partly allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 27th September, 2021

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 27-09-2021

TNMM

Copy to :

1.NCC Limited, Survey No.64, Madhapur, Shaikpet, Hyderabad.

2.The Asst.Commissioner of Income Tax, Circle-16(1), Hyderabad.

3.CIT(Appeals)-4, Hyderabad.

4.Pr.CIT-4, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.