

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

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 513/Del/2021
And
SA No. 92/Del/2021
(in ITA No. 513/Del/2021)
Assessment Year: 2016-17**

M/s. ERM India Pvt. Ltd.,
Building No. 10, 3rd Floor,
Tower-B, DLF, Cyber City,
Phase-II, Gurgaon.

vs.

National e-assessment
Centre, New Delhi.

PAN : AAACE1502C
(Appellant)

(Respondent)

Appellant by :Mr. Ajit Jain, A.R. &
Mr. Arpan Khanna, CA
Respondent by:Mr. Bhagwati Charan, Sr. DR

Date of hearing: 04.08.2021
Date of order : 28.09.2021

ORDER

PER K. NARASIMHA CHARY, J.M.

This is an appeal by the assessee being aggrieved by the Assessment Order dated 26.03.2021 pursuant to the directions dated 17.11.2020 of the Dispute Resolution Panel -I, New Delhi (for short hereinafter called "Ld. DRP") for the assessment year 2016-17.

2. Brief facts of the case are that the assessee is a company and was

engaged in the business of consulting in the field of an environmental, health and safety, social land and natural resources management. For the assessment year 2016-17, they have filed a return of income on 30/11/2016 declaring an income of Rs.10,02,95,050/-. Noting that the assessee company made international transactions with the Associated Enterprises (“AEs”), the determination of arm’s-length price was referred to the Ld. Transfer Pricing Officer (“Ld. TPO”). By order dated 28/10/2019, Ld. TPO suggested to enhance the income of the assessee by Rs.2,10,22,69/-on account of interest on receivables from the AEs. After hearing the assessee, learned Assessing Officer passed the draft assessment order on 21/12/2019 under section 144C of the Income Tax Act, 1961 (for short “the Act”).

3. Assessee filed objections to the proposed adjustment before the Ld. DRP and submitted that the Ld. TPO erroneously considered the continuing debit balance of the receivables from the AEs as an “unsecured interest free loan” granted by the assessee to its AE’s during the relevant previous year. According to the assessee once the primary transaction of provision/receipt of consultancy services is held to be at arm’s length price, then the intercompany receivables arising therefrom (being consequential and closely linked to the main transaction) also conform to the arm’s length principle. Case of assessee is that it is a debt free company, and therefore no borrowed funds was utilised to grant extra credit period to the AEs; that no interest was paid by the assessee to its AEs and therefore, consequently the assessee does not charge any interest from AEs; and that the commercial factors warrant a longer period of credit and the Ld. TPO failed to appreciate this fact. Assessee also placed reliance on the

decision of the Tribunal and also of the Hon'ble jurisdictional High Court in the case of Kusum Healthcare Private Limited vs. ACIT[2017] 398 ITR 66 (Delhi), in support of their contention that when once working capital adjustment is made, it subsumes the interest on receivables also and, therefore, no separate benchmarking of the interest on receivables could be resorted to.

4. By order dated 17/11/2020 Ld. DRP held that the decision in Kusum Healthcare Private Limited (supra) cannot be followed in view of the amendment brought about by Finance Act, 2012 whereby a new Explanation was inserted with retrospective effect from 01.04.2002 and Explanation (i) (c) of section 92B of the Act created a deeming fiction treating the payments or deferred payments of receivables or any other debt arising during the course of business as a separate international transaction. Ld. DRP also referred to the deletion of the Hon'ble Bombay High Court in the case of CIT vs. Patni Computer Systems Ltd (2013) 215 Taxman 108 (Bom) and also the decision of the Tribunal in the case of Bechtel India Private Limited vs. ACIT (2017) 85 taxmann.com 121 (Delhi-Trib) and concluded that the working capital adjustment and the interest on receivables operates in two different fields, inasmuch as working capital adjustment relate to the cost of service/product, the agreement in respect of which permits the payment within a stipulated period, whereas the benchmarking of the interest on receivables commences with such interest payable from the expiry of the period prescribed in the agreement. Ld. DRP accordingly negated the contention of the assessee and while upholding the separate benchmarking of the interest on receivables outstanding for a period beyond 60 days.

5. Aggrieved by the action of the Ld. DRP, assessee approached the Tribunal in this appeal contending that the authorities below failed to appreciate the fact that the assessee has not been charging any interest from third-party customers as an outstanding receivable which represent an arm's length scenario and therefore, no notional interest is warranted in respect of the outstanding receivables by the assessee from its AEs. Ld. AR submitted that the decision of the Tribunal in Kusum Healthcare (supra) has been upheld by the Hon'ble High Court, the SLP against which was dismissed by the Hon'ble Supreme Court and therefore, as the things stand today, the decision in Kusum Healthcare holds the field.

6. Per contra, it is the submission of the Ld. DR that the amendment brought in the Act with retrospective effect from 1/4/2002 and inception of Explanation (i) (c) of section 92B of the Act creating a deeming fiction treating the payments or deferred payment of receivables or any other debt arising during the course of business as a separate international transaction, provides a complete answer to the question involved in this matter and therefore, the decision of the Hon'ble Bombay High Court in the case of Patni Computer Systems Ltd (supra) and Bechtel India Private Limited (supra) rightly followed by the Ld. DRP. According to him no interference with the impugned order is warranted in this matter.

7. We have gone through the record in the light of the submissions made on either side. Ld. DRP, did not follow the decision in Kusum Healthcare, rendered by a coordinate Bench of this Tribunal, on the ground that the reason that the context of incorporating the Explanation to section 92B of the Act, which was to specifically bring the interest on delayed receivables within the purview of TP regulations, was not considered in

Kusum Healthcare, whereas it was considered in Patni Computer Systems Ltd (supra) and Bechtel India private limited vs. ACIT(supra).

8. A perusal of the order of the coordinate Bench in Bechtel India (P.) Ltd. v.ACIT [2017] 85 taxmann.com121 (Del-Trib) reveals that heavy reliance was placed by the Tribunal on the decisions in Techbooks International (P.) Ltd. v. Dy. CIT [2017] 63 taxmann.com 114 (Del-Trib). Mckinsey Knowledge Centre (P.) Ltd. v. Dy. CIT [2017] 77 taxmann.com 164 (Delhi-Trib). When the decision in Mckinsey Knowledge Centre (P.) Ltd. v. Dy. CIT [2017] 77 taxmann.com 164 (Delhi-Trib) reached Hon'ble Delhi High Court, vide decision reported in [2018] 96 taxmann.com 237 (Delhi) (Mckinsey Knowledge Centre India (P.) Ltd.v.Principal Commissioner of Income-tax) Hon'ble Court observed that by a plain reading of the (retrospectively applicable) amendment that introduced the Explanation to section 92B of the Act by Finance Act, 2012, it is determinable that if there is any delay in the realization of a trading debt arising from the sale of goods or services rendered in the course of carrying on the business, it is liable to be visited with transfer pricing adjustment on account of interest income short charged/uncharged. Hon'ble High Court, however, by the order dated 07.02.2018, on the question with respect to the notional interest attributed to the assessee and for which adjustment was made by the Transfer Pricing Officer (TPO), opined that having regard to the considered view in the case of Pr. CIT v. Kusum Health Care (P.) Ltd. [2017] 398 ITR 66 (Delhi), the matter requires further examination/scrutiny; the reasons for the credit or delay in payment needs to be examined and on that ground remanded the matter.

9. Order dated 07.02.2018 in ITA 461/2017 & ITA 526/2017reads thus:

The other question urged with respect to the notional interest attributed to the assessee and for which adjustment was made by the TPO, was finally affirmed by the ITAT. This Court has considered the submissions of the parties and is of the opinion that having regard to the considered view in the case of Pr. CIT Vs. Kusum Health Care Pvt. Ltd. (ITA No. 765/2016 vide order dated 25.4.2017), the matter requires further examination/scrutiny; the reasons for the credit or delay in payment needs to be examined. The matter is therefore remitted back to the ITAT which may, if deem necessary, file a report in this regard.

10. It is, therefore, clear that even subsequent to the amendment brought by the Finance Act, 2012, the view taken in Kusum Healthcare Private Limited reported in [2017] 398 ITR 66 (Delhi) still holds the field. In Kusum Healthcare Private Limited vs. ACIT in ITA No. 6814/Del/2014, a coordinate Bench of this Tribunal held that no additional imputation of interest on the outstanding receivables is warranted if the pricing/profitability is more than the working capital adjusted margin of the comparables. In appeal the Hon'ble High Court held that –

...The inclusion in the Explanation to Section 92B of the Act of the expression „receivables“ does not mean that de hors the context every item of „receivables“ appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterised as an international transaction. There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the Assessee will have to be studied. In other words, 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 reflects an international transaction intended to benefit the AE in some way.

11. *The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the*

Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-à-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi).

11. From the above, it is, therefore, clear that when once the working capital adjustment is given, it subsumes the interest on receivables and no separate benchmark for it has to be made. Respectfully following the view taken by the Hon'ble jurisdictional High Court in the case of Kusum Healthcare (supra), we hold that the addition made on account of interest on receivables cannot be sustained.

12. The other ground argued before us is in respect of non-grant of credit of entire TDS amounting to Rs.3,24,57,359/-as claimed by the assessee. Both the counsel agreed on the point that it would suffice if the learned Assessing Officer is required to verify and grant the credit of TDS as per law. We direct the learned Assessing Officer to verify and grant the TDS under law.

13. In the result appeal of the assessee is allowed in part and for statistical purpose. Stay application filed by assessee is dismissed.

Order pronounced in the open court on this the 28th day of September, 2021.

Sd/-

(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Sd/-

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated: 28/09/2021/'aks'