

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

**Before Sh. H. S. Sidhu, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**(Through Video Conferencing)**

**ITA No. 6293/Del/2017 : Asstt. Year : 2005-06**

Aithent Technologies Pvt. Ltd., A-16/9, Vasant Vihar, New Delhi-110057	Vs	DCIT, Circle-2(1), New Delhi-110002
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAACS2319H</b>		

**Assessee by : Sh. Atul Ninawat, AR  
Revenue by : Sh. Surender Pal, CIT DR.**

<b>Date of Hearing: 14.12.2020</b>	<b>Date of Pronouncement: 05.01.2021</b>
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**ORDER**

**Per Dr. B.R.R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order dated 31.07.2017 passed by the AO u/s 254/143(3) r.w.s. 144C of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

*"1. The order of the learned Assessing Officer ('Ld. AO') is bad in law and on the facts and circumstances of the case.*

*2. The Ld. Transfer Pricing Officer ('Ld. TPO')/ Ld. Assessing Officer ('Ld. AO') have erred on facts and circumstances of the case in determining the arm's length price of the appellant's international transaction with its associated enterprises in respect of interest on loan advanced to wholly owned subsidiary thereby proposing an enhancement of returned income by Rs.1,47,99,068/-.*

*3. The Ld. TPO/AP/Ho'ble DRP has erred in laws and facts of the case by computing interest at US LIBOR further enhanced by more than 236% for risk profile etc. which is completely unreasonable and against the accepted industry norms."*

3. Regarding the third and effective ground pertaining to US LIBOR, the Id. Counsel for the assessee at the very outset stated that this issue is squarely covered in assessee's own case in ITA No. 6076/Del/2016 vide order dated 06.12.2019.

4. The Id. CIT DR although supported the order of the AO but could not controvert the aforesaid contention of the Id. Counsel for the assessee.

5. Heard the arguments of both the parties and perused the material available on record.

6. The issue stands covered in the case of the assessee in ITA No.257/Del/2017 dated 02.09.2019 for the assessment year 2006-07, the relevant findings have been given in para 10 which read as under:

*"10. In the circumstances, we are of the considered opinion that the LIBOR with mark up cannot be found fault with, having regard to the facts of the case of the assessee. However, we find that the mark up of 500 basis points to the US LIBOR appears to be unjustifiable. We consequently, accept the alternate plea of the assessee and find that the bench marking of the interest on loan at US LIBOR plus 170 basis points would meet the ends of justice, and, accordingly, direct the Ld. TPO to re-compute the notional interest at US LIBOR plus 170 basis points. Grounds of appeal are, accordingly, allowed in part."*

7. Further, we find that an identical issue having similar facts was a subject matter of the assessee's appeal in ITA No. 6076/Del/2016 dated 06.12.2019 for the assessment year 2004-

05, the relevant findings have been given in para 7 to 12 which read as under:

*"7. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.*

*8. At the very outset, Id. AR for the taxpayer contended that the issue in question is duly covered in favour of the taxpayer in its own case for AY 2006-07 decided in ITA No.257/Del/2017 vide order dated 02.09.2019. It is further contended that when granting a loan to wholly owned subsidiary is less risky as compared to loan granted by bank, TPO/DRP have erred in making the mark-up of 500 basis points to the LIBOR and relied upon the decision rendered by the Hon'ble Delhi High Court in the case of CIT vs. Cotton Naturals (I)(P) Ltd. (2015) 55 taxmann.com 523 (Delhi) and the decision rendered by Hon'ble Rajasthan High Court in the case of CIT vs. M/s. Vaibhav Gems Ltd. (now known as Vaibhav Global Ltd.) in D.B. ITA No.14/2015 order dated 13.10.2017.*

*9. Hon'ble Delhi High Court in CIT vs. Cotton Naturals (I)(P) Ltd. (supra) rejected the mark-up towards the translation cost and has also rejected the comparison by the TPO with banks and also held that risk factor attached to the loan granted by the taxpayer to its AE by the TPO is also not approved by the Hon'ble High Court and returned the finding in favour of the taxpayer as under:-*

*"32. On the question of adjustment made on account of the transaction cost, we do not appreciate the reasoning given by the TPO and find it difficult to accept. The transaction or hedging cost is borne and paid by the borrower. These are undertaken when they take loans in US Dollars or other foreign currencies because the borrower wants to cover any loss on account of the depreciation of the Indian Rupee vis-à-vis the foreign currency. The assessee in the present case is not the borrower, but the lender. Transaction cost is not, therefore, applicable in the case in question, as the loan had to be repaid in US Dollars. Mark up towards the transaction cost is exorbitant and even comparison with banks is unsound and unintelligible. Risk factor adjustment is also*

*stretched, for it ignores the close relationship between the two AEs and the funds were the shareholder funds, and not borrowed money."*

*10. Similarly, Hon'ble Rajasthan High Court in CIT vs. M/s. Vaibhav Gems Ltd. (supra) also decided the identical issue in favour of the taxpayer by holding that the taxpayer is entitled for the benefit of average LIBOR rate existing at that time which was 0.79% and also rejected the addition of ad hoc 2% applied by the Revenue by returning following findings:-*

*"11. Regarding ITA No.149/2015 preferred by the assessee in view of the Delhi High Court judgment (para no.14), the international transaction is required to be accepted, therefore, Tribunal has committed serious error. The assessee will be entitled for the benefit of average LIBOR rate existing at that time which was 0.79% and addition of adhoc 2% is not proper. In that view of the matter, the addition of 2% interest in the income is required to be quashed and set aside."*

*11. Coordinate Bench of the Tribunal in taxpayer's own case for AY 2006-07 (supra) decided the identical issue in favour of the taxpayer by returning following findings:-*

*"9. In so far as the facts are concerned, there is no dispute that the assessee advanced the interest free loan to its wholly owned subsidiary. In the first round of litigation, the Ld. TPO reckoned the notional interest as per PLR and was confirmed by the Ld. DRP, In the second round of litigation, the Id. TPO bench marked the interest on loan at SBI PLR plus 300 basis points, whereas, Id. DRP, while following their own finding for the AY 2002-03 made it US LIBOR plus 500 basis points. It is not the case of the assessee that the facts involved in the matter are different from those involved for the AY 2002-03. It is not the case of the assessee that the findings of the Id. DRP for the AY 2002-03 are in any way disturbed in any subsequent proceedings.*

*10. In the circumstances, we are of the considered opinion that the LIBOR with mark up cannot be found fault with, having regard to the facts of the case of the assessee. However, we find that the mark up of 500 basis points to the US LIBOR appears to be unjustifiable. We consequently,*

*accept the alternate plea of the assessee and find that the bench marking of the interest on loan at US LIBOR plus 170 basis points would meet the ends of justice, and, accordingly, direct the Id. TPO to re-compute the notional interest at US LIBOR plus 170 basis points, Grounds of appeal are, accordingly, allowed in part."*

*12. In view of the facts and circumstances of the case discussed in the preceding paras and following the aforesaid decision rendered by Hon'ble High Courts discussed in preceding paras and by the coordinate Bench of the Tribunal, we are of the considered view that transfer pricing adjustment qua the transaction of advancing loan by the taxpayer to its AE is to be determined at US LIBOR plus 170 basis points. Consequently, the TPO is directed to re-compute the interest at US LIBOR plus 170 basis points to benchmark the international transactions qua interest on loan by the taxpayer to its AE. Consequently, the appeal filed by the taxpayer is allowed."*

8. Hence, owing to the history of the case, *Stare decisis* invoked.
9. We direct that transfer pricing adjustment qua the transaction of advancing loan by the taxpayer to its AE is to be determined at US LIBOR plus 170 basis points.
10. In the result, the appeal of the assessee is allowed.
- Order Pronounced in the Open Court on 05/01/2021.

Sd/-

**(H. S. Sidhu)**  
**Judicial Member**

**Dated: 05/01/2021**

\*Subodh\*

Copy forwarded to:

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

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**