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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 623/2016 & C.M.30452/2016

PR COMMISSIONER OF INCOME TAX – 9 ..... Appellant

versus

M/S UFO MOVIEZ INIDA LTD. ..... Respondent

\+ ITA 624/2016 & C.M.30453/2016

PR COMMISSIONER OF INCOME TAX – 9 ..... Appellant

versus

M/S UFO MOVIEZ INIDA LTD. ..... Respondent

\+ ITA 625/2016 & C.M.30454/2016

PR COMMISSIONER OF INCOME TAX – 9 ..... Appellant

versus

M/S UFO MOVIEZ INIDA LTD. ..... Respondent

Present: Mr.Zoheb Hossain, Sr.Standing counsel with Mr.Deepak Anand, Jr.standing counsel for the appellants.
Mr.V.N.Jha, Advocate for the respondents.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

O R D E R

% 17.10.2016

1. The revenue in these appeals under Section 260A of the Income Tax Act is aggrieved by the common decision of the Income Tax Appellate Tribunal (ITAT) for three assessment years. It urges two issues namely (1) Whether the inapplicability of transfer pricing exercise with respect to loans advanced to subsidiary/AE is contrary to the provisions of Chapter X of the Income Tax Act and Rule 10A

of Income Tax Rules. (2) Whether the deletion of the disallowance under Section 14A was justified.

2. The assessee carries on business in digital cinema distribution network and in-cinema advertisements. As part of its return it had reported in international subsidiary in AE. The subject matter of the appeals concerns the loan advanced in dollar equivalent, for a five year term i.e. Rs.45,61,65,318/- to its subsidiary/AE. The agreement between the parties stipulated tenure of five years for repayment of the loan and interest @ of 7% per annum. The transfer pricing officer rejected the assessee's contentions and indicated an appropriate adjustment on the basis that upon ALP determination the interest rate had to be fixed at 17.26% using the CUP method. The assessee partly succeeded in its reference to the DRP which noticed that the TPO had wrongly applied domestic interest rates to carry out the adjustment. It applied what according to it was appropriate i.e. 4% above the prevailing LIBOR rate – which aggregated to 8.53% per annum.

3. The ITAT, on assessee's appeal set aside the DRP's ruling. The revenue contends that ITAT's approach according to it was incorrect. Mr.Zoheb Hussain, learned counsel for the appellants argues that ITAT's assumption that loan was advanced by principal to its subsidiary – regardless of the latter being an AE which could not be subjected to an ALP exercise, is too broad for acceptance.

4. The ITAT in its impugned order had inter alia reasoned as under:

> *"11. There are any number of decisions by the coordinate benches which show that the interest rates charged on*

foreign currency, say US dollars, loans are much lower than the 250 to 500 basis points above the LIBOR having been to be generally applicable rates. For instance, in the cases of Bharti Airtel (supra), which pertains to the assessment years 2007-08 and 2008-09, the comparable cases were taken as 150 basis points above LIBOR and in the range of 140-170 basis points above LIBOR. In contrast to this comparable case, the interest charged in the present case is 247 points above the LIBOR rate. In the case of Siva Industries & Holdings Ltd Vs ACIT [(2012) 145 TTJ 197 (Chennai)], dealing with the assessment year 2006-07 and while referring to LIBOR at 4.42, interest rate on advances to subsidiary at 6%, which was thus 158 points above the LIBOR rate, was held to be an arm's length price. ln view of these discussions, it cannot be said that the advance to subsidiary, at 247 basis points above the LIBOR, is not at an arm's length price. In any event, once DRP itself states that the Indian banks are charging 250 basis above LIBOR on similar loans, even though this interest rate could reach upto 400 basis points in some cases, there cannot be any good reason for holding that loan advanced to a subsidiary at 247 basis points above the LIBOR rate is not at an arm's length price. That apart, as noted earlier in this order, once Hon'ble Delhi High Court, observes that the ***"assessee advanced monies to the subsidiaries which were under its management and. control, which in fact substantially reduced the risk and in these circumstances there was no rationale of adjusting any amount of higher basis"****, it cannot be open to the transfer pricing authorities to contend that this loan should be treated as a high risk loan on which high interest rate should be charged even within the range of interest rates charged by the Indian banks generally. In view of these discussions, as also bearing in mind entirety of the case, we uphold the grievance of the assessee and direct the Assessing Officer to delete this arm's length price adjustment of Rs.74,20,785 in respect of interest charged on advances to the subsidiaries."*

5. In this case, while examining the sum advanced in question, especially the rate of interest, the DRP and later the ITAT closely scrutinized not only the prevalent LIBOR rates but also the risk assessment. The Tribunal – as is evident from the extracted part of its reasoning, held that when the DRP itself stated that since Indian banks were charging 250 basis points above LIBOR on similar loans, there was no good reason for holding that the loan advanced to a subsidiary at 247 basis points above the LIBOR rate to be not at arm's length. These findings are essentially factual and based upon the choice of either accepting in entirety the DRP reasoning which itself had found the TPOs approach incorrect or substituting it with the ITAT's reasoning. In other words, as between the views of the DRP and that of the ITAT, this court is being asked preferred that of the former. *Ipso facto* this does not constitute a question of law, however this Court finds some merit and substance in the revenue's grievance with the ITAT's observations that advances to foreign subsidiaries per se may not constitute international transactions. This court clarifies that such observations should not be treated as binding and that it is up to the concerned Transfer Pricing Officer to undertake the necessary scrutiny having regard to the facts of each case to discern whether indeed the terms of any given loan are at arm's length or not. To that extent the wide observations of the ITAT are not approved but are confined to the facts of the present case. On the first issue, no question of law arises.

6. As far as the second question goes, the Court notices that the findings of the ITAT that the kind of disallowance made could not be

sustained, was entirely fact dependent inasmuch as application of Rule 8D in this case was wronged upon. The assessee had contended successfully that the funds deployed to derive the tax exempt income were its own and were not borrowed. These findings too are factual and cannot constitute questions of law.

7. For the foregoing discussion, the appeals along with the pending applications are dismissed.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

OCTOBER 17, 2016

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