

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

BEFORE SHRI B.R. BASKARAN (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 4810/MUM/2015
Assessment Year: 2009-10**

&

**ITA No. 4809/MUM/2015
Assessment Year: 2010-11**

The DCIT-4(1)(2), Room No. 640, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Aurionpro Solutions Ltd., 404, 4 th Floor, Winchester, Hiranandani Business Park, Powai, Mumbai – 76 PAN : AAACV7297H
(Appellant)		(Respondent)

Revenue by : Shri Manas Kumar (DR)
Assessee by : Shri Satya Prakash Singh (AR)

Date of Hearing: 26/10/2018
Date of Pronouncement: 31/10/2018

आदेश / O R D E R

PER RAM LAL NEGI, JM

These appeals have been filed by the revenue against the order dated 24.03.2015 passed by the Ld. Commissioner of Income Tax (Appeals) (for short 'the CIT (A)')-55, Mumbai pertaining to the assessment years 2009-10 and 2010-11 respectively, whereby the Ld. CIT (A) has partly allowed the appeals filed by the assessee against assessment orders passed u/s 144C read with section 143 (3) of the Income Tax Act, 1961 (for short 'the Act'). Since, these appeals pertain to the same assessee and issues involved are identical, both the appeals were clubbed, heard together and are being disposed of by this common and consolidated order for the sake of convenience.

ITA No. 4810/MUM/2015 (Assessment Year: 2009-10)

Brief facts of the case are that the assessee company engaged in the business of computer software and development and website designing, filed its return of income for the assessment year 2009-10 declaring the total income of Rs. 2,750/- and the tax calculated on the book profit of Rs. 21,13,54,025/-. In response to the notices u/s 143 (2) and 142 (1), the Authorized Representative (AR) of the assessee appeared before the AO from time to time and filed the details called for. A reference was made u/s 92CA of the Act for computation of arm's length price in relation to the international transaction, mentioned in the audit report, was made to the TPO for making adjustment on account of interest on advances given by the assessee to its associated enterprises. The Ld. TPO after hearing the assessee determined the arms length price of interest not charged by the assessee at Rs. 1,81,80,524/- taking the rate of 13.27%.

2. In the first appeal, the Ld CIT(A) rejected the adjustment made by the Ld. TPO and following the decision of the Tribunal rendered in the assessee's own appeal pertaining to the assessment year 2007-08, directed the AO to work out the arms length price of international transaction applying LIBOR plus 2% on monthly closing balance of advances in question. The revenue is in appeal against the said findings of the Ld. CIT(A).

3. The revenue has challenged the impugned order on the following effective grounds:-

1. *“On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in directing the AO to work out the arms length price of international transaction in the appellant's case applying LIBOR plus 2% on monthly closing balance of advance to subsidiaries.*
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in rejecting the action of the TOP in working out the*

rate of benchmarking @ 13.27% based on the material on records by invoking yield method.

3. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in rejecting the view of the TPO that loans advanced by assessee to AEs are in the nature of short term working capital requirement and hence interest rate of 1-2 years bonds is applied relying on the information obtained from CRISIL and not based on LIBOR plus.*
4. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not bringing in any comparable transactions, and deleting the adjustment made by TPO.*
5. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not considering the fact that the TPO has worked out the interest rate or yield method after analyzing the rate at which the assessee would have earned in advancing loan of above amount to unrelated third parties with similar financial strength as that of its subsidiary.”*

4. Before us, the Ld. Departmental Representative (DR) relying on the assessment order passed by the AO in accordance with the transfer pricing adjustment made by the Transfer Pricing Officer (TPO) under section 92CA (3) of the Act, submitted that the Ld. CIT (A) has erred in directing the AO to work out the arm's length price of the international transaction in the present case by applying LIBOR plus 2% on monthly closing balance of advance to its subsidiaries rejecting the action of the TPO, who has worked out the rate of benchmarking @ 13.27 based on the material on record. The Ld. DR further submitted that the loans advanced by the assessee to its associated enterprises are in the nature of short term working capital requirement and hence the interest rate of 1-2 years bonds is applied. The Ld. counsel further submitted that the Ld. CIT (A) has rejected the adjustment made by the Ld. TPO without considering the fact that the TPO has worked out the interest rate after analyzing the rate at which the assessee would have earned interest from

advancing loan to unrelated parties. The Ld. counsel accordingly submitted that the findings of the Ld. CIT (A) is liable to be set aside.

5. On the other hand, the Ld. counsel for the assessee submitted that the issue involved in the present case is covered in favour of the assessee by the decision of the Mumbai Tribunal in the assessee's own case for the A.Y. 2007-08 rendered in ITA No. 7872/Mum/2011 vide order dated 12.04.2013. The Ld. counsel further submitted that since the Ld. CIT (A) has decided the identical issue by following the decision of the Tribunal, there is no merit in the appeal of the revenue. Therefore, the appeal of the revenue is liable to be dismissed.

6. We have heard the rival submissions and also perused the orders passed by the authorities below as well as the order passed by the coordinate Bench in ITA No. 7872/Mum/2011 in the assessee's appeal for the A.Y. 2007-08 (supra). The only grievance of the revenue is that the Ld. CIT (A) has wrongly rejected the transfer adjustment made by the TPO and directed the AO to work out the arms length price of international transaction applying LIBOR Plus 2% on monthly closing balance of advances to its subsidiaries. We notice that the Ld. CIT (A) has decided the issue in question by following the decision of the coordinate Bench rendered in the assessee's own case for the A.Y. 2007-08 (supra). The coordinate Bench of the Tribunal has decided the identical issue in the assessee's own case holding as under:-

“8.7 Under the Transfer Pricing Regulations, an international transaction has to be compared with an uncontrolled transactions between unrelated parties which means that an international transaction is tested with the transaction, if the assessee could have entered into a similar transaction with unrelated third party and thereby the income of the assessee would have earned from a similar transaction with an uncontrolled party. Thus, the same income is expected or deemed to have been earned from the

transaction with the AEs. The underlining principle of determining the ALP is based on the transaction between the unrelated parties. The income of the assessee should not be effected as reduced and therefore, the same is compared with the income or expenditure as the case may be earned or incurred by the assessee, if it would have been between the assessee and the unrelated parties. Therefore, tested party for the purpose of determination of ALP is the assessee and not the AEs.

8.8 In the case in hand, the assessee has advanced loans to the AEs without charging any interest; therefore, the transaction has to be tested with a situation, had the assessee invested or advanced or deposited the said amount with an unrelated third party and thereby the income, which would have been earned by the assessee is expected to have been earned from the transaction of advancing loans to the AEs.

8.9 Thus, on principle, we do agree with the DRP on the point of the tested party for determining the Arm's Length interest rate that would have been earned by the assessee by advancing loans to the unrelated third party.

8.10 The Transfer Pricing Regulation are based on the deeming principle by taking into account a hypothetical situation that instead of having transaction with AE had the assessee transacted with unrelated party what would have been the financial/commercial result of that transaction. Thus, the effect of transaction on the income of the assessee is to be seen and considered and not effect on the cost or income of the AE. Therefore, the tested party is always the tax payer and not the AE. None of the factors under the Transfer Pricing Regulations require to consider whether the AEs would have incurred or earned more or less; but it is always considered whether the assessee had earned more or less by doing a similar transaction with an unrelated parties.

8.11 Even under Rule 10B of the IT Rules, the factors prescribed for inclusion or exclusion of comparables to determine the ALP are also based on the comparison of the assessee with the chosen entities and the AE has no rule in the exercise of selecting the comparables. Thus, in our view, the interest that would have been earned by the assessee by advancing or placing the said amount

with unrelated parties would be the Arm's Length interest in relation to the interest free loans/advances to the AE. The safest comparables, which can be taken as Arm's Length Interest rate in such a case would be the interest on FD with the bank for a term equalent to the term for which the loans given to the AEs.

8.12 *It is pertinent to note that in case of FD with the Bank, the investment is safe as it is free from risk of credit and interest. On the other hand, if the loan/advances is given to the unrelated party, then always there is some risk of credit and interest involved I such transaction. There is one more reason for taking the FD as an appropriate and good comparable because the lending rate by financial institutions/bank varies depending upon the credit rating of the borrower and further on the guarantee and security provided to secure the loans.*

8.13 *Though in principle we do concur with the view of DRP on this issue, however, since the issue of LIBOR has been considered and decided by the Tribunal in various cases as relied upon by the assessee (supra), therefore, to maintain the rule of consistency, we follow the decision of the coordinate Benchs of his Tribunal, and accept LIBOR for benchmarking interest on interest free loans to AEs. Since the LIBOR is a rate applicable in the transactions between the bank and further the loans advanced by the bank to clients are secure by security and guarantee, therefore, a loan which has been advanced without any security or guarantee as in the case of the assessee has to be benchmark by taking the Arm's Length Interest rate as LIBOR plus. Though the TPO took ALP as LIBOR + 3% , however, in our view, the appropriate rate would be LIBOR plus 2%. We accordingly, direct the AO/TPO to determine the Arm/s Length interest by considering the LIBOR plus 2% on the monthly closing balance of advances during the financial year relevant to the AY under consideration.”*

7. We find that the facts and the issue involved in the present case are identical to the facts of the case and the issue involved in the assessee's own case for the A.Y. 2007-08 (supra). The coordinate Bench has decided the identical issue and directed the AO /TPO to determine the arm's length interest

in question by considering the LIBOR plus 2% on the monthly closing balance of the advances during the Financial Year relevant to the assessment year under consideration. The Ld. DR did not controvert the fact that the issue involved in the present case is identical to the issue decided by the coordinate Bench in the assessee's own case for the A.Y. 2007-08. The Ld. CIT(A) has decided the issue by following the decision of the coordinate Bench. Since the coordinate Bench has already decided this issue, we respectfully following the decision of the coordinate Bench uphold the findings of the Ld. CIT (A) and dismiss the appeal of the revenue and further direct the AO/TPO to work out the arms length price of international transactions applying LIBOR plus 2% of monthly closing balance of advances to its subsidiaries, in terms of the order dated 24.03.2015 of the Ld. CIT (A).

ITA No. 4809/MUM/2015 (Assessment Year: 2010-11)

The revenue has challenged the impugned order on the following effective grounds:-

1. *“On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in directing the AO to work out the arms length price of international transaction in the appellant's case applying LIBOR plus 2% on monthly closing balance of advance to subsidiaries.*
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in rejecting the action of the TOP in working out the rate of benchmarking @ 9.77% based on the material on records by invoking yield method.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in rejecting the view of the TPO that loans advanced by assessee to AEs are in the nature of short term working capital requirement and hence interest rate of 1-2 years bonds is applied relying on the information obtained from CRISIL and not based on LIBOR plus.*

4. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not bringing in any comparable transactions, and deleting the adjustment made by TPO.*
5. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not considering the fact that the TPO has worked out the interest rate or yield method after analyzing the rate at which the assessee would have earned in advancing loan of above amount to unrelated third parties with similar financial strength as that of its subsidiary.”*

2. The facts and the issues involved in the present appeal are identical to the facts and issue involve in the assessee’s appeal for the assessment year 2009-10. Since, we have dismissed the appeal filed by the revenue for the assessment year 2009-10, consistent with our findings, we uphold the order passed by the Ld. CIT (A) and dismiss this appeal of the revenue for the same reasons and further direct the AO to work out the arm’s length price of international transaction applying LIBOR plus 2% on monthly closing balance of advances made to the subsidies, in terms of the order of the Ld. CIT (A).

In the result, appeal filed by the revenue for assessment years 2009-10 and 2010-2011 are dismissed.

Order pronounced in the open court on 31st. October, 2018.

Sd/-
(B.R. BASKARN)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 31/10/2018

Alindra, PS

Sd/-
(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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