

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORESHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A No.681/Bang/2017
Assessment Years : 2012 – 13

M/s. AMD India Private Ltd., (Formerly known as AMD R & D Centre India Private Ltd.), Plot No. 102 & 103, export Promotion, Industrial Park, Whitefield, Bangalore North – 560066. PAN: AABCC3447R	Vs.	The DCIT, Circle – 1 (1) (1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri PadamchandKhincha, C. A.
Revenue by	:	Shri R. N. Parbat, CIT DR

Date of hearing	:	17.10.2017
Date of Pronouncement	:	26.10.2017

ORDER

Per Shri A.K. Garodia, Accountant Member:

This appeal is filed by the assessee and this is directed against the assessment order dated 31.01.2017 passed by the A. O. u/s 143 (3) r.w.s. 144C as per the directions of DRP for Assessment Years 2012 – 13.

2. The grounds raised by the assessee are as under:-

"GENERAL GROUNDS:

1. The Orders passed by learned Deputy Commissioner of Income Tax, Circle- 1(1)(1), Bangalore (hereinafter referred to as "AO" for brevity), learned Joint Commissioner of Income Tax, Transfer Pricing, Hyderabad (hereinafter referred to as "TPO" for brevity) and Honorable Dispute Resolution Panel-I (hereinafter referred to as "DRP" for brevity) ("AO "TPO" and "DRP" collectively referred as "lower authorities" for brevity) are bad in law and liable to be quashed.

GROUND RELATING TO TRANSFER PRICING (LEGAL ISSUES):

2. The learned AO has erred in making a reference to TPO for determining arm's length price without demonstrating as to why it was

necessary and expedient to do so. The Honorable DRP has erred in confirming the action of the Assessing officer.

3. The lower authorities have erred in:

(i) Making transfer pricing adjustment of Rs. 14,42,77,085/-.

(ii) Passing the order without demonstrating that the Appellant had motive of tax evasion; and

(iii) Not appreciating that there is no amendment to the definition of "income" and the charging or computation provision relating to income under the head "Profits & Gains of Business or Profession" do not refer to or include the amounts computed under Chapter X and therefore addition made under Chapter X is bad in law.

4. The learned AO/TPO has erred in determining TP adjustment in final assessment order at Rs. 14,42,77,085/- without giving basis of computation and without following all the directions of the DRP.

GROUNDS RELATING TO TRANSFER PRICING (SOFTWARE DEVELOPMENT):

5. The lower authorities have erred in:

(i) Rejecting comparables selected and the TP analysis undertaken by the Appellant on unjustifiable grounds;

(ii) Not adopting profits before depreciation, interest and taxes as profit level indicator in the case of Appellant and Comparable companies even after direction by the DRP;

(iii) Computing the ALP only based on the data for the FY 2011-12 of the comparables, which was not available when Appellant complied with documentation requirement; and

(iv) Not computing the ALP considering weighted average margin of comparables considering data of FY 2009-10, 2010-11 and 2011-12.

6. The lower authorities have erred in:

(i) Adopting inappropriate filters like one sided turnover filter, 25% Related Party Transactions filter etc. in the process of selecting comparables;

(ii) Adopting companies as comparables even though they are not comparable in respect of functions performed, risks assumed, assets utilized, size, turnover, unusual business circumstances or high margins, etc; and

(iii) Inappropriately computing the operating margins of comparables and the Appellant and treating provision for doubtful debt as non-operating in nature;

7. *The lower authorities have erred in:*

(i) *Not making proper adjustment for enterprise level and transactional level differences between the Appellant and the comparable companies;*

(ii) *Not properly computing working capital adjustment and adopting incorrect interest rate while computing the working capital adjustment;*

(iii) *Not recognizing that the Appellant was insulated from risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account; and*

(iv) *Not providing Depreciation adjustment while computing the Arm's length price;*

GROUND RELATING TO TRANSFER PRICING (INTEREST ON RECEIVABLES)

8. *The lower income tax authorities have erred in:*

(i) *Ignoring the business, commercial and industry realities and economic circumstances applicable to the Appellant;*

(ii) *Making adjustment for notional interest on extended payment terms given to AE without appreciating that there is no real income arising to the Appellant; and*

