

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 4584/DEL/2016  
[A.Y 2007-08]

The Bank of Tokyo-Mitsubishi                      Vs              Dy. C.I.T  
UFJ Ltd., 5th Floor, Worldmark-2,                      Circle-3(1)(1), International  
Asset 8, Aerocity, NH-8,                                      Taxation, New Delhi  
New Delhi-110037

PAN No. AABCT3880 D

(APPELLANT)

(RESPONDENT)

Assessee By                      :    Shri Percy Pardiwala

Department By                 :    Shri G.K. Dhall, CIT- DR [Intll. Tax]

Date of Hearing                      :    12.09.2019

Date of Pronouncement         :    16.09.2019

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 28.07.2016 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to assessment year 2009-10.

2. Ground No. 1 is general in nature and needs no separate adjudication.

3. Vide Ground No. 2, the assessee has challenged the addition on account of interest received on External Commercial Borrowings [ECB], extended to Indian borrowers.

4. At the very outset, the ld. counsel for the assessee stated that on identical set of facts, this issue was considered by the Tribunal in Assessment Year 2011-12 in ITA No. 306/DEL/2016 vide Ground No. 2 of that appeal and vide adjudicating the issue in favour of the assessee, the Tribunal relied on the decision of the co-ordinate bench for Assessment Year 2010-11 in ITA No. 1174/DEL/2015.

5. The ld. counsel for the assessee further pointed out that this issue came up for adjudication again in Assessment Year 2013-14 and again the Tribunal in ITA No. 7212/DEL/2017 has decided it in favour of the assessee and against the Revenue. The ld. counsel for the assessee supplied copies of the orders of the co-ordinate bench.

6. Per contra, the ld. DR stated that this issue was also considered by the Tribunal in ITA No. 4548/DEL/2016 for Assessment Year 2008-09 and has decided the issue against the assessee and in favour of the Revenue.

7. The ld. counsel for the assessee stated that due to typographical error, it has been mentioned as “in favour of the department and against the assessee” and a Misc Application has already been filed for rectification of the mistake. The ld. DR further stated that since the issue was decided against the revenue, the Revenue preferred appeal before the Hon'ble High Court of Delhi, which appeal has been admitted. The ld. counsel for the assessee furnished copy of the order of the Hon'ble High Court bearing ITA No. 1066/2017 and 1072/2017.

7. We have heard the rival submissions and have carefully perused the orders of the co-ordinate benches as mentioned hereinabove. We find force in the contention of the ld. counsel for the assessee. The issue stands covered in favour of the assessee and against the Revenue vide order of the Tribunal in ITA No. 1174/DEL/2015. The relevant findings of the Tribunal read as under:

"Ground No. 7 : It is regarding addition on account of interest received from external commercial borrowings (ECB) given to Indian borrowers.

21. The facts in brief are that the head office / other overseas branches of the assessee are in receipt of interest earned from the external commercial borrowings (ECB) given to the Indian borrowers parties. Indian branches of assessee help its Indian customers in arranging funds through its overseas branches and the dealer in India cannot lend in foreign currency except for providing export credit to its concern as per the extant Reserve Bank of India Regulations. Indian branches of the assessee but on the request of the customers pass on the lead to the overseas branches along with the credit evaluation report, terms and conditions of approval and details of security documents to be entered into. Indian branches evaluate the customer on an on-going basis and passes on the lead information to its overseas branches on activities related to credit rating, monitoring of covenants etc. On receipt of the information from the Indian branches of the assessee, the overseas branches of the bank do the booking of the loan based on the terms and conditions of the approval. The agreement and security documentations are entered between overseas branches and the borrowers. Indian branches receive syndication fees from its head office

/ other overseas branches for the services rendered by it in relation to ECB.

22. The case of authorities below is that interest income accrues and arises as under:

(i) Interest income accrues and arises in India under section 9(l)(v) of the Act. Since the ECB do not form part of the asset base of the PE in India and is not effectively connected with the PE, ECB interest is chargeable to tax under Article 11 of the Treaty between India and Japan (*para 9.2 and 9.3 at page nos. 207-208 of appeal set*).

(ii) No tax credit, however is allowable to the assessee, since, any new claim can be made by the assessee only through a revised return of income (*para 9.7 at page 210 of appeal set*) (iii) Since interest is payable on a net of tax basis i.e. tax has been borne by the borrowers, the ECB interest is grossed up for arriving at the income to be included in the computation of total income of the assessee (*para 9.8 at page 210 of appeal set*).

23. In support of the ground the Id. AR made following submissions :-

(i) At the outset, we wish to submit that due to lack of the details/information, the Tribunal in the order passed for Assessment Years 2007-08 and 2008-09 had remanded back the issue of taxability of ECB interest to the file of the Assessing Officer for de novo consideration. However, as noted by the DRP, since all the requisite details have been filed by the assessee for AY 2010-11 and the issue has been decided accordingly, it is submitted that the matter is not required to be restored back to the Assessing Officer for Assessment Year 2010-11 and the same be decided by the Tribunal on merits.

(ii) ECBs given to the Indian customers are effectively connected with the Indian PE of the assessee and an amount i.e. syndication fee, which is commensurate with the role played by the Indian PE and is attributable to the Indian PE has already been offered to tax, by the assessee, in the computation of its income taxable in India as per the provisions of Article 7 of the Indo-Japanese treaty; and therefore, in view of Article 11(6) read with Article 7 of Indo-Japanese treaty, nothing further can be brought to tax in India.

(iii) During the year under consideration, the Indian PE/branches of the assessee received an amount of Rs 14,58,92,297 as syndication fee from its HO/other overseas branches for the services performed by the Indian branches in relation to ECBs, which has been credited to profit & loss account of the Indian branches of the assessee and offered to tax in the return of income filed by the assessee. Apart from this, the assessee has offered to tax an amount of Rs 2,14,77,903 as transfer pricing adjustment with respect to ECB syndication fee in the return of income. Therefore, the assessee has already offered to tax an amount of Rs 16,73,70,200 (Rs.14,58,92,297 + Rs 2,14,77,903) as fee received by the Indian PE of the assessee from its HO/other overseas branches for the services performed in relation to ECBs, which has been accepted to be an arms' length price by the Revenue.

(iv) The Mumbai Tribunal in the case of Credit Lyonnais (ITA No. 1935/Mum/2007) has held that ECB interest is not attributable to the Indian branches of the assessee and only the fee is taxable in the hands of the Indian branches of the assessee for the role played by it in arranging the ECBs.

(v) Without prejudice to the claim of non-taxability of ECB interest income, the AO has erred in not allowing the credit for tax deducted at source on ECB interest. Sample copies of

TDS certificates were also furnished to the AO. Further, that the taxes have been deducted is an admitted position since the AO has himself grossed up the entire amount of ECB interest by the amount of tax borne by the borrowers. Once this is so, in view of section 208 of the Act, the necessary credit has to be given to the assessee.

i) Tax at source has been deducted from the sample copies of TDS certificates furnished before the Assessing Officer and he has admitted the same by grossing up the ECB interest by the amount of tax borne by the borrowers, therefore, no interest under section 234B of the Act can be levied for the tax demand on account of ECB interest.

(vii) Even on merits, interest under section 234B of the Act is not applicable since ECB interest received by the assessee from the borrowers is subject to tax deduction at source under section 195 of the Act. Reliance is placed on the judgment of the Delhi High Court in the case of GE Packaged Power Inc. [2015] 373 ITR 65 wherein it has been held by the Delhi High Court that no interest under section 234B of the Act can be levied where the payment to non-resident payee is subject to tax deduction at source.

24. The Id. CIT [DR], on the other hand, contended that

ECB interest has been earned by the HO/other overseas branches of the assessee from third party. Such ECB is not the debt claim of the Indian branches of the assessee and, therefore, ECB interest is not effectively connected with the Indian branches.

If tax is borne by the borrowers, credit for TDS on ECB interest is not allowable to the assessee.

If direction is issued for allowability of TDS credit, the same should be granted to the assessee subject to verification of the same from the deductors/borrowers.

25. The Id. AR rejoined with the submission that when the tax is born by the payer of the income, income is grossed up by the amount of tax born by the payer and such grossed up interest is taxed in the hands of the payee. Any taxes with-held by the payer is allowable as credit to the payee of income against the income taxed in the hands of the payee. He submitted that CBDT vide its Circular No. 785 dated 24.11.1999 has also clarified that where the payment is made of taxes i.e. tax is borne by the payer of the income, the payer is under obligation to issue TDS certificate to the payee, since such grossed up income is taxable in the hands of the payee and the payee is eligible

to claim credit of such taxes with held against the income taxed in the hands of the payee.

26. After having gone through the above cited decision, we find that Mumbai Bench of the Tribunal in the case of Credit Lyonnais (supra) has held that ECB interest is not attributable to the Indian branches of the assessee and only the fee is taxable in the hands of the Indian branches of the assessee for the role played by it in arranging the ECB. The Hon'ble High Court of Delhi in the case of GE Package Powerink (supra) has been pleased to hold that no interest under section 234B of the Act can be levied where the payment to nonresident payee is subject to tax deduction at source. In the present case, the Assessing Officer himself had admitted by grossing up the ECB interest by the amount of tax borne by the borrowers that tax at source has been deducted. We are thus of the view that no interest under section 234B of the Act can be levied for the tax demand on account of ECB interest and interest under section 234B is also not chargeable since ECB interest received by the assessee from the borrowers was subject to tax deduction at source under section 195 of the Act. The Assessing Officer is thus directed to delete the addition made on account of interest received from ECB given to Indian borrowers. The ground No. 7 is accordingly allowed."

8. We further find that similar view was taken by the co-ordinate bench in Assessment Years 2008-09, 2011-12 and 2013-14. Respectfully following the findings of the co-ordinate bench, Ground No. 2 is decided in favour of the assessee and against the Revenue.

9. Ground No. 3 relates to the deduction u/s 44C of the Act.

10. This Ground is taken without prejudice to Ground No. 2 above. Since Ground No. 2 stands decided in favour of the assessee, Ground no. 3 becomes otiose.

11. Ground No. 4 relates to the levy of interest u/s 234D of the Act.

12. Before us, the ld. counsel for the assessee furnished an intimation u/s 143(1) of the Act and pointed out that refund was adjusted against the demand on 31.10.2012. This shows that refund was never granted to the assessee but was adjusted against the demand. The ld. counsel for the assessee also furnished Income tax computation form and pointed out that interest has been levied u/s 234D of the Act for the period 10.07.2009 to July 2016. The date of this Income tax computation is 28.07.2016. It is the say of the ld.

counsel for the assessee that on these facts, no interest is leviable u/s 234D of the Act since the refund has been adjusted against the demand vide order dated 31.10.2012.

13. On the other hand, the ld. DR could not point out any factual defects in the submissions of the ld. counsel for the assessee.

14. We have carefully considered the intimation u/s 143(1) of the Act dated 31.10.2012 and the Income tax computation form dated 28.07.2016. We find force in the contention of the ld. counsel for the assessee that refund was adjusted against the outstanding demand vide order dated 31.10.2012. Therefore, in our considered opinion, the Revenue erred in levying interest u/s 234D of the Act for the period July 2009 to July 2016. We, accordingly, direct the Assessing Officer to delete the interest so levied.

15. Ground No. 5 relates to the claim of set off of brought forward business losses and unabsorbed depreciation.

16. We direct the Assessing Officer to allow set off of brought forward business losses and unabsorbed depreciation as per provisions of law.

17. In the result, the appeal of the assessee in ITA No. 4584/DEL/2016 is allowed.

**The order is pronounced in the open court on 16.09.2019.**

Sd/-

**[AMIT SHUKLA]  
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 16<sup>th</sup> September, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	