

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI**

**BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER
AND
SH. KULDIP SINGH, JUDICIAL MEMBER**

ITA No.1758/Del/2016
Assessment Year: 2011-12

DHR Holding India Pvt. Ltd. 5 th Floor, Aggarwal Corporate Tower-23, Rajendra Place, New Delhi-110008 PAN No.AACCD6672N	Vs.	DCIT Circle – 7 (1) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Ved Jain, Advocate
Respondent by	Sh. Surender Pal, CIT DR

ORDER

PER R.K PANDA, AM:

This appeal filed by the assessee is directed against the order dated 29.01.2016 of the AO passed u/s. 143 (3) r.w.s 144 C of the IT Act 1961 for the A.Y. 2011-12.

2. Facts of the case, in brief, are that the assessee DHR India, a Danaher group company was set up in 2007 and is engaged into business of various medical instruments and other products. It also renders some support services to its AEs. It filed its return of income on 23.11.2011 declaring total income of

Rs.4,58,29,367/-. Since the assessee had entered into certain international transaction with its AE's, the AO made a reference to the TPO u/s. 92 CA (3) of the IT Act 1961 for determination of the ALP of the international transactions entered into by the assessee.

3. The TPO during the TP assessment proceedings observed that the assessee has entered into the following international transactions with its AE's :-

Nature of transaction	Method	Value (Rs.)
Import of medical instruments and consumables for resale	TNMM using operating profit as a PLI	39,365,247
Import of medical instruments capitalized	Operating Revenue	9,412,171
Provision of business support services	TNMM using operating Profit as a PLI operating Cost	227,720,946

4. The TPO noted that the cost of the medical instruments which were used in the business were capitalized in the books of account of the assessee. Its related operating cost i.e.

depreciation has been charged to the P & L account while computing the profitability of the trading segment of DHR India. Subsequently such instruments were installed at the customer's premises and the consumables required by the customer in using these instruments were provided by the assessee. As the above international transaction was closely linked to the assessee's business of trading of medical equipment, the TNMM analysis was used to bench mark the arms length nature of the international transaction of purchase of medical equipment. The TPO disregarded the assessee's bench marking and determined the ALP of purchase of fixed assets as nil. Similarly the TPO also made an adjustment on account of receivables amounting to Rs.45,793/- on the ground that the payments for invoices raised by DHR India on its AE's were not received within the year. Therefore, he re-characterised the outstanding receivables as unsecured loan and held that interest be levied at the rate of 11.69% being SBI base rate + 300 basis points. There is another adjustment suggested by the TPO i.e. provision of business support services amounting to Rs.1,57,44,824/-. However, since the DRP has deleted this addition, the same is not the subject matter of this appeal and, therefore, we are not concerned with the same.

5. So far as outstanding receivable is concerned the DRP directed to use rate of interest at 4.53% i.e. 6 month libor + 400 basis points. So far as the adjustment on account of purchase of medical equipments is concerned the DRP held that the ALP and

the WDV of the asset is limited to the customs duty paid and the cost of transportation of these assets. The DRP held that depreciation is allowable only on the WDV so computed and directed to limit the depreciation. Accordingly the TPO made adjustment of Rs.17,745/- on account of interest on outstanding receivables and allowed depreciation of Rs.6,15,948/- being the customs duty paid and the transportation cost in relation to such capital assets.

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

1. *On facts and in law, the Learned Deputy Commissioner of Income Tax, Transfer Pricing Officer 1 (2) (1) (“Ld. TPO”) and Learned Deputy Commissioner of Income Tax, Circle 7(1), New Delhi / Learned Assessing Officer (“ Ld. AO”) erred in determining, and Hon’ble Dispute Resolution Panel – I, New Delhi (Hon’ble DRP) erred in confirming an addition of Rs.6,33,693 to the income of the Appellant, on account of the difference in the Arm’s Length Price of the international transaction of purchase of medical equipments and alleged international transaction of interest on outstanding receivables.*
- 2 *On facts and in law, the Ld. AO and the Ld. TPO erred in making an adjustment of Rs.6,51,948 to the international transaction of purchase of medical equipments by*
 - 2.1 *Arbitrarily rejecting the Transactional Net Margin Method applied by the Appellant ; and*
 - 2.2 *Arriving at ‘Nil’ value without applying any of the specified methods, thereby disregarded Rule 10 B and Rule 10 C of the Income-Tax Rules, 1962 and also erred in not appreciating that the medical equipments could not have been imported at Nil price.*
3. *On facts and in law, the Ld. AO and Ld. TPO erred in making an adjustment of Rs.17,745 to the alleged international transaction of interest on outstanding receivables by*
 - 3.1 *Not appreciating that the outstanding receivables was not a separate international transaction as per provisions of section 92 B of the Act and erred in treating the receivables as an “unsecured loan”, and*

3.2 Rejecting the Appellant's contention that the issue of outstanding is subsumed in the working capital adjustment granted to the Appellant and no separate adjustment on account of outstanding receivables is called for.

4. That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271 (1) (c) of the Act as per the impugned order consequential to the above disallowances.

5. On the facts and in law, the Ld. AO erred in levying an interest of Rs.1,26,297 under section 234 b of the Act.

7. The ground of appeal no.1 being general in nature is dismissed.

8. So far as the ground of appeal No.2 is concerned i.e. adjustment of Rs.6,15,948/- on account of purchase of medical equipments, the Ld. Counsel for the assessee submitted that once the import of capital goods has been substantiated by way of furnishing the customs documentation (sample invoices along with corresponding bill of entries), the arm's length value of such goods cannot be limited to the value of customs duty and transportation cost only. He submitted that the equipment could not have been imported at NIL price in an independent scenario. He submitted that the TPO did not apply any method to benchmark the said transaction in violation of Rule 10B of the Income Tax Rules, 1962. Further the TPO did not provide any comparable data which would have suggested that the arm's length price for the purchase of capital goods can be Nil. No third party would have sold such goods free of cost. The TPO exceeded the powers provided to him by the Act in violation of section 92CA of the Act, by determining the arm's length price at Nil on the

basis of conjectures and surmises. The Act requires the TPO to determine the arm's length price and not decide allowability of a transaction. Once the trading segment of DHR India is accepted to at be arm's length by the Ld. TPO which already takes into account the depreciation on the imported goods, no further adverse inference is plausible under transfer pricing- The transaction of purchase of fixed asset is closely linked to the Appellant's business of trading of medical equipment, therefore TNMM was selected as the most appropriate method. As the Net Profit Margin earned by DHR India at 16% is much more than the margins earned by other comparable companies which are 4.42%, therefore, no adverse view should have been taken by the TPO/AO.

9. Referring to the following decisions he submitted that the value of ALP determined for the transaction of purchase of capital assets cannot be taken at nil :-

1. BC Management Services Pvt. Ltd. ITA No.6134/Del/2015
2. M/s. Avaya India Pvt. Ltd. Vs. ACIT ITA No. vs. ACIT ITA No. 1904/Del/2015
3. Ciena India Pvt. Ltd. (ITA No. 1453 /Del/2014)
4. Kellogg India Private Limited Vs. Dy. Commissioner of Income Tax ITA No. 2888/Mum.2014 (A.Y. 2009-10)
5. M/s. Benetton India Private Ltd. ITA no. 4229/Del/2014)

6. ACIT Vs. Netafirm Irrigation India Private Limited ITA No. 3668/Mum/2008 (AY 2003-04) ITA No. 4837/Mum./2009 A. Y. 2004-05) & ITA No. 1874/Mum/2011 (A. Y. 2005-06)
7. Bucher Hydraulics P. Ltd. Vs. ACIT, Circle – 5 (1) ITA No.177/Del/2016 (A.Y. 2011-12)

10. So far as interest on outstanding receivables is concerned he submitted that the DRP in the Appellant's own case in A.Y. 2009-10 deleted the adjustment of interest on outstanding receivables stating that the issue of interest on receivables stood subsumed in the working capital adjustment provided. Accordingly, it was held that no separate adjustment is called for. He submitted that in the present year also, working capital adjustment has been provided by the Hon'ble DRP for the services segment which already takes into account the impact of outstanding receivables. Further the TPO failed to appreciate that during AY 2011-12, there were more 'outstanding payables' than 'outstanding receivables'. Furthermore, the average payment period to AEs is 176 days, whereas the average collection period from AEs is only 19.55 days. Thus no adverse inference is warranted on this account. He submitted that no interest has been charged from third parties- DHR India does not charge any interest from third parties on delay in payment.

11. Referring to the following decisions he submitted that interest is subsumed in working capital :-

1. Hon'ble Delhi High Court in the case of Kusum Healthcare Private Limited (ITA No.765/2016)
2. Concentrix Daksh Services India Private Limited (In ITA No. 4453/Del/2019)
3. M/s. Barco Electronic Systems (P.) Ltd. (ITA No. 1530/Del/2016)
4. M/s. Target Sourcing Services India Private Limited Vs. ACIT (ITA No.4132/Del/2017)

12. Referring to the decision of AVL India Private Limited in ITA No.4529/Del/2014 he submitted that the Tribunal in the said decision has held that the international transactions of trade receivables and trade payables with all the three AEs should be aggregated and processed as a single transaction of interest on receivables / payables.

13. He also relied on the decision of Mumbai Bench of the Tribunal in the case of CIT Vs. Indo American Jewellery Ltd. and the decision of Mumbai Bench of the Tribunal in the case of Lintas India Pvt. Ltd. Vs. ACIT 3 (2) Mumbai vide ITA No. 2024/M/2007.

14. The Ld. DR on the other hand heavily relied on the order of the DRP/AO/TPO.

15. We have considered the rival arguments made by both the sides, perused the orders of the AO / TPO / DRP and the paper book on behalf of the assessee. We have also considered the various decisions cited before us. We find the TPO in the instant case while rejecting the contention of the assessee that purchase of fixed assets should be accepted at arm's length noted that despite ample opportunities provided to the tax payer, the tax payer merely provided copy of sample invoices corresponding bills of entry but failed to provide mark up, if any, on the cost of the fixed assets in the hands of the AE's. No contemporaneous documentary evidence was submitted by the tax payer for deducing the AE book value/ mark up charged. The primary onus was on the part of the tax payer to establish the cost of goods in the hands of the AE which exported it to the tax payer. Further the tax payer also failed to provide any supporting document / evidence as provided as per rule 10 D of the IT Rules.

16. We find the DRP while holding the ALP and WDV for calculating depreciation as limited to the customs duty paid and the cost of transportation of these assets has observed as under :-

“4. The assessee has stated that these fixed assets are new and have been purchased by the AE and sold to the assessee. The assessee could have easily filed a copy of purchase bills of these assets relating to purchase by the AE, and if the AE had sold these assets to the assessee at the same price at which they were purchased by the AE,

then the transaction could have been shown to be at arm's length. The assessee has however, chosen not to produce this basic evidence. A copy of the valuer's report has also not been filed.

5. The TPO's decision to hold the ALP to be nil and make an adjustment of the entire purchase cost is not sustainable, as the assessee has not claimed the purchase cost as revenue expenditure, and has claimed only the depreciation treating this as capital expenditure. In view of the facts discussed above, the ALP and the WDV for calculating depreciation, is limited to the customs duties paid and the cost of transportation of these assets. Depreciation is allowable only on the WDV so computed. The AO is directed to limit the depreciation allowed to the depreciation allowable on the WDV so computed. The ground is accordingly partly allowed.

17. It is the submission of the Ld. Counsel for the assessee that the TPO did not provide any comparable data and did not apply any method to bench mark the said transaction. It is also his submission that as per provision section 92 CA of the IT Act the TPO is required to determine the arms length price and not decided the allowability of transaction. Since the assessee in the instant case has not filed the purchase bills of these assets in the hands of its AE and as to whether the AE has sold these assets to the assessee at the same price at which they were purchased by

the AE or with any mark up value, therefore, we are of the considered opinion that the contention of the assessee that the purchase of medical equipments are at ALP cannot be accepted. However, considering the totality of the facts of the case and in the interest of justice we deem it proper to restore the issue to the file of the AO / TPO with a direction to give one more opportunity to the assessee to substantiate its case by filing some basic evidence regarding purchase cost in the hands of the AE or copy of the valuer's report etc regarding purchase of the assets from the AE's. Needless to say the AO/ TPO shall give due opportunity of being heard to the assessee and decide the issue as per fact and law. We hold and direct accordingly. The first issue raised by the assessee in the grounds of appeal is accordingly allowed for statistical purpose.

18. So far as the second issue is concerned i.e. interest on outstanding receivables we find the DRP in assessee's own case in assessment year 2009-10 has deleted the adjustment of interest on outstanding receivables by holding that the interest on receivables stood subsumed in the working capital adjustment provided and no separate adjustment is called for. We find the Hon'ble Delhi High Court in the case of DCIT Vs. Kusum Healthcare Private Limited vide ITA No.765/2016 order dated 25.04.2017 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 re-characterised the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliances Ltd. (2012) 345ITR 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.”

19. We find in the impugned assessment year also working capital adjustment has been provided by the DRP for the services segment which already takes into account the impact of the outstanding receivables. Further in the impugned assessment year the outstandings payable are more than the outstandings receivable and average payment period to its AE is 176 days whereas the average collection period from its AE is only 19.55 days which is evident from page 331 of the paper book. Therefore, in our opinion, no adverse inference is warranted on account of receivables from the AE. We further find no interest has been charged from third parties by the assessee on account of delay in payment. Under these circumstances and in the light of the decision of Hon'ble Delhi High Court in the case of Kusum Health Care (P) Ltd. (supra) we are of the considered opinion that

no adjustment on account of interest on receivables is called for. The AO is directed to delete the addition. We hold and direct accordingly. The second issue raised by the assessee in the grounds of appeal is accordingly allowed.

20. The ground of appeal No.4 by the assessee relates to levy of interest u/s. 271 (1) (c) of the IT Act which, in our opinion, is premature at this juncture. Accordingly the same is dismissed.

21. The ground of appeal No.5 of appeal relates to levy of interest u/s. 234 B of the IT Act which is mandatory and consequential in nature and, therefore, the same is dismissed.

22. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 22.06.2020.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:- 22.06.2020

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	22.06.2020
Date on which the final order is uploaded on the website of ITAT	22.06.2020
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	