आयकर अपीलीय अधिकरण, कोलकाता पीठ "सी'', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

[Before Shri Rajpal Yadav, Vice-President & Shri Girish Agrawal, Accountant Member]

I.T.A. Nos.310&311/Kol/2021
Assessment Years: 2005-06 & 2007-08

GE Healthcare Finland Oy (formerly known as Instrumentarium Corporation Ltd.) (PAN:AADCG1535E)	Vs.	DCIT(International Taxation)-1(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / प्रत्यर्थी

Date of Hearing / सुनवाई की तिथि	01.04.2024
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	05.04.2024
For the Appellant/ निर्धारिती की ओर से	Shri Sachit Jolly and Himani Seth, AR
For the Respondent/ राजस्व की ओर से	Shri Manoj Kumar Pati, Addl. CIT

ORDER / आदेश

Per Girish Agrawal, AM:

The captioned appeals have been preferred by the assessee against separate orders both dated 14.07.2021 of the Commissioner of Income Tax (Appeals)-22, Kolkata (hereinafter referred to as the 'CIT(A)') passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act'). Since, the facts and issues involved in both the appeals are common and the same have been heard together, therefore, these are being adjudicated by this common order.

2. ITA No.310/Kol/2021, A.Y 2005-06 – The assessee in this appeal has taken the following grounds of appeal:

> *"1. That the Commissioner of Income Tax (Appeals) ['CIT(A)'] erred on facts and in law in upholding the assessment order dated 08.12.2008 ("Assessment Order") passed by the Assessing Officer ['AO'] under Section 144/147 of the Income Tax Act, 1961 ('the Act') whereby income*

of the Appellant was assessed at Rs.5,18,95,560 against the NIL returned income.

1.1 That the CIT(A) erred on facts and in law in not appreciating that the Assessment Order is without jurisdiction inasmuch as the AO has computed the transfer pricing adjustment without first referring the matter to Transfer Pricing officer ("TPO") as per the mandatory procedure prescribed under Section 92CA of the Act.

2. That the CIT(A) erred on facts and in law in not appreciating that the Assessment Order passed by the AO is without jurisdiction and bad in law inasmuch as the notice purportedly issued under Section 148 of the Act was never served on the Appellant.

2.1 Without prejudice, the CIT(A) erred on facts and in law in approving the action of the AO in framing the Assessment Order as per best judgment assessment under Section 144 of the Act.

3. That the CIT(A) erred on facts and in law in upholding the transfer pricing addition of Rs.5,18,95,560/- made by the AO by attributing notional interest to interest free loan advanced by the Appellant based in Finland to its associated enterprise named Datex-Ohmeda (India) Private Limited ("Datex India") in India.

3.1 That the CIT(A) erred on facts and in law in not appreciating notional interest income cannot be brought to tax in the hands of the Appellant due to beneficial provisions of the Article-11 of the India-Finland DTAA which mandates that interest income cannot be taxed unless the same is actually 'paid' to the Appellant.

3.2 That the CIT(A) erred on facts and in law in not appreciating that there was no occasion for the AO to invoke Section 92 of the Act for making the transfer pricing adjustment since no 'interest' was payable at all under the Loan Agreement and thus, no 'income' of the Appellant could be deemed to accrue or arise in India under Section 9 of the Act.

3.3 That the CIT(A) erred on facts and in law in not appreciating that transfer pricing provisions under Chapter X of the Act being an anti-abuse provision can be invoked only when there is shifting of profits from India whereas the transfer pricing adjustment in the Assessment Order has resulted in erosion of tax revenue to the extent of 23.66% (33.66%-10%).

4. Without prejudice, the CIT(A) erred in upholding the action of the AO in benchmarking the alleged international transaction of interest payable on loan on the basis of prime lending rate of SBI as opposed to

LIBOR which has been applied in the Appellant's own case by this Hon'ble Tribunal.

5. That the CIT(A) erred on the facts and in law in upholding the action of the AO in charging interest under Section 234A and 234B of the Act.

The appellant craves leave to add, amend, alter or vary from the aforesaid grounds of appeal at or before the time of hearing."

3. Ground Nos.1 & 2 are dismissed being not pressed.

4. Ground No.3 –The issue involved in Ground no.3 is regarding notional interest on interest free loan advanced by the assessee based in Finland to its associated enterprise in India.

5. The brief facts relating to the issue are that the assessee is a Company incorporated in Finland and also a tax resident of Finland. The assessee is a multinational company with operations across the globe, operating in the business of medical equipments. Datex-Ohmeda (India) Private Limited (hereinafter referred to as "Datex") is a wholly owned subsidiary of the appellant, incorporated In India. The assessee vide the loan agreement executed with Datex dated 26th August, 2002 had granted a rupee denominated interest-free loan amounting to Rs. 360 million in its favour. There were subsequent interest free loans granted to Datex, with final amount of outstanding loan as on 31st March, 2005, being Rs. 506.298 million.

5.1 In respect of the above loan, the Assessing Officer relying on the order of the Ld. AAR dated 25th November 2004, the rectification order of the Ld. AAR dated 2nd February 2005 as well as other facts and subsequent events, held that in respect of the aforesaid loan,

interest income should be chargeable to tax in the hands of the appellant for the AY 2005-06.

6. We find that the issue is squarely covered by the decision of the Special Bench dated 15.07.2016 and common decision of the Coordinate Kolkata Bench of the Tribunal in assessee's own case of Instrumentarium Corporation Ltd. vs. DDIT in ITA No.1548,1549/Kol/2009 and 2058/Kol/2010 for A.Y 2003-04/2004-05 and 2006-07 wherein it has been held inter alia as under:

> *"9.3. Be it as it may, without prejudice to our above finding and as we have heard the case at length, for the sake of completeness, we consider the issue on merits also.*
>
> *We extract the relevant articles of the agreement between Indian and Finland for avoidance of double taxation and prevention of fiscal abuse with respect to taxes on income.*
>
> *Article 9*
> *ASSOCIATED ENTERPRISES*
>
> *"1. Where*
>
> *(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or*
>
> *(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,*
>
> *and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."*
>
> *Article 11*
> *INTEREST*

"1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest."

ARTICLE 12
ROYALTIES AND FEES FOR TECHNICAL SERVICES

"1. Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services."

9.4. Article 9 is attracted in this case. The transfer prising adjustment on account of interest is to be taxed by including the same in the profits of the assessee as it is not accrued by reason of conditions made and imposed between the Associate Enterprises.

9.5 Article 11, does not apply, as no interest accrues or arises in this case and the question of 'payment' of such interest simply does not arise. What is sought to be taxed is a Transfer Pricing adjustment which is permitted under Article 9 which talks about accrual and not payment. In the OECD commentary on the provisions of the Article 11 the term "paid" in context of interest is as follows: –

"5. …The term "paid" has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom."

In this case there is no obligation to pay interest. The learned counsel for the assessee projects a scenario which would never ever arise in the facts of this case and claims that, interest can be taxed only on payment, in view of Article 11. Such an argument is flawed. Hence, the interpretation sought to be placed by the ld. Counsel for the assessee on Article 11, by relying on the interpretation given by different Benches of

the Tribunal while considering Article 12, does not help the case of the assessee.

This view is supported by the order of a coordinate bench of the Mumbai ITAT in the case of ***PMP Auto Components (P.) Ltd. v. DCIT, Mumbai [2014] 50 taxmann.com 272 (Mumbai – Trib.)****. The Tribunal in this above-mentioned case at para 10 & 11 has observed:*

*"**10.** Therefore, it is clear that the transaction of loan given to the AE is an international transaction and subjected to ALP as per the transfer pricing provisions of Income Tax Act. The assessee has raised an alternative plea that even in case the transfer pricing provisions are applicable in respect of the non charging of interest on loan given to AE, it is not taxable in India as per the provisions of Article 11 of Indo-Mauritius DTAA because the said interest was not paid to the assesse. We note that the provisions of Article 11 are applicable in the case of interest arising in the contracting state and paid to the resident of another contracting state.*

***11.** It is contemplated under Article 11 of DTAA that the payment is a condition for taxing the interest only in circumstances when the interest is arising in the contracting state and accrued to the resident of another contracting state and, therefore, the same is subjected to tax in the other state when it is paid. In other words, the provisions of Article 11 defers the taxability of the interest arising but not received and therefore, it is taxed only when it is received. Article 11 does not exempt the interest arising in a contracting state and accrue to a resident of other contracting state but it makes the same taxable on the event of payment. In the case in hand, when the assessee has not even admitted the interest arisen and accrued to the assessee on the loan given to the AE for the assessment year under consideration, therefore, the provisions of Article 11 of Indo-Mauritius treaty cannot be pressed into service."*

10. In view of the above discussion, we dismiss this Ground No. 1A of the assessee both on the ground that this additional ground is not admissible, as well as on merits of the case.

7. Respectfully following the above decisions, we hold that the matter being squarely covered and decided against the assessee, no interference is called for and the addition confirmed by the learned CIT is upheld.

8. Ground No.4 –The issue involved in Ground no.4 is whether SBI prime lending rate has to be applied or whether LIBOR has to be applied. We find that the issue is squarely covered by the common decision of the Coordinate Kolkata Bench of the Tribunal in the case of Instrumentarium Corporation Ltd. vs. DDIT (supra) i.e. assessee itself wherein it has been held as under:

> *"11.1. This issue relates to computation of the Arm's Length Price. The special bench has remitted this issue of quantification of Arm's Length Price adjustment to the division bench. The issue whether SBI Prime Lending Rate has to be applied or whether LIBOR has to be applied is an issue where no fresh investigation into facts is required. Under these facts and circumstances we are of the opinion that this Ground No. 4A has to be admitted. Hence, we admit the same.*
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> *12. We now consider, the issue on merits.*
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> *The ld. D/R, relies on the judgment of the Hon'ble Bombay High Court in the case of TATA Autocomps Systems Ltd. (supra). The assessee on the other hand relies on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Cotton Naturals (I)(P) Ltd. (supra). The loan in question in this case has been given in US Dollars. Though the loan has been consumed in India, the repayment has to be made in US Dollars. Under these facts and circumstance of the case, we prefer to follow the decision of the Hon'ble Delhi High Court in the case of CIT vs. Cotton Naturals (I)(P) Ltd. (supra), wherein it has been held as follows:-*
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> > *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 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."*

13. Respectfully, following the same we hold that LIBOR has to be applied while benchmarking the international transaction in question. In view of the above discussion, this issue is decided in favour of the assessee.

13.1. We now remit the matter back to the file of the TPO for recomputing the Arm's Length Price adjustment by taking LIBOR for the purpose of benchmarking the international transaction.

9. Respectfully following the above decision, the matter is decided in favour of the assessee with a direction to the Assessing Officer to recompute the ALP accordingly.

10. Ground No.5 : The assessee has contested charging of interest u/s 234A and 234B of the Act on the ground that it was not liable to pay advance tax. Reliance has been placed on the decision of Hon'ble Supreme Court in the case of *Director of Income Tax vs. Mitsubishi Corporation reported in 438 ITR 174(SC).* We have considered the issue in hand and find the ratio of above decision squarely applicable to the facts of the case. Accordingly, we hold that the assessee is not liable to any interest chargeable u/s 234A and 234B of the Act. This ground of appeal is, therefore, allowed.

11. ITA No.311/Kol/2021, A.Y 2007-08 - Since all the grounds of appeal as also the facts and issues involved are identical in both the appeals, therefore, our findings given above, will mutatis mutandis apply to ITA No.311/Kol/2021 also.

12. In the result, all the two appeals of the assessee are allowed in part.

Order is pronounced in the open court on 5th April, 2024.

Sd/-	Sd/-
(Rajpal Yadav)	(Girish Agrawal)
Vice-President /उपाध्यक्ष	Accountant Member/लेखा सदस्य

Dated: .04.2024
RS

Copy of the order forwarded to:

1. Appellant- GE Healthcare Finland Oy (formerly known as Instrumentarium Corporation Ltd.), No.4, Kadugodi Industrial Area, Kadugodi Plantation, Bangalore-560067, Karnataka
2. Respondent – DCIT(International Taxation)-1(1), Kolkata, 4th Floor, P-7, Chowringhee Square, Kolkata-700069.
3. Ld. CIT(A)-
4. Ld. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata

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Assistant Registrar
ITAT, Kolkata Benches, Kolkata