

आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.1987/PUN/2017

निर्धारण वर्ष / Assessment Year : 2012-13

Uttara Foods and Feeds Pvt. Ltd.
Venkateshwara House,
Pune Sihngad Road,
Pune-411 030.
PAN : AAACU3663Q

.....अपीलार्थी / Appellant

बनाम / V/s.

The Assistant Commissioner of Income Tax,
Circle-12, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Kishore Phadke
Revenue by : Shri Avadhesh Kumar, CIT

सुनवाई की तारीख / Date of Hearing : 02.07.2019

घोषणा की तारीख / Date of Pronouncement : 03.07.2019

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 26.02.2017 passed by the Assessing Officer (AO) u/s.143(3) read with section 144C(13) of the Income

tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2012-13.

2. The only effective ground pressed by the Ld. AR is against determining the interest rate of 17.50% as arm's length interest rate for loans advanced by the assessee to its Associated Enterprises (AEs).

3. Succinctly, the facts of the case are that the assessee company was established with an objective of providing poultry with hygienic, nutritionally balanced and easily digestible diet. It began operations in 1998. The assessee filed its return for the year under consideration declaring total income of Rs.15,66,20,820/-. Certain international transactions were reported in Form No. 3CEB. The Assessing Officer made reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of the international transactions. During the course of proceedings before the TPO, which remained unrepresented by the assessee, it was observed that the assessee availed External Commercial Borrowings (ECB) from ICICI Bank, Singapore amounting to USD 17 Million for establishing three entities in Bangladesh, Switzerland and Vietnam. The TPO further observed that the assessee also availed Long Term Rupee Loans carrying rates of interest between 12% to 15.25%. The TPO found that though the

assessee was paying interest, but it did not charge any analogous interest from its AEs. Considering these transactions of advancing loans to its AEs as international transactions in terms of section 92B(1) of the Act, the TPO determined arm's length rate of interest at 11.35%. This resulted into proposing of transfer pricing adjustment of Rs.6,64,77,625/-. The Assessing Officer made the transfer pricing addition in the draft assessment order. The assessee approached before the Dispute Resolution Panel (DRP) urging that advances given to the AEs carried interest, which was charged at the rate of 15.25% amounting to Rs.9,65,45,886/-. The DRP determined the arm's length rate of interest at 17.50% and directed the TPO to compute transfer pricing adjustment afresh after verifying the assessee's submission that the interest was charged at the rate of 15.25%. In the final impugned assessment order, an addition of Rs.1,31,78,383/- has been made for the differential rate of interest at 2.25% (17.50% as determined by the DRP minus 15.25% as charged by the assessee). The assessee is aggrieved by such an addition.

4. We have heard both the sides and gone through the relevant material available on record. The facts of the case which are not disputed by the ld. DR as well that the assessee made certain advances to its AEs in Bangalesh, Switzerland and Vietnam, on which it charged interest at the rate of 15.25% as against the TPO

originally determining the arm's length rate of interest at 11.35%. Such determination was done in *ex parte* proceedings without knowing that the assessee had already charged interest from its AEs at the rate of 15.25%. When the assessee brought this fact to the notice of the DRP, the Panel revised upwards the arm's length rate of interest to 17.50% on the basis of 300 basis points above the prime lending rate in India.

5. It is a matter of record that the assessee was subjected to search and seizure proceedings. The assessee moved Income Tax Settlement Commission (ITSC) for the assessment years 2012-13 to 2017-18. One of the issues raised before the ITSC was the interest rate to be charged by the assessee from its AEs. The assessee contended before the Settlement Commission that interest rate charged by it from the three subsidiaries was over and above the prevailing interest rates in the respective countries where loans were utilized. The ITSC, vide its order dated 02.04.2019, a copy available at page 76 onwards of the paper book, called for a report from the TPO, who gave three options for determining the arm's length rate of interest on loans given by the assessee to its AEs. The first option was to work out the ALP as per the directions given by the DRP in the case of the assessee for the assessment year 2012-13, leading to determination of the ALP at Rs.205.30 crore for all the six assessment years. The second

option was that the loans given to the AEs be treated as Rupee Loans and after according very high risk credit rating of CCC, the TPO worked out ALP at Rs.203.10 crore for all the six assessment years. The last option given by the TPO was to consider the loans advanced to AEs as foreign currency loans. By applying average bond yield rates and CCC credit rating, he worked out the ALP for six assessment years at Rs.173.29 crore. The above referred three options given by the TPO have been incorporated by the ITSC in para 18.3 of its order. After considering relevant material available on record, the Settlement Commission came to the conclusion that there was 'absolutely no justification on facts and in law for the TPO adopting such high interest for determining ALP of interest income on the loans advanced to the AEs.' Thus, it is evident that the Settlement Commission did not make any addition on account of interest on loans given by the assessee to its AEs. It is pertinent to note that the Settlement Commission passed its order on 2.4.2019, which is much after the passing of the impugned order on 26.2.2017. At this juncture, it would be relevant to note the mandate of section 245-I of the Act which provides that: '*Every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.*'

6. Be that as it may, since the appeal has been agitated on merits, we need to examine and evaluate if interest on loans advanced by the assessee to its AEs is at ALP? It can be seen from the written submissions before the ITSC and the order of the ITSC that the assessee gave elaborate details of rates of interest prevalent in the countries in which the AEs availed loan from the assessee. On the basis of such rates, the assessee worked out the arm's length interest income on daily basis at Rs.6,56,21,097/- for the assessment year 2012-13, which has been reflected in the assessee's application before the Settlement Commission, whose copy has been placed at page 25 of the paper book. At page 27 of the paper book, the assessee has stated that as against the arm's length rate of interest income of Rs.6.56 crore, the assessee actually charged interest income of Rs.9.65 crore on the amounts advanced to its subsidiaries. Thus, it is established that the rate of interest actually charged by the assessee is much more than the rate of interest prevalent in the countries in which the assessee's subsidiaries are situated, which fact has also been accepted by the Settlement Commission and not controverted by the Ld. DR.

7. At this stage, it would be relevant to note the *ratio* laid down by the Hon'ble jurisdictional High Court in the case of *CIT Vs. Tata Autocomp Systems Ltd. (2015) 374 ITR 516 (Bom.)* wherein the assessee advanced loans to its AE situated in Germany for which

no interest was charged. The TPO determined the ALP of interest at the rate of 10.25% on the basis of lending rate charged by banks of India. The DRP enhanced the arm's length rate of interest to 12%. When the matter came up before the Hon'ble High Court, it was held that the interest free loans extended by a company to its AEs come within the ambit of 'International Transaction' and arm's length rate of interest: 'would be determined on the basis of rate of interest being charged in the country where the loan is received/consumed.' Similar view has been reiterated by the Hon'ble Bombay High Court in *CIT Vs. The Great Eastern Shipping Co. Ltd. (2018) 301 CTR 662 (Bom.)* holding that the arm's length rate of interest in the case of loans advanced to the AEs would be determined on the basis of rate of interest being charged in the countries where loan is received/consumed. It further observed that: 'the very basis of the order of the Transfer Pricing Officer was on wrong premise i.e. it has considered the rate as prevailing in India'. We find that the DRP in the instant case has committed the same mistake as was done by the authorities in the case of *The Great Eastern Shipping Co. Ltd. (supra)*. In view of the aforesaid judgments rendered by the Hon'ble jurisdictional High Court, there remains no doubt whatsoever that the arm's length rate of interest is the rate prevalent in the country where loan is received/consumed and not the country whose enterprise advances loans to its AEs. Admittedly, the subsidiaries of the

assessee company situated in Bangladesh, Switzerland and Vietnam availed loans from the assessee in India. The arm's length rate of interest as per the rates prevalent in such countries comes to Rs.6.56 crore against which the assessee actually charged interest at Rs.9.65 crore. Since the rate of interest charged by the assessee is more than the arm's length rate of interest, in our considered opinion, there is no rationale in making any transfer pricing adjustment on this score. Accordingly, we order to delete the addition.

8. No other ground was pressed by the ld. AR, which hereby stand dismissed.

9. In the result, appeal of the assessee is partly allowed.

Order pronounced on 03rd day of July, 2019.

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

Sd/-
R.S.SYAL
VICE PRESIDENT

पुणे / Pune; दिनांक / Dated : 03rd July, 2019.

SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-13, Pune.
4. The Pr. CIT (Central), Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "सी" बेंच,
पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	02.07.2019	Sr.PS/PS
2	Draft placed before author	02.07.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order	*	