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

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA Nos.7722 & 7723/Del/2017
Assessment Years: 2009-10 & 2010-11

AT Kearney Ltd. ï India Branch, 7th Floor, Tower-D, Global Business Park, Mehrauli Gurgaon Raod, Gurgaon, Haryana.	Vs	ADIT, Circle-1(1), International Taxation, New Delhi.
PAN: AADCA0861H		
(Appellant)		(Respondent)

Assessee by	:	Shri Ved Jain, Advocate, Shri Himanshu Agarwal, CA & Ms Surabhi Goyal, CA
Revenue by	:	Shri Mehboob Ali, Sr. DR
Date of Hearing	:	17.02.2020
Date of Pronouncement	:	25.02.2020

ORDER

PER R.K. PANDA, AM:

The above two appeals filed by the assessee are directed against the separate orders dated 22nd September, 2017 of the CIT(A)-38, New Delhi, relating to assessment year 2009-10 and 2010-11, respectively.

2. Since common issues are involved in both these appeals, therefore, these were heard together and are being disposed of by this common order, for the sake of convenience.

3. First we take up ITA No.7723/Del/2017 (A.Y. 2010-11)

4. Grounds of appeal No.1 to 3 raised by the assessee read as under:-

> ñThe following grounds are independent of and without any prejudice to one another:
>
> Availing of lntra group services (adjustment of INR Rs. 2,28,44,668)
>
> 1. On the facts and law, the Hon'ble Commissioner of Income Tax (Appeal)-38 ['Hon'ble CIT(A)'] has erred in upholding the arm's length price of the transaction related to availing of Intra group services amounting to INR 2,28,44,668.
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> 2. On the facts and in law, the Hon'ble CIT (A), erred in adopting an ad-hoc basis to uphold the adjustment to the extent of 50% while accepting the Appellant's contentions that questioning the commercial expediency is not permissible and that the services were availed by the Appellant
>
> 3. On the facts and in law, the Hon'ble CIT (A) erred in concluding that it is not possible to quantify the value of services received, thereby ignoring the methodical allocation basis of the cost of services and benchmarking analysis using Transaction Net Margin Method ('TNMM') already provided by the Appellant which were not disputed by the TPO or the CIT (A) himself.ò

5. Facts of the case, in brief, are that the assessee is a company which provides consultancy services in the manufacturing industry to a diverse, multinational enterprise. It has established a branch office in India in 1997 which is engaged in the business of providing management consultancy services. It filed its return of income on 08.10.2010 declaring a loss of Rs.2,38,78,160/- which was subsequently revised on 29th March, 2011 declaring a loss of Rs.1,56,58,002/-. The assessee has

paid a tax of Rs.42,14,520/- under the provisions of section 115JB on book profit of Rs.2,47,98,586/-. The AO made a reference to the TPO, vide order dated 28th January, 2014 who held that the assessee has not been able to show as to what cost benefit analysis has been done by it with regard to the purported receipt of services from the AE. According to the TPO, no independent party would have made a payment in uncontrolled circumstances. Therefore, by applying CUP method, he held that the armôs length of the transaction of payment of service fee at nil as against Rs.4,56,89,336/- determined by the assessee. In appeal, the ld.CIT(A) directed the TPO to grant 50% of the adjustment claimed by the assessee on account of intra-group services by observing as under:-

> ñ5.3 I have carefully considered the facts of the case, the submissions of the appellant, the TP Order and gone through the various contentions raised by the appellant. The services received by the appellant were in the nature of various management and business support services, including the following:
> HR Services & IT Human Resource Information Systems (HRIS);
> Global Business Policy Council (GBPC);
> IT- KNet services
> Production Services
> Information Systems;
> Other services
>
> The appellant furnished the break-up of costs and allocation methodology of total fee between various categories of such services, evidences for actual receipt and the benefits availed from such services.
>
> It is evident that as the appellant is receiving services from the centralized management support services, it not required to employ full-fledged team for all the support functions in India, hence resulting in reduced cost base. Thus, the commercial expediency of the appellant in availing these services should not be challenged.
>
> Also, given the nature of proprietary and specific services provided to the Appellant (which cannot be provided by any other third party service provider) by associated enterprise, it can said that the said services are neither shareholder services nor duplicative in nature.

> I have considered the arguments of the AR and the order of TPO. In light of various judicial precedents including CIT vs EKL Appliances Ltd., [2012] 345 ITR 241, Dresser-Rand India Pvt. Ltd. v. Additional Commissioner of Income Tax, 2012 (13) ITR (Trib) 422 and Commissioner of Income Tax-I vs. Cushman and Wakefield India Pvt. Ltd. (ITA No. 475/2012), it has been clearly established that it is beyond the powers of the Transfer Pricing Officer to question the commercial wisdom of the Assessee. The TPO's authority is restricted to determining the ALP for international transactions referred to him by the AO. The TPO, after a consideration of the facts, can state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. Further, the Delhi High Court in case of Bausch and Lomb Eyecare Private Limited has held that re-characterization of transaction and questioning commercial expediency is not permissible on the basis of the judgment in EKL Appliances.
>
> In this case, the issue raised by the Learned TPO/AO is whether an independent entity would have paid for such services. Relying on the decision of Hon'ble Delhi High Court in multiple cases such as EKL Appliances and Bausch and Lomb Eyecare India Private Limited and the submissions of appellant, I am of the opinion that there is enough material on record to conclude that some services were availed by the company. However, it is not possible to quantify the value of services availed by appellant in the absence of any independent third party documentation. Therefore, TPO is directed to grant 50% of the adjustment claimed by appellant on account of intra group services availed by the appellant.ò

6. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

7. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We find identical issue had come up before the Tribunal in assessee's own case vide ITA No.6249/Del/2012 for A.Y. 2008-09. The Tribunal, vide order dated 21st May, 2018 at para 16 to 18 of the order has observed as under:-

> ñ11. After considering the written submissions of the ld. DR and the orders of the authorities below, in our considered opinion, in order to examine the ALP

of intra group services received by one of the associated enterprises, following essential information should be available:

1. Whether the AE has received intra group services?

2. What are the economic and commercial benefits derived by the recipient of intra group services

3. In order to indentify the charges relating to services, there should be a mechanism in place which can identity (i) the cost incurred by the AE in providing the intra group services and (ii) the basis of allocation of cost to various AEs.

4. Whether a comparable independent enterprise would have paid for the services in comparable circumstances?

12. Examination of controlled transaction ordinarily should be based on the transaction actually undertaken by the AE as it has been structured by them using the method applied by tax payer in so far these are consistent with the methods described under Chapter II and III. Only in exceptional cases tax Admn. should disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double transaction created where the other tax administration does not share the same views as to how the transaction should be structured. For this proposition, we draw support from the judgment of the Hon'ble jurisdictional High Court of Delhi in the case of EKL appliances 344 ITR 241.

13. In the same judgment, the Hon'ble High Court observed that

> ñThe character of transaction may derive from relationship between the parties rather than be determined by normal commercial conditions as may have been structured by the tax payer to avoid or minimize tax.
>
> The significance of the aforesaid guidelines lies in the fact that they recognise that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions.ò

14. It has been held by various courts that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not

for them to tell the assessee as to what expenditure the assessee can incur. The question whether decision was commercially sound or not is not relevant. The Hon'ble High Court in the judgment cited as EKL Appliances [Supra] has held that the assessee was not required to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in the subsequent years.

15. The Hon'ble High Court of Delhi in the case of Cotton Naturals India [P] Ltd 276 CTR 445 at para 17 of its order has held that ñChapter X and Transfer Pricing rules do not permit the Revenue authorities to step into the shoes of the assessee and decide whether or not a transaction should have been entered. It is for the assessee to take commercial decisions and decide how to conduct and carry on its business.ò

16. It is incorrect to say that the assessee has not provided appropriate/logical allocation of cost to ATK affiliates for management support and cost allocated to ATK India. Following chart summarizes the total group costs:

17. Break up of cost under each head is exhibited separately in the paper book. Each cost is supported by evidences which are placed at pages 701 to 1421 of the paper book.

18. In so far as the allegation relating to the payment for duplicate services is concerned, it appears that lower authorities have confused ATKBO with another group entity ATK India Pvt. Ltd which is a separate entity whose financial/TP study are placed on our record for the year under consideration. Detailed cost allocation sheets showing different personnel involved for each service has been placed on record separately. We find that the revenue authorities have simply rubbished the email evidences brought on record without examining and pointing out defects in the evidences. It is not proper for the lower authorities to disregard such direct evidences.

19. In so far as the payment relating to management services provided by ATK Australia is concerned, we find that the same has been dismissed by lower authorities on flimsy grounds. We find that the allocation in respect of services provided by Shri John Yoshimura Regional head of offices is on the basis of time spent by him in relation to ATKBO. In our considered opinion, this allocation is logical and sound on the facts of the case. There are email evidences wherein it has been mentioned that Shri John Yoshimura was responsible for advising on various performances/review of Indian partners. Moreover, specific dates of physical presence of Shri John Yoshimura in India are exhibited at pages 1417, 1419 and 1420 of the paper book.

20. Considering the cost allocation chart exhibited elsewhere supported by evidences placed as exhibits in the paper book, we do not find any merit in the

transfer pricing adjustments made by DRP/TP/Assessing Officer on this count and the same is directed to be deleted.

8. Since the facts of the impugned assessment year are identical to the facts of the case decided by the Tribunal in the assesseeôs own case, therefore, respectfully following the order of the Tribunal, we direct the A.O./TPO to delete the addition. The grounds raised by the assessee are accordingly allowed.

9. Grounds of appeal No.4 and 5 are as under:-

ñInterest on intercompany credit (adjustment of INR Rs.60,89,881)

4. On facts and in law, the Hon'ble CIT(A) and the Ld. TPO has erred in not appreciating that the interest on outstanding credit was at arm's length and do not warrant determination of a separate ALP under section 92C of the Act as the interest earned by the Appellant on fixed deposits was 5.10% vis-a-vis 5.50% earned from its associated enterprise.

5. On facts and in law, the Hon'ble CIT(A) and Ld. TPO has erred in applying an arbitrary rate of 13.88% on the international transaction of interest earned on inter-company credit by doing the following:

5.1 Applying SBI Base Rate of 11.88% for benchmarking the international transaction of borrowing repayable in foreign currency.

5.2 Applying State Bank of India's ("SBI") Prime Lending Rate ("PLR") of 11.88%, instead of a LIBOR based rate for amounts due in foreign currency.

5.3 On further applying an arbitrary mark-up of 200 Basis Points / 300 basis points on the said rate based on conjectures and surmises.ò

10. Facts of the case, in brief, are that the assessee has received interest on loan advanced to AE named as A.T. Kearney Finance Ltd. It has used CUP method for the interest transactions on loan and in support of its analysis, the assessee in its TP report has submitted as under:-

ñThe average rate of interest earned by ATK BO on fixed deposits placed with Indian Banks for a tenure of 150-180 days is 5.10% per annum. The effective rate of interest earned by ATK BO on the intercompany credit balance with ATKF is 5.50%.

Using the CUP method, since the rate of interest earned by ATK BO in respect of the intercompany credit provided to ATKF is higher than the opportunity cost of such credit lying with ATKF i.e., interest that ATK BO could have earned if same would have been placed with banks as fixed deposit, the above mentioned transaction between ATK BO and ATKF can be said to be at armôs length.ò

11. The TPO rejected the ALP of the assessee and instead required to charge interest @ 14.88% (being SBI PLR + 300 basis points). In appeal, the ld.CIT(A) upheld the action of the TPO, however, he directed that interest be computed @ 13.88% being SBI PLR + 200 basis points by observing as under:-

ñ8.2 I find that the facts in the case of the appellant can be distinguished from the facts of the cases referred by Ld. Counsel for the appellant. Hoñble ITAT Delhi in ITA NO. 2010/Del/2014 Assessment Year: 2009-10, in the case of Ameriprise India Pvt. Ltd. PAN No.: - AAFCA3489B vs. Asstt. Commissioner of Income Tax Circle 1(1), New Delhi lays down the principle of charging interest as International Transaction on delayed payment of receivables from AEs. It has been held that the non-realization of invoice value beyond the stipulated period is a separate international transaction, whose ALP is separately determinable. ñThe International transaction of charging interest on late recovery of trade receivable covers the period which starts with the termination of the period of credit allowed under the agreement, which is subject matter of the International Transaction of rending of servicesé The TP adjustment on account of interest on delayed realization of invoice value... depends on transaction to transaction basis. To put it differently, suppose an invoice is raised on 1st May ; period allowed for realization is two months; and the invoice is actually realized on 31st December; Notwithstanding the fact that interest on such late realization would become chargeable for a period of 6 months (from 1st July to 31st December) but the amount of invoice will not be receivable as at the end of the financial year on 31st March. As such, this receivable would not have an impact on the working capital adjustment in any manner, but would call for addition on account of the late realization of invoice value for a period of six months.ò

8.3 It may further be mentioned that Hon'ble ITAT, Mumbai bench in the case of Tecnimont ICB Ltd. vs. DCIT (2013) 32, taxman.com 357 has also held that transfer pricing adjustment can be made on account of interest for period beyond the agreed credit period.

In light of the TPO's order, if the appellant did not have sufficient surplus funds to lend, it may borrow such funds from banks or others, then cost of borrowings in India would be relevant. Also if the surplus funds were to be invested in existing business or expansion into new businesses, the return also would be linked with domestic interest rates. So, the entire opportunity cost to the appellant, will be with reference to the interest rates prevailing in India.

Hence, I hold that the CUP to be used is the prime lending rate (PLR) of SBI to which 200 basis points is being added to take into account the various factors/ risks as already discussed in the order of TPO, reducing the addition above SBI PLR to 200 basis points from 300 basis points as computed by TPO/ AO.ò

12. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

13. After hearing both the sides, we find identical issue had come up before the Tribunal in assessee's own case in A.Y. 2008-09. We find , the Tribunal, vide ITA No.6249/Del/2012, order dated 21st May, 2018, has decided the issue in favour of the assessee by observing as under:-

ñ21. The next issue relates to the adjustment made on the interest received from 8.46% to 17.26% which was reduced by the DRP to 13.38%.

22. This relates to the interest received by the assessee from ATK Finance Ltd on which the assessee received interest @ 8.46%.

23. The assessee has bench marked receipt of interest using internal CUP by pointing out that the loan received by ATK Group from unrelated party i.e. the bank. This was dismissed by DRP which was of the opinion that the lender has negotiated rate of interest to be charged not on credit rate of ATK Finance alone but conjointly with parent company ATK UK. DRP further observed that the credit rating of ATK Finance cannot be sole guiding factor. DRP was of the view that the interest rate equal to prime lending rate of RBI during the year under consideration should be applied and accordingly direct the TPO.

> 24. We find that the assessee has earned interest on fixed deposits @ 7.56%. In our considered opinion, since the assessee has received interest from its AE in France, applying prime lending rate of RBI is not proper In any case, since the assessee is receiving interest on FD @ 7.56%, interest received from AE @ 8.46% can be considered at ALP. Therefore, no TP adjustment is called for. We direct accordingly.ò

14. Ground of appeal No.6 reads as under:-

> ñ6. That the learned AO has erred, in law and on facts, in proposing to levy interest under section 234A, 234B, 234C and 234D of the Act.ò

15. After hearing both the sides, we are of the opinion that levy of interest u/s 234A, 234B, 234C and 234D of the Act is mandatory and consequential in nature. Accordingly this ground is dismissed.

16. Ground No.7 relating to levy of penalty u/s 271(1)(c) being premature at this juncture is dismissed.

17. In the result, the appeal filed by the assessee is partly allowed.

ITA No.7722/Del/2017 (A.Y. 2009-10)

18. Grounds of appeal No.1 to 3 raised by the assessee read as under:-

> ñAvailing of lntra group services (adjustment of INR Rs. 2,66,25,507)
>
> 1. On the facts and law, the Hon'ble Commissioner of Income Tax (Appeal)-38 ['Hon'ble CIT(A)'] has erred in upholding the arm's length price of the transaction related to availing of Intra group services amounting to INR 2,66,25,507.
>
> 2. On the facts and in law, the Hon'ble CIT (A), erred in adopting an ad-hoc basis to uphold the adjustment to the extent of 50% while accepting the Appellant's contentions that questioning the commercial expediency is not permissible and that the services were availed by the Appellant

3. On the facts and in law, the Hon'ble CIT (A) erred in concluding that it is not possible to quantify the value of services received, thereby ignoring the methodical allocation basis of the cost of services and benchmarking analysis using Transaction Net Margin Method ('TNMM') already provided by the Appellant which were not disputed by the TPO or the CIT (A) himself.ò

19. After hearing both the sides, we find the above grounds are identical to Grounds of appeal No.1 to 3 for A.Y. 2010-11, vide ITA No.7723/Del/2017. We have already decided the issue and the grounds raised by the assessee have been allowed. Following the similar reasonings, the grounds raised by the assessee are allowed.

20. Ground of appeal No.4 reads as under:-

ñProvision of management consultancy services (adjustment of INR Rs. 22,94,854)

4. On the facts and in law, the Hon'ble CIT(A) erred in selecting certain new comparables that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed, thereby contravening the provisions of the Rule 10B(2) of the Income Tax Rules, 1962 ("the Rules") and rejecting certain other comparables which are functionally comparable to the Appellant and in doing so, erred in :

4.1 Accepting Edserv Softsystems Limited even though the company is functionally incomparable to the Appellant. The CIT(A) also ignored the pertinent facts related to financial irregularities found in the said company.

4.2 Accepting Antrix Corporation limited and WAPCOS Limited as comparable companies even though the same are functionally not comparable to the Appellant.

4.3 Disregarding the plea of the Appellant that the transaction of provision of management consultancy services can be considered to be arm's length even by application of internal TNMM as the Appellant has provided similar services to third parties also at lower net margin.

20.1 Facts of the case, in brief, are that the TPO during the TP assessment proceedings, did not concur with the analysis undertaken in the TP documentation in relation to international transaction related to provision of management consultancy services provided to AEs and reimbursement of expenses from AEs.

20.2 The TPO in his order u/s 92CA(3) has undertaken the following approach in respect of these international transactions:-

a) He did not agree with the multiple year data used in the TP documentation in relation to comparable companies and was of the view that the financial information of comparable companies pertaining to FY 2008-09 should only be used.

b) He applied certain filters (in addition to those applied in the TP documentation) to reject/accept certain comparables which are as under:-

- Rejected companies whose sales is less than Rs.5 crores;
- Rejected companies having diminishing revenues for the last three years upto and including F.Y. 2008-09;
- Rejected companies having different accounting year other than April to March; and
- Rejected companies that are functionally different from the assessee.

c) The above approach of the TPO resulted in exclusion of five out of seven companies selected as comparable by the assessee.

d) Thereafter, the TPO selected five additional companies being comparable to the assessee based on the Accept/Reject Matrix.

e) The TPO accordingly determined the ALP of the comparable companies at 24.05% on operating cost and proposed an upward adjustment of Rs.61,08,740/-.

20.3 In appeal, the ld.CIT(A) accepted four comparables of TPO and accepted three comparables of the assessee and determined OP/OC of the comparable companies at 18.20%.

20.4 Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

20.5 The ld. Counsel submitted that the assessee is challenging only the inclusion of the following three comparables taken by the TPO/CIT(A) which are as under:-

(i) WAPCOS Ltd. (Seg.);

(ii) Antrix Corporation Ltd.;

(iii) Edserv Softsystems Ltd.

20.6 So far as Edserv Softsystems Ltd. is concerned, he submitted that the company is an online education and placement company engaged in providing education and education linked placement to students. He submitted that the ld. CIT(A) has misplaced her finding that since the company was in the process of IPO, intangibles were yet to be operational in this year as majority revenue of the company for the year was also from license fee/royalty from intangibles owned by

the company. He submitted that since the assessee does not own any intangible or earn any royalty income and instead pays royalty to its AE for use of AE's intangible and is thus not at all comparable to the company picked up by the TPO/CIT(A). He submitted that the TPO did not take Edserve Softsystems Ltd. as a functionally comparable company in any of the succeeding years and agreed with the assessee in considering the company as functionally non-comparable in all succeeding years including A.Y. 2010-11. Referring to the decision of the Hon'ble Delhi High Court in the case of Avenue Asia Advisors Pvt. Ltd., ITA No.350/2016 and the decision of the Delhi Bench of the Tribunal in the case of Genzyme India Private Ltd. in ITA No.892/Del/2014, he submitted that this company was excluded from the list of comparables.

20.7 So far as WAPCOS Ltd. (Seg.) is concerned, he submitted that it is a 'MINI RATNA' Public Sector Enterprise under the aegis of the Union Ministry of Water Resources and provides services in all facets of water resources, power and infrastructure sectors in India and abroad. This being a Government of India Undertaking and also involved in Government project cannot be held as a comparable company since such projects are conducted on a social motive.

20.8 So far as Antrix Corporation Ltd. is concerned, he submitted that this is also a wholly owned Government of India company under the administrative control of Department of Space. It is the commercial arm of Indian Space Research Organisation (ISRO) largely involved in building satellites. Therefore, the key

services offered by this company being functionally dissimilar to that of the assessee company, it cannot be held as a comparable company. He accordingly submitted that these three comparables be excluded from the list of comparables.

20.9 The ld. DR, on the other hand, strongly supported the order of the AO/TPO/CIT(A).

20.10 We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find the ld. Counsel for the assessee is basically challenging the inclusion of the three companies, namely, WAPCOS Ltd. (Seg.); Antrix Corporation Ltd.; and Edserv Softsystems Ltd. from the list of comparables. So far as Antrix Corporation Ltd. and WAPCOS Ltd. (Seg.) are concerned, both these companies are Government of India Undertakings. While Antrix Corporation Ltd., is under the administrative control of the Department of Space and is the commercial arm of Indian Space Research Organisation and involved in building satellites, WAPCOS Ltd. is a Mini Ratna Public Sector Enterprise under the aegis of Union Ministry of Water Resources and provides services in all facets of water resources, power and infrastructure sectors in India and abroad. The Hon'ble Bombay High Court in the case of *CIT vs. Thyssen Krupp Industries India (P) Ltd.,* has held that Public Sector Undertakings are not driven by profit motive alone, but, such other considerations also weigh such as discharge of social obligations, etc., and hence, they cannot be considered as comparable with the private companies.

Respectfully following the above decision of the Hon'ble Bombay High Court and observing that WAPCO Ltd and Antrix Corporation Ltd. are Government of India Undertakings, we hold that these two companies cannot be held as comparable with the assessee company and are to be rejected. So far as Edserv Softsystems Ltd. is concerned, it is the submission of the ld. Counsel for the assessee that the TPO, in the succeeding years has not considered this company as a functionally comparable company and has agreed with the assessee in considering the company as a functionally non-comparable. We, therefore, deem it proper to restore this issue to the file of the AO/TPO with a direction to verify the analysis done by them in subsequent years and find out as to whether this company is functionally similar or dissimilar to that of the assessee company and decide the issue as per fact and law. The ground of appeal No.4 raised by the assessee is accordingly allowed for statistical purposes.

21. Ground Nos.5 and 6 are as under:-

> ñAlleged interest on outstanding receivables (adjustment of INR Rs.59,50,217)
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> 5. On facts and in law, the Hon'ble CIT(A) has erred in not appreciating that the outstanding receivables are a result/consequence of the Appellant's international transaction with its AE and are not a separate international transaction per se; therefore, do not warrant determination of a separate ALP under section 92C of the Act owing to the following;
>
> 5.1 That no interest was charged on outstanding receivables from third parties in an arm's length scenario in the non-AE segment by the Appellant.
>
> 5.2 That no interest was charged on outstanding payables of the Appellant by the AEs; therefore, no such notional interest is warranted for outstanding receivables of the Appellant.

> 6. On facts and in law, the Hon'ble ClT(A) has erred in applying an arbitrary rate of 14.77% on the alleged international transaction of interest on outstanding receivables by doing the following:
>
> 6.1 Applying SBI Base Rate of 12.77% for benchmarking the compensation on alleged over-dues which were result of an international transaction denominated in foreign currency.
>
> 6.2 Applying State Bank of India's ("SBI") Prime Lending Rate ("PLR") of 12.77%, instead of a LIBOR based rate for amounts due in foreign currency.
>
> 6.3 On further applying an arbitrary mark-up of 200 Basis Points on the said rate based on conjectures and surmises.ò

22. After hearing both the sides, we find the TPO made an adjustment of Rs.73,17,724/- in the TP order alleging that the payment for invoices raised by ATK-BO on its AEs during A.Y. 2009-10 was not received on time. Therefore, the said outstanding receivables were re-characterized as unsecured loan. Applying the interest rate of 15.77% (i.e., SBI PLR + 300 basis points), the TPO proposed an upward adjustment of Rs.73,17,724/- on the receivables.

22.1 In appeal, the ld.CIT(A) upheld the action of the AO/TPO, however, he directed that the interest be computed @ 14.77% being SBI PLR + 300 basis points. The relevant observation of the CIT(A) at para 11.3 and 11.4 of her order at pages 26 and 27 reads as under:-

> ñ11.3 I find that the facts in the case of the appellant can be distinguished from the facts of the cases referred by Ld. Counsel for the appellant. Hon3ble ITAT Delhi in ITA No. 2010/Del/2014 Assessment Year: 2009-10, in the case of Ameriprise India Pvt. Ltd. PAN No.: - AAFCA3489B vs. Asstt. Commissioner of Income Tax Circle 1(1), New Delhi lays down the principle of charging interest as International Transaction on delayed payment of receivables from AEs. It has been held that the non-realization of invoice value beyond the stipulated period is a separate international transaction,

whose ALP is separately determinable. ñThe International transaction of charging interest on late recovery of trade receivable covers the period which starts with the termination of the period of credit allowed under the agreement, which is subject matter of the International Transaction of rending of servicesé é The TP adjustment on account of interest on delayed realization of invoice value... depends on transaction to transaction basis. To put it differently, suppose an Invoice is raised on 1st May ; period allowed for realization is two months; and the invoice is actually realized on 31st December; Notwithstanding the fact that interest on such late realization would become chargeable for a period of 6 months (from 1st July to 31st December) but the amount of invoice will not be receivable as at the end of the financial year on 31st March. As such, this receivable would not have an impact on the working capital adjustment in any manner, but would call for addition on account of the late realization of invoice value for a period of six months.ò

11.4 It may further be mentioned that Hon'ble ITAT, Mumbai bench in the case of Tecnimont ICB Ltd. vs. DCIT (2013) 32, taxman.com 357 has also held that transfer pricing adjustment can be made on account of interest for period beyond the agreed credit period.

In light of the TPO's order, if the appellant did not have sufficient surplus funds to lend, it may borrow such funds from banks or others, then cost of borrowings in India would be relevant. Also if the surplus funds were to be: invested in existing business or expansion into new businesses, the return also would he linked with domestic' interest rates. So, the entire .opportunity cost to the appellant, will be with reference to the interest rates prevailing in India.

Hence, I hold that the CUP to be used is the prime lending rate (PLR) of SBI to which 200 basis points is being added to take into account the various factors/ risks as already discussed in the order of TPO, reducing the addition above SBI PLR to 200 basis points from 300 basis points as computed by TPO/ AO.ò

23. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

24. After hearing both the sides, we find the issue stands covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in the case of PCIT vs. Kusum Healthcare Pvt. Ltd. in ITA No.765/2016 dated 25.04.2017.

The relevant observation of the Hon'ble High Court from para 9 onwards reads as under:-

> ñ9. Mr. Raghvendra Singh, learned counsel appearing for the Revenue submitted that the ITAT overlooked the fact that the expression ñinternational transactionò as defined in Explanation (i)(c) to Section 92B of the Act included ñpayments or deferred payment or receivable or any other debt arising during the course of businessò, and therefore, the outstanding receivables could by themselves constitute an international transaction. He further referred to the OCED Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. Paras 3.48 & 3.49 under Chapter III para A.6.1 of the said Guidelines titled "Different types of comparability adjustmentsò spoke of the need to eliminate differences that may arise from different accounting practices between controlled and uncontrolled transactions. In particular, it was noted under para 3.49 that ña significantly different level of relative working capital between the controlled and uncontrolled parties may result in further investigation of the comparability characteristics of the potential comparable.ò Mr. Singh submitted that the ITAT erred in disagreeing with the TPO, who had characterised the outstanding receivables as an international transaction by itself which required benchmarking.
>
> 10. The Court is unable to agree with the above submissions. The conclusion in the explanation to section 92B of the Act of the expiration receivables does not mean that de hors the context every item of receivables appearing in the accounts of an entity, ITA No.1440/Del/2016 which may have dealings with the foreign AEs would 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 facts 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 enquiry 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 80AE, the arrangement reflects an international transaction intended to benefit the AE in some way.ò

25. Since the facts of the instant case are identical to the facts of the case decided by the Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. (supra), therefore, we set aside the order of the CIT(A) and direct the

AO/TPO to delete the addition on account of interest outstanding receivables.

The grounds raised by the assessee are accordingly allowed.

26. Ground of appeal No.7 relating to levy interest under section 234A, 234B, 234C and 234D of the Act being mandatory and consequential in nature is dismissed.

27. Ground No.8 relating to levy of penalty u/s 271(1)(c) being premature at this juncture is dismissed.

28. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 25.02.2020.

Sd/-	Sd/-
(BHAVNESH SAINI) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMBER

Dated: 25th February, 2020.

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi