

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES : I-1 : NEW DELHI

BEFORE SHRI R.S. SYAL, VICE PRESIDENT  
AND  
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No.5244/Del/2015  
Assessment Year : 2005-06

ITA No.1126/Del/2014  
Assessment Year : 2009-10

ITA No.728/Del/2015  
Assessment Year 2010-11

ITA No.2140/Del/2016  
Assessment Year 2011-12

ITA No.7312/Del/2017  
Assessment Year 2013-14

Carrier Air-conditioning &  
Refrigeration Ltd.,  
Kherki Daula Post,  
Narsinghpur,  
Gurgaon.

Vs. ACIT,  
Circle-1(1),  
Gurgaon.

PAN: AAACC8414B

(Appellant)

(Respondent)

Assessee By : Shri Nageshwar Rao &  
Shri Sandeep Karhail, Advocates  
Department By : Shri Sanjay I Bara, CIT, DR

Date of Hearing : 11.07.2018  
Date of Pronouncement : 13.07.2018

### ORDER

PER R.S. SYAL, VP:

This batch of five appeals relates to the assessment years 2005-06, 2009-10, 2010-11, 2011-12 and 2013-14. Some common points have been raised in these appeals. We are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

#### Assessment Year 2005-06

2. The only issue raised in this appeal is against the confirmation of addition by the Id. CIT(A) vide his order dated 02.06.2015 on account of transfer pricing adjustment amounting to Rs.5,14,02,502/- made by the Assessing Officer in the Transport segment.

3. The facts of the case, in a nutshell are that the assessee is a wholly owned subsidiary of Carrier Corporation, USA and is engaged in the manufacture, assembly and trading of commercial refrigeration equipments.

A return was filed declaring loss of Rs.6.35 crore. Form No. 3CEB was furnished reporting four international transactions. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of these transactions. The TPO, during the course of proceedings, observed that the reported international transactions included 'Import of raw materials and components'; 'Import of finished goods'; and 'Export of finished goods'. The assessee applied Transactional Net Margin Method (TNMM) as the most appropriate method with Profit level indicator (PLI) of Operating Profit to Operating Revenue/cost for demonstrating that these transactions were at ALP. The transactions were reported in four segments, viz., Segment A [Trading and assembly of Transport and Bus refrigeration systems]; Segment B [Manufacturing and export of finished goods for associated enterprises (AEs)]; and Segment-C [Manufacturing for unrelated parties]. There is no dispute as regards the Segment-D relating to Marketing support services. The TPO took up transactions relating to import of raw material and components, import of finished goods and export of manufactured finished goods for consideration. He accepted transactions given in Segment-B,

namely, Refrigeration transactions relating to AEs, at ALP. For demonstrating that the international transactions under Segment-A, being, Transport, were at ALP, the assessee considered Segment-C, namely, Refrigeration (non-AEs) only as internal comparable and its PLI as a benchmark. The TPO held that the nature of work carried out by the assessee in Segment-A was different from that done under Segment-C and hence the functions relating to Transport could not be compared with the functions carried out in Refrigeration (non-AEs) segment. It was so opined, *inter alia*, on the basis of the assessee itself differentiating its line of business under the Transport and Refrigeration (non-AEs) segments by treating them separately. The TPO further did not accept the comparability of Refrigeration (non-AE) segment with Transport segment by noticing that the Transport segment consisted of Truck refrigeration systems and Bus air-conditioning systems, whereas Refrigeration division comprised of Commercial refrigeration. He, therefore, refused to accept Segment-C as comparable. Thereafter, he carried out a search process himself and found out one comparable, namely, Subros Ltd. The assessee was show-caused on this comparable. In reply, the assessee submitted that Subros Ltd. was

functionally not comparable with the assessee's business in Segment-A. Not convinced, the TPO applied the OP/OR of Subors Ltd. at 5.57% as benchmark and computed transfer pricing adjustment amounting to Rs.5.14 crore. No relief was allowed in the first appeal, against which the assessee has approached the Tribunal.

4. We have heard both the sides and perused the relevant material on record. It is observed that the assessee's case for the immediately succeeding assessment year, namely, 2006-07 came up for consideration before the Tribunal. Vide order dated 12.02.2016 in ITA No.5123/Del/2010, the Tribunal found that the main issue was of comparability of the Refrigeration (non-AE) segment with the Transport segment. It noticed that the Transport segment dealt with cooling of all movable systems, such as, bus, trucks and containers; whereas Refrigeration segment dealt with cooling of immovable properties, such as, cold rooms, breezers and vizi coolers. It further noticed that the products in Segment-C were assembled/manufactured from raw materials and components procured from unrelated parties. It also considered the

findings returned by the TPO who found that there was no internal comparable under Segment-A, being, Transport segment and the assessee's application of PLI given in Segment-C relating to Refrigeration (non-AE) segment was not acceptable. In the absence of sufficient discussion in the order of the TPO about the functional profile of the relevant two segments, the Tribunal restored the matter to the AO/TPO with a direction to have opinion of some technical experts on the functions performed by the assessee under these two segments for finding out similarity/dissimilarity between them. The Id. AR submitted that pursuant to such an order passed by the Tribunal, the assessee filed expert technical opinion of Shri Pawanexh Kohli in support of its contention that there was no functional difference between the two segments and, contrary to that, the Officer sought report from Valuation officer, which held otherwise. It was submitted that the Assessing Officer/TPO have held the two segments different by relying on the report of the Valuation officer.

5. In so far as the facts of the instant year are concerned, we, again, find that the primary controversy remains the same as to whether Refrigeration

(non-AE) segment is comparable with Transport segment. Again, we find that there is not much discussion in the assessment order on the functions, assets and risks in the two segments of the assessee. The ld. AR submitted that the additional evidence should be considered and the matter should be decided by the Tribunal. The ld. DR strongly opposed the submission made on behalf of the assessee by urging that it was not clear if the facts for the assessment year 2006-07 were similar or different from those for the year under consideration. He further stated that the reports submitted by the experts need to be examined by the AO/TPO on the touchstone of the facts prevailing for the assessment year in question.

6. In the given facts and circumstances, we are of the opinion that the assessee's application for additional evidence including expert technical opinion provided by the assessee and the report of the Valuation Officer need to be examined at the end of the TPO/AO on the facts relevant for the year under consideration. Even if the AO/TPO has found the additional evidence as supporting the Departmental view for the A.Y. 2006-07, that does not *per se* operate as *res judicata* for other years. The facts of each

year need to be separately examined in the light of the additional evidence before jumping to any conclusion. Reliance of the Id. AR on the decision of the Tribunal in the case of *Zuari Leasing and Finance Corpn. Ltd. (2008) 112 ITD 205(Del) (TM)* for the proposition that the Tribunal should not send the matter back and decide the issue itself, is misplaced. In that case, the restoration was held to be not justified on the strength of material which was already available on record at the assessment stage. Extantly, we are concerned with additional evidence which has not been examined by the AO/TPO in the light of the facts for the relevant year. Our view in restoring that matter to the AO/TPO for a fresh adjudication of this issue is fortified by the judgment of the Hon'ble Calcutta High Court in *CIT vs. Trimline Vyapaar Ltd. (2015) 370 ITR 373 (Cal)* in which it has been held that additional evidence cannot be permitted to be adduced without making an opportunity to the AO. In that case, the Tribunal decided the issue in assessee's favour by relying on additional evidence without confronting it to the AO. The Tribunal order was set aside by holding that consideration of additional evidence, without giving any opportunity to the AO to examine the same, is gross violation of principles of natural justice. The

SLP filed by the assessee against the judgment of the Hon'ble Calcutta High Court has been dismissed by the Hon'ble Supreme Court, since reported at (2015) 378 ITR 34 (St.). Taking a holistic view of the matter, we set aside the impugned order and remit the matter to the file of AO/TPO for deciding this issue afresh in the light of the additional evidence which the assessee has filed before the Tribunal.

7. In the result, the appeal is allowed for statistical purposes.

### **Assessment Year 2009-10**

8. The assail in this appeal is to the legal tenability of the final assessment order dated 19.12.2013 passed by the Assessing Officer u/s 143(3) read with section 144C of the Income-tax Act, 1961 (hereinafter also called 'the Act'). The first issue is against the transfer pricing addition amounting to Rs.7,56,79,236/-.

9. Succinctly, the factual scenario is that the assessee filed its return declaring income of Rs. 54.20 crore. The assessee also furnished Form No. 3CEB reporting certain international transactions. The Assessing Officer made a reference to the TPO for determining the ALP of such transactions.

The TPO noticed that the assessee company carried on its business through certain segments, viz., Transport, Refrigeration and Air-conditioning. It also rendered Marketing support services. The dispute in the instant appeal is only in respect of transfer pricing addition made in Transport segment. The assessee employed the TNMM as the most appropriate method with PLI of Operating profit/Operating Revenue. The assessee segregated its revenue and operating costs in different segments and thus deduced segment-wise operating profits. That is how, it computed OP/OR in Transport segment at (-)12.81%. For demonstrating that the international transaction of Transport segment was at arm's length price, the assessee considered OP/OR of Refrigeration (non-AE) segment at (-)15.48% as a sole internal comparable. The TPO did not accept the assessee's transfer pricing analysis. He held that the Refrigeration segment was functionally distinct from the Transport segment, as were segregated by the assessee itself in its Transfer pricing study report. He further found out certain functional differences between the two segments. In addition, risks in Transport and Refrigeration (non-AE) segments were also found to be different. The TPO also held that the bifurcation of operating expenses

between AE and non-AE segments of Refrigeration was not reliable. He, therefore, refused to accept the assessee's benchmarking approach. A fresh search process was carried out by the TPO, who found five companies as comparable, namely, Frick India Ltd., Patels Airtemp (India) Ltd., Sanden Vikas (India) Ltd., Subros Ltd. and Voltas Ltd. Mean OP/Sales ratio of such five comparables was determined at 6.75%, which was considered as arm's length margin. Applying this PLI to the revenues of Rs.43.47 crore in the assessee's Transport segment, the TPO worked out transfer pricing adjustment of Rs.8,50,26,705/-. The assessee objected to the draft order proposed by the Assessing Officer incorporating the transfer pricing adjustment before the Dispute Resolution Panel (DRP). The Panel held that the TPO was right in ignoring Refrigeration (non-AE) segment for benchmarking the international transaction of the Transport segment. Out of five comparables chosen by the TPO, the DRP directed to exclude Patels Airtemp (India) Ltd. from the list of comparables. The Assessing Officer eventually made transfer pricing addition of Rs.7,56,79,236/- in the international transaction of Transport segment, against which the assessee has come up in appeal before the Tribunal.

10. The assessee has filed an application under rule 29 of the Income-tax Appellate Tribunal Rules, 1963 for this year as well requesting to admit additional evidence, namely, expert technical opinion of Mr. Pawanexh Kohli, report submitted by the Valuation Officer and order passed by the TPO for the assessment year 2006-07 (post-remand proceedings) etc. The ld. AR contended that the expert technical opinion given by Shri Pawanexh Kohli amply brings out that there is no functional difference between the assessee's Transport segment and Refrigeration (non-AE) segment. He insisted that the Tribunal should decide the issue at its own without remitting the matter to the AO/TPO. It was emphasized that the situation for the A.Ys. 2009-10 onwards was different from that for the A.Ys. 2005-06 and 2006-07 inasmuch as the TPO did not discuss the functional profile of the assessee under the Transport and Refrigeration (Non-AE) segments at great length and simply refused to accept the internal comparable, being Refrigeration (Non-AE) segment at the threshold, for the A.Y. 2005-06 and 2006-07, but he carried out full functional and risk analysis of both the segments for the A.Ys. 2009-10 onwards and thereafter reached the

conclusion that the Refrigeration (non-AE) segment was not a fit comparable for the Transport segment.

11. *Au contraire*, the Id. DR submitted that the additional evidence filed by the assessee for the first time can't be taken note of by the Tribunal without confronting it to the AO/TPO and hence the matter should be sent back, as has been done by the Tribunal for the A.Y. 2006-07, which order has attained finality.

12. The Id. AR was advised that in case he wanted the Tribunal to decide the matter at its own, observing departure from the view taken by it for the A.Y. 2006-07, then he should not press for consideration of the additional evidence as it amounts to violation of the principles of natural justice *qua* the Revenue. He not only insisted on going ahead with the matter on merits independently, but also refused to take back his application for additional evidence, thereby taking conflicting stands. Though initially we were not in favour of rendering any finding on merits at this stage, which may influence the decision of the authorities below for other years, but it was

due to the Id. AR's insistence, that we took up the matter on merits. This is how, we examined the relevant material in the light of arguments advanced.

13. The assessee has drawn a combined Profit & Loss Account, a copy of which is available on page 157 of the paper book. It can be seen from such Profit & Loss Account that the income as well as the expenses of all the segments are shown in common. Page 173 of the paper book is continuation of the Annual report, which contains segmental reporting. Though the revenues in respect of Refrigeration, Transport and Air-conditioning segments have been shown distinctly, but all the operating and other expenses are common under the head 'Total', which figures have been taken from the Profit and Loss account. In other words, the assessee has maintained accounts on entity level and not on segment level. Page 87 of the paper book is a summary of segment-wise operating margins drawn by the assessee for the year, which has been prepared by allocating expenses in certain ratios. There is no reference to any such ratios in such computation. A summary of the so-called segment-wise operating income

and operating costs etc. was given by the assessee to the TPO, which has been captured on page 3 of his order, as under:-

Particulars	Air-conditioning Division	Marketing Support Services	Transport segmentA	Refrigeration Division	
				AE segment B	Non-AE Segment
Total Income	6306528	413420	434766	206479	651565
Total Operating Cost	5898233	242532	490446	129330	752427
Operating Profit	408295	170888	-55680	77149	-100862
Operating profit/Operating Revenue	6.47%		-12.81%	37.36%	-15.48%

14. It can be seen from the above that the assessee has segregated Refrigeration segment in two parts, namely, AE and non-AE segments. The assessee has sought to benchmark its OP/OR of (-) 12.81% in Transport segment with the OP/OR of (-) 15.48% in Refrigeration (non-AE) segment for demonstrating that the negative OP/OR in Transport segment, being, less than that of Refrigeration (non-AE) segment, is an arm's length margin. When the nature of activity in Refrigeration (AE and non-AE) segments is same, it is not understandable as to how OP/OR in Refrigeration (AE segment) is 37.36% and there is loss in Refrigeration (non-AE segment) at (-)15.48%, which later figure the assessee has adopted

as a solitary comparable for benchmarking the international transaction of Transport segment in dispute. The TPO has also doubted the correctness of allocation of expenses between these segments for working out drastically varying OP/ORs. He has recorded on page 22 of his order : “that even AE and non-AE segment of Refrigeration segment has not been done on the basis of actual accounts and has been done on the basis of allocation key of sales ratio. The aforesaid division between the AE and non-AE segments is, therefore, not reliable.”

15. One can understand benchmarking of AE transactions in Transport segment with the non-AE transactions in the Transport segment itself. How the Refrigeration (non-AE) segment can be compared with Transport segment is anybody’s guess. It is more so, when the assessee has itself segregated Transport segment from Refrigeration segment, thereby indicating that both the segments are mutually exclusive and cannot be compared with each other. If the assessee has to benchmark international transactions of Transport segment, it needs to find out non-AE transactions under the Transport segment itself and not the Refrigeration segment,

unless it gets established that the functions performed, assets employed and risks involved in Transport and Refrigeration segments are similar. Turning to the facts of the instant case, we find that such a position does not *prima facie* appear to have been established.

16. The assessee categorically admitted before the authorities that the Transport segment deals with: “trading and assembling of refrigeration and cooling products for movable systems in which the assessee imports truck refrigeration system and bus air-conditioning system as kits/completely built units for assembly and sale in India.” In this segment, the assessee also trades in spare parts of truck, bus and container refrigeration. In contrast, in the Refrigeration segment, the assessee is engaged in manufacture and supply of completely different line of products, namely, breezers, vizi coolers and bottle coolers and cold rooms etc. Two things emerge from it. First, whereas in Transport segment, the assessee is undertaking refrigeration of movable items, such as bus and trucks, in Refrigeration segment, it is undertaking the refrigeration of immovable items, such as, cold rooms. It is axiomatic that both these activities are

different in nature. Another important feature which *ex facie* makes the two segments different from each other is that the assessee is engaged in manufacturing activity in Refrigeration segment, whereas it is an admitted position that the assessee does not carry out any manufacturing activity in the Transport segment. It goes without saying that the functions, risks and assets in a manufacturing activity are completely different from those in a trading activity. When this position was confronted to the Id. AR, he submitted that the manufacturing activity in Refrigeration Segment was minimal. On a pointed query, he failed to invite our attention towards any material indicating the extent of manufacturing activity or revenue from it in the overall Refrigeration (non-AE) segment.

17. It is further observed that risks in the Transport Segment are different from those in the Refrigeration Segment. In the case of Refrigeration segment, the assessee needs to purchase raw material and components for manufacturing panels and refrigeration units, which are procured from unrelated third party vendors having risk of poor quality or difference in specifications etc. However, in the case of Transport Segment, such a risk

is very limited as the raw materials are supplied by group concerns and in case of any defective goods, the same can be easily replaced. Foreign exchange risk also varies in the two segments. Whereas in the Transport segment, the AEs invoice the assessee for purchases in US Dollars, but, in the case of non-AE segment of Refrigeration, the assessee makes purchases through third parties and pays in Indian rupees, thereby leading to difference in foreign exchange risk in the two segments. Further, the TPO has referred to several other differences in risks involved in the two segments at page 22 of his order, which are not reproduced for the sake of brevity. The above discussion explicitly manifests that there is a difference in the FAR analysis of Transport and Refrigeration (non-AE) segments.

18. Having seen that the assessee did not correctly benchmark its international transaction of Transport Segment by comparing it with the Refrigeration (non-AE) segment, we need to examine as to whether the comparables chosen by the TPO are really comparable.

19. The Id. AR submitted that the TPO was not correct in selecting the comparables, all of which are involved in the manufacturing activity, as

against the assessee not doing any manufacturing activity under the Transport segment. The DRP has discussed the functional profile of the comparables chosen by the TPO on pages 2 to 4 of its direction. It has been clearly set out that these companies are involved in manufacturing activity. Such a position has also been rightly conceded by the Id. DR.

20. It is pertinent to mention that the Id. AR has contested the comparability of the companies chosen by the TPO and retained by the DRP on the premise that all of them are engaged in manufacturing activity whereas its Transport segment is not into any manufacturing activity. There is an apparent inconsistency in the stand of the assessee in so far as the selection of comparable companies by the TPO is concerned. *Por una parte*, the assessee is seeking to benchmark its Transport segment by treating its Refrigeration (non-AE segment) as comparable, which is admittedly, engaged in manufacturing activity. *Por otra parte*, the assessee is seeking exclusion of the companies chosen by the TPO on the *raison d'etre* that they are into manufacturing activity, which is absent in the

Transport segment. These are two diagonally opposite and irreconcilable stands, having no meeting ground.

21. Albeit, *ex facie* it appears that the Refrigeration (non-AE) segment is not comparable with the Transport segment due to the reasons set out in the earlier paras of this order, the assessee is still seeking to rely on certain additional evidence under Rule 29 of ITAT Rules with an attempt to demonstrate that the two segments are similar. As admittedly, such an additional evidence has not been considered during the course of assessment proceedings for the year under consideration, respectfully following the Tribunal order for the assessment year 2006-07 in the assessee's own case, we set aside the impugned order and remit the matter to the file of Assessing Officer/TPO for deciding this issue afresh as per law after allowing a reasonable opportunity of being heard to the assessee. It is made clear that the assessee will be at liberty to file any fresh evidence in its support in such fresh proceedings. It is further made clear that the transfer pricing adjustment, if warranted, should be confined only to the international transactions. This ground is thus disposed of accordingly.

22. The only other issue raised in this appeal is against treating leasehold improvement of Rs.55,10,000/- as capital expenditure. The factual panorama of this issue is that the assessee claimed deduction of Rs.55,10,000/- on account of improvements on leasehold premises. On perusal of the details and supporting bills, it was observed by the Assessing Officer that such expenditure was incurred for flooring, construction of cubicles, workstations, wiring and other interior works and for purchase of office furniture. The Assessing Officer treated this amount as capital expenditure in terms of Explanation 1 to section 32(1). After allowing depreciation @ 10%, he made an addition for the remaining sum. Having not succeeded before the DRP, the assessee has come up before the Tribunal against the confirmation of such an addition.

23. We have heard both the sides and perused the relevant material on record. The assessment year under consideration involves financial year 2008-09, comprising of the period from 1.4.2008 to 31.3.2009. The assessee has placed on record copies of Leave and licence agreements in respect of which the above expenses were incurred, which were also filed

before the AO vide its letter dated 29.7.2013. First Agreement is dated 19<sup>th</sup> August, 2008 in respect of Lucknow premises. The second Agreement is dated 1.7.2007 but with the effective date of 1.2.2008. The third Agreement is dated 31<sup>st</sup> December, 2007 in respect of Gurgaon property but with the effective date of 1.2.2008. There is one more agreement dated 13<sup>th</sup> May, 2008 in respect of leasing of Hyderabad property. There is still another lease agreement dated 25<sup>th</sup> March, 2008 in respect of Bangalore property. The assessee stated through the above letter to the AO that the sum of Rs.55.10 lac was incurred in respect of the above leased premises. A common filament running through these lease Agreements is that all the properties in question were taken on lease either during the financial year under consideration itself or near to the close of the preceding year. When we examine the nature of work carried out in respect of the above premises taken on lease by the assessee, being, flooring, construction of cubicles, workstations, wiring and other interior works and also purchase of furniture, it becomes vivid that such premises were renovated to make them fit for use in its business. In other words, the amount was spent on complete renovation of such premises. The Hon'ble Supreme Court in *Ballimal*

*Naval Kishore vs. CIT 1997 224 ITR 414 (SC)* has held that the expenditure incurred by the assessee on total renovation of cinema theatre by installing new machinery, new furniture, new sanitary fitting and new electrical installation besides extensive repair of structure of building, to be capital expenditure and not allowable as current repairs. This judgment indicates that any capital expenditure on total renovation is liable to be considered as capital expenditure. The Hon'ble jurisdictional High Court in *Bigjo's India Ltd. vs. CIT (2007) 293 ITR 170 (Del)* considered almost a similar situation as is obtaining before us in the present appeal. In that case, the assessee, a licensee of the showroom, erected new counters and built a new lift shaft at a new site. It was held that such amount was not in the nature of current repairs but a capital expenditure, not deductible in full. Ergo, we find that the present facts are on all fours with those considered by the Hon'ble High Court in *Bigjo's (supra)*. It is evident from the description of the items on which the above referred expenditure has been incurred that it is a case of renovation of premises immediately after taking them on lease. As such, there can be no question of replacement. We, therefore, hold that the authorities below have taken an unimpeachable view in treating the instant

amount as a capital expenditure. Reliance of the Id. AR on certain decisions to bring home the deductibility of such expenses is misplaced. In none of these cases, the premises were taken on lease and the expenses were incurred immediately thereafter on renovation for making them fit for use.

24. At this stage, it is relevant to note that the Tax Laws (Amendment and Miscellaneous Provisions) Act, 1986 inserted Explanation 1 to section 32 w.e.f. 1.4.1988, reading as under : -

“Explanation-1. Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to and by way of renovation or extension of, or improvement to the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee.”

25. A circumspection of the above Explanation reveals that where a business is carried on in a building not owned by the assessee but in respect of which it holds a lease or either occupancy rights, then the expenditure on i) the construction of a structure; or ii) *doing of any work* in or in relation to and *by way of renovation or extension of, or improvement to the*

*building*, shall be considered as structure or work in the nature of building owned by the assessee for the purpose of depreciation. Spirit and text of Explanation 1 to section 32 is that any capital expenditure by the assessee on a building not owned by him, in which he carries on the business, shall be considered as building owned by him for the purposes of section 32, to the extent of the amounts spent on the construction of structure or doing of any work in or in relation to and by way of renovation or extension or improvement to the building. It therefore, follows that in order to bring any amount within the ambit of Explanation 1 to section 32, it is paramount that the expenditure incurred by the assessee on the premises in the capacity of non-owner should firstly be in the nature of capital expenditure and then it should fall within any of the clauses as discussed above. If these conditions get satisfied, as is the case under consideration, then the amount incurred for such works falls under Explanation 1 to section 32. In other words, the amount so incurred would be capitalized entitling the assessee to depreciation as per the eligible rate. The facts of the instant case precisely fall within the ambit of Explanation 1 to section 32. In view of the

foregoing discussion, we uphold the impugned order treating such amount as capital expenditure, eligible for depreciation.

26. In the result, the appeal is partly allowed for statistical purposes.

### **Assessment Year 2010-11**

27. The assessee has challenged the final assessment order passed by the Assessing Officer u/s 143(3) read with section 144C of the Act. The first issue raised in this appeal is against the addition on account of transfer pricing adjustment in the Transport segment.

28. Both the sides are in agreement that the facts and circumstances of this ground are similar to those of the immediately preceding assessment year 2009-10. For this year also, the assessee has filed an application under Rule 29 requesting for the admission of additional evidence. In fact, both the sides adopted their respective arguments made for the immediately preceding year. Following the view taken hereinabove, we set aside the impugned order and remit the matter to the file of AO/TPO to decide this issue afresh in accordance with our directions given for the assessment year 2009-10.

29. Ground no. 2 is against not allowing depreciation on leasehold improvements.

30. The Id. AR submitted that though the Assessing Officer treated Rs.55.10 lac as capital expenditure as against the assessee's claim of the same being of revenue nature for the immediately preceding year, but he did not allow any depreciation on its opening written down value in the computation of income for the instant year. The Id. AR contended that if the assessee's contention of such an amount being a revenue expenditure is not accepted, then depreciation should be allowed on it.

31. While dealing with this issue for the immediately preceding assessment year, we have upheld the view of the authorities below that the expenditure of Rs.55.10 lac is capital in nature and eligible for depreciation u/s 32 of the Act. *Ex consequenti*, the AO is directed to grant depreciation on such amount as per law for the year under consideration.

32. In the result, the appeal is allowed for statistical purposes.

**Assessment Year 2011-12**

33. The assessee has assailed the correctness of the final assessment order dated 15.2.2016 passed by the Assessing Officer u/s 143(3) read with section 144C of the Act. The first issue raised in this appeal is against the addition on account of transfer pricing adjustment in the Transport segment. Both the sides are in agreement that the facts and circumstances of this ground are similar to those of the immediately preceding assessment years, namely, 2009-10 & 2010-11. For this year also, the assessee has filed an application under Rule 29 requesting for the admission of additional evidence. In fact, both the sides adopted their respective arguments made for the A.Y. 2009-10. Following the view taken hereinabove, we set aside the impugned order and remit the matter to the file of AO/TPO to decide this issue afresh in accordance with our directions given for the assessment year 2009-10.

34. The only other issue raised in this appeal is against the addition on account of transfer pricing adjustment amounting to Rs.38,31,848/- in the international transaction of 'Interest on outstanding receivables' from the

AE. The factual matrix of this ground is that the TPO observed during the course of proceedings before him that the assessee had not charged interest on receivables from its AEs. Considering the necessary aspects of the matter and taking into consideration the replies filed by the assessee, he allowed 60 days as a normal period of realization. Applying the interest rate of 9.34%, being, the rate of return associated with BB rated bonds and PLR of SBI, the TPO worked out transfer pricing adjustment of Rs.38,31,848/- on this count. The assessee remained unsuccessful before the DRP, which led to the making of transfer pricing addition of this magnitude as interest on receivables in the final assessment order.

35. Relying on the judgment of the Hon'ble Delhi High Court in *Pr. CIT vs. Kusum Health Care Pvt. Ltd. (2017) 398 ITR 66 (Del)*, the ld. AR contended that no interest could have been charged as there was no international transaction on this score.

36. Sounding a contra note, the ld. DR submitted that interest on receivables is an international transaction and the TPO has rightly determined its ALP. To buttress the contention of rightly treating the

interest on receivables as an international transaction, he read out the relevant parts of the DRP's direction, in which the Panel has relied on the Delhi Tribunal order in *Ameriprise India Pvt. Ltd. vs. ACIT (2015- TII-347-ITAT-DEL-TP)* for holding that interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that the Finance Act, 2012 has inserted Explanation to section 92B with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this Explanation provides that (i) the expression "international transaction" shall include—..... (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or *any other debt arising during the course of business;....* . He accentuated that the expression '*debt arising during the course of business*' refers to trading debt arising from the sale of goods or services rendered in the course of carrying on the business. Once any debt arising during the course of business is an international transaction, he submitted that any delay in the realization of such debt is liable to be visited with the transfer pricing adjustment on account of interest income short charged or

uncharged. It was argued that insertion of the Explanation with retrospective effect covers the assessment year under consideration and hence under/non-payment of interest by the AEs on the debt arising during the course of business also becomes international transactions, requiring the determination of its ALP. He referred to the decision of the Delhi Tribunal in *Ameriprise (supra)* in which this issue has been thoroughly discussed and eventually interest on trade receivables has been held to be an international transaction. Referring to the discussion in the said order, it was stated that the Delhi Bench in this case has also noted a decision of the Hon'ble Bombay High Court in the case of *CIT vs. Patni Computer Systems Ltd., (2013) 215 Taxmann 108 (Bom.)*, which dealt with question of law : (c) 'Whether on the facts and circumstances of the case and in law, the Tribunal did not err in holding that *the loss suffered by the assessee by allowing excess period of credit to the associated enterprises without charging an interest* during such credit period would not amount to international transaction whereas section 92B(1) of the Income-tax Act, 1961 refers to any other transaction having a bearing on the profits, income, losses or assets of such enterprises?' He pointed out that while answering

the above question, the Hon'ble High Court noticed that an amendment to section 92B has been carried out by the Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside the view taken by the Tribunal, the Hon'ble High Court restored this issue to the file of the Tribunal for fresh decision in the light of the legislative amendment. It was thus argued that the non/under-charging of interest on the excess period of credit allowed to the AEs for the realization of invoices amounts to an international transaction and the ALP of such an international transaction has been rightly determined by the TPO. In so far as the charging of the rate of interest is concerned, he relied on the decision of the Hon'ble Delhi High Court in *CIT vs. Cotton Naturals (I) Pvt. Ltd (2015) 276 CTR 445 (Del)* holding that the currency in which the loan is to be re-paid determines the rate of interest. He, therefore, concluded by summing up that interest on outstanding trade receivables is an international transaction and its ALP has been correctly determined.

37. We have heard the rival submissions and perused the relevant material on record. The Hon'ble Delhi High Court in *Pr. CIT vs. Kusum Health Care Pvt. Ltd. (supra)* found that the entire focus of the AO was on

just one assessment year and the figure of receivables in relation to that assessment year could hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond particular number of days constituted an international transaction by itself. It observed that there may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which would have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee would have to be studied. It went on to hold that, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that *vis-à-vis* the receivables for the supplies made to an AE, the arrangement reflected an international transaction intended to benefit the AE in some way. Similar matter once again came up for consideration before the Hon'ble Delhi High Court in *Avenue Asia Advisors Pvt. Ltd. vs. DCIT (2017) 398 ITR 120 (Del)*. Following the earlier decision in *Kusum Healthcare (supra)*, it was observed that there are several factors which need to be considered before holding that every receivable is an international transaction and it requires an assessment on the working

capital of the assessee. Applying the decision in *Kusum Health Care (supra)*, the Hon'ble High Court directed the TPO to study the impact of the receivables appearing in the accounts of the assessee; looking into the various factors as to the reasons why the same are shown as receivables and also as to whether the said transactions can be characterized as international transactions. In view of the above decision in *Avenue Asia Advisors (supra)*, we deem it appropriate to set aside the impugned order on this issue and remit the matter to the file of the Assessing Officer/TPO for deciding it in conformity with the above referred judgment. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such fresh proceedings. Similar view has been taken by the Delhi Bench of the Tribunal in *Orange Business Services India Solutions Pvt. Ltd. vs. DCIT* in ITA No. 6570/Del/2016 vide its order dated 15.2.2018.

38. In the result, the appeal is allowed for statistical purposes.

### **Assessment Year 2013-14**

39. The assessee has assailed the final assessment order dated 25.10.2017 passed by the Assessing Officer u/s 143(3) read with section 144C of the

Act. The only issue raised in this appeal is against the addition on account of transfer pricing adjustment in the Transport segment. Both the sides are in agreement that the facts and circumstances of this ground are similar to those of the earlier years including the assessment year 2009-10. For this year also, the assessee has filed an application under Rule 29 requesting for the admission of additional evidence. In fact, both the sides adopted the arguments made by them for the A.Y. 2009-10. Following the view taken hereinabove, we set aside the impugned order and remit the matter to the file of AO/TPO to decide this issue afresh in accordance with our directions given for assessment year 2009-10.

40. In the result, the appeal is allowed for statistical purposes.

The order pronounced in the open court on 13.07.2018.

Sd/-

[BEENA A. PILLAI]  
JUDICIAL MEMBER

Sd/-

[R.S. SYAL]  
VICE PRESIDENT

Dated, 13<sup>th</sup> July, 2018.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.