

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'के', मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH MUMBAI**

**सर्वश्री डी.मनमोहन, उपाध्यक्ष एवं श्री आर.सी.शर्मा, लेखा सदस्य**

**BEFORE SHRI D. MANMOHAN, VP**

**&**

**SHRI R.C.SHARMA, AM**

**आयकर अपील सं./ITA No.487/Mum/2014**

**(निर्धारण वर्ष / Assessment Year :2009-10)**

Tecnimont ICB House, Chincholi Bunder, 504 Link Road, Malad (W), Mumbai- 400064	Vs.	DCIT-9(3), Mumbai-20
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AAACI 2628 B</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri R.R.Vora &  
Shri Nikhil Tiwari

राजस्व की ओर से /Revenue by : Shri N.K.Chand

सुनवाई की तारीख / Date of Hearing : **16<sup>th</sup> April, 2015**

घोषणा की तारीख/Date of Pronouncement **08-07-2015**

**आदेश / O R D E R**

**PER R.C.SHARMA (A.M):**

This is an appeal filed by the assessee against the direction passed u/s.144C(5) of the IT Act by DRP-II, Mumbai, in the matter of order passed u/s.143(3) r.w.s.144C of the Act for the A.Y.2009-10.

2. The rival contentions have been heard and record perused. Facts in brief are that assessee Tecnimont ICB Private Limited (hereinafter referred to as 'TICB is engaged in the business of execution of turnkey project services particularly in the field of petrochemicals, oil and gas, fertilizers and instrumentation and electrical erection. It is also engaged in activities like EPC lump sum turnkey contracts, engineering design

services, supervision services, translation services and feasibility studies. It also renders onshore/ offshore design and engineering services and field construction supervision services. During AY 2009-10, TICB has entered into the following international transactions with its associated enterprises ('AEs'):

Sr. No	Associated Enterprises	International Transactions	Amount (INR)	Method applied	Margin of Appellant	Arithmetic mean of single year updated margins of the comparables
<b>Transaction with AEs</b>						
1	Tecnimont SpA	project services Electrical & instrumentation work	20,35,37,560 34,41,48,917	TNMM* OP/OC as PLI	17.03 %	7.02%(As per assessee's comparables –Annexure-1) (6.12% As per comparable set identified by TPO for AY 2008-09)
2	Tecnimont Arabia Ltd	Electrical & Instrumentation work	139,43,12,063			
3	TWS SA	Project Services	11,92,62,993			
4	Sofregaz SA	Project services	1,74,404			
5	Tecnimont ICB Qatar WLL PO	Project services	4,09,28,739			
<b>Transaction with AE's PE in India</b>						
6	Tecnimont SpA India Project office	Execution of EPC Project	156,69,36,279			
Reimbursement of expenses to AEs						
Recovery of expenses from AEs						

*\*All transactions were aggregated and benchmarked using TNMM at segment level TNMM- Transactional Net Margin Method.*

The TPO accepted all the transactions to be at arm's length price (ÁLP'). However, the learned TPO made an adjustment of Rs.10,36,49,646/- by charging notional interest for delayed recovery of export receivables and delayed recovery of expenses from AE's till the date of transfer pricing order (i.e. 25<sup>th</sup> January, 2013). The assessment was completed by the AO

under Section 143(3) read with Section 144C (13) of the Act. An order dated 24 December 2013 was issued assessing the assessee at total income of Rs.67,96,55,391, thereby confirming the transfer pricing adjustment of Rs.10,36,49,646 on account of notional interest for delayed recovery of export receivables and delayed recovery of expenses from AEs by applying interest rate of 12.25% (i.e. SBI PLR). Assessee is aggrieved by this addition of notional interest.

3. It was contended by Id. AR that assessee company does not charge any interest on outstanding advances to AE's as well as Non AE's. The Learned AO/ TPO considered 60 days credit period for receipt of outstanding receivables and outstanding recovery of expenses from its AEs in the normal course of business activities which is not disputed by the assessee. He further submitted that delay in recovery of outstanding receivables from debtors does not fall within the purview of "international transaction" under the provisions of section 92B of the Act read with Rule 80IB of the Income-tax Rules as prevailing at that point of time and therefore the transfer pricing regulations do not apply to the same. Further contention of Id. AR was that while transacting with group entities/ third parties, it is a common practice to extend certain credit period. Assessee provides services to AEs and hence inter-company balances (debit! credit receivables) are unavoidable. AO/TPO failed to appreciate that AEs were facing financial difficulties in the relevant assessment year, which has resulted in delay in payment to assessee. Such circumstances happen in

business cycle and therefore interest cannot be charged for such delays. Ld. AR placed reliance on the decisions, wherein the Hon'ble Courts have held that transfer pricing addition to levy interest cannot be made on account of extra credit period to AEs in this regard. Further the contention of Id. AR was that amendment in the definition of international transaction cannot be applied in the absence of corresponding amendment in the Income Tax Rules. As per the Id. AR similar proposition was also upheld by Delhi Tribunal, specifically dealing in transfer pricing scenario. In this regard, reliance is placed on the Delhi Tribunal ruling in the case of Bharti Airtel Ltd (ITA No.5816/Del/2012) dated 11 March 2014 (Del) (PB pg 389-445) wherein the following has been observed:

*"(34). There is more than one aspect of the matter. The Explanation to section 928 has been brought on the statute by the Finance Act 2012. If one is to proceed on the basis that the provisions of Explanation to section 928 enlarge the scope of section 92B itself, even as it is modestly described as 'clarificatory' in nature, it is an issue to be examined whether an enhancement of scope of this anti avoidance provision can be implemented with retrospective effect. Undoubtedly, the scope of a charging provision can be enlarged with retrospective effect, but an anti-avoidance measure, that the transfer pricing legislation inherently is, is not primarily a source of revenue as it mainly seeks compliant behavior from the assessee vis-a-vis certain norms and these norms cannot be given effect from a date earlier than the date norms are being introduced. However as we have decided the issue in favour of the assessee on merits and even after taking into account the amendments brought by the Finance Act 2012 we need not deal with this as aspect of the matter in greater detail."*

4. It was also the contention of Id. AR that since the margin earned from its AE transactions is higher as compared to similarly placed comparable companies, the element of interest for delayed payment is subsumed in the higher mark-up charged. In view of the same,

adjustment on account of notional interest on outstanding balances of AEs is not warranted. Even if one assumes that deemed interest income on account receivables is already included as a part of the total profit of the assessee as per the audited financials for AY 2009-10 and the same is reduced from such total profit so as to exclude such notional interest income from the total income, the margin earned by the assessee even after reducing such amount is still much higher than the margin earned by the comparable companies.

5. It was also contended by Id. AR that AO/TPO failed to consider that transaction between TICB and Tecnimont SpA India Project Office ('TIPO') (PE of foreign AE in India) is a transaction between two resident entities and therefore such transaction does not come under the purview of Indian transfer pricing regulations since there was no possibility of shifting of profits outside India or erosion of country's tax base. As per Id. AR the PE (ie TIPO) of the company is located in India and carrying on its business with an Indian company(ie TICB). Hence, irrespective of the fact that TIPO is a part of an AE, for the purpose of proceedings under the Income-tax Act, and particularly in the transfer pricing proceedings, has to be treated as a separate business entity, similar to any other corporate entity doing business in India. In the present case, the business activities of TIPO are conducted in India and the establishment is maintained in India. As a separate business unit, TIPO has its own audited accounts prepared in terms of Indian accounting standards for submitting to the

Indian Tax Authorities for the purpose of tax proceedings in India. Therefore, the legal status of the PE being an extension of a foreign company, should not come in the way of treating the PE as a separate Indian business unit on par with any other business entities carrying out their business in India during the year under consideration. However, the DRP has rejected assessee's contention relying on P&H High Court decision in case of Coca Cola (supra), without considering the facts before P&H High Court in that case. In the above mentioned case, there was transaction between resident (located in India) and non- resident AE (located outside India) and the argument taken by the assessee was that its entire profit is exempt from tax (due to tax deduction) and hence, there is no intention of base erosion and hence transfer pricing is not applicable. As against, in the facts of the present case, the transaction entered by the assessee (located in India) is with PE or its AE (located in India) and hence, it was held by Hyderabad Tribunal in the case of IJM (India) Infrastructure Ltd., 28 ITR (trib) 176 that any transaction of Indian enterprise with PE of foreign company in India would be treated as transaction between two residents and hence, the transfer pricing provisions would not apply in such situation.

6. On the other hand, Id. DR relied on the order of the lower authorities and contended that in respect of export to associate enterprise the amount was recovered after a period of 60 days, therefore, the TPO was justified in directing to charge interest at SBI PLR rate of 12.25% as

the benchmarked rate for delay in recovery of export receivable beyond the normal credit period of 60 days.

7. We have considered rival contentions, carefully gone through the orders of the authorities below. We have also deliberated on the judicial pronouncements cited at bar by Id. AR and Id. DR in the factual matrix of instant case. From the record we found that the assessee company had provided EPC services to its AEs, and as the concerned AEs were going through financial difficulties certain payments by the AEs to the assessee company were delayed beyond the normal credit period. Similarly, the assessee company had incurred certain expenses on behalf of its AEs. These were recovered from the AEs. Some such expenses were recovered beyond the normal credit period. The TPO, on these facts, computed the interest chargeable by adopting the SBI PLR rate of 12.25% as the bench mark rate for delay in receipt of export receivables beyond the normal credit period of 60 days and the similar interest was charged on delayed recovery of expenses. Thus, a total adjustment of Rs.10,36,49,646/- was proposed by the TPO and incorporated in the assessment order.

8. From the record we found that assessee has not charged interest in respect of services rendered to non-AEs, payment of which was received beyond normal credit period of 60days. We also found that assessee was having advances from AE. Charging of interest by TPO in respect of amount received beyond 60 days is correct as per the amendment

brought in by the Finance Act, 2012 in Section 92B(2) retrospectively. However, we found that the AE was having advances with the assessee, therefore, while computing interest on realized amount beyond 60 days, the AO should reduce the proportionate advance relating to the transaction under consideration. We also found that the TPO has directed for charging of interest even beyond the end of the financial year i.e. 31.3.2009. Accordingly, we direct the AO to charge interest only upto the end of the financial year insofar as Section 92(1) of the Act specifically provides to tax not income arising from any international transaction which is to be computed with regard to the arms length price for the year under consideration. Accordingly, we restore the matter back to the file of AO to recompute the interest in terms of the above direction.

9. It was also brought to our notice that while fixing the sale price the assessee has already considered the delay, if any, in recovery of the price. Accordingly, while recomputing the interest, the AO should also take into account the price fixed by the assessee with respect to the transaction entered with non-AE vis-à-vis AE and if he finds that price so charged has already taken care of the delayed period of payment, the same should be taken into account while computing the interest chargeable.

10. We also found that operating margin earned by the assessee on provision of EPC services (17.03% OP/ OC) from its AEs transactions is higher than the margin earned on its non-AE transactions. Since the

transactions are intrinsically linked and the assessee under the TNMM fits within the arm's length, the assessee should be given due credit for the same while computing chargeable interest for delayed payment.

11. The Mumbai Tribunal in the case of Goldstar Jewellery Limited Vs JCIT (ITA No 6570/Mum/2012) held that since sale price of the product or service was always influenced by the credit period allowed by the seller, the transaction of sale to the AE and credit period allowed in realization of sale proceeds are closely linked and the price determined for such sale is after consideration of the credit period provided by the seller. Further, it was also held that for the purpose of determining the ALP of sale transaction, the transaction of excess credit period provided by the seller to the AE is required to be aggregated with the sale transaction by the seller to the AE and cannot be benchmarked separately. The Delhi Tribunal has pronounced a ruling dated 31 March 2015, in the case of Kusum Hea care Pvt Ltd (ITA No 6814/Del/2014) (Delhi Tribunal), on similar facts. The Tribunal therein followed the ratio laid down by Sony Ericsson (supra) and held as under:

*"(14) .... the differential impact of the working capital of the assessee vis-a-vis its comparables has already been factored in the pricing! profitability of the assessee and therefore, any further adjustment to the margins of the assessee on the pretext of outstanding receivables is unwarranted and wholly unjustified.*

*(17) ... it is clear that assessee had earned significantly higher margin than the comparable companies (which have been accepted by the TPO) which more than compensates for the credit period extended to the AEs. Thus, the approach by the assessee of aggregating the international transactions pertaining to sale of goods to AE and receivables arising from such transactions which is undoubtedly inextricable connected is in accordance with established transfer pricing principles ... "*

12. The addition on account of interest should be computed only till the end of financial year (i.e. till 31 March 2009 and not till the date of passing of transfer pricing order (i.e. 28 January 2013). It is trite law that income tax has to be computed with reference to previous year and as per Section 5 of the Act explains the scope of total income to be considered earned by any person during the previous year. In the present case, the TPO has made addition of notional interest till the date of passing of order (i.e. 28 January 2013) which is incorrect and against the basic principle of taxation as laid down by Income Tax Act. Hence, interest adjustment on delayed accounts receivables, if any, should be computed only upto 31 March 2009.

13. We also found that during the year under consideration, the assessee has received advances from AE's for the purpose of export, therefore computation of interest, if any, on delayed recovery of export receivables should be after reducing the advances received from AE's for the purpose of export. Reliance is placed on the Mumbai Tribunal ruling in the case of Boston Scientific International BV India (40 SOT 11) (2010) wherein it has been held that interest income on accounts receivables of an assessee from its AE should be examined after considering the outstanding payables from that AE.

14. From the record, we found that so called delay repatriation from foreign AE's, TPO/ AO, while working out deemed notional interest has considered interest rate of 12.25% p.a. (SBI PLR). As per our considered

view the notional interest has to be worked out for so called amount receivable from AE, by applying LIBOR interest rate for the purpose of computation of transfer pricing adjustment, if any. In this regard, reliance is placed on the following decisions, wherein the Hon'ble Tribunals has upheld use of LIBOR for the purpose of benchmarking loan/advance given to foreign AE's:

- i. *Everest Kanto Cylinder Ltd Vs ACIT (L TU) (ITA No 7073/Mum/2012) (Mumbai Tribunal)*
- ii. *M/s PMP Auto Components P. Ltd, (ITA NO.1484/Mum/2014) dated 22 August 2014*
- iii. *Hinduja Global Solutions Ltd Vs ACIT (145 ITD 361) (2013) (Mumbai Tribunal)*
- iv. *Tata Autocomp Systems Ltd Vs ACIT (52 SOT 48) (2012) (Mumbai Tribunal)*
- v. *Tata Autocomp Systems Ltd Vs ACIT (ITA No 1320 of 2012) (Approved by Bombay High Court)*
- vi. *Four Soft Ltd Vs DCIT (142 TT J 358) (2011) (Hyderabad Tribunal)*
- vii. *Everest Kanto Cylinder Ltd Vs ACIT (L TU) (ITA No 550/Mum/2014) (Mumbai Tribunal)*

15. In view of above discussion, computation of interest is restored back to the file of AO for recomputing the interest on delayed payment of receivables, keeping in view our above observation.

16. In respect of the expenditure incurred on behalf of the AEs and which was reimbursed by the AE, the AO also levied interest thereon. We found that the recovery of expenses was beyond the normal period of 60 days. Recovery of expenses beyond the normal period was in the nature of deemed loan in the hands of AEs and require transfer pricing adjustment. Accordingly, we do not find any infirmity in the transfer pricing

adjustment made. However, we direct the AO to charge interest by applying LIBOR rate.

17. The ground taken by assessee with regard to levy of interest u/s.234B & 234C is consequential in nature, accordingly, the AO is directed to recompute the same after giving effect to our above order.

**18. In the result, appeal of the assessee is allowed in part for statistical purposes.**

Order pronounced in the open court on this 08/07/2015.

**Sd/-**  
**(डी.मनमोहन)**  
**(D.MANMOHAN)**  
उपाध्यक्ष / VICE PRESIDENT

**Sd/-**  
**(आर.सी.शर्मा)**  
**(R.C.SHARMA)**  
लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 08/07/2015

प्र.कु.मि/pkm, नि.स/ PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार  
(Asstt. Registrar)  
यकर अपीलीय अधिकरण, मुंबई /  
ITAT, Mumbai