आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD

BEFORE
SHRI MANJUNATHA G., ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / **ITA No.509/Hyd/2022**
(निर्धारण वर्ष / Assessment Year: 2018-19)

Microchip Technology (India) Private Ltd. (for the merged entity Microsemi India Private Limited) Bengaluru [PAN :AABCM9868J]	Vs.	Deputy Commissioner of Income Tax Circle-5(1) Hyderabad
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Ms.Tanmayee Rajkumar, AR
राजस्व द्वारा/Revenue by: Ms. TH Vijaya Lakshmi, DR

सुनवाई की तारीख/Date of hearing: 08/08/2024
घोषणा की तारीख/Pronouncement on: 11/09/2024

आदेश / **ORDER**

PER K.NARASIMHA CHARY, J.M:

Aggrieved by the order dated 29/07/2022 passed by the learned Deputy Commissioner of Income Tax, Circle-5(1), Hyderabad pursuant to the directions of the learned Dispute Resolution Panel (learned DRP) in the case of Microchip Technology (India) Private Ltd ("the assessee") for the assessment year 2018-19, assessee preferred this appeal.

2. Issue in this matter relates to arm's length price (ALP) adjustment in respect of interest on the receivables. Argument of the learned AR is two fold. One is challenging the legality of the assessment order on the ground

that in spite of repeated information furnished to the learned Assessing Officer about the merger of Microsemi India Private Ltd. (MIPL) with Microchip Technology (India) Private Limited (MTIPL), the learned Assessing Officer passed the assessment order on a non-existent entity, consequent to its merger. In so far as the merits are concerned, the learned AR's submission is that the assessee has both trade receivables as well as payables and therefore, charging interest only in respect of trade receivables for the purpose of ALP is incorrect. Now, we shall proceed to appreciate these contentions in the light of the material on record.

3. In this matter, notice u/s 143(2) of the Income tax Act, 1961 ("the Act") was issued on the Microsemi India Private Ltd. (MIPL) on 22/09/2019; that a scheme of amalgamation came to sanction on 21/12/2010 by the National Company Law Tribunal, Hyderabad, under which MIPL and other group entities were amalgamated with Microchip Technology (India) Private Limited (MTIPL); that 01/04/2019 happened to be the appointed date for merger; that letters dated 08/03/2021, 08/04/2021 and 15/04/2021 were filed with the learned Assessing Officer/Transfer Pricing Officer, intimating the merger of MIPL and MTIPL; that on 30/07/2021, the Transfer Pricing Order was passed on the name of MIPL; that draft assessment order u/s 143(3) r.w.s.142(1) was passed on 22/09/2021 on the name of MIPL; and that final assessment order dated 29/07/2022 was also passed on the name of MIPL.

4. Learned AR submits that there is no dispute as to these dates and there is no controversy in respect of the assessee informing the authorities about the merger of MIPL and MTIPL. Based on this, she submitted that there is catena of cases, wherein it has been held that any assessment order passed on the name of the non-existent entity is non-est in the eye of law.

5. Per contra, learned DR submitted that amalgamating company, namely M/s Microsemi India Private Ltd. continues to be existent as per

Income Tax records since its PAN AAHCS7379L was not withdrawn and at the same time M/s Microchip Technology (India) Private Ltd also exist with PAN : AABCM9868J as on the date of passing of assessment order and therefore, the search in Income Tax Business Application(ITBA) module based on the PAN had displayed the name of M/s Microsemi India Pvt. Ltd., which resulted in passing of the assessment order. She further referred to the statement of the learned AR that the PAN relating to M/s Microsemi India Private Ltd. could not be surrendered in view of certain unconcluded litigation pending against the amalgamating company and such a surrender will be done only after the litigation is complete and demands against the said PAN are exhausted. While referring to this statement, the learned DR submitted that as on the date of the passing of the assessment order, both the entities are existent in the eye of law and the assessee cannot say that MIPL was not in existence. She placed reliance on the Hon'ble Apex Court in the case of PCIT Vs Mahagun Realtors (P.) Ltd. [2022] 137 taxmann.com 91(SC) to buttress her argument.

6. We have gone through the record in the light of the submissions made on either side. In the case of Mahagun Realtors (P) Ltd. supra, the Hon'ble Apex Court held in unequivocal terms that in the case of amalgamation, unlike the winding up of a corporate entity, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues unfolded within the new or the existing transferee entity. Hon'ble Apex Court further held that the business and the adventure lives on but within a new corporate residence, namely, the transferee company. Therefore, it is essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings. Hon'ble Apex Court also held that whether corporate death of an entity upon amalgamation per se invalidates an assessment order ordinarily cannot be determined on a bare application of section 481 of the

Companies Act, 1956 (and its equivalent in the 2013 Act), but would depend on the terms of the amalgamation and the facts of each case.

7. Viewing in the light of these observations of the Hon'ble Apex Court, the facts of the present case clearly present a picture, where the amalgamated as well as the amalgamating company to be in existence, despite the fact of amalgamation, because for the purpose of concluding the litigations and exhausting the demands against the amalgamating company, the continuance of the said entity with its PAN AAHCL7379L was necessary. This situation created nuanced picture as to the existence or to the continuance of the entity, M/s Microsemi India Pvt. Ltd. for the purpose of litigation, demands etc. Having clarified that such a continuance is essential for the purpose of concluding the litigations and exhausting the demands against M/s Microsemi India Private Limited for the purpose of litigation, demands etc., resulting in non surrender of the PAN, it is not open for the assessee to say that the assessment order was passed against a non-existing company. Existence or non-existence do not lie on any continuum. If a company exists for the purpose of some litigation, it exists for the purpose of tax litigation also. This was the dicta of the Hon'ble Apex court in the case of Mahagun Realtors Pvt Ltd. In these facts and circumstances of the case, we, therefore, conclude that there is no merit in the argument of the learned AR that assessment itself is bad, because the order was passed on the name of M/s Microsemi India Private Ltd.

8. Now turning to the merits of the case in the grounds of appeal, the assessee contended that the transaction of outstanding receivables with the Associated Enterprise of the assessee is in the regular course of their business and cannot be benchmarked as a separate international transaction, assessee not only has trade receivables, but also, there are trade payables and therefore set off must be given in respect of these transactions and lastly in respect of rate of interest.

9. Per contra, learned DR submitted that this aspect does not leave any scope for any discussion in view of the decision of the Hon'ble Delhi High Court in the case of DCIT vs. McKensey knowledge Centre India Pvt. Ltd [2018] 96 taxmann.com 237 (Delhi) and the Co-ordinate Bench of the Delhi Tribunal in the case of Bhatia Airtel services Ltd vs. DCIT, [2021] 126 taxmann.com 315 (Delhi - Trib.) holding that with the introduction of the explanation to section 92B of the Act by Finance Act, 2012 it is a determinable that if there is any delay in the realization of credit arising from the sale of goods or services rendered in the course of carrying on the business, it is liable to be visited with the transfer pricing adjustment on account of interest income short charged/uncharged. Basing on the view taken in a number of decisions of the Tribunal of various Benches, authorities held that it is incumbent upon the taxpayer to separately benchmark the arm's length price of the international transaction relating to interest on overdue receivables from the AE by way of analysis of functions, assets and risks.

10. Learned DR further argued that the credit period as per the invoice with the AE cannot be contemplated as a comparable in TP regime as it is a controlled transaction and lacks arm's length characteristic as held by the ITAT in the case of M/s. Technimont ICB P. Ltd., vs. Addl. CIT 138 ITD 23 (Mum); whereas apart from placing reliance on the view taken by the learned DRP for the assessment year 2018-19 which became final, the learned AR also placed reliance on a decision of the Mumbai Bench of the Tribunal in the case of DCIT vs. Indo American jewellery Ltd in ITA No. 5872/mum/2009 for the principle that if an entity is engaged in commercial transactions with the group entity as well as third-party unrelated customers, and if the entity is giving credit facility ranging up to 352 days to both group entity as well as the third-party unrelated customers, in such case, no addition on account of interest adjustment can be made.

11. On the quantification of the interest on trade receivables, learned DR, while placing reliance on the view taken by a coordinate Bench in assessee's own case for the assessment year 2018-19 in ITA No. 485 /Hyd/ 2022 by order dated 27/4/2023, submitted that the rate of interest chargeable on the trade receivables at 6% was held to be reasonable. He further submitted that while reaching this conclusion, the Tribunal placing reliance on the earlier decisions of the coordinate benches in the cases of indeed India in ITA No. 254 /Hyd/ 2021, Quizlex Legal Services in ITA No. 6 /Hyd/ 2022, Zeta Interactive Systems (India) (P) Ltd., in ITA No. 1812 /Hyd/ 2017, Satyam Venture in ITA 362 /Hyd/ 2021 and Apache Footwear India Pvt. Ltd (Supra) in ITA No. 568 /Hyd/ 2022. He filed a copy of the order in ITA No. 485 /Hyd/ 2022 and it forms part of record.

12. Ld. AR, on the other hand placed reliance on the decisions reported in PCIT vs. Tecnimont (P.) Ltd. [2018] 96 taxmann.com 223 (Bombay) and CIT Vs. Cotton Naturals (I) (P.) Ltd. [2015] 55 taxmann.com 523 (Delhi) wherein it was held that interest at LIBOR rates as the rate prevailing in country where the loan is received/consumed by the AE is proper as it is in line with the decision of this Court in CIT v. Tata Autocomp Systems Ltd. [2015] 56 taxmann.com 206 (Bom.). Ld. AR submitted that the decision of the Tribunal in the earlier assessment year 2018-19 was rendered without noticing these decisions of the Hon'ble Bombay and Delhi High Court's on the aspect of the interest to be levied, whether it is at the State Bank Lending Rates or at LIBOR. He, therefore, submitted that when the decisions of the higher fora are brought to the notice of the Tribunal, it would be a mistake to prefer the decision of the coordinate benches on this aspect.

13. We have considered the submissions on either side. In the case of the DCIT vs. McKensey knowledge Centre India Pvt. Ltd [2018] 96 taxmann.com 237 (Delhi) Hon'ble Delhi High Court and in the case of Bhatia

Airtel services Ltd vs. DCIT, [2021] 126 taxmann.com 315 (Delhi - Trib.) the Co-ordinate Bench of the Delhi Tribunal it was held that with the introduction of the explanation to section 92B of the Act by Finance Act, it is determinable that if there is any delay in the realization of credit arising from the sale of goods or services rendered in the course of carrying on the business, it is liable to be visited with the transfer pricing adjustment on account of interest income short charged/uncharged. It is, therefore, not open for the assessee to agitate this question as to whether the interest on outstanding receivables in an international transaction is requiring separate benchmarking time and again.

14. Next issue remains to be considered is in respect of the rate of interest. While placing reliance on the decisions reported in Tecnimont ICB House Vs. DCIT [2015] 60 taxmann.com 143 (Mumbai - Trib.), Hon'ble Bombay High Court in PCIT Vs. Tecnimont (P) Ltd., (supra) and CIT Vs. Cotton Naturals (I) (P.) Ltd. [2015] 55 taxmann.com 523 (Delhi), learned AR prayed that LIBOR+200 basis points may be adopted. This aspect is no longer res integra and dealt with by the Mumbai Bench of the Tribunal in the case of Tecnimont ICB House (supra) and confirmed by the Hon'ble Bombay High Court. Cotton Naturals (I) (P.) Ltd. (supra) is also on the same aspect.

15. In the case of the Tribunal, Tecnimont ICB House Vs. DCIT [2015] 60 taxmann.com 143 (Mumbai - Trib.) considered the view taken in Everest Kanto Cylinder Ltd. v. Asstt. CIT (LTU) [2014] 52 taxmann.com 395 (Mum.); PMP Auto Components (P.) Ltd. v. [IT Appeal No. 1484 (Mum.) of 2014, dated 22-8-2014]; Hinduja Global Solutions Ltd. v. Addl. CIT [2013] 145 ITD 361/35 taxmann.com 348 (Mum.); Tata Autocomp Systems Ltd. v. Asstt. CIT [2012] 52 SOT 48/21 taxmann.com 6 (Mum.); CIT v. Tata Autocomp Systems Ltd. [2015] 56 taxmann.com 206 (Bom.); Four Soft Ltd. v. Dy. CIT [2011] 142 TTJ 358 (Hyd.); and Everest Kanto Cylinder Ltd. v. Asstt. CIT (LTU) [2015] 56 taxmann.com 361 (Mum.) and upheld use

of LIBOR for the purpose of benchmarking loan/advance given to foreign AE's, and held that the notional interest has to be worked out for so called amount receivable from AE, by applying LIBOR interest rate for the purpose of computation of transfer pricing adjustment, if any. This view is affirmed by the Hon'ble Bombay High Court in PCIT vs. Tecnimont (P.) Ltd. [2018] 96 taxmann.com 223 (Bombay) observing that 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 than 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 agreed period 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 time agreed. On this premise the Hon'ble High Court upheld the Tribunal computing interest at LIBOR rates as the rate prevailing in country where the loan is received/consumed by the AE by observing that the same cannot be faulted.

16. In the case of CIT Vs. Cotton Naturals (I) (P.) Ltd. [2015] 55 taxmann.com 523 (Delhi) the Hon'ble Delhi High Court considered the question - whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, observed that such a question must be answered by adopting and applying a commonsensical and pragmatic reasoning and held that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid; that the interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. It is further observed that the interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal

policy of the Central bank, mandate of the Government and several other parameters; that the interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable; that the currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. While referring to the Klaus Vogel on Double Taxation Conventions (Third Edition) under Article 11 in paragraph 115, the Hon'ble High Court held that the PLR rate, therefore, would not be applicable and should not be applied for determining the interest rate and the PLR rates are not applicable to loans to be re-paid in foreign currency. Hon'ble Court accordingly held that whatever the principle that is applicable to the case of outbound loans, would be equally applicable to inbound loans given to Indian subsidiaries of foreign AEs, that the parameters cannot be different for outbound and inbound loans, and a similar reasoning applies to both inbound and outbound loans.

17. In the case of PCIT vs. Tecnimont (P.) Ltd. [2018] 96 taxmann.com 223 (Bombay) AY. 2009-10, Hon’ble Bombay High Court held that interest chargeable on delayed recovery of export receivables from AEs should be taken at LIBOR rates for determining ALP of notional interest on delayed recovery.

18. In this case, the loan attributable to the AE, is deemed to have been consumed in a country outside India and, therefore, the interest at LIBOR rates as the rate prevailing in country where the loan is received/consumed by the AE cannot be said to be incorrect and such a view is in line with the decision of the Bombay High Court in the case of Tecnimont (P.) Ltd (supra). Reasons for not bringing the decisions of the Hon’ble Bombay High Court and Delhi High Court to the notice of the Bench when the matter for the assessment year 2018-19 was heard, are not known. Be that as it may, now the assessee brings to our notice the decision of the Hon’ble Bombay High

Court in the case of Tecnimont (P.) Ltd (supra) and the decision of the Hon'ble Delhi High Court in the case of Cotton Naturals (I) (P.) Ltd. (supra), and such decisions are no doubt binding precedents and should be preferred to the decisions of the Co-ordinate Benches of the Tribunal. We, therefore, do not wish to enter into a fresh debate on that aspect and respectfully follow the directions of the higher fora.

19. Respectfully following the judicial opinion stated supra, we are of the considered opinion that the ends of justice would be met by accepting the interest rate on similar foreign currency receivables/advances as LIBOR+200 points. We direct the learned Assessing Officer / learned TPO to adopt the same. Grounds are partly allowed accordingly.

20. In so far as the prayer of the assessee in respect of set off of the trade receivables and payables and the deemed interest thereon, is concerned, learned AR placed reliance on the decision of the coordinate Bench in the case of Coim India Pvt.Ltd Vs. DCIT in ITA No.495/Del/2021. We find it reasonable because, when the assessee has both trade receivables and trade payables, it would be unreasonable to calculate interest only on trade receivables for the purpose of determining the ALP of the transaction. It would be in the interest of justice to direct the learned Assessing Officer/learned TPO to consider both trade payables and trade receivables for the purpose of notional interest to be charged for determining the ALP value of the transaction. We hold and direct so.

21. In the result, appeal of the assessee is allowed in part.

Order pronounced in the open court on this the 11th day of September, 2024.

Sd/-	Sd/-
(MANJUNATHA G.)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 11/09/2024

L.Rama, SPS

Copy forwarded to:

1.M/s Microchip Technology (India) Private Ltd.(for the merged entity Microsemi India Private Limited), Plot No.149/B, Block A, EPIP Industrial Area, Whitefield, Bengaluru, Karnataka
2.The Deputy Commissioner of Income Tax, Circle-5(1),Hyderabad.
3.The Pr.CIT, DRP-1, Bengaluru
4.DR, ITAT, Hyderabad.
5.GUARD FILE

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