IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: "I-2", NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.5802/Del/2015
Assessment Year: 2011-12

M/s. Kadimi Tool Manufacturing Co. Pvt. Ltd., 118, Udyog Vihar, Phase-I, Dundahera, Gurgaon	**Vs.**	DCIT, Circle-14(1), New Delhi
PAN :AAACK1016F		
(Appellant)		**(Respondent)**

Appellant by	S/shri Pradeep Dinodia & R.K. Kapoor, Advocates
Respondent by	Shri H.K. Choudhary, CIT(DR)

Date of hearing	11.02.2019
Date of pronouncement	04.04.2019

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against the final assessment order dated 26.08.2015 passed by the learned Deputy Commissioner of Income-tax, Circle -14(1), New Delhi, (in short 'the learned Assessing Officer') for assessment year 2011-12, pursuant to the directions dated 01.07.2015 of learned Dispute Resolution Panel (DRP). The grounds raised by the assessee are reproduced as under:

1. *That the learned DRP and consequently the A.O. have grossly erred in law and on facts and in circumstances of the appellant's case in making adjustment u/s 92CA(3) of the Income-tax Act amounting to Rs. 10,63,122/- on account of alleged delay in recovering the outstanding trade receivables from the AE.*

2. *That the order of assessment is bad in law and on facts of the appellant's case.*

3. *That the learned DRP and consequently the AO have erred in law and on facts and in the circumstances of the appellant's case in disregarding the internal CUP furnished by the assessee between the transactions with the AE and with non-AE for the credit period extended.*

4. *That the learned DRP and consequently the AO have erred in holding that the benchmarking of the income to be earned on the delayed trade receivables should be based on the interest rate charged by the Indian banks for domestic loans extended in India.*

5. *That without prejudice and subject to Ground 6 below, the learned AO has erred in law in not giving the benefit of base rate of SBI as on 30 June of the relevant financial year with regard to safe harbour rules.*

6. *That without prejudice, the learned DRP and consequently the AO have grossly erred in not applying the LIBOR rate as applicable to the international transactions of loans in the foreign currency to the trade receivables of the assessee.*

7. *That the learned DRP and consequently the AO have grossly erred in law in re-characterizing trade receivables against sales made as independent transaction from the transaction of sales made to the AE and requiring separate benchmarking.*

7.1 *That the Hon'ble DRP grossly erred in law in not appreciating that the transaction of sales & receivables were required to be aggregated for the purpose of TP analysis.*

7.2 *That the margins derived by the tested party were way beyond the comparables and thus failed to apply the view taken by Delhi HC in case of Sony Ericsson Mobile Communications in its correct perspective.*

8. *That the learned DRP and consequently the AO have erred in law in denying the benefit of Sec 1 OB of the Act being 100% Export Oriented Unit.*

9. *That the learned DRP and consequently the AO have erred in law in alleging that the approval granted by Joint Development*

Commissioner has not been subsequently ratified by the Board Of Approvals.

10. That the Hon'ble DRP and Ld. AO failed to appreciate that the ratification is internal process of the Board of Approval and assessee is not a party to the same.

11. That the benefit of Sec 1 OB has been denied on the assumption of the fact that the assessee is supposed to have formal ratification approval from the Board of Approvals.

11.1 That the directions by DRP on the claim u/s 10B for the years not before DRP are extraneous, illegal and are prayed to be expunged.

11.2 That the order passed by DRP denying the deduction u/s 10B are based on conjectures, surmises, imaginations and reasons which are beyond the control of the assessee and are prayed to be nullified.

12. That each ground in independent of and without prejudice to the other grounds raised herein.

2. Briefly stated facts of the case are that the assessee-company was engaged in the business of manufacturing of Thread Rolling Dies, Milled Flat Dies and Milled Ground Dies and sale of Screws etc. For the year under consideration, the assessee filed return of income, declaring income of Rs.1,14,72,196/- on 25.09.2011. The case was selected for scrutiny and notice under Section 143(2) of the Income-tax Act, 1961 (for short 'the Act') was issued and complied with. In view of the international transaction carried out by the assessee with its Associated Enterprises (AEs), the Assessing Officer referred the matter of determination of Arm's Length Price (ALP) of those international transactions to the learned Transfer Pricing Officer (TPO). The learned TPO proposed an adjustment of Rs.9,38,224/- on account of international transaction of interest on overdue receivables.

2.1 The learned Assessing Officer issued a draft assessment order on 26.08.2015, in which, along with addition of the transfer pricing adjustment proposed by the Ld. TPO, he also proposed disallowance of deduction under Section 10B of the Act amounting to Rs.10,63,73,255/-. Against the draft assessment order, the assessee filed petition before the learned DRP. The learned DRP increased the transfer pricing adjustment to Rs.10,63,122/-, however, subsequently rectified to to Rs.7,22,120/- vide order passed under Section 154 of the Act, dated 20.10.2015. On the issue of disallowance under Section 10B of the Act, two members of the learned DRP upheld the disallowance, although on the grounds not relied upon by the learned Assessing Officer.

2.2 Aggrieved with the disallowances sustained by the learned DRP and incorporated by the Assessing Officer in the final assessment order dated 26.08.2015 read with TPO's order dated 20.10.2015, the assessee is in appeal raising the grounds as reproduced above.

3. In the grounds raised, ground nos. 1 to 7.2 of the appeal are related to the issue of interest on overdue receivables of Rs.7,22,122/-. The facts qua the issue in dispute are that, the assessee reported international transactions of sale of finished goods, amounting to Rs.29.28 crores to its AEs and for which it applied TNMM as the most appropriate method. The assessee earned margin under the TNMM method @48.06% based on Operating Profit/Operating Cost (OP/OC), whereas the comparables had earned decrease margin of 5.62%. All the reported international transactions were accepted at the ALP and no adjustment was made by the Ld. TPO. However, the Ld. TPO

on perusal of the financial statement of the assessee was of the view that there were overdue receivables against the sale of finished goods to the AE and no interest on said receivables was charged by the assessee. The Ld. TPO proceeded to make adjustment for interest on outstanding receivables @11.69% for Rs.9,38,224/-. The said amount of adjustment was increased to Rs.10,63,122/- pursuant to the DRP directions and subsequently, rectified to Rs.7,22,120/- @ 9% vide order under Section 154 dated 20.10.2015.

3.1 Before us, the learned counsel for the assessee submitted that the learned DRP disregarded the internal CUP furnished by the assessee between transactions with the AE and Non-AE at similar terms. It was submitted, on behalf of the assessee, that no separate benchmarking was required to be done on account delayed amount recovered from the AE especially when the assessee does not charge such interest either from AEs or non-AEs. The learned counsel relied upon the judgment of the Tribunal in the case of Indo Americal Jewellery Ltd., 2012-TII-117-ITAT-Mumbai, which has been upheld by Bombay High Court. Further, learned counsel also submitted that the transactions of the sales with the AE are at ALP and the net margins earned by the assessee are substantially higher than that of the comparables (48.06% of the assessee as against 5.62% of the comparables). Learned counsel submitted that the transaction of the delayed recoverable, if at all, it is to be treated as a separate transaction, same gets subsumed in the overall TNMM analysis and no separate adjustment is warranted on the delayed recoverable. Learned counsel of the assessee further submitted that the issue in dispute is covered in favour of the

assessee by the order of the Tribunal in its own case for assessment year 2010-11.

3.2 On the other hand, the learned DR relied on the order of the lower authorities.

3.3 We have heard the rival submissions and perused the relevant material, including the order of the Tribunal in the case of the assessee for assessment year 2010-11. We find that in the case of the assessee, margin is relatively too higher (48.06%) as compared to the average margin (5.62%) of the comparables. We further find that in the assessee own case, the Tribunal in ITA No. 7068/Del/2014 for assessment year 2010-11 vide order dated 25.09.2017 adjudicated the identical issued of transfer pricing adjustment of interest on receivables as under:

> *"10. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the DRP and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. The only issue to be decided in the above ground is regarding as to whether the receivables beyond the period mentioned in the service agreement is international transaction and as to whether any adjustment u/s 92CA(3) of the I.T. Act is required on account of delay in recovering outstanding receivables from the AE. We find the Assessing Officer, after the direction of the DRP, made an adjustment of Rs.6,36,894/- on account of the interest that should have been charged by the assessee on the outstanding amount from the AE. It is the submission of the Id. counsel for the assessee that in view of the decision of the Hon'ble Delhi High Court in the case of Bechtel India Pvt. Ltd. (supra) and in the case of Kusum Healthcare Pvt. Ltd. (supra), no adjustment is required on account of notional interest on receivables. We find merit in the above argument of the Id. counsel for the assessee. We find the Hon'ble Delhi High\Court in the case of Bechtel India Pvt. Ltd. (supra) has held that where the assessee is a debt free company the question of receiving any interest on receivables did not arise. Consequently, no adjustment for interest on receivables is required. The decision of the Hon'ble High Court was challenged by the Revenue and the SLP was dismissed by the Hon'ble Supreme Court vide CC No(s).4956/2017 order dated 21.07.2017.*

10.1. We also find the Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. (supra) while deciding an identical issue has observed as under:

> *"10. 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 characterised 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 analysing 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.*

11. 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 v. EKL Appliances Ltd. (2012) 3451TR 241 (Delhi).

12. Consequently, the Court is unable to find any error in the impugned order of the IT AT giving rise to any substantial question of law for determination. The appeal is, accordingly, dismissed. "

11. Similar view has been taken by the Co-ordinate Bench of the Tribunal in the case of Teradata India Pvt. Ltd. (supra) wherein the Tribunal following the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. (supra) has held that no adjustment can be made on account of interest on receivables on credit granted by the Indian Subsidiary to its foreign AE. Respectfully following the decisions cited above, we hold that the TPO is not justified in making adjustment of interest amounting to Rs.6,36,894/- on account of alleged delay in recovering the outstanding toward receivables from the AE as per the provisions of

Section 92CA(3) of the I.T. Act. The first issue raised by the assessee in the grounds of appeal is accordingly allowed."

3.4 In the instant case, in the year under consideration, the assessee is debt free company, thus, respectfully following the finding of the Tribunal, the transfer pricing adjustment on account of interest on overdue receivables is deleted. The grounds no. 1 to 7.2 of the appeal are accordingly allowed.

4. The Ground Nos. 8 to 12 of the appeal relate to disallowance of Rs.10,63,73,255/- under Section 10B of the Act.

4.1 Facts qua the issue in dispute are that the assessee claimed deduction under Section 10B of the Act from assessment year 2002-03 upto to assessment year under consideration. The claim of the assessee was that no disallowance on account of deduction under Section 10B of the Act has been made in any of the earlier years. The assessee has claimed that the Assessing Officer made disallowance in the draft assessment order without any discussion in the body of the order. However, two members of the Ld. DRP held that approval to 100% Export Oriented Unit (EOU) was granted by the Joint Development Commissioner, Noida, SEZ, whereas the same should have been granted by the Development Commissioner. According to learned DRP, the Development Commissioner cannot delegate powers to Joint Commissioner and thus due to lack of proper approval, the assessee was held not eligible for the deduction under Section 10B of the Act.

4.2 Before us, the learned counsel submitted that in earlier years no disallowance has been made on this ground and this is

for the first time, the disallowance is being made without providing sufficient opportunity of being heard to the assessee. Learned counsel submitted that for requisite approval, the application was filed before the Development Commissioner and, thus, it was not relevant who has signed in the final certificate issued. Further, the learned counsel submitted that the assessee obtained a clarificatory order letter 19th May, 2015, whereas the approval granted to the assessee as a 100% EOU has been subsequently ratified by the Board of Approvals. Learned counsel submitted that this was also furnished before the DRP along with review application under Rule 13, however, same was not acted upon.

4.3 On the contrary, the learned DR relied on the order of the lower authorities.

4.4 We have heard the rival submissions and perused the relevant material on record. The facts in respect of the disallowance have already been mentioned above. According to Ld. DRP, the Joint Development Commissioner was not authorized to approve the assessee as 100% EOU and the said order must have been ratified by the Board of Approvals. The assessee has submitted before us that the permission granted by the Joint Development Commissioner has been ratified by the Board of Approval with retrospective effect. In view of facts, the only issue in dispute in the instant case, which has precipitated before us is, whether the action of the Joint Commissioner approving the assessee as a 100 % EOU has been ratified subsequently by the Board of Approvals or not? We find that the assessee has filed a copy of such order of ratification of the permission by the Board of Approvals vide its letter dated

13.08.2015 before the learned DRP, a copy of which is placed on pages 31 to 35 of the paper book filed by the assessee. We have perused the said letter conveying the said ratification of the Board of Approvals' issued by the Assistant Development Commissioner. In view of the said ratification, the ground on the basis of which, the learned DRP disallowed the deduction no longer exists. In view of the foregoing discussion, we direct the Assessing Officer to deleted the disallowance of deduction under Section 10B of the Act. The grounds of appeal of the assessee are accordingly allowed.

5. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 4th April, 2019.

Sd/-	**Sd/-**
[AMIT SHUKLA]	**[O.P. KANT]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 4th April, 2019.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi