

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

IT(TP)A No.1333/Bang/2011
Assessment year : 2007-08

M/s. Kennametal India Ltd., 8/9 th Mile, Tumkur Road, Bengaluru – 560073. PAN:AACCK4472B	Vs.	Assistant Commissioner of Income Tax(LTU), JSS Towers, 100 Feet Ring Road, Banashankari III Stage, Bangalore-560085.
APPELLANT		RESPONDENT

Assessee by	:	Shri. K. R. Vasudevan, Advocate
Revenue by	:	Smt. Preethi Garg, CIT-DR

Date of hearing	:	3.1.2017
Date of Pronouncement	:	6.1.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of the Assessing Officer passed pursuant to the direction of the DRP on the following grounds:

1. The Assessing Officer erred in determining the arm's length price of the sum of Rs. 13,26,31,510/- paid to Kennametal Inc. as SAP implementation/IT/SAP service charges at nil and, accordingly, enhancing the Appellant's income from Rs.58,30,73,414/- to Rs. 71,57,04,924/-;
2. The Assessing Officer/Transfer Pricing Officer erred in holding that as the payment in the form of IT cross charges is a class of transactions on its own it requires a separate analysis;

3. The Assessing Officer/Transfer Pricing Officer proceeded on a misconception of the correct factual situation when they held that nobody would pay a yearly license fee when a lump sum amount is paid at the time of implementation having failed to appreciate the true nature and character of the payments made as explained in detail in the course of the proceedings before them;
4. The Assessing Officer/Transfer Pricing Officer erred in holding that the Appellant had only contributed towards the cost but did not prove that it derived a benefit from such contribution in consonance with the costs borne either in the current year or in the subsequent years;
5. The Assessing Officer/Transfer Pricing Officer erred in holding that no independent party would pay an amount as large as that paid by the Appellant to a third party when the same services can be provided in India for a lesser cost based on certain details, the veracity of which has not been established, available for independent companies who had implemented SAP;

6. The Assessing Officer/Transfer Pricing Officer erred in relying on the cases of companies where SAP implementation was done without appreciating the true nature of the globally integrated package that was installed in Kennametal entities all across the world to assist among others in automated transactions of sourcing materials from various associated enterprises and aiding in placing orders for critical important raw materials at globally competitive contracted prices;
7. The Transfer Pricing Officer exceeded his jurisdiction in determining the arm's length price of the amount contributed by the Appellant towards meeting a portion of the information technology cost incurred by Kennametal Inc. at nil on the basis that the Appellant has not proved substantially that services have been rendered overlooking that the issue as to whether expenditure has been properly incurred is one that is to be determined by the Assessing Officer in the course of assessment proceedings and not by the Transfer Pricing Officer who has only to determine whether the amount paid represents a payment made on arm's length terms;

8. The Assessing Officer/Transfer Pricing Officer erred in holding that the Appellant did not produce details of the quantum of expenditure incurred by the associated enterprise in rendering services to the Appellant in connection with SAP services and also that the Appellant did not produce any evidence regarding the payment made for SAP implementation by the associated enterprise and how it could be quantified at an arm's length price;
9. The Assessing Officer/Transfer Pricing Officer erred in observing that the payment of the SAP services charges represented a mode of siphoning of profits from India with minimum incidence of tax.

2. During the course of hearing, the learned counsel has invited attention that during the impugned assessment year, the assessee had entered into several international transactions with its AE. The transactions related to purchase of raw materials and components, purchase and sale of finished goods, import of capital goods and reimbursement of costs paid and received. In its transfer pricing analysis, the assessee had applied Transactional Net Margin Method (TNMM). However, in the absence of the required information and database to ascertain the correct ALP, the AO has made reference to TPO under section 92CA of the Act. After making an exhaustive study

of the data available on the matter, the TPO has held that the payment made for SAP implementation was treated as Nil for various reasons. Based on these conclusions, the TPO held that ALP of the transactions involving SAP implementation charges is Nil. Accordingly, the amount of Rs.13,26,31,510/- paid by the assessee as SAP implementation/IT/SAP service charges was treated as TP adjustment u/s 92CA of the Act. Against the TP adjustment, the assessee is before us.

3. The learned counsel for the assessee further contended that in the succeeding assessment year, similar TP adjustment was made by the TPO and in appeal, the CIT(A) called a remand report during the period of appellate proceedings and in remand report the TPO has accepted the contentions of the assessee. The relevant portion of the TPO's remand report order accepting the contention of the assessee is reproduced below:

“After going through the submissions of the taxpayer and the demonstration of the services received, the TPO is of the opinion that the payments made for these Group services are for day to day SAP running costs, payment for SAP Licences and maintenance and upgradation. The transaction was aggregated with manufacturing and trading since it was closely linked and hence was aggregated without any separate benchmarking. This stand of the taxpayer is acceptable to the TPO.”

4. In the light of these findings of the TPO in remand proceedings, the learned counsel for the assessee has contended that since the TPO

has accepted the version of the assessee, the TP analysis in the instant case be redone by the TPO afresh.

5. The Id. DR did not dispute the remand report of the TPO. He however placed reliance upon the assessment order and order of the TPO in the instant case. Having carefully examined the order of the lower authorities and in the light of the remand report of the TPO, we find that the TPO has taken a contradicting stand in the succeeding year in the remand proceedings.

6. In the light of these facts, we are of the view that in the instant case, TPO should do fresh exercise in the light of its remand report in order to determine the ALP for international transactions.

7. Accordingly, we set aside the assessment order and restore the matter to the file of the AO/TPO to make fresh exercise for determining the ALP of the international transaction in the light of the assessee's contentions, TPO report and the remand proceedings submitted to the CIT(A) in succeeding year.

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

Pronounced in the open court on this day of 6th January, 2017.

sd/-
(S. JAYARAMAN)
Accountant Member

sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Bangalore.
Dated: 6th January, 2017.
/NS/

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.