आयकर अपीलीय अधीकरण, न्यायपीठ – "सि" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**C**" KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.33/Kol/2018 & 1090/Kol/2017 Assessment Years : 2010-11 & 2011-12

Russell Credit Ltd., 37, J.L. Nhru Road, Kolkata-700 071 [**PAN No.AABCR 3494 H**]	**V/s**.	DCIT, Cricle-8/Addl.CIT Range-8,Aayakar Bhawan, P-7, Chowringhee Square, Kolkakta-700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri J.P. Khaitan, Senior Advocate & Shri Bikash Chandra, AR
राजस्व की ओर से/By Revenue	Shri Sanjay Paul, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	04-11-2019
घोषणा की तारीख/Date of Pronouncement	17-01-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

These two assessee's appeal(s) for assessment year(s) 2010-11 and 2011-12 arise against the Commissioner of Income Tax (Appeals)-22 Kolkata's separate orders dated 30.10.2017 & 23.03.2017 passed in case Nos.45/CIT(A)-22/Kol/10-11/17-18 & 54/CIT(A)-22/Kol/11-12/16-17; respectively, involving proceedings u/s 143(3) of the Income Tax Act, 1961; in short to as 'the Act'.

Heard both the parties. Case file(s) perused.

We notice at the outset that all the issues raised in these two appeal(s) are identical. We accordingly deem it appropriate to adjudicate assessee's instant appeal(s) together for the sake of convenience and brevity.

2. The assessee's first and foremost identical substantive ground in its two appeal(s) challenges correctness of learned lower authorities' action making transfer pricing adjustment of ₹8,19,134/- and ₹6,27,062/-; (**assessment year-wise**) respectively, regarding its interest free loans of AUD 5,00,000 provided to the overseas associate enterprise M/s Technico Pty Ltd. Australia since financial year 2007-08. Both the learned representatives are fair enough at the outset that this first issue involved in both these years is no more *res integra* since the tribunal's order in assessment year 2009-10 involving Revenue and assessee's cross-appeals **ITA Nos.629 and 674/Kol/2013** decided on 11.04.2018 has deleted identical adjustment under the very head as follows:-

> "3. First of all we will decide the transfer pricing issue of assessee's appeal. Brief facts of the issue are that the assessee company during the AY 2008-09 had given an interest free loan of AUD 5,00,000 to its associated enterprise (AE) Technico Pty. Ltd., Australia (TPL). For the purpose of determining the arm's length nature of the transaction, the assessee adopted CUP method and took the arm's length rate of interest @ 8.91% as was prevailing in Australia during the year 2008. The assessee thus computed the arm's length interest of AUD 44,550 which was converted into Indian currency i.e. Rs.15,75,444/- using the exchange rate as on 31.03.2009. During the assessment proceedings, the assessee filed before the AO copy of the loan agreement and written submission towards justification of arm's length interest computed by the assessee. But the AO did not agree with the interest rate of 8.91% adopted by the assessee and according to him, 10% interest rate would be reasonable and held as under:
>
> > *"4.3. In the light of the above discussion, it is held that the interest rate of 8.91% adopted by the assessee cannot be the arm's length interest rate in an uncontrolled environment and the same is accordingly rejected. Taking into account the totality of facts of the case, it is deemed reasonable to take the arm's length interest rate at 10% and thus the amount of interest payable is worked out at 5,00,000 x 10% x Rs.35.3635 = Rs.17,68,175/-. Since the assessee has already offered arm's length adjustment of Rs.15,75,444/-, the balance of Rs.1,92,731/- is now added back as further transfer pricing adjustment."*

On appeal, the Ld. CIT(A) while dismissing the assessee's appeal has held as under:

> *"I have carefully considered the submission and argument put forth on behalf of the appellant, perused the facts of the case including the observation of the AO, the various clauses in the*

Loan Agreement and other materials brought on record. I do not find any merit in the argument advanced on behalf of the appellant simply because as to why the appellant itself offered the notional interest @ 8.91 % on the amount of borrowed fund given to the subsidiary company even though no interest is receivable as per the normal clause of the Loan Agreement in normal situation and the interest is chargeable only in exceptional circumstances, as claimed by the appellant. On the other hand, the action of the AO is found to be justified as he has calculated the notional interest on the basis of the rate mentioned in the penal clause of the Loan Agreement. Under this circumstances and perusing the facts of the case, I am of the view that the action of the AO in computing the chargeable interest @ 10% and thereby making the addition of Rs. 1,92,731/- is justified and hence the same is hereby upheld. Thus, this ground of appeal is dismissed."

Aggrieved, the assessee is in appeal before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee has granted an interest free loan of AUD 5,00,000 to its AE Technico Pty. Ltd. during the FY ended on 31.03.2008. For the purpose of determining the arm's length nature of the transaction, the assessee considered the same from the perspective of the TPL. According to the assessee, the objective to do so was to determine the rate of interest at which the same amount could have been borrowed by the AE which is an Australian company from an Australian Bank at the same point of time. The arms length rate of interest was determined using the average rate of interest which was the borrowing rate applicable to corporate's which prevailed in Australia during the current year 2008. The assessee extracted the information from the International Monetary Fund (IMF) data base and the arm's length rate of interest for the current year 2008 mentioned was 8.91% and the assessee computed the amount of arm's length interest denominated in AUD by applying the arm's length interest rate to the amount of loan. Thereafter, the assessee added the arm's length value of interest to its income and offered it to tax thereon. The assessee calculated amount of interest as per AUD came to AUD 44,550 which was converted into Indian currency using the exchange rate applicable as on 31.03.2009 i.e. AUD is equal to Rs.35.3635 which was not acceptable to the AO though the AO agreed to the CUP method. According to AO, the loan agreement vide clauses 3 and 5 reveals that as soon as the AE ceases to be a wholly owned subsidiary of the assessee interest shall be charged @ 1% over the prevailing bank rate and the borrower shall pay the lender interest at 10% per annum or 1% over the prevailing bank rate whichever is higher for the period of delay beyond the due date i.e. 24.08.2010. According to AO, the expression bank rate noted in the agreement does not expressly specifies whether it refers to the bank rate prevailing in India or Australia. Therefore, he has adopted the bank rates in India and was of the opinion that 10%

interest need to be computed for the amount given to the AE and thereafter, made an addition of Rs.1,92,731/-. We note that the clauses referred to i.e. 3 and 5 in the agreement is only in cases of default of non-payment which will arise only not before the due date i.e. on 24.08.2010 and has got no relevance in the assessment year under consideration. On perusal of the Promissory Note given by the borrower AE which is placed at page 34 of the paper book reveals as under:

PROMSSORY NOTE

AUD 500,000

In consideration of the loan of AUD 500,000 (Australian Dollars Five hundred Thousand only) advanced to us by Russell Credit Limited, a company incorporated under the Companies Act 1956 and having its registered office at Virginia House, 37 Chowringhee, Kolkata-700 071 in terms of the loan agreement dated 24th August, 2007, we Technico Pty Limited ACN 063 602 782, a company incorporated under the laws of Australia and having its registered office at C/- PKF, Level 10, Margaret Street, Sydney NSW 2000, Australia, promise to repay to Russell Credit Limited on or before 22nd August, 2010 the said loan amount of AUD 500,000 together with interest, if any payable, under the aforesaid loan agreement dated 24th August, 2007.

Sd/-
David Charles McDonald
Managing Director & Company Secretary
Technico Pty Limited CAN 063 602 782"

5. From a perusal of the aforesaid Promissory Note reveals that the loan amount has been given in AUD 500,000 by the assessee and in terms of the loan agreement dated 24.08.2007 and the AE Technico Pty. Ltd. a company incorporated under the law of Australia promised to repay the assessee company on or before 22nd August, 2010 the said loan amount of AUD 500,000 together with interest which clearly reveals that the assessee has given loan of AUD 500,000 to Technico Pty. Ltd. and the said loan amount of AUD 500,000 together with interest, if any need to be paid back to the assessee in AUD 500,000. So, the loan amount given and have to be repaid is in AUD 500,000. We note that the assessee for the purpose of determining the arm's length nature of the transaction has taken the rate of interest of the same amount if it had been borrowed by the Australian company from an Australian bank at the said point of time and has adopted interest rate of 8.91%. The issue which is before us as to the rate of interest in such a scenario is no longer res integra. The Hon'ble Delhi High Court in CIT Vs. Cotton Naturals (I) (P) Ltd. (2015) 55 taxmann.com 523 (Del) at para 39 and 40 has answered this question as under:

"39. The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United

States should be applied, for the borrower was a resident and an assessee of the said country, in our considered opinion, must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable. The currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. Klaus Vogel on Double Taxation Conventions (Third Edition) under Article 11 in paragraph 115 states as under:- —

"The existing differences in the levels of interest rates do not depend on any place but rather on the currency concerned. The rate of interest on a US $ loan is the same in New York as in Frankfurt-at least within the framework of free capital markets (subject to the arbitrage). In regard to the question as to whether http://www.itatonline.org ITA No. 233/2014 Page 29 of 34 the level of interest rates in the lender's State or that in the borrower's is decisive, therefore, primarily depends on the currency agreed upon (BFH BSt.B1. II 725 (1994), re. 1 § AStG). A differentiation between debt-claims or debts in national currency and those in foreign currency is normally no use, because, for instance, a US $ loan advanced by a US lender is to him a debt-claim in national currency whereas to a German borrower it is a foreign currency debt (the situation being different, however, when an agreement in a third currency is involved). Moreover, a difference in interest levels frequently reflects no more than different expectations in regard to rates of exchange, rates of inflation and other aspects. Hence, the choice of one particular currency can be just as reasonable as that of another, despite different levels of interest rates. An economic criterion for one party may be that it wants, if possible, to avoid exchange risks (for example, by matching the currency of the loan with that of the funds anticipated to be available for debt service), such as taking out a US $ loan if the proceeds in US $ are expected to become available (say from exports). If an exchange risk were to prove incapable of being avoided (say, by forward rate fixing), the appropriate course would be to attribute it to the economically more powerful party. But, exactly where there is no special relationship', this will frequently not be possible in dealings with such party. Consequently, it will normally not be possible to review and adjust the interest rate to the extent that such rate depends on the

> *currency involved. Moreover, it is questionable whether such an adjustment could be based on Art. 11 (6). For Art. 11(6), at least its wording, allows the authorities to _eliminate hypothetically' the special relationships only in regard to the level of interest rates and not in regard to other circumstances, such as the choice of currency. If such other circumstances were to be included in the review, there would be doubts as to where the line should be drawn, i.e., whether an examination should be allowed of the question of whether in the absence of a special relationship (i.e., financial power, strong position in the market, etc., of the foreign corporate group member) the borrowing company might not have completely refrained from making investment for which it borrowed the money."*
>
> *40. The aforesaid methodology recommended by Klaus Vogel appeals to us and appears to be the reasonable and proper parameter to decide upon the question of applicability of interest rate. The loan in question was given in foreign currency i.e. US $ and was also to be repaid in the same currency i.e. US $. Interest rate applicable to loans granted and to be returned in Indian Rupees would not be the relevant comparable. Even in India, interest rates on FCNR accounts maintained in foreign currency are different and dependent upon the currency in question. They are not dependent upon the PLR rate, which is applicable to loans in Indian Rupee. The PLR rate, therefore, would not be applicable and should not be applied for determining the interest rate in the extant case. PLR rates are not applicable to loans to be re-paid in foreign currency. The interest rates vary and are thus dependent on the foreign currency in which the repayment is to be made. The same principle should apply."*
>
> Likewise, the Hon'ble High Court of Bombay in CIT Vs. the Great Eastern Shipping Co. Ltd. in ITA No. 1455 of 2014 dated 28.06.2017 has upheld the action of the Tribunal wherein it was held that arm's length price in the case of loans advanced to AE would be determined on the basis of rate of interest being charged in the country where the loan is received/consumed. In the light of the aforesaid decisions of the Hon'ble Delhi High Court as well as Hon'ble Bombay High Court, the action of the assessee in adopting the bank rate prevailing in Australia is correct and the AO erred in adopting the Indian bank rate. The loan amount was given in Australian currency and as per the promissory note the AE has to return the amount in Australian Dollar. Therefore, applying the ratio laid by the Hon'ble High Courts discussed above, we hold that there was no necessity of any arm's length adjustment in this case and, therefore, we direct the deletion of the addition made on this count. Ground of appeal of assessee in respect to Transfer Pricing raised by it is **allowed**."

We adopt the above detailed reasoning mutatis mutandis to hold that learned lower authorities have erred in going by the penal interest stipulation in the loan agreement than the corresponding interest benchmark in the overseas

market. We go by judicial consistency and delete the impugned identical transfer pricing adjustment(s) of ₹8,19,134/- & ₹6,27,062/- under challenge.

3. Next comes the assessee's second substantive grievance challenging u/s. 14A r.w.s. Rule 8D disallowance(s) of ₹98,47,788/- and ₹34,79,136/-; assessment year-wise; respectively. The assessee had derived exempt income from dividends and mutual funds amounting to ₹186,100,400/- and ₹167,439,252/-; assessment year-wise respectively. It had made *suo motu* corresponding disallowances of ₹31,392/- and ₹1,65,198/-. The Assessing Officer invoked Rule 8D(2)(iii) administrative expenditure disallowance of ₹120,31,315/- and ₹120,99,174/-; respectively excluding the above *suo motu* figure(s). The CIT(A)'s identical detailed discussion directs the Assessing Officer to exclude the assessee's strategic investments for the proposed of computing the impugned disallowances. He further observes that the assessee's investments not yielding any exempt income have also to be excluded in consequential computations.

4. It emerges during the course that very issue had arisen between the parties in assessment year 2009-10 as well (supra) which stood restored back to the Assessing Officer for afresh computation after taking note of hon'ble apex court's judgment.

5. Learned senior counsel's only contention during the course of hearing is that although the CIT(A) has rightly granted relief to the assessee on the foregoing twin counts (supra) which have attained finality since the department has not come in appeal, it needs to be emphasized that we are dealing with an indirect head of expenditure which has to be apportioned between that incurred for business purposes and in deriving exempt income as per hon'ble apex court's above stated decision. His further case is that going by the very apportionment formula, this tribunal's yet another co-ordinate bench's decision in *Maruti Traders & Investors vs. ACIT, Circle-31,*

Kolkata in **ITA No.846/Kol/2017** & **ITA No.637/Kol/2018** for assessment year 2013-14 (***after insertion of Rule 8D from assessment year 2008-09 onwards***) has held that proportionate allocation of exempt incomes / total turnover deserves to be adopted for the purpose of computing administrative expenditure under the Rule 8D(2)(iii). The Revenue's case on the other hand is that the Assessing Officer had rightly invoked the impugned disallowance going by the statutory formula and also that the very issue in assessment year 2009-10 is pending yet taxpayer.

6. We have given our thoughtful consideration and foregoing rival pleadings. Suffice to say, it has already come on record that the impugned sec. 14A r.w.s. 8D disallowance has to be computed going by apportionment formula by determining the expenditure incurred for deriving business as well as exempt income. We therefore deem it appropriate to restore the instant administrative expenditure disallowance issue back to the Assessing Officer for computation of administrative expenditure disallowance going by the proportionate formula as per this tribunal's co-ordinate bench's decision (supra). We reiterate that we are dealing with an indirect head of expenditure which cannot be strictly apportioned between regular business activities and for deriving exempt income. We accordingly accept assessee's instant identical grievance raised in both assessment year(s) for statistical purposes in above terms.

7. Lastly comes the assessee's identical additional ground seeking to allow education cess and secondary higher education cess u/s 40(a)(ii) r.w.s. 37(1) of the Act. It is vehemently contended at the Revenue's behest that the additional ground does not deserve to be admitted at this belated stage. And more so when the relevant facts do not form part of the records. We find no merit in Revenue's instant technical argument. The fact remain hon'ble apex court's landmark decision in *National Thermal Power Corporation. Ltd. vs. Commissioner of Income-tax* (1998) 229 ITR 383 (SC) considered in tribunal's special bench order in All Cargo Global Logistics Ltd. vs. DCIT (2012) 137 ITD 26 (Mum) holds that we can very well entertain such an additional ground in

order to determine correct tax liability of a taxpayer provided all the relevant facts are already on record. Going by the very analogy, we admit the assessee's instant additional ground. We further note that the assessee's corresponding sums of education and higher education cess involved assessment year-wise figures of ₹18,85,062 and ₹6,67,018/-; respectively. Hon'ble Rajasthan high court's judgment in **D.B. Tax Appeal No. 52 of 2018** *Chembal Fertilizers & Chemicals Ltd.* holds that the relevant statutory provision to this effect as well as the CBDT's Circular issued way back on 18.05.1967 do not include "**Cess**". Learned co-ordinate bench's decision in ITC Ltd. case **ITA No.685/Kol/2014** dated 27.11.2018 also decided the very issue in assessee's favour. We therefore decline the Revenue's arguments supporting the impugned disallowance and direct the Assessing Officer to grant necessary relief to the assessee. This identical third substantive grievance raised in both appeal(s) is accepted.

8. These two assessee's appeal(s) are partly in above terms.

Order pronounced in the open court 17/01/2020

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(A.L.Saini)	(S.S.Godara)
(Accountant Member)	(Judicial Member)

Kolkata,
*Dkp
दिनांकः- 17/01/2020 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Russell Credit Ltd., 37,J.L. Nehru Road, Kolkata-71
2. राजस्व/Revenue-Addl-CIT, Range-8/DCIT Cir-8, P-7, Chowringhee Sq. Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

सहायक पंजीकार
आयकर अपीलीय अधिकरण, **कोलकाता** ।