

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

Before Sh. N. K. Saini, AM and Smt. Beena Pillai, JM

ITA No. 3443/Del/2016 : Asstt. Year : 2011-12

Contitech India Pvt. Ltd., DSM 249, DLF Tower, Shivaji Marg, Najafgarh Road, Industrial Area, New Delhi-110015	Vs	Asstt. Commissioner of Income Tax, Circle-6(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCR6921P		

**Assessee by : Sh. Ajay Vohra, Sr. Adv., Neeraj Jain, Adv.
& Puneet Chugh, CA**

Revenue by : Sh. N. C. Swain, Sr. DR

Date of Hearing : 04.08.2016	Date of Pronouncement : 17.10.2016
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ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 29.01.2016 of the AO passed u/s 144C r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

2. Following grounds have been raised in this appeal:

“1. That the assessing officer erred on facts and in law in completing assessment under section 144C/143(3) of the Income-tax Act, 1961 ('the Act') at an income of Rs. 9,96,58,477 as against the income of Rs. 7,10,81,725 returned by the appellant.

2. That the assessing officer erred on facts and in law in making an adjustment of Rs. 2,53,87,180 to the arm's length price of the 'international transactions' of payment of corporate expense (intra group charges) on the basis of the order passed under section 92CA(3) of the Act by the TPO.

2.1 That the assessing officer/ TPO erred on facts and in law in holding the arms length price of international transactions of payment of corporate charges as NIL as against Rs.2,53,87,180 incurred by the appellant, alleging that (i) no services were received by the appellant (ii) cost are charged on allocation basis and therefore, some of the group cost may be loaded in appellant share of corporate charges (iii) the services received are incidental being in the nature of long association.

2.2 That the assessing officer/TPO erred on facts and in law in not appreciating that the payment of corporate charges was appropriately benchmarked applying TNMM as most appropriate method and that no adverse inference could be drawn on this account.

2.3 That the assessing officer/TPO erred on facts and in law in computing adjustment on account of international transaction of payment of corporate charges without reasonably applying any prescribed methods, thereby, violating the basic principles of TP regulations.

2.4 That the assessing officer/TPO erred on facts and in law in undertaking cost benefit analysis to determine the arm's length price of payment of corporate charges without appreciating that cost-

benefit analysis is not a prescribed method under Rule 10B of Income Tax Rules, 1963.

2.5 That the assessing officer/TPO erred on facts and in law in applying CUP method for benchmarking the transaction of payment of corporate charges without placing on record any comparable data for comparison.

2.6 That the assessing officer/TPO erred on facts and in law in not appreciating that the expenditure on the payment of corporate charges was wholly and exclusively for the purpose of business of the appellant.

2.7 That the assessing officer/TPO erred on facts and in law in concluding that the appellant has failed to maintain the documents for the purpose of cost analysis.

2.8 That the Dispute Resolution Panel erred on facts and in law in confirming the adjustment made by the TPO with regard to the payment of corporate expense holding that (i) the services rendered by the associated enterprise are in the nature of shareholders activities (ii) the services are duplicative services and no additional benefit or additional saving has resulted to the appellant on payment of corporate charges; (iii) the services received by the appellant are generic.

2.9 That the Dispute Resolution Panel erred on facts and in law in holding that the additional evidences filed by the appellant are generic in nature and are

regular communications between the AE and appellant.

2.10 That the Dispute Resolution Panel erred on facts and in law in directing the assessing officer to alternatively disallow the payment of corporate charges u/s 37(1).

3. That the assessing officer erred on facts and in law in making an adjustment of Rs. 29,14,135 to the arm's length price of the 'international transactions' of payment of fees for technical know-how on the basis of the order passed under section 92CA(3) of the Act by the TPO.

3.1 That the assessing officer/ TPO erred on facts and in law in considering the arm's length price of international transactions of payment of fees for technical know-how at Rs. NIL as against Rs. 29,14,135 incurred by the appellant, holding that (i) payment of fees for technical know-how is in the nature of price reduction for the products sold to AE (ii) the appellant is in fact working as a contract manufacturer for the limited purpose of exports made to AE.

3.2 That the assessing officer/TPO failed to appreciate that the appellant manufactures products on the basis of the technical know-how provided by the AE and the fees for technical services is paid as percentage of sales.

3.3 That the assessing officer/TPO erred on facts and in law in not appreciating that the intangibles provided by the AE helps the appellant to manufacture

new products, upgrade existing products, reduce manpower, reduce raw material cost and increase in productivity.

3.4 That the Dispute Resolution Panel erred on facts and in law in confirming the adjustment made by the TPO with regard to the payment of royalty by relying on its order for AY 2009-10 & AY 2010-11 and holding that the issues are identical.

4. That the assessing officer erred on facts and in law in making an ad-hoc disallowance of Rs 2,75,437 to the returned income on account of advertising and sales promotion expenses incurred by the assessee.

4.1 That the assessing officer erred on facts and in law in making ad-hoc disallowance of 5% of advertising & publicity expenditure incurred by the assessee during the relevant previous year by holding that complete bills/vouchers in support of its claims of advertising & sales promotion expenses was not produced before the assessing officer.

4.2 That the assessing officer erred on the facts and in law in not appreciating that the assessee has furnished all the evidences as asked by the assessing officer during the assessment proceedings in order to substantiate the occurrence/ claims of advertising & sales promotion expense.

4.3 That the Dispute Resolution Panel erred on facts and in law in confirming the adjustment made by the assessing officer by holding that the appellant has failed to adduce evidence in support of claims of expenditure.

5. That the assessing officer erred on facts and in law in levying interest under Section 234B and Section 234C of the Act.

The appellant craves leave to add, alter, supplement, amend, vary, withdraw or otherwise modify the ground mentioned herein above at or before the time of hearing.”

3. Ground No. 1 in this appeal is general in nature so does not require any comments on our part.

4. Vide Ground Nos. 2 to 2.10, the grievance of the assessee relates to the armø length price of the international transactions of Rs.2,53,87,180/- made by the AO on account of corporate expenses.

5. Facts of the case related to this issue in brief are that the assessee filed its return of income on 30.11.2011 declaring total income of Rs.7,10,81,725/-. Later on, the case was selected for scrutiny. Since the assessee had undertaken international transactions with its associated enterprises (AE), the AO made a reference to the TPO, New Delhi u/s 92CA(1) of the Act. During the year under consideration, the assessee in terms of agreement dated 20.10.2006 for availing the technical, marketing and administrative support services had entered into, *inter alia*, international transaction for payment

of corporate charges amounting to Rs. 2,53,87,180/- with its AE. In the transfer pricing document maintained by the assessee, the said transaction for the purpose of benchmarking was aggregated with other international transactions and benchmarked by applying TNMM as the most appropriate method with OP/OC as the Profit Level Indicator (PLI). The assessee submitted before the TPO that since the operating profit margin to operating cost (OP/OC%) of the assessee at 9.20% was higher than the weighted average profit margin of comparable companies at 8.43%, therefore, the international transactions undertaken by it with AE were at arm's length price. However, the TPO held that the assessee has failed to substantiate that services have actually been rendered to it and benefit has actually been derived by it on the basis of documentary evidence. He further observed that the assessee in support of its contention has merely furnished copies of certain mails exchanged between its personnel. The TPO was of the view that none of the e-mails exchanged between the employees established the requirement/specific need of the assessee for their services, the benefit which had accrued to the assessee or that an independent party would have been willing to pay another independent party for the services purported to be received by the taxpayer. The TPO applied

CUP method and concluded that the arm's length price of this transaction for payment of corporate charges was at Nil as against Rs. 2,53,87,180/- paid by the assessee to its AE. Thereafter, the AO passed the draft assessment order by making the addition of aforesaid amount. Against the draft assessment order, the assessee raised the objection before the Id. DRP who upheld the additions made by the TPO. Accordingly, the AO made the impugned addition of Rs. 2,53,87,180/- on account of arm's length price of payment relating to international transaction of corporate expenses (intragroup charges).

6. Now the assessee is in appeal. The Id. Counsel for the assessee at the very outset stated that this issue is covered in assessee's own case for the assessment year 2008-09 in ITA No. 5765/Del/2012 wherein the ITAT remanded the matter back to the file of the TPO for *de-novo* consideration vide para 4.5 at pages no. 9 & 10 of the order dated 29.08.2014. It was also submitted that the assessee could not procure the evidences from its AE earlier which now had been obtained. Therefore, this matter may go back to the file of the TPO/AO as has been done in the earlier year.

7. The ld. DR in his rival submissions although supported the orders of the authorities below but could not controvert the aforesaid contention of the ld. Counsel for the assessee.

8. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is an admitted fact that the assessee could not procure summary of the invoices raised on it by its AE and could not furnish the specific details or complete break-up of how the cost had been allocated, during the proceeding before the TPO/DRP. Therefore, this issue was set aside to the file of the TPO/AO in the appeal relating to the assessment year 2008-09 and the said order has been followed by the ITAT in ITA No. 455/Del/2014 for the assessment year 2009-10. The relevant findings have been given vide para 4.5 of the order dated 29.08.2014 in ITA No. 5765/Del/2012 for the assessment year 2008-09 which read as under:

“4.5. We have heard the rival submissions and perused the material on record. The assessee, in accordance with the terms of service agreement dated 20.10.2006 received various technical, marketing and administrative support service from its AE. The TPO had restricted the payment of service fee to an amount of Rs. 7,20,010/- (5% of the total payment) as against 1,58,01,22/- determined by the assessee. The DRP on its part has made an increase of deduction from 5% allowed by the TPO to 10% of the total expenditure. Broad details of various technical,

marketing and administrative support service were furnished to the TPO / DRP. In terms of application dated 4.7.2014 under Rule 29 of the ITAT Rules, the assessee had sought to place on record the summary of invoices raised on the assessee by its AE during the financial year 2007-08. The detailed break up of invoices on the basis of nature of services and the summary of the man hours spent by the various divisions of the AE in rendering technical, marketing and administrative service to Contitech group of companies. It is a case of the assessee that the above said specific details or complete break up of how the cost has been allocated could not be furnished before the completion of the proceedings before the TPO/DRP, since these details were to be obtained from its AE Germany. We find that the details now produced have an important bearing for resolving the transfer pricing dispute and therefore in the interest substantial justice and equity, we admit the same on record. Since the additional evidence is admitted on record the same needs to verify by the TPO/AO. Hence, the transfer pricing dispute of payment of corporate charges is restored to the TPO for denovo consideration. Needless to state the assessee shall be afforded reasonable opportunity of being heard before the matter is decided. It is ordered accordingly.”

9. Since the facts for the year under consideration are identical to the facts involved in the preceding years. So, respectfully following the earlier order dated 29.08.2014 of the Tribunal for the assessment year 2008-09 in ITA No. 5765/Del/2012, the issue under consideration is set aside to the file of the AO/TPO to be adjudicated afresh in accordance with

law after providing due and reasonable opportunity of being heard to the assessee.

10. Vide Ground Nos. 3 to 3.4, the grievance of the assessee relates to the adjustment amounting to Rs.29,14,135/- on account of payment of royalty.

11. As regards to this issue the ld. Counsel for the assessee at the very outset stated that an identical issue having similar facts was involved in ITA No. 455/Del/2014 for the assessment year 2009-10 in assessee's own case wherein vide order dated 18.02.2016 and the matter was remanded back to the file of the AO/TPO for reconsideration and deciding it in the conformity with law laid down in the recent judgment of the Honorable Delhi High Court in the case of CIT Vs Cushman & Wakefield India Pvt. Ltd. (2014) 367 ITR 730.

12. In his rival submissions the ld. DR could not controvert the aforesaid contention of the ld. Counsel for the assessee.

13. After considering the submissions of both the parties and the material on record, it is noticed that an identical issue having similar facts has already been adjudicated by this bench of the Tribunal in ITA No. 455/Del/2014 for the assessment year 2009-10 in assessee's own case vide order dated

18.02.2016 wherein relevant findings have been given in paras 8 to 11 of the said order which read as under:

“8. We have heard the rival submissions and perused the relevant material on record. It is observed that the TPO has computed ALP of the international transaction of ‘Payment of Royalty’ at Nil by holding that the assessee did not avail any benefit and the services provided by the foreign AEs were unwarranted. In doing so, he rejected the assessee’s adoption of TNMM as the most appropriate method and followed the CUP method. That is how, he computed ALP of this international transaction at Nil. The AO in his order has simply incorporated the conclusion of the TPO in determining the ALP of this international transaction at Nil without carrying out any independent analysis or evaluation as to whether or not such use of technical know-how was required/availed by the assessee in terms of section 37(1) of the Act. The ld. AR fairly admitted that there is no independent discussion in the assessment order about the disallowance of royalty payment, except for reproduction of the relevant parts from the order of the TPO.

9. The Hon'ble Delhi High Court in CIT v. Cushman & Wakefield (India) (P.) Ltd. (2014) 367 ITR 730(Del) has held that the authority of the TPO is limited to conducting transfer pricing analysis for determining the ALP of an international transaction and not to decide if such services exist or benefits did accrue to the assessee. Such later aspects have been held to be falling in the exclusive domain of the AO. In that case, it was observed that the E-mails considered by tribunal from Mr. Braganza and Mr. Choudhary dealt with specific interaction and related to benefits obtained by assessee, providing a sufficient basis to hold that benefit accrued to assessee. Since the details of specific activities for

which cost was incurred by both AEs (for activities of Mr. Braganza and Mr. Choudhary), and attendant benefits to assessee were not considered, the Hon'ble High Court remanded the matter to file of concerned AO for an ALP assessment by TPO, followed by AO's assessment order in accordance with law considering the deductibility or otherwise as per section 37(1) of the Act.

10. When we advert to the facts of the instant case, it turns out that the TPO proposed the transfer pricing adjustment with Nil ALP of the international transaction of 'Payment of royalty' on the ground that no such payment was warranted and further no cost benefit analysis on this count was brought to his notice and as such the payment of royalty was not required. The AO in his final assessment order dated 26.12.2013 has taken the ALP at Nil on the basis of recommendation of the TPO without carrying out any independent investigation in terms of the deductibility or otherwise of such payment in terms of section 37(1) of the Act. As per the ratio decidendi of Cushman & Wakefield India (P.) Ltd. (supra), the TPO was required to simply determine the ALP of this transaction unconcerned with the fact, if any benefit accrued to the assessee and thereafter, it was for the AO to decide the deductibility of this amount u/s 37(1) of the Act.

11. Since the authorities below have acted in contradiction to the ratio laid down in Cushman & Wakefield (supra), we set aside the impugned order on this score and remit the matter to the file of AO/TPO for deciding it in conformity with the law laid down by the Hon'ble jurisdictional High Court in the case of Cushman & Wakefield (India) (P.) Ltd. (supra)."

14. So, respectfully following the aforesaid referred to order for the assessment year 2009-10 in assessee's own case, this

issue is set aside to the file of the AO/TPO to be adjudicated as directed vide order dated 18.02.2016 in assessee's own case in ITA No. 455/Del/2014 for the assessment year 2009-10.

15. Next issue vide Ground Nos. 4 to 4.3 relates to the ad-hoc disallowance of Rs.2,75,437/- made by the AO on account of advertising and sales promotion expenses incurred by the assessee.

16. The facts related to this issue in brief are that the AO during the course of assessment proceedings asked the assessee to produce books of accounts in respect of expenses claimed. According to the AO the assessee could not produce complete bills/vouchers in support of its claim in respect of sales promotion and advertising. He made a disallowance @ 5% on ad-hoc basis to prevent leakages of revenue, if any. Accordingly, disallowance of Rs.2,75,437/- @ 5% of Rs.55,08,731/- was made.

17. Being aggrieved the assessee is in appeal. The Id. Counsel for the assessee submitted that the AO had not brought any evidence on record to substantiate that the sales promotion and advertising expenses was not incurred by the assessee for the business purposes. It was further stated that despite of all

bills/vouchers as asked by the AO being produced before him, the AO without pointing out any specific instance of non-incurrence of said expenditure, had simply disallowed @ 5% of the total expenditure which was not justified. The reliance was placed on the following case laws:

- *Dwarka Prasad Agarwal Vs ITO 52 ITD 239 (Cal)*
- *Mahendra Oil Cake Industries Pvt. Ltd. Vs ACIT 55 TTJ 711*
- *Rattah Mechanical Works Ltd. Vs ITO 87 Taxman 288 (Chd.)*
- *Shriram Pistons and Rings Ltd. Vs IAC 39 TTJ 132(Del.)*
- *CIT Vs Gemi Motors India Ltd. in ITA 130 of 2011*
- *J.J. Enterprises Vs CIT 254 ITR 216 (SC)*
- *Friends Clearing Agency P. Ltd. Vs CIT 332 ITR 269 (Del)*
- *Nodi Exports Vs ACIT 24 SOT 526 (Del)*
- *ACIT Vs Amtek Auto Ltd. 112 TTJ 455 (Del)*
- *Roger Enterprises Pvt. Ltd. Vs ITA 52 TTJ 198 (Del)*
- *Ramji Das Modi Vs DCIT 110 Taxman 107 (JP)*
- *ACIT Vs Bateli Tea Co. Ltd. (2003) SOT 72 (Kol)*
- *Continental Seeds & Chemicals Ltd. Vs ACIT (2003) SOT 393 (Del)*
- *Agarwal Trading Co. Vs ITO 108 TTJ 589 (Del)*
- *Sterling Motors Vs Addl. CIT in ITA No. 3217 to 3219/Mum/2009 (Mum)*
- *Asstt. CIT Vs Amrik Singh in ITA No. 987/2010 (Kol)*
- *Rajni Combustion P. Ltd. Vs DCIT in ITA No. 1779/Ahd./2009 (Ahd.)*

18. In his rival submissions the Id. DR strongly supported the orders of the authorities below and further submitted that the assessee could not produce the complete bills and vouchers in respect of its claim for the expenses incurred for the sales promotion and advertisement. Therefore, the AO to prevent the revenue leakage had no option except to make the impugned disallowance.

19. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the AO made the impugned disallowance without pointing out any specific instances where expenses were not incurred for the business purposes. He made a general remark that the disallowance on ad-hoc basis was required to prevent leakage of revenue but no basis has been given to make the disallowance @ 5%. In the instance case, the DRP confirmed the action of the AO by observing that the onus lies on taxpayer to adduce evidence in support of claims of expenditure. However, no cogent reason has been given that the ad-hoc disallowance @ 5% made by the AO was justified, particularly when nothing is brought on record to substantiate that the expenses incurred by the assessee were not related to its business. Therefore, in the absence of any specific item

pointed out by the AO for non-business purposes out of the expenses incurred during the course of carrying on the business on account of sales promotion and advertising of the products, the ad-hoc disallowance @ 5% was not justified. We, therefore, delete the ad-hoc disallowance amounting to Rs.2,75,437/- made by the AO.

20. As regards to Ground No. 5 relating to charging of interest u/s 234B and 234C of the Act. It was the common contention of both the parties that it is consequential in nature. We order accordingly.

21. In the result, the appeal of the assessee is partly allowed for statistical purposes.

(Order Pronounced in the Court on 17/10/2016)

Sd/-
(Beena Pillai)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 17/10/2016

Subodh

Copy forwarded to:

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

ASSISTANT REGISTRAR