

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

**BEFORE SHRI R.S.SYAL, VICE PRESIDENT  
AND  
SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

I.T.A. No. 442/Del/2016  
(Assessment Year : 2011-12)  
&  
I.T.A. No. 302/Del/2017  
(Assessment Year : 2012-13)

BT (India) Pvt. Ltd., Vs ACIT, Circle 5(1),  
11<sup>th</sup> Floor, New Delhi  
Eros Corporate Tower,  
Opp. International Trade Tower  
Nehru Place,  
New Delhi -110 019  
GIR / PAN :**AABCC4785E**

(Appellant)

(Respondent)

Appellant by : Shri Nageswar Rao, Adv.  
Ms. Sherry Goyal, Adv.

Respondent by : Shri Sanjay I Bara, CIT, DR

Date of hearing: 11.07.2018

Date of Pronouncement: 19.07.2018

**ORDER**

**PER BEENA A. PILLAI, JM:**

Present appeals have been filed by assessee against the final assessment order dated 28/12/15 and order dated 09/12/16, passed by Ld. ACIT, Circle 5 (1), New Delhi under section 144 (3) read with section 144C of the Income-tax Act, 1961 ('the Act') for

Assessment Year 2011-12 and 2012-13 respectively on the following grounds of appeal:

**ITA No. 442/Del/2016**

*Impugned Assessment Order dated 28.12.2015 passed under section 143(3) read with section 144C of the Income-tax Act, 1961 ('the Act') pursuant to directions of Dispute Resolution Panel under section 144C(5) of the Act dated 27.11.2015, is erroneous and not in accordance with provisions of law inter-alia on the following Grounds, which are without prejudice to each other:*

**Transfer Pricing grounds:**

1. *Ld. AO / TPO / DRP have erred in making an addition of Rs. 10,22,69,751 under chapter X of the Act.*
2. *Ld. AO / TPO / DRP have erred by not accepting the economic analysis undertaken by Appellant and in accepting / rejecting comparables by applying incorrect filters and comparability criteria.*

**Transfer Pricing adjustment in respect of 'Provision of telecommunication and related support services'**

3. *Ld. AO / TPO / DRP have erred in facts of the case and in law by making an adjustment of Rs. 6,78,19,915 while determining arm's length price of services provided by the Appellant.*
4. *Ld. AO/ TPO/ DRP have erred in law and in facts and circumstances of the present case by applying inappropriate filters for selection/ rejection of comparables.*
5. *Ld. AO/ TPO/ DRP have erred in law and in facts and circumstances of the present case, by rejecting certain comparables having Turnover less than INR 5 crores.*
6. *Ld. AO/ TPO/ DRP have erred in law and in facts and circumstances of the present case, by rejecting certain comparables identified by the Appellant, for having different financial year.*
7. *Ld. AO/ TPO/ DRP have erred in law and in facts and circumstances of the present case, by rejecting certain comparables identified by the Appellant, on account of*

- showing diminishing revenues trend.*
8. *Ld. AO/ TPO/ DRP have erred in law and in facts and circumstances of the present case, by wrongly selecting/rejecting certain comparables in the final list of comparables.*
  9. *Ld. AO/ TPO/ DRP have erred in law and in facts in considering gain/ loss foreign exchange fluctuations and certain provisions written back as 'non-operating' in nature. Further Ld. AO/TPO/ DRP erred in ignoring DRP directions in the Appellant's own case for an earlier year.*
  10. *Ld. TPO has erred in law and in facts and circumstances of the present case by not considering working capital adjusted margin of Telecommunication Consultants India Limited, and thus not complying with Ld. DRP's directions.*
  11. *Without prejudice to the above, Ld. TPO has erred in computing the average margin of comparable companies while giving effect to Ld. DRP's directions.*
  12. *Without prejudice to the above, Ld. TPO/ DRP erred in computing the transfer pricing adjustment by taking entire turnover of the Appellant/ Assessee and not restricting it to proportion of international transactions of Appellant with its AEs.*
  13. *Ld. AO/ TPO/ DRP have erred in law and in facts and circumstances of the present case by not making suitable adjustments to account for difference in level of risk undertaken by the Appellant vis-a-vis comparables.*
  14. *Ld. AO/ TPO/ DRP have erred in law and in facts and circumstances of the present case in disregarding use of multiple year financial data as used by the Appellant, in its transfer pricing documentation and using single year financial data.*
  15. *Ld. AO/ TPO/ DRP have erred in law and in facts and circumstances of the present case, in not providing the benefit of range of +/- 5% as per proviso to Section 920(2) of the Act.*

*Transfer Pricing adjustment in respect of 'Receivables'*

16. *Ld. AO / TPO / DRP have erred by considering outstanding receivables as a separate international*

*transaction and benchmarking the same separately using comparable uncontrolled price (“CUP”) as the Most Appropriate Method.*

17. *In the facts and circumstances of present case Ld AO / TPO / DRP have erred in failing to appreciate that a separate benchmarking and determination of arm’s length price of receivables is not warranted.*
18. *Ld. AO / TPO / DRP have erred in considering outstanding receivables as a loan and imputing interest on the same, thereby making an adjustment of Rs. 3,44,49,836 to the returned income of the Appellant.*
19. *Without prejudice to the above, Ld. AO / TPO / DRP have erred in failing to appreciate that the Appellant does not charge interest from third parties on its receivables, thus no interest is required to be charged on receivables from AEs also.*
20. *Without prejudice to the above, Ld. AO / TPO / DRP have erred in undertaking an adjustment on gross outstanding receivables, instead of net outstanding receivables.*
21. *Without prejudice to above the rate of interest adopted for this purpose is also not justified.*

Corporate Tax grounds:

22. *the learned AO / DRP have erred by making disallowance amounting to INR 12,93,901, being the 25% of expenditure incurred by the assessee towards ‘sales promotion’ on ad-hoc basis.*
23. *the learned AO / DRP have erred by alleging that sales promotion expenses were not wholly and exclusively for the purpose of business ignoring the details submitted by the Appellant.*
24. *the learned AO / DRP have erred by in making disallowance amounting to INR 1,39,58,376 from expenditure incurred by the assessee towards ‘legal and professional expenses’.*
25. *the learned AO erred in enhancing the amount of disallowance from INR 69,30,512 to INR 1,39,58,376 without providing opportunity to the Appellant to object to such*

*disallowance, which is in violation of mandatory provisions of section 144C of the Act.*

*26. the learned AO / DRP have erred by alleging that legal and professional expenses were not wholly and exclusively for the purpose of business.*

*27. the learned AO has erred in levying interest under section 234B of the Act.*

*28. the learned AO has erred by alleging that the Assessee has furnished inaccurate particulars of income, thereby proposing to initiate penalty proceedings under Section 271(1)(C) of the Act.*

*29. the learned AO has erred in facts of the case and in law in initiating penalty proceedings under Section 271G of the Act, especially without giving any reason or pointing out any failure on account of the Appellant in furnishing the details/ Transfer Pricing documentation.*

*The above grounds are independent and without prejudice to each other. The Appellant craves to leave to add, withdraw, amend or vary the above grounds of appeal before or at the time of hearing.*

### **ITA 302/Del/017**

*“On the facts and circumstances of the case and in law , the learned Assessing Officer (“AO”) has erred in passing the assessment order under section 143(3) read with section 144C of the Income-tax Act, 1961 (“the Act”) and subsequently confirmed by the Hon’ble Dispute Resolution Panel (‘DRP’).*

*Each of the ground is referred to separately, which may kindly be considered independent of each other and without prejudice to each other.*

*That on the facts and circumstances of the case and in law,*

#### **Transfer pricing grounds:**

- 1. The AO / Transfer Pricing Officer (“TPO”) / DRP have erred in making an addition of INR 4,61,16,783 to the total income of the appellant on account of notional interest on outstanding receivables.*
- 2. The learned AO / TPO / DRP have erred undertaken by not*

accepting the economic analysis the appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 (“the Rules”).

3. The learned AO / TPO / DRP have erred in not appreciating that the appellant has undertaken working capital adjustment to account for difference in the working capital intensities of the comparables vis-a-vis the Appellant which inevitably considers the impact of receivables and payables arising from international transactions.
4. The learned AO/TPO/DRP have erred by considering outstanding receivables as a separate international transaction and benchmarking the same using CUP as the Most Appropriate Method.
5. The learned AO/TPO/DRP have erred by re-characterization of outstanding receivables as a loan extended by the appellant to its associated enterprise and imputing interest on the same.
6. The CUP analysis undertaken by the TPO and upheld by DRP is flawed and does not represent an uncontrolled transaction.
7. Without prejudice to the above, the learned AO/ TPO/ DRP have failed to appreciate that the Appellant does not charge any interest from unrelated parties and therefore an application of the arm’s length standard requires that no interest should be imputed in - respect of receivables outstanding from the AEs.
8. Without prejudice to above, the rate of interest considered by the learned AO/TPO/DRP for the purpose of computation of interest is also incorrect.

Corporate Tax grounds:

9. The learned AO/DRP have erred on facts and in law in disallowing prior period expenses amounting to INR 64,46,782.
10. The learned AO has erred in not allowing foreign tax credit amounting to INR 335,053.
11. The learned AO has erred in levying interest under sections 234B and 234D of the Act.
12. The AO has erred in alleging that the Appellant concealed the income/filed inaccurate particulars of income, thereby proposing to initiate penalty proceedings under Section 271(1) (C) of the Act.

*The above grounds are independent and without prejudice to each other. The Appellant craves to leave to add, withdraw, amend or vary the above grounds of appeal before or at the time of hearing.”*

## **2. ITA No. 442/Del/2016**

Brief facts of case are as under:

Assessee filed its return of income on 6/02/2013, declaring total income at Rs.57,13,58,784/-. The case was selected for scrutiny and notice under section 143 (2) of the Act was issued. Thereafter notice under section 142 (1) of the Act, along with questionnaire was issued to assessee, in response to which, Representatives of assessee appeared before Ld.AO and filed requisite details/information.

Ld.AO observed that assessee is a Subsidiary of BT Holdco BV Netherlands and was incorporated in India on 26/12/2000 under Companies Act,1956.

Ld.AO observed that assessee had entered into international transaction the value of which was more than Rs.5 crores. Accordingly a reference was made to Ld.TPO for computing the arm's length price of the international transaction.

Upon receipt of the reference under section 92CA (1) of the Act Ld.TPO called for various details for determination of arm's length price of international transaction undertaken by assessee for the year under consideration.

Ld.TPO observed that assessee is engaged in the business of providing telecommunication and related support services to its Associated Enterprises (AE). It also provides similar services to

third-party clients. For the year under consideration assessee reported the following international transactions:

Nature	Amount (Rs.)
Provision of telecommunication and related support services	1,214,999,636
Availing of services	138,083,923
Purchase of fixed assets	34,951,630

The method adopted by assessee was TNMM using OP/OC as PLI. Assessee computed its margin at 15.73%, *vis-a-vis* 12 comparables selected by assessee, whose margin was computed at 1.98%. Dissatisfied with the comparables selected by assessee, Ld.TPO rejected 3 companies and added two companies. Final comparable list determined by Ld.TPO was a set of 4 comparables whose margins were computed at 1.68%. Ld.TPO rejected working capital. The margin thereafter, edited by assessee by refusing certain items considered as non-operating income by assessee came to 6.32%. The adjustment computed by assessee was at Rs.1,63,641,409/-.

Ld.AO also computed interest on receivables by imputing interest @ 11.69% for the delay in receipt of payments at Rs.3,44,49,836/-. Thus the total adjustment proposed by Ld.TPO was Rs.19,80,91,245/-.

**3.** Aggrieved by the draft assessment order, assessee raised objection before DRP.

**3.1.** Before DRP assessee pointed out certain computational errors and upon verification of the details, DRP directed;

- Ld.TPO to verify and consider these details for margin computation.

- Ld.TPO was directed to keep the view of safe harbour rules wherein, items of operating revenue and operating expenses have been defined.
- Ld.TPO was directed to exclude 2 comparables being Essel Shyam Communications Ltd., Indus Towers Ltd.
- Ld.TPO was directed to grant working capital adjustment to improve comparability. Assessee was also directed to provide Ld.TPO with reliable and accurate data in respect of each segment so as to facilitate computation of working capital adjustment.

**3.2.** Ld.TPO gave effect to directions of DRP vide order dated 23/12/15 and final assessment order was passed by making addition of Rs.68,88,80,812/-in the hands of assessee.

**4.** Aggrieved by final assessment order passed, assessee is in appeal before us now.

**5. Ground No. 1& 2** are general in nature and therefore do not require any adjudication.

**6. Ground No. 3-15**

Ld.Counsel submitted that grounds raised for transfer pricing adjustment contains 4 issues as under:

- inappropriate selection/rejection of comparables;
- Working capital adjustment has been provided by Ld. TPO in Sasken Network Engineering Ltd and not in Telecommunication Consultants India Pvt.Ltd;
- non-granting of certain provisions as operating expenses even after directions by DRP;
- adjustment on behalf of interest on receivables.

Ld.Counsel submitted that **Ground No. 4-8, Ground No. 11-15** relates to comparables. He submitted that in the event grounds in respect of working capital adjustment, inclusion of certain provision as operating expenses and interest on receivables are considered, then comparables need not be looked into.

Ld.Counsel submitted that **Ground No. 9** is in respect of computational errors pointed in determination of ALP. He submitted that Ld.TPO considered OP/OE as appropriate PLI. It was submitted that Ld.TPO considered incomes and expenses related to operations for relevant financial year was only considered for computation of operating margins of comparables. It was submitted that foreign exchange gain/loss has been taken as non-operating income/loss. Ld.Counsel referred to page 13 of the order of DRP, wherein assessee submitted that:

- remission of liability against amount payable for certain fixed assets were to be treated as non-operating as it pertains to nontrade transaction of the assessee
- and
- amount of lease rent equalisation written back;
  - provision of PF shortfall written back/ other provisions written back, provision of doubtful loans and advances written back
  - other write-offs/written back on account of reconciliation of profit/loss items;

to be treated as operating items as it pertains to regular trade and business transaction of assessee.

DRP passed directions in respect of the above as under:

*“Attention is invited to the detailed discussion at Para 6.7 page 37- 43 of TPO’s order. While most of the items supra are covered in the discussion, TPO is directed to examine the objections and recompute the operating margins correctly taking into account the factual inaccuracies pointed out by the taxpayer. After excluding/considering the companies as directed the TPO is directed to rework the OP/OC margin of remaining comparables by removing the computational errors, if any.*

*Before DRP the taxpayer has filed additional evidences supporting breakup of provisions made during the year and provisions written back during the year vide submissions dated 19/08/15 under Rule 4 (3) (b) of the Income Tax (Dispute Resolution Panel) Rule 2009. The TPO is directed to verify and consider these details for margin computation while doing so, in order to achieve certainty in respect of the variation caused in the profit margin on account of items of revenue and expenditure being of operating and non-operating nature, the TPO is further directed to keep in view the safe harbour rules notified by CBDT vide notification dated 18/09/13 wherein the items of operating revenue and operating expenses have been defined vide rule 10 TA (J) and 10 TA (K).”*

**7.** Assessee placed reliance upon various decisions of this Tribunal, wherein working capital adjustments has been allowed to cover interest costs recovered/recoverable from the customers. It has been submitted that DRP directed Ld.TPO to grant adjustment to improve comparability, and directed assessee to provide with reliable information in respect of each segment. Before us Ld.Counsel placed reliance upon DRP order for

Assessment Year 2010-11, wherein these write-offs have been treated as operating income. It has also been submitted that assessee had filed a Rectification Application dated 25/02/16 before Ld. TPO/AO which he submitted is pending till date.

**7.1.** Ld. CIT DR submitted that issue may be set aside to Ld. AO/TPO for verification and considering margin for computation.

**7.2.** We have perused submissions advanced by both sides in the light of records placed before us.

It is observed that in rectification application assessee has submitted computation of working capital adjustment and margins to Ld.TPO. It has been submitted that provision written back was accepted to be operating margin of assessee in AY 2009-10 by Ld.TPO himself. It is also submitted that expenses for which provisions were originally made, were considered to be operating in nature and has been allowed in prior assessment year. In rectification application, assessee has submitted that these provisions no longer are required by assessee for year under consideration and has to be reversed because of which these provisions are to be treated as operating items for computation of working capital adjustments.

**7.3.** We find considerable force in submissions of Ld.Counsel, as mistake has crept in which is apparent from record. Ld.TPO even after directions by DRP has not granted working capital adjustment by not considering the written back amount as operating items. In the application for rectification filed by assessee, assessee has submitted all relevant information/details regarding the breakup of the provision written back.

We therefore direct Ld.TPO to recompute working capital adjustment by considering these items as operating items after due verification. It is observed that DRP has directed to compute working capital adjustment by using safe harbour rules. It is very much evident from observations of order passed by DRP that CBDT had notified these rules vide notification dated 18/09/13. However *Hon'ble Delhi Tribunal in case of Rolls-Royce India Pvt. Ltd. vs. DCIT reported in [2016] 69 taxmann.com 209*, has held it to be applicable from 18/09/2013.

**7.4.** With the above direction we remit this issue back to Ld. TPO/AO for recomputing the working capital adjustment by considering provisions written back as operating items without applying Safe Harbour Rules.

**7.5.** Accordingly this ground raised by the assessee stands allowed for statistical purposes.

**8. Ground No. 10**

The next adjustment challenged by Ld.Counsel is in respect of denial of working capital adjustment in case of Telecommunication Consultants India Ltd. It has been submitted that Ld.TPO has erred in considering unadjusted margins for Telecommunication Consultants India Ltd. He placed reliance upon a computation of working capital adjusted margins which is annexed to Rectification Application dated 25/02/16. It has been submitted that this issue was also subject matter of Rectification Application is pending before Ld.AO/TPO for consideration.

**8.1.** Ld. CIT DR do not have any objection in setting aside this issue back to Ld. AO/TPO for reconsideration on the basis of details furnished by assessee, subject to verification.

**8.2.** We have perused the submissions advanced by both the sides in the light of the records placed before us. As we have already set aside the issue regarding the computation of working capital adjustment raised by assessee in the Rectification Application dated 25/02/2016 to Ld.AO/TPO, this issue is also set aside to Ld. AO/TPO.

**9. Ground No.16-21** are in respect of adjustment in respect of receivables.

From TP study, it is observed that payments to assessee are not contingent upon payment received by AEs from their respective customers. Further Ld.Counsel submitted that working capital adjustment undertaken by assessee includes the adjustment regarding the receivables and thus receivables arising out of such transaction have already been accounted for. It has been submitted that working capital subsumes sundry creditors and therefore separate addition is not called for.

Ld.TPO computed interest on outstanding receivables at the rate equal to 11.69 % LIBOR (SBI base rate) +300 basis points. It has been argued by Ld. Counsel that authorities below disregarded business/commercial arrangement between the assessee and its AE's, by holding outstanding receivables to be an independent international transaction.

**9.1.** At the outset Ld.Counsel submitted that this issue stands squarely covered by *Delhi Tribunal* in assessee's own case in ITA No. 566/Del/2015 for immediately preceding Assessment Year

being 2010-11. *Delhi Tribunal* in assessee's own case for assessment year 2010-11 (supra) decided this issue as under:

"8. We have heard both the parties and perused the material available on record. ....

*As relates to the issue of receivables, the same is also covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in case of Kusum healthcare."*

It has been mentioned by Ld.Counsel that there is no functional difference in present year under consideration *vis-a-vis* immediately preceding Assessment Year.

Ld. Counsel submitted that *Delhi Tribunal* in *Kusum Healthcare Pvt.Ltd vs. ACIT* reported in (2015) 62 *Taxmann.com* 79, deleted addition by considering the above principle, and subsequently *Hon'ble Delhi High Court* in *Pr. CIT vs. Kusum Health Care Pvt. Ltd. (2017) 398 ITR 66 (Del)*, held that no interest could have been charged as it cannot be considered as international transaction.

**9.2.** On the contrary Ld.CIT DR submitted that interest on receivables is an international transaction and Ld.TPO rightly determined its ALP. In support of his contentions, he read out relevant parts of DRP's direction, in which Panel relying upon decision of *Delhi Tribunal* order in *Ameriprise India Pvt. Ltd. vs. ACIT (2015- TII-347-ITAT-DEL-TP)* held that interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that Finance Act, 2012 has inserted *Explanation* to Section 92B, with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this *Explanation* provides that:

- (i) *the expression "international transaction" shall include—  
..... (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;....'* .

Ld.CIT DR submitted that expression '*debt arising during the course of business*' refers to trading debt arising from sale of goods or services rendered in course of carrying on business. Once any debt arising during course of business is an international transaction, he submitted that any delay in realization of same needs to be considered within transfer pricing adjustment, on account of interest income short charged or uncharged. It was argued that insertion of *Explanation* with retrospective effect covers Assessment Year under consideration and hence under/non-payment of interest by AEs on debt arising during course of business becomes international transactions, calling for computing its ALP. He referred to decision of *Delhi Tribunal* in *Ameriprise (supra)*, in which this issue has been discussed at length and eventually interest on trade receivables has been held to be an international transaction. Referring to the discussion in the said order, it was stated that the Delhi Bench in this case has also noted a decision of the *Hon'ble Bombay High Court* in the case of *CIT vs. Patni Computer Systems Ltd., (2013) 215 Taxmann 108 (Bom.)*, which dealt with question of law:

- (c) *'Whether on the facts and circumstances of the case and in law, the Tribunal did not err in holding that the loss suffered by*

*the assessee by allowing excess period of credit to the associated enterprises without charging an interest during such credit period would not amount to international transaction whereas section 92B(1) of the Income-tax Act, 1961 refers to any other transaction having a bearing on the profits, income, losses or assets of such enterprises?’*

**9.3.** He pointed out that while answering the above question, *Hon’ble Bombay High Court* noticed that amendment to section 92B has been carried out by Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside the view taken by the Tribunal, the *Hon’ble Bombay High Court* restored the issue to the file of Tribunal for fresh decision in the light of legislative amendment. It was thus argued that non/under-charging of interest on excess period of credit allowed to AEs for realization of invoices, amounts to an international transaction and ALP of such international transaction has been rightly determined by Ld.TPO. In so far as the charging of the rate of interest is concerned, he relied on the decision of the *Hon’ble Delhi High Court* in *CIT vs. Cotton Naturals (I) Pvt. Ltd (2015) 276 CTR 445 (Del)* holding that currency in which such amount is to be re-paid, determines rate of interest. He, therefore, concluded by summing up that interest on outstanding trade receivables is an international transaction and its ALP has been correctly determined.

**9.4.** We have perused the submissions advanced by both the sides in the light of the records placed before us.

**9.5.** On perusal of service agreement between assessee and AE placed at page 337-353 of paper book it is observed that there is

no specific period mentioned for the payments to be received from its AE. Ld.TPO, therefore estimated a period of 30 days as allowable for payment receivables and any delay beyond 30 days has been bench marked as international transaction by imputing interest at the rate of 11.69% LIBOR +300 basis points.

Delhi Tribunal in case of *Orange Business Services India Solutions Pvt. Ltd. vs. DCIT* in ITA No. 6570/Del/2016 vide its order dated 15.2.2018 has observed that:

*“There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which would have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee would have to be studied. It went on to hold that, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that vis-à-vis the receivables for the supplies made to an AE, the arrangement reflected an international transaction intended to benefit the AE in some way. Similar matter once again came up for consideration before the Hon’ble Delhi High Court in Avenue Asia Advisors Pvt. Ltd. vs. DCIT (2017) 398 ITR 120 (Del). Following the earlier decision in Kusum Healthcare (supra), it was observed that there are several factors which need to be considered before holding that every receivable is an international transaction and it requires an assessment on the working capital of the assessee. Applying the decision in Kusum Health Care (supra), the Hon’ble High Court directed the TPO to study the impact of the receivables appearing in the accounts of the assessee; looking into the various factors as to the reasons why*

*the same are shown as receivables and also as to whether the said transactions can be characterized as international transactions.”*

**9.6.** In view of the above, we deem it appropriate to set aside the impugned order on this issue and remit the matter to the file of the Assessing Officer/TPO for deciding it in conformity with the above referred judgment. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such fresh proceedings.

**10. Accordingly we set aside this issue to Ld. AO/TPO.**

**11. Corporate tax issues**

**Ground No. 22-26** deals with disallowance of 25% of expenditure incurred by assessee towards sales promotion on adhoc basis and expenditure incurred by assessee towards legal and professional expenses.

**11.1.** Ld.Counsel has submitted before us application under Rule 29 seeking admission of additional evidence. Ld.Counsel submitted that these expenses are incurred for sales promotion and details have been fully furnished before Ld.AO vide submission dated 07/01/15. It has been submitted that these were genuine expenses incurred wholly and exclusively for purposes of business, and is allowable under section 37 (1) of the Act.

**11.2.** Ld.Counsel submitted that these documents were not considered either by Ld. AO/DRP.

**11.3.** Ld. CIT DR submitted that the issue may be set said to Ld. AO for due verification of the same.

**11.4.** We have perused the submissions advanced by both the sides in the light of the records placed before us. It is observed that corporate tax grounds raised before us involve disallowance towards sales promotion expenses and legal and professional expenses. Application for admitting additional evidence in respect of sales promotion expenses has been filed by assessee before us.

**11.5.** We therefore set aside these issues to Ld.AO for verification of invoices placed in the form of additional evidences in respect of the sales promotion expenses and then allow the claim as per law.

Assessee is directed to file evidence in respect of legal and professional expenses if any, to Ld.AO. Ld.AO shall verify the same and consider the claim of assessee as per law.

**11.6. Accordingly ground 22- 24 stands allowed for statistical purposes.**

**Grounds 25-26** are general in nature.

**12. Ground No. 27** is in respect of interest under section 234B of the Act which is consequential in nature.

**13. Ground No. 28-29** is in respect of penalty proceedings being initiated which are premature at this stage.

**14. In the result, on the basis of above discussion, appeal filed by assessee for Assessment Year 2011-12 stands partly allowed for statistical purposes.**

**15. ITA No. 302/Del/17**

**15.1. Ground No.1-6** are in respect of adjustment in respect of receivables.

**15.2.** From TP study, it is observed that payments to assessee are not contingent upon payment received by AEs from their

respective customers. Further Ld.Counsel submitted that working capital adjustment undertaken by assessee includes adjustment regarding receivables and thus receivables arising out of such transaction have already been accounted for. It has been submitted that working capital subsumes sundry creditors and therefore a separate addition is not called for.

Ld.TPO computed interest on outstanding receivables at the rate equal to 9.60% LIBOR (SBI base rate) +300 basis points. It has been argued by Ld.Counsel that authorities below disregarded business/commercial arrangement between assessee and its AE's, by holding outstanding receivables to be an independent international transaction.

**15.2.** At the outset Ld.Counsel submitted that this issue stands squarely covered by Delhi Tribunal in assessee's own case in ITA No. 566/Del/2015 for immediately preceding Assessment Year being 2010-11. *Delhi Tribunal* in assessee's own case for assessment year 2010-11 (supra) decided this issue as under:

*"8. We have heard both the parties and perused the material available on record. ....*

*As relates to the issue of receivables, the same is also covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in case of Kusum healthcare."*

It has been mentioned by Ld.Counsel that there is no functional difference in the present year under consideration *vis-a-vis* immediately preceding Assessment Year. Ld. Counsel submitted that *Delhi Tribunal* in *Kusum Healthcare Pvt.Ltd vs. ACIT reported in (2015) 62 Taxmann.com 79*, deleted the addition by considering the above principle, and subsequently *Hon'ble Delhi High Court* in

*Pr. CIT vs. Kusum Health Care Pvt. Ltd. (2017) 398 ITR 66 (Del)*, held that no interest could have been charged as it cannot be considered as international transaction.

**15.3.** On the contrary Ld. CIT DR submitted that interest on receivables is an international transaction and Ld.TPO rightly determined its ALP. In support of his contentions, he read out relevant parts of DRP's direction, in which the Panel relying upon the decision of Delhi Tribunal order in *Ameriprise India Pvt. Ltd. vs. ACIT (2015- TII-347-ITAT-DEL-TP)* held that interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that Finance Act, 2012 has inserted *Explanation* to Section 92B, with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this *Explanation* provides that:

- (i) *the expression "international transaction" shall include—  
..... (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;....' .*

Ld. DR submitted that expression '*debt arising during the course of business*' refers to trading debt arising from sale of goods or services rendered in course of carrying on business. Once any debt arising during course of business is an international transaction, he submitted that any delay in realization of same needs to be considered within transfer pricing adjustment, on account of interest income short charged or uncharged. It was argued that insertion of *Explanation* with retrospective effect

covers Assessment Year under consideration and hence under/non-payment of interest by AEs on debt arising during course of business becomes international transactions, calling for computing its ALP. He referred to the decision of the *Delhi Tribunal* in *Ameriprise (supra)* in which this issue has been discussed at length and eventually interest on trade receivables has been held to be an international transaction. Referring to the discussion in the said order, it was stated that the Delhi Bench in this case has also noted a decision of the Hon'ble Bombay High Court in the case of *CIT vs. Patni Computer Systems Ltd., (2013) 215 Taxmann 108 (Bom.)*, which dealt with question of law:

*(c) 'Whether on the facts and circumstances of the case and in law, the Tribunal did not err in holding that the loss suffered by the assessee by allowing excess period of credit to the associated enterprises without charging an interest during such credit period would not amount to international transaction whereas section 92B(1) of the Income-tax Act, 1961 refers to any other transaction having a bearing on the profits, income, losses or assets of such enterprises?'*

**15.4.** He pointed out that while answering the above question, *Hon'ble Bombay High Court* noticed that amendment to section 92B has been carried out by Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside the view taken by the Tribunal, the *Hon'ble Bombay High Court* restored the issue to the file of the Tribunal for fresh decision in the light of legislative amendment. It was thus argued that non/under-charging of interest on excess period of credit allowed to AEs for

realization of invoices, amounts to an international transaction and ALP of such international transaction has been rightly determined by Ld.TPO. In so far as the charging of the rate of interest is concerned, he relied on the decision of the Hon'ble Delhi High Court in *CIT vs. Cotton Naturals (I) Pvt. Ltd (2015) 276 CTR 445 (Del)* holding that currency in which such amount is to be re-paid, determines rate of interest. He, therefore, concluded by summing up that interest on outstanding trade receivables is an international transaction and its ALP has been correctly determined.

**16.** We have perused the submissions advanced by both the sides in the light of the records placed before us.

On perusal of service agreement between assessee and AE placed at page 337-353 of paper book it is observed that there is no specific period mentioned for the payments to be received from its AE. Ld.TPO, therefore estimated a period of 30 days as allowable for payment receivables and any delay beyond 30 days has been bench marked as international transaction by imputing interest at the rate of 9.60% LIBOR +300 basis points.

Delhi Tribunal in case of *Orange Business Services India Solutions Pvt. Ltd. vs. DCIT* in ITA No. 6570/Del/2016 vide its order dated 15.2.2018 has observed that:

*“There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which would have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee would have to be studied. It went on to hold that, there has to be a proper inquiry by the TPO by analysing the statistics over a*

*period of time to discern a pattern which would indicate that vis-à-vis the receivables for the supplies made to an AE, the arrangement reflected an international transaction intended to benefit the AE in some way. Similar matter once again came up for consideration before the Hon'ble Delhi High Court in Avenue Asia Advisors Pvt. Ltd. vs. DCIT (2017) 398 ITR 120 (Del). Following the earlier decision in Kusum Healthcare (supra), it was observed that there are several factors which need to be considered before holding that every receivable is an international transaction and it requires an assessment on the working capital of the assessee. Applying the decision in Kusum Health Care (supra), the Hon'ble High Court directed the TPO to study the impact of the receivables appearing in the accounts of the assessee; looking into the various factors as to the reasons why the same are shown as receivables and also as to whether the said transactions can be characterized as international transactions.”*

**16.1.** In view of the above, we deem it appropriate to set aside the impugned order on this issue and remit the matter to the file of the Assessing Officer/TPO for deciding it in conformity with the above referred judgment. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such fresh proceedings.

**16.2. Accordingly we set aside this issue to Ld. AO/TPO.**

**17. Ground No. 7-8** are general in nature and therefore do not require adjudication.

## **18. Corporate tax grounds**

**18.1. Ground No. 9** has been raised by assessee in respect of disallowance of prior period expenses amounting to Rs.64,46,782/-.

**18.2.** At the outset Ld. Counsel has submitted before us request for admitting additional evidence in support of claim, as per Rule 29 of Income Tax Appellate Tribunal Rules,1963. It has been submitted that prior period income of Rs.3,24,15,258/- was reflected in audited financial report for Assessment Year 2012-13 and has been reported under clause 22 (b) of the Tax Audit Report. Ld.Counsel submitted that prior period income was *suo-moto* offered to tax by assessee during relevant Assessment Year and has claimed expenses of Rs.30,992,565/- which comprises of expenses amounting to Rs.61,59,151/-. At this juncture Ld.Counsel submitted that said sum of Rs.61,14 9,151/- has been offered to tax in return of income for Assessment Year 2010-11. Subsequently said expenditure has been reported under the head 'prior period expenses' for Assessment Year 2012-13 and assessee claimed deduction while computing taxable income for Assessment Year 2012-13 which has been denied by Ld.AO.

**18.3.** Ld.Counsel submitted that in anticipation Assessee before us raised additional ground for assessment year 2011-12, pertaining to allowability of prior period expenses, which is as under:

### ***Additional ground No. 30***

*“That, on facts and circumstances of the case and in law, without prejudice to ground No. 9 in relation to AY 2012-13, and in the event prior period expenses of INR 64,46,782 are not considered*

*deductible in the hands of the appellant for AY 2012-11, the said expenses shall be allowable as a deduction during AY 2011-12, i.e., the AY in which the said expenses were actually incurred by the appellant.”*

**18.4.** Ld.Counsel submitted that in the event for year under consideration assessee is not granted deduction of prior period expenses for Assessment Year 2012-13, the same may be considered as expenses for Assessment year 2011-12 as raised in Additional Ground No. 30.

**18.5.** Ld.CIT DR submitted that assessee has filed additional evidence in respect of prior period expenses, which needs verification by Ld.AO. He thus submitted that issue may be set-aside to Ld.AO to be considered afresh.

**19.** We have perused the submissions advanced by both the sides in the light of records placed before us.

**19.1.** It is observed that expenses claimed by assessee pertain to prior period, in respect of which additional evidence has been filed. This needs to be verified by Ld.AO. Ld.AO is directed first to apply test of allowability of these expenses u/s.37(1). In the event these expenses passed through threshold test, Ld.AO shall consider whether these are to be allowed as deduction for the year under consideration(2012-13), or else as expenditure for assessment year 2011-12 as per law, raised in Additional Ground 30 for A.Y.2011-12.

**19.2.** Accordingly, with the above directions, we set aside this issue to Ld. AO.

**19.3. In the result this ground is allowed for statistical purposes.**

**20. Ground No. 10** is in respect of disallowability of foreign tax credit amounting to Rs.3,35,053/-.

**20.1.** Ld. AO is directed to consider the claim of assessee subject to verification of the relevant documents regarding payment of foreign taxes.

**20.2. Accordingly this ground is allowed for statistical purposes.**

**21. Ground No. 11** is in respect of levy of interest which is consequential in nature.

**22. Ground No. 12** is in respect of levy of penalty which is premature.

**23.** In the result appeal filed by assessee for A.Y. 2012-13 stands allowed for statistical purposes.

**24. In the result, appeals filed by assessee for both the A.Ys 2011-12 and 2012-13 stand partly allowed for statistical purposes.**

Order pronounced in the Open Court on 19<sup>th</sup> July, 2018.

Sd/-

Sd/-

**(R.S.SYAL)**  
**VICE PRESIDENT**

**(BEENA A PILLAI)**  
**JUDICIAL MEMBER**

Dated: 19<sup>th</sup> July, 2018

\*manga

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI

		Date
1.	Draft dictated on	13.07.18/ 16.07.2018
2.	Draft placed before author	16.07.18
3.	Draft proposed & placed before the second member	17.07.2018
4.	Draft discussed/approved by Second Member.	18.07.18
5.	Approved Draft comes to the Sr.PS/PS	
6.	Kept for pronouncement on & Order uploaded on :	19.07.18
7.	File sent to the Bench Clerk	
8.	Date on which file goes to the AR	
9.	Date on which file goes to the Head Clerk.	
10.	Date of dispatch of Order.	