IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1869 OF 2014

The Commissioner of Income Tax-4 Mumbai .... Appellant

Vs.

M/s Aurionpro Solutions Ltd. Mumbai. .... Respondent

Mr. A.R. Malhotra, Advocate for the Appellant.
Mr. Vipul J. Shah, Advocate for the Respondent.

CORAM : S.V. GANGAPURWALA AND G.S. KULKARNI, JJ.

DATE : 9 JUNE, 2017

PER COURT :

The present appeal relates to Assessment Year 2007-2008.

2 The order of the Tribunal is assailed by the Revenue. The Tribunal has partly allowed the appeal. Mr. Malhotra, the learned counsel for the Appellant submits that the following issue gives rise to the substantial question of law :

> "Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in directing the Assessing Officer to determine the Arm's Length interest by considering the LIBOR (London Inter Bank Operative Rate) plus 2% on the monthly closing balance of the advances?"

3 The learned counsel strenuously contends that the Tribunal was not justified in directing the Assessing Officer to determine the Arms Length interest by considering LIBOR plus 2% on monthly closing balance of the advances. The learned counsel submits that the advances have been given by the entity in India. As such the rate of interest as applicable in India ought to have been applied and same would be reasonable and proper. The learned counsel further submits that the judgment relied upon by the Tribunal does not lay down any law even the observations in the case of the Commissioner of Income Tax-2 Vs. Tata Autocomp Systems Limited, reported in [2015] 56 taxmann.com 206 (Bombay) is not laying down any proposition of law. The observations therein are only *obiter dicta*. The learned counsel submits that as the said observations are only *obiter dicta*, the same could not be treated as direction.

4 The learned counsel for the Respondent supports the order passed by the Tribunal.

5 We have considered the submissions canvassed for the respective parties. In a case of Commissioner of Income Tax-2 Vs. Tata Autocomp referred supra, this Court had made following observations :

> "7. We find that the impugned order of the Tribunal inter alia has followed the decisions of the Bombay Bench of the Tribunal in cases of VVF Ltd. Vs. DCIT" (supra) and "DCIT Vs. Tech Mahindra Ltd." (supra) to reach the conclusion that ALP in the case of loans advanced to Associate Enterprises would be determined on the basis of rate of interest being charged in the country where the loan is received/consumed. Mr. Suresh Kumar, the learned counsel for the revenue informed us that the Revenue has not preferred any appeal against the decision of the Tribunal in "VVF Ltd. Vs. DCIT" (supra) and "DCIT Vs. Tech Machindra Ltd." (supra) on the above issue. No reason has been shown to us as to why the Revenue seeks to take a different view in respect of the impugned order from that taken in "VVF Ltd. Vs. DCIT" (supra) and

"DCIT Vs. Tech Mahindra Ltd." (supra). The Revenue not having filed any appeal, has in fact accepted the decision of the Tribunal in "VVF Ltd. Vs. DCIT" (supra) and "DCIT Vs. Tech Mahindra Ltd." (supra)."

6 We have also perused the order of the Tribunal in case of Deputy Commissioner of Income-Tax, Circle 2(3), Mumbai vs. Tech Mahindra Ltd., reported in [2011] 12 taxmann.com 132 (Mum). The Tribunal has made following observations :

"The view taken by us also finds support from these observations of the co-ordinate Bench. When there is a choice between the interest rate of a currency other than the currency in which transaction has taken place and the interest rate in respect of the currency in which transaction has taken place, in our considered view, the latter should be adopted. In *Siva Industries & Holdings Ltd.'s* case (supra), co-ordinate Bench was making a choice between the PLR (Prima Lending Rate in India) and the LIBOR (London Inter Bank Offered Rate). The co-ordinate Bench held that "once the transaction between the assessee and the Associated Enterprises is in foreign currency and

the transaction is an international transaction, then the transaction would have to be looked upon by applying the commercial principles in regard to international transactions", and accordingly proceeded to take into account interest rate in terms of LIBOR basis. We have adopted the same approach by taking into account the commercial principles and practices with regard to a US Dollar denominated extended credit for arriving at the benchmark rate, and take LIBOR as the base. Accordingly, the LIBOR (US Dollar) has to be as benchmark for US Dollar transactions – rather than the rate of interest on domestic borrowings, even which is lower than the interest rate of 10 per cent taken as ALP by the TPO, or, for that purpose, rate of interest on any other currency loans. Having said that, we may also reiterate that as we hold so, we are not giving any decision on whether the ALP adjustment can be made, on the basis of LIBOR plus mark up, in respect of extended credit because we are dealing with a very limited issue in this appeal which does not require adjudication on the broader question as to whether an extended credit period can anyway be compared with a loan, much

less a loan in some other currency which will have distinct lending rates depending on the peculiarities relating that currency, since it does not involve the lending period commitment as loan necessarily involves. Be that as it may, the CIT (A) cannot thus be said to be in error in adopting the US Dollars LIBOR rate, with mark-up which is not in dispute for its being too low, as a basis for ALP adjustment- as long as he can be said to be justified in upholding the ALP adjustment. There is thus no justification in grievance raised by the Assessing Officer against the relief granted by the CIT (A). As we uphold the relief given by the CIT (A), we refrain from making any observations on whether or not such an ALP adjustment could have been made in the first place. The mere fact that the relief granted by the CIT (A) is upheld, it does not imply that the CIT (A)'s action of confirming the ALP adjustment on the facts of this case, in principle, is upheld too. That remains an open question and need not be adjudicated in this appeal. With these observations, and to the extent the grievance of the revenue is concerned, we confirm the order of CIT(A) and decline to

interfere in the matter at the instance of the revenue authorities, Ground No. 2 is dismissed.".

7 This Court in a case of Commissioner of Income Tax-2 Vs. Tata (supra) has approved the said reasoning given by the Tribunal in Dy Commissioner of Income-Tax, vs. Tech Mahindra (supra), the observations, which are reproduced above.

8 In the present case also, it is not disputed that advances were made to the company situated abroad. The LIBOR rate naturally will be considered to determine the Arms Length interest, the same would be reasonable and proper in applying the commercial principle. The Tribunal has directed the appropriate rate would be LIBOR plus 2% instead of LIBOR plus 3% applied by the TPO.

9 Considering the aforesaid, no substantial question of law arises for consideration. The Appeal is dismissed. No costs.

(**G.S. KULKARNI, J.**) (**S.V. GANGAPURWALA, J.)**