

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

**[Coram : D K Agarwal JM, and Pramod Kumar AM]**

ITA No.: 6597/Mum/09  
Assessment year: 2004-05

***Nimbus Communications Limited*** ..... ***Appellant***  
*Nimbus Centre, Oberoi Complex*  
*Off : New Link Road, Andheri (West)*  
*Mumbai 400 053 (PAN : AAACN3947L)*

***Vs.***

***Assistant Commissioner of Income Tax*** ..... ***Respondent***  
***Circle 11 (1), Mumbai 400 020***

Appearances:

K R Laxminaraynan, *for the appellant*  
Har Govind Singh, *for the respondent*

**O R D E R**

**Per Pramod Kumar:**

1. The short issue that we are required to adjudicate in this appeal is whether the Commissioner (Appeals) was justified in sustaining an arm's length price (ALP) adjustment in respect of interest not charged by the assessee on debit balances, overdue beyond thirty days, of assessee's associated enterprises. The assessment year involved in 2004-05.

2. The issue in appeal lies in a rather narrow compass of facts. The assessee is engaged in the business of marketing of airtime, available on television programs, cricket and other sports events, as also in the business of producing television serials. During the relevant previous year, the assessee had international transactions with one of its associated enterprises, i.e. World Sports Nimbus Pte Ltd Singapore, and the said associated enterprises had some overdue payments, to be made to the assessee. The assessee did not charge any interest on these overdue payments. The Assessing Officer referred these transactions, for ascertainment of arm's length price, to the Transfer Pricing Officer. While it was submitted by the assessee that **"it does not charge any interest on debit balances with independent parties, nor does it pay any interest to the international creditors"**, the Transfer Pricing Officer brushed aside this plea and observed that since **"charging of interest on outstanding balances, after a period of time of normally 30 days, would be the expected normal arm's length price"**. It was in this backdrop, and relying upon the similar stand taken by his predecessor, the TPO made an arm's length adjustment of Rs 12,51,175. The quantification of notional interest was done by adopting interest at 2.19 % LIBOR on overdue amount beyond 30 days. Aggrieved assessee carried the matter in appeal before CIT(A), but without any success. The assessee is not satisfied and is in further appeal before us.

3. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

4. It is only elementary, in terms of the provisions of Section 92, any income arising from an international transaction has to be computed having regard to the arm's length price (ALP), and that this exercise includes the allowance for any expense or interest arising from an

international transaction as well. That is the only provisions under which ALP adjustments can be made. In other words, therefore, arm's length price adjustments can only be made in respect of an 'international transactions'. The expression 'international transaction', on the other hand, is defined under section 92 B as a transaction between two or more associated enterprises, either or both of them are non-residents, "in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing of money, or any other transaction having a bearing on the profits, incomes, losses or assets of such enterprises" as also transaction in the nature of cost or expense sharing arrangement. The question that we must address ourselves to is whether a continuing debit balance constitutes a 'transaction' in terms of the provisions of Section 92 B.

5. A continuing debit balance, in our humble understanding, is not an international transaction *per se*, but is a result of the international transaction. In plain words, a continuing debit balance only reflects that the payment, even though due, has not been made by the debtor. It is not, however, necessary that a payment is to be made as soon as it becomes due. Many factors, including terms of payment and normal business practices, influence the fact of payment in respect of a commercial transaction. Unlike a loan or borrowing, it is not an independent transaction which can be viewed on standalone basis. What can be examined on the touchstone of arm's length principles is the commercial transaction itself, as a result of which the debit balance has come into existence, and the terms and conditions, including terms of payment, on which the said commercial transaction has been entered into. The payment terms are an integral part of any commercial transaction, and the transaction value takes into account the terms of payment, such as permissible credit period, as well. The residuary clause in the definition of 'international transaction', i.e. any other transaction having a bearing

on the profits, incomes, losses or assets of such enterprises, does not apply to a continuing debit balance, on the given facts of the case, for the elementary reason that there is nothing on record to show that as a result of not realizing the debts from associated enterprises, there has been any impact on *profits, incomes, losses or assets* of the assessee. In view of these discussions, in our considered view, a continuing debit balance *per se*, in the account of the associated enterprises, does not amount to an international transaction under section 92 B in respect of which ALP adjustments can be made. The factum of payment has to be considered vis-à-vis terms of payment set out in the transaction arrangement, and not in isolation with the commercial terms on which transaction in respect of which payment is, according to the revenue authorities, delayed. In any event, even when an ALP is made in respect excessive credit period allowed under the CUP method, stated by the TPO, the comparable has to be dues recoverable from a debtor and not a borrower. It appears that the TPO has adopted interest @ 2.19% LIBOR on balances which exceed 30 days, but LIBOR rate is relevant only in the case of lending or borrowing of funds, and not in the case of commercial overdues. Even assuming that the continuing debit balances of associated enterprises can be treated as 'international transactions' under section 92 B, the right course of applying the CUP method, in the case of non charging of interest on overdue balances, would have been by comparing this not charging of interest with other cases in which the assessee has charged interest on overdues with independent enterprises (internal CUP) or with the cases in which other enterprises have charged interest, in respect of overdues in respect of similar business transactions, with independent enterprises (external CUP). No such exercise has been carried out in this case, nor is it shown, as is the condition precedent for bringing this continuing debit balance in the ambit of 'international transaction', that as a result of not realizing the debts from associated

enterprises, there has been any impact on *profits, incomes, losses or assets* of the assessee.

6. For all these reasons set out above, as also respectfully following the decision dated 28<sup>th</sup> January 2010 of the coordinate bench in assessee's own case in the immediately preceding year, we hold that the impugned addition of Rs 12,51,175 is unsustainable in law and that the CIT(A) ought to have deleted the same. We, accordingly, direct the Assessing Officer to delete the impugned adjustment. The assessee gets the relief accordingly.

7. In the result, the appeal is allowed. Pronounced in the open court today on 5<sup>th</sup> day of January, 2011.

Sd/-  
**(D K Agarwal)**  
Judicial Member  
Mumbai; 5<sup>th</sup> day of **January**, 2011.

sd/-  
**(Pramod Kumar)**  
Accountant Member

*Copy forwarded to :*

1. *The appellant*
2. *The respondent*
3. *The Commissioner- 4 , Mumbai*
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*By Order etc.*

*Assistant Registrar  
Income Tax Appellate Tribunal  
Mumbai benches, Mumbai*