IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.6998/Del/2017
Assessment Year : 2013-14

Contitech India Pvt. Ltd., DSM 249, DLF Tower, Shivaji Marg, Najafgarh Road Industrial Area, New Delhi.	**Vs.**	DCIT, Circle- 6(2), New Delhi.
PAN : AABCR6921P		
(Appellant)		**(Respondent)**

Appellant by	**:**	Shri Ajay Vohra, Sr. Adv. Shri Neeraj Jain, Adv. Shri Sahil Sharma, CA
Respondent by	**:**	Shri Sanjay I. Bara, CIT-DR
Date of hearing	**:**	21-12-2017
Date of pronouncement	**:**	02-01-2018

O R D E R

PER R. K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 05.10.2017 passed by the Assessing Officer u/s 143(3) r.w.s. 144C of the I.T. Act relating to assessment year 2013-14.

2. Facts of the case, in brief, are that the assessee company is a joint venture between Hilton Rubbers Ltd. (HRL), India and A/S Roulunds Fabriker (RF), Denmark and is currently engaged in the manufacturing and marketing of Wrapped B Belts, Raw Edge V-Belts and Industrial Hoses. It filed its return of income on 29.11.2013 declaring total income of Rs.13,89,190/-. The Assessing

Officer referred the matter to the TPO for determination of the arm's length price u/s 92CA(3) of the I.T. Act. The TPO during the TP assessment proceedings observed that the assessee has entered into various international transactions as per Form 3CEB. In order to benchmark the international transactions, the assessee has used TNMM on an aggregate basis. He, therefore, asked the assessee to justify the arm's length price determined by the assessee. He noted that the assessee has also made payment of Rs.24,09,599/- under the head royalty to varies AEs. According to the TPO, the assessee is not availing any benefit by paying royalty to the AEs. Further, the assessee has also paid an amount of Rs.3,33,53,054/- towards corporate expenses (Intra Group Services). The TPO held the arm's length price of these services at Nil on application of CUP as according to him no uncontrolled enterprise would have paid any amount for services which does not tantamount to intra group services with demonstrable benefits. The TPO accordingly made an upward adjustment of Rs.3,57,62,693/- on account of royalty and intra group services.

3. The assessee approached the DRP but without any success. The Assessing Officer in the final order accordingly made addition of Rs.3,57,62,653/- to the total income of the assessee.

4. Aggrieved with such order of the Assessing Officer/TPO/DRP, the assessee is in appeal before the Tribunal by raising the following grounds :-

> *"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.3,71,51,843 as against the income of Rs. 13,89,190 returned by the appellant.

2. *That the assessing officer erred on facts and in law in making an adjustment of Rs. 3,33,53,054 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.3,33,53,054 incurred by the appellant, alleging that (i) no services were received by the appellant (ii) the appellant has not been able to prove the benefits derived from the services (iii) no documentation produced in support of claim for receipt of services (iv) benchmarking done by the appellant is not in accordance with law and therefore CUP method is required to be applied in this case.*

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 applying CUP method for benchmarking the transaction of payment of corporate charges without placing on record any comparable data for comparison.*

2.5 *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.*

2.6 *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.*

2.7 *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.*

3. *That the assessing officer erred on facts and in law in making an adjustment of Rs. 24,09,599 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. 24,09,599 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 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, 2010-11 and 2011-12 and holding that no independent entity in a comparable transaction would pay any amount towards technical know-how fees.

4. That the assessing officer erred on facts and in law in levying interest under Section 2348 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."

5. Ground no.1 being general in nature is dismissed.

6. So far as ground no.2 to 2.7 are concerned, the same relates to upward adjustment of Rs.3,33,53,054/- to the arm's length price on account of payment of corporate expenses (intra group charges).

7. After hearing both the sides, we find this is a recurring issue before the Tribunal. The Tribunal in assessee's own case for assessment years 2008-09 to 2011-12 has restored the matter to the file of the Assessing Officer/TPO for fresh adjudication. We find the Tribunal in assessee's own case for assessment year 2011-12 vide ITA No.3443/Del/2016 order dated 17.10.2016 has restored the issue to the file of the Assessing Officer/TPO for adjudication of the issue afresh by observing as under :-

"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/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."

8. Respectfully following the decision of the Tribunal in assessee's own case in the preceding assessment years and in absence of any contrary material brought to our notice by either sides, we restore the issue to the file of the Assessing Officer/TPO for adjudication of the issue afresh after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The grounds no.2 to 2.7 are accordingly allowed for statistical purposes.

9. Ground no.3 to 3.4 relates to upward adjustment of Rs.24,09,599/- to the arm's length price of the international transactions on account of payment of fees for technical know-how.

10. After hearing both the sides, we find this issue is also a recurring issue before the Tribunal. We find the Tribunal in assessee's own case ITA No.370/Del/2015 order dated 17.10.2016 for assessment year 2010-11 has restored the issue to the file of Assessing Officer/TPO for fresh adjudication by observing as under :-

> *"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 assessee's 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 assessee's 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 assessee's own case in ITA No. 455/Del/2014 for the assessment year 2009-10."

11. Since the facts of the impugned assessment year are identical to the facts of the case in the present assessment year, therefore, following the order of the Tribunal in assessee's own case in the preceding assessment year and in absence of any contrary material brought to our notice by either sides, we restore the issue to the file of the Assessing Officer for adjudication of the issue afresh in the light of the direction of the Tribunal. The above grounds no.3 to 3.4 by the assessee are accordingly allowed for statistical purposes.

12. In ground no.4, the assessee has challenged the levy of interest u/s 234B and 234C of the I.T. Act.

13. After hearing both the sides, we are of the considered opinion that levy of interest u/s 234B is mandatory and consequential in nature. So far as levy of interest u/s 234C is concerned, the same has to be computed as per the returned income as held in various decisions. The Assessing Officer is directed to compute the interest chargeable u/s 234C on the basis of returned income. The ground no.4 by the assessee is accordingly partly allowed for statistical purposes.

14. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on this 02nd day of January, 2018.

Sd/-	**Sd/-**
(SUDHANSHU SRIVASTAVA)	(R. K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 02-01-2018.
Sujeet

Copy of order to: -

1) The Appellant
2) The Respondent
3) The DRP-1, New Delhi
4) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi