

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.432/Del/2016
Assessment Year: 2011-12

CRM Services India Pvt. Ltd.,
220, Vinobha Puri,
Lajpat Nagar-II,
New Delhi.

Vs ACIT,
Circle-6(2),
CR Building,
New Delhi.

PAN: AABCC6211B

(Appellant)

(Respondent)

Assessee by	:	Shri Neeraj Jain, Advocate & Shri Abhishek Agarwal, CA
Revenue by	:	Shri Sanjay I Bara, CIT, DR
Date of Hearing	:	16.05.2019
Date of Pronouncement	:	15.07.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 13.11.2015 passed by the Assessing Officer u/s 143(3) read with section 144C of the IT Act, relating to assessment year 2011-12.

2. Facts of the case, in brief, are that the assessee M/s CRM Services India Pvt. Ltd., is a 99.9% subsidiary of TPUSA Inc., a Delaware Corporation, running a voice based call centre facility in Gurgaon. It filed its return of income on 29.11.2011,

declaring an income of Rs.10,89,04,919/-. The Assessing Officer referred the matter to the TPO for determining the arm's length price of the international transactions entered into by the assessee. The TPO, during the course of TP assessment proceedings, observed that the assessee has reported the following international transactions:-

International Transactions	Name of the AE	Value (in Rs.)	Method
Payment of Royalty	TPUSA Inc.	25,300,568	TNMM
Information Technology Enabled and related IT Services	TPUSA Inc.	674,155,488	TNMM
Information Technology Enabled and related IT Services	Teleperformanc, UK.	1,161,236	TNMM
Reimbursement for expenses incurred	TPUSA Inc.	30,471,276	CUP
Reimbursement for expenses incurred (training expense]	Merkafon De Mexico, SA De C.V.	25,42,550	CUP
Reimbursement for expenses incurred (software expense)	Teleperformance Group Inc., USA	32,66,046	CUP
Reimbursement for expenses (received]	Teleperformance Group Inc., USA	2,92,178	CUP
	Total	73,68,97,164	

3. After considering various objections filed by the assessee from time to time, the TPO proposed the following adjustments to the international transactions entered into by the assessee with its AEs:-

S. No.	Nature of International Transaction	ALP determined by assessee (INR)	ALP determined by this office (INR)	Adjustment u/s 92CA (INR)
1.	Payment of Royalty	2,53,00,568	Nil	2,53,00,568
2.	Receivables	Nil	52,80,570	52,80,570
	Total			3,05,81,138

4. The Assessing Officer accordingly made this addition in the draft assessment order passed by him. The assessee approached the DRP who gave part relief on both the issues on which addition was proposed by the TPO/A.O. So far as payment of

royalty is concerned, the DRP restricted the same to Rs.1,25,61,795/- as against Rs.2,53,00,568/- made by the Assessing Officer. So far as the receivables are concerned, the DRP restricted the same to Rs.10,28,714/- as against Rs.52,80,570/-.

5. Aggrieved with such order of the A.O./TPO/DRP, the assessee is in appeal before the Tribunal by raising the following grounds:-

“1. That the assessing officer / Dispute Resolution Panel (DRP) erred on facts and in law in completing the assessment under section 144C/143(3) of the Income-tax Act, 1961 (‘the Act’) at an income of Rs. 12,24,95,430 as against income of Rs. 10,89,04,919 returned by the appellant.

2. That the assessing officer/ DRP erred on facts and in law in making a transfer pricing adjustment of Rs. 1,25,61,795 allegedly on account of difference in the arm’s length price of the international transaction of payment of royalty of Rs. 2,53,00,568 holding that the appellant was not required to pay royalty in respect of services provided to the associated enterprise.

2.1 That the assessing officer/ DRP erred on facts and in law in holding that in terms of ‘Intangible and Proprietary Property and Licensing agreement’ (“the Agreement”) dated 02-01-2002, royalty was required to be paid only on the proportionate sales made to unrelated third parties.

2.2 That the assessing officer/ DRP erred on facts and in law in not appreciating that the entire revenues of the appellant are from sale of services to third parties - whether such third parties are direct customers of the assessee or customers of the associated enterprise, and accordingly royalty was payable on the total revenue.

2.3 That the assessing officer/TPO erred on facts and in law in making a transfer pricing adjustment of Rs. 1,25,61,795 undertaking cost benefit analysis to determine the arm’s length price of payment of royalty without appreciating that cost-benefit analysis is not a prescribed method under Rule 10B of Income Tax Rules, 1963.

2.4 That the assessing officer/ TPO erred on facts and in law in applying CUP method for benchmarking the transaction of payment of royalty 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 transaction of payment of royalty has already been

benchmarked applying TNM method as the most appropriate method and accordingly, no adjustment is required to be made on this account.

2.6 Without prejudice, that the assessing officer/DRP erred on facts and in law in not appreciating that the payment of royalty was made in respect of sale of services to the customers of the associated enterprise in terms of the agreement and was incurred wholly and exclusively for purposes of business.

3. That the assessing officer/ DRP erred on facts and in law in making a transfer pricing adjustment of Rs.10,28,714 in respect of the receipt of receivable from the associated enterprise considering the same to be an 'international transaction' of loan, on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer ('TPO').

3.1 That the Dispute Resolution Panel ('DRP') erred on facts and in law in upholding the order of the TPO, wherein, it was held that the alleged delay in realization of receivables is as an international transaction in terms of section 92B of the Act.

3.2 Without prejudice, that the DRP/ TPO erred on facts and in law in not accepting that in any case the transaction of delay in respect of receivables was closely linked to the 'international transaction' of exports and since the profit earned by the appellant as a percentage of cost is higher than the profit earned by comparable companies, no transfer pricing adjustment was even otherwise required to be made in this regard.

3.3 Without prejudice, that the DRP/ TPO erred on facts and in law in not appreciating that even after considering adjustment on account of working capital in the margin of the appellant and the comparable companies since the adjusted margin of the appellant is higher than that of comparable companies no interest ought to be imputed on the alleged delay in receipt of receivables.

3.4 Without prejudice, that the DRP/ TPO erred on facts and in law in rejecting the delay in receipt of receivables on transaction undertaken with unrelated third parties as comparable uncontrolled price for the purpose of benchmarking the delay in receipt of receivables on transaction undertaken with associated enterprises, applying CUP method.

3.5 Without prejudice, that the DRP erred on adding a markup of 400 basis points to the USD LIBOR, on account of adjustment for security and transaction cost, without providing cogent reasons and on the basis of his surmises and conjecture.

The appellant craves leave to add, alter, amend or vary from the aforesaid grounds of appeal before or at the time of hearing.”

6. Ground of appeal No.1 by the assessee being general in nature is dismissed.

7. So far as ground of appeal No.2 is concerned, the Id. counsel for the assessee submitted that royalty has been paid to the AE as well as to the third party. The DRP has given direction to delete the royalty that has been paid to the third party. However, they have rejected the contention of the assessee for the royalty paid to the AE. Referring to the copy of the order of the Tribunal in assessee's own case for assessment year 2008-09, 2009-10 and 2010-11, he submitted that under identical circumstances, the Tribunal has restored the issue to the file of the A.O./TPO for determining the issue afresh on the basis of the additional evidences filed under Rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963. He submitted that for this year also the assessee is filing an application under Rule 29 of the Income-tax (Appellate Tribunal) Rules which should be admitted and he has no objection if the matter is restored to the file of the A.O./TPO. He submitted that since the licence agreement was misconceived by the lower authority, therefore, the assessee is filing these additional evidences. He accordingly submitted that the matter should be restored to the file of the Assessing Officer.

8. The Id. DR, on the other hand, while supporting the order of the A.O./TPO/DRP, fairly conceded that he has no objection if the matter is restored to the file of the A.O./TPO.

9. We have considered the rival arguments made by both the sides and perused the orders of the A.O./TPO/DRP and the paper book filed on behalf of the assessee. We find, in the immediately preceding assessment year i.e., 2010-11, vide ITA No.1161/Del/2015, order dated 27th July, 2018, the Tribunal has restored the issue to the file of the A.O./TPO for fresh adjudication by observing as under:-

“6. We have considered the submissions of both the parties and perused the material available on record. It is noticed that an identical issue having similar facts was a subject matter of the assessee’s appeal for the earlier assessment years 2008-09 and 2009-10 in those years also assessee furnished the additional evidences as has been done in the year under consideration. This Bench of the ITAT in assessee’s own case for the aforesaid assessment years 2008-09 and 2009-10 while deciding the identical issue in ITA Nos. 5930/Del/2012 and 1630/Del/2014 has restored the issue back to the file of the AO / TPO. The relevant findings have been given in para 7.1 to 9 which read as under:-

“7.1 As far as the assessee’s plea regarding adjustment in respect of royalty is concerned, we have duly considered the assessee’s application for admission of additional evidence which has been filed under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 and looking to the facts and circumstances, it is our considered opinion that this Addendum to the agreement goes to the very root of the matter and it will suitably assist the lower authorities did not have the benefit of examining this document, the matter has to be necessarily restored to the file of the Assessing Officer / TPO for deciding the issue of royalty afresh after duly considering this agreement and after giving due opportunity to the assessee to present its case. Accordingly, ground no. 17 in assessee’s appeal for assessment year 2008-09 also stands allowed for statistical purposes.

7.2 Since the Ld. AR has stated that if ground nos. 3 and 17 are decided in favour of the assessee, the other grounds will become academic in nature, we are not proceeding to hear the arguments of either of the parties on the remaining grounds at the present moment. We, however, note that the assessee will be at liberty to raise these grounds again before the Tribunal at a future date, if it is so required.

8. In the result, the assessee’s appeal ITA No. 5930/Del/2013 stands partly allowed for statistical purposes in terms of our directions as contained in the preceding paragraphs.

9. *Coming to the assessee's appeal in ITA No. 1630/Del/2014, since we have already admitted additional evidence in respect of the issue pertaining to ALP of royalty in assessment year 2008-09, on identical reasoning, we admit additional evidence in this year as well. Since the lower authorities did not have the benefit of examining this document, the matter has to be necessarily restored to the file of the Assessing Officer / TPO for deciding the issue of royalty afresh after duly considering this agreement and after giving due opportunity to the assessee to present its case."*

7. So respectfully following the aforesaid referred to order dated 14.5.2018 for the assessment years 2008-09 and 2009-10 in assessee's own case. The issue under consideration in the present case relating to payment of royalty is also set aside to the file of the AO / TPO to be adjudicated afresh in accordance with law by keeping in view the directions given in the aforesaid referred to order dated 14.5.2018."

10. Since the facts of the impugned assessment year are identical to the facts of the preceding assessment year, therefore, following the order of the Tribunal in assessee's own case for the immediately preceding assessment years, we restore the issue to the file of the A.O./TPO with a direction to decide the issue afresh and in accordance with the law in the light of the directions of the Tribunal. The ground of appeal No.2 raised by the assessee is accordingly allowed for statistical purposes.

11. So far as ground of appeal No.3 is concerned, the ld. counsel for the assessee drew the attention of the Bench to para 11 of the order of the Hon'ble Delhi High Court in the case of *PCIT vs. Kusum Healthcare Pvt. Ltd.*, vide *ITA No.765/2016*, order dated 25th April, 2017 which reads as under:-

"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-à-vis that of its comparables, any further

adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this Court in *CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi)*.”

12. He submitted that the assessee, in the instant case, has earned a profit margin of 39.86% from its AE whereas it has earned profit margin of 4.67% from unrelated parties. Therefore, the profit earned from the AE being much higher than the profit earned from third party/unrelated parties, therefore, no adjustment on account of receivables is called for. He also relied on the following decisions:-

- i) PCIT vs. Kusum Healthcare Pvt. Ltd., ITA No.1161/Del/2015 (Delhi High Court)
- ii) Global Logic India Ltd. vs. DCIT [ITA No.1630/Del/2014, A.Y. 2010-11 & ITA No.1115/Del/2017, A.Y. 2012-13]

13. Referring to the decision of the coordinate Bench of the Tribunal in the case of M/s Global Logic India Ltd. in ITA No.1104/Del/2015 and 1115/Del/2017, order dated, 12.12.2017, for assessment year 2010-11 and 2012-13, respectively, he submitted that here also the Tribunal, following the decision of the Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd., has held that no adjustment can be made on account of notional interest on receivables by relying upon Explanation (i), (a) and (c) to section 92B by treating the continued debt balance as an international transaction. He accordingly submitted that no adjustment on account of receivables is called for.

14. The Id. DR, on the other hand, referred to page 35 and 36 of the order of the TPO and submitted that the TPO has given valid reasons for holding that the delay in realization of receivables is an international transaction in terms of section 92B of the IT Act and, thereby, making adjustment on account delay in realization of receivables. He accordingly submitted that the grounds raised by the assessee should be dismissed.

15. We have considered the rival arguments made by both the sides and perused the orders of the A.O/TPO/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 impugned ground is regarding the transfer pricing adjustment of Rs.10,28,714/- in respect of the realization of receivables from the AEs considering the same to be an international transaction of loan. From the various details filed by the assessee as well as the submission made by the Id. counsel, we find the assessee has earned a profit margin of 31.86% from its AEs whereas the profit margin from the third parties/unrelated parties is only 4.67%. We find the coordinate Bench of the Tribunal in the case of Global Logic India (supra) while deciding an identical issue has held that no adjustment can be on account of notional interest on receivables, by relying upon Explanation (i), (a) and (c) of Section 92B by treating the continued debit balance as an international transaction. While doing so, the Tribunal has relied on the decision of the Hon'ble Delhi High Court in the case PCIT vs. Kusum Healthcare Pvt. Ltd. (supra). The relevant observation of the Tribunal from para 13 onwards reads as under:-

“13. The Id. TPO while treating the outstanding receivables as international transaction relied upon Explanation (i), (a) & (c) of section 92B which is reproduced as under for ready reference :-

"Explanation (i), (a) and (c) of section 92B recognizes sales and receivables arising during the course of business as separate transaction. The explanations read as under :-

(i) the expression "international transaction" shall include--

(a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;

(b)

(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"

14. Provisions contained under Explanation (i), (a) & (c) of section 92B have been analyzed by Hon'ble Delhi High Court in case cited as Pr. CIT-V vs. Kusum Health Care Pvt. Ltd. in ITA 765/2016 order dated 25.04.2017, wherein it is held that the expression added in Explanation to section 92B does not mean that de hors the context, every item of receivables appearing in the accounts of an entity, which may have dealing with foreign AE, would automatically be characterized as an international transaction and decided the issue in favour of the taxpayer by returning following findings :-

"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-à-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-à-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi).

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

15. So, in view of the law laid down by Hon'ble High Court in Pr. CIT-V vs. Kusum Health Care Pvt. Ltd. (supra), we are of the considered view that no adjustment can be made on account of notional interest on receivables by relying upon Explanation (i), (a) & (c) of section 92B by treating the continued debt balance as an international transaction. Moreover when the taxpayer is debt free company, there is no question of charging any interest on receivables. This issue has also been decided by Hon'ble Delhi High Court in case of Pr. CIT-1 vs. M/s. Bechtel India Pvt. Ltd. in ITA 379/2016 order dated 21.07.2016.

16. Furthermore when we examine the entity level margin of the taxpayer vis-à-vis comparable companies, the taxpayer has earned higher margin i.e. taxpayer earned 38.39% OP/OC margin vis-à-vis margin of comparable companies at 11.43%. In such circumstances, no separate adjustment on account of interest can be made. Because the credit period extended to AE cannot be considered as a standalone transaction without considering the main transaction of the sale.

17. Furthermore when the taxpayer is undisputedly a debt free company, as it is not the case of the ld. TPO that borrowed funds have been appropriated enabling the AE to make the delayed payment on receivables. So when outstanding receivables is not a separate international transaction, the delay in realization of the sale proceeds is incidental to the transaction of sale and as such no notional interest can be levied by treating the same as unsecured loan.

18. Furthermore it is the case of the taxpayer that when the taxpayer is not charging interest from unrelated third party / non- AE, in case of such delay, no adjustment on interest in case of AE can be made and drew our attention towards the details of invoices raised qua unrelated parties available at page 183A of the paper book wherein delay in realization of the receivables is also up to 218 days for AY 2010-11 and up to 417 days qua AY 2012-13 as per detail of invoices raised on unrelated parties qua AY 2012-13, available at page 236 of the paper book.

19. This issue has been dealt with by Hon'ble Bombay High Court in case cited as CIT-9 vs. M/s. Indo American Jewellery Ltd. in ITA (L) No.1053 of 2012 order dated 08.01.2013 wherein following question was framed :-

"B. Whether on the facts and in the circumstances of the case and in law the ITAT was justified in deleting the addition of Rs.87,66,641/- being interest receivable on outstanding amount due to the Assessee Company from the Associated Enterprises?"

20. Aforesaid question was decided in favour of the taxpayer by upholding the order rendered by the Tribunal by making following observations :-

"5. On appeal filed by the Revenue, the ITAT upheld the order of CIT (A). While, upholding the order of CIT (A), the ITAT held that interest income is associated only with the lending or borrowing of money and not in case of sale. We express no opinion on the above reasoning of the ITAT and keep that reasoning open for debate in an appropriate case. However, in the facts of the present case, the specific finding of the ITAT is that there is complete uniformity in the act of the assessee in not charging interest from both the Associated Enterprises and Non Associated Enterprises- debtors and the delay in realization of the export proceeds in both the cases is same. In these circumstances, the decision of the Tribunal in deleting the notional interest on outstanding amount of export proceeds realized belatedly cannot be faulted."

21. So, when the taxpayer has not been making any distinction between AE and non-AE in charging any interest on outstanding receivables, the adjustment made by the TPO/DRP/AO on account of arm's length interest is not sustainable. Moreover the interest can be charged only on loaning or borrowing of money and not in case of sale. Particularly when there is no penal clause in the agreement entered into between the taxpayer and its AE/non-AE to charge the interest on delayed receivables. Even otherwise, a transaction cannot be recharacterized merely on ground of delay in payment of receivables.

22. Identical issue has also been examined by coordinate Bench of the Tribunal in Kadimi Tool Manufacturing Co. Pvt. Ltd. vs. DCIT in ITA No.7068/Del/2014 order dated 25.09.2017 and has been decided in favour of the taxpayer by relying upon Kusum Healthcare Pvt. Ltd. vs. ACIT - 170 TTJ 411 and Bechtel India Pvt. Ltd. (supra) wherein SLP filed in the Hon'ble Supreme Court has been dismissed.

23. In view of what has been discussed above, TPO/DRP/AO have erred in making adjustment on account of arm's length interest which is not sustainable in the eyes of law, hence no adjustment on account of interest on receivables can be made. So, Grounds No.2 to 2.9 are determined in favour of the taxpayer. "

16. Respectfully following the decisions cited (supra), we hold that no adjustment is required on account of interest on receivables. We accordingly set aside the order of the A.O./TPO/DRP and direct the A.O. to delete the disallowances so made. The grounds of appeal on this issue are accordingly allowed.

17. In the result, the appeal filed by the assessee is allowed for statistical purposes as indicated above.

The decision was pronounced in the open court on 15.07.2019.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 15th July, 2019

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Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi