

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH '1-1', NEW DELHI  
BEFORE SH.AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SH. PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.4107/Del/2016  
Assessment Year: 2010-11

M/s. Bry Air (Asia) Pvt. Ltd, 20, Rajpur Road, Delhi PAN: AAACB4050A	Vs	DCIT, Circle-5(1), New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Shri Shailender Kr. Bajaj, CA
Respondent by	Shri Dheeraj Jain, Sr. DR

Date of hearing:	09/03/2021
Date of Pronouncement:	08/06/2021

ORDER

PER PRASHANT MAHARISHI, AM:

1. This appeal is filed by the assessee against the order of the ld CIT (A)-44, New Delhi dated 02.02.2016 for Assessment Year 2010-11 wherein, the appeal filed by the assessee against the order of this ld Dy. CIT, Circle-3(1), New Delhi was partly allowed. Only issue involved in this appeal is regarding benchmarking of interest receivable on loan given by the assessee to the subsidiary company in Germany.
2. The assessee has raised the following grounds of appeal in ITA No. 4107/Del/2016 for the Assessment Year 2010-11:-
  - “1.a That the Ld. CIT(A) has failed to appreciate that appellant had charged interest rate of 6% p.a. on loan given to Ahlberg +Hennrich GmbH Germany (A+H) ,its German subsidiary, which was higher than the interest rate prevalent in the country of borrower and the adjustment by applying 700bps above the LIBOR is unjustified.
  - 1.b That the Ld. CIT(A) has erred both in facts and in law by arbitrarily applying interest rate of 700 bps above the LIBOR on loan given in

*foreign currency by the Appellant Company to its German wholly owned subsidiary.*

*1.c That order passed by Ld. CIT(A) sustaining the adjustment under section 92CA is bad in law and against the facts of the case.”*

3. Brief facts of the case shows that the assessee is a solution provider for environmental control with specialization in humidity control, dehumidification, drying, storage, preservation, air and gas purification and plastic auxiliaries. The company manufactures dehumidification, air and gas purification systems, seeds dryers and complete environmental control system.
4. The assessee filed its return of income declaring income of Rs. 23,75,61,256/-. The assessee has entered into certain international transactions and therefore, the matter was referred to the TPO for determination of Arm's Length Price of international transaction entered into.
5. The ld TPO passed order u/s 92CA(3) on 16.09.2013 and made an addition of Rs. 43,79,341/- on account of adjustment of ALP wherein he made adjustment on account of outstanding receivables and also on interest charged on loan to subsidiary. The draft assessment order was passed. The assessee did not file any objection before the ld DRP and therefore, assessment order u/s 143(3) read with section 144C of the Income Tax Act, 1961 was passed on 26.05.2014 determining total income of Rs. 23,75,61,256/-.
6. The assessee preferred an appeal before the ld CIT (A) who passed an order on 02.02.2016 allowing the appeal of the assessee. The ld CIT(A) deleted the adjustment of Rs. 38,05,170/- being interest on outstanding receivable and granted certain relief with respect to adjustment in arms length price of interest on unsecured loan to a subsidiary company in Germany but he retained that interest is at ALP at LIBOR +700 BPS.. Therefore, assessee aggrieved with the order of the ld CIT (A) and challenging the part

confirmation of addition on account of ALP of interest on unsecured loan to its subsidiaries.

7. The facts shows that the assessee has advanced in foreign currency loan to its German subsidiary of Rs. 53,96,360/- and has received interest of Rs. 3,87,954/- where the effective rate of interest is 6%. The assessee benchmarked the above transaction using CUP method. In its TP study, report assessee took the rates of interest prevalent in Germany for long term and short-term loans, which are far less than interest @ 6 %, charged by the assessee and stated it to be at Arm's Length. The ld TPO after considering the reply of the assessee took State Bank of India prime lending rate for different period at average value of 11.88%. He also applied 300 basis point as per safe harbor rules for various sectors and determine the arm's length interest rate @14.88% and computed the arms length price of interest at Rs. 962125/-. SO he proposed an adjustment of Rs. 574171/-.
8. The LD CIT (A) held that SBI rate cannot be applied but LIBOR should be applied on the basis of the decision of the Hon'ble Delhi High Court in case of Cotton Naturals India Pvt Ltd. He therefore, took the Royal Bank of Scotland Libor rate + 3.5%. The ld CIT (A) further made an addition of Mark up to 700 basis points. He therefore, directed the ld AO to compute the arms length interest of the loan to its associated enterprises at LIBOR +7% BPS and recomputed the adjustment. The assessee aggrieved with the same has preferred this appeal.
9. The ld AR vehemently contested the above addition. He referred to page No. 55 of the paper book, which is part of the TP study report and submitted that the rate of interest earned by the assessee should be compared with the rate of interest prevailing in Germany during the April 2009. He further submitted that short term interest rate prevailing in April 2009 was 1.42% and long term interest rate were 3.13% and therefore, the assessee has already charged interest higher than prevailing interest rate in Germany. Therefore, he submitted that, there could not be any

adjustment on account of arm's-length price of the interest charged on loan to subsidiary. He further submitted that as the assessee is a holding company and loan is advanced to a subsidiary company there is no credit risk involved. In view of this, he submitted that no adjustment should be made.

10. The Id DR submitted that risk factors, opportunity cost of market return should be considered and therefore, there has been an addition over and above LIBOR rates should be made. He therefore, submitted that the Id CIT (A) has correctly upheld the applicability of LIBOR +s 700 basis points for benchmarking of the interest.
11. We have carefully considered the rival contentions and perused the orders of the lower authorities. The loan was granted by the assessee to its German subsidiary in FY. 2007-08. during this year there is no change in the terms of the loan. The assessee advanced loan of Euro 96576/- in December 2007 to its subsidiary at the interest rate of 6% PA. The assessee has also submitted that short term interest rate in Germany during April 2009 is 1.72% on short term interest rate ( for three months) and 3.13% ease long term interest rates. The interest rate charged by assessee is 6%, which is higher than the both are the above rates. It is not in dispute that interest rate prevailing in Germany should be applied for benchmarking the interest received by the assessee on a loan given to a German subsidiary company. The above associated enterprises were in fact acquired by the assessee in 2007 to gain access to the German and European markets for its products. Further, the German company is wholly owned subsidiary of the assessee. There is no dispute with respect to the applicability of CUP as the most appropriate method. The assessee has supported the interest rates prevailing in Germany with evidence which were not disputed by the learned transfer pricing officer or the learned CIT – A. The learned CIT – A further increased Libor by 700 base points for covering capital risk. However, honourable Delhi High Court in Commissioner of income tax versus Cotton naturals India private limited

(2015) 276 CTR 445 (Del) has categorically held that the financial position and credit rating of the subsidiaries will be broadly the same as of the holding company. Therefore, there should not be any adjustment on account of capital risk. The honourable court also categorically held that where the transaction was of lending money in foreign currency to its foreign subsidiaries the comparable transactions therefore was of foreign currency lent by unrelated parties. When the learned CIT – A applied the decision of the honourable Delhi High Court for applying the rate of interest where the foreign currency is lent but did not apply this aspect of the decision. Therefore, when the assessee has charged higher interest on loan to subsidiary compared to the prevailing interest rate in the country in which the money is lent, CUP method undisputedly agreed by the parties as the most appropriate method, there is no reason to make any adjustment in the hands of the assessee on this count. Assessee has given comparable instances of the prevailing interest rate for short-term and long-term in Germany, which could not be disputed as a better comparable price. Therefore, we allow ground number 1 of the appeal of the assessee (which is the solitary ground of appeal) and direct the learned transfer-pricing officer/assessing officer to delete the adjustment on account of arm's-length price of interest received on loan given to a wholly owned subsidiary in Germany.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court 08/06/2021

Sd/-  
( AMIT SHUKLA )  
JUDICIAL MEMBER

Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

*AK KEOT*

Date:- 08.06.2021

Copy forwarded to:

1. Appellant
2. Respondent

3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

0Date of dictation	08.06.2021
Date on which the typed draft is placed before the dictating Member	08.06.2021
Date on which the typed draft is placed before the Other member	08.06.2021
Date on which the approved draft comes to the Sr.PS/PS	08.06.2021
Date on which the fair order is placed before the Dictating Member for Pronouncement	08.06.2021
Date on which the fair order comes back to the Sr. PS/ PS	08.06.2021
Date on which the final order is uploaded on the website of ITAT	08.06.2021
Date on which the file goes to the Bench Clerk	08.06.2021
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	