

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2' NEW DELHI**

**BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 5736/Del /2015
Asstt. Year: 2010-11**

ACIT, Circle 10(1), New Delhi	vs	Gillette Diversified Pvt. Ltd., P&G Plaza, Cardinal Gracious Road, Chankala, Andheri (East), Mumbai-400009 (PAN: AAACG2469C)
(Appellant)		(Respondent)

**ITA No. 5675/DEL/2015 to 5677/DEL/2015
Asstt. Year: 2008-09 to 2010-11**

Gillette Diversified Pvt. Ltd., P&G Plaza, Cardinal Gracious Road, Chankala, Andheri (East), Mumbai-400009	vs	ACIT, Circle 12(1), New Delhi
(Appellant)		(Respondent)

**Assessee by: Shri Pradip Dinodia, Adv.
Shri R.K. Kapoor, Adv.
Department by: Shri Sanjay Kumar Yadav, Sr. DR**

**Date of Hearing: 24.05.2018
Date of Pronouncement: 23.08.2018**

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

ITA No. 5675/Del/2015 is assessee's appeal against the order dated 30.7.2015 passed by the Ld. CIT (Appeals)-44, New

Delhi for assessment year 2008-09. ITA 5676/Del/2015 is assessee's appeal against the order dated 30.7.2015 passed by the Ld. CIT (A)-44, New Delhi for assessment year 2009-10, ITA 5677/Del/2015 is assessee's appeal against order dated 30.7.2015 passed by the Ld. CIT (A)-44, New Delhi for assessment year 2010-2011 and ITA 5736/Del/2015 is the department's cross appeal for assessment year 2010-11. Since these appeals involve identical issues, these were heard together and are being disposed of through this consolidated order.

2. Brief facts of the case are that the assessee is engaged in the business of trading of wide range of products for personal care use. It is engaged in the distribution of oral care products primarily falling under health care segment consisting of toothbrush, toothpaste, dental floss etc. The assessee is a subsidiary of Gillette India Group of Companies.

2.1 For assessment year 2008-09, the return of income was filed at a loss of Rs. 3,57,402/-. The assessment was completed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") at a total income of Rs. 2,21,93,140/- after making an adjustment in respect of transfer pricing

adjustment of Rs. 2,25,50,540/-. This adjustment was made on account of non-charging of interest on delayed payments received from the Associated Enterprises (AE).

2.2 In assessment year 2009-10, the return of income was filed declaring income at nil and an income of Rs.3,02,28,446/- under the provisions of section 115JB of the Act. In this year, the transfer pricing adjustment in respect of interest on delayed payments was of Rs. 1,58,33,490/-.

2.3 In assessment year 2010-11, the return of income was filed declaring income at nil and of Rs. 11,796,566/- u/s 115JB of the Act. In this year, the transfer pricing adjustment with respect to interest on delayed payment from the AEs was of Rs. 1,59,24,926/-. In assessment year 2010-11, a disallowance of Rs. 5,31,53,415/- was also made by the Assessing Officer on account of depreciation claimed by the assessee on plant and machinery which was not being used by the assessee company.

2.4 In all the three years under consideration, the assessee approached the Ld. Commissioner of Income Tax (A) who upheld the action of the Assessing Officer/Transfer Pricing

Officer (TPO) in making the transfer pricing adjustment with respect to notional interest on delayed payment received from the AE. The Ld. Commissioner of Income Tax (A), however, upheld the assessee's claim for depreciation in assessment year 2010-11.

2.5 Now, the assessee is before the ITAT challenging the findings of the Ld. Commissioner of Income Tax (A) in respect of confirmation of transfer pricing adjustment with respect to interest on delayed payments from the AE in all the three years under appeal while the department is in appeal in assessment year 2010-11 and is challenging the action of the Ld. Commissioner of Income Tax (A) in directing the deletion of disallowance with respect to depreciation on plant and machinery not utilized by the assessee company.

3. The Ld. AR appearing on behalf of the assessee submitted that assessment year 2010-11 may be taken as the lead case and assessment years 2008-09 and 2009-10 being essentially identical, the same arguments would apply for these assessment years as well.

3.1 The Ld. Authorised Representative (AR) submitted that the major transaction undertaken by the assessee is the export of finished goods amounting to Rs.45.79 crores to its AEs for which the assessee had applied TNMM as the most appropriate method. It was submitted that the assessee earned margins under the TNMM method @ 5.63% based on OP/OR and the comparables had earned a margin of 4.72% as have been noted by the TPO in Para 2 of his Order. It was submitted that the assessee had earned a higher profit of Rs. 41.66 lacs while transacting with its AE as compared to the comparables based on these margins. It was submitted that all the reported international transactions had been accepted at the Arms Length Price (ALP) and no adjustment has been made by the TPO in any of the reported international transactions. The Ld. AR further submitted that the TPO had held all the international transactions to be at arm's length price, but had made an adjustment of Rs. 1,59,24,916/- on account of outstanding receivables from the AEs beyond the alleged standard credit period of 30 days @ interest rate of 14.88% based on PLR of State Bank of India.

3.2 The Ld. AR elaborated that during the Transfer Pricing proceedings, the TPO observed that the balance sheet of the assessee was showing receivables as on 31st March, 2010 and the TPO required the assessee to explain as to why the receivables which were outstanding beyond the agreed period should not be treated as separate international transactions and why interest @ 14.88% on such receivables should not be computed to determine the ALP of such receivables. It was further submitted that in response to the show cause notice, the assessee filed its reply dated 23.11.2013 giving reference to commercial business reasons, uniformity in non-charging interest from AE and Non-AE and to consider the credit period of 180 days against the export realization. Alternatively, the assessee also requested to apply LIBOR instead of SBI PLR rate of 14.88% but the TPO did not consider the submission of the assessee appropriate and proceeded to determine the Transfer Pricing adjustment at Rs. 1,59,24,926/-.

3.3 The Ld. AR further submitted that the interest on overdue receivables is result of sale of goods and when the main transaction has been considered to be at ALP then there is no reason to treat the receivables as a separate international

transaction. The Ld. AR submitted that 'receivable' mentioned under Explanation to Sec. 92B of the Act does not mean 'accounts receivable' and, thus, the outstanding balance cannot be treated as an independent transaction for transfer pricing adjustment. The Ld. AR further submitted that 'receivable' under clause (c) would apply to loan funds only and, therefore, the charging of interest is applicable only with the lending or borrowing of funds and not in the case of commercial over-dues which is already subjected to transfer pricing. It was also submitted that the rate of interest charged on loan granted cannot be used as comparable for charging interest on outstanding trade receivables, even if applicable as per the contract. The Ld. AR reiterated that the trade receivables have a different business perspective altogether and interest on overdue is only an incidental activity to the main activity of sale or purchase of goods or provision of services.

3.4 The Ld. AR placed reliance on numerous judicial precedents for the proposition that non-charging of interest in respect of extended credit period cannot be held as an international transaction provided the assessee was giving similar treatment to both AEs and non AEs.

3.5 The Ld. AR also submitted that the working capital adjusted margins of the assessee have already factored in to account for the impact of delay in receivables and, thus, any separate adjustment on this account was not warranted in view of the judgment of the Hon'ble Delhi High Court in the case of Principal CIT Vs. Kusum Health Care Pvt. Ltd. reported in 2017-TII-28-HC-Delhi (TP). It was submitted that the working capital adjusted margins of the comparable and the assessee computed in accordance with the Hon'ble Delhi High Court in Kusum Healthcare (supra) is 6.78% and 5.63% respectively, which is, thus, within the +/-5% range as per proviso to Sec 92C. Our attention was drawn to the working placed at page 162 of the Paper Book.

3.6 Without prejudice, it was further submitted, that the assessee has, in the Transfer Pricing proceedings, also submitted the updated margins of the comparables at the instance of the TPO which comes to (3.39%) as compared to the assessee's PLI of 4.72% and place at page 114 of the paper book. It was submitted that this has not been discussed by the TPO in its order.

3.7 The Ld. AR also submitted that in the case of the assessee, the transaction of recoverables has sprung up and is an off-shoot

of sales transaction. It was submitted that the transaction of sales with the AE were, admittedly, at ALP and the margins earned by the assessee were higher than that of the comparables and, therefore, the transaction of delayed recoverable, if at all, it is to be treated as a separate transaction, the same gets subsumed in the overall TNMM analysis and no separate adjustment is warranted on the delayed recoverable.

3.8 It was further submitted by the Ld. AR that without prejudice to the contention that overdue receivables is not a separate international transaction, it was submitted that even the RBI allows a time limit of 6 months for realizing the export proceeds (now 365 days from year 2013). It was submitted that the RBI is the competent authority for the time being in force for regulating payments and dealings in foreign currency. It was prayed that the credit period of 180/365 days for realizing export proceeds from AE outside India may be considered for making adjustment if any.

3.9 Reliance was placed on the order of ITAT Delhi Bench in the case of AVL India Pvt. Ltd vs. DCIT [ITA No. 4275/Del/2016] in which also the TPO had made adjustment for receivables taking prudent estimate of 30 days credit period at interest rate of

14.88% but the Ld. CIT (A) had allowed and the ITAT confirmed the credit period of 180 days.

3.10 Further reliance was also placed on the following judicial precedents wherein a credit period of 180 days has been accepted by the courts:

-DCIT vs. M/s Indo American Jewellery Limited- ITA NO. 5872 (MUM.) OF 2009

-Lintas India P. Ltd vs. ACIT [2013] 152 TTJ 706 (Mum)

-Mastek Ltd. vs. ACIT (ITA No.3120/Ahd/2010)

-Bausch & Lomb Eye Care (I) Pvt Ltd v ACIT - Order dated May 23, 2014 in ITA /3861/Del/ 2010 , ITAT Delhi

3.11 The Ld. AR submitted that even if interest on overdue receivables is treated as international transaction, standard credit period of 180 days, as against 30 days taken by TPO, be allowed to the assessee as even the provisions of law like Sec 10A or 80HHC etc and RBI Rules allow 6 months/one year period now for realizing export proceeds and allow benefit of deduction. Reliance placed on GSS Infotech [ITA No. 602/Hyd/2017].

3.12 Without prejudice to the above, it was further submitted that rate of interest for calculation of notional interest cannot be taken at the rate of 14.88% p.a., but has to be the rate from

borrowers perspective. It was submitted that in the present case, as the AEs are based in USA, Switzerland, Singapore etc, rates should be as per the prevalent borrowing rates in those countries, which is LIBOR. It was further submitted that comparing Indian interest rates for the purpose of benchmarking of lending or borrowing (which are dominated in foreign currency) does not constitute an appropriate comparable within the meaning of Rule 10B (a)(i) and that the comparison of interest on a foreign currency loan with Indian rates on domestic loans tantamounts to contravention of the above stated rule. It was prayed that in the case of the interest rate on overdue trade receivables to the Associated Enterprises, LIBOR be applied instead of the Indian SBI base rate for the ALP determination. The Ld. AR placed reliance on the following judicial precedents:

- Tech Mahindra Limited ITA. No. 1176/Mum/2010
- Siva Ventures Ltd. v ACIT (TS-218-ITAT-2013)(CHNY)
- Cotton Naturals [TS-117-HC- 2015-DEL-TP]
- GSS Infotech Ltd [TS-298- ITAT-2016(HYD)-TP]

3.13 It was further submitted that the 6 months LIBOR rate for AY 2010-11, was 1.10 % and even if this is increased by 150 basis points it will become 2.60%.The adjustment on account of

overdue receivables, if any, will be around Rs.3 Lacs based on 180 days credit period and 2.60% LIBOR rate as per the calculations enclosed in Annexure-IV. It was submitted that this amount of adjustment gets subsumed into the extra PLI margins earned by assessee as compared with comparables whereby assessee has made extra profit of about 41 lacs. Hence, no adjustment whatsoever is warranted.

4.0 Arguing against the Department's appeal, it was submitted by the Ld. AR that the AO disallowed the depreciation on plant & machinery on the ground that the assessee company did not put the Plant & Machinery to use for the business activities during the year, rather these were out to use by M/s Rialto Enterprises Pvt. Ltd. It was submitted that the AO also alleged that the depreciation is allowable only if the assets were either used actively or passively for the purpose of business but in the instant case the assessee company did not carry out any manufacturing activities. The Ld. AR drew our attention to the relevant portion of the impugned order wherein the Ld. CIT (A) allowed the appeal of the assessee by stating that-

"I have perused the agreement between the appellant and Rialto Enterprises private limited. As per the said agreement

there are annexures of plant and machinery to be provided by the appellant however, the cost of such plant and machinery, date of purchase etc are not available in the said agreement. Therefore, the assessing officer is directed to verify actual cost of the plant and machinery used for the production of product of the appellant by M/s Rialto Enterprises Private Limited before allowing depreciation u/s 32. Accordingly this ground of appeal is partly allowed.”

4.1 Strong reliance was placed on the reasons given by the Ld. CIT (A) in allowing the claim of the depreciation to the assessee. It was submitted that as per the provisions of Sec 32, the asset should be owned and used for the purpose of business of the assessee and that it does not mandate that the asset must be used by assessee itself. It was submitted that during the year under consideration also, the assets had been owned by the assessee, though installed at the premises of M/s Rialto Enterprises Pvt. Ltd, for the business of assessee only. The assessee company itself is not manufacturing the goods but got them manufactured from M/s Rialto Enterprises Pvt. Ltd and as per the agreement with Rialto, the assessee was to provide all the required machineries, equipment testing equipment and moulds for the purpose of manufacturing products to Rialto. It was further submitted that the relevant clauses of the agreement were

explained before the Ld. CIT (A) vide submission dated 9th July 2015 (Paper Book Pages 104-106) and the Ld. CIT (A), in his order, has also appreciated that the plant & machinery need not necessarily be actually used by the assessee itself for claiming depreciation and can be used by other person also as in the case of leased assets. The Ld. AR made a reference to the following observations of the Ld. CIT (A):

“During the remand proceedings, the AO has raised a new issue that even the depreciation of plant and machinery used by M/s Rialto Enterprises Pvt. Ltd. for manufacturing should not be allowed to the appellant. Although the AO's claim is not entertainable at the stage of appellate proceedings against the penalty order. However, the claim of the AO is prima-facie not maintainable as depreciation is always allowable even when the plant and machinery is leased out and is being used by the other person. Here, in the appellant's case, the plant and machinery is being used by a concern which exclusively manufactures products for the appellant and plant and machinery is maintained by the appellant itself. Therefore, there remains no doubt regarding the ownership as well as the fact that plant and machinery was put to use for business purposes. In such circumstances, depreciation is fully allowable to the appellant. Therefore, the issue raised by the AO during the remand proceedings has no merits and hence deserves to be rejected.”

4.2 The Ld. AR placed reliance on numerous judicial precedents to support his contention that it is not necessary that the assets should be used by the assessee itself in order to claim depreciation.

4.3 The Ld. AR summed up his arguments by submitting that:

- The plant and machinery placed at Rialto' premises were exclusively for manufacturing the products for the assessee company and its associates.
- The proprietary rights of assets remained with the assessee company.
- The assessee continued to own and maintain the plant and machinery, the costs of maintenance and repairs as well as the depreciation costs.
- The price of the products sold to assessee company did not include the depreciation costs.
- The plant and machinery were of assessee company's proprietary design, over which it maintained ownership and close control on access as well as measures undertaken to prevent counterfeiting.

4.4 The Ld. AR also made a reference to section 32 of the Act and submitted that the following conditions as prescribed in section 32 of Income Tax Act, 1961 were fully satisfied in the case of the assessee company:-

- Assessee must be the owner of the asset - registered owner need not be necessary

-The asset must be used for the purposes of business or profession.

- The asset must be used during the previous year.

4.5 It was prayed that the Department's appeal on the issue be dismissed.

5.0 In response, the Ld. Senior Departmental Representative (Sr. DR) placed strong reliance on the order of the TPO as upheld by the Ld. CIT (A) with respect to the transfer pricing adjustment on overdue receivables.

5.1 In respect of the Department's appeal pertaining to disallowance of depreciation, the Ld. Sr. DR placed reliance on the findings of the AO.

6.0 We have heard the rival submissions and have also perused the material on record. We take up the assessee's appeals first and the sole issue for our consideration in the three appeals is whether the transfer pricing adjustment/s in respect of receivables outstanding beyond the agreed period is sustainable or not. The Ld. CIT (A) has discussed the issue at length in the impugned order and has noted that as per the Invoices, payments

were to be made within five working days of the invoicing period. It has also been noted by the Ld. CIT (A) that the TPO has further allowed a grace period of 30 days in all cases of delayed payments before proceeding to compute the transfer pricing adjustment. The Ld. CIT (A) has dismissed all the contentions raised by the assessee before him by relying on the various judicial precedents which he has duly quoted in the impugned order. The Ld. AR has also argued at length and has placed reliance on a plethora of case laws with respect to each limb of his contention. We find that the Hon'ble Delhi High Court, also being the jurisdictional High Court for the assessee, has dealt this issue in Principal CIT vs. Kusum Health Care Pvt. Ltd reported in 2017-TII-28-HC-Delhi TP and has held in Para 10 of the judgment as under:

“The Court is unable to agree with the above submissions. The inclusion in the Explanation to Section 92B of the Act of the expression ‘receivables’ does not mean that de hors the context every item of ‘receivables’ appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterized as an international transaction. There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case

basis. Importantly, the impact this would have on the working capital of the Assessee will have to be studied. In other words, there has to be a proper inquiry by the TPO by analyzing the statistics over a period of time to discern a pattern which would indicate that vis-a-vis the receivables for the supplies made to an AE, the arrangement reflects an international transaction intended to benefit the AE in some way.

The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and recharacterised the transaction. This was clearly impermissible in law as explained by this Court in CIT Vs. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi) — 2012-TII-01 -HXC-Del-TP.”

6.1 Thus, the Hon'ble Delhi High Court has held the delay in collection of monies even beyond the agreed period will have to be

investigated on a case to case basis. It has also been laid down that the TPO will have to make a proper enquiry to discern a pattern which could indicate that the arrangement reflects an international transaction intended to benefit the AE in some way. It has also been held that where the assessee has already factored in the impact of receivables on the working capital, any further adjustment only on the basis of outstanding receivables would distort the picture.

6.2 We are of the considered opinion that this aspect will have to be necessarily re-examined by the AO/TPO before any such adjustment is made. It has also been submitted by the Ld. AR that the impact of the outstanding receivables has been factored in the working capital adjustment. This aspect also requires verification. We also note that the Ld. CIT (A) did not have the benefit of this judgment of the Hon'ble Delhi High Court when he passed the impugned order. Therefore, on an overall view of the facts of the case and respectfully following the ratio of the Hon'ble Delhi High Court in the case of Principal CIT vs. Kusum Health Care Pvt. Ltd (supra) we restore this issue to the file of the AO/TPO for the purpose of re-examining and re-considering the issue in light of the ratio of the judgment of the Hon'ble Delhi

High Court in the case of Principal CIT vs. Kusum Health Care Pvt. Ltd (supra) and pass a speaking order as per law after giving proper opportunity to the assessee. The assessee shall be at liberty to take all/any of the pleas raised before us and shall also be at liberty to file relevant workings/computations.

7.0 Accordingly, the three appeals of the assessee stand allowed for statistical purposes.

8.0 Coming to the department's appeal challenging the action of the Ld. CIT (A) in deleting the disallowance of depreciation, we find that the issue is squarely covered in favour of the assessee by the judgment of the Hon'ble Apex Court in the case of ICDS Ltd. vs. CIT reported in (2013) 29 taxmann.com 129 (SC) wherein the Hon'ble Apex Court, while examining provision of Section 32 of the Act, held as under:

“Section requires that the assessee must use the asset for the ‘purposes of business’. It does not mandate usage of the asset by the assessee itself. As long as the asset is utilized for the purpose of business of the assessee, the requirement of section 32 will stand satisfied, notwithstanding non-usage of the asset itself by the assessee.”

8.1 The Hon'ble Supreme Court considered the phrase 'use for the purpose of business' in the case of liquidators of Pursa Ltd. v. CIT(1954) 25 ITR 265 (SC). The Hon'ble Apex Court pointed out

that the critical words which are essentially constituent for the purpose of considering the claim of the assessee was machinery or plant "used for the purposes of business, profession or vocation". The words "used for the purposes of business" obviously means used for the purpose of enabling the owner to carry on the business and earn profits in the business.

8.2 In view of the binding precedent of the Hon'ble Apex Court, respectfully following the same, we find no reason to interfere with the findings of the Ld. CIT (A) on the issue and dismiss the grounds raised by the Department.

9.0 In the result the appeal of the department stands dismissed.

10.0 In the final result, the appeals of the assessee are allowed and the appeal of the Department is dismissed.

Order is pronounced in the open court on 23rd August, 2018.

Sd/-

(PRAMOD KUMAR)
ACCOUNTANT MEMBER

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 23rd AUGUST, 2018
'GS'

Copy forwarded to:

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

TRUE COPY

By Order

ASSISTANT REGISTRAR