IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1455 OF 2014

THE COMMISSIONER OF INCOME TAX-5)...APPELLANT

V/s.

THE GREAT EASTERN SHIPPING CO. LTD.)...RESPONDENT

Mr.N.C.Mohanty, Advocate for the Appellant.

Mr.Percy Pardiwalla, Senior Counsel, a/w. Mr.Jitendra Jain and Mr.A.K.Jasani, Advocate for the Respondent.

CORAM : S.V.GANGAPURWALA & A. M. BADAR, JJ.

DATE : 28th JUNE 2017

P.C. :

1 The learned counsel for the appellant fairly concedes that as far as Question Nos.4 and 5 raised in this appeal are concerned, the same had also arisen in case of the present assessee in other appeals and the same are decided against the revenue and would be pressing only Question Nos.1, 2 and 3.

2 The Question Nos.1, 2 and 3 framed are as under :

(i) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in holding that the Ld. CIT(A) had not validly considered the Transfer Pricing adjustment as required under the law ?

(ii) Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT was justified in ignoring the fact that Transfer Pricing adjustment USD IRS rate is for conversion of floating rate of interest to the fixed rate of interest and export credit rates are in respect of export consignments and not for the purpose of working capital as per the RBI guidelines which are in respect of ECB ?

(iii) Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT was justified in ignoring the fact that the RBI's Master Circular No.07/2006-07 dated 1st July 2006 on External Commercial Borrowings (ECB) is applicable in the present case ? Any other question of law if this Hon'ble Court may like to formulate, in the facts and circumstances of the case.

3 The learned counsel for the appellant strenuously contends that the Tribunal was not right in holding that the Commissioner (Appeals) has not validly considered the Transfer Pricing adjustment as required under the law. It ought to have been considered that Transfer Pricing adjustment USD IRS rate is for conversion of floating rate of interest to the fixed rate of interest. The RBI's Master Circular has been completely ignored. The Commissioner (Appeals) has rightly considered the same and had adopted the correct policy that the loan of 17 million was for a period of 7 years, and as such, LIBOR plus 350 basis points was correctly applied by the Commissioner (Appeals) as is laid down by the RBI's Master Circular dated 1st August 2005. According to the learned counsel, the case relied by the respondent in **Commissioner of Income-Tax vs. Tata Autocomp Systems Ltd.** reported in **[2015] 374 ITR 516** also dealt with application of the said circular and the said circular was applied by the Tribunal and this court on upholding the same. According to the learned counsel, the rate of interest upon which the loan is received by the assessee cannot be considered as a comparable one with the rate of interest at which the loan is given to Associate Enterprises for various reasons. The assessee has got a

better goodwill and better reputation. As such, loan at lower rate of interest could be available. All these factors are rightly considered by the Commissioner (Appeals). The mistake that was committed by the Transfer Pricing Officer is corrected by the Commissioner (Appeals). The Tribunal has gone on entirely wrong premise. It could not have considered the period of repayment of loan. However, the period for which the loan was given was required to be considered.

4 Mr.Pardiwalla, the learned senior advocate for the respondent, submits that the Transfer Pricing Officer had considered the rate of interest as applicable in India, which is, on the face of it, erroneous. The charging of Arms Length interest has been considered rightly. The assessee has taken loan at a rate of Rs.4.79 and it has advanced loan of 17 million to its Associate Enterprise situated in a foreign country at 7.3%. According to the learned senior advocate, the same has been rightly considered. The rate of interest as prevailing in the country where the said loan is consumed will have to be considered and not the rate of interest prevailing in India. The Tribunal has considered that the benchmarking done by

the assessee are based on the interest paid by it on its borrowing of loan from KEXIM Bank and from the State Bank of India. The said finding of fact is arrived at on appreciation of the facts to the present case.

4 We have considered the submissions canvassed by the learned counsel for respective parties. In the case of **Commissioner of Income-Tax vs. Tata Autocomp** referred to supra, it was held that arm's length price in the case of loans advanced to Associate Enterprises would be determined on the basis of rate of interest being charged in the country where the loan is received / consumed.

5 In the present case, the Revenue has not brought on record any other evidence to the effect that in the country where the loan is received by the Associate Enterprise, the rate of interest is different than the one which is being charged by the assessee. Further, it has been brought on record that the assessee has been advanced loan by the foreign bank at rate of 4.79 % and has charged interest on loan advanced to Associate Enterprise at Rs.7.3%. We could have considered the case of the Revenue had the Revenue

brought on record the rate of interest being charged in the country where the Associate Enterprise of the assessee has advanced the loan. Naturally, the period for which loan has been given would be considered and not the period within which the loan has been repaid. However, considering the fact that the assessee has got the loan at 4.79% and has advanced the loan to his Associate Enterprise at 7.3% and the very basis of the order of the Transfer Pricing Officer was on wrong premise i.e. it has considered the rate as prevailing in India, the Tribunal has considered the facts of the present case in a plausible manner.

6 In the light of above, no substantial question of law is made out. As such, the appeal is dismissed.

(A. M. BADAR, J.) **(S.V.GANGAPURWALA), J.)**