

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
ASHWANI TANEJA ACCOUNTANT MEMBER
ITA No. 774/M/2014
Assessment Year: 2009-10**

Tata Autocomp Systems Ltd., Bombay House, 24, Homy Mody Street, Fort, Mumbai- 400001 PAN: AA ACT1848E	Vs.	ACIT-2(3), R.No. 552, 5 th Floor, Aayakar Bhavan, M.K.Road, Mumbai-400020
(Appellant)		(Respondent)

**ITA No.1508/Mum/2014
Assessment Year: 2009-10**

ACIT-2(3), R.No. 552, 5 th Floor, Aayakar Bhavan, M.K.Road, Mumbai-400020	Vs.	Tata Autocomp Systems Ltd., Bombay House, 24, Homy Mody Street, Fort, Mumbai- 400001 PAN: AA ACT1848E
(Appellant)		(Respondent)

Assessee by : Shri P.J.Pardiwala, Sr.
Advocate

Revenue by : Shri N.K.Chand (CIT-DR)

Date of hearing : 28.09.2015

Date of Pronouncement : 18.11.2015

ORDER

PER ASHWANI TANEJA, AM:

These cross appeals have been filed by the Assessee and Revenue against order of the Dispute Resolution Panel-II, Mumbai (in short 'DRP'), dated 13.12.2013 u/s 144C of the Income Tax Act, 1961 (in short 'Act').

2. During the course of hearing, these appeals were argued by Mr. P.J. Pardiwala, Sr. Advocate on behalf of the assessee company and Mr. N.K.Chand, CIT (DR) on behalf of the Revenue. After hearing both the sides, these appeals are adjudicated as under:-

First we take up appeal of the assessee in ITA No. 774/M/2014:

3. Ground No. 1:

This ground is general and does not require specific adjudication, as the same has been decided while deciding other grounds.

4. Grounds No. 2 to 9:-

In all these grounds, only one issue has been raised. The assessee has raised the grievance with regard to the order of the Dispute Resolution Panel (DRP) in confirming the adjustment of Rs. 87,27,27,128/- to the

International Transactions pertaining to exports/imports to/from AEs (i.e. Associated Enterprises), mainly, in holding that similar issue was there before the predecessor DRP for the Assessment Year (AY) 2007-08 and AY 2008-09; whereas in fact impugned AY- 2009-10 was the first year in which this kind of adjustment has been made by the AO/TPO and no such adjustment was never made in any of the previous years, in the case of the assessee-company. It has also raised other numerous grounds challenging the adjustment on merits also. For the sake of ready reference, these grounds are reproduced below:-

"Grounds in respect of international transactions pertaining to the exports/imports to/from AEs:

Ground No. 2: Erroneous directions of the Hon'ble DRP based on incorrect facts' pertaining to previous assessment years

The Hon'ble DRP erred in confirming the adjustment of Rs. 87,27,27,128 to the international transactions pertaining exports/imports to/from AEs by holding that similar issue was before the predecessor DRP for the Assessment Year ('AY') 2007-08 and AY 2008-09; when in fact AY 2009-10 was the first year in which similar adjustment was made by the Ld. AO/Ld. TPO and such an adjustment was never made in any of the previous AYs in the Appellant's case.

Ground No. 3: Violation of principles of natural justice by making adjustment without issuing show cause notice

The Learned Transfer Pricing Officer ('Ld. TPO') erred in not issuing a show cause notice nor granted the Appellant an opportunity to provide its submissions against the approach adopted and has violated the principles laid down in section 92C (3) of the Act.

Ground No. 4: Erroneous application of Transactional Net Margin Method ('TNMM') at entity level

The Hon'ble DRP / Ld. AO / Ld. TPO erred in applying TNMM at entity level to determine the arm's length nature of the international transactions pertaining to the exports/imports to/from AEs.

Ground No. 5: Erroneous rejection of transactional profitability analysis undertaken by the Appellant

The Hon'ble DRP / Ld. AO / Ld. TPO erred in rejecting the transactional profitability analysis conducted by the Appellant under the TNMM to evaluate the arm's length nature of the international transactions pertaining to the exports/imports to/from AEs.

Ground No. 6: Erroneous computation of TP adjustment without considering principle of proportionality

Without prejudice to the above, the Hon'ble DRP / Ld. AO / Ld. TPO erroneously computed the TP adjustment without considering the principle of proportionality. On the facts and in the circumstances of the case and in law, it is submitted that if an adjustment is sought to be made to the price of international transactions, then the adjustment should be made only on a proportionate basis to the extent of value of international transactions.

Ground No. 7: Errors in computation of Profit Level Indicator ('PLI') of the Appellant, at entity level.

Without prejudice to the above, the Hon'ble DRP / Ld. AO / Ld. TPO committed errors in computing the PLI of the Appellant at entity level.

Ground No. 8: Errors in computation of PLI of the comparable companies and erroneous consideration of companies at entity level as against comparable segment

Without prejudice to the above, the Hon'ble DRP / Ld. AO / Ld. TPO committed errors in computing the PLI of certain comparable companies. The Hon'ble DRP / Ld. AO / Ld. TPO also erred in computing the PLI of Kriti Industries (India) Ltd,

Mahindra Composites Ltd. and Prima Plastics Ltd. at entity level instead of PLI for comparable segment.

Ground No 9: Rejection of use of multiple year data for comparables

The Hon'ble DRP / Ld. AO / Ld. TPO erred in considering the single year data for the comparables i.e. data for Financial Year (FY) 2008-09 only and disregarding multiple year data which was considered by the Appellant in accordance with the provisions of Rule 10B (4) of the Rules.

4.1. During the course of hearing, our attention was drawn by the Id. counsel on the relevant part of the order of the DRP, and argued that the DRP has misunderstood the facts and under some wrong impression, it was presumed by it that similar issue was involved in the preceding two years, whereas no such issue was involved in any of the earlier years, it was further submitted that the DRP decided such a big issue in just three lines by stating that similar issue was involved in earlier years, and following the order of earlier years, claim of the assessee was rejected in this year also. It was submitted that this kind of order is devoid of any respect or regard towards the law and is manifestations of casual approach of the DRP, as is sometimes followed in adjudicating the appeals. It was further submitted that this kind of cryptic, non-speaking, casual, presumptuous and factually incorrect order has caused serious hardships to the assessee-company. Our attention was drawn upon the orders of the earlier years to show that

no such issue was involved in any of the earlier years. It was also stated by the Id. counsel that a rectification petition was also filed before the DRP, on which no action has been taken so far. In view of these circumstances, it was requested by the Id. counsel that this issue should be sent back to the file of the DRP with the direction to dispose this issue properly on merits after passing a detailed, well-reasoned and speaking order.

4.2. On the other hand, Id. Departmental Representative (DR) initially supported the order of the DRP, but when the order of DRP was read by the Ld. counsel in the courtroom, pointing out that the order of DRP is totally misplaced and factually incorrect, and leads us nowhere, then Id. CIT(DR) was not able to point out anything wrong in the submissions of the Id. counsel and therefore, no serious objections were raised by him, if this issue was sent back to the DRP for fresh adjudication.

4.3. We have gone through the order of the DRP and other lower authorities, the submissions made by both the sides as well as material placed before us for our consideration. We note that, although, detailed submissions along with huge documentation was provided to

the DRP by the assessee, the DRP decided this issue, in the following manner:-

"4.6 Discussion and Directions of the DRP:

We have gone through the order of the AO and the submissions of the assessee. It is seen that the similar issue was before the predecessor DRP for the AY 2007-08 and 2008-09 and DRP has rejected the claim of the assessee. Respectfully following the predecessor DRP, the action of the TPO is upheld. "

It is noted by us that exhaustive documentation work has been done by the assessee and detailed submissions were made before the DRP, but it is very disappointing to note that such a big issue involving addition of the amount of more than Rs. 87 crores, has been disposed of in such a non-speaking and cryptic manner, and no reasoning, whatsoever, has been given, no facts have been discussed, no comparison with the issue claimed to be involved in the earlier years, if at all any similar issue were involved in the earlier years, has been made. The order is disregardful of any minimum standards that should be followed while adjudicating an appeal by an appellate authority.

4.4. Further, on careful examination of all the facts, it is noted by us that no such issue was involved in the preceding years i.e. AYs 2007-08, 2008-09 or any other preceding year. The minimum, the DRP could

have done was to at least reproduce or discuss some of the relevant findings from the orders of earlier years while disposing the appeal of this year. It is further noted that the assessee has also submitted a rectification petition dated January 13, 2014 under Rule 13 of the Income Tax (Dispute Resolution Panel) Rules, 2009, requesting for rectification of inadvertent mistake apparent from record in the directions given by the DRP. Relevant portion of the rectification petition is reproduced below:-

"All the above grounds were disposed off together by the Hon'ble DRP by way of following directions (Pg. 10 Para 4.6 of the directions):

"We have gone through the order of the AO and the submissions of the assessee. It is seen that the similar issue was before the predecessor DRP for the AY 2007-08 and 2008-09 and DRP has rejected the claim of the assessee. Respectfully following the predecessor DRP, the action of the TPO is upheld". (emphasis supplied)

Facts:

The facts of the assessee's case are as under:

The year under consideration i.e. AY 2009-10 is the first year in which an adjustment to the international transactions pertaining to the exports/imports to/from AEs was made by the Learned Transfer Pricing Officer ('Ld. TPO') and such an adjustment was never made in any of the previous AYs in the assessee's case. In view of this no objections were raised by the assessee before the Hon'ble DRP in AY 2007-08 and 2008-09. A copy of the Hon'ble DRP directions is attached as Annexure 2 and 3, respectively.

In light of the above, we would request the Hon'ble DRP to reconsider their decision on these objections as it is clear that this is an inadvertent mistake, apparent from record."

4.5. It is further noted that in the aforesaid petition, the assessee-company briefly reiterated the objections that were raised by it before the DRP in its submissions, containing various contentions as filed before the DRP dated 26th April 2013, and we find it appropriate to reproduce hereunder all the details objections/arguments filed by the assessee company before the DRP for the sake of convenience. It is noted from the facts held on record that the detailed contentions of the assessee were filed with the Hon'ble DRP vide its detailed Objections dated April 26, 2013 and these were discussed in detail during the hearing dated December 9, 2013, held before the DRP. The key contentions put forth by the assessee are encapsulated in brief below:

- *The Ld. TPO computed the TP adjustment of Rs. 89.94 crores considering assessee's entity level operating margin and ignored the fact that export sales to AEs amount to only Rs. 21.72 crores (3.29% of entity level sales) as against the entity level sales of Rs. 659.36 crores. Thus, the approach of the Ld. TPO in evaluating entity level profitability to test 3.27% of total sales was unreasonable and bereft of any rationale.*
- *The detailed break-up of the segmental profitability statement explaining the methodology and the allocation keys adopted in respect of sale of finished goods to AEs were submitted to the Ld. TPO (Paper Book Page No. 322 to 325). Further, the copy of audited segmental profitability, certified*

by an independent auditor, was again submitted to the Hon'ble DRP vide our submission dated December 9, 2013 (paper Book Page No 466 to 477).

- *The Ld. TPO committed errors in computation of Profit Level Indicator (CPU') of comparable companies and erroneously considered certain companies at entity level as against comparable segments. The Ld. TPO had also committed certain errors in computing the entity level PU of the assessee [Paper Book Page No 52 to 54].*

- *Without prejudice to any of the contentions raised by the assessee, it is submitted that the adjustment should be made only on a proportionate basis to the extent of value of international transactions and accordingly the TP adjustment would work out to Rs. 1.52 crores. The principle of proportionality has been upheld by the Hon'ble ITAT in various cases including the jurisdictional Mumbai bench in the case of T. Two International Private Limited vs DCIT (ITA NO.7331/Mum/2011) [Paper Book Page No 56 to 57].*

- *As regards Objection No. 6, the assessee had filed a rectification application before the Ld. TPO and after considering the rectification order passed by the Ld. TPO (enclosed as Annexure 4), the TP adjustment stands reduced from Rs. 89.94 crores to Rs. 87.27 crores.*

In the aforesaid petition, the assessee-company made a request to the DRP to make suitable rectification and provide opportunity of personal hearing to enable the assessee-company to explain the situation and also pointed out various anomalies that have been taken place, as a result of order of the DRP.

4.6. We were disappointed to note, when it was informed by the Ld. counsel of the assessee company, that no action whatsoever has been

taken by the DRP in response to the aforesaid petition filed by the assessee-company. Under these circumstances, we direct the DRP to take up this matter on priority basis and dispose of this issue after giving adequate opportunity of hearing to the assessee, in a detailed, well reasoned and speaking manner. The DRP shall give adequate opportunity of hearing to the assessee, and thereafter it shall adjudicate all the issues as have been raised in grounds no 2 to 9 above, by passing a well reasoned and speaking order, dealing with and giving its findings on all these grounds individually and separately. As a result, grounds no. 2 to 9 are allowed for statistical purposes.

5. Ground No. 10 to 12:- These grounds are reproduced hereunder for convenience:

"Grounds in respect of notional interest on interest-free loan

Ground No. 10: Disregarding the commercial and economic circumstances for extending interest free loan

The Hon'ble DRP / Ld. AO / Ld. TPO erred in making a TP adjustment of Rs. 77,98,656 to the income of the Appellant, by holding that the Appellant should have charged interest on the international loan extended to its AE.

Ground No. 11: Erroneous application of CUP Method for computing the arm's length interest rate

Without prejudice to the above, the Hon'ble DRP erred in the application of the CUP Method for computing the arm's length

interest rate, without actually undertaking any search for comparable uncontrolled transactions and considering the State Bank of India's (SBI) Prime Lending Rate (PLR) of 12.25% p. a. as the arm's length interest rate.

Ground No. 12: Disregarding the consideration of EURIBOR/LIBOR based interest rate for application of the CUP method

Without prejudice to the above, the Hon'ble DRP / Ld. AO / Ld. TPO disregarded the use of EURIBOR/LIBOR based interest rate for application of the CUP method despite the presence of ruling of the Honourable Jurisdictional Mumbai Income Tax Appellate Tribunal ('ITAT') and the directions of the Hon'ble DRP in Appellant's own case for AY 2007-08 and AY 2008-09 respectively."

5.1. These grounds deal with the common issue pertaining to action of the DRP in confirming the action of AO/TPO in making a Transfer Pricing Adjustment of Rs. 77,98,656/- to the income of the assessee-company, by holding that the assessee should have charged interest on the international loan extended to its A.E.

5.2. During the course of hearing, it was submitted by the ld. counsel of the assessee that no interest was charged by it on the amount of loan given to its subsidiary. It was held by the AO that interest should be charged at SBI PLR +3%, whereas the DRP capped it to SBI PLR at 12.25%, holding that additional charge of risk premium was not justified. It was submitted that similar issue came up before the Tribunal in AY 2007-08 in assessee's own case, wherein after making

detailed discussion, it was held by the Hon'ble Tribunal that claim of the assessee to adopt EURIBOR rate as stated before the TPO was reasonable and deserve to be accepted. It was further brought to our notice that this matter was carried upto High Court by the Revenue, and Hon'ble High Court upheld the order of the Tribunal and dismissed the appeal of the Revenue. It was further submitted that in AY 2008-09 also, this issue came up again before the DRP, wherein the assessee submitted that the EURIBOR rate was only 5.25% during the relevant period, whereas the assessee itself has charged interest @ 6%, and therefore, no further adjustment was warranted on this issue. The claim of the assessee was accepted by the DRP and it was held that the AO shall examine the correctness of the details submitted by the assessee, and if it is found that delay in payment by third parties was comparable to delay by AE, the AO shall not make any adjustment as the assessee has already charged interest @ 6%.

5.3. On the other hand, although, Ld. Departmental Representative (DR) had initially opposed the submissions of the Ld. Counsel, but, he was fair enough to submit that, it was not mandatory under the law to apply Indian PLR. Therefore, the bench mark of EURIBOR can be adopted. But, these EURIBOR rates are for wholesale market and not

for the retail borrowers and therefore, proper rate for the retail borrowers should be EURIBOR + BPS. He has drawn our attention to paragraph 19 of the order of the Tribunal in assessee's own case for AY 2007-08, wherein, it was mentioned that the appropriate percentage ranging from 1% to 2% should be added over and above the EURIBOR rate. He drew our attention on the relevant part of the written submissions made by the assessee-company before the TPO vide paragraph nos. 1.8.17 wherein assessee himself has suggested that some BPS points should be added to EURIBOR rate, and it was suggested by the assessee that ALP rates should be 5.17% (i.e. 4.37% EURIBOR rate + 0.8%). It was further submitted by him that all the submissions of the assessee refers to Libor + rates. With regard to the order of the ITAT as well as order of the Hon'ble High Court for AY 2007-08, it was submitted by him that there was no 'question of law' before the Hon'ble High Court and therefore, legal position has not attained finality in this regard, as far as assessee is concerned, since this decision was given by the Tribunal and confirmed by the Hon'ble High Court on the factual matrix of that year, and even ITAT had given its decision referring to the facts and circumstances of that year only. It was submitted by him that, thus, the question of adding some BPS

point was still left open. With respect to the rationale for adding some BPS points, it was submitted by him that AE of the assessee-company was in financial crisis and therefore it should rather increase the BPS, and further, since financial position of the AE in this year may have been further deteriorated, therefore, these facts needs examination to decide that how much BPS should be added.

5.4. On the other hand, in reply to the submissions of the Ld. CIT (DR), it was submitted by the Ld. Counsel that the Tribunal in AY 2007-08 has clearly said that the notional interest rate to be charged should be EURIBOR rate, and that the order of the Tribunal has been upheld by the Hon'ble High Court by accepting the same and that too by passing a detailed order, independently. The order of the Tribunal stood merged in the order of the Hon'ble High Court. Once an issue has been decided by the Hon'ble jurisdictional High Court, it attains finality and no controversy whatsoever should be allowed to remain alive, otherwise there will be endless litigation and finality of the litigation shall never be achieved. With regard to the submissions of the Id. CIT (DR) that assessee has himself suggested that in this year, that the assessee may be charged EURIBOR +BPS basis. It was replied by the Id. counsel that it may be noted from the perusal of the submissions available at page

426 of Paper Book that this suggestion was made on 'without prejudice' basis and therefore, it should not be held against the assessee, that too disregarding the judgment of the Hon'ble jurisdictional High Court.

5.5. We have gone through the orders of the lower authorities, submissions made by the both the sides as well as the material placed before us for our consideration, and also orders of the earlier years of DRP, Tribunal and Hon'ble High Court. In our considered view, the controversy has now been reduced to a narrow compass because of the decisions of earlier year and only limited objections made by the parties, it is no more a controversy, now in the given facts and circumstances of the case, that whether Indian PLR should be applied or EURIBOR should be applied, because this issue has been decided in assessee's own case by the Tribunal and confirmed by the Hon'ble High Court in AY 2007-08, holding clearly that EURIBOR rate should be applied. In this regard, position was accepted by the Ld. CIT (DR) also very fairly. Thus taking into account all the facts and circumstances of the case, order of the Tribunal and Hon'ble High Court in AY 2007-08, we hold that out of the above said two rates, rate to be applied is that of EURIBOR. The assessee has submitted the EURIBOR rate was 4.37%. This rate has not been negated or controverted by any of the

lower authorities or by the Revenue before us, and therefore, we hold that EURIBOR rate of 4.37% should be adopted in this year for the purpose of making T.P. Adjustment on account of notional interest to be charged on the amount of interest free loan granted by the assessee to TACO Kunststofftechnik GmbH (in short referred to 'TKT') by the assessee.

5.6. Ld. CIT(DR) has raised another contention i.e. the rate should be EURIBOR rate + BPS basis. The reasoning given by the Id. CIT(DR) is that decision in AY 2007-08 has been taken on the decision of factual matrix of that year and that in this year the assessee had himself suggested the rate of 4.37% + 0.8%, aggregating to 5.17%.

5.7. We have carefully analysed the submissions of the Ld. CIT (DR). To resolve this controversy, let us first refer to the order of the Tribunal in AY 2007-08 in ITA No. 7354/Mum/2011 order dated 30th April 2012, holding vide paragraph 19 as under:-

"In the present case the AE is a German company. Euribor rates are based on the average interest rates at which a panel of more than 50 European banks borrows from one another. There are different maturities, ranging from one week to one year. These rates are considered to be the most important rate in the European money market. The interest rates do provide the basis for the price and interest rates of all kinds of financial products like interest rate swaps, interest rate futures, saving account and mortgages. We find that the

*RBI in respect of export credit to exporters at internationally competitive rates under the scheme of pre-shipment credit in foreign currency (PCFC) and Rediscounting of Export Bills abroad (EBR), has permitted banks to fix the rates of interest with reference to ruling LIBOR, EURO LIBOR or EURIBOR, wherever applicable and thereto appropriate percentage ranging from 1 % to 2%. The reference to the said circular is at page - 80 of the Assessee's paper book. **In our view the claim of the Assessee to adopt EURIBOR rate as stated before the TPO is reasonable and deserves to be accepted.** Following the ruling of the tribunal in the aforesaid cases, we are of the view that the claim made by the Assessee in this is to be accepted. The AO is directed to work out the TP adjustment accordingly. Gr. No. 1 to 4 are thus partly allowed."*

This matter was carried by the Revenue before Hon'ble Bombay High Court, wherein the Tribunal's order was upheld by the Hon'ble High Court.

5.8. It is noted from the order of the Tribunal that both the issues were raised before it i.e. 1) adoption of Indian PLR or EURIBOR/LIBOR and 2) appropriate percentage of BPS to be added. The Tribunal decided the first issue by choosing EURIBOR, but the second issue with regard to addition of BPS, has not been decided and thus, we find force in the contention of Ld CIT (DR) that the question of adding some BPS point was still left open. With respect to the rationale for adding some BPS points, it was submitted by him that AE of the assessee-company was in financial crisis and therefore it should rather increase the BPS, and

further, since financial position of the AE in this year may have been further deteriorated, therefore, these facts needs examination to decide that how much BPS should be added. It was further submitted by him that assessee had himself suggested about the rate of 5.17% (i.e. EURIBOR + BPS rate). We find it appropriate to reproduce the submissions made by the assessee to the TPO vide letter dated 03.01.2013 vide paragraph no. 1.8.17 as under:-

*"It is pertinent to note that during the year under consideration, TKT has paid interest to a German bank at the rate of EURIBOR plus 80 basis points i.e. EURIBOR plus 0.8% (refer Annexure A). The average EURIBOR for the period April 2008 to March 2009 was 4.37 (refer Annexure B). Accordingly, on a without prejudice basis we submit that if notional interest has to be computed, **the arm's length interest rate should be 5.17% (4.37+0.8%)**"*

5.9. We have carefully considered this issue. We find force in the contention that EURIBOR rate is that at which banks and other large financial institutions deal with each other, *inter se*. Retail borrower do not get finance at this rate, because lending bank/institution would add some margin/premium to cover their risks/profits, which ranges to be generally between 1 to 2%. But, keeping in view peculiar facts of this case, and particularly when no contrary evidence has been brought on record by the Revenue, we find it appropriate to accept the submissions

of the assessee, and hold that 0.8% should be added upon EURIBOR, and thus total interest to be charged would be 5.17%. We direct accordingly.

5.10. As a result, these grounds are partly allowed in terms of our directions as given above.

6. Ground Nos. 13 & 14:- These grounds are reproduced below for ready reference:

Grounds pertaining to the international transaction of provision of corporate guarantee

Ground No. 13: Disregarding the commercial and economic circumstances for providing corporate guarantee without charging guarantee fee

The Hon'ble DRP / Ld. AO / Ld. TPO erred in not appreciating the commercial and economic circumstances under which the corporate guarantee was provided by the Appellant to its AEs.

Ground No. 14: Computing arm's length guarantee fee without conducting any analysis of comparable uncontrolled transaction

Without prejudice to the Ground No. 13 above, the Hon'ble DRP / Ld. AO / Ld. TPO erred in computing arm's length price for provision of guarantee without conducting any analysis for selection of most appropriate method and identification of comparable uncontrolled transaction.

6.1. These grounds deal with the grievance of the assessee with respect to T.P. Adjustment of Rs. 4,23,09,960/- by way of corporate

guarantee extended by the assessee on behalf of its AE. During the course of proceedings before the TPO, the assessee was asked by the TPO that why should not a suitable adjustment at Arm's Length Price (ALP) on account of corporate guarantee extended by the assessee on behalf of its AE be made, the assessee submitted that there was no need to compute the ALP interest in assessee's case, and even if the notional interest was to be computed, the Arm's Length interest rate should be in accordance with the Indian pricing regulations, but the TPO did not agree fully with the submissions of the assessee and made adjustment @ 3% on the equivalent INR value of loan taken by AE for Rs. 14,17,08,000/- and accordingly a total adjustment of Rs. 4,23,09,960/- was made to the total income of the assessee. The assessee contested this matter before the DRP wherein detailed submissions were made by taking various arguments. The DRP did not agree with the submissions of the assessee fully. It was held by the DRP that service was rendered by the assessee to its AE, and if the same service would have been rendered by a Bank, than Arm's Length Price would have been determined on the basis of financial considerations of the Bank, and thus the order of the AO was approved, in principle. But rate applied by the TPO @ 3% for guarantee

commission was found by the DRP on the higher side, and therefore the DRP directed to re-compute the ALP of guarantee commission by applying the rate of 2%, thereby accepting the claim of the assessee in part.

6.2. Before us, Id. counsel has submitted that no comparable analysis of the rates have been done by the TPO or the DRP. Reliance was placed before him in this regard on the judgment of the Tribunal in the case of Everest Kanto Cylinder vs. DCIT (ITA No. 542/M/2012 for AY-2007-08 order dated 23.11.2012), wherein the TPO had applied the rate of 3% but assessee had charged the rate of 0.5% from its AE, and Hon'ble bench found the rate of 0.5% to be reasonable and at ALP. It was further submitted that aforesaid decision has been upheld by the Hon'ble High Court. Our attention was drawn on page no. 169 to 171 of the Paper Book comprising of detailed objections made before the DRP, wherein it was submitted that no cost has been incurred by the assessee in this regard and that assessee has huge own funds. In response to our query, it was submitted by the Id. counsel that no details were available with respect to the cost, the AE (i.e. TKT), would have incurred if it would have taken loan/guarantee from some other independent party.

6.3. On the other hand, it has been submitted by the Ld. CIT (DR) that, there is no doubt on the legal proposition that some amount on account of guarantee commission has to be charged by the assessee for extending corporate guarantee on behalf of its AE, because any transaction of guarantee involves costs, for example, there are some costs necessarily to be incurred for administration and risk management etc. Thus, the only controversy to be resolved by the Hon'ble Bench would be that how much rate should be charged by the assessee from its AE which should be taken as ALP in the hands of the assessee. With regard to the fixation of rate, it was submitted by the Id. CIT (DR) that financial position of the AE is not good, therefore, the AE would get credit facility at relatively higher rate of interest and therefore, higher amount should be charged. In response to the judgment of Everest Kanto (supra) it has been submitted by the Id. CIT (DR) that rate of 0.5% as adopted in the aforesaid case is on the lower side. As suggested by him, the rate of 2% would be reasonable.

6.4. In reply, it was submitted by the Id. counsel that CIT (DR) was not able to show that what method could be adopted to determine the rate to be charged by the assessee from its AE, what kind of costs have been incurred by the AE vis-a-vis other independent parties for the

similar transactions. Under these circumstances, the TPO has to suggest a suitable method, following the judicial approach, and keeping in view the facts and circumstances of the case, and for this purpose this matter can be sent back to the file of the TPO for its re-examination.

6.5. We have gone through the submissions made by both the sides as well as material placed before our consideration. There is unanimity on the point that some amount should be charged by the assessee from its AE on account of corporate guarantee issued by the assessee on behalf of its AE. The only controversy to be decided is that how much rate should be applied. Ld. Counsel has relied upon the judgment of Hon'ble Tribunal in the case of Everest Kanto (supra). This judgment has been accepted to be applicable on law, by both the parties. But it has been argued by the Id. CIT(DR) that rate of 0.5% has been decided in that case keeping in view the specific facts of the actual cost incurred by the AE of Everest Kanto, and also that 0.5% was too low a rate, and therefore, it cannot be blindly applied, universally or uniformly, in all other cases. Ld. Counsel has also fairly accepted the argument of Id. CIT (DR), to the extent that ALP rate of corporate guarantee can be determined, keeping in view the actual cost incurred by the AE or as it would have been incurred by the AE with respect to a similar

transaction between the AE and any other independent party. But, no information in this regard was available. Thus taking into account all the facts and circumstances as well as submissions made by both the parties before us, and in the interest of justice, we find that this case should be sent back to the file of the TPO. Therefore, we send this issue back to the file of the TPO for deciding the rate of commission. He will give opportunity to the assessee to submit all the details and documents as may be considered appropriate by it, and shall decide this issue after taking into consideration all the facts and circumstances of this case, and by exercising his suitable powers under the law to get the required information from the concerned agencies, and thereafter he shall take a judicious view of the matter, taking into account all the judgments available including the judgment of the Tribunal as confirmed by the Hon'ble High Court in the case of Everest Kanto (supra). Thus, these grounds are allowed for statistical purposes.

7. Ground No. 15 to 19:- Deal with the disallowance made u/s 14A r.w.s Rule 8D of the Income-tax Rules, 1962, and these are reproduced hereunder for the sake of ready reference:

Ground 15: Erroneously invoking rule 8D of the Income-tax Rules, 1962 and thereby disallowing additional expenditure under section 14A of the Act

On the facts and circumstances of the case and in law, the Ld: AO/Hon'ble DRP has erred in erroneously invoking the provisions of Rule 8D and thereby disallowing amount of Rs. 13,01,27,740 as additional disallowance under section 14A read with Rule 8D of the Act.

Ground 16: Erroneously applying rule 8D of the Income-tax Rules, 1962 and thereby disallowing additional expenditure under section 14A of the Act

Without prejudice to the Ground 15, on the facts and circumstances of the case and in law, the Ld. AO / Hon'ble DRP has erred in erroneously applying the provisions of Rule 8D and thereby disallowing amount of Rs. 13,01,27,740 as additional disallowance under section 14A read with Rule 8D of the Act.

Ground 17: The Ld. AO erred in dissenting with the directions issued by Hon'ble DRP

Without prejudice to the Ground 15 and 16, on the facts and circumstances of the case and in law and in accordance with the provisions of section 144C(10) of the Act, the Ld. AO has erred in including the interest incurred for investment in overseas subsidiary for computing disallowance under rule 8D(2)(ii) which has already been allowed as revenue expenditure by Hon'ble DRP.

Your Appellant submits that the Ld. AO is bound to follow the directions issued by the Hon'ble DRP as per section 144C(10) of the Act and hence such act of the Ld. AO is not valid in accordance with provisions of the Act.

Ground 18: Erroneously considering the interest expenditure incurred for investment in overseas subsidiary for computing disallowance as per Rule 8D(2)(ii)

Without prejudice to the Ground 15, 16 and 17 and on the facts and circumstances of the case and in law, the Ld. AO has erred in considering the interest expenditure incurred for investment in overseas subsidiary for computing disallowance as per Rule 8D(2)(ii).

7.1. In these grounds, assessee has challenged the action of the lower authorities in making the disallowance u/s 14A for Rs. 13,01,27,740/- as additional disallowance over and above the disallowance of Rs. 2,59,85,604/- made by the assessee-company, voluntarily, in the computation of income filed by it along with its return.

7.2. The brief facts of the case are that during the course of assessment proceedings it was noticed by the AO that the assessee has claimed exempt income of Rs.14,69,16,869/- and the assessee had made disallowance of Rs.2,59,85,604/- for earning exempt income. The AO was of the view that the disallowance was neither proper nor in accordance with rule 8D. It was the claim of the assessee that reasonable disallowance has been made. The AO was not satisfied with the working of the assessee. He worked out total disallowance of Rs.14,72,27,181/- after giving deduction of Rs. 2,55,40,604/- (i.e. disallowance made in the return), an addition of Rs.12,16,86,577/- was made by the AO.

7.3. Before the DRP, detailed submissions were made by the assessee-company and various arguments were taken covering various aspects of the issue involved. But, the DRP confirmed the disallowance without

dealing with the specific arguments of the assessee-company. It is noted by us that in support of each and every argument, the assessee-company had placed reliance on various judgments of Tribunal as well as High Courts, but the DRP, without distinguishing or dealing with these judgments, upheld the disallowance made by AO.

7.4. Before us, Ld. Counsel made detailed arguments against the action of the lower authorities. His arguments can be summarised as under:-

- (i) All investments in joint ventures and subsidiaries made as strategic investment should be excluded for computing the amount of average investment for the purpose of formula prescribed under Rule 8D.
- (ii) Amount of investment on which no dividend income has been received should also be excluded.
- (iii) Investment in the share capital of foreign companies, dividend income from which is taxable, should be excluded.
- (iv) Certain borrowings were made for the purpose of business, and the amount borrowed has been utilized for the purpose of business, and its nexus has also been established. Interest paid on such borrowings should be excluded before considering the amount of interest to be disallowed u/s 14A.

7.5. It was requested that, for this purpose, this issue should be sent back to the file of the AO for examining these facts properly and re-quantifying the amount disallowable u/s 14A. On the other hand, Id. CIT

(DR) has supported the order of the lower authorities and submitted that the disallowance has been made in accordance with the Rule 8D. He has placed reliance upon the judgment of Maxopp Investment Ltd. vs. CIT (347 ITR 272). In reply, Ld. Counsel of the assessee has drawn our attention upon various judgments, which have been rendered subsequent to the judgment of Maxopp Investment Ltd. (supra), wherein the arguments made by the Id. counsel have been found to be acceptable.

7.6. We have considered the submissions made by both the sides, the order of the lower authorities, the facts and circumstances of this case as well as judgments relied upon by both the sides. In our considered opinion there has been lot of judicial development with respect to disallowance u/s 14A, and therefore, we find that the arguments made by the Id. counsel carry weight under the law. This cannot be dismissed or brushed aside without examining them on facts. Recently, Hon'ble Delhi High Court has held in the case of CIT vs. Cheminvest Ltd (ITA No 749 of 2014, order dated 2-9-2014) that investment made for strategic reasons cannot be considered for making disallowance u/s 14A, and that those investments on which no dividend income has been received, cannot be considered for making disallowance u/s 14A. There are

various other judgments, as has been relied upon by the Id. counsel in the submissions made before us and before the lower authorities, in support of the propositions argued by him. Thus, after analysing the latest position of law, we find it proper to send this issue back to the file of the AO to re-compute the amount of disallowance after taking into account following directions:-

(i) All the investments made in joint ventures, subsidiaries and other companies as strategic investment, should be excluded for computing the average amount of investment for the purpose of Rule 8D.

(ii) Those investments should be excluded on which no dividend income has been received during the year.

(iii) All those investments should be excluded which have been made in the foreign companies whose dividend income would be taxable as per law, as and when received by the assessee-company.

(iv) If the assessee is able to demonstrate that a particular amount borrowed by it has been used directly for the purpose of its business and has not been utilized anywhere for earning tax free income, than interest paid on such borrowing should be excluded from the amount of interest paid to be considered for computation of disallowance u/s 14A.

7.7. The AO shall keep in mind the aforesaid directions while re-adjudicating this issue. The assessee shall furnish required details and documents as may be required by the AO, and as may be considered appropriate by the assessee, as per law, for which the AO shall give adequate opportunity of hearing to the assessee. The AO shall take into consideration all the judgments as may be placed before him, by the assessee and as may be available at that time. With these directions, these grounds are sent back to the file of the AO, to be decided afresh. Thus, these grounds are allowed for statistical purposes.

Now, we take up appeal of the Revenue in ITA No. 1508/Mum/2014:

8. Ground No. 1 to 4: In these grounds, the revenue is aggrieved with the decision of the DRP in reducing the risk premium charged by the TPO on account of guarantee fees @ 3% to 2%.

8.1. Since, we have adjudicated this issue in detail while deciding ground no. 13 and 14 of the assessee's appeal, therefore, our order given in assessee's appeal should be followed for deciding the grounds raised by the revenue. Issues raised in grounds no. 13 & 14 of assessee's appeal have been sent back to the file of the TPO, and accordingly, the issues raised by the revenue in its ground are also sent

back to the file of the TPO. Accordingly, appeal of the revenue is allowed for statistical purposes.

9. As a result, the appeal of the assessee is partly allowed and appeal of the revenue is allowed for statistical purposes.

Order pronounced in the open court on this 18th November, 2015.

Sd/-

(AMIT SHUKLA)

JUDICIAL MEMBER

Sd/-

(ASHWANI TANEJA)

ACCOUNTANT MEMBER

Mumbai; Dated 18/11/2015
S.K.PS

Copy of the Order forwarded to :

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

//True Copy/

BY ORDER,

(Asstt. Registrar)

ITAT, Mumbai