

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 1749/DEL/2017 (A.Y 2012-13)

(THROUGH VIDEO CONFERENCING)

Assotech Moonshine Urban Developers Pvt. Ltd. Assotech One, C-20/1A/1, Sector-62 Noida AAECM8184A (APPELLANT)	Vs	DCIT Circle-3(2) New Delhi (RESPONDENT)
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Appellant by	Sh. Vishal Kalra & Sh. S. S. Tomar, Advs
Respondent by	Sh. Surender Pal, CIT(DR)

Date of Hearing	13.08.2020
Date of Pronouncement	26 .08.2020

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 30/12/2016 passed by the Deputy Commissioner of Income Tax, Circle 3 (2), New Delhi, u/s 143(3) read with Section 144C (13) for Assessment Year 2012-13.

2. The grounds of appeal are as under:-

Appeal against the order under section 143(3) read with section 144C of the Income Tax Act, 1961 ("The Act") dated December 30, 2016 for the Assessment Year ("AY") 2012-13, passed by the Deputy Commissioner of

Income Tax, Circle-3(2), New Delhi

1. *That on the facts and in the circumstances of the case and in law, the order passed under section 143(3) r.w.s. 144C of the Act by the Learned Assessing Officer ("Ld. AO") is erroneous and bad in law as well as in facts.*
2. *That on facts and circumstances of the case and in law, the reference made by the Ld. AO suffers from jurisdictional error as the Ld. AO did not record any reasons in the assessment order based on which he reached the conclusion that it was "expedient and necessary" to refer the matter to the Ld. Transfer Pricing Officer ("TPO") for computation of the arm's length price, as is required under section 92 CA(1) of the Act.*
3. *That on the facts and in the circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Ld. Dispute Resolution Panel ("DRP") erred in making an adjustment to the arm's length price ("ALP") of the appellant's international transactions, relating to payment of interest on fully and compulsorily convertible Indian Rupee denominated debentures ("FCCDs") to the Associated Enterprises ("AEs") amounting to INR 18,606,021.*
 - 3.1. *That on the facts and in the circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Ld. DRP erred in modifying the comparability analysis conducted in the Transfer Pricing Documentation of the Assessee on inappropriate and inadequate grounds;*
 - 3.2. *That on the facts and in the circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Ld. DRP erred in using a LIBOR based interest rate to benchmark the international transaction of payment of interest on FCCDs denominated in Indian Rupees; and*
 - 3.3. *That on the facts and in the circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Ld. DRP erred in ignoring the principle laid down in several judicial precedents by Indian Courts that a LIBOR based interest rate cannot be applied to benchmark a financial transaction which is not denominated in foreign currency.*
4. *That on the facts and in the circumstances of the case and in law the Ld. AO/ Ld. TPO erred in not examining the validity of initiation of penalty*

proceedings u/s 271 (1) (c) of the Act.

5. That on the facts and in the circumstances of the case and in law, the Ld. AO erred in charging and computing interest under section 234A, 234B, 234C and 234D of the Act.

2. The assessee company was incorporated in India on 2/3/2012 and is engaged in the business of development sale and advisory of realistic related activities. The return of income declaring income at Rs.13,40,080/- and business loss of Rs. 3,83,98,509/- was filed on 24/11/2012 by the assessee. A reference was made to the TPO u/s 92CA of the Income Tax Act, 1961 and the Transfer Pricing Officer (TPO) on 6/1/2016 passed an order wherein adjustment of Rs. 1,86,06,021/- attributed to the difference in Arms Length Price of the international transaction entered by the assessee with associated enterprises was made. The assessee filed objection before the Dispute Resolution Panel (DRP) and the DRP upheld the transfer pricing adjustment made by the TPO. Thereafter, the Assessing Officer passed assessment order dated 30.12.2016 thereby assessing the income at loss of Rs. 1,84,52,413/-.

3. Being aggrieved by the assessment order, the assessee filed the present appeal before us.

4. The Ld. AR submitted that in the year 2014-15 i.e. subsequent assessment year, the DRP has allowed the claim of the assessee towards payment of interest on Foreign Compulsorily Convertible Indian Rupee Debentures (FCCDs) to the Associated Enterprises. The Ld. AR submitted that the AO/TPO/DRP erred in using LIBOR based interest rates to bench mark international transaction of payment of interest on FCCDs denominated in Indian Rupees. Rupee denominated FCCDs cannot be treated as foreign currency loans. The Ld. AR further submitted that RBI controls on capital account inflows into India broadly takes two forms - External Commercial Borrowings ("ECBs") and Foreign Direct Investments ("FDIs"). A loan is covered

as ECBs whereas FCCDs are considered as FDIs. As per the 'Consolidated FDI Policy' effective April 1, 2010 issued by the Department of Industrial Policy and Promotion ('DIPP'), Ministry of Commerce and Industry, Government of India, 'FDI' means investment by non-resident entity / person resident outside India in the capital of the Indian Company. Further, 'Capital' means equity shares; fully, compulsorily & mandatorily convertible preference shares; fully, compulsorily & mandatorily convertible debentures. Schedule 1 to the FEMA Regulations Notification No. FEMA 20/2000-RB dated May 3, 2000 permits FDI by a person resident outside India into convertible debentures issued by an Indian Company. Further, as per RBI Circular No. 74 dated June 8, 2007, the position on issue of capital by an Indian Company by way of issue of FCCDs has been clarified to be in the nature of FDI. The Ld. AR submitted that the TPO has considered the FCCDs as optionally or partially convertible without any basis, which is contrary to the terms of the Investment agreement as per which the conversion is mandatory within the tenure of 10 years from the date of issue of FCCDs. In this regard, the Ld. AR pointed out that the TPO himself in the order has stated that fully and mandatorily convertible preference shares and debentures are considered to be equity investments and would be subject to FDI rules and not ECB guidelines. Thus, as per the FDI policy of DIPP, RBI guidelines and FEMA regulations, issue of FCCDs by an Indian company falls in the category of FDI and not ECB as alleged by the TPO. The Ld. AR further submitted that the fact that FCCD is a hybrid instrument and categorized as equity in nature. It has been so held was accepted by the Hon'ble Supreme Court in the case of Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited & Ors. vs. Securities and Exchange Board of India & Anr. [Civil Appeal No. 9813 of 2011] dated August 31, 2012 while assigning the jurisdiction to SEBI as an equity instrument'. The Ld. AR submitted that it is an undisputed fact that the assessee has entered into a transaction in domestic currency. FCGPR filed with RBI evidencing that the payment was received in INR. The Ld. AR submitted that in various judicial precedents it has been established that the rate of interest has to be considered

in the currency in which loan has originated. In the Assessee's case, FCCDs are issued in INR, the rate of interest should be benchmarked using Indian rates. The Hon'ble Delhi High Court in the case of CIT(A) Vs. Cotton Natural (I) Pvt. Ltd. [ITA No. 233/2014] held that –the interest rate should be market determined interest rate applicable to the currency concerned in which the loan has to be repaid. The Hon'ble Bombay High Court in the case of Pr. CIT vs India Debt Management (P.) Ltd. [ITA No. 266 of 2017] relying on the above mentioned Hon'ble Delhi High Court judgment, held that the interest rate should be market determined interest rate applicable to the currency concerned in which the loan has to be repaid. It has been similarly held in the following decisions by various coordinate benches of the Tribunal:–

- ❖ ADAMA India Pvt. Ltd. Vs. DCIT (ITA No. 497/Hyd/2016)
- ❖ Hyderabad Infratech Pvt. Ltd. Vs. DCIT (ITA No. 1781/Hyd/2017)
- ❖ Brahma Center Development Pvt. Ltd. vs ITO [ITA No.373/Del/2016 (ITAT Del)]
- ❖ Granite Gate Properties Pvt. Ltd. vs ACIT [ITA No. 7026/Del/2017; 7027/Del/2017]

The London Interbank Offered Rate (LIBOR) is the average of interest rates estimated by each of the leading banks in London that it would be charged were it to borrow from other banks. The LIBOR rates are calculated for 5 currencies and 7 borrowing periods ranging from overnight to one year and are published each business day by Thomson Reuters. LIBOR is a rate of reference for interbank transactions and is primarily for Pound Sterling transactions, though it is used as a rate of reference by a few other currencies (note including INR) also. Thus, LIBOR cannot be used for the determination of ALP of interest payment for loans denominated in Indian Currency. DRP, in assessee's own case for Assessment Year 2014-15, vide directions dated August 27, 2018 accepted the fact that since FCCDs are

invested in INR, rate of interest should be benchmarked using Indian rate only and not LIBOR.

5. The Ld. DR submitted that the DRP has taken proper cognizance of the objections raised by the assessee and categorically held that the investment in FCCDs was made by the Foreign AE in US dollar and since the assessee is based in India, this foreign investment was converted by the assessee into Indian rupees. In this case, the FCCDs being raised abroad and represent foreign investment. The mere fact that this was converted by the Indian assessee in its domestic currency and even the fact that the FCCDs are claim to be denominated in Indian Rupees and are convertible into shares is not sufficient to support the assessee's claim. The Ld. DR further submitted that the interest is to be bench marked against the interest in Indian rupees and not the comparable interest in foreign currency. The FCCDs represent investment by the foreign A.E and the assessee stated in the reply that this investment was made in US dollars. Therefore, the comparable rate of interest is the rate prevailing for loans in foreign currency. The DRP categorically mentioned that the decision of the TPO is in accordance with the decision of the Hon'ble Delhi High Court in case of Cotton Naturals India Pvt. Ltd. (2015) 55 Taxman.com 523 (Delhi).

6. We have heard both the parties and perused the material available on record. It is pertinent to note that during the year, the assessee company had issued 64,08,999 number of Fully Convertible Debentures (FCD) of Rs. 100/- each @ 17.75% per annum to SA Mallika Ventures Ltd., Cyprus i.e. Associated Enterprises) and the amount paid/payable towards interest to the said AE was Rs. 2,34,84,098/- during the year. The said amount of Rs. 2,34,84,098/- has been computed by the assessee company having regard to the arm's length price as per the provisions of Section 92C of the Income Tax Act, 1961. The subscription amount received by the Assessee was INR 540,899,900 as per

clause 4 of Investment agreement dated 20.01.2012. The said amount has been computed by the assessee company having regard to the Arms Length Price, as per the provision of Section 92C of the Income Tax Act, 1961, as per the provisions and Government Orders that is exchange control regulations in force as mentioned in Rule 10B (2Xd) of the Income Tax Rules, 1962. The fact was not disputed by the Revenue that the Investment agreement clearly sets out that the subscription money for FCCDs has been received in INR (Rupees) by the assessee company and the FCCDs are said to be converted mandatorily into equity shares of assessee company (denominated in INR) and nowhere the borrowed money on reduction has to be repaid in any other foreign currency. In fact, it should be SBI Prime lending rate + 300 basis by point, which at the time of investment was 14.75%. In-fact, the decision of the Hon'ble Delhi High Court in case of Cotton Naturals (supra) categorically held in para 43 that normally there would be a difference between the lending rate and borrowing rate in each country. However, the economic purpose and substance of the debt claim or debt for which the grant of credit goes for the lending rate would be determining. Thus, in case of capital investment the borrowing rate will apply where as in case of credit allow to a customer, the lending rate would apply. Thus, the decision of the Hon'ble Delhi High Court supports the case of the assessee. It is pertinent to note that it is an undisputed fact that the assessee entered into a transaction in domestic currency. The details filed with the RBI clearly set out that the payment was received in INR. The interest should be market determined interest rate applicable to the currency concerned in which the loan has be repaid. In the present case the lending rate is in SBI Prime Lending Rate + 300 basis point, which at the time of investment was $14.75\% + 300 = 17.75\%$. In fact, the DRP in A.Y. 2014-15 allowed this claim of assessee. Thus, the AO/TPO and DRP were not correct in using LIBOR based interest rate to bench mark international transaction of payment of interest on FCCDs denominated in Indian Rupees. Thus, Ground Nos. 1, 2, 3, 3.1, 3.2 and 3.3 are allowed. As relates to Ground Nos. 4 and 5, the same are consequential, hence disposed off accordingly. The appeal of the assessee is

allowed.

7. In result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on this 26th Day of AUGUST, 2020

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 26/08/2020
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

