

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "J" MUMBAI**

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3181& 4608/MUM/2019  
Assessment Year: 2012-13**

Peri (India) Private Limited,  
1406, DLH Park, S.V. Road,  
Goregaon West,  
Mumbai-400062.

**Vs.** Jt. Commissioner of Income Tax  
(OSD), Circle-13(1)(2),  
Room No. 218, 2<sup>nd</sup> floor, Aayakar  
Bhavan, Maharshi Karve Road,  
Mumbai-400020.

**PAN No. AAACP 4115 E  
Appellant**

**Respondent**

**ITA No. 3182 & 4607/MUM/2019  
Assessment Year: 2013-14**

Peri (India) Private Limited,  
1406, DLH Park, S.V. Road,  
Goregaon West,  
Mumbai-400062.

**Vs.** Dy. Commissioner of Income Tax  
Circle-13(1)(2),  
Room No. 218, 2<sup>nd</sup> floor, Aayakar  
Bhavan,  
Mumbai-400020.

**PAN No. AAACP 4115 E  
Appellant**

**Respondent**

Assessee by : Mr. M.P. Lohia, AR  
Revenue by : Mr. Sushil Mishra, DR

Date of Hearing : 25/01/2021  
Date of pronouncement : 05/03/2021

ORDER

PER N.K. PRADHAN, A.M.

The captioned appeals filed by the assessee are directed against the order of the order of the Commissioner of Income Tax (Appeals)-57, Mumbai [in short 'CIT(A)'] and arise out of the assessment completed u/s 143(3) r.w.s. 144C(3) of the Income Tax Act 1961, (the 'Act'). As common issues are involved, we are proceeding to dispose off these appeals by a common order for the sake of convenience.

**ITA No. 4608/MUM/2019**  
**Assessment Year: 2012-13**

2. For AY 2012-13, the assessee had filed Form No. 36 (ITA No. 3181/M/2019) on 13.05.2019. It had also filed Form No. 36 (ITA No. 4608/M/2019) for the same assessment year on 22.05.2019. The assessee received a defect notice dated 11.11.2020 intimating that the appeal is time barred by 55 days. The assessee submits that the captioned appeal was filed before the Tribunal on 13.05.2019; this appeal was filed against the order of the Ld. CIT(A) dated 22.02.2019 passed u/s 250 of the Act; however, at the time of filing of the appeal, the Managing Director was travelling and the other Director being a foreign Director, was not available in India for execution of the appeal; hence, the appeal could not be signed by them; hence, the assessee, in order to avoid any delay in filing of the appeal filed the appeal documents as executed by the authorized signatory of the assessee. It is stated that a copy of certificate stating that the Managing Director was travelling was filed along with the appeal before the Tribunal on 13.05.2019 and therefore, the assessee took *suo motu* initiative and filed a revised memorandum of appeal *vide* letter dated 22.05.2019 to rectify this error of execution by an

authorized signatory and this revised memorandum of appeal was duly signed by the Managing Director of the assessee. Thus it is explained by the Ld. counsel that the assessee has already filed the appeal within the time limit of 60 days i.e. on 13.05.2019 and for the purpose of curing the defect in the appeal filed on 13.05.2019, the assessee has filed the revised memorandum of appeal dated 22.05.2019 which is duly signed by the Managing Director. Similar is the case for AY 2013-14. Considering the above facts, we hold that the assessee has filed the appeal within the time limit of 60 days. Accordingly, the appeal filed bearing ITA No. 3181/M/2019 for AY 2012-13 and ITA No. 3182/M/2019 for AY 2013-14 becomes infructuous. We adjudicate below ITA No. 4608/M/2019 for AY 2012-13 and ITA No. 4607/M/2019 for AY 2013-14.

3. Facts being identical, we begin with the assessment year (AY) 2012-13. The 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal are general in nature and require no specific adjudication. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> grounds of appeal relate to adjustment on account of payment for IT license maintenance cost of Rs.5,89,732/- as reproduced as under :

3. The Ld. CIT(A) erred in violating the principle of natural justice by not granting an opportunity of being heard to the Appellant by disallowing the payment for IT license maintenance cost on ground of non-deduction of tax at same and treating as payment of royalty as per explanation 2(i) of section 9(1)(vi) of the Act.

4. The Ld. CIT(A) erred in disregarding the submission of the appellant wherein the appellant has stated that tax has been deducted by the appellant under section 206AA of the Act at the rate of 21.115 percent and accordingly, disallowance on account of non-deduction of tax at source is uncalled for;

5. The Ld. CIT(A) erred in not giving a clear finding that transfer pricing adjustment on account of payment of IT license maintenance cost is not required even though same is accepted on earlier years also.

4. The assessee filed its return of income for the AY 2012-13 on 28.09.2012 declaring total income at Rs.36,72,757/-. The assessee is a Company which was incorporated on 28.12.2006 and is a 100% subsidiary of PERI GmbH, Germany and it provides design and supply of framework and scaffolding systems to Companies engaged in construction and infrastructure. It also provides technical support and services to customers in India for use of framework and scaffolding systems.

In Form 3CEB, the assessee has reported *inter alia* payment towards IT licenses maintenance cost of Rs.5,89,732/- as an international transaction. The Assessing Officer (AO) following the order of the Transfer Pricing Officer (TPO) has made an addition of the above amount on the ground that the assessee failed to justify the price and benefit derived by it. In appeal, the Ld. CIT(A) confirmed the above disallowance of Rs.5,89,732/- made by the AO by observing that :

“(iii) As regards payment of IT license maintenance cost, again no discussion appears on record. The assessee contends that no such addition is made in earlier year also. However, in my view this is in the nature of royalty as per Explanation 2(i) to section 9(1)(vi) of the Act and as no tax is deducted on this amount, the same needs to be disallowed.”

5. Before us, the Ld. counsel for the assessee submits that the appellant has deducted tax u/s 206AA of the Act @ 21.115% and accordingly, disallowance on account of non-deduction of tax at source is uncalled for.

On the other hand, the Ld. Departmental Representative supports the order passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. The only point of dispute here is the finding of the Ld. CIT(A) that no tax has been deducted on payment of Rs.5,89,732/- by the assessee for IT license maintenance cost, whereas it is the contentions of the Ld. counsel that the assessee has deducted tax @ 21.115% u/s 206AA of the Act.

To resolve the above contentions, we set aside the order of the Ld. CIT(A) on the above matter and restore the matter to the file of the TPO/AO to make an order afresh after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the TPO/AO.

In the result, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal are allowed for statistical purposes.

7. The 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> grounds of appeal deal with adjustment on account of payment of interest on trade credits of Rs.29,79,359/- and these are reproduced as under :

6. The Ld. CIT(A) erred in confirming the action of TPO/AO in making transfer pricing adjustment on the international transaction of payment of interest on trade credits to its AE and computing the ALP at NIL by adopting Internal CUP method;

7. The Ld. CIT(A) erred in ignoring the contractual terms of the Appellant with its AE in respect of charge of interest post availing interest period of 90 days,

8. The Ld. CIT(A) failed to appreciate the fact that the credit period allowed by non-AE (30 days) is less than the credit period allowed by AE (90 days);

9. The Ld. CIT(A) failed to appreciate the commercial and business realities of the industry in which the Appellant operates and business decision of the appellant of not charging interest from customers;

10. Without prejudice to above, the Ld. CIT(A) erred in not relying on external comparable data for determining the arm's length interest rate for the said transaction,

11. The Ld. CIT(A) failed to appreciate that payment of interest on trade credits is linked to the transaction of import of goods and hence should be aggregated with the said transaction.

8. During the year under consideration, the assessee had paid interest of Rs.29,79,359/- on outstanding trade credits to its AEs. The TPO made an adjustment of the above sum by holding that :

“7.2.4 On perusal of the above reply, it can be seen that the assessee has stated that it paid interest to AE on outstanding balances but has not paid any interest to Non-AEs at all. The assessee has not submitted any document in support of the claim that the credit period allowed to Non-AEs was less than credit period allowed to AE. Also, the chart submitted by the assessee with respect to interest paid to AE shows the period of credit in number of days which is less than 30 days in all the transactions. Thus also it is not justified to pay interest when credit period is as low as less than 30 days. In addition to above, it is also a fact which the assessee has stated that the assessee gives credit period to its customers (Non-AEs) ranging between 90 to 180 days but it does not charge any amount from them as interest at all. Also, it is a fact that the assessee was having transaction with AE in the previous years also and had similar terms of payment with AE in those years also for which the AE had charged NIL interest in all the previous years.”

Following the order of the TPO, the AO has made an adjustment of Rs.29,79,359/-.

9. In appeal, the Ld. CIT(A) confirmed the above adjustment made by the AO by observing that :

The facts are that the assessee has paid interest of Rs.29,79,359/- to the A.E on outstanding credit balance. It was submitted by the assessee before the TPO that interest is paid to the A.E after 90 days from the date of invoice, it was also submitted that 30 days credit period is allowed to non AE though no interest was paid to the non AE. However the TPO noted that no documentary evidence is provided showing that credit period of non AE is lesser than that of AE. Further in the chart submitted before the TPO, it was seen that interest paid to AE in cases even less than 30 days. No such interest was paid to AE in earlier year even though the terms of payments were similar. The assessee however disputes this argument contending that interest was paid in earlier years also. However, the assessee failed to rebut the comment of the TPO that interest is paid to the AE even for period of less than 30 days. No interest was also charged from debtors/Non AEs though allowable credit period 90 to 180 days to maintain cordial relation. The assessee has not benchmarked this transaction independently. The TPO apparently used internal CUP comparing the interest payments to AE vs. non AE. Looking into the entirety of the facts, in my opinion, there is an internal CUP available in respect of interest payment to AE vs. non AE and the assessee has failed to give any FAR analysis in respect of this transaction therefore this addition is upheld.”

10. Before us, the counsel submits that for the year under consideration the assessee had paid interest amounting to Rs.29,79,359/- on outstanding trade credit to its AEs ; the interest was paid to AE after 90 days from the date of invoice @ 5.5% per annum. It is submitted by him that the assessee wishes to file supporting evidence in the form of Circular issued by the Peri GmbH (Parent Company of the appellant) to all its subsidiaries, communicating that interest at rate of 5.5% p.a. would be charged to all the subsidiaries (including

the appellant), on outstanding trade payable to Peri GmbH. It is thus stated that the supporting evidence be admitted for adjudication.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

11. We have heard the rival submissions and perused the relevant materials on record. The supporting evidence as filed by the Ld. counsel is nothing but additional evidence. We are of the considered view that admission of the additional evidence filed by the assessee on the above ground of appeal by us would facilitate to render substantial justice between the parties. We are aware of the position of law that where an additional evidence has been allowed to be adduced, the interests of justice demand that the other side must be given an opportunity to explain or rebut such additional evidence as held in the case of *Smt. Urmial Ratilal v. CIT*, (1982) 136 ITR 797, 799 (Guj); *Hiralal Devdutt Jagadhri v. Addl. CIT*, (1980) 18 CIT (Punj) 96, 98.

Having considered the facts of the case and having regard to the above position of law, we set aside the order of the Ld. CIT(A) on the above grounds of appeal and restore the matter to the file of the TPO/AO to make an order afresh after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the TPO/AO.

In the result, the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> grounds of appeal are allowed for statistical purposes.

12. The 12<sup>th</sup> and 13<sup>th</sup> ground of appeal being levy of interest are consequential. As the penalty has been initiated only, the 14<sup>th</sup> ground of appeal relating to penalty proceedings is premature and therefore dismissed.

13. In the result, the appeal is partly allowed.

**ITA No. 4607/MUM/2019**  
**Assessment Year: 2013-14**

14. The 1<sup>st</sup> ground of appeal is general in nature and needs no specific adjudication. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> grounds of appeal relate to adjustment on account of fees on corporate guarantee of Rs.7,23,100/- and these are reproduced as under :

2. The Ld. CIT(A) erred in determining the arm's length price of the international transaction of payment of corporate guarantee fees as NIL by considering it as shareholder activity and making transfer pricing adjustments of Rs.7,23,100/-;

3. The Ld. CIT(A) failed to appreciate that guarantee has been specifically included in the definition of international transaction while holding that it is a shareholder activity;

4. The Ld. CIT(A) erred in not considering the fact that corporate guarantee fee has been determined considering average cost of interest that AE has paid on its non-liquid financing instruments obtained from independent third parties.

5. The Ld. CIT(A) failed to appreciate that guarantee was provided to Appellant for the entire amount of credit/OD facility irrespective of the same being partly utilized by the Appellant

6. The Ld. CIT(A) failed to appreciate that payment of corporate guarantee is linked to transaction of import of goods and hence should be aggregated with the said transaction.

15. For the AY 2013-14, the assessee-company filed its return of income on 29.11.2013 declaring total income of Rs.2,72,98,000/-. The TPO has made adjustment on account of fees on corporate guarantee of Rs.7,23,100/- by determining ALP of guarantee fees paid at Nil as against 2% by the assessee to its parent company (Peri GmbH). The AO has followed the order of the TPO.

16. In appeal, the Ld. CIT(A) confirmed the order of the AO by observing that :

“I have gone through the TPO's order and also appellant's submission. The TPO in his order pg17 to 19 has explained in details why the assessee's contention is not accepted. The TPO is of a view that the guarantee is not in the nature of any service being rendered by the AE but it is only a shareholder's obligation to provide the corporate guarantee to its wholly owned subsidiaries. I find that the contention of the TPO is correct. Hence the adjustment made by the AO is confirmed.”

17. Before us, the Ld. counsel submits that the assessee had availed overdraft facility from Deutsche Bank, Mumbai Branch for Euro 5,00,000 and AE had provided corporate guarantee for the same; the AE charged 2% guarantee commission from the assessee and thereby assessee has paid corporate guarantee fees of Rs.7,23,100/- to its AE; that corporate guarantee given by AE was for providing finance from Bank on better terms to go a long way in efficient conduct of business, thereby resulting in direct and indirect benefit to the assessee. It is argued by him that the TPO, instead of examining whether guarantee fees paid by the assessee is at arm's length, has considered

that this is a shareholder function of the AE. Further, it is argued that the TPO has observed that overdraft facility was taken on 18.08.2008, but the assessee has not paid the corporate guarantee fees till financial year 2011-12, as those were not charged by the AE since AE treated it as shareholder function.

Arguing that it is AE's policy to charge 2% guarantee fee to all its AE and the assessee wishes to file supporting evidence in support of the above corporate guarantee fees, the Ld. counsel pleads that the additional evidence be admitted for adjudication.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

18. We have heard the rival submissions and perused the relevant materials on record. The supporting evidence as filed by the Ld. counsel is nothing but additional evidence. We are of the considered view that admission of the additional evidence filed by the assessee on the above grounds of appeal by us would facilitate to render substantial justice between the parties. We are aware of the position of law that where an additional evidence has been allowed to be adduced, the interests of justice demand that the other side must be given an opportunity to explain or rebut such additional evidence as narrated at para 11 hereinabove.

Having considered the facts of the case and having regard to the above position of law, we set aside the order of the Ld. CIT(A) on the above grounds of appeal and restore the matter to the file of the TPO/AO to make an order afresh after giving reasonable opportunity of being heard to the assessee. We

direct the assessee to file the relevant documents/evidence before the TPO/AO.

In the result, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> grounds of appeal are allowed for statistical purposes.

19. The 7<sup>th</sup> and 8<sup>th</sup> grounds of appeal being levy of interest are consequential. As the penalty has been initiated only, the 9<sup>th</sup> ground of appeal relating to penalty proceedings is premature and therefore dismissed.

20. In the result, the appeal is partly allowed.

21. To sum up, ITA No. 3181/M/2019 for AY 2012-13 and ITA No. 3182/M/2019 for AY 2013-14 becomes infructuous. The appeal bearing No. 4608/M/2019 for AY 2012-13 and 4607/M/2019 for AY 2013-14 are partly allowed.

**Order pronounced in the open Court on 05/03/2021.**

Sd/-  
(VIKAS AWASTHY)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 05/03/2021

Rahul Sharma, Sr. P.S.

**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.

//True Copy//

BY ORDER,

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