

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 56 OF 2016

Principal Commissioner of Income Tax-13
Mumbai .. Appellant
V/s.
M/s. Tecnimont Pvt. Ltd. .. Respondent

**AND
CROSS OBJECTION NO. 8 OF 2016
IN
INCOME TAX APPEAL NO. 56 OF 2016
(ARISING FROM ITA NO. 487/MUM/2014)
(ASSESSMENT YEAR 2009-10)**

M/s. Tecnimont Pvt. Ltd. .. Appellant
V/s.
The Dy. Commissioner of Income Tax-9(3),
Mumbai & Ors. .. Respondents

Mr. Arvind Pinto for the appellant
Mr. Nishant Thakkar a/w Ms. Jasmin Amalsadvala i/b PDS Legal for the
respondents

**CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.**

DATED : 3rd JULY, 2018.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 8th July, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2009-10.

2. The Revenue urges the following questions of law for our consideration :-

(i) *Whether on the facts and circumstances of the case and in law, the Tribunal has erred in ignoring that SBI PLR rate should have been used as benchmark instead of LIBOR since “cost of funds approach” is used for charging interest on receivable and the same is in line with the Guidelines prescribed when working capital adjustments are to be made?*

(ii) *Whether on the facts and circumstances of the case and in law, the Tribunal was erred in directing the Assessing Officer to consider LIBOR rates on transactions with the Associated Enterprises, without appreciating that the loans in the instant case, from the Company in India and the rates to be taken should naturally be local rates rather than international lending rates; more so since the subject matter of the loans relate to export receivables in India?*

3. The respondent assessee is *inter alia* engaged in the business of providing services of Engineerinig Procurement Contract (EPC) in the field of petrochemical, oil and gas, fertilizers, instrumentation and electrical erection, amongst others to its Associated Enterprises (AEs). In view of the delayed recovery of export receivables and expenses by the respondents from its AEs the Transfer Pricing Officer (TPO) made

an adjustment of Rs.10.32 crores by charging notional interest thereon by applying the interest rate at 12.25% i.e. SBI PLR (Prime Lending Rate). This by negativiting the respondents' contention that the interest to be charged be bench marked at LIBOR (London Inter Bank Operative Rate). In terms of the order of the TOP, the Assessing Officer passed a draft assessment order dated 8th February, 2013 under Section 143(3) r/w 144C of the Act.

4. Being aggrieved, the respondents had filed an application to the Dispute Resolution Panel (DRP) from the draft assessment order. However, the grievance of the respondents that the ALP of the delay in recovery of export receivable and expenses be bench marked at at LIBOR (London Inter Bank Operative Rate) rate of interest was negatived. This led to passing of a final assessment order dated 24th December, 2013 of Assessing Officer under Section 143(3) r/w Section 144C (13) of the Act.

5. Being aggrieved with the order dated 24th December, 2013, the respondent filed an appeal to the Tribunal. By the impugned order dated 8th July, 2015, the appeal was allowed. The impugned order records a finding of fact that no interest was charged by the respondent

assessee to its AEs nor was it charging interest in respect of the services rendered to non-AEs even when payments are made beyond the normal credit limit of 60 days. The impugned order also finds that the operating margin earned by the respondent assessee in respect of its AEs transactions was higher than the margin earned from its non-AEs transactions. The impugned order of the Tribunal further holds that the interest chargeable on delayed recovery of export receivables and expenses from the AEs should be taken at LIBOR rates determining the ALP of notional interest on delayed recovery. In support reliance was placed *inter alia* upon the decision of this Court in ***Commissioner of Income Tax Vs. Tata Autocomp Systems Ltd.*** (Income Tax Appeal No.1320 of 2012) rendered on 3rd February, 2015.

6. Mr. Pinto, learned Counsel appearing for the Revenue submits that the aforesaid decision in Tata Autocomp Systems Ltd. (surpa) would have no application to the facts of the present case as the issue therein was in respect of loans given to the AEs whereas the issue in this case is extending credit beyond the normal period of credit provided by the respondent assessee to its AEs and non-AEs. Thus, this appeal requires admission.

7. We note the finding of fact by the Tribunal that no interest is charged by the respondent assessee from its AEs as well as its non-AEs for delayed payment of export receivable and expenses. Further finding of fact that operating margin earned by the respondent assessee in respect of its transactions with AEs is higher than that earned on transactions with non-AEs entities. Thus, keeping the above finding of fact, we proceed to examine the Revenue's challenge to the impugned order of the Tribunal. The entire exercise of determining the ALP in respect of the AE transaction is to arrive at the price which would be the normal price in competitive conditions between non-AEs. In this case, it is only the notional interest which is being computed as in fact no interest is charged by the respondent for delayed payments universally i.e. from AEs and non-AEs. In cases where any business enterprise is required to pay interest on delayed payment, it would examine the cost of interest and if the same is higher then the amount of interest payable on funds obtained locally, it would take a loan from local sources and pay the amounts payable for exports and expenses within time. Therefore, extending of credit beyond the normal period of 60 days is in substance a granting of loan to an AE so as to enjoy the funds, which the AE would otherwise have to repay within the period of 60 days. The aforesaid finding of ours also finds support from the question of law at

Sr. No.2 as proposed by the Revenue. Thus, in these circumstances, in the facts of this case order of the Tribunal computing interest at LIBOR rates as the rate prevailing in country where the loan is received / consumed by the AE cannot in these facts be faulted as it is in line with the decision of this Court in Tata Autocomp Systems Ltd. (supra).

8. In the above view, the two questions of law as proposed do not give rise to any substantial question of law. Thus, not entertained.

9. The appeal is dismissed. No order as to costs.

10. In view of the appeal being dismissed, the Cross Objection filed by the respondent is rendered infructuous. Accordingly dismissed.

(SANDEEP K. SHINDE J.)

(M.S. SANKLECHA, J.)