

(2024) 06 ITAT CK 0001

Income Tax Appellate Tribunal (Delhi I Bench)

Case No: Income Tax Appeal No. 475/DEL/2022

Mckinsey Knowledge Centre
India Pvt. Ltd.

APPELLANT

Vs

DCIT

RESPONDENT

Date of Decision: June 4, 2024

Acts Referred:

- Income Tax Rules, 1962 - Rule 10TC
- Income Tax Act, 1961 - Section 92B, 92CA(3), 234B, 270A

Hon'ble Judges: Shamim Yahya, (AM); Sudhir Kumar, J

Bench: Division Bench

Advocate: Porus Kaka, Divesh Chawla, Rajesh Kumar

Final Decision: Partly Allowed

Judgement

1. This appeal by the assessee is directed against the order of the Assessing Officer dated 21.01.2022 pursuant to the directions issued by the DRP for the Assessment Year 2017-18.

2. Grounds of appeal taken by the assessee read as under :-

“General grounds:

1. On the facts and in the circumstance of the case, the learned AO has erred in assessing the total income of the Appellant at INR 1,15,49,28,770 as against a total income of INR 85,51,62,380 as per the return of income filed by the Appellant.

Transfer pricing grounds:

2. On the facts and in the circumstances of the case, the learned AO / TPO/ DRP has erred in making a transfer pricing adjustment of INR 29,97,66,387 to the total income of the Appellant in respect of provision of Research and Information ('R&I'), IT support and back office support services (,international transactions') and

notional interest on inter-company receivables arising from the impugned international transactions.

3. On the facts and in the circumstances of the case, the learned TPO has incorrectly given effect (in his order dated 29 December 2021) to the directions of Hon'ble DRP by applying such directions proposed in the original transfer pricing order dated 30 January 2021 as against the rectified transfer pricing order dated 1 September 2021 (which was passed by the learned TPO before completion of proceedings before Hon'ble DRP).

4. On the facts and in the circumstances of the case, the learned AO/ TPO / Hon'ble DRP have erred in passing orders which suffered from computational errors in determination of the Appellant's operating margin and consequently, erred in computing the amount of adjustment to be made in respect of the impugned international transactions.

5. On the facts and in the circumstances of the case, the learned AO / TPO / Hon'ble DRP have erred in computing the operating margin of the Appellant wherein certain income items (i.e., third-party income, miscellaneous income) have been excluded from the income of the Appellant without correspondingly reducing expenses attributable to third party income which has unjustly resulted in decreasing the operating margin of the Appellant.

6. On the facts and in the circumstances of the case, the learned AO / TPO / Hon'ble have erred in not applying principle of parity i.e., when third party income (albeit only approx. 2% of the total revenue of the Appellant) is excluded from the computation of operating margin of the Appellant, expenses (on the proportionate basis) incurred in rendering services to such third party should also be excluded from this computation of operating margin of the Appellant.

7. On the facts and in the circumstances of the case, the learned TPO / AO / Hon'ble DRP have erred in not accepting the economic analysis undertaken by the Appellant in accordance with provisions of the Act read with the Income-tax Rules, 1962 ('the Rules ') and modifying the same for determination of arm's length price of the impugned international transactions to hold that the same are not at arm's length.

8. On the facts and in the circumstances of the case, the learned TPO / AO have erred by wrongly rejecting certain companies from and adding certain companies to the final set of comparables for the impugned international transactions on an ad-hoc basis, thereby resorting to cherry picking of comparables for benchmarking the impugned international transactions.

9. On the facts and in the circumstances of the case, the learned TPO / AO / Hon'ble DRP have erred in excluding Informed Technologies India Ltd in the final set of comparables for benchmarking the impugned international transaction, even though the said company is functionally comparable to the Appellant.

10. On the facts and in the circumstances of the case, the learned TPO / AO / Hon'ble DRP have erred in excluding R Systems International Limited in the final set of comparables for benchmarking the impugned international transaction on the basis that it fails the different financial year filter, even though the said company is functionally comparable to the Appellant.

11. On the facts and in the circumstances of the case, the learned TPO / AO / Hon'ble DRP have erred in excluding Cosmic Global Limited, Cyfuture India Private Limited and Allsec Technologies Limited in the final set of comparables for benchmarking the impugned international transaction on the basis that it fails the export earning filter of 75% of revenue, even though the said companies are functionally comparable to the Appellant.

12. On the facts and in the circumstances of the case, the learned TPO / AO / Hon'ble DRP have erred in including Teks Tech Inspection Private Pvt. Ltd., E-Infochips Pvt Ltd, Infobeans Technologies Ltd, Larsen & Turbo Infotech Ltd, Tech Mahindra Business Services Ltd, Pagetrafic Web Tech Pvt Ltd and Infosys BPO Ltd in the final set of comparables for benchmarking the impugned international transaction, even though the said companies are functionally not comparable to the Appellant.

13. On the facts and in the circumstances of the case, the learned AO / TPO / Hon'ble DRP have erred in holding inter-company receivables arising from the impugned international transactions provided by the Appellant to its AEs as a separate international transaction under section 92B of the Act.

14. On the facts and in the circumstances of the case, the learned AO / TPO / Hon'ble DRP have erred in not appreciating that the impugned international transactions (from which the inter- company receivables have arisen) were benchmarked by undertaking working capital adjustment by the Appellant which takes into account the difference in credit terms of the Appellant vis-a-vis the comparable companies.

15. On the facts and in the circumstances of the case, the learned AO / TPO / Hon'ble DRP have erred in not considering the fact that the Appellant is a debt free company where the Appellant does not incur any finance charges and accordingly, there is no requirement to make such notional interest adjustment.

16. On the facts and in the circumstances of the case, the learned AO / TPO / Hon'ble DRP have erred in not considering the weighted average period of recovery to determine whether or not an adjustment ought to be made in respect of notional interest on outstanding AE receivables arising from provision of services.

Corporate tax grounds:

17. On the facts and in circumstances of the case, the learned AO has erred in levying consequential interest under Section 234B of the Act in the income tax computation as per final assessment order.

18. On the facts and in circumstances of the case, the learned AO has erred in considering an incorrect amount of book profits at INR 74,84,47,150 as against the correct book profit of INR 69,88,35,419 as reported in the return of income.

19. On the facts and in the circumstances of the case, the learned AO has erred in initiating penalty proceedings under section 270A of the Act.

Each of the above grounds of appeal is without prejudice to and independent of one another."

3. We have heard both the parties and perused the records. Both the parties have given written submissions which bring out the facts and respective arguments as under :-

"SUBMISSIONS BY THE LD. COUNSEL FOR THE ASSESSEE :

As submitted during the hearing, if the issues determined in grounds 6 and 15 are adjudicated in favour of the Appellant, no further transfer pricing adjustment would stand. Therefore, submissions are limited to these grounds.

1. Proportionate adjustment for third-party transactions [Ground No.6]

Facts

1.1 The Appellant, primarily a captive service provider to its Associated Enterprises ('AEs'), also provided certain services to third-party clients. The revenue earned by the Appellant was a minuscule portion of the total revenue generated (i.e. only 2% of revenue). Since the services provided by Appellant to third parties were minuscule, Appellant did not maintain any separate segmental for such revenue generated or cost incurred from third-party clients vis-a-vis its AEs.

Finding by the Lower authorities.

1.2 During the proceedings before the Hon'ble Dispute Resolution Panel ('DRP'), the Appellant submitted that the TPO had incorrectly calculated the arm's length price ('ALP') by excluding the third-party revenue without proportionately excluding the expenses related to the services provided to third party while determining the Appellant's operating margin. Consequently, the Appellant urged the computation of adjustments to provide R&I, IT support, and other back-office services to be deleted. The DRP directed the learned TPO to verify the computations and make necessary corrections, as required, after examining the details provided by the Appellant and allowing the Appellant an opportunity to be heard. (Please refer to the objection no. 6 of the DRP directions - Page no. 33 of the Appeal set)

1.3 However, the learned TPO did not give effect to the directions of the Hon'ble DRP while passing the order giving effect dated 29 December 2021 (page no. 18 of the Appeal set).

Submission of the Appellant

1.4 It is submitted that the transfer pricing provisions only apply to transactions entered with AEs and not with third parties (non-AEs). The learned TPO accepted that third-party revenue ought to be excluded while computing the Appellant's operating margin from the controlled transaction but ignored the costs relating to services provided to third parties. Given that the Appellant's revenue from third parties constituted only a minuscule portion, accounting for just 2% of the total revenue, it applied the principle of parity. The Appellant provided a calculation of the operating margin by excluding third-party income and expenses incurred (calculated on a proportionate basis) in rendering services to such third parties.

1.5 Below is a detailed computation of the Appellant's operating margin after excluding proportionate third-party expenses from the cost bases as submitted during the hearing.

Sr.No.	Particulars	Amount
A	Total revenue from operations	5,22,79,60,006
B	Less: Third party income	10,51,89,946
C	Transactions with AE [A-B]	5,12,27,70,060
D	% of third-party transaction to total revenue from operations [B/A]	2.01%
E	Total operating cost (including cost for third party services) as per revised transfer pricing order dated 1 September 2021	4,47,70,40,439
F	Less: Proportionate reduction in operating cost to the extent of third-party income [E*D]	9,00,80,957
G	Revised Operating cost base of the Appellant [E=F]	4,38,69,59,482

H	Revised Operating profit [C-G]	73,58,10,578
I	Revised Operating Profit / Operating cost [H/G]	16.77%
H	Arm's length range as per order giving effect to DRP directions	16.06% - 24.03%

1.6 As mentioned earlier, when determining the ALP, benchmarking should only be conducted on AE transactions, excluding third-party transactions. This principle was affirmed by the Bombay High Court in Hindustan Unilever Ltd [72 taxmann.com 325]. The Special Leave Petition has been dismissed by the Supreme Court [S.L.P No 28540/2018]

1.7 It is submitted that the courts have accepted the exclusion of income earned from third parties and the expenses incurred for services rendered to third parties on a proportionate basis. The Appellant placed reliance on the Delhi High Court ruling in the case of Keihin Panalfa Ltd, [2016] 70 taxmann.com 328 (Delhi) (Order enclosed as Exhibit 1), wherein the Hon'ble HC held as follows:

"12. The contention that the adjustment on account of expenses as determined by the TPO must be attributed entirely to the international transaction is bereft of any merits. During the Financial Year 2003-04 relating to the Assessment Year 2004-05, the Assessee had reported an operating income of Rs.72,24,22,000/-. The total expenses for the said period amounted to Rs. 68,00,88,000/-. Admittedly, the international transactions in question amounted to Rs.15,90,66,935/- which were only 23.38% in value of the total expenses. The TPO had determined the PLI (Operating Profit over Total Cost) of comparable cases at 8.29% against 6.22% as declared by the Assessee. Applying the PLI of comparable cases, the adjusted total expenses were computed at Rs.66,71,17,924/-, thus, indicating an adjustment of Rs.1,29,70,0761-. As is apparent from the above, the said adjustment related to entire expenses and not just the international transactions alone. Since the international transactions only constituted 23.38%, a TP Adjustment proportionate to that extent could be made in respect of such international transactions. Thus, only an adjustment of Rs. 30,33,5931- could be attributed to the international transactions in question. The same was accepted by the CIT (A) as well as the Tribunal. We do not find any infirmity with their decision." (emphasis supplied)

1.8 The Appellant also placed reliance on the Bombay High Court ruling in the case of Alstom Projects India Ltd, [2017] 88 taxmann.com 465 (Bombay) (Order enclosed as Exhibit 2), has held that:

"12. We are in respectful agreement with the view of the Delhi High Court in Keihin Panalfa Ltd (supra). One must not lose sight of the fact that the transfer pricing adjustment is done under Chapter X of the Act. The mandate therein is only to redetermine the consideration received or given to arrive at income arising from International Transactions with Associated Enterprises. This is particularly so as in respect of transaction with non-Associated Enterprises, Chapter X of the Act is not triggered to make adjustment to considerations received or paid unless they are Specified Domestic Transactions. The transactions with non-Associated Enterprises are presumed to be at the arm's length as there is no relationship likely to influence the price. If the contention of the Revenue is accepted, it would lead to artificial increase in profits of the transactions entered into with non-Associated Enterprises by applying the margin at entity level which is not the object of Chapter X of the Act. Absence of segmental accounting is not an insurmountable issue, as proportionate basis could be adopted as done by the Delhi High Court in Keihin Panalfa Ltd. (supra).

13. In the above view, no substantial question of law arises. There/ore, we do not entertain the present appeal." (emphasis supplied)

1.9 During the hearing before Your Honors, the learned Department Representative ('DR') did not provide any counterarguments to the above submission made by the Appellant's Counsel. Further, it accepted that the Learned TPO failed to follow the directions of the DRP and requested that the computation provided by the Appellant only be set aