

**IN THE INCOME TAX APPELLATE TRIBUNAL "J", BENCH
MUMBAI**

BEFORE SHRI R.C.SHARMA, AM & SHRI PAWAN SINGH, JM

**ITA No. 1238 & 5427/Mum/2017
(Assessment Year: 2012-13 & 2013-14)**

Tecnimont Private Limited, Tecnimont House, Chincholi Bunder, 504, Link Road, Malad West, Mumbai-400064.	Vs.	A.C.I.T.-13(3)(2), Room No. 229, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai- 400020.
PAN/GIR No. AAACI 2628 B		
(Appellant)	..	(Respondent)

Assessee by	Shri M.P. Lohia (AR)
Revenue by	Shri Udal Raj Singh (DR)
Date of Hearing	06/01/2020
Date of Pronouncement	08/ 01/2020

आदेश / ORDER

PER: R.C. SHARMA, A.M.

These are the appeals filed by the assessee against the separate directions of the Dispute Resolution Panel-2, Mumbai (In short, the DRP) dated 18/11/2016 and 20/03/2017 for the A.Y. 2012-13 and 2013-14 respectively which were given effect by the order passed U/s 143(3)/144C(5) of the Income Tax Act, 1961 (in short, the Act).

2. At the outset, the Id AR of the assessee placed on record order of the Tribunal in assessee's own case for the A.Y. 2009-10 in ITA No. 487/Mum/2014 wherein main issue with regard to charging of notional interest pertaining to outstanding balance of receivables from AEs of

the assessee was decided in favour of assessee vide order dated 08/07/2015.

3. We have considered the rival contentions and found that one of the common issue in both the years pertain to charging of notional interest on the outstanding balance of receivables of the assessee from its AEs. From the record we found that the TPO has computed adjustment on the interest that should have been charged to the AE on receivables that remained unpaid even the period of 90 days. The TPO has applied LIBOR of 4.8% in making the adjustment which was confirmed by the DRP. Grounds No. 1 to 10 in the A.Y. 2012-13 pertains to the said addition.

4. It was argued by the Id AR of the assessee that the issue under consideration is covered by the order of the Tribunal in assessee's own case for the A.Y. 2009-10. He has further contended that no adjustment was made on account of notional interest on AE receivable for AY 2010-11 and AY 2011-12. Copy of the TPO order are enclosed at pages 237 to 244 and page 245 of the paper book respectively. As per the Id AR, the interest is already factored in while pricing the contracts undertaken with AEs. Further, since the assessee's margin from its AE transactions is higher vis a vis non-AEs as well as single year working

capital adjustment margin of independent comparables, interest element for delayed payment is subsumed in higher mark up charged.

5. On the other hand, the Id DR has relied on the orders of the lower authorities.

6. We have gone through the orders of the authorities below as well as the order of the Tribunal in assessee's own case dated 08/07/2015 for the A.Y. 2009-10 wherein the Tribunal have given certain directions to the TPO with regard to interest to be charged on outstanding receivables. The precise observation of the Tribunal was as under:

"7. We have considered rival contentions, carefully gone through the orders of the authorities below. We have also deliberated on the judicial pronouncements cited at bar by Id. AR and Id. DR in the factual matrix of instant case. From the record we found that the assessee company had provided EPC services to its AEs, and as the concerned AEs were going through financial difficulties certain payments by the AEs to the assessee company were delayed beyond the normal credit period. Similarly, the assessee company had incurred certain expenses on behalf of its AEs. These were recovered from the AEs. Some such expenses were recovered beyond the normal credit period. The TPO, on these facts, computed the interest chargeable by adopting the SBI PLR rate of 12.25% as the bench mark rate for delay in receipt of export receivables beyond the normal credit period of 60 days and the similar interest was charged on delayed recovery of expenses. Thus, a total adjustment of Rs.10,36,49,646/- was proposed by the TPO and incorporated in the assessment order.

8. *From the record we found that assessee has not charged interest in respect of services rendered to non-AEs, payment of which was received beyond normal credit period of 60days. We also found that assessee was having advances from AE. Charging of interest by TPO in respect of amount received beyond 60 days is correct as per the amendment brought in by the Finance Act, 2012 in Section 92B(2) retrospectively. However, we found that the AE was having advances with the assessee, therefore, while computing interest on realized amount beyond 60 days, the AO should reduce the proportionate advance relating to the transaction under consideration. We also found that the TPO has directed for charging of interest even beyond the end of the financial year i.e. 31.3.2009. Accordingly, we direct the AO to charge interest only upto the end of the financial year insofar as Section 92(1) of the Act specifically provides to tax not income arising from any international transaction which is to be computed with regard to the arms length price for the year under consideration. Accordingly, we restore the matter back to the file of AO to recompute the interest in terms of the above direction.*
9. *It was also brought to our notice that while fixing the sale price the assessee has already considered the delay, if any, in recovery of the price. Accordingly, while recomputing the interest, the AO should also take into account the price fixed by the assessee with respect to the transaction entered with non-AE vis-à-vis AE and if he finds that price so charged has already taken care of the delayed period of payment, the same should be taken into account while computing the interest chargeable.*
10. *We also found that operating margin earned by the assessee on provision of EPC services (17.03% OP/ OC) from its AEs transactions is higher than the margin earned on its non-AE transactions. Since the transactions are intrinsically linked and the assessee under the TNMM*

fits within the arm's length, the assessee should be given due credit for the same while computing chargeable interest for delayed payment.

11. *The Mumbai Tribunal in the case of Goldstar Jewellery Limited Vs JCIT (ITA No 6570/Mum/2012) held that since sale price of the product or service was always influenced by the credit period allowed by the seller, the transaction of sale to the AE and credit period allowed in realization of sale proceeds are closely linked and the price determined for such sale is after consideration of the credit period provided by the seller. Further, it was also held that for the purpose of determining the ALP of sale transaction, the transaction of excess credit period provided by the seller to the AE is required to be aggregated with the sale transaction by the seller to the AE and cannot be benchmarked separately. The Delhi Tribunal has pronounced a ruling dated 31 March 2015, in the case of Kusum Hea care Pvt Ltd (ITA No 6814/Del/2014) (Delhi Tribunal), on similar facts. The Tribunal therein followed the ratio laid down by Sony Ericsson (supra) and held as under:*

"(14) the differential impact of the working capital of the assessee vis-a-vis its comparables has already been factored in the pricing! profitability of the assessee and therefore, any further adjustment to the margins of the assessee on the pretext of outstanding receivables is unwarranted and wholly unjustified.

(17) ... it is clear that assessee had earned significantly higher margin than the comparable companies (which have been accepted by the TPO) which more than compensates for the credit period extended to the AEs. Thus, the approach by the assessee of aggregating the international transactions pertaining to sale of goods to AE and receivables arising from such transactions which is undoubtedly inextricably connected is in accordance with established transfer pricing principles ... "

12. *The addition on account of interest should be computed only till the end of financial year (i.e. till 31 March 2009 and not till the date of passing of transfer pricing order (i.e. 28 January 2013)). It is trite law that income tax has to be computed with reference to previous year and as per Section 5 of the Act explains the scope of total income to be considered earned by any person during the previous year. In the present case, the TPO has made addition of notional interest till the date of passing of order (i.e. 28 January 2013) which is incorrect and against the basic principle of taxation as laid down by Income Tax Act. Hence, interest adjustment on delayed accounts receivables, if any, should be computed only upto 31 March 2009.*

13. *We also found that during the year under consideration, the assessee has received advances from AE's for the purpose of export, therefore computation of interest, if any, on delayed recovery of export receivables should be after reducing the advances received from AE's for the purpose of export. Reliance is placed on the Mumbai Tribunal ruling in the case of Boston Scientific International BV India (40 SOT 11) (2010) wherein it has been held that interest income on accounts receivables of an assessee from its AE should be examined after considering the outstanding payables from that AE.*

14. *From the record, we found that so called delay repatriation from foreign AE's, TPO/ AO, while working out deemed notional interest has considered interest rate of 12.25% p.a. (SBI PLR). As per our considered view the notional interest has to be worked out for so called amount receivable from AE, by applying LIBOR interest rate for the purpose of computation of transfer pricing adjustment, if any. In this regard, reliance is placed on the following decisions, wherein the Hon'ble Tribunals has upheld use of LIBOR for the purpose of benchmarking loan/advance given to foreign AE's:*

- i. *Everest Kanto Cylinder Ltd Vs ACIT (L TU) (ITA No 7073/Mum/2012) (Mumbai Tribunal)*
 - ii. *M/s PMP Auto Components P. Ltd, (ITA NO.1484/Mum/2014) dated 22 August 2014*
 - iii. *Hinduja Global Solutions Ltd Vs ACIT (145 ITD 361) (2013) (Mumbai Tribunal)*
 - iv. *Tata Autocomp Systems Ltd Vs ACIT (52 SOT 48) (2012) (Mumbai Tribunal)*
 - v. *Tata Autocomp Systems Ltd Vs ACIT (ITA No 1320 of 2012) (Approved by Bombay High Court)*
 - vi. *Four Soft Ltd Vs DCIT (142 TT J 358) (2011) (Hyderabad Tribunal)*
 - vii. *Everest Kanto Cylinder Ltd Vs ACIT (L TU) (ITA No 550/Mum/2014) (Mumbai Tribunal)*
15. *In view of above discussion, computation of interest is restored back to the file of AO for recomputing the interest on delayed payment of receivables, keeping in view our above observation."*

7. From the record we observe that after the matter was restored back by the Tribunal to the file of the A.O., the A.O. has passed order dated 29/09/2016 wherein no adjustment was made in terms of the direction of the Tribunal. It was also pointed out by the Id AR that the department has not gone in further appeal against the above findings of the Tribunal in its order dated 08/07/2015 and the same has been finalized now.

8. We found that the facts and circumstances in both the years under consideration i.e. A.Y. 2012-13 and 2013-14 are same wherein

under similar facts, the addition was made by the A.O. on account of interest pertaining to outstanding receivables from AEs. In all fairness, we restore the matter back to the file of the TPO/AO for deciding the issue afresh in terms of the direction given by the Tribunal in its order dated 08/07/2015 in so far as facts and circumstances for the A.Y. 2009-10 are pari materia to the facts and circumstances which are before the lower authorities for the A.Y. 2012-13 and 2013-14.

9. Ground No. 11 of the appeal for the A.Y. 2012-13 pertains to incorrect computation of the income tax payable by the assessee and utilization and carry forward of MAT credit by the assessee.

10. It was stated by the Id AR that the MAT credit was not correctly given by the A.O., therefore, in all fairness, we restore the matter back to the file of the TPO/AO and direct to reverify the carry forward and MAT credit. We direct accordingly.

11. Ground No. 12 of the appeal is with regard to non grant of full TDS/TCS credit and non consideration of TDS and advance tax payable by erstwhile subsidiary. It is just a matter of verification, therefore, in all fairness, we restore the matter back to the file of the TPO/AO and direct to verify actual amount of TCS credit which is alleged to be Rs. 15,94,56,254/- in place of credit give by the A.O. of Rs. 15,74,61,198/-. It appears that the TDS credit and advance tax payable by erstwhile

subsidiary of the assessee amount go Rs. 1,72,79,041/- was not given which was merged with the assessee w.e.f. 01/04/2011. It was also pointed out by the Id AR that the A.O. has not given credit of advance tax paid by the erstwhile subsidiary of the assessee which was merged with the assessee w.e.f. 01/04/2011. We direct the A.O. to verify the factual position of TDS and advance tax and to give proper credit as per law. We direct accordingly.

12. Ground No. 15 of the appeal for the A.Y. 2012-13 is with regard to incorrect computation of interest U/s 234B/234C due to non-credits/short credits granted to the assessee. We direct the A.O. to verify the computation of interest U/s 234B of the Act. With regard to interest U/s 234C, we direct the A.O. to charge the same on returned income and not on the assessed income.

13. In the appeal for the A.Y. 2013-14, similar grounds have been taken.

14. Ground No. 1 is general in nature and does not require any adjudication.

15. Grounds No. 2 to 11 of the appeal are with regard to notional interest. As observed in the A.Y. 2012-13, we restore the matter back

to the file of the A.O. with the same direction for deciding as per the order of the Tribunal for the A.Y. 2009-10.

16. Ground No. 12 of the appeal is with regard to computation of interest U/s 244A of the Act. It was argued by the Id AR that on perusal of the refund order and income tax computation sheet, it is observed that the AO has granted refund of Rs. 10,41,05,950/- alongwith interest U/s 244A of Rs. 1,62,52,824/-. He further submitted that the assessee has received the refund cheque on 7th July 2017. Accordingly, the assessee was entitled to interest till July 2017 (i.e. for 52 months i.e. from April 2013 to July 2017). However, the A.O. has granted interest u/s 244A of the Act only for 37 months.

17. On the other hand, the Id DR has relied on the orders of the authorities below.

18. We have considered the rival contentions and carefully gone through the orders of the authorities below. As per the provisions of Section 244A of the Act, interest on refund is to be allowed @ 0.50% per month from the 1st day of April of the assessment year to be date on which the refund is granted. Accordingly, the assessee is entitled for interest u/s 244A of the Act up to the date on which the refund is granted. The A.O. is directed to verify the correctness of interest and grant necessary refund as per law.

19. Ground No. 13 of the appeal is with regard to adjusting book profit U/s 115JB of the Act by adding the disallowance on account of depreciation on office premises.

20. During the year under consideration, the AO has made disallowance of tax depreciation of Rs. 4,29,332/- on the cost of the office premises. Further, the A.O. has also made this disallowance to the book profits as per Section 115JB of the Act. The contention of the assessee was that for the purposes of computation of book profits as per explanation 1 to Section 115JB(2) of the Act, the profit/loss in the profit and loss account is increased by amount of depreciation as per the books and shall be reduced by amount of depreciation debited to the books (excluding depreciation on account of revaluation of assets). Accordingly, depreciation as computed under the Income Tax Act, 1961 is not relevant for book profit computation.

21. In this regard we observe that the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. Vs CIT (2002) 255 ITR 273 (SC) have observed that while computing income U/s 115J, the A.O. has only power of examining whether books of account are certified by authorities under Companies Act as having been properly maintained in accordance with Companies Act and thereafter, he has limited power of making additions and reductions as provided for in Explanation to said

Section. It was further held that the A.O. does not have jurisdiction to go behind net profit shown in the P&L account except to extent provided in Explanation to Section 115J of the Act. Respectfully following the decision of the Hon'ble Supreme Court, we do not find any justification in the order of the TPO/A.O. for making addition of the depreciation while computing book profit.

22. In the result, both the appeals of the assessee are allowed in part in terms indicated hereinabove.

Order pronounced in the open court on 08th January, 2020.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 08/ 01/2020
*Ranjan

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai