

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER**

**ITA No.366/Del./2022
(ASSESSMENT YEAR : 2017-18)**

Alcatel Lucent India Limited, vs. ACIT, Central Circle 15,
202-206, Tolstoy House, Delhi.
15, Tolstoy Marg,
Delhi – 110 001.

(PAN : AAACP6300M)

**SA No.69/Del/2022
(in ITA No.366/Del./2022)
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15, Tolstoy Marg,
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(PAN : AAACP6300M)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ankul Goyal, Advocate
REVENUE BY : Shri Rajesh Kumar, CIT DR

Date of Hearing : 08.12.2022
Date of Order : 19.01.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal by the assessee is directed against the order of the
Assessing Officer dated 25.01.2022 passed under section 143(3) r.w.s.

144C of the Income-tax Act, 1961 (for short 'the Act') pursuant to the directions of the Dispute Resolution Panel (DRP).

2. Grounds of appeal taken by the assessee read as under :-

“1. That on the facts and circumstances of the case and in law, the Ld. AO, has erred in determining the taxable income of the Appellant for the subject assessment year at INR 145,50,52,7601- as against the returned income of INR 133,26,80,602/-.

1.1 That on the facts and circumstances of the case and in law, the Ld. AO has erred in making additions based on mere conjunctures and surmises, ignoring the factual matrix of the Appellant as well as the nature of the transactions undertaken by the Appellant.

1.2 That the Ld. AO failed to appreciate the submissions made/ contentions raised by the Appellant and further erred in making several observations and inferences in the impugned assessment order which are factually incorrect and legally untenable.

Transfer Pricing Grounds

2. That, in framing the impugned assessment order, the reference made by the Ld. AO, under section 92CA(1) of the Act suffers from jurisdictional error, as the Ld. AO, had not recorded any reasons nor he had any material whatsoever on the basis of which he could even reach a prima- facie opinion, that it was 'necessary or expedient' to refer the matter to the learned Deputy Commissioner of Income Tax & Transfer Pricing - 1 (1)(1), New Delhi ('Ld. TPO') for computation of arm's length price ('ALP').

3. That on facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO / Hon'ble Dispute Resolution Panel ('Hon'ble DRP') has erred, in making an adjustment of INR 12,23,72,160 in relation to notional interest on overdue receivables from AEs.

3.1 That on the facts and circumstances of the case and in law, the Ld. TPO/ Ld. AO/ the Hon'ble DRP have erred by de-linking the inter-company receivables arising from the international transactions and re-characterization of inter-company receivables as a separate international transaction of advancing of money (in the nature of unsecured loan) to AEs.

3.2 That on the facts and circumstances of the case and in law, the Ld. TPO/ Ld. AO/ the Hon'ble DRP have erred in not considering the benchmarking analysis undertaken by the Assessee in accordance with Indian TP regulations, wherein the Assessee had treated the account receivables/ account payables as closely linked to the other international transactions and compared the working capital adjusted margins of comparable companies with the Assessee's margin.

3.3 That on the facts and circumstances of the case and in law, the Ld. TPO/ Ld. AO/ the Hon'ble DRP have erred in disregarding that Indian TP regulations permit aggregation of closely linked transactions for the purpose of benchmarking under TNMM analysis. Rule 10A(d) of the Income Tax Rules, 1962 ("the Rules") define the term transaction for the purpose of 'international transaction' as "Transaction includes a number of closely linked transactions."

3.4 That on the facts and circumstances of the case and in law, the Ld. TPO/ the Ld. AO/ the Hon'ble DRP have erred in not considering the fact that working capital adjustment factors the impact of receivables on the pricing/ profitability of the Appellant vis-a-vis that of comparable companies.

3.5 That on the facts and circumstances of the case and in law, the Ld. TPO/ the Ld. AO/ the Hon'ble DRP have erred in completely disregarding the fact that the AEs do not charge any interest from the Appellant on outstanding payable due to such AEs.

3.6 That on the facts and circumstances of the case and in law, the Ld. TPO/ Ld. AO have erred in using an SBI Prime Lending Rate ("PLR") based interest rate for computing interest on outstanding receivables without considering the fact that the Assessee has raised invoices to its AEs in foreign currency.

3.6.1 That on the facts and circumstances of the case and in law, the Ld. TPO/ Ld. AO have erred in applying the SBI PLR based interest rate for computing interest on receivables in complete disregard to the directions of Hon'ble DRP which directed the Ld. TPO to verify the fact if invoices were being raised in foreign currency and apply 6-month LIBOR + appropriate basis points.

3.7 That on the facts and circumstances of the case and in law, the Ld. TPO/ the Ld. AO/ Hon'ble DRP have erred in arbitrarily adding 300 basis point to the SBI PLR for computing interest on outstanding receivables, without giving any cogent reason

3.8 That on the on the facts and circumstances of the case and in law, the Ld. TPO and Ld. AO have erred by not restricting the amount of adjustment to net outstanding receivables which is also in line with directions issued by the Hon'ble DRP in Assessee's own cases for AY 2010-11 to AY 2012-13.

Corporate Tax Grounds

4. That on the facts and circumstances of the case and in law, the Ld. AO erred in not granting the complete credit of tax deducted at source.

5. That on the facts and circumstances of the case and in law, the Ld. AO has erred in charging interest under section 234A of the Act without appreciating that return of income was filed within the time limit specified under section 139(1) of the Act.

6. That on the facts and circumstances of the case and in law, the Ld. AO has erred in charging interest under section 234B of the Act.

7. That on the facts and circumstances of the case and in law, the Ld. AO has erred in incorrectly computing interest under section 234C of the Act.”

3. At the outset in this case, Id. Counsel of the assessee submitted that assessee wishes to press only the ground relating to transfer pricing adjustment with respect to receivables from the Associated Enterprises (AE).

4. Brief facts of the case are that the assessee company is primarily engaged in distribution and sale of digital switching equipment, cellular exchange equipment etc. It also provides intra group marketing, technical support and contract software development services.

4.1 Adjustment recommended by TPO u/s 92CA of the Income Tax Act, 1961 : During the year under consideration, the assessee company entered into International Transactions 'with Associated Enterprises' within the meaning of Section 92B of the I.T. Act, 1961. The details of said transactions are mentioned in Form 3CEB by the assessee. The case was referred to the TPO as per the provision of Section 92CA(1) of the Act for computation of Arms Length Price in relation to the International Transaction.

4.2 Subsequently, an order u/s 92CA(3) of the Act was passed by the TPO, DC IT, IT&TP-1(1)(1), New Delhi on 29.01.2021 wherein an adjustment of Rs.147,38,75,440/- attributable to difference in Arms Length Price of International Transactions entered by the assessee company with its associated enterprises has been made. The details of TP

Adjustments as per Para No.8 & 9 of the TPO order are reproduced as under:-

S. No.	Nature of international transaction	Adjustment u/s 92CA (Rs.)
1	Software Development Services	106,88,84,280
2	Technical Support Services	28,26,19,000
3	Interest on receivable	12,23,72,160
	Total adjustment	147,38,75,440/-

4.3 In view of the above, an addition of Rs. 147,38,75,440/- was made to the income of the assessee on account of the TP Adjustment in the draft assessment order u/s 143(3) r.w.s. 144C dated 26.03.2021.

5. Aggrieved with the order of AO, assessee company filed writ petition before Hon'ble High Court of Delhi for quashing the assessment order dated 26.03.2021. Assessee argued before the High Court that title of the said assessment order dated 26.03.2021 was 'Draft Assessment Order u/s 143(3) r.w.s. 144C of the Act, 1961" but it was final assessment order. Assessee objected that final assessment order was passed without giving the opportunity to file objections before DRP. Based on the arguments of the assessee and facts brought on record by the Sr. Standing Counsel of the Department, Hon'ble High Court passed order dated 17.04.2021 and held that:-

- "(i) The assessment order dated 26.03.2021 shall be treated as a draft assessment order.

- (ii) The petitioner will have 30 days' time to file its objections with the DRP. The aforementioned timeframe will commence from the date of the receipt of a copy of this order.
- (iii) The notice of demand and the notice for initiation of penalty proceedings shall stand withdrawn."

6. After the order of Hon'ble High Court, Assessee filed objections before Dispute Resolution Panel (DRP) against the draft order dated 26.03.2021. DRP vide its order dated 29.11.2021 allowed part relief to the assessee. The TPO recommended following adjustments to the total income of the assessee based on the directions of DRP :-

S. No.	Nature of international transaction	Adjustment u/s 92CA (Rs.)
1	Software Development Services	Nil
2	Technical Support Services	Nil
3	Interest on receivable	12,23,72,160
	Total adjustment	12,23,72,160

7. Upon assessee's objection, the DRP noted following submissions of the assessee :-

“ It is submitted by the assessee that outstanding receivables are already a part of the main transaction of provision of support services (under service segment). The assessee further submits that in relation to the service segment, the assessee earns approximately 90% of its total revenue from its AEs and keeping in view the strong presence and volume of business with AEs, no third party would be willing to charge interest on amount receivable from such key customers and would rather invest in relationship by allowing better credit terms in expectation of more business and profits. Based on the aforesaid, non-charging of interest by the assessee on outstanding receivable from its AE is said to be prudent from a businessmen's perspective and does not warrant any adjustment.

It is also submitted that the assessee is a debt free company and, therefore, no adjustment towards interest on delayed receivables is warranted. Reliance is placed on Bechtel India Pvt. Ltd. vs. DCIT [I.T.A .No. 1478/Del/2015], Global Logic India Ltd vs DCIT (1104/Del/2015) and Kadimi Tool Manufacturing Co (P) Ltd vs DCIT [2017] 187 taxmann.com 42 (Del-Trib.). It is further submitted that no interest is charged by the assessee from AEs as well as from non-AEs. Further, the impact of working capital policy in terms of credit days/ credit period (i.e. outstanding receivables) is said to have been subsumed in the working capital adjustment analysis. Hence, it is pleaded that separate imputation of interest on the outstanding receivables was not warranted. Reliance in this regard is placed on PCIT- V vs. Kusum Healthcare Pvt. Ltd. [2017] 398 ITR 66 (Delhi)/ [2018] 300 CTR 343 (Delhi). The assessee further contests application of SBI PLR rate +300 basis points.

8. However, the DRP was not convinced. It emphasized upon the amendment by Finance Act, 2012 regarding insertion with retrospective effect from 01.04.2002 and explanation (i)(c) of section 92B. It also distinguished the Hon'ble Delhi High Court decision relied upon and referred to some Tribunal decisions and upheld the transfer pricing adjustment by inter alia observing as under :-

“ Thus, post-amendment, respectfully following the judgment of the Hon'ble Bombay High Court in Patni Computer Systems cited supra and the decisions of ITAT in Bechtel India, Ameriprise India (P) Ltd, Mckinsey Knowledge Centre (P) Ltd and KBACE Technologies (P) Ltd cited supra, the Panel upholds the action of the AO of treating delayed payment on receivables as a separate international transactions which cannot be said to be subsumed or factored in, in the working capital adjustments.”

9. Against this addition, assessee is in appeal before us. We have heard both the parties and perused the records.

10. Ld. Counsel of the assessee submitted that ld. DRP has erred in distinguishing the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. (supra). He submitted that the Tribunal has relied upon the decision in several cases to decide the issue in favour of assessee. He referred to following case laws :-

- (i) Principal Commissioner of Income-tax v. Kusum Healthcare Pvt. Ltd. (2018) 99 taxmann.com 431 (Delhi);
- (ii) ERM India (P.) Ltd. v. National e-assessment Centre, New Delhi – [2021] 132 taxmann.com 220 (Delhi-Trib.);
- (iii) Orange Business Services India Solutions)P.) Ltd. v. Deputy Commissioner of Income-tax – (2022) 141 taxmann.com 167 (Delhi-Trib.);
- (iv) Deputy Commissioner of Income Tax v. IQOR India Services (P.) Ltd. (2022) 140 taxmann.com 629 (Delhi-Trib.)

11. Per contra ld. DR for the Revenue relied upon the order of DRP and further referred to ITAT decision in the case of Bechtel India Ltd. (supra).

12. We find that ITAT in its recent decision in Orange Business Services India Solutions)P.) Ltd. has elaborately noted similar facts and has held as under :-

“10. The Id. DRP held that the assessee's reliance on the Delhi High Court's decision in Kusum Health Care (P) Ltd. (supra) is quite misplaced as in that case an important aspect of the matter was not brought to the notice of their lordships of the High Court that this new explanation to section 92B was specifically inserted to reiterate the fact that the items enumerated in the explanation will ipso facto partake the character of an

international transaction and will be subjected to transfer pricing provisions irrespective of whether they have any bearing on profit/loss of the relevant year or their impact on profit/loss account is determinable under normal computation procedures other than the transfer pricing regulations. The Id. DRP quoted legislative intent which has been elucidated in the Explanatory Memorandum to the Finance Bill 2012.

11. This issue has been adjudicated by the Tribunal examining the decisions in the case of Kusum Healthcare, Mckinsey Knowledge, Ameriprise India (P.) Ltd. The details are as under.

12. The Delhi Tribunal in case of Kusum Healthcare (P) Ltd. v. Asstt. CIT [2015] 62 taxmann.com 79 held that the working capital adjustment takes into account impact of outstanding receivables and no further adjustment required if the margin of the assessee is higher than working capital adjusted margin of comparable.

13. The Hon'ble Delhi Tribunal in case of Ameriprise India (P) Ltd. (supra) considered the decision of coordinate bench in the case of Kusum Healthcare and held that the allowing working capital adjustment in the international transaction of rendering services can have no impact on the determination of ALP of the international transaction of interest on receivables from AEs.

14. The Delhi Tribunal in the case of McKinsey Knowledge Centre (P) Ltd. (supra) followed their finding in the case of Ameriprise India (supra).

15. In the meanwhile, the Hon'ble Delhi High Court, vide order dated 25-4-2017 in the case of Kusum Healthcare (supra), dismissed the appeal of the revenue against the decision of Hon'ble Tribunal and that (i) The inclusion in the Explanation to section 92B of the Act of the expression "receivables" does not mean that de hors the context every item of "receivables" appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterized as an international transaction and (ii) 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-characterized the transaction.

16. In the appeal filed by the assessee in the case of Mckinsey Knowledge, the Hon'ble High Court vide order dated 7-2-2018, while admitting the appeal on the other issue, remitted the issue of interest charged on outstanding receivables to ITAT, following their decision in the case of Kusum Healthcare.

17. However, vide order dated 9-8-2018, the Hon'ble High Court in the case of Mckinsey Knowledge, while deciding the appeal of the assessee on other issue, also referred to the decision of the Hon'ble Delhi Tribunal in case of Ameriprise India (P) Ltd. (supra) on issue of interest charged on outstanding receivable and concluded that the assessee's contention that the TTAT erred in concluding that charging of interest on delayed receipt, of receivables is a separate international transaction which requires to be benchmarked independently, is incorrect."

18. Aggrieved, the taxpayer (Mckinsey Knowledge) filed Review Petition before the Hon'ble High Court against the order dated 9-8-2018 and the Hon'ble High Court, vide order dated 16-4-2019 in Review Pet. No. 360/2018, was pleased to recall/correct their order dated 9-8-2018 holding as under:

"9. As far as the first argument by the review petitioner, i.e., the answer to the question of bringing to tax the interest amounts goes, this Court is of the opinion that the fact that the order of 7 -2-2018 referred to Kusum Health Care had expressly remitted the matter for consideration to the ITAT supports the assessee's submission. All that the court had stated on 7-2-2018 was that the matter required re-examination by the ITAT in the light of the Kusum Health Care (supra). For these reasons, the judgment to the extent it deals with adjustments made by the TPO, and regarding interest on delayed receipt of receivables, is a clear error. The court also furthermore notes the submissions made with respect

to inapplicability to Explanation of Section 92B and its prospective operation. As the order of 7-2-2018 reserved by-contentions, this Court does not propose to disturb the effect of that matter. The matter will be considered by the ITAT on its own merits."

19. In view of the aforesaid sequence of events, it would be noted that the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare is still the binding precedent on the issue of interest on outstanding receivables. Needless to mention that the law laid down by the Hon'ble High Court in the case of Kusum Healthcare was followed by the ITAT in case of Global Logic India Ltd. v. Dy. CIT [2019] 102 taxman1.com 115(Delhi - Trib.), Global Logic India Ltd. v. ACIT [2020] 117 taxmann.com 6401185 ITD 795(Delhi - Trib.) and Global Logic India (P) Ltd. v. Dy. CIT [2022] 134 taxmann.com 35(Delhi - Trib.). Hence, keeping in view, the established position, we hereby deleted the addition made by the Assessing Officer."

13. Since on identical facts it has been found that the Hon'ble jurisdictional High Court decision is still the binding precedent, we respectfully follow the same and set aside the order of authorities below. In the result, the assessee's appeal is allowed.

14. Since, the appeal of the assessee is decided in assessee's favour, the Stay Application No. 69/De1/2022 filed by the assessee is dismissed as infructuous

Order pronounced in the open court on this 19th day of January, 2023.

**Sd/-
(CHANDRA MOHAN GARG)
JUDICIAL MEMBER**

**sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

Dated the 19th day of January, 2023/TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)
- 5.CIT(ITAT), New Delhi.

AR, ITAT
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