IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.6947/Mum./2017
(Assessment Year : 2013–14)

Aries Agro Ltd.
Aris House, Plot no.24
Deonar, Govandi (E) ……. Appellant
Mumbai 400 043
PAN – AAACA5035G

v/s

Dy. Commissioner of Income Tax
Circle–14(1)(1), Mumbai ……. Respondent

Assessee by : Shri Firoz B. Andhyarajina
Revenue by : Shri Manjunath Karkihalli a/w
Shri Manish Kanojia

Date of Hearing – 16.01.2019	Date of Order – 20.03.2019

O R D E R

PER SAKTIJIT DEY, J.M.

This is an appeal by the assessee against assessment order passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "the Act") for the assessment year 2013–14, in pursuance to the directions of the Dispute Resolution Panel–1 (DRP), Mumbai.

2. In ground no.1, the assessee has challenged the decision of the DRP in upholding the transfer pricing adjustment of ₹ 70,78,619, on account of short charging of interest on External Commercial Borrowing (ECB) loan to its Associated Enterprise (AE).

3. Brief facts are, the assessee, an Indian Company, is engaged in the business of manufacturing and marketing of micronutrients, fertilizers and food Additives. In the course of assessment proceedings, the Assessing Officer noticing that the assessee has entered into international transactions with its overseas AE made a reference to the Transfer Pricing Officer for benchmarking the arm's length price of the international transaction. In the course of proceedings before him, the Transfer Pricing Officer noticed that the assessee has advanced ECB loan to its AE Golden Harvest Middle East FZC. He found that the assessee has charged interest on such loan to the AE at LIBOR plus 2.5%. He noticed that the assessee has benchmarked the arm's length price of the interest charged by selecting comparable uncontrolled price (CUP) method and has used the interest rate charged by the ICICI Bank to the assessee as the benchmark. After examining the claim of the assessee, the Assessing Officer, however, did not find merit in them and proceeded to benchmark the arm's length price of the interest charged by applying the interest rate of 6.24%. As a result of which the arm's length interest was determined at ₹ 1,41,57,298. Since the assessee has

received interest of ₹ 70,78,649, from the AE, the short fall of ₹ 70,78,649, was treated as adjustment to be made to the ARM'S LENGTH PRICE shown by the shown by assessee. In pursuance to the aforesaid adjustment made by the Transfer Pricing Officer, the Assessing Officer made the addition in the draft assessment order.

4. Though, the assessee objected to the aforesaid addition before the DRP, however, it was unsuccessful.

5. We have heard the parties. Shri Firoz B. Andhyarujina, learned Sr. Counsel for the assessee and Shri Manjunath Karkihalli, learned Departmental Representative have agreed before us that the issue has been decided by the Tribunal in favour of the assessee in the preceding assessment year. A copy of the order passed in assessee's own case for assessment year 2012–13 in ITA no.1452/Mum./2017, dated 28th November 2018, was placed before the Bench. On a perusal of the aforesaid order, we have noted that while deciding identical issue arising in assessee's own case, the Tribunal following the decision of the Hon'ble Jurisdictional High Court in Everast Kanto Cylinder v/s ACIT, [2014] 52 taxmann.com 395 has deleted the addition made by accepting the claim of the assessee. The observation of the Tribunal in this regard is reproduced below:–

> *"7. We have heard the rival submissions of both the parties and perused the material on record including the decisions cited by the assessee. The assessee has advanced loan to its subsidiary*

Golden Harvest to set up a plant at Fujairah by borrowing the same from the ICICI Bank abroad . The assessee has charged the same rate from the AE at which the loan was borrowed from ICICI Bank i.e. LIBOR plus 250 basis points. In our view the issue is squarely covered by the various decisions as referred to hereinabove wherein it has been held that loan transactions to the AR have to be benchmarked on the basis of LIBOR. In the present case the transaction is benchmarked by the assessee by following CUP method by charging LIBOR plus 250 basis points i.e. the same rate of interest which is charged by the ICICI Bank from the assessee and it is for this reason we are not in agreement with the direction of the DRP on this issue. The case of the assessee is squarely covered by the decision of co-ordinate bench of the Tribunal in the case of Everest Kanto Cylinder Ltd. v. ACIT (supra). The relevant observation of the Tribunal is reproduced as under:

"11. We had considered rival contentions and gone through the orders of lower authorities. As per our considered opinion, appropriate international rates should be used for the purpose of the comparability analysis. For this purpose, the London Inter Bank Offer Rate (LIBOR) is an internationally recognized rate for benchmarking loans denominated in foreign currency. For this purpose, reliance may be placed on the following decision of the coordinate bench :—

(i) Great Eastern Shipping Co. Ltd. [IT Appeal No 397 (M) of 2012, dated 10-1- 2014]

(ii) Mahindra & Mahindra Ltd. [IT Appeal No 7999/M/2011, dated 8-6-2012];

(iii) Hinduja Global Solutions Ltd. v. Addl CIT [2013] 145 ITD 361/35 taxmann.com 348 (Mum. – Trib.)

(iv) Aurionpro Solutions Ltd. v. Addl. CIT[2013] 33 taxmann.com 187 (Mum. - Trib.);

(v) Aurobindo Pharma Ltd, v. Asstt. CIT [2014] 42 taxmarm.com 556/62 SOT 214 (Hyd.)

(vi) Cotton Naturals (I) (P.) Ltd. v. Dy. CIT [2014] 146 ITD 662/32 taxmann.com 219 (Delhi)

(vii) Siva Industries and Holdings Ltd. v. Asstt. CIT [2014] 46 SOT 112 (URO)/11 taxmann.com 404 (Chennai)

(viii) Bharti Airtel Ltd. (supra)

(ix) Infotech Enterprises Ltd. v. Addl CIT [2014] 63 SOT 23/41 taxmann.com 364 (Hyd)

(x) Kohinoor Foods Ltd. [IT Appeal Nos. 3688-3691 & 3868-3869 (Delhi) of 2012 & dated 21-7-2014]; and

(xi) Four Soft Ltd. v. Dy. CIT [IT Appeal No. 1495 of2011]

12. In light of the above decisions, the rate to be used for undertaking an adjustment should be LIBOR and not the average yield rates considered by the learned TPO. The LIBOR rate for March 2008 was 2.6798%. However the assessee has charged 7% from its AE as per the internal CUP available. Thus, the assessee haS charged interest to EKC Dubai and EKC China at the rate higher than existing LIBOR rates. Accordingly, the said transaction of providing loan to EKC Dubai and EKC China is at arm's length. Additions made by the AO are accordingly set aside."

We ,therefore , respectfully following the ratio , set aside the DRP direction and direct the AO to delete the addition. The ground no. 1 is resultantly allowed."

6. Facts being identical, respectfully following the decision of the Tribunal, as referred to above, we delete the addition made by the Assessing Officer.

7. In ground no.2, the assessee has challenged the addition made of ₹ 52,09,249, on account of transfer pricing adjustment to the hedging loss.

8. Brief facts are, the Transfer Pricing Officer in the course of proceedings before him noticing that the assessee has claimed hedging loss of ₹ 52,09,249, called for the necessary details. On verifying the details furnished by the assessee, he noticed that the hedging loss was on account of interest on loan taken by the assessee from ICICI Bank,

Dubai, for providing the said loan to the AE. He observed that the AE is paying interest on loan directly to the ICICI Bank, Dubai. Being of the view that the assessee should have recovered the hedging loss from the AE, the Transfer Pricing Officer held that the hedging loss of ₹ 52,09,249, should be adjusted towards the arm's length price of the interest charged to the AE. In pursuance to the aforesaid decision of the Transfer Pricing Officer, the Assessing Officer made the addition in the draft assessment order. Though, the assessee objected to the aforesaid addition before the DRP, however, it was unsuccessful.

9. We have considered rival submissions and perused material on record. The learned Counsels appearing for the parties have agreed before us that identical issue arising in assessee's own case for assessment year 2012–13 has been decided in favour of the assessee by the Tribunal. On a perusal of the order passed by the Tribunal in assessee's own case for assessment year 2012–13 in ITA no.1452/ Mum./2017, dated 28th November 2018, it is noticed that while deciding identical issue the Tribunal has held as under:–

> *"11. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that the assessee has borrowed money from ICICI Bank Bahrain for specific purpose of advancing the same to the AE of the assessee to set up a plant in Fujairah for the reason that majority of the production would be sold to the assessee. Now the issue before us whether the loss incurred by the assessee in connection with hedging of the foreign exchange for payment of interest on loan provided to its AE by way of derivative contract entered into between the assessee and independent third party i.e. ICICI*

Bank, Mumbai is liable for transfer pricing adjustment or the assessee is not entitled to claim the said loss. The undisputed fact is that the contract is between the assessee and ICICI Bank, Mumbai and not with the AE , therefore we find merit in the contention of the assessee that the this is not an international within the meaning of section 92C of the Act. Having considered the facts of the case and rival submissions of the parties we are of the considered view that the loan was taken for the purpose of advancing it to the foreign subsidiary. Therefore, any expense or loss incurred in connection with that transaction would not be an international transaction between the assessee and the AE as the said loss or expense was incurred under a contract between the assessee and the third party. So under these circumstances, we are inclined to take a view that the DRP has taken a incorrect view of the matter in upholding the order of AO on this issue. We definitely feel that the expenses in not in connection with the business of the assessee or out of commercial and business expediency of the business but disallowance by making TP adjustments is not correct . The AO could made the disallowance u/s 37 of the Act as not wholly and exclusively for the purpose of business. In view our observations , we not setting aside the order of DRP on this issue and direct the AO to delete the disallowance. The ground no 2 is accordingly allowed."

10. Facts being identical, respectfully following the aforesaid decision of the Co–ordinate Bench in assessee's own case, we delete the addition made by the Assessing Officer. Ground is allowed.

11. In ground no.3, the assessee has challenged the addition of ₹ 1,30,60,541, on account of transfer pricing adjustment made for not charging interest on share application money remitted to its AE.

12. Brief facts are, in course of proceedings before him, the Transfer Pricing Officer on verifying the audited financial statement of the assessee found that, though, the assessee had remitted share application money to its overseas A.E., Golden Harvest, Middle East

FZC, however, perusal of financial statements of financial year 2010–11, 2011–12 and 2012–31, revealed that the AE has not issued shares against the share application money remitted by the assessee. Further, after calling for the necessary details, the Transfer Pricing Officer found that the shares have not been issued till October 2016. The Transfer Pricing Officer observed, the share application money remitted by the assessee stood at ₹ 20,24,89,000, as on 31st March 2013. Whereas, the assessee has remitted share application money to its AE in the year 2007. Therefore, he called upon the assessee to explain why interest should not be charged on the share application money lying with the AE. In response, it was submitted that the AE was set–up in free trade zone at Sharjah and is governed by free trade zone rules. It was submitted, as per the said rules investment in any company set–up in free trade zone at Sharjah requires approval of the free trade zone authorities. It was submitted, as the AE has not received approval of the free trade authorities, it has not been able to issue shares to the assessee. He submitted, as per law the assessee is not entitled to any interest on share application money. However, the Transfer Pricing Officer did not find merit in the submissions of the assessee and by relying upon the information obtained from Bloomberg database, the Transfer Pricing Officer determined the arm's length price of the interest on share application money @ 6.455%. Accordingly, he proposed an adjustment of ₹ 1,30,60,541. The

aforesaid adjustment proposed by the Transfer Pricing Officer was added back to the income of the assessee in the draft assessment order. Though, the assessee objected to the aforesaid addition made before the DRP, however, the DRP upheld the decision of the Transfer Pricing Officer.

13. We have considered rival submissions and perused material on record. The learned Counsels appearing for the parties have submitted that identical issue arising in assessee's own case for assessment year 2012–13 has been decided in favour of the assessee by the Tribunal. On a perusal of the aforesaid order passed by the Tribunal in assessee's own case in ITA no.1452/Mum./2017, dated 28th November 2018, it is noticed that the Tribunal has deleted the addition made on account of determination of arm's length price of interest charged on share application money holding as under:–

> *"18. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that the assessee has advanced money as share application money to Golden Harvest a foreign AE to set up a plant in free trade zone in Sharjah. It is also undisputed that the AE could not convert the share application money into share capital by issuing shares to the assessee as the permission from the free trade zone authorities with whom the AE was registered was pending and this was the only sole reason for not issuing the shares in favour of the assessee. Now the issue before us is whether the share application money could be treated as loan and could be subjected to the transfer pricing provisions. After perusing the facts on record and going through the decision relied on by the Ld. A.R., we find that no income has accrued from the share application money to the assessee and therefore such transactions could not be subjected to transfer pricing provisions. The Hon'ble Jurisdictional Bombay High Court in the*

case of Shell India Markets Pvt. Ltd. vs. ACIT and others has also held that the provisions of chapter 10 of the Act would apply only when income arises from the international transactions. The relevant portion of the said order is reproduced as under:

"9. We shall now consider the above submissions on behalf of the Revenue. So far as the availability of alternative remedy is concerned, the petitioner has at the beginning of today's hearing itself undertaken to withdraw its objection on the issue of jurisdiction before the Dispute Resolution Panel. This was accepted by us before considering the issue on the merits. Moreover, this petition was filed on April 24, 2013, challenging the impugned orders dated January 30, 2013, of the Transfer Pricing Officer and the draft assessment order dated March 28, 2014, of the Assessing Officer, on the issue of jurisdiction. This issue has been decided in Vodafone IV and would be binding on all authorities within the State till the apex court takes a different view on it. Therefore, in view of the fact that the Revenue does not dispute that the issue on the merits stands covered by the decision of Vodafone IV it would serve no useful purpose by directing the petitioner to prosecute its objections before the Dispute Resolution Panel and the Dispute Resolution Panel disposing of the same in accordance with Vodafone IV. Thus, in the present facts the distinction sought to be made on the ground of alternative remedy is not such as to warrant not entertaining the petition.

10. The second distinguishing feature from that of Vodafone IV, as canvassed by the Revenue, is that Form 3CEB in respect of the transaction of issue of shares to its associated enterprises, is not disclosed as an international transaction. This the petitioner was obliged to do as the transaction is an international transaction. This was in fact done by the petitioners in Vodafone IV. This stand by the Revenue is a little curious as in Vodafone IV the Revenue contended that as the petitioners therein had filed Form 3CEB in respect of issue of shares to its associated enterprise, they had submitted to the jurisdiction of Chapter X of the Act and cannot now contend that the proceeding to tax such shortfall on capital account is without jurisdiction. In this case, an exactly opposite stand is being taken by the State. The State is expected to be consistent and not change its stand from case to case. Be that as it may, the petitioner herein had not disclosed the transaction in Form 3CEB as, according to the petitioner, it was not an international transaction for the reason that it did not give no rise to any income. The fact that the petitioner chose not to declare issue of shares to its non-resident associated enterprises in Form 3CEB as in its understanding it fell outside the scope of Chapter X of the Act now stands vindicated by the decision of this court in Vodafone IV. If the

petitioner did not file a particular transaction in Form 3CEB when so required to be filed, the consequences of the same as provided in the Act would follow. However, the mere not filing of Form 3CEB on the part of the petitioner would not give jurisdiction to the Revenue to tax an amount which it does not have jurisdiction to tax. Therefore, we do not find any substance in this objection also.

11. The last objection taken by the Revenue was that in view of the variation in the shareholding pattern amongst different shareholders of the petitioner during the year clearly brought the issue of shares within clause (e) of the Explanation to section 92B of the Act. In terms of the above provision an international transaction would include a transaction of restructuring entered into by an enterprise with an associated enterprise. Mr. Pardiwala, learned counsel appearing for the petitioner, points out that there has been no restructuring of the organisation but there has been a mere change in the shareholding of different shareholders of the petitioner. However, in the present facts we need not examine this for the reason that even if it is assumed that it is an international transaction, the jurisdictional requirement for Chapter X of the Act to be applicable is that income must arise. In this case, admittedly following Vodafone IV no income has arisen. Thus, the jurisdictional requirement for application of Chapter X of the Act is not satisfied.

12. As held in Vodafone IV, the jurisdiction to apply Chapter X of the Act would occasion only when income arises out of international transaction and such income is chargeable to tax under the Act. The issues raised in the present petition are identical to the issues which arose for consideration before this court in Vodafone IV. Therefore, following the aforesaid decision we set aside the order dated January 30, 2013, of the Transfer Pricing Officer to the extent it holds that the arm's length price of issue of equity shares is Rs. 183.44 per share as against Rs. 10 per share as declared by the petitioner and consequent deemed interest brought to tax on the amount not received when benchmarked to the arm's length price. Accordingly, we set aside the draft assessment order dated March 30, 2013, to the extent it seeks to bring to tax the arm's length price of the share issued by the petitioner to its non-resident associated enterprises and also deemed interest which is sought to be brought to tax on the ground of nonreceipt of the consideration equivalent to the arm's length price by the petitioner on issue of equity shares. It is further clarified that the petitioner's objection before the Dispute Resolution Panel filed on April 25, 2013, on all issues save and except the issue covered by this order would be considered by the Dispute Resolution Panel on its own merits."

19. The Hon'ble Bombay High Court further in the case of Equinox Business Parks (P.) Ltd. vs. Union of India has held as under:

"This has been accepted by the Revenue and is evident from the order of DRP dated 30 October 2014 in Petitioner's case for A.Y. 2010-11. In the A.Y.2010-11 also the Petitioner had issued CCDs and equity-shares and the basis was identical to the present Petition. The Revenue sought to tax the Petitioner in terms of Chapter X of the Act. However, the Petitioner objected to the Draft Assessment order before DRP. On 30 October 2014, DRP issued directions under Section 144C(5) of the Act to the Assessing Officer for the A.Y. 2010-11 and on identical facts qua equity shares and CCDs holding as under:

"3.4 We find that the issue under consideration of applying Transfer Pricing Provisions on 'issue of shares' has been decided in favour of the assessee by the Hon'ble Bombay High Court in the case of M/s Vodafone India Services Private Limited in Writ Petition number 871 of 2014 dated 10th October 2014. The honourable High Court has held that the amounts received on issue of shares is a capital account transaction not separately brought within the definition of 'income' as per the provisions of section 2(24) as well as sections 4 & 5 of the Act. Therefore, such capital account transaction not falling within a statutory exception cannot be brought to tax. Even income arising from international Transaction between AE must satisfy the test of income under the Act and must find its home in one of the above heads i.e. charging provisions. There is no charging section in chapter X of the act. Only if there is income which is chargeable to tax under the normal provisions of the act, then alone Chapter X of the act could be invoked. Further, since there is no income arising from the transaction of issue of shares, the provisions of chapter X would not apply. The Hon'ble Bombay High Court in the said case has quashed and set aside as Being without jurisdiction, null and void, the reference made by the TPO, and the order of the TPO making a transfer pricing adjustment on issue of shares. Respectfully following the decision of the jurisdictional Bombay High Court, the adjustment proposed by the' TPO on account of issue of shares is deleted. Accordingly, ground of objection number 16 of the assessee is allowed."

20. We, therefore, respectfully following the ratio laid down by the Hon'ble Bombay High Court, reverse the direction of DRP and direct the AO to delete the addition on account of notional interest of Rs.2,44,20,173/-."

14. Facts being identical, respectfully following the aforesaid decision of the Co–ordinate Bench, we delete the addition made of ₹ 1,30,60,541. Ground is allowed.

15. Grounds no.4 and 5 are not pressed, hence, dismissed.

16. In the result, appeal is partly allowed.

Order pronounced in the open Court on 20.03.2019

Sd/-	**Sd/-**
MANOJ KUMAR AGGARWAL	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 20.03.2019

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai