आयकर अपीलीय अधिकरण "के" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. : 620/Mum/2013
(Assessment year: 2008-09)

अदित्या बिरला मीनाक्स वर्ल्डवाइड लिमिटेड Aditya Birla Minacs Worldwide Limited, Teritex Bldg, Saki Vihar Road, Sakinaka Andheri (East), Mumbai -400 072 स्थयी लेखा सं.:PAN: AACT1567A	**Vs**	JT CIT 8(1), R.NO.210, 2ND FLOOR, AAYAKAR BHAVAN M K Marg, Mumbai -400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Rajan Vora Shri Hemen Chandariya
Respondent by	:	Rupinder Bror CIT (DR)

ITA No. : 610/Mum/2013
(Assessment year: 2008-09)

JCIT (OSD) 8 (1), R.NO 260 A, 2ND FLOOR AAYAKAR BHAVAN, M. K. ROAD, MUMBAI- 400020	**Vs**	अदित्या बिरला मीनाक्स वर्ल्डवाइड लिमिटेड Aditya Birla Minacs Worldwide Limited,Teritex Bldg, Saki Vihar Road, Sakinaka Andheri (East), Mumbai -400 072 स्थयी लेखा सं.:PAN: AAACT1567A
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Rajan Vora Shri Hemen Chandariya
Respondent by	:	Rupinder Bror CIT (DR)

ITA No. : 4276/Mum/2015
(Assessment year: 2009-10)

Minacs Private Limited (Formerly Known as Aditya Birla Minacs Worldwide Limited), 9th Floor, Symphony IT Park, Chandivali Farm Road,Andheri (East), Mumbai -400 072 स्थयी लेखा सं.:PAN: AAACT1567A	**Vs**	Dy. Commissioner of Income Tax 10(1) (1), Mumbai (Erstwhile Dy. Commissioner of In Tax- 8 (1)-Mumbai ,Room No. 209, 2nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Yogesh Thar
Respondent by	:	Rupinder Bror CIT (DR)

ITA No. : 4790/Mum/2015
(Assessment year: 2009-10)

DCIT-10 (2) (2), Mumbai R.NO 216- A, 2ND FLOOR AAYAKAR BHAVAN, M. K. ROAD MUMBAI- 400020	**Vs**	Minacs Private Limited (Formerly Known as Aditya Birla Minacs) Worldwide Limited,Symphony IT Park, 8th,9th ,10th Floor, Behind Chandivali Ice Factory Chandivali Farm Village Mumbai -400 072 स्थयी लेखा सं.:PAN: AAACT1567A
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Yogesh Thar
Respondent by	:	Rupinder Bror CIT (DR)

सुनवाई की तारीख /Date of Hearing : 22-06-2016

घोषणा की तारीख /Date of Pronouncement : 25-08-2016

आदेश
ORDER

PER R.C. SHARMA, AM:

The captioned are four cross appeals, preferred by Assessee and Revenue pertaining to assessment year 2008-09 and 2009-10.

2. Two cross Appeals pertaining to assessment year 2008-09 are directed against an order passed by the Ld. CIT (A)-15 Mumbai dated 30/11/2012 which in turn arises out of an order passed by Jt. Commissioner of Income Tax (OSD)-8 (1), Mumbai, under section 143 (3) r.w.s.144C(3) of the Income Tax Act, 1961 (in short, `the Act') dated 11/01/2012 and vide TPO order U/s 92CA (3) of the I.T. Act,1961 dated 14/10/2011. On an application filed by the Assessee U/s 154 of the Act pointing out certain arithmetical inaccuracies the transfer pricing order rectified on dated 13/12/2011 and consequently the assessment order U/s 143(3) was also rectified U/s 154 on dated 20/06/2013.

3. Two Cross Appeals pertaining to assessment year 2009-10 , are directed against an order passed by the Ld. CIT (A)-55 Mumbai, Vide order No.CIT (A)-55/IT-143/13-14 dated 31/03/2015, which in turn arises out of an order passed by Dy. Commissioner of Income Tax 8 (1), Mumbai, under section 143 (3) r.w.s.144C(3) (a) of the Income Tax Act, 1961 (in short, `the Act') dated 28/05/2013 and vide TPO order U/s 92CA (3) of the I.T. Act,1961, (in short 'the Act') dated 28/01/2013.

4. Briefly put, the relevant facts are that the assessee is a company and is inter-alia engaged in the business of providing information Technology enabled services, such as, call centre and BPO services etc. During the assessment proceedings, certain additions and disallowances were made including transfer pricing adjustments on account of certain transactions with its Associated

Enterprises (“AE”) namely AVTL Ltd. Canada,(here in after referred as AVTL Canada), Aditya Birla minacs (here in after referred as Minacs Philippines) and Transwork BPO Philippines Ltd (here in after referred as TBPO Philippines).

5. Since these four cross appeals relate to the same assessee, different assessment years and involve common issues, therefore these have been clubbed and heard altogether and a consolidated order is being passed for the sake of convenience and brevity.

6. The Ground No. 1 of Revenue appeal in ITA No 610/M/13 and ground No. 2 of assessee`s appeal in ITA No. 620/M/13 for A.Y 2008-09.And Ground of Appeal No. 4 of Assessee`s Appeal No 4276/M/2015 & Ground of Appeal No. 2 of Departmental`s Appeal No. 4790/M/2015) for A.Y.2009-10: Issue involved is: Addition on account of Interest on Loan to Associate enterprise (AE) at LIBOR+2%:

7. The contention of the assessee is that the Ld. CIT (A) has erred in directing the AO/TPO to recompute the addition U/s 92C of the Act on account of loans given to associate enterprise (AE) by adopting 6 Months bench marking at LIBOR +200 basis points (LIBOR +2%). The assessee also stated before us that TPO has ignored the TP study report, assessee has charged interest from AE which was higher than the LIBOR, interest rate is higher than prevailing CUP and loan is advanced to safeguard assessee`s business interest therefore, the interest rate should be lower than LIBOR+2%.

8. The contention of the department on this issue is that the Ld.CIT(A) has erred in directing the AO/TPO to adopt arm`s length price of interest at LIBOR+2%. It should be higher than LIBOR+2%, because the LIBOR is not the rate of consideration for loan transactions as it differs from country to country.

9. The relevant facts of the said issue are that the Transfer Pricing officer determined Arm`s length Price (ALP) at LIBOR +9.65%, using 9.65% interest rate on ECBs taken by the assesee in Indian currency, thereby making an adjustment of Rs. 4,83,25,085/- in A.Y 2008-09.Subsequently, Transfer Pricing Officer passed rectification order on account of arithmetical error and as a result reduced the adjustment to Rs. 3,42,77,125/- and accordingly the Assessing officer also rectified the order U/s 154 of the Act.

10. Aggrieved from the order of the Assessing Officer the assessee filed an appeal before the CIT (A) , who has determined the ALP at LIBOR + 2%. Since no independent CUP rate is available for the transaction, the CIT(A) relied on RBI guidelines and used External Commercial Borrowings rates and determined the ALP at LIBOR+2%, and accordingly the adjustment amount reduced to Rs.51,32,859/- as against Rs.3,42,77,125/- made by AO/TPO in A.Y 2008-09. Aggrieved, from the order of the Ld. CIT (A), the Revenue as well as the Assessee are in further appeals before us on this particular issue for A.Y 2008-09 and A.Y. 2009-10. Since the assessee and Revenue both are in further appeals on the same identical issue and facts before us, therefore we are not going to repeat the issue and facts for A.Y. 2009-10 for the sake of brevity.

11. The ld. Departmental Representative for the Revenue has primarily reiterated the stand of the Assessing Officer/TPO which we have already noted in earlier para and is not being repeated for the sake of brevity.

12. On the other hand the Ld. AR for the assessee submitted that internal CUP should be preferred over external CUP, as it has benchmarked the transactions by using Internal CUPs of LIBOR +0.65% ,(JPY LIBOR + 1% +0.2% upfront fees). The Internal CUPs have been determined based on the loan availed from DBS Bank, Singapore. Further, the Ld. AR for the assessee

submitted that the said identical issue is covered by an order of the Hon`ble Mumbai Tribunal in assessee`s own case vide ITA No. 7033/Mum/2012 dated 16/03/2016, wherein it was held that Internal CUP is always preferable to external CUP. The relevant para 8 of the Tribunal order reads as under:

> *"8. Thus, the LIBOR +BPS point would be correct method for benchmarking the arm`s length price in case of interest is paid in foreign currency. Since assessee`s charging interest rate at the LIBOR+1% which is based on internal CUP, therefore, such a benchmarking gives the most appropriate result of arm`s length price because internal CUP is always preferable to external CUP, which gives far more accuracy of ALP. Accordingly, we accept the Ld. Counsel`s contention on this score and direct the AO to accept the interest rate charged at LIBOR +1% as on arm`s length price. Accordingly, ground no. 2 is treated as allowed."*
>
> *Thus, respectfully, following the decision of Tribunal in assessee company`s own case, we direct the Assessing Officer to accept the interest rate charged at LIBOR+1% as an arm`s length price.*

13. In the result, ground No. 2 of the appeal filed by the assessee in ITA No. 620/M/13 for A.Y. 2008-09 and ground No. 4 of the appeal filed by the assesse in ITA No. 4276/M/2015 are allowed and ground No.1 of appeal filed by Revenue in ITA No.610/Mum/2013 for A.Y. 2008-09 & ground No. 2 of appeal filed by Revenue in ITA No.4790/M/2015 are dismissed.

14. Ground No. 1 of Assessee`s appeal in ITA No. 620/M/13 For A.Y. 2008-09, Grounds Nos: 1,2 and 3 of Assessee`s Appeal No. 4276/M/2015 for A.Y. 2009-10, and Ground No. 1 of Revenue`s Appeal No. 4790/M/2015: Issue involved is : Transfer Pricing Addition in respect of Corporate Guarantee.

15. The assessee company has given Corporate Guarantee to DBS bank by way of deeds of guarantee for loan taken by AV Transwork Ltd, Canada, (AVTL Canada) amounting to USD 24.5 million. The assessee company has not charged commission to AVTL Canada. The AO/TPO based on the order for A.Y. 2007-08 has held that the appellant company ought to have charged a cost of

guarantee of 3.25%. The assessee company has filed an appeal before Ld. CIT (A) , Mumbai, who has confirmed the action of AO/TPO. Not being satisfied, with the order of the Ld. CIT (A), the assessee company as well as Revenue are in further appeals before us.

16. We have carefully considered the rival submissions and gone through the facts and circumstances of the case. The Ld. Departmental Representative for the Revenue has primarily reiterated the stand of the Assessing Officer and CIT (A). On the other hand, the Ld. AR for the assessee company stated that the same identical issue is covered by the Hon`ble Mumbai Tribunal`s order in ITA No.7033/Mum/2012, in assessee`s own case for A.Y. 2007-08 dated 25/03/2015. The Hon`ble Mumbai Tribunal in para 2.6 of the said order held that guarantee commission at the rate of 0.5% from its Associate Enterprise can be said to be at arms length. Thus, respectfully following the decision of Tribunal in assessee company`s own case, whereby issue were decided in favour of the assessee company. Accordingly, we direct the AO/TPO to compute and charge the guarantee commission at the rate of 0.5% from its Associate Enterprise.

17. In the result, the ground No. 1 of Assessee`s appeal in ITA No. 620/M/13 for A.Y. 2008-09, and grounds Nos: 1,2 and 3 of Assessee`s Appeal No. 4276/M/2015 for A.Y. 2009-10 are allowed and ground No. 1 of Revenue`s Appeal No. 4790/M/2015 for A.Y. 2009-10 is dismissed.

18. Ground No.3 of Assessee`s appeal in ITA No. 620/M/13 for A.Y. 2008-09 and Ground No. 3 of Revenue`s appeal No. 4790/M/2015 for A.Y. 2009-10: Issue involved is: Addition on account of adjustment in respect of interest on recharactarising share application money as Loan advanced to Associate Enterprise.

19. The facts of this issue are that , the assessee company has advanced a sum of USD 10,30,140/- (i.e. Rs. 4,23,84,720) for subscribing to the shares of its Associate Enterprise, Transwork BPO Philippines Ltd. (TBPO, Philippines). TBPO Philippines has converted the share application money into equity shares on 24 March 2011 and issued certificate on 24 January 2012. The Transfer Pricing Officer/Assessing officer has recharacterised the share application money advanced to Associate Enterprise as loan and made an adjustment of Rs. 59,20,349/- on account of interest recoverable at the rate of LIBOR +4.45% from the Associate Enterprise for A.Y.2008-09. Aggrieved from the order of the AO/TPO, the assessee company filed an appeal before CIT (A) Mumbai, who has also confirmed the action of AO/TPO. Not being satisfied from the order of the CIT (A),the assessee company is in further appeal before us for A.Y. 2008-09.

20. For A.Y. 2009-10,aggrieved from the order of AO/TPO, the assesee company filed an appeal before CIT (A),Mumbai, who has deleted the addition made by AO/TPO, therefore, not being satisfied from the order of the CIT (A), the Revenue is in further appeal before us on the same issue.

21. We have carefully considered the rival submissions and gone through the facts and circumstances of the case and perused the material on record. The Ld. Departmental Representative for the Revenue has primarily reiterated the stand of the Assessing Officer/TPO. On the other hand, the Ld. AR for the assessee company stated that the share application money can not be treated as loan amount merely because there is a delay in issuance of shares by the subsidiary in the name of the assessee. The Ld. AR for the assessee company further stated that the same identical issue is covered by the Hon`ble Mumbai Tribunal`s

order in ITA No.7033/Mum/2012, in assessee`s own case for A.Y. 2007-08 dated 25/03/2015. The Hon`ble Mumbai Tribunal in para 4.5 of the said order held that share application money can not be treated as loan amount merely because there is a delay in issuance of shares by the subsidiary in the name of the assessee.

22. Thus, respectfully following the decision of Tribunal in assessee company`s own case, whereby issue were decided in favour of the assessee company. Accordingly, we direct the AO/TPO to delete the addition made on this ground.

23. In the result, Ground No.3 of Assessee`s appeal in ITA No. 620/M/13 for A.Y. 2008-09 is allowed and Ground No. 3 of Revenue`s appeal No. 4790/M/2015 for A.Y. 2009-10 is dismissed.

24. Ground No.4 of Assessee`s appeal in ITA No. 620/M/13 for A.Y. 2008-09 and Ground No. 5 of Assessee`s Appeal No. 4276/M/2015 for A.Y 2009-10: Issue involved is: Disallowance of deduction claimed under section 35D of Rs.4,65,200/-The said grounds for A.Y.2008-09 and A.Y. 2009-10 are not pressed by the assessee.

25. Ground No.5 of Assessee`s appeal in ITA No. 620/M/13 for A.Y. 2008-09 and grounds Nos. 4(a) & 4(b) of Revenue`s Appeal No.4790/M/2015 for A.Y 2009-10 : Issue involved is: Addition in respect of interest and finance expenses related to acquisition of shares of foreign subsidiary and disallowance of the same under section 36 (1) (iii) of the I.T. Act.

26. For A.Y. 2008-09 the Assessing Officer did the addition in respect of interest and finance expenses related to acquisition of shares of foreign subsidiary. Against the said addition, the assessee filed an appeal before CIT (A)-15, Mumbai, who has confirmed the action of the Assessing Officer, therefore

not being satisfied from the order of the CIT(A), the assessee is in further appeal before us on this issue.

27. For A.Y. 2009-10 the Assessing Officer did the addition in respect of interest and finance expenses related to acquisition of shares of foreign subsidiary. Against the said addition, the assessee filed an appeal before CIT (A)-55, Mumbai, who has deleted the addition made by the Assessing Officer, therefore not being satisfied from the order of the CIT(A), the Revenue is in further appeal before us on this issue.

28. The issue involved in this case is that the assessee company has incurred interest expenses of Rs.18,35.14,582/- and exchange fluctuation loss of Rs.1,24,01,148/- in connection with the loans taken for DBS Bank for acquisition of Minacs Canada, which was claimed as allowable business expenses by the assessee company. The Ld. Assessing Officer, has held that assessee company is not earning any income under the head business or profession from the said investment and hence, the interest expenses cannot be treated as business expenditure. Therefore, the Assessing Officer has disallowed the interest expenses along with exchange fluctuation loss. Aggrieved from the order of the Assessing Officer, the assessee company has filed an appeal before the CIT (A)-15, for A.Y. 2008-09, who has confirmed the action of the Assessing officer. Not being satisfied from the order of the Ld. CIT (A), the assessee company is in further appeal before us for A.Y. 2008-09 and for A.Y. 2009-10 the Revenue is in further appeal before us against the order of the CIT (A) who has deleted the addition made by AO.

29. We have carefully considered the rival submissions and gone through the facts and circumstances of the case. The Ld. Departmental Representative for the Revenue has primarily reiterated the stand of the Assessing Officer and CIT

(A). On the other hand, the Ld. AR for the assessee company stated that assessee company wanted to expand its existing business operations in North America and European countries. It had the option to either set up of branch in those countries or form new companies in those countries or acquire some operative company having business activities and presence in those countries. In order to attain the ultimate object of expanding operation in different geographies the assessee decided to acquire Minacs Worldwide Inc, Canada (Minacs Canada), existing operative company which was in similar line of business as that of the assessee i.e. BPO and Call centre activities. Due to regulatory restrictions in Canada and also for having ease of business, the assessee decided to set up a Special Purpose Vehicle (Investment SPV) in Canada which in turn will acquire shares on Minacs Canada from its existing shareholders.

30. The interest bearing funds have been utilized for making investment in SPV, AVTL Canada which has acquired Minacs Canada, on account of which there has been significant rise in the business of the assessee. Further, the same has enabled the assesssee to enhance its presence in the world market for its BPO business. Accordingly, the interest expenditure incurred by the assessee is out of commercial exigency of the business and hence should be allowed as business expenditure under section 36 (1) (iii)/37 (1) of the Act. Further, in A.Y. 2007-08 the assessee had net gain of Rs.5.29 Crores arising from same borrowing of USD 75.4 million, the Assessing Officer taxed the same income arising from the same borrowing when it is positive and offered by the assessee to tax subsequently. If there is expenditure on similar transaction of borrowing the Assessing Officer can not use different yardstick and deny the claim of the expenditure in view of principles of consistency. Further, after considering all the contentions of the Assessee Company, the Ld. CIT (A) in subsequent year i.e.

A.Y. 2009-10 has accepted the claim of the assessee and allowed the interest expenditure incurred by the assessee company. The Ld. AR for the assessee company has cited before us the following judgments wherein it has been held that interest expenditure should not be disallowed in relation to loan given to subsidiaries based on commercial expediency:

1.Bombay steam Navigation Co (P) Ltd (56ITR 52) (SC)
2.India Cements Ltd (60 ITR 52) (SC)
3.S.A. Builders Ltd. (288 ITR 1) (SC)

31. Further the Ld. AR for the assessee company has also relied on the following judgments wherein it has been held that interest paid on borrowed funds for the purpose of acquiring controlling interest in the company is allowable expenditure:

1. Shrishti Securities 321 ITR 498 (H.C.Bom)
2. Rajeev Lochan Kanoria 208 ITR 616 (Cal. H.C)

Therefore, based on the above cited facts and circumstances and position in case law, the interest expenditure incurred by the assessee is out of commercial exigency of the business and hence should be allowed as business expenditure under section 36 (1) (iii) of the Act, and we accordingly direct the Ld. CIT (A) / AO to delete the addition for A.Y.2008-09. For A.Y. 2009-10 we do not hesitate to confirm the order of the CIT(A).

32. In the result, the ground No.5 of Assessee`s appeal in ITA No. 620/M/13 for A.Y. 2008-09 is allowed and grounds Nos. 4(a) & 4(b) of Revenue`s Appeal No.4790/M/2015 for A.Y 2009-10 is dismissed.

33.Ground No.6 (Assessee`s appeal in ITA No. 620/M/13):Addition of Rs. 34,31,823/- in respect of foreign travelling expenses related to acquisition of shares of the foreign subsidiary and disallowing the same and treating it as a capital expenditure.

34. The assessee company had incurred expenditure of Rs. 34,31,823/- towards the foreign travel of its employees for expansion of its business acquired in Canada. The said expenditure were incurred by the assessee in relation to acquisition of its subsidiary Minacs Canada. The Assessing officer disallowed the said expenditure holding that these expenditure are in relation to the investment activity in Canada and the same has not been incurred by the assessee for the purpose of the business. Besides, the Assessing officer treated these expenses as capital expenses and disallowed the same. Aggrieved from the order of the Assessing Officer, the assessee filed an appeal before the Ld CIT (A) -15, Mumbai, who has also confirmed the action of the Assessing Officer. Not being satisfied with the order of the Ld. CIT (A), the assessee is in further appeal before us on this ground.

35. We have carefully considered the rival submissions and gone through the facts and circumstances of the case. The Ld. Departmental Representative for the Revenue has primarily reiterated the stand of the Assessing Officer and CIT (A). On the other hand, the Ld. AR for the assessee company stated that assessee company wanted to expand its existing business operations in North America, Canada and European countries. It had the option to either set up of branch in those countries or form new companies in those countries or acquire some operative company having business activities and presence in those countries.

36. Since the foreign travel expenses are incurred by the assessee company in respect of the visit of its employees to overseas places in pursuance of its acquisition of call centre business in Canada and expanding the business thereof, the same should not be disallowed because all these expenses are related to business purpose and covered under the provisions of section 37 (1) of

the Act, therefore, we do not hesitate to direct the CIT (A) / AO to delete the said addition. In the result, appeal of the assessee is allowed on this ground.

38. Ground No. 6 of Assessee`s Appeal No.4276/M/2015 for A.Y. 2009-10 relates to charging of interest U/s 234B of the Act. This ground is consequential in nature and does not require adjudication.

39. In the result, appeals of revenue are dismissed, whereas appeals of assessee are allowed in part.

Order pronounced in the open court on 25th August, 2016.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai, Date: 25/08/2016

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) The CIT(A) –, Mumbai.
4) विभागीय प्रतिनिधि “के”, आयकर अपीलीय अधिकरण, मुंबई/
   The D.R. “K” Bench, Mumbai.
5) गार्ड फाईल \
   Copy to Guard File.

आदेशानुसार/By Order

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उप/सहायक पंजीकार
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Dy./Asstt. Registrar
I.T.A.T., Mumbai