IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

IT(TP)A No.489/Coch/2016 : Asst.Year 2012-2013

M/s.Allianz Cornhill Information Services Private Limited, Door No.3F, Chandragiri Techno Park Campus Thiruvananthapuram Pin 695 581. **PAN : AAECA1104C.**	Vs.	The Dy.Commissioner of Income-tax, Circle 2(1) Trivandrum.
(Appellant)		(Respondent)

SA No.60/Coch/2017 : Asst.Year 2012-2013

M/s.Allianz Cornhill Information Services Private Limited, Door No.3F, Chandragiri Techno Park Campus Thiruvananthapuram Pin 695 581.	Vs.	The Dy.Commissioner of Income-tax, Circle 2(1) Trivandrum.
(Petitioner)		(Respondent)

Appellant by : Sri.Raghunathan S, Advocate
Respondent by : Sri. Santhom Bose, CIT-DR

Date of Hearing : 17.05.2018		**Date of Pronouncement : 30.05.2018**

O R D E R

Per George George K., JM

This appeal at the instance of the assessee is directed against the final assessment order dated 26.09.2016 passed u/s 143(3) r.w.s. 144C r.w.s. 92CA of the Income-tax Act, pursuant to the direction of the Draft Resolution Panel (DRP)

dated 12.08.2016. The relevant assessment year is 2012-2013.

2. The brief facts of the case are as follows:-

2.1 The assessee is a company engaged in the business of information technology and information technology enabled services. For the assessment year 2012-2013, the return of income was filed on 30.11.2012, declaring a total income of Rs.35,14,18,810. The assessment was taken up for scrutiny by issuing notice u/s 143(2). In the course of assessment proceedings, the case was referred to the Transfer Pricing Officer (TPO) since assessee had entered into international transactions with its Associate Enterprises (AEs). The TPO vide his order dated 27.01.2016 made upward adjustment to the arm's length price amounting to Rs.62,81,151. On receipt of the TPO's order, the Assessing Officer issued a draft assessment order dated 29.02.2016 wherein the taxable income was re-computed to Rs.37,06,59,137 by making the following additions :-

(i)	Disallowance of provision for legal and professional charges	Rs.1,12,19,079
(ii)	Disallowance u/s 36(1)(va)	Rs. 33,32,307
(iii)	Transfer Pricing adjustment	Rs. 62,81,151

2.2 On receipt of the draft assessment order, the assessee filed its objection u/s 144C(2)(b) of the I.T.Act before the Dispute Resolution Panel (DRP). The DRP vide its order dated

12.08.2016, disposed off the objections of the assessee. The direction of the DRP are as follows:-

(i) Disallowance of provision for legal & professional charges was enhanced to Rs.1,74,48,290 instead of Rs.1,12,19,079 disallowed by the A.O.

(ii) Disallowance under section 36(1)(va) of the Act was upheld, and

(iii) Transfer pricing adjustment was reduced to Rs.6,72,554.

2.3 The Assessing Officer on receipt of the DRP's order dated 12.08.2016, passed the final assessment order u/s 143(3) r.w.s. 144C r.w.s. 92CA of the I.T.Act and issued the demand notice u/s 156 of the Act raising a total demand of Rs.9,38,08,666.

2.4 Aggrieved by the final assessment order, the assessee company has filed the present appeal and the stay application before the Tribunal. The synopsis of the grounds argued by the learned Counsel for the assessee are as follows:-

Sl. No.	Particulars	Ground Reference	Amount involved (Rs.)
1.	Disallowance of provision for legal and professional charges	1	1,74,48,290
2.	Disallowance under section 36(1)(va) of the Act on late	2	33,32,307

	payment of employees' contribution to PF and ESI		
3.	Erroneous imputation of interest on amounts which are not in the nature of loan	4	6,72,554
4.	Erroneous granting of credit period which is short in normal course of business	5	
5.	Erroneous use of average rate of interest earned by the appellant instead of LIBOR / EURIBOR	6	

We shall adjudicate the issues ground-wise as under:

Ground No.1

3. The Assessing Officer had made a disallowance of provision amounting to Rs.1,12,19,079 by observing as under:-

> *"During the course of assessment proceedings it was seen that the assessee had debited an amount of Rs.11,50,59,428/- on account of Legal and Professional charges. It was submitted during the course of hearing that out of this amount, Rs.1,74,48,290/- is provision for which parties have not been identified. However, the assessee had already disallowed Rs.62,29,211/- out of this amount u/s 40(a)(ia) as TDS was not deducted, while computing the total income. Hence the difference amount of Rs.1,12,19,079/- being a provision is added back to total income as the expenses have not been incurred. (Addition Rs.1,12,19,079/-)"*

3.1 The DRP enhanced the disallowance to Rs.1,74,48,290 instead of Rs.1,12,19,079 computed by the Assessing Officer. The relevant finding of the DRP in making the enhancement of Rs.1,74,48,290 reads as follows:-

> *"4.1 The submissions of the assessee on these objections have duly been considered. During the hearings before this Panel, this was admitted by the assessee that the provision was made on an estimated basis and this was not known as to how much amount was actually due to each person, to whom payments on account of legal and professional charges was to be made, as such persons were not identified. Thus the provision was not based on any scientific basis and was contingent in nature. So the action of the assessing officer cannot be faulted with. Further, from the details provided by the assessee it is evident that the provision was of Rs 1,74,48,290 and on the entire amount of tax at source was not deducted. So the findings of the AO, that of the total provisions tax at source had been deducted on an amount of Rs 62,29,21l is found to be wrong, as the said amount was not part of the above provision. The above facts could not be controverted by the assessee during hearings. So the total disallowance of Rs 1,74,48,290 should have been made by the AO instead of disallowance of only Rs 1,12,19,079. The assessing officer is thus directed to make disallowance of Rs 1,74,48,290/- instead of Rs 1,12,19,079. Further, in view of provisions of Section 194J Explanation (c)/Section 195 Explanation I, the assessee should have deducted tax at source while making such provision. Since the assessee failed to do so, the amount becomes disallowable as per provisions of section 40a(i)/(ia) also. AO is free to inform the concerned TDS authorities regarding non deduction of Tax at source by the assessee at the relevant time of making provision, so that appropriate action can be taken by such authorities for such default. Considering above, the objections of the assessee are not accepted."*

3.2 Aggrieved by the order of the DRP, the assessee-company has raised this issue before the Tribunal.

3.3 The learned Counsel for the assessee submitted that during the previous year relevant to the assessment year 2012-2013, the assessee had incurred expenditure of Rs.11,50,59,429 as software development and testing. Out of the same, a sum of Rs.1,74,48,219 was pertaining to provision created. It was submitted that details of such provision created are annexed at page 520 of the paper book filed by the assessee. It was further submitted that the assessee had voluntarily disallowed a sum of Rs.62,29,211 u/s 40(a)(ia) of the I.T.Act in the return of income filed on 30.11.2012. (The return of income was enclosed at page 28 of the Paper Book). It was further stated that on the remaining provision, i.e., Rs.1,12,19,079, the assessee-company had deducted the applicable tax at the time of payment to the concerned party and remitted the same prior to the due date of filing of the return of income. It was contended that the provision created was based on reasonable certainty, service utilization and past experience and assessee had complied with the TDS provision before the due date of filing of the return in respect of the provision of Rs.1,12,19,079, for assessment year 2012-2013. The learned AR has also placed on record the party-wise details of provision created for software and testing charges. Therefore, it was contended that the findings of the A.O. and the DRP that parties have not been identified is wrong. It was submitted that only amounts due to each party was not quantified during the close of the accounting year.

3.4 The learned Departmental Representative, on the other hand, strongly supported the directions of the DRP.

3.5 We have heard the rival submissions and perused the material on record. The assessee has placed on record party-wise details of the provision created for software and testing charges. On perusal of the same, it is clear that the parties have been identified, however, only the amount i.e. to be paid to each of the parties are not quantified. It is stated that the assessee's billing arrangement with its vendors is time cost basis, and therefore, it was contended that the amount paid will crystallize only at a later stage post all negotiations. Out of the total provision created amounting to Rs.1,74,48,290, the assessee-company itself had disallowed a sum of Rs.62,29,210 by adding the same to the total income. This is evident from the return of income filed by the assessee, which is placed at page 28 of the paper book filed by the assessee. The DRP had directed that the total provision amounting to Rs.1,74,48,290 has to be disallowed. This direction of the DRP was wrong obviously for the reason that the assessee itself had disallowed Rs.62,29,211 u/s 40(a)(ia) of the I.T.Act since it had not complied with the TDS provision in respect of the above said expenses. With regard to the balance amount of Rs.1,12,19,079, the party-wise details are placed on record, however, the quantification of the amount due to the parties was done beyond the close of accounting year, hence, the provision was created. According to the assessee, the provision created was based on scientific estimate and past

years trend. The learned AR had relied on the judgment of the Hon'ble Supreme Court in the case of *Rotork Controls India (p.) L.d v. CIT [(2009) 314 ITR 62 (SC)]*. We noticed with regard to the expenditure of Rs.1,12,19,079, the assessee had complied with the TDS provision before the due date of filing of the return, hence, there could not have been disallowance u/s 40(a)(ia) of the I.T.Act. The question is whether the provision created for such an amount is part of scientific estimate and past years trend. The comparative analysis of the gross turnover to the provision created in ratio for assessment years 2011-2012 and 2012-2013 are placed on record and is annexed as Exhibit 19 of the DRP Exhibit. As mentioned earlier, the party-wise details of the provision created for the software and testing charges are on record. The parties are identifiable and TDS provision have been duly complied with before the due date of filing of the return. These facts were not taken into consideration either by the A.O. nor by the DRP. If the TDS provision are complied with before the due date of filing of the return of income in respect of Rs.1,12,19,079 out of the total provision of Rs. 1,74,48,219, the expenditure is an ascertained liability and not a contingent liability. The ascertained liability, which is actually incurred as per the provisions of section 145 of the I.T.Act cannot be subject matter of disallowance. Moreover, as mentioned earlier, the assessee itself had disallowed a sum of Rs.62,29,211 out of the total provision amounting to Rs.1,74,48,219 u/s 40(a)(ia) of the I.T.Act in the return of income filed by it. The DRP on its part again directed to

disallow Rs.62,29,211, which would tantamount to double disallowance of the same amount. We are of the view that there was no proper examination of this issue by the A.O. nor by the DRP. The important / vital aspect that party-wise details and TDS provision was duly complied by the assessee in respect of provision amounting to Rs.1,12,19,079, was not taken into consideration by the authorities below. Therefore, in the interest of justice and equity, we are of the view that the issue of disallowance of provision for software development and testing charges needs to be adjudicated afresh and accordingly we restore the matter to the files of the A.O. The A.O. shall look into the party-wise details of the provision created for software development and testing charges and shall also examine whether the TDS provision has been duly complied in respect of such provision before the due date of filing of the return. The A.O. shall take a decision as expediously as possible after affording a reasonable opportunity of hearing to the assessee. It is ordered accordingly.

3.6 In the result, ground No.1 is allowed for statistical purposes.

4. **Ground No.2.**

The assessee had claimed an amount of Rs.32,72,175 and Rs.60,132 being employees contribution towards PF and ESI u/s 36(1)(va) of the I.T.Act. The said payments made by the assessee were after the due date specified under the

respective statutes. The Assessing Officer disallowed the employees contribution to PF and ESI by placing reliance on the judgment of the Hon'ble Kerala High Court in the case of *CIT v. M/s.South India Corporation Limited [(2015) 58 Taxmann 208 (Ker.)]* (judgment dated 27.03.2015). The view taken by the Assessing Officer was confirmed by the DRP.

4.1 Aggrieved by the final assessment order, the assessee has raised the issue before the Tribunal. The learned Counsel for the assessee had made the following submissions:-

> ***Section 36(1)(va) to be read in conjunction with section 43B of the Act:*** *Section 43B applies to 'any sum payable by the assessee as an employer' by way of contribution to PF/ESI. Also, section 43B contains a non-obstanate clause which implies that provisions of section 43B shall override the other provisions of the Act.*
>
> *Since the contribution made by the employee is a contribution to the welfare fund held in trust by the employer who is bound to deposit the same, employee's contribution towards ES) and PF has to be treated at par with employer's contribution. Hence, employee's contribution to PF/ES) would also get covered under section 43B of the Act.*
>
> *Since 43B allows the deduction of contributions subject to payment prior to due date of filing return of income, by applying the same principle, the employees' contribution ought to allowed as expenditure in the instant case. This view was upheld by Karnataka High Court in the case of Spectrum Consultants India (P) Ltd Vs CIT [2013J 34 taxmann.com 20 (Annexure 3)*

Curative Amendment to section 43B of the Act vide Finance Act, 2003: *The Finance Act 2003 deleted the second proviso to Section 43B with effect from 01 April 2004 of the Act which specifically made reference to section 36(1)(va) of the Act for the due date payment of employee's contribution to Provident Fund and other employee welfare fund as specified under section2(24)(x) of the Act. Vide the said amendment employee's contributions to PF would be allowed as business expenditure, if the same is paid within the due date of filing return of income under section 139(I) of the Act. This view was upheld in the following judicial precedents:*

CIT vs Jaipur Vidyut Vitran Nigam Ltd[ITA No 278,280,281 & 301 012011J

CIT v Udaipur Dugdh Utpadak Sahakari Sangh Ltd [(2013) 35 taxmann.com 616 (Rajasthan)

The case law relied upon by the AO, being, CIT Cochin vs M/s South India Corporation Ltd 58 Taxman 208 (2015) pertains to AY 1992-93 i.e., prior to introduction of the aforesaid curative amendment. Hence, the aforesaid judicial ruling would not be applicable for the Company pursuant to the curative amendment.

It may be noted that the matter has not attained finality in light of following developments with respect to following rulings by the Kerala High Court on similar issue:

CIT v Merchem Limited [2015] 378 ITR 443- an SLP has been filed with the Supreme Court against such ruling. The SLP is currently posted for hearing on 17 July 2018 (Annexure 4);

Popular Vehicles & Services Pvt. Ltd. (ITA 172/2016) - the Court has referred the dictum of dictum of Merchern Ltd. (supra) to a larger Bench for reconsideration."

4.2 The learned Departmental Representative, on the other hand, submitted that the issue in question is covered in favour of the Revenue by the judgment of the Hon'ble jurisdictional High Court in the case of *CIT v. M/s.South India Corporation Ltd. (supra)* and the recent judgment of the Hon'ble Kerala High Court in the case of *CIT v. Merchem Limited [(2015) 378 ITR 443 (Ker.)]*.

4.3 We have heard the rival submissions and perused the material on record. The Hon'ble High Court in the case of *Merchem Limited (supra)* had categorically held that the employees' contribution towards PF and ESI u/s 36(1)(va) of the I.T.Act cannot be allowed as a deduction if the said payment has been made after the due dates specified under the respective statutes. In view of the judgment of the Hon'ble jurisdictional High Court we dismiss ground No.2 raised by the assessee.

5. **Ground Nos. 3, 4 & 5**

The assessee-company had met travelling and accommodation expenses on behalf of its AEs. It is claimed that these expenditure have been subsequently recovered by the assessee from the AEs at the cost based on third party invoices. No interest was charged on the outstanding amount, since according to the assessee, the same is not in the nature of a loan. However, the TPO / AO imputed interest of Rs.6,72,554 on the balance outstanding by considering credit

period of 15 days. The view taken by the TPO / AO was confirmed by the DRP.

5.1 Aggrieved, the assessee has raised this issue before the Tribunal. The learned Counsel had made the following submissions :-

> *"The Appellant had met the travelling and accommodation expenses on behalf of the AE's. These expenses have been subsequently recovered by the assessee from the AEs at cost based on third party invoices. This arrangement is purely for administrative convenience where Allianz India does not provide any additional service. Further, the assesses submits that these expenses have been fully recovered from the AEs. Further, as on 31 March, a few invoices exceeds 180 days.*
>
> *Further, the TPO m the Show Cause Notice issued for A Y 2012-13, has considered 180 days as a reasonable credit period for imputing interest on outstanding trade receivables. Considering the fact that TPO has adopted 180 days as a general norm in the industry, no interest should be imputed on the recovery of expense which is outstanding for less than 180 days. (Annexure 5)*
>
> *Without prejudice to any of the above submission, even if interest is to be considered LIBOR/EURIBOR should be considered. The same has been upheld in Salcomp Manufacturing India (P.) Ltd. vs Assistant Commissioner of Income-tax,.Company Circle VI (/), Chennai by the Chennai [TAT (Annexure 6)"*

5.2 The learned Departmental Representative present was duly heard.

5.3 It is an admitted position that expenses were incurred by the assessee on behalf of and for the benefit of its AEs. The expenses so incurred by the assessee on behalf of its AE if it is outstanding would come within the meaning / explanation of international transaction in section 92B of the I.T.Act. Therefore, the contention of the assessee that the A.O. cannot impute interest on balance outstanding from its AEs, is rejected.

5.4 As regards the claim of the assessee that a period of six month should be considered as reasonable for making recovery of cost incurred by it from the AE, we are of the view that such a plea cannot be entertained. A prudent businessman would always recover the outstanding amounts at the earliest point of time. The funds are the lifeline of any business and any amounts outstanding from a debtor would be the focal point of any businessman / industry for the earliest recovery. As rightly pointed out by the DRP, will assessee allow such amounts to remain outstanding for long period if it is in the case of third partes? The answer would be in negative. Therefore, the above plea of the assessee is rejected. We are of the considered view that a period of 60 days is reasonable period within which the expenses ought to have been recovered by the assessee from its AEs. The period of 15 days granted by the DRP is too short of period considering the business transaction undertaken by the assessee with its AEs. Therefore, the A.O. is directed to impute the interest on the outstanding amounts for a period

exceeding 60 days at any point of time during the year in consideration.

5.5 As regards the issue of rate of interest, the TPO/AO adopted ALP interest at the rate of 17.06% being average SBI-PLR rate with the spread of 3%. The TPO/AO while adopting average SBI-PLR rate, rejected the assessee's plea that only LIBOR rate should be applied. The DRP reduced the ALP rate to 12.75% instead of 17.06% adopted by the TPO/AO. The DRP considered inter-company deposits interest rates at 9.75% and a spread of 3%.

5.6 Before the Tribunal, the learned AR reiterated the submissions that LIBOR rate should be adopted. The learned DR supported the DRP's directions.

5.7 We have heard the rival submissions and perused the material on record. In the instant case, the assessee had incurred expenditure on behalf of its AEs in Indian currency. The invoices are raised against the AE in Indian currency only. Since the expenditure has been incurred in Indian currency and not in dollars, the plea of the assessee to adopt LIBOR rates is rejected. However, we find the opportunity cost to the assessee's funds have to be calculated in relation to the interest earning capacity in the domestic market. The assessee had parked its surplus funds in FDs with the banks. It is also found by the DRP that the assessee has not taken any interest bearing funds and thus was not incurring any interest expenditure. Therefore, the fixed interest rate is the

maximum the assessee could have got if the recovery of the amounts were not delayed. Therefore, the SBI-PLR rates alone should be calculated without any 3% spread. The weightage average interest of SBI-PLR on FDs has been worked out by the DRP at 8.15%. We are of the considered view that only 8.15% should be adopted while calculating ALP interest on the amounts outstanding from the assessee's AEs. It is ordered accordingly.

5.8 In the result, ground Nos.3, 4 and 5 are partly allowed.

6. **Ground Nos.7, 8 & 9 :**

6.1 No arguments were raised on these grounds, hence these grounds are dismissed.

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7. Since the appeal is disposed off by this Tribunal, the stay application filed by the assessee, arising out of the said appeal, has become infructuous. Accordingly, the same is dismissed as infructuous.

Order pronounced on this 30th day of May, 2018.

Sd/-	Sd/-
(Chandra Poojari)	**(George George K.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin ; Dated : 30th May, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr.CIT, Trivandrum
4. The CIT(TP)-2, Bangalore.
5. The DR, ITAT, Cochin.
6. Guard File.

By Order

Asst.Registrar/ITAT, Cochin