(iii) *Not appreciating that the receivable from the AE is not an international transaction within the meaning of section 92B of the Act;*

9. *Without prejudice, assuming that receivable is an international transaction, the lower authorities have erred in not appreciating that receivable is not separate transaction from the sale from which it is arising;*

10. *The lower authorities have erred in:*

(i) *Not appreciating that the Appellant had adopted TNMM at entity level, in which process, the receivables were considered as closely linked transaction and hence were subsumed and accordingly already considered;*

(ii) *Not appreciating that once the net profit margin is tested on the touchstone of arm's length price, it pre-supposes that all the aspects of income and expenditure are also considered and accordingly benchmarked; and*

(iii) *Not appreciating that once working capital adjustment considering receivables/payables to AE is done, no separate adjustment for notional interest can be made.*

11. *Without prejudice, the lower authorities have erred in adopted excessive interest rate and not adopting LIBOR as the basis for benchmarking.*

12. *The lower authorities have erred in computing interest for entire 12 months and not from the date of invoice and only for the excess credit period.*

13. *The learned AO/TPO have erred in not following directions of the DRP while computing the TP adjustment in the final assessment order.*

GROUND RELATING TO 5% RANGE

14. *Assuming without admitting that the adjustment is to be made, the lower authorities have erred in not allowing the benefit of the +/-5% range prescribed in the provision to section 92C(2).*

CORPORATE TAX GROUNDS:

15. *The lower authorities have erred in levying interest of Rs.2,58,30,639/- under section 234B of the Act. On the facts and in the circumstances of the case, interest under section 234B is not leviable. The Appellant denies its liability to pay interest under section 234B. Even otherwise the amount computed as interest is excessive.*

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly.”

3. Learned AR of the assessee submitted that he wants to argue only one issue i.e. T. P. adjustment on account of Interest on receivables of Rs. 932,96,476/-. In this regard, he drawn our attention to pages 38 to 40 of the order of TPO and pointed out that Working Capital adjustment was already made and therefore, no addition should be made on account of interest on receivables because it is not an independent transaction and it should be considered together as per Rule 10A (d). He placed reliance on various tribunal orders but in reply to this observation of the bench that there may be some High Court's judgment on this issue, he submitted that there is a judgment of Hon'ble Delhi High Court rendered in the case of CIT vs. Kusum Health care Pvt. Ltd. in ITA No. 765/2016 dated 25.04.2017, copy on pages 218 to 222 of

the paper Book. The bench observed that when a judgment of Hon'ble Delhi High Court is available for guiding the tribunal, such judgment should be pointed out first and that should be considered first and thereafter, if need be, the tribunal orders may also be considered. In reply, he had nothing to say. He merely submitted that even if it is held that such addition is to be made, it should be on LIBOR and not on Indian rates as per page 9 of the order of DRP. In support of this contention, he placed reliance on the tribunal order rendered in the case of Och-Ziff Real estate India Pvt. Ltd. vs. DCIT in ITA No. 358/bang/2016 dated 24.08.2017 copy on pages 234 to 252 of the paper book.

4. As against this, learned DR of the revenue supported the assessment order and the order of DRP. He also submitted that on page on page 7 of the order of DRP, it was noted that the TPO has allowed interest free period of 30 days as agreed to in terms of the agreement with AE and on page 9 of the order of DRP, the A. O. was directed to compute the no. of days of delay after allowing credit period of 30 days and there is no dispute on this aspect that the agreed period of payment is 30 days and for that agreed period, no interest is charged but for the credit allowed in excess of agreed period, the transaction, this is an independent transaction. Regarding rate of interest as per LIBOR, it was submitted that the DRP has followed the tribunal order rendered in the case of M/s Logix Systems Ltd. in ITA No. 524/Bang/2009.
5. We have considered the rival submissions. First, we examine the applicability and ratio of the judgment of Hon'ble Delhi High Court rendered in the case of CIT vs. Kusum Health care Pvt. Ltd. (Supra). As per the facts of this case, it is seen that in that case also, the credit agreed was 180 days but actual credit allowed was more as in the present case and such receivables were treated as a separate international transaction. The tribunal in that case noted that differential impact of working capital of the assessee vis a vis its comparables had already been factored in the pricing/profitability and therefore, any further adjustment to the margins of the assessee on the pretext of outstanding receivables is unwarranted and wholly unjustified. The revenue filed appeal before Hon'ble Delhi High Court. The Hon'ble Delhi High Court followed its own earlier judgment rendered in the case of CIT vs. EKL Appliances Ltd. as

reported in 345 ITR 241. The relevant paras of this judgment are reproduced below to see as to what was the issue before Hon'ble Delhi High Court in this case. The same are asunder:-

"1. In these appeals filed under Section 260A of the Income Tax Act, 1961 ('Act', for short) the Commissioner of Income Tax challenges the common order passed by the Income Tax Appellate Tribunal ('Tribunal', for short) on 11.02.2011 for the assessment years 2002-03 and 2003-04.

2. The appeals arise this way. The assessee is a public limited company engaged in the business of manufacturing of refrigerators, washing machines, compressor and spares thereof and also trading all these items and microwave ovens, dish washers, cooking ranges, air conditioners and spares thereof. In respect of the assessment years 2002-03 and 2003-04, it filed returns of income declaring losses amounting to Rs 148,23,80,117/- and Rs 1,14,59,660/- respectively. The Assessing Officer noticed that there were international transactions entered into by the assessee during the relevant previous years and accordingly invoked the provisions of Section 92CA(3) of the Act and referred the question of determination of the Arms Length Price ('ALP', for short) to the Transfer Pricing Officer ('TPO', for short). The TPO examined the matter in considerable detail and noticed that AB Electrolux, Sweden held 76% of the assessee's equity as on 31.03.2002 and out of the balance, 26% was held by the local joint venture partners and the balance 18% was held by the public. He noted that the turnover of the assessee for the assessment year 2003-04 amounted to Rs 440.97 crores including trading sales of Rs 48.29 crores pertaining to goods partly imported from the associated enterprises and also purchased locally. The major international transactions undertaken by the assessee were also noticed by him and he has listed the same at page 2 of the order passed by him on 20.03.2006 under Section 92CA (3) of the Act. It is noticed from the order that there are 13 types of international transactions entered into by the assessee in the previous relevant year 2003-04. The TPO accepted all of them to be Arm's Length Transactions, except the payment of brand fee/ royalty of Rs 3,42,97,940/-. The corresponding figure for the assessment year 2002-03 is Rs 3,99,51,000/-. We may clarify that the revenue has filed before us the order passed by the TPO for the assessment year 2003-04 on 20.03.2006, but the order passed by the TPO for assessment year 2002-03 has not been made available. This, however, is not material because it is common ground that the facts and the controversy arising in both the assessment years are the same so far as the ALP is concerned. Reverting to the order of the TPO, he considered the payment of brand fee/ royalty by the assessee to the associated enterprise namely AB Electrolux, Sweden under an agreement dated 01.10.1998 to be unjustified."

6. Since, the issue before Hon'ble Delhi high court in this case was different and in the later judgment cited before us, this judgment was followed, we are of the considered opinion that this judgment cited before us is not required to be considered particularly since Delhi High Court is not jurisdictional High Court in the present case. Hence we consider the tribunal orders cited before us.

7. The first tribunal order on which the reliance is placed is rendered in the case of M/s Avnet India Pvt. Ltd. vs. DCIT in ITA No. 757/Bang/2011 dated 18.11.2015 available on pages 192 to 204 of the paper book. The tribunal in this order considered and followed another tribunal order rendered in the case of M/s Goldstar Jewellery Ltd. vs. JCIT in ITA No. 6570/Mum/2012 dated 14.01.2015 and also reproduced relevant part of this tribunal order. As per the same, it is seen that in that case, the assessee was not making any difference for not charging any interest from AE as well as non AE and the tribunal observed that under these facts, only difference between the two can be considered is the average period allowed along with outstanding amount and if the average period multiplied by the outstanding amount of the AE is at arms' length in comparison to the average period of realization and multiplied by the outstanding amount of the non AEs then no adjustment can be made being the transaction is at arms' length. Regarding the rate of interest, it was held that average cost of the total funds available to the assessee should be considered. Hence, it is seen that as per this tribunal order, it was held that extra credit allowed can be considered as an independent transaction also and the same be compared with internal CUP being average cost of the total funds available to the assessee. In the later order, the tribunal disregarded this vital finding of the earlier tribunal order and therefore, this later tribunal order cited before us is not required to be followed because it does not lay down a binding precedence in view of this fact that the tribunal in the later order disregarded this vital finding of the earlier tribunal order.
8. The second tribunal order on which the reliance is placed is rendered in the case of Kusum Health care Pvt. Ltd. vs. CIT in ITA No. 6814/Del/2014 dated 31.03.2015, copy on pages 205 to 217 of the paper Book. In this case, the tribunal has not examined and decided this aspect as to whether extra credit allowed to AE can be considered an independent international transaction and therefore, for deciding this aspect, this tribunal order is not relevant.
9. The third tribunal order on which the reliance is placed is rendered in the case of M/s Dell International Services India Pvt. Ltd. vs. JCIT in ITA No. 308/Bang/2015 dated 17.06.2016, copy on pages 223 to 233 of the paper Book. In this case, as per Para 7, the tribunal has proceeded straightaway on

this basis that allowing a credit period on receivable from AE is not an independent international transaction without examining and deciding this aspect and therefore, the tribunal has not examined and decided this aspect as to whether extra credit allowed to AE can be considered an independent international transaction and therefore, for deciding this aspect, this tribunal order is also not relevant.

10. In our considered opinion, to the extent of agreed credit period, the sale price to AE or non AE is inclusive of possible interest on such agreed debt and therefore, for such credit allowed to AE, it cannot be said that this is an independent international transaction. But when extra credit is allowed beyond the agreed credit period, the same is a subsequent independent event and interest for such extra credit period cannot be factored in the price agreed. Only because the agreed price without considering extra credit period is in excess of the ALP, it cannot be said and held that for such independent subsequent event of allowing extra credit also, the agreed prices takes care and this is not an independent international transaction requiring separate benchmarking. In transfer pricing analysis, the purpose is not to compare profit of the tested party with that of the comparables but the purpose is to compare the prices charged by the tested party with the prices charged by the comparables although when TNMM is adopted as MAM, the process of such price comparison is by comparing profits of tested party with that of the comparables and therefore, if the profit of the tested party is equal or above the profit of comparables, even after taking into account the effect of working capital adjustment and the ALP is less than the price charged by the tested party, it cannot be said that the extra credit allowed is not an independent international transaction and not required to be separately benchmarked. In our considered opinion, the first requirement is this that it has to be first decided that whether it is an independent international transaction or not and if it is found that it is not so, then obviously, no separate benchmarking is required but if it is found that it is an independent international transaction then separate benchmarking has to be done and TP adjustment is to be made as per law irrespective of whether any TP adjustment is required to be made in respect of main transaction of sale.

11. Hence, we first decide this aspect as to whether this is an independent international transaction or not. In our considered opinion, in respect of agreed credit period which is 30 days in the present case, there is no independent international transaction because the effect of the credit to that extent is factored in the agreed prices. But for extra credit, the effect of the credit to that extent cannot be factored in the agreed prices because it is not even known at that stage as to how extra credit will be allowed and therefore, that is an independent international transaction and hence, separate bench making has to be done and TP adjustment is to be made as per law. This is worth noting that by allowing extra credit in excess of agreed period of 30 days, profit shifting is there because if credit period is more, prices go up which is not done in the present case since, the prices are determined on the basis of 30 days credit period.
12. Having decided this aspect, now we decide the rate of interest for such benchmarking. We find that this aspect is covered by the tribunal order rendered in the case of M/s Goldstar Jewellery Ltd. vs. JCIT in ITA No. 6570/Mum/2012 dated 14.01.2015. This was held in this case that extra credit allowed can be considered as an independent international transaction and the same be compared with internal CUP being average cost of the total funds available to the assessee. Respectfully following this tribunal order, we direct the A. O. to find out the cost of the total funds available to the assessee and the same should be adopted as internal CUP for benchmarking of this independent international transaction i.e. allowing extra credit in addition to agreed credit period of 30 days.
13. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(LALIET KUMAR)
Judicial Member
Bangalore,
Dated, the 26th October, 2017.
/MS/

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Senior Private Secretary,
Income Tax Appellate Tribunal,
Bangalore.