

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.873/Del/2016
Asstt. Year: 2011-12

DCIT Circle 1 Noida	Vs.	Bridal Jewellery Mfg. Co. 2705 Basement, Bank Street, Karol Bagh, New Delhi PAN AADFB0557C
(Appellant)		(Respondent)

ITA No. 804/Del/2016
Asstt. Year : 2011-12

Bridal Jewellery Mfg. Co. 2705 Basement, Bank Street, Karol Bagh, New Delhi PAN AADFB0557C	Vs.	DCIT Circle 1 Noida
(Appellant)		(Respondent)

Assessee by:	Shri Salil Kapoor, Advocate, Ms. Ananya Kapoor, Advocate, Shri Sumit Chandani, Advocate Ms. Pallavi Saigal, CA
Department by :	Shri H.K. Choudhary, CIT-DR
Date of Hearing	06/02/2019
Date of pronouncement	28/02/2019

ORDER

PER O.P. KANT, A.M

These cross appeals by the assessee and the Revenue respectively are directed against final assessment order dated 19/12/2015 passed by the Ld. Deputy Commissioner of Income Tax, Circle-1, Noida (hereinafter will be referred as the 'Assessing Officer') for assessment year 2011-12, in compliance to direction of the Ld. Dispute Resolution Panel (DRP). As both the appeals have emanated from the same order, both were heard together and disposed off by way of this consolidated order for convenience.

2. The grounds raised by the assessee in its appeal are reproduced as under: -

1. *“That the assessment order U/s 143(3) r.w.s. 144C passed by the Assessing Officer ('AO') and addition/ disallowance made by the AO are illegal, bad in law and without jurisdiction.*
2. *That the additions/ disallowances made are illegal, unjust, highly excessive and are not based on any material on record. The total income of the Appellant has been wrongly and illegally computed by the Assessing Officer at Rs. 1,63,01,178/- as against income declared at Rs. 1,37,85,627 /- thereby making total addition/ disallowance of Rs. 25,15,551/-.*

3. *That the reference made by the AO to TPO suffers from jurisdictional error as the AO has not recorded any reasons in the draft assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the Transfer Pricing Officer ('TPO') for computation of the arm's length price ('ALP'), as is required under section 92CA(1) of the Income Tax Act, 1961 ('Act').*

4. *Regarding the addition/ disallowance of Rs.7,26,471/- on account of interest on grant of loan to AE*

4.1 *That the TPO/AO/DRP in view of facts and circumstances of case and in law erred in treating the loan to AE as a separate international transaction not realizing that the business of the appellant is heavily dependent on AE therefore, loan transaction is part and parcel of international transaction on account of export sale.*

4.2 *That the TPO/AO/DRP in view of facts and circumstances of the case has erred in law and on facts in attributing notional interest on loan to AE*

4.3 *That the TPO/AO/DRP erred in view of facts and circumstances of case and in law and on facts in not appreciating the underlying functional assets and risk analysis of the transaction of loan to AE*

4.4 *That the TPO/AO erred in facts and circumstances of case and in law in not appreciating that the loan is advanced on account of commercial expediency. The DRP erred on facts and in law in disregarding the claim of the appellant on the*

ground that appellant has failed to substantiate the "Commercial Expediency" of the transaction.

4.5 That the TPO/AO/DRP erred in facts and circumstances of case and in law in disregarding the agreement between the appellant and AE with respect to the fact that consideration towards loan advanced shall be embedded in the sale price of jewellery and no separate consideration shall be charged for it.

4.6 That the TPO/AO/DRP erred in law and on facts in not appreciating that interest on loan advanced embedded in sale price is at arm's length being within permissible +/- 5% range as provided in second proviso to sec 92C(2)

4.7 That the AO/TPO erred in travelling beyond the directions of DRP and comparing the notional interest on loan with new set of comparables ignoring the clear direction of the DRP that GBP LIBOR rate should be applied.

4.8 Without prejudice to ground no. 4.7 the TPO/AO erred in comparing the transaction of interest on loan advanced with interest on commercial borrowings and further erred in not disclosing the source of information.

4.9 That without to above grounds, the interest rate charged by the TPO/AO is highly excessive, arbitrary and unreasonable.

5. Regarding the addition/ disallowance of Rs.17,89,480/- on account of interest on unrealized export proceeds

5.1 *That TPO/ AO grossly erred in law and on facts, in attributing notional interest on unrealized export proceeds*

5.2 *That the TPO/AO erred in disregarding the fact that export proceeds are realized within the statutorily permitted time limits as prescribed by RBI and has arbitrarily taken 60days.Further he has not given the benefit of notional interest on advance payments and payment received before 60 days to the assessee.*

5.2a *That the TPO/AO/DRP in view of facts and circumstances of case and in law erred in characterizing unrealized export proceeds as loans advanced and thereby treating it as a separate international transaction not realizing that the unrealized export proceeds are part and parcel of international transaction on account of export sale.*

5.3 *That the TPO/AO/DRP failed to appreciate the appellant has not charged any interest on outstanding export receivables to non AEs and therefore, transaction with AE is at arm's length.*

5.4 *That the TPO/AO/DRP erred in facts and circumstances of case and in law in not appreciating that interest on outstanding receivables is not charged on account of commercial expediency.*

5.5 *That the TPO/AO/DRP erred in facts and circumstances of case and in law in disregarding the fact that consideration towards delay in realization of export proceeds is embedded*

in the sale price of jewellery and as agreed between parties no separate consideration shall be charged for it.

5.6 That the TPO/AO/DRP erred in law and on facts in not appreciating that interest on outstanding receivables embedded in sale price is at arm's length being within permissible +/-5% range as provided in second proviso to sec 92C(2)

5.7 That the AO/TPO erred in travelling beyond the directions of DRP and comparing the notional interest on outstanding receivables with new set of comparables ignoring the clear direction of the DRP that GBP LIBOR rate should be applied.

5.8 Without prejudice to ground no. 5.6 the TPO/AO erred in comparing the transaction of interest on outstanding receivables with interest on commercial borrowings and further erred in not disclosing the source of information

5.9 That without to above grounds, the interest rate charged by the TPO/AO is highly excessive, arbitrary and unreasonable.

6. Without prejudice, the transactions are within the permissible limit of 5% as the alleged variation on account of extended credit period beyond 60 days is hardly significant considering value of export to AE and alleged interest from AE is hardly significant considering the value of exports to AE. Hence no addition is called for.

7. That without prejudice TPO/AO/DRP has failed to consider the advance amount received from AE. In any case same

should have been considered for working out the said disallowance and benefit for same should have been given to Assessee.

8. *The TPO/AO has erred in not providing adequate opportunity of hearing to the Appellant to place the details on record to substantiate its claim before passing the order in pursuance to the directions of DRP.*
9. *The additions made and the observations made are unjust, unlawful and based on mere surmises and conjunctures. The additions made cannot be justified by any material on record and also excessive.*
10. *The explanation given in the evidence produced, material placed that has been made available on record has not been properly considered and judicially interpreted and the same do not justify the additions/ allowances made.*
11. *That interest U/s 234A, 234B and 234C of the Income Tax Act, 1961 has been wrongly and illegally charged and has been wrongly worked out.*
12. *The AO has erred in initiation of proceedings u/s 271(1)(c) of the Act.*

The above grounds are without prejudice to each other.”

3. The grounds raised by the Revenue in its appeal are reproduced as under:

1. *“The Hon’ble DRP has erred in law and on facts by directing to perform similar interest calculation for the*

receivable which remains outstanding for more than 60 days subject to the verification that whether the loan is being repaid in US\$ or INR respectively.

2. *That the appellant craves to leave, add, alter and amend any of the ground of appeal on or before hearing.*
3. *That the order of the DRP being erroneous in law and on facts deserves to be set asides/cancelled and the order of the Transfer Pricing Officer be restored.”*

4. Briefly stated facts of the case are that the assessee firm was engaged in manufacturing and export of the jewellery from its unit located in Noida special economic zone. The assessee exported jewellery to its associate concern M/s Sidhartha Jewellery (UK) Ltd., United Kingdom. For the year under consideration, the assessee filed return of income on 30/09/2011 declaring income of Rs. 1,37,85,627/-after claiming exemption u/s 10A/10AA of the Income Tax Act, 1961 (in short the Act). The case of the assessee was selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued and complied with. The Assessing Officer noticed international transaction carried out by the assessee with its Associated Enterprises (AEs) and referred the matter to the Ld. Transfer Pricing Officer (TPO) for determining arm's-length price (ALP) of the international transactions carried out by the assessee. The Ld. TPO found following two international transactions in addition to the international transaction of export of Gold jewellery to its Associated Enterprise and determined their arm's-length price in his order dated 28/01/2015 u/s 92 CA(3) of the Act as under:

<i>S.No.</i>	<i>Nature of Transaction</i>	<i>TP Adjustment u/s 92CA</i>
1.	<i>Interest on grant of loan to AE 12.26% of 1,66,77,107/-</i>	<i>Rs. 20,44,686/-</i>
2.	<i>Interest on unrealized export proceeds 12.26% of receivable as per Annexure</i>	<i>Rs. 1,64,45,999/-</i>
	<i>Total</i>	<i>Rs. 1,84,90,685/-</i>

5. The Ld. Assessing Officer, after incorporating the adjustments of Rs. 1,84,90,685/-proposed by the Ld. TPO, issued draft assessment order on 24.3.2015. Aggrieved with the draft assessment order, the assessee filed objections before the Ld. DRP. After taking into account submissions of the assessee, the Ld. DRP directed the AO/TPO to recompute the adjustment both in respect of interest on overdue receivables and interest-free loan given to Associated Enterprises, applying the rate of interest in accordance with the directions issued. The Ld. TPO recomputed the adjustment to international transaction to Rs. 25,15,551/-as under:

<i>S.No.</i>	<i>Nature of Transaction</i>	<i>TP Adjustment u/s 92CA</i>
1.	<i>Interest on grant of loan to AE 4.3561% of 1,66,77,107/-</i>	<i>Rs. 7,26,471/-</i>
2.	<i>Interest on unrealized</i>	<i>Rs. 17,89,080/-</i>

	<i>export proceeds</i>	
	<i>4.3561 % of receivable</i>	
	<i>Total</i>	<i>Rs. 25,15,551/-</i>

6. In compliance with the direction of the Ld. DRP, the Assessing Officer issued final assessment order dated 19/12/2015 making addition of Rs. 25,15,551/-. Against the said order, both the assessee and the Revenue are in appeal before the Tribunal raising the grounds as reproduced above.

7. The ground Nos. 1 to 3 of the appeal are claimed to be general in nature and not argued specifically and, therefore, we are not required to adjudicate upon on those grounds specifically and dismissed the same as infructuous.

8. The ground No. 4 relates to transfer pricing adjustment of Rs. 7,26,471/- on account of interest on loans granted to the Associated Enterprises namely M/s Sidhartha Jewellery (UK) Ltd. This loan equivalent to Rs. 1,66,77,107/- was granted from the EEFC accounts of the assessee in foreign currency. According to the Ld. TPO giving interest-free loan to its AE in financial year 2004-05, which remained outstanding during the year under consideration was in the nature of international transactions as per the provisions of the Act. The Ld. TPO held that the assessee was operating in Indian environment and thus the grant of loan is to be benchmarked with respect to prevailing interest rate in India i.e. SBI prime lending rate. However, the Ld. DRP holding that PLR of SBI, which operates in domestic environment shall

not be suitable comparable and directed the TPO/AO to apply LIBOR rate to determine arm's-length price of the interest to be charged for transfer pricing adjustment. Following the direction of the Ld. DRP, the Ld. TPO taking six-month average LIBOR+ 400 basis point worked out the interest rate of 4.3561 and computed the transfer pricing adjustment of interest to Rs. 7,26,471/-.

9. Before us the Ld. Counsel could not controvert the LIBOR applied by the Ld. DRP.

10. We have heard the submission of the Ld. Counsel of the assessee. As the assessee is not interested in pursuing the issue of adjustment before the Tribunal, the grounds raised in this respect are dismissed as infructuous. .

11. In ground No. 5 to 5.9 the assessee has challenged the issue of restricting transfer pricing adjustment to Rs. 17,89,480/-on account of interest on unrealised export proceeds. The Revenue in its appeal is agitated with the direction of computing interest for the receivable which remains outstanding for more than 60 days subject to verification whether the loan is being repaid in US dollar or in Indian rupees respectively.

12. The facts qua the issue in dispute are that the proceeds of export to the Associated Enterprises were received by the assessee after delay of substantial period. According to the Ld. TPO non-realisation of the export proceeds within a stipulated time period amounts to international transaction in the form of interest-free loan and needs to be separately benchmarked. The

assessee contended that consideration for delayed sale proceeds from the AE is embedded in the sale price and is part of the agreement. This contention of the assessee was rejected by the Ld. TPO as well as by the Ld. DRP. The Ld. TPO benchmarked the interest rate based on the prime lending rate of the State Bank of India and he worked out average rate of interest at 12.26 on the basis of the interest rate for different period reproduced in the assessment order. The Ld. TPO applied this rate for delay in receipt of the proceeds for more than 60 days from the date of the invoice and computed the adjustment to Rs. 1,64,45,999/-. The Ld. DRP, however rejected the prime lending rate of the SBI for benchmarking as the receivables were to be paid to the assessee in foreign currency. The Ld. DRP following the decision of the Hon'ble Delhi High Court in the case of CIT vs Cotton Naturals (I) Pvt. Ltd.(2015-TII-09-HC-DEL-TP) and other decisions, directed to apply LIBOR for Great Britain Pound. The relevant direction of the Ld. DRP is reproduced as under:

“(iv)Considering these facts and judicial decisions on the subject, 6 month LIBOR plus 400 basis points is the most appropriate CUP. As discussed in para (iii) above, a mark-up of 100 basis points is appropriate towards the currency risk arising from fluctuations in the foreign exchange rate, borne by the assessee. The LIBOR plus 300 basis points rate discussed in para (i) above compensates the remaining costs. The AO/TPO is directed to compute the adjustment using the rate 6 month LIBOR plus 400 basis points, on receivables which are to be paid to the assessee in Pounds, in accordance with the decision in Cotton Naturals. In this case, the foreign currency used is GB Pound therefore, LIBOR for this currency shall be applied as above.”

13. Further the Ld. DRP upheld the consideration of the delay beyond 60 days.

14. The Ld. Counsel of the assessee before us filed a paper book containing pages 1 to 277 and reiterated the submissions made before the lower authorities. The Ld. Counsel submitted that interest on receivable is not an international transaction. He further referred to page 182 of the paper book and submitted that the assessee has not charged any interest in case of delay of receipt of export proceeds from unrelated parties namely Shan Jewellers Corporation and therefore, no adjustment should be made in case of delayed export proceeds received from the AE. The Ld. Counsel alternatively argued that in assessment year 2015-16, the Ld. TPO has considered proceeds received beyond 90 days period for calculating the transfer pricing adjustment and if in the year under consideration also , proceeds received beyond 90 days period are considered for adjustment, the assessee will not object the resultant transfer pricing adjustment. The Ld. Counsel also referred to page 13 of the paper book, which is a letter from the Associated Enterprise to the assessee, wherein the Associated Enterprise has requested for average credit period of 90 days from the assessee.

15. The Ld. DR on the other hand submitted that there is no agreement between the AE and the assessee regarding the credit period and the page no. 13 of the paper book referred is merely a letter addressed by the Associated Enterprise to the assessee and cannot be termed as an agreement. Supporting the ground of the appeal of the Revenue, the Ld. DR submitted that in the case of

the assessee LIBOR rate of Great Britain Pound currency should be applied.

16. We have heard the rival submissions of the parties and perused the relevant material on record. We find that whether the interest on receivable is an international transaction or not has been decided by the Ld. DRP as under :

“3.1 Whether it is an international transaction

The assessee argued that interest on receivables and on interest free loan, is not an international transaction. The submissions of the assessee and the facts have been carefully considered. Several decisions of the Hon’ble ITAT have consistently held this to be an international transaction. Any doubt on this issue has been removed by the Finance Act, 2012 which has inserted Explanation to section 92B with retrospective effect from 1.4.2002. Clause (i) of this Explanation, which is for the removal of doubts, clarifies the expression ‘international transaction’ as follows:

‘Explanation –For the removal of doubts, it is hereby clarified that

- (i) The expression “international transaction” shall include*
 - (a).....*
 - (b).....*
 - (c) capital financing, including any type of long-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance payment*

or deferred payment or receivable or any other debt arising during the course of business...

This is clearly an international transaction in terms of Explanation (i)(c) to section 92B. This view is supported by the decision of the Hon'ble Delhi High Court in CIT vs. Cotton Naturals (I) Pvt. Ltd. (2015-TII-09-HC-DEL-TP)."

17. We find that the Ld. DRP in arriving at the decision that interest on receivable is an international transaction, has followed the decision of the Hon'ble Delhi High Court in the case of CIT vs. Cotton Naturals (supra). We do not find any error in the finding of the Ld. DRP on the issue and accordingly we reject the contention of the Ld. Counsel that interest receivable is not an international transaction.

18. Further the Ld. DRP, following the Hon'ble Delhi High Court in the case of Cotton Naturals (supra) has also rejected the contention of the assessee that the interest subsumed in the sale price of the assessee and no separate benchmarking for interest is required. Before us also nothing has been demonstrated that margin of the assessee is better than the margin of such comparables also having receivables and thus we do not find any error in the finding of the Ld. DRP on this issue.

19. As far as not charging of the interest on two invoices raised on Shan Jewellers Corporation dated 13/06/2010 and 16/09/2010 for equivalent USD 1,65,401/- and 1,71,920/-, the Ld. Counsel has not brought on record comparability of the

transactions carried out with Associated Enterprises like country to which exported, agreement with parties etc. and thus these transactions cannot be considered for benchmarking the interest on receivables from the Associated Enterprises.

20. As far as the issue of request of the Ld. Counsel for allowing credit of 90 days is concerned, we find that this period of 60 days adopted by the Ld. TPO or 90 days requested by the assessee depend on the prevalent business practice in the trade. The Ld. Counsel has pointed out before us that in assessment year 2015-16 the Ld. TPO himself as considered the receivables beyond the period of 90 days for the purpose of transfer pricing adjustment. We have verified this fact from the order of the Ld. TPO for assessment year 2015-16 available on page 254 to 277 of the paper book. We find from the Annexure-1 to the order of the TPO that receivables beyond 90 days have been considered for transfer pricing adjustment. In view of the rule of consistency, the period of 90 days credit is found to be reasonable in the trade of the assessee and accordingly we direct the Ld.AO/TPO to compute the transfer pricing adjustment for receivables having delay in receipt of payment more than 90 days. Accordingly the ground of the appeal raised by the assessee in respect of transfer pricing adjustment for interest on receivables are partly allowed for statistical purposes.

21. As far as ground of the Revenue is concerned, we find that the Ld. DRP has observed that the foreign currency involved in the case of receivables from AE is Great Britain Pound and thus directed to apply the LBOR of that currency. But while giving

effect to the order of the Ld. DRP, the TPO has applied the LIBOR rate of US dollar observing that invoices have been raised in US dollar. We find that the Ld. DRP given direction following the decision of the Hon'ble Delhi High Court in the case of **Cotton Naturals (supra)** where in the Hon'ble High Court has observed *that interest rates should be the market determine interest-rate applicable to the currency concerned in which the loan has to be repaid and interest-rate should not be computed on the basis of the interest payable on the currency of the legal tender of the place of the country of residence of the either party.* Accordingly, we feel it appropriate to direct the Ld. AO/TPO to verify the currency in which invoices have been raised by the assessee on the Associated Enterprises and apply the LIBOR of the said currency. Accordingly ground No. 1 of the Revenue is allowed for statistical purposes.

22. Ground Nos. 6 to 10 of the appeal were not argued before us specifically, and thus we dismiss the same as infructuous.

23. The ground Nos. 11 and 12 are consequential in nature and thus were not required to adjudicate upon.

24. In the result, the appeal of the assessee is partly allowed for statistical purposes whereas appeal of the Revenue allowed for statistical purposes.

This decision was pronounced in the Open Court on 28th February, 2019.

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 28/02/2019

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

sd/-

(O.P. KANT)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT, New Delhi