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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA No. 1867/Mum/2022
(Assessment Year: 2017-18)

Nipro Corporation, Japan Nipro India Corporation Pvt. Ltd. Plot No.3-1, MIDC, Kesurdi, Khandala, Tal, Khandala, Satara, Mumbai-412802	Vs.	The Deputy Commissioner of Income tax , International Taxation, Circle 3(3)(1) Room No.1630, 16th Floor, Air India Building, Nariman Point, Mumbai-400 021
(Appellant)		**(Respondent)**

PAN No. AAECN4534F

Assessee by	:	Shri Kishore Phadke, AR
Revenue by	:	Shri Mehul Jain, DR

Date of hearing:	14.09.2023
Date of pronouncement :	11.12.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. ITA No.1867/Mum/2022, is filed by Nipro Corporation, Japan (the assessee / appellant) for A.Y. 2017-18, against the assessment order passed under Section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act), dated 27th May, 2022, by the Dy. Commissioner of income Tax,

International Taxation, 3(3)(1), Mumbai, (the learned Assessing Officer) determining the total income of assessee at ₹6,65,24,700/- against the returned income of ₹2,80,77,580/-, wherein the order passed by the learned Asst. Commissioner of Income Tax, Transfer Pricing, 3(1)(1), Mumbai (the learned Transfer Pricing Officer) under Section 92CA[3] of the Act dated 31st December, 2022, and direction of the learned Dispute Resolution Panel-2, Mumbai, (the learned DRP) dated 29th April, 2022, were incorporated.

02. Assessee is aggrieved and has raised following grounds of appeal:-

> *"Issue no. 1-Debt/Corporate guarantee fees taxed in India*
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> *1. The learned DCIT, Int. Tax-3(3)(1). Mumbai (referred to as AO) erred in law and on facts in taxing alleged arm's length Debt/Corporate guarantee fees of Rs. 2,70,84,735/- in India under "Article 22: Other Income" of the DTAA between India and Japan.*
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> *2. The learned DRP Panel-2, Mumbai (referred to as DRP Panel) and the learned AO erred in law and on facts in not appreciating that as per "Article-7: Business Profits" of DTAA between India and Japan, in the absence of PE in India, debt/corporate guarantee fees charged to Indian AE are taxable only in Japan.*
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> *3. The learned AO erred in law and on facts in taxing alleged arm's length Debt/Corporate guarantee fees of Rs. 2,70,84,735/- in India under "Article 22: Other Income" of the DTAA between India and Japan*

instead of applying "Article 11: Interest" as per specific directions of learned DRP Panel and thereby erred in law in charging tax on debt/corporate guarantee fees @ 40% instead of 10%.

4. The appellant craves leave to add/modify/ delete / amend all / any of the grounds of appeal.

Issue no. 2-TP adjustment in Interest on External Commercial Borrowings

5. The learned DRP Panel and the learned AO erred in law and on facts in deciding the arm's length rate of Interest charged on External Commercial Borrowing (ECB) by appellant to Indian AE @ SBI prime lending rate (PLR) of 14.05% instead of 10.50% as charged by appellant. As such, learned I-T authorities erred in law and on facts in computing arm's length amount of Interest charge on ECB at Rs. 3,36,33,234 instead of Rs. 2,51,35,157 and hence proposing upward adjustment of Rs. 84,98,077.

6. The learned IT authorities erred in law in not appreciating that, if the rate charged by appellant has to be compared, it is has to be done with the rates prevalent in Japan as assessee is a tax-resident of Japan. The learned 1-T authorities failed to understand that, assessee's rate of charging is at arm's length if rightly compared with prevalent rates in Japan.

7. The learned TPO and the learned DRP Panel erred in law in not appreciating that once the international transaction is at arm's length from AE's point of view,

the same transaction cannot be unfavorable from assessee's point of view. The learned TPO erred in law in proposing and the learned DRP Panel erred in law in sustaining the upward adjustment in interest on ECB as it is against the principle of Section 92(3).

8. The appellant craves leave to add/modify/delete/amend all/any of the grounds of appeal. Issue no. 3-Double addition of Interest on ECB.

9. The learned AO erred in law and on facts in making double addition of Interest on ECB amounting to Rs. 28,64,302 in the appellant's assessed income charged by appellant on JPY denominated loan given to AE (Nipro Pharma packaging India Pvt. Ltd.).

10. The appellant craves leave to add/modify/delete/amend all/any of the grounds of appeal."

03. Brief fact of the case is that assessee is a company incorporated in Japan, engaged in the business of manufacturing of medical equipments.

04. For AY 2017-18, Assessee filed its return of income on 29th November, 2017, at a total income of ₹2,80,77,580/-. In the computation of total income all these income is a disclosed under the head income from other sources. The assessee offered income of ₹ 78,126/– being interest received from Nipro India Corporation private limited being income offered for taxation as per the Double Taxation Avoidance Agreement rate at the rate of 10%. Accordingly tax of ₹ 7813/– was determined. Assessee has also received interest of ₹

25,135,155 from Nipro tube glass Ltd and further interest of ₹ 2,864,302/– from Nipro Pharma packaging India private limited. This sum totaling to ₹ 27,999,457/– was offered for taxation at a special rate under section 115A (1) (a) (iiaa) as interest received under section 194LC and taxed accordingly.

05. Return of income was picked up for scrutiny for verification of international transaction in respect of lending or borrowing of money as per transfer pricing risk parameters. The notice under Section 143(2) of the Act was issued on 9 August 2018.

06. As the assessee has entered into an international transaction, reference was made to the learned Transfer Pricing Officer for determination of Arm's Length Price of international transaction.

07. Assessee has entered in to following international transaction of corporate guarantee over and above the interest disclosed in the return of income, which are in dispute :-

Sr No	Transaction	Associated Enterprise	Amount	Most Appropriate Method	Method of benchmarking
1	Corporate Guarantee	Nipro India Corporation Pvt Ltd	Guarantee Fees of 45,16,626/- being 01.10% of Guarantee Amount	Other method	Mizhuo bank rates

2	Corporate Guarantee	Nipro Pharma Packaging Pvt Ltd	Guarantee Fees of Rs 360123/- being 0.10 % of Guarantee Amount		
3	Corporate Guarantee	Nipro Tubes Glass India p Ltd	Guarantee Fees of Rs 540198 being 0.10 % of Guarantee		

08. In form number 3CEB dated 29/11/2017, assessee in serial number 15 with respect to particulars in respect of transaction in the nature of guarantee has disclosed the above three transactions. Corporate guarantee fee is received on the same by the assessee of ₹ 5,416,947/– has not been offered for taxation in the return of income. Thus the assessee has disclosed this as international transaction but the above guarantee fee income is stated to be not chargeable to tax in the hands of the assessee for the reason that it is chargeable to tax as business income and as the assessee does not have any permanent establishment in India, in terms of article 5 and article 7 of the Double Taxation Avoidance Agreement between India and Japan, such income is not taxable in India.

09. The learned Transfer Pricing Officer passed an order under Section 92CA (3) of the Act on 31st December, 2020, making a transfer pricing adjustment of ₹6,75,36,860/- on account of two international transaction.

> [1] Arm's length price of Guarantee fee on corporate guarantee transaction of Rs 54,16,947/- was determined at ₹5,41,69,470/- by adopting CUP method as Most Appropriate method by taking comparables of four banks having Average rate of Guarantee charged by banks determined at 1.15% reducing therefrom 0.15 % as downward adjustments and arriving at Alp rate of 1 % of Guarantee amount.
>
> [2] [a] On interest from ECB Loan the ld TPO determined ALP of interest received of Rs 28,64,302/- at Rs 7733,615/- by taking interest rate of 3.51% against assessee's rate of 1.30% and
>
> [2][b] On Japanese Yen Loan [INR 30 Crs] interest transaction of Rs 25135157/- @ 10.50% was determined @ 14.50% of Rs. 3,3633,234/-. Thus on account of ALP of Interest income adjustments was determined at ₹1,33,67,390/-.

010. Assessee also raised a contention before the learned transfer pricing officer that the guarantee fee charged to the Indian associated enterprises exempt from tax in India as per India Japan double taxation avoidance agreement, the learned TPO held that it would be the jurisdiction of the assessing officer to examine the taxability of the guarantee commission fee.

011. On the basis of above adjustment of Alp of international transaction, learned Assessing Officer issued a show cause notice on 26th April, 2021, holding that corporate guarantee fee should be brought to tax in accordance with Article 22(3) of Indo Japan Double Taxation Avoidance Agreement [DTAA] which provides taxation rights to sources state in case of 'other income'. Further, in view of the corporate guarantee fee accrues and arises in India as fees are linked to Indian Associated Enterprises availing credit facility from banks. Thus according to ld AO Guarantee fee should be taxed as 'other income' as per article 22(3) of DTAA. Assessee submitted that such guarantee fee is classified as 'business income' and therefore, is chargeable to tax as per Article 7 read with Article 5 of the Indo Japan Double Taxation Avoidance Agreement. It was further submitted that Article 22 of the Double Taxation Avoidance Agreement should not apply to the above income. Assessee relied upon the decision of the co-ordinate Bench in case of Johnson Matthey Public Ltd. Company Vs. Deputy Commissioner of Income tax, 88 taxmann.com 127.

012. The learned Assessing Officer held that guarantee is provided in order to avail credit facility from banks in India and therefore, the Guarantee Fees income is chargeable to tax under the head income from other sources taxable at normal rate being 40% plus surcharge.

013. With respect to the second adjustment of interest receivable under the head income from other sources was taxable at the rate of 5% under Section 194LC of the Act read with section 115A of the Act of ₹1,33,67,390/-.

014. The draft assessment order under Section 144C of the Act was passed on 30th July, 2021, at the total income of ₹9,56,14,440/-.

015. Against the above adjustment, assessee preferred the objection before the learned Dispute Resolution Panel, wherein the directions were issued on 29 April 2022.

i. On objection of the assessee to taxability of corporate guarantee fee at the rate of 40%, The learned Dispute Resolution Panel vide paragraph no.5, categorically held that guarantee fee and commission is chargeable to tax as interest under Article 11 of DTAA and not as income from other source as 'other income' under Article 22(3) of the Double Taxation Avoidance Agreement. The Arm's Length Price of the guarantee commission of ₹ 5,41,69,470/-, was also reduced to ₹2,70,84,745/-. In fact, the guarantee commission at 1% determined by the learned Transfer Pricing Officer was reduced to 0.5% against international transaction of 0.10% amounting to ₹54,16,947/-.

ii. With respect to the adjustment of interest receivable it was found that assessee has provided loans to two different Indian entities and rates charged on a loan given to Nipro Pharma Packaging private limited under external commercial borrowings was at 1.30% and to Nipro Tubes / glass India Pvt. Ltd., where the loan was provided in Indian rupees, interest was charged @ of ₹10.50%. The assessee benchmarked the interest received by adopting the Comparable Uncontrolled

Price (CUP) method and stating comparable rates for ECB @ of 3.51% (labor +350) and for rupee loan at State Bank of India prime lending rate at 14.07% as the interest received was below the CUP rates, same were considered at Arm's Length. The learned Transfer Pricing Officer determined the Arm's Length Price of ECB loan at 3.51% and rupee loan at 14.05%. Arm's Length Price of the interest received on ECB loan of ₹28,64,302/-, was determined at ₹77,33,615/-, whereas the interest received of rupee loan of ₹2,31,31,157/- was determined at ₹3,36,33,234/-. Therefore, the interest received of ₹279,99,459/- had Arm's Length Price of ₹4,73,66,849/-. This resulted into upward adjustment of ₹1,33,57,390/-. The learned Dispute Resolution Panel upheld the action of the learned Transfer Pricing Officer with respect to the benchmarking of rupee loan, however, with respect to ECB loan following the decision of the co-ordinate Bench in assessee's own case for A.Y. 2014-15 considered the Arm's Length Price of six months LIBOR +100 basis points. Accordingly, the interest adjustment was reduced to 1,13,62,379/-.

016. Based on the direction of learned Dispute Resolution Panel, the learned Assessing Officer made the adjustment on account of guarantee fee commission of ₹2,70,84,735/-, however, taxed same as under head 'income from other sources' taxable at the rate of 40%. Further, transfer-pricing adjustment on account of interest receivable was also taxed under the head income from other sources at the rate of 5% as provision of Section 194LC of the Act read with section 115A of the Act. The total income

was determined at ₹6,65,24,700/- as per assessment order dated 27 May 2022.

017. Assessee is aggrieved with the same.

018. The learned Authorized Representative on ground no.1 stated that corporate guarantee fee of ₹2,70,84,735/- though directed by the learned Dispute Resolution Panel to be taxed as 'business income' or as an 'interest' but the learned Assessing Officer has taxed it as 'income from other sources' and taxed it @ of 40%. Therefore, the learned Assessing Officer has failed to carry out the direction of the learned Dispute Resolution Panel and therefore, such adjustment is not valid.

019. With respect to ground no.2, it was submitted that the assessee received interest from Indian Associated Enterprise wherein adjustment is made by the learned Transfer Pricing Officer/Dispute Resolution Panel/Assessing Officer, stating that assessee should have received higher interest by the permanent establishment of Japanese company in India. This resulted in Arm's Length price of interest paid by an Indian entity to the PE of a Foreign entity at higher sum. Therefore, such an adjustment will result into the erosion of tax base in India for the reason that Indian entities would claim higher deduction of interest. He relied upon the Pune Bench decision of Cummins Incorporation Vs. ACIT, in ITA No.2181/Pun/2013 and Kolkata Bench decision of At & S Austria Technologie & Systemtechnik Aktiongesellschaft DCIT in ITA No. 95/Kol/2018. Even with respect to the rupee loan, he submits that the State Bank of India PLR rate are ranging from 11% and therefore, the Arm's Length Price determined by the Revenue authorities at the rate of 14.5% is on higher side. Accordingly, the transfer pricing adjustment deserves to be deleted.

020. Ground no.3 of double addition on interest of external commercial borrowing was not pressed.

021. He further submitted that for A.Y. 2014-15 in ITA No.7452/Mum/2018, dated 23 June, 2021, the issue of corporate guarantee was decided by the co-ordinate Bench as per paragraph nos.12-15, wherein the matter is remitted back to the file of the learned Assessing Officer for fresh adjudication as per paragraph no. 15 of the order. He extensively read the paragraph no.15, wherein it has been held that article 22 can be applied only when an amount in question is not taxable under any other specific provision of Double Taxation Avoidance Agreement. He also submitted a chart of the bank rates showing bank group wise average lending rates on fresh rupee loans stating that nowhere 14.50% rate is available . He further referred to the decision of the co-ordinate Bench in 117 taxmann.com 343, wherein it has been held that corporate guarantee fee also not be taxable under Article 11 of Double Taxation Avoidance Agreement. He specifically referred to Para nos.23 and 24 of that decision.

022. The learned CIT Departmental Representative vehemently supported the order of learned lower authorities.

023. We come with respect to the first ground of appeal wherein it has been challenged that (1) that the learned assessing officer has not followed the direction of the learned dispute resolution panel, (2) of the act that guarantee fee is not chargeable to tax in India, (3) the guarantee fee is not an interest, (4) the guarantee fee is also not chargeable to tax under the head income from other sources and, (5) even if the guarantee fee is chargeable to tax in India, the arm’s-length price of the same cannot exceed 0.5% of the guarantee amount, (6) as the issue

is identical to the issue decided by the coordinate bench in assessee's own case for assessment year 2014 – 15 wherein as per paragraph number 15 the issue is remitted to the file of the learned assessing Officer for fresh adjudication. It is a fact that in the return of income they assessee has not offered the guarantee fee income as income of the assessee. The assessee has only received interest income, which has been offered under the head income from other sources in the return of income. It is always the claim of the assessee that guarantee fee income cannot be taxed in India in the hands of the assessee as the same is a business income and in absence of any permanent establishment in terms of article 5 and article 7 of the double taxation avoidance agreement, same cannot be taxed. The learned that assessing officer while passing the draft assessment order the assessee was categorically asked that such a receipt should be brought to tax in view of article 22 (3) of the Double Taxation Avoidance Agreement as the corporate guarantee fee of crude and arises in India as it is linked to the Indian associated enterprises availing credit facility from banks. The assessee has categorically denied that such guarantee fee can only be taxed as business income as per article 7 and in absence of permanent establishment it cannot be taxed. With respect to applicability of article 22 does not apply in view of the guarantee fee being a business income. It was further stated that even if with respect to applicability of article 22 (3), the other income may be taxed in the country in which it arises i.e. where such income is sourced. It was submitted that guarantee fee should be sourced to the location of the guarantor, which is outside India, and therefore it is not taxable in India. The learned AO considered the above submission of the assessee and held that the above income is chargeable to tax in India according to article 22 (3) of the

Double Taxation Avoidance Agreement as the guarantee fee is arising in India. He further referred to the commentary on UN model tax Convention in respect of paragraph number 5 – 6 where in this issue has been discussed. Accordingly the learned AO held that according to the Double Taxation Avoidance Agreement between India and Japan source state of tax has a right to tax any other income not dealt in other specific articles be taxed under article 22 of ' other income', provided that sources state has statutory provision to tax such income in its state. The AO for specifically referred the decision of the Delhi bench of ITAT in 88 taxmann.com 127 to support his findings. Therefore, about the taxability of the income according to the double taxation avoidance agreement, the learned AO held that same is chargeable to tax under article 22 (3) of the act in India. With respect to the head of income under which such income is chargeable to tax as per the income tax act, he taxed the same under the head 'income from other sources'. Thus, this guarantee fee was charged to tax at the rate of 40% tax in the draft assessment order. When assessee objected before the dispute resolution panel, while raising the objection assessee specifically stated that assessee is aggrieved with taxability of the same at the rate of 40% and also its taxability in India, under article 22 (3) of the Double Taxation Avoidance Agreement and also that it should be held as a business income. The learned DRP in paragraph number 5 of the direction at page number 15 – 18 categorically held that the arm's-length price of the guarantee fees is 0.5%. When the DRP was confronted with the identical issue in case of the assessee for assessment year 2014 – 15 wherein the issue of applicability of article 11 and article 22 was the case, the coordinate bench remitted the issue back to the file of the learned assessing officer as the applicability of article 11 was

not examined, the learned DRP categorically held that guarantee fee commission would be falling within article 11 (5) of the act as interest after getting support from definition of interest under that article as well as the definition of interest under section 2 (28A) of the income tax act. Therefore it held that the action of the learned assessing officer to tax the guarantee fee under article 22 (3) is not sustainable. DRP was of the opinion that guarantees fee in question is taxable as interest in India under article 11 of the double taxation avoidance agreement. The arm's-length price was upheld at 0.5% of the guarantee sum. Indian the DRP held that as a matter of utmost precaution, in case, in any future litigation in higher judicial forum, if the guarantee fees commission in question is held to be not interest within meaning of article 11 (5) of the double taxation avoidance agreement, then alternatively the same would need to be taxed under article 22 of the double taxation avoidance agreement. Based on such direction the learned AO in the final Assessment Order considered such direction at paragraph number 4.1 consequently the arm's-length price at 0.5%. Therefore, according to the above direction of the learned dispute resolution panel the guarantee fee income is chargeable to tax as interest under article 11. The learned that AO has charged the above income under article 22 (3) of the act. Further the identical issue arose in the case of the assessee for assessment year 2014 – 15 in ITA number 7452/M/2018 dated 23 June 2021 where the coordinate bench on the same issue has held as under:-

> *" 15. So for as the head of taxability is concerned, we find that the assessing officer has proceeded on the basis that the income is taxable under article 11 is also under article 22 of the Indo Japan tax treaty.*

> *There is, however an inherent contradiction in this approach that the residual under article 22 can be invoked only when the amount in question is not taxable under any other specific provision. Once, therefore, the assessing officer holds the view that the amount is taxable under article 11, for that short reason alone, the jurisdiction to tax under article 22 is ousted. To this extent, uphold the plea of the assessee in principle. It is then contended that there are decisions of the coordinate benches holding that the income in question cannot be treated under article 11, and as there is no PE in India, it cannot be taxed under articles 7 either. This aspect of the matter has however not been examined by any of the authorities below. We, therefore, deemed it fit and proper to remit the matter to the file of the assessing officer for adjudication on this point, and to this limited extent, by way of a speaking order, in accordance with the law dealing with all the contention of the assessee. Ordered, accordingly."*

024. On careful consideration of the decision of learned AO, learned dispute resolution panel and the coordinate bench, we do not find that it gives an answer that whether the income chargeable to tax in the hands of the assessee under which head of income. Whether it is an interest or other income according to the double taxation avoidance agreement, for computation of taxation as per the provisions of the income tax act, it has to fall basically within one of the heads of the income as per section 14 of the act. Issue that precedes it is about the taxability of such sum. It may be the case that income may either be chargeable to tax under article 11 or under article 22, according to section 14 of The Income Tax Act such income is chargeable to tax under the head 'income from other sources". Purpose of Double Taxation Avoidance Agreement is to distribute the tax between the source country and the country of residence whereas the purpose of the domestic tax law is to compute the income under the various heads as prescribed

under section 14 of the act. The distributive rule of the Double Taxation Avoidance Agreement only classifies income into various types. This is not relevant for determining the head of income according to section 14 of the act in spite of similarity in terminology. The purpose of both is quite different. However, as for assessment year 2014 – 15 the issue has been set-aside to the file of the learned assessing officer to first determine whether the income of the assessee is classified as interest under article 11 or under article 22 of the double taxation avoidance agreement. The issue is still not decided. Therefore in the interest of justice, we also set-aside issue number 1 as per ground number 1 – 4 of the appeal of the assessee back to the file of the learned assessing officer to 1st decide how the income is chargeable to tax according income tax act, as per distributive rule what is the classification of income on what is the tax rate as per the double taxation avoidance agreement, and then compute tax according to income tax act. At this stage, we do not enter into the controversy whether the learned assessing officer has followed the direction of the learned dispute resolution panel or not. The issue needs a fresh adjudication on all these issues in accordance with the law after granting opportunity of hearing to the assessee. Accordingly, ground numbers 1 – 4 of the appeal are allowed for statistical purposes.

025. Coming to issue number 2 , on the transfer pricing adjustment in respect of interest on external commercial borrowings, The only dispute is with respect to the arm's-length price of interest charged on external commercial borrowing lent to associated enterprises in India. The assessee has advanced a loan to Nipro tube glass India private limited in Indian rupees wherein the assessee has received total interest of ₹ 25,135,155/– wherein

the assessee receives such interested the rate of 10.50% of the loan amount. For benchmarking, assessee used Indian associated enterprise as tested party, compared reserve bank of India prescribed 'all in cost ceiling rate, and the state bank of India private lending rate. Further, the above interest payment was held to be at arm's-length in case of Indian associated enterprises and therefore it was believed by the assessee that it is also at arm's-length in assessee's own case. The learned TPO proposed the arm's-length price of the interest at the rate of 14.05% and proposed an upward adjustment. The claim of the assessee before the learned dispute resolution panel was that the identical transaction took place in assessment year 2014 – 15 and benchmarked in the similar manner, there is no change in the facts and circumstances of the case, despite the same the learned transfer pricing officer has disturbed the ALP of the international transaction. It was further stated that in the case of the Indian associated enterprises the transaction is held to be at arm's-length, therefore there is no reason that the above transaction can be disturbed in the hence of the foreign entity. It is further the claim of the assessee that if the arm's-length price of the international transaction entered into with the associated enterprise is revised upwardly than, the cost of the Indian enterprises goes up as it would be the case that the foreign enterprises should have charged more from the Indian entities and it would result in to the reduction of overall tax base in India and therefore the transfer pricing provisions will not apply. The proposed addition is against the principles of provisions of section 92 (3) of the act. For this proposition, the decision of the coordinate bench in case of Cummins Ltd [2181/PN/2013] and AT & S Austria technology and Systemtechnok V DCIT (ITA 95/Kol/2018) was relied upon. It was further stated that the reserve bank of India Masters

circular prescribes the maximum rate, which can be charged for interest by a foreign enterprise from an Indian entity, and therefore the arm's-length price of the same cannot be higher than that. Even otherwise, the state bank of India prime lending rate cannot be applied to the loan provided by foreign company to Indian entity and only the interest rates in Japan are to be compared with the rates charged by the assessee. It was stated that the rates charged by the long-term prime lending rates by a bank is 1% and therefore the interest charged by the foreign entity at 10.50% cannot be disturbed. On the issue whether the tested party should be taken as an Indian entity or a foreign associated Enterprises, the learned dispute resolution panel held that the tested party should be the least complex of the transaction party and accordingly assessee is required to be taken as the tested party as it is least complex for the transaction of external commercial borrowing and comparable data is also available for interest charged. Against the argument of the assessee about applicability of provisions of section 92 (3) of the act the learned dispute resolution panel held that if the adjustments are required to be made in the hands of the assessee the same would result in additional tax deduction for Indian associated enterprises at higher tax rate of 30.90% is not acceptable as there is no provision in the act which provides for adjustment in the hence of the Indian entity. Therefore, with regard to the transaction of interest of ₹ 25,135,157 the interest rate of 10.50% is not at arm's-length and interest rate of 14.05% is confirmed. The charters been placed before us by the learned authorized representative extracted from RBI.org to 10 wherein the weighted average lending rates of fresh rupees on sanctioned for March 2013 to March 2018 are placed stating that in none of the times the rate was higher than 11.46% and

in the subsequent year from June 15 – March 2018 the rates are almost 10%. In this case, the assessee has charged interest at the rate of 10.5% whereas the learned TPO has charged the arm's-length price at 14.50%. As per the order of the learned transfer-pricing officer in paragraph number eight, the rate of statement of India prime lending rate of 14.05% was also given by the assessee contending that the interest is received from an Indian entity to a foreign AE and therefore it should not be disturbed. The loan facility agreement is dated 21st of January 2015 between the assessee and the Indian AE wherein assessee lender will make an advance of credit amount in Japanese in equivalent to ₹ 30 crores at the fixed interest rate of 10.50% per annum for a period of seven years was provided. The Masters circular of reserve bank of India number 12/2015 – 16 dated 1 July 2015 provides that in such circumstances the all in cost ceiling over six months LIBOR would be 500 basis points. However, for determination of the arm's-length price of an international transaction the reserve bank of India guidelines does not have any role to play. However, when the external commercial borrowing is provided by the assessee to its Indian associated enterprises in Japanese yen, adoption of SBI PLR is not relevant. The Transaction is to be benchmarked by taking in to consideration whether any third party would give loan to Indian entity at those interest rates and on those conditions for that tenure. Therefore, taking Foreign AE as tested party is irrelevant. Even otherwise it is not a profit based method applied. It is the borrower whose condition and financial health needs to be ascertained first. That is Indian entity. Further, for determination of Arm's length price of interest received it is necessary to determine the credit rating of borrower. Thereafter the External comparables for benchmarking can be searched on publicly

available financial databases, by applying appropriate filters to find comparable loan transactions with the same characteristics such as [1] Currency type, [2] Tenure, [3] Purpose of loan General/Working Capital/Capital Expansion/Re-financing, etc. [4] Tranche Type such as Term Loan/Revolving Credit, [5] Covenants , and [6] Credit Rating. Such Interest rate is further required to be adjusted to meet the economic conditions of the tested loan transaction to Interest Swap Adjustment, Tenor Adjustment and Country Risk Adjustment to factor in the geographical difference. The Assessee or the TPO / ld DRP has not looked in to these basic aspects. Therefore, in the result we remit this issue back to the file of the ld AO with direction to assessee to benchmark interest on loan transaction taking all these issues in consideration, ld AO may examine the same and decide the issue afresh. Accordingly, issue of ALP of Interest receipt issue number 2 of appeal covering ground numbers 5 – 8 of the appeal are allowed with above directions.

026. In the result, appeal of the assessee is partly allowed as indicated above for statistical purposes.
Order pronounced in the open court on 11.12. 2023.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated:11.12.2023
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai