IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-2 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2242/Del/2011
Assessment Year: 2005-06

Jindal Dyechem Industries Pvt. Ltd., 110, Babar Road, Opp. World Trade Centre, New Delhi. PAN: AAACJ0719Q	Vs	Addl. CIT, Range-4, New Delhi.

ITA No.3253/Del/2011
Assessment Year: 2005-06

DCIT, Circle-4(1), New Delhi.	Vs.	Jindal Dyechem Industries Pvt. Ltd., 110, Babar Road, Opp. World Trade Centre, New Delhi. PAN: AAACJ0719Q
(Appellants)		(Respondents)

Assessee By	:	Shri Salil Aggarwal, Advocate & Shri Shailesh Gupta, Advocate
Deptt. By	:	Shri H.K. Choudhary, CIT, DR
Date of Hearing	:	16.09.2019
Date of Pronouncement	:	13.12.2019

ORDER

PER R.K. PANDA, AM:

These are cross appeals. The first one is filed by the assessee and the second one is filed by the Revenue and are directed against the order dated 31.03.2011 of the CIT(A)-20, New Delhi, relating to the assessment year 2005-06.

2. For the sake of convenience, these were heard together and are being disposed of by this common order.

ITA No.3253/Del/2011 (by the Revenue)

3. The grounds raised by the Revenue are as under:-

> ñ01. The order of the Learned CIT (A) is erroneous & contrary to facts and Law.
>
> 02. On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) has erred in deleting the addition of Rs.3,58,670/- made by the AO u/s 69A as the assessee was under invoicing.
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> 03. On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) has erred in deleting the addition of Rs.4,969/- made by AO in respect of shortage of silver claimed by the assessee.
>
> 3.1 The Ld. CIT (A) ignored the fact that Silver being a precious metal, every milligram is accounted for while handling.
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> 04. On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) has erred in deleting the addition of Rs.34,15,935/- made by the AO due to Transfer Pricing adjustment suggested by Transfer Pricing Officer.
>
> 4.1 The Ld. CIT (A) has not called for any report from AO before accepting the assesseeôs contentions that the net variation is negative and has violated the provision of Rule 46.
>
> 05. The appellant craves leave to add, to alter, or amend any grounds of the appeal the time of hearing.ò

4. The ld. Counsel for the assessee, at the outset, submitted that the tax effect involved in the grounds raised by the Revenue is below Rs.50 lakhs. Therefore, in view of the recent CBDT Circular No.17/2019 dated 8th August, 2019, raising the monetary limit for filing of the appeal by the Revenue before the Tribunal to Rs.50 lakhs and the subsequent clarification of the CBDT, vide Notification dated 20th

August, 2019 stating that the said Circular is applicable even to pending appeals, the appeal filed by the Revenue is not maintainable.

5. The ld. DR, on the other hand, fairly conceded that the tax effect involved in the grounds raised by the Revenue being below Rs.50 lakhs, the appeal filed by the Revenue squarely falls within the ambit of the recent CBDT Circular No.17/2019 dated 8th August, 2019 and the subsequent clarification dated 20th August, 2019.

6. After hearing both the sides, we find the tax effect involved in the grounds raised by the Revenue is admittedly below Rs.50 lakhs. Therefore, in view of the CBDT Circular No.17/2019 dated 8th August, 2019 raising the monetary limits for filing of the appeals by the Revenue before the Tribunal to Rs.50 lakhs and the subsequent clarification dated 20th August, 2019 to the effect that the said Circular is applicable even to pending appeals, the appeal filed by the Revenue is not maintainable. Accordingly, the same is dismissed.

7. However, if the Revenue at any point of time finds that the tax effect involved in the grounds of the Revenue is more than Rs.50 lakhs or that the same is falling under the exceptions provided in the said Circular, the Revenue may move necessary application for recall of this order.

8. In the result, the appeal filed by the Revenue is dismissed.

ITA No.2242/Del/2011 (by the Assessee)

9. The grounds raised by the assessee are as under:-

ñ1. That the learned Commissioner of Income Tax (Appeals) has grossly erred both in law and on facts in upholding the addition of Rs. 1,67,64,621/- on account of alleged international transaction of interest free advances to M/s Prudential Precious Metals Ltd., a wholly owned subsidiary of the appellant company by invoking the provisions contained in section 92 read with section 92CA of the Act.

1.1 That the learned Commissioner of Income Tax (Appeals) while sustaining the aforesaid addition has failed to appreciate that, statutory precondition for invoking the provisions of section 92 of the Act is that, there must be a transaction resulting into an arisal of income and, since in the instant case, funds advanced are interest free advances no income arose to the assessee company and as such addition made is beyond the scope and, ambit of the Act and hence, without jurisdiction.

1.2 That while upholding the addition, the learned Commissioner of Income Tax (Appeals) has mechanically applied the decision of Delhi Bench of Tribunal in the case of Perot Systems vs. DCIT reported in 130 TTJ 685 and, overlooked the following judicial pronouncements wherein it has been held that, section 92 of the Act does not apply to transactions where income is not chargeable to tax:

a) 227 CTR 44 (AAR) Dana Corporation
b) 289 ITR 464 (AAR) Vanenburg Group B. V.
c) 35 DTR 178 (AAR) Amiantit International Holding Ltd.

1.3 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that, addition made by the learned Additional Commissioner of Income Tax was wholly unsustainable since it brings to tax an income which has neither accrued to the appellant company and, nor received by the appellant company and, is thus, contrary to judgment in the case of CIT vs. Messrs. Shoorji Vallabhdas And Company reported in 46 ITR 144 (SC).

1.4 That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in confirming the aforesaid addition in disregard of the following submissions made by the appellant company:

a) That mere advance of interest free loan does not constitute to international transaction u/s 92B of the Act. The expression ñlendingò or ñborrowingò connotes a transaction where the sum has been advanced on interest and, not an advance which is interest free

advance to wholly owned subsidiary company and, as such adjustment made is erroneous and, misconceived.

b) That mere fact that such a transaction was reported in the fact sheet by the appellant cannot be a ground much less a valid ground to allege and, hold that advance of interest free loan is an international transaction.

c) That M/s PPML is a wholly subsidiary and, entire income of M/s PPML is taxable in the hands of the assessee company. Infact dividend income of Rs. 9,16,000/- had been assessed to tax even in the instant year.

d) That M/s PPML is also not paying any taxes or paying any interest to third party and, therefore the entire profits by way of dividend or other-wise have been repatriated to India and, offered to tax at maximum marginal rate.

e) That the transaction was based on commercial expediency, as M/s PPML depends entirely on funding of the assessee company for its business operations and, needed funds for working capital purposes and, entire profits, are taxable in India.

f) That assessee had also invested as share capital in M/s PPML of Rs. 18,87,200/ and, even this loan which is interest free loan is also in the shape of capital infusion in M/s PPML.

g) That RBI has specifically not specified any interest rate to be charged on loans advanced to wholly owned subsidiary and, infact they have been treated as part of the financial commitment in the subsidiary.

h) That the provisions contained in section 372A of the Companies Act, 1956 provides that, a company can only grant interest free loan to a wholly owned subsidiary company.

i) That M/s PPML had been wound up in the succeeding assessment year and, as such the adjustment proposed is highly hypothetical, notional and, at best revenue neutral. Infact, no sum has been brought to tax in the succeeding assessment year.

2. That without prejudice to the aforesaid and in the alternative, the learned Commissioner of Income Tax (Appeals) has overlooked the contention of the appellant that, rate of 6% by the learned Transfer Pricing Officer on the closing balance was without any basis and, at best rate of 50 basis point plus labor could have been applied on the day to day balance and,

as such the addition at best could be made of Rs. 20.62 lacs. Thus, the addition so confirmed and sustained is in any case excessive.

3. That the learned Commissioner of Income Tax (Appeals) has otherwise failed to appreciate that, reference by the learned Assessing Officer to the learned Transfer Pricing Officer was bad in law and void-ab-initio on the following grounds and, consequentially the entire proceedings by the learned TPO, order of learned TPO dated October 21, 2008 and, also the impugned addition was vitiated, invalid, illegal and hence, a nullity:

a) As none of the conditions precedent laid down under section 92C(3) of the Act were satisfied, there was no occasion for determination of armôs length price by the AO and the value of the international transactions ought to have been accepted;

b) As the reference made by the learned AO to the learned TPO is not in accordance with the provisions of Section 92CA(1) of the Act;

c) As no opportunity of being heard was granted at any stage of the proceedings for this purpose, whether at the proposal or the approval stage;

d) As no initial opinion was formed u/s 92C(3) of the Act which is a jurisdictional precondition;.

e) By not furnishing the Letter of Reference (ôLORô) to appellant.

4. That the learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in upholding the disallowance of sum of Rs. 2,61,652/- out of expenditure incurred on business promotion claimed by the appellant company.

5. That the learned Commissioner of Income Tax (Appeals) has further erred in upholding the levy of interest under section 234B of the Act.

It is, therefore prayed that, addition and disallowance made by the learned Additional Commissioner of Income and upheld by the learned Commissioner of Income Tax (Appeals) may kindly be deleted and, appeal of the appellant company be allowed.ò

10. The ld. Counsel for the assessee, at the outset, did not press ground of appeal No.4 due to smallness of the ground for which the ld. DR has no objection. Accordingly, ground of appeal No.4 is dismissed as not pressed.

11. Ground of appeal No.5 relates to levy of interest u/s 234B which, in our opinion is mandatory and consequential in nature. Accordingly, this ground is dismissed.

12. So far as ground of appeal Nos.1 to 3 are concerned, the same relates to the order of the CIT(A) in upholding the addition of Rs.1,67,64,621/- on account of alleged international transaction of interest free advances to M/s Prudential Precious Metals Ltd., a wholly owned subsidiary of the assessee company.

13. Facts of the case, in brief, are that the assessee company is engaged in the business of import, export of precious metals, toys, stationery items, etc. It has a wholly owned subsidiary by the name Prudential Metals Pvt. Ltd., FZE in Sharjah, UAE. It filed its return of income on 31.10.2005 declaring the total income at Rs.20,64,54,644/- which was revised on 30th March, 2007 declaring the total income at Rs.18,71,79,219. Since the assessee had entered into certain international transactions with its AE, the Assessing Officer referred the matter to the Transfer Pricing Officer u/s 92CA(3) of the Act for determination of the armôs length price of such international transactions. The TPO, during the course of TP assessment proceedings, observed that the assessee company has undertaken the following international transactions with its AEs:-

No.	Description of transaction	Value (in crores)
1	Export of Platinum	165.63
2	Advances of money	29.56

14. The TPO noted that the assessee has given advance of Rs.29.50 crores to its AE on which it has not charged any interest. On being questioned by the TPO, it was submitted that since the overseas entity is a wholly owned subsidiary, the entire income is charged to tax at the hands of the assessee company. It was submitted that out of the accumulated profits of US $ 3,63,483 earned by the overseas subsidiary, it has received an amount of USD 20000 as dividend during the year 2004-05. If any interest was to be adjusted notionally to the income of the assessee, it would give rise to lesser accumulated profits in the hands of the AE at the beginning of the next year. Also, in the next year, the AE has booked a loss and its business has been wound up. After netting this loss from the accumulated profits there would be no dividend that would be repatriated to India. It was argued that by not charging interest, the assessee had, in fact, received a dividend of USD 30,000 and the residual profit of USD, after adjusting for the current year losses in 2005-06 amounting to USD 48,303, has actually been repatriated to India. In addition to the above, investment made by the assessee company and the loans outstanding at the end of the year 2005-06 has also been repatriated to India.

15. However, the TPO was not satisfied with the arguments advanced by the assessee. He noted that the assessee has advanced an amount of Rs.22.40 crores as interest free loans to its AE. According to the TPO, the international transactions undertaken during the F.Y. 2004-05 is to be benchmarked and not the international transactions undertaken during the F.Y. 2005-06. According to him, if the money

was advanced in the domestic market during F.Y. 2004-05 or invested in least risk assets, the assessee could have earned an average return of approximately 6% and if investment was made in foreign market, the assessee could have received at least a return of LIBOR +2%. On the basis of average return of 6% on bank deposits, government securities, etc., the return on Rs.22.40 crores is Rs.1.344 crores. He, therefore, asked the assessee to explain as to why an amount of Rs.1.344 crores should not be added to the total income of the assessee. It was submitted by the assessee that the interest free loan to AE was for working capital purpose which was a wholly owned subsidiary of the assessee. Since the AE was only subsidiary of the assessee, the entire income of the AE was taxable in the hands of the assessee. Without prejudice to the above, it was submitted that interest rate applicable to the assessee company should be at least 50 basis points + LIBOR in view of the Circular issued by the RBI. If the same principle is adopted, then, the interest comes to Rs.43,05,116/-. It was further submitted that if the interest is calculated on the basis of 6% rate, then, the interest comes to 82,54,202/-. Rejecting the various explanations given by the assessee and observing that the assessee had advanced interest free loan of Rs.29.57 crores and a risk free return in the Indian market during F.Y. 2004-05 was 5.67%, the TPO calculated the return on the basis of the above at Rs.1,67,64,621/-. He accordingly directed the AO to enhance the income and to make the above addition to the total income of the assessee on account of interest free loan to its AE. The AO accordingly made the addition to the total income of the assessee.

16. Before the CIT(A), it was argued that the addition made by the AO/TPO is not tenable since section 92(1) cannot be applied. Relying on various decisions, it was argued that since funds advanced are interest free advances, no income arises to the assessee so as to warrant the invocation of the provisions of section 92(1) of the IT Act. The assessee, relying on various decisions also argued that interest free advance does not constitute an international transaction as it is not a case of lending and borrowing money. It was submitted that disclosure made by the assessee does not determine the taxability of the receipt or allowability of claim of expenditure. It was further argued that since the assessee had given interest free advances to its wholly owned subsidiary company for working capital purpose, therefore, invocation of the provisions of section 92(1) is unjustified since even such transaction is at armôs length i.e., on the basis of commercial expediency. It was further submitted that the entire income of M/s PPML is taxable in the hands of the assessee company. The details of dividend received by the assessee from M/s PPML was also brought to the notice of the CIT(A). It was further argued that M/s PPML is also not paying any taxes and the entire profits have been repatriated to India and offered for taxes in the succeeding assessment year and, therefore, even otherwise the addition is not sustainable. The assessee submitted that no addition has been made in assessment year 2006-07. Without prejudice to the above, it was argued that even if its assumed that the assessee company should have charged interest on such interest free loan granted to the AE, then too the position would be revenue neutral. For the above proposition the assessee filed a

tabular chart before the CIT(A) giving accumulated profits at the beginning of the assessment year and at the end of the assessment year including the profit for the current year, dividend received, profit of subsidiary repatriated to India and offered to tax, etc. It was accordingly argued that if addition made u/s 92 of the Act of Rs.4,48,457/- USD is considered, then, as a result, the income actually offered in the succeeding year of Rs.78,303 USD would have to be excluded and apart therefrom loss incurred on account of investment in subsidiary of Rs.3,70,154/- USD would have to be allowed. It was further submitted that this position has arisen broadly since the wholly owned subsidiary company was wound up in the succeeding year i.e., 12.11.2005 and, therefore, no adverse inference be drawn. The RBI Circular was also brought to the notice of the CIT(A) according to which the interest rate applicable to the assessee company should be at best 50 basis point + LIBOR. It was argued that applying the rate of LIBOR + 50 basis points, the addition would be Rs.20.62 lakhs and if the basis of opening balance is considered, then, the addition would be Rs.43.06 lakhs. Finally, it was argued that even if the rate of interest as taken by the TPO is considered, then, the interest should have been charged on day-to-day basis and not on the closing balance and, in that case, the alleged under statement would be at best Rs.78 lakhs.

17. However, the ld.CIT(A) was not satisfied with the arguments advanced by the assessee. So far as the argument of the assessee that the concerned transaction is not an international transaction, she held the same against the assessee by relying

on the decision of the Tribunal. So far as the argument of the assessee that no addition is called for, she decided the issue against the assessee.

18. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

19. The ld. Counsel for the assessee, at the outset, submitted that as to whether the interest free advance given to AE is an international transaction or not has been decided against the assessee by the decision of the Hon'ble Delhi High Court in the cased of *CIT vs. Cotton Naturals (I) (P) Ltd., reported in 276 CTR 445*. However, so far as the addition is concerned, the ld. Counsel reiterated the same arguments as made before the CIT(A). Referring to page 282 of the paper book, the ld. Counsel for the assessee drew the attention of the Bench to the letter issued by the AO on 1st August, 2008 asking the assessee to explain as to why the income for the assessment year 2005-06 should not be increased by Rs.1.344 crores being the interest on such interest free loan advanced to the AE. Referring to page 296 of the paper book, the ld. Counsel drew the attention of the Bench to the calculation of interest as per LIBOR + 0.50% on outstanding balance which comes to Rs.43.05 lakhs. Referring to page 324 of the paper book, he submitted that if the opening balance is excluded, then, the notional interest on amount advanced during the year to the AE @ LIBOR + 0.5% comes to Rs.20,62,591/- and @ LIBOR + 2% comes to Rs.30,51,243/-. Similarly, the notional interest on amount advanced during the year to the AE @ 6% comes to Rs.39,54,607/-. Therefore, as per the version of the

assessee, such interest is calculated on daily basis. The minimum interest comes to Rs.20.63 lakhs whereas if one goes by the version of the AO, then, the maximum interest that can be added is Rs.39.55 lakhs. Referring to the decision of the Hon'ble Supreme Court in the case of *CIT vs. Excel Industries Ltd., reported in 358 ITR 295*, he submitted that the Hon'ble Supreme Court in the said decision has held that income-tax cannot be levied on hypothetical income. It has been held that income accrues when it becomes due, but, it must also be accompanied by corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee.

20. Referring to the decision of the Hon'ble Calcutta High Court in the case of *Sanjay Kumar Modi vs. DIT (Inv.) & Ors., (2005) 278 ITR 374 (Cal),* he submitted that the Hon'ble High Court in the said decision has held that subsequent development having nexus to the original cause of action can be brought in the parent proceeding to cut short the litigation and for the ends of justice. Referring to page 272 of the paper book, the ld. Counsel drew the attention of the Bench to the master Circular issued by CBDT on 2nd July, 2007 and submitted that even though the said Circular was brought to the notice of the lower authorities, however, they have completely misread the same and proceeded in a different tangent. He submitted that the Tribunal while deciding the issue in the case of the assessee during assessment year 2004-05 has restored the issue to the file of the

CIT(A) for fresh adjudication. He further submitted that even if the argument that the assessee company should have charged interest on such interest free loan granted to the AE, then too the position would be revenue neutral. He accordingly submitted that the addition made by the AO and sustained by the CIT(A) should be deleted. In his alternate contention, he submitted that at best the addition can be made to the extent of Rs.20,62,591/- by applying the interest rate @ LIBOR + 0.50% as per the RBI Circular.

21. The ld. DR, on the other hand, heavily relied on the order of the AO/TPO/CIT(A). He submitted that it is not share capital given to the subsidiary, but, is a loan as shown in the audit report. Since the AE has invested money in its inventory, therefore, the fund advanced by the parent company is a loan. He submitted that the argument of the assessee that it is given for working capital purpose is not relevant. So far as the argument of the assessee that they have received dividend, he submitted that it is also of no use since the TPO and CIT(A) have already considered the same. He submitted that the transaction has to be benchmarked and the provision does not say that dividend income should be set off. He submitted that the reliance by the ld. Counsel for the assessee on the case of Excel Industries Ltd. (supra) is also a futile exercise. Once it is treated as an international transaction, the next question that required is adoption of the interest that has to be charged from the AE. He, however, submitted that he has no

objection if the matter is restored to the file of the AO/TPO for computation of the notional interest on the amount advanced to the AE.

22. The ld. AR, in his rejoinder, submitted that there is no dispute to the fact that the transaction entered into during the year is of Rs.22.40 crores. The TPO has not brought any comparables regarding the rate of interest that has to be applied. He submitted that for the year 2004-05, the AO has adopted the LIBOR rate + 1.25% for computing such interest. Therefore, the addition at best can be Rs.20,62,591/- as computed by the assessee by adopting interest @ LIBOR + 0.5% as per the RBI Circular.

23. We have considered the rival arguments made by both the sides, perused the orders of the A.O./TPO/CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the TPO proposed an addition of Rs.1,67,64,621/- in respect of interest free funds advanced to M/s PPML, the AE of the assessee company on the ground that an amount of Rs.29.56 crores was advanced free of interest. We find the ld.CIT(A) upheld the action of the AO/TPO. It is the submission of the ld. Counsel that as per his calculation at page 324 of the paper book, such interest comes to Rs.20,62,591/- by adopting LIBOR + 0.50% as per the RBI Circular. Similarly, according to him, if the interest is computed @ 6% per annum as observed by the TPO, then, such interest comes to Rs.39,54,607/-. We find, under identical circumstances, the Tribunal had restored the issue to the file of the CIT(A) where the AO had made

addition of Rs.14,51,465/- on account of such interest free advances given to M/s PPML, the wholly owned subsidiary of the assessee company without charging any interest. The AO, in that case, made addition of Rs.14,51,465/- u/s 92CA of the IT Act by applying LIBOR + 1.25%. However, nothing is available before us as to what happened after the Tribunal had restored the issue to the file of the CIT(A) on this very issue. Since the assessee in the paper book at page 324 has given various calculations for charging such interest and considering the fact that in the immediately preceding assessment year the issue under identical circumstances was restored to the file of the CIT(A) and it is not known as to what has happened thereafter, therefore, considering the totality of the facts of the case and in the interest of justice we deem it proper to restore the issue to the file of the AO/TPO with a direction to adjudicate the issue afresh as per fact and law, after giving due opportunity of being heard to the assessee. While doing so, the AO shall keep in mind the Circular issued by the RBI, the decision of the Hon'ble Delhi High Court in the case of CIT vs. Cotton Naturals (I) (P) Ltd. (supra) and the decision of the CIT(A) for A.Y. 2004-05 after the issue was restored to his file for fresh adjudication and the calculation given by the assessee in the paper book at page 324. The AO shall decide the issue as per fact and law, after giving due opportunity of being heard to the assessee. We hold and direct accordingly. Grounds No.1 to 3 filed by the assessee are accordingly allowed for statistical purposes.

24. In the result, ITA No.3253/Del/2011 filed by the Revenue is dismissed and ITA No.2242/Del/2011 filed by the assessee is partly allowed for statistical purposes.

The decision was pronounced in the open court on 13.12.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMBER

Dated: 13th December, 2019

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi