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

Before Sh. N. K. Saini, AM and Smt. Beena Pillai, JM

ITA No. 370/Del/2015 : Asstt. Year : 2010-11

Contitech India Pvt. Ltd., 301, Himland House, Najafgarh Road, Opp. Milan Cinema, Karam Pura, New Delhi	Vs	Deputy Commissioner of Income Tax, Circle-6(2), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCR6921P		

Assessee by : Sh. Ajay Vohra, Sr. Adv., Neeraj Jain & Romit Katyal Advs.
Revenue by : Sh. Neeraj Kumar, Sr. DR

Date of Hearing : 26.08.2016	**Date of Pronouncement : 17.10.2016**

ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 05.12.2014 of the AO passed u/s 144C r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

2. Following grounds have been raised in this appeal:

"1. That the assessing officer erred on facts and in law in completing assessment under section 144C/143(3) of the Income-tax Act, 1961 ('the Act') at an income of Rs. 10,35,16,330 as against the income of Rs. 7,28,40,768 returned by the appellant.

2. That the assessing officer erred on facts and in law in making an adjustment of Rs. 2,62,53,680 to the arm's length price of the 'international transactions' of payment of corporate expense (intra group charges) on the basis of the order passed under section 92CA(3) of the Act by the TPO.

2.1 That the assessing officer/ TPO erred on facts and in law in holding the arms length price of international transactions of payment of corporate charges as NIL as against Rs.2,62,53,680 incurred by the appellant, alleging that (i) no services were received by the appellant (ii) cost are charged on allocation basis and therefore, some of the group cost may be loaded in appellant share of corporate charges.

2.2 That the assessing officer/TPO erred on facts and in law in not appreciating that the payment of corporate charges was appropriately benchmarked applying TNMM as most appropriate method and that no adverse inference could be drawn on this account.

2.3 That the assessing officer/TPO erred on facts and in law in computing adjustment on account of international transaction of payment of corporate charges without reasonably applying any prescribed methods, thereby, violating the basic principles of TP regulations.

2.4 That the assessing officer/TPO erred on facts and in law in undertaking cost benefit analysis to determine the arm's length price of payment of corporate charges without appreciating that cost-

benefit analysis is not a prescribed method under Rule 10B of Income Tax Rules, 1963.

2.5 That the assessing officer/TPO erred on facts and in law in applying CUP method for benchmarking the transaction of payment of corporate charges without placing on record any comparable data for comparison.

2.6 That the assessing officer/TPO erred on facts and in law in not appreciating that the expenditure on the payment of corporate charges was wholly and exclusively for the purpose of business of the appellant.

2.7 That the assessing officer/TPO erred on facts and in law in concluding that the appellant has failed to maintain the documents for the purpose of cost analysis.

2.8 That the assessing officer/TPO erred on facts and in law in not appreciating the basis of allocation of corporate charges by the associated enterprises and holding that mere allocation of cost is not rendition of relevant services.

2.9 That the Dispute Resolution Panel erred on facts and in law in confirming the adjustment made by the TPO with regard to the payment of corporate expense by relying on its order for AY 2009-10 and holding that (i) no change in the functions, assets or risks of the appellant on acquisition by the Continental Group (ii) no additional benefit or additional saving has resulted to the appellant on payment of corporate

charges; (iii) there is no drastic change in the customer base of the appellant.

3. That the assessing officer erred on facts and in law in making an adjustment of Rs. 25,51,251 to the arm's length price of the 'international transactions' of payment of fees for technical know-how on the basis of the order passed under section 92CA(3) of the Act by the TPO.

3.1 That the assessing officer/ TPO erred on facts and in law in considering the arms length price of international transactions of payment of fees for technical know-how at Rs. NIL as against Rs. 25,51,251 incurred by the appellant, holding that (i) payment of fees for technical know-how is in the nature of price reduction for the products sold to AE (ii) the appellant is in fact working as a contract manufacturer for the limited purpose of exports made to AE.

3.2 That the assessing officer/TPO failed to appreciate that the appellant manufactures products on the basis of the technical know-how provided by the AE and the fees for technical services is paid as percentage of sales.

3.3 That the assessing officer/TPO erred on facts and in law in not appreciating that the intangibles provided by the AE helps the appellant to manufacture new products, upgrade existing products, reduce manpower, reduce raw material cost and increase in productivity.

3.4 That the assessing officer/TPO erred on facts and in law in holding that the appellant has wide experience and expertise in the manufacturing of products for which fees for technical know-how is paid and should in turn charge royalty from AE for the technology and technical know-how given.

3.5 That the Dispute Resolution Panel erred on facts and in law in confirming the adjustment made by the TPO with regard to the payment of royalty by relying on its order for AY 2009-10 and holding that (i) there is no change in the business model of the appellant (ii) no change in the items manufactured by the appellant on payment of royalty; (iii) royalty payment has no bearing on exports.

4. That the assessing officer/TPO erred on facts and in law in making an adjustment of Rs. 18,70,633 allegedly considering the delay in receipt of receivables from the associated enterprise in the nature of unsecured loans.

4.1 That the assessing officer/TPO erred on facts and in law in not appreciating that delay in receipt of receivable is not an international transaction as defined in section 92B of the Act, but is a consequence of an internal transaction undertaken in the form of sales made to the associated enterprise.

4.2 That the assessing officer/ TPO erred on facts and in law in holding that the payment on receivables due from all the associated enterprise ought to have received within the time stipulated in service agreement i.e. within 20 days from the end of the month in which invoice is raised.

4.3 Without prejudice, the assessing officer/TPO erred on facts and in law in not appreciating that the appellant has received receivables from unrelated parties with similar delay of period and accordingly the delay in receipt of receivables from unrelated parties should be considered as a valid CUP for the purpose of benchmarking.

4.4 Without prejudice, the assessing officer/TPO erred on facts and in law in imputing an interest rate of 13.25% on the period of delay in receipt of receivables.

4.5 Without prejudice, the assessing officer/TPO erred on facts and in law in computing interest on period of delay in receipt of receivables beyond the end of the said financial year (i.e. 31 March 2010) without appreciating that the arm's length price shall be determined only for the said assessment year.

4.6 Without prejudice, the assessing officer/TPO erred on facts and in law in not setting off the interest on payables due to the associated enterprises while computing interest on period of delay in receipt of receivables due from associated enterprises.

4.7 That the DRP/TPO erred on facts and in law in not appreciating that since the operating profit margin earned by the assessee is higher than the comparable companies, the assessee has already factored the cost of interest in its pricing while selling products to its associated enterprise.

4.8 Without prejudice, that the DRP/TPO erred on facts and in law in disregarding the fact that the

invoice for services were raised by the assessee to its associated enterprise in foreign denominated currency and accordingly, arm's length interest rate shall be computed considering Libor rates applicable on foreign denominated loans.

5. That the assessing officer erred on facts and in law in levying interest under Section 234B and Section 234C of the Act.

The appellant craves leave to add, alter, supplement, amend, vary, withdraw or otherwise modify the ground mentioned herein above at or before the time of hearing."

3. Ground No. 1 in this appeal is general in nature so does not require any comment on our part.

4. Vide Ground Nos. 2 to 2.9, the grievance of the assessee relates to the transfer pricing adjustment of Rs.2,62,53,680/- made by the AO on account of corporate expenses.

5. Facts of the case related to this issue in brief are that the assessee e-filed its return of income declaring total income of Rs.7,28,40,766/-. Since the assessee had undertaken international transactions with its associated enterprises (AE), the AO made a reference to the TPO, New Delhi u/s 92CA(1) of the Act vide order dated 23.12.2013. During the year under consideration, the assessee in terms of agreement dated

20.10.2006 for availing the technical, marketing and administrative support services had entered into, *inter alia,* international transaction for payment of corporate charges amounting to Rs.2,62,53,680/- with its AE. In the transfer pricing document maintained by the assessee, the said transaction for the purpose of benchmarking was aggregated with other international transactions and benchmarked by applying TNMM as the most appropriate method with OP/OC as the Profit Level Indicator (PLI). The assessee submitted that since the operating profit margin to operating cost (OP/OC) percentage of the assessee at 12.10% was higher than the weighted average profit margin of comparable companies at 10.92%, therefore, the international transactions undertaken by the assessee with AE were at armôs length price. However, the TPO held that the assessee has failed to substantiate that services have actually been rendered to it and benefit has actually been derived by it on the basis of documentary evidence. The TPO observed that the assessee in support of its contention has merely furnished copies of certain mails exchanged between the personnel of the assessee. The TPO was of the view that none of the e-mails exchanged between the employees established the requirement/specific need of the assessee for their services, the benefit which has accrued to the

assessee, or that an independent party would have been willing to pay another independent party for the services purported to be received by the assessee. The TPO applied CUP method and concluded that the armôs length price of this transaction for payment of corporate charges was at Nil as against Rs.2,62,53,680/- paid by the assessee to its AE. Thereafter, the AO passed the draft assessment order by making the addition of aforesaid amount. Against the draft assessment order, the assessee raised the objection before the ld. DRP who upheld the addition made by the TPO. Accordingly, the AO made the impugned addition on account of adjustment to the armôs length price of payment relating to international transaction of corporate expense (intra group charges).

6. Now the assessee is in appeal. The ld. Counsel for the assessee at the very outset stated that this issue is covered in assesseeôs own case for the assessment year 2008-09 in ITA No. 5765/Del/2012 wherein the ITAT remanded the matter back to the file of the TPO for *de-novo* consideration vide para 4.5 at pages no. 9 & 10 of the order dated 29.08.2014. It was also submitted that the assessee could not procure evidences from its AE earlier which now had been obtained. Therefore, this matter may go back to the file of the TPO/AO as has been done in the earlier year.

7. The ld. DR in his rival submissions although supported the orders of the authorities below but could not controvert the aforesaid contention of the ld. Counsel for the assessee.

8. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is an admitted fact that the assessee could not procure summary of the invoices raised on it by its AE and could not furnish the specific details or complete break-up of how the cost had been allocated, during the proceeding before the TPO or DRP. Therefore, this issue was set aside to the file of the TPO/AO in the appeal relating to the assessment year 2008-09 and the said order has been followed by the ITAT in ITA No. 455/Del/2014 for the assessment year 2009-10. The relevant findings have been given vide para 4.5 of the order dated 29.08.2014 in ITA No. 5765/Del/2012 for the assessment year 2008-09 which read as under:

> *"4.5. We have heard the rival submissions and perused the material on record. The assessee, in accordance with the terms of service agreement dated 20.10.2006 received various technical, marketing and administrative support service from its AE. The TPO had restricted the payment of service fee to an amount of Rs. 7,20,010/- (5% of the total payment) as against 1,58,01,22/- determined by the assessee. The DRP on its part has made an increase of deduction from 5%*

allowed by the TPO to 10% of the total expenditure. Broad details of various technical, marketing and administrative support service were furnished to the TPO / DRP. In terms of application dated 4.7.2014 under Rule 29 of the ITAT Rules, the assessee had sought to place on record the summary of invoices raised on the assessee by its AE during the financial year 2007-08. The detailed break up of invoices on the basis of nature of services and the summary of the man hours spent by the various divisions of the AE in rendering technical, marketing and administrative service to Contitech group of companies. It is a case of the assessee that the above said specific details or complete break up of how the cost has been allocated could not be furnished before the completion of the proceedings before the TPO/DRP, since these details were to be obtained from its AE Germany. We find that the details now produced have an important bearing for resolving the transfer pricing dispute and therefore in the interest substantial justice and equity, we admit the same on record. Since the additional evidence is admitted on record the same needs to verify by the TPO/AO. Hence, the transfer pricing dispute of payment of corporate charges is restored to the TPO for denovo consideration. Needless to state the assessee shall be afforded reasonable opportunity of being heard before the matter is decided. It is ordered accordingly."

9. Since the facts for the year under consideration are identical to the facts involved in the preceding years. So, respectfully following the earlier order dated 29.08.2014 of the Tribunal for the assessment year 2008-09 in ITA No.

5765/Del/2012, the issue under consideration is set aside to the file of the AO/TPO to be adjudicated afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee.

10. Vide Ground Nos. 3 to 3.5, the grievance of the assessee relates to the adjustment amounting to Rs.25,51,251/- on account of payment of royalty.

11. As regards to this issue, the ld. Counsel for the assessee at the very outset stated that an identical issue having similar facts was involved in ITA No. 455/Del/2014 for the assessment year 2009-10 wherein vide order dated 18.02.2016 the matter was remanded back to the file of the AO/TPO for reconsideration and deciding it in conformity with law laid down by the recent judgment of the Hon'ble Delhi High Court in the case of CIT Vs Cushman & Wakefield India Pvt. Ltd. (2014) 367 ITR 730.

12. In his rival submissions the ld. DR could not controvert the aforesaid contention of the ld. Counsel for the assessee.

13. After considering the submissions of both the parties and the material on record, it is noticed that an identical issue having similar facts has already been adjudicated by this bench

of the Tribunal in ITA No. 455/Del/2014 for the assessment year 2009-10 in assesseeôs own case vide order dated 18.02.2016 wherein relevant findings have been given in paras 8 to 11 of the said order which read as under:

"8. We have heard the rival submissions and perused the relevant material on record. It is observed that the TPO has computed ALP of the international transaction of `Payment of Royalty' at Nil by holding that the assessee did not avail any benefit and the services provided by the foreign AEs were unwarranted. In doing so, he rejected the assessee's adoption of TNMM as the most appropriate method and followed the CUP method. That is how, he computed ALP of this international transaction at Nil. The AO in his order has simply incorporated the conclusion of the TPO in determining the ALP of this international transaction at Nil without carrying out any independent analysis or evaluation as to whether or not such use of technical know-how was required/availed by the assessee in terms of section 37(1) of the Act. The ld. AR fairly admitted that there is no independent discussion in the assessment order about the disallowance of royalty payment, except for reproduction of the relevant parts from the order of the TPO.

9. The Hon'ble Delhi High Court in CIT v. Cushman & Wakefield (India) (P.) Ltd. (2014) 367 ITR 730(Del) has held that the authority of the TPO is limited to conducting transfer pricing analysis for determining the ALP of an international transaction and not to decide if such services exist or benefits did accrue to

the assessee. Such later aspects have been held to be falling in the exclusive domain of the AO. In that case, it was observed that the E-mails considered by tribunal from Mr. Braganza and Mr. Choudhary dealt with specific interaction and related to benefits obtained by assessee, providing a sufficient basis to hold that benefit accrued to assessee. Since the details of specific activities for which cost was incurred by both AEs (for activities of Mr. Braganza and Mr. Choudhary), and attendant benefits to assessee were not considered, the Hon'ble High Court remanded the matter to file of concerned AO for an ALP assessment by TPO, followed by AO's assessment order in accordance with law considering the deductibility or otherwise as per section 37(1) of the Act.

10. When we advert to the facts of the instant case, it turns out that the TPO proposed the transfer pricing adjustment with Nil ALP of the international transaction of `Payment of royalty' on the ground that no such payment was warranted and further no cost benefit analysis on this count was brought to his notice and as such the payment of royalty was not required. The AO in his final assessment order dated 26.12.2013 has taken the ALP at Nil on the basis of recommendation of the TPO without carrying out any independent investigation in terms of the deductibility or otherwise of such payment in terms of section 37(1) of the Act. As per the ratio decidendi of Cushman & Wakefield India (P.) Ltd. (supra), the TPO was required to simply determine the ALP of this transaction unconcerned with the fact, if any benefit accrued to the assessee and thereafter, it was for the AO to decide the deductibility of this amount u/s 37(1) of the Act.

11. Since the authorities below have acted in contradiction to the ratio laid down in Cushman & Wakefield (supra), we set aside the impugned order on this score and remit the matter to the file of AO/TPO for deciding it in conformity with the law laid down by the Hon'ble jurisdictional High Court in the case of Cushman & Wakefield (India) (P.) Ltd. (supra).”

14. So, respectfully following the aforesaid referred to order for the assessment year 2009-10 in assesseeôs own case, this issue is set aside to the file of the AO/TPO to be adjudicated as directed vide order dated 18.02.2016 in assesseeôs own case in ITA No. 455/Del/2014 for the assessment year 2009-10.

15. Another issue raised by the assessee vide Ground Nos. 4 to 4.8 relates to the adjustment of interest amounting to Rs.18,70,633/- on account of delay in receipt of receivables from the associated enterprise and considering the same as unsecured loans.

16. The facts related to this issue in brief are that during the year under consideration the assessee raised invoices for export of automotive power transmission V-belts and industrial power transmission V-belts to the AEs. The receivables were, however, received after some time lag than the period agreed between the parties. Similar delay was also reported in

transactions undertaken with unrelated third parties. The TPO re-characterized the delay in receipt of receivables as unsecured loans advanced to the AEs and charged interest @ 13.25% on the period of delay exceeding 45 days and accordingly computed an interest of Rs.18,70,633/-. The ld. DRP sustained the addition recommended by the TPO. Accordingly, the AO in the impugned order made the addition of Rs.18,70,633/- against which assessee is in appeal.

17. The ld. Counsel for the assessee submitted that the TPO re-characterized the delay in receipt of receivables, as unsecured loans advanced to the AEs and charged interest @ 13.25% on the period of delay exceeding 45 days. It was contended that in the transfer pricing documentation, the assessee had benchmarked its operating profit margin earned from international transactions with AE at 12.10% as against the weighted operating profit (OP/OC%) of the comparable companies at 10.92%. Since the operating profit margin earned by the assessee was higher than the weighted average operating profit margin of the comparables, therefore, the international transaction was to be considered at armôs length price. It was further contended that the ITAT has deleted the adjustment made by the TPO on account of delay in receipt of receivables,

considering the higher profitability earned by the assessee vis-à-vis comparables in the following cases:

- *Goldstar Jewellery Ltd. Vs JCIT (ITA No. 6570/Mum/2012)*
- *Kusum Healthcare Pvt. Ltd. Vs ACIT (ITA No. 6814/Del/2014)*
- *Bechtel India Pvt. Ltd. Vs DCIT (ITA No. 1478/Del/2015)*
- *Micro Inks Ltd. Vs ACIT (ITA No. 1668/Ahd/2006)*
- *ACIT Vs Information Systems Resource Pvt. Ltd. (ITA No. 7757/Mum/2012)*

18. It was further submitted that the assessee had received remittance from unrelated third parties with a time lag of 2-3 months and in some cases the assessee had either not received the remittance or received after a year. Therefore, there was no inordinate delay in receipt of the amount and the time lag was as per industry norms. It was stated that even after applying CUP, the transaction relating to the receipt of proceeds from AE was at armôs length. Therefore, no interest was to be charged on the receivables of the AE when the assessee was not charging interest on receivable of unrelated parties. The reliance was placed on the decisions of the ITAT rendered in the following cases:

- *DCIT Vs Indo American Jewellery Ltd. in ITA No. 5872/Mum/2009*

- *Baush and Laumb Eyecare India Pvt. Ltd. Vs ACIT in ITA No. 3861/Del/2010*

19. Alternatively, it was submitted that in a number invoices raised on the AE, the assessee had received remittances well in advance and was under liability to pay to its AE for the services rendered by them and did not incur any expense on such payables to its AE. Therefore, when the assessee had not incurred any expenses on payables to its AE and had received payment in advance, there could not be any adverse inference with regard to delay in receipt of receivables against the provision of services. It was emphasized that the DRP vide its order dated 03.11.2014, directed the TPO to deduct the interest forgone on outstanding due to AE from the armôs length on receivables due from AE. A reference was made to page no. 15 of the DRPôs order. It was stated that the TPO disregarded the direction of the DRP and proceeded to make adjustment considering only the delay in receipt of receivables. It was further stated that the direction of the DRP, to net off the interest expenses while computing the interest on delay in receipt of receivables from the AE. It was submitted that the said view is also supported by the decision of Mumbai Bench of the ITAT in the case of Technimont ICB House Vs DCIT in ITA No. 487/Mum/2014. It was also pointed out that the

interest on payable to AE in the present case worked out to Rs.36,70,655/- as against the transfer pricing adjustment of Rs.18,70,633/- made by the TPO, therefore, the adjustment made by the TPO was liable to be deleted. It was further submitted that the interest on receivable was to be restricted at the rate of Libor as receivable due from the AE are primarily in Euros. The reliance was placed on the decisions of the ITAT in the following cases:

- *CIT Vs Cotton Naturals India Pvt. Ltd. in ITA 233/2014 (Del)*
- *Bharti Airtel Ltd. Vs ACIT in ITA No. 5816/Del/2012*

20. In his rival submissions the ld. DR strongly supported the orders of the authorities below.

21. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it appears that the TPO considered the delay in receipt of receivables as unsecured loans advanced to the AE and charged the interest on the period of delay exceeding 45 days. However, he had not considered the payables due to the AE and also did not consider the amount received in advance from the AE while working out the interest on the delay in receipt of receivables from the AE. In the

instant case, the TPO has not followed the directions of the DRP in right perspective. The DRP at page no. 15 of its order dated 03.11.2014, directed the TPO by observing as under:

> *"Since, in the present case as per the service agreement the payment is not received as per the agreement, therefore, the TPO was justified to charge interest beyond the Arm's length period. Any delay beyond a period mentioned in the agreement, in an arm's length situation would have warranted a return based on opportunity cost of the money. Accordingly, this Panel upholds that any delay beyond the arm's length period should have been subject matter adjustment and TPO has rightly determined the ALP by applying CUP method. But since there are certain instances where payments have been received earlier and the taxpayer has not charged interest thereon, therefore, taxpayer is to provide the necessary data in this regard and TPO is directed to compute the interest forgone on these outstanding also and give benefit of same and bring to tax only the net interest income."*

22. Since the TPO has not worked out the net interest income on the basis of the direction given by the DRP. We, therefore, deem it appropriate to set aside this issue back to the file of the AO/TPO to be decided afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee.

23. The next issue vide Ground No. 5 relates to the charging of interest u/s 234B and 234C of the Act.

24. As regards to this issue it was the common contention of both the parties that it is consequential in nature. We order accordingly.

25. In the result, the appeal of the assessee is allowed for statistical purposes.

(Order Pronounced in the Court on 17/10/2016)

Sd/-	**Sd/-**
(Beena Pillai)	**(N. K. Saini)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 17/10/2016
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR