**IN THE INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI BENCH "K" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND**
**SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 6484/MUM/2018**
**Assessment Year: 2014-15**

| | | |
|---|---|---|
| Aries Agro Ltd., Plot No. 24, Aries House, Deonar, Govandi, Mumbai-400043. | Vs. | Dy. Commissioner of Income Tax-14(1)(1), AayakarBhavan, M.K. Road, Mumbai-400020. |

**PAN No. AAACA5035G**

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|---|---|
| **Appellant** | **Respondent** |

| | | |
|---|---|---|
| Assessee by | : | Mr. Firoze B. Andhyarujina/<br>Mr. ManekAndhyarujina&<br>Mr. HimanshuKalavadia, ARs |
| Revenue by | : | Mr. Suhas Kulkarni, DR |
| Date of Hearing | : | 28/11/2019 |
| Date of pronouncement | : | 27/12/2019 |

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2014-15. The appeal is directed against the order passed by the Deputy Commissioner of Income Tax-14(1)(1), Mumbai (in short 'AO') u/s 143(3) r.w.s. 144C(13) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground is general in nature. The 2ndground raised in this appeal is against the order of the AO making an upward revision of Rs.40,30,335/- to

the Arm's Length Price (ALP) of the interest charged on loan to the subsidiary GHME.

Briefly stated, the facts are that the assessee filed its return of income for the assessment year (AY) 2014-15 on 28.11.2014 declaring net income of Rs.19,37,86,983/-. The AO made a reference u/s 92CA(1) to the Transfer Pricing Officer (TPO) for computation of ALP in relation to the international transaction reported in Form No. 3CEB filed by the assessee. The TPO noticed that the assessee has advanced ECB loan to its AE i.e. Golden Harvest during the year on which it has received an interest of LIBOR + 2.5%. The said loan was acquired by the assessee from ICICI Bahrain, wherein the assessee paid interest at the same rate. The above transaction was benchmarked using Comparable Uncontrolled Price (CUP) method, using interest rate charged by ICICI Bank to the assessee.

The TPO observed that the total interest received by the assessee i.e. LIBOR + 2.5% during the year under consideration amounted to Rs.37,31,699/-. He conducted a search on the global rates.com to determine the six months USD LIBOR for the financial year (FY) 2013-14. The same was determined at 0.50%. Accordingly, the interest rate charged by the assessee is determined at 3% (0.50% + 2.5%). He worked out the interest on the basis of ALP which comes to Rs.77,61,934/- [(37,31,699/3.00%) x 6.24%]. Accordingly, the TPO worked out the shortfall in interest received as under :

| **Particulars** | **Amount in INR** |
|---|---|
| Arm's Length Interest | 77,61,934 |
| Less : Received by Assessee | 37,31,699 |
| **Shortfall** | **40,30,235** |

The Dispute Resolution Penal (DRP) agreed with the above working by the TPO. In the final assessment order dated 19.09.2018 the AO made an addition of the above sum of Rs.40,30,235/-.

2.1 Before us, the Ld. counsels for the assessee submit that the above issue has been decided in favour of the assessee by the order of the Tribunal in assessee's own case for AY 2012-13 (ITA No. 1452/M/2017) and for AY 2013-14 (ITA No. 6947/Mum/2017).

On the other hand, the Ld. Departmental Representative (DR) supports the order passed by the AO.

2.2 We have heard the rival submissions and perused the relevant materials on record. We find that similar issue arose before the Tribunal in assessee's own case for AYs 2012-13 and 2013-14. The Tribunal *vide* order dated 20.03.2019 in ITA No. 6947/Mum/2017 for AY 2013-14 held :

> "5. We have heard the parties. Shri Firoz B. Andhyarujina, learned Sr. Counsel for the assessee and Shri ManjunathKarkihalli, 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 subsidiaryGolden 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 coordinate bench of the Tribunal in the case of Everest KantoCylinder Ltd. v. ACIT (supra). The relevant observation of the Tribunal is reproduced as under:

11. We had considered rival contentions and gone through theorders 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.com187 (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."

2.3 Facts being identical, we follow the above order of the Co-ordinate Bench and delete the addition of Rs.40,30,235/- made by the AO.

3. In the 3rdground raised in this appeal, the assessee has disputed the disallowance of Rs.32,60,301/- on account of hedging loss.

During the course of transfer pricing proceedings, the assessee was asked by the TPO to submit the details of hedging loss i.e. amount, nature of transaction on which loss is being incurred and hedging agreement. It was stated before the TPO that the hedging loss was on account of interest on loan taken by the assessee from ICICI Bank, Dubai with an intent to provide loan to the AE in Dubai. However, the TPO observed that the AE is paying interest on loan taken by the assessee directly to ICICI Bank Dubai. The date of interest received and interest paid are same and this is due to the fact that AE is paying interest directly to ICICI Bank on behalf of the assessee and the same amount has been routed through journal voucher entry. Therefore, the TPO concluded that the loan taken by the assessee has been discharged to give loan to the AE and hence the assessee should have recovered the hedging loss on the same also from the AE. However, the said loss was not recovered by the assessee from the AE and the same is borne by the assessee. Accordingly, the TPO made an upward transfer pricing adjustment of Rs.32,60,601/-. The DRP agreed with the above working of the TPO. In the final order dated 19.09.2018, the AO made an upward transfer pricing adjustment of the above amount.

3.1 Before us, the Ld. counsels for the assessee submit that the above issue has been decided in favour of the assessee by the order of the Tribunal in assessee's own case for AY 2012-13 (ITA No. 1452/M/2017) and for AY 2013-14 (ITA No. 6947/Mum/2017).

On the other hand, the Ld. Departmental Representative (DR) supports the order passed by the AO.

3.2 We have heard the rival submissions and perused the relevant materials on record. We find that similar issue arose before the Tribunal in assessee's own case for AYs 2012-13 and 2013-14. The Tribunal *vide* order dated 20.03.2019 in ITA No. 6947/Mum/2017 for AY 2013-14 held :

> "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 make 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."

3.3 Facts being identical, we follow the order of the Co-ordinate Bench and delete the addition of Rs.32,60,601/- made by the AO.

4. In the 4th ground, the assessee has raised objection to the addition of Rs.1,30,60,541/- on account of notional interest on share application monies invested in overseas subsidiary.

During the course of transfer pricing proceedings, the TPO on a perusal of the audited financial statements observed that the assessee has remitted share application money to its AE Golden Harvest. On perusal of the financial statements for FYs 2010-11, 2011-12 & 2012-13, the TPO observed that the shares have not been issued by the AE against the share application remitted

by the assessee till the date of proceedings before him. In response to a query raised by the TPO, the assessee submitted that the shares have not been issued and it is still pending allotment.

The assessee submitted before the AO that Golden Harvest is set up in Free Trade Zone (FTZ) at Sharjah and is governed by the FTZ Rules. As per these Rules, the investment in any company set up in FTZ at Sharjah requires approval of FTZ authorities and the Rules say that the capital of company must be AED 150,000. It was stated before the TPO that as the assessee has not received the approval of the FTZ authorities, Golden Harvest was not able to issue shares to the assessee and as per the law, the assessee is not entitled to any interest on such funds.

However, the TPO was not convinced with the above explanation of the assessee on the ground that in an arm's length scenario, any independent entity would not have left the amount in the hands of another entity without the same being converted into equity within a reasonable period or receiving interest on the same and accordingly, capital locked up for want of transfer of shares for reasonably long period can be construed to be in the nature of loan. By using Bloomberg Database, the TPO searched for third party comparables to determine the ALP. Based on the above, he determined the ALP on the interest that ought to be earned by the assessee on the share application money and determined it at 6.45%. Accordingly, he made a calculation making a disallowance of Rs.1,30,60,541/- which is as under :

| Date | Amount | Cut-off date | Delay days | Interest @ (6.45%) |
|---|---|---|---|---|
| 1/4/2013 | 202,489,000 | 31/3/2014 | 365.00 | 1,30,60,541 |

The DRP agreed with the above working by the TPO. In the final assessment order dated 19.09.2018 the AO made an addition of the above sum of Rs.1,30,60,541/-.

4.1 Before us, the Ld. counsels for the assessee submit that the above issue has been decided in favour of the assessee by the order of the Tribunal in assessee's own case for AY 2012-13 (ITA No. 1452/M/2017) and for AY 2013-14 (ITA No. 6947/Mum/2017).

On the other hand, the Ld. Departmental Representative (DR) supports the order passed by the AO. Further, reliance is placed by him on the order of the Tribunal in *Logix Microsystems Ltd. v. DCIT* (2017) 80 taxmann.com 39 (Bangalore-Trib.).

4.2 We have heard the rival submissions and perused the relevant materials on record. We find that similar issue arose before the Tribunal in assessee's own case for AYs 2012-13 and 2013-14. The Tribunal *vide* order dated 20.03.2019 in ITA No. 6947/Mum/2017 for AY 2013-14 held :

> "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:–
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> > 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 favourof 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, isnot 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 applyingTransfer 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."

4.3 Facts being identical and the amount being identical, we follow the above order of the Co-ordinate Bench and delete the addition of Rs.1,30,60,541/- made by the AO.

5. The 5th ground of appeal is not pressed.

6. In the result, the appeal filed by the assessee is allowed.

**Order pronounced in the open Court on 27/12/2019.**

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| Sd/- | Sd/- |
| (SAKTIJIT DEY)<br>JUDICIAL MEMBER | (N.K. PRADHAN)<br>ACCOUNTANT MEMBER |

Mumbai;
Dated: 27/12/2019
*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-

4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
**ITAT, Mumbai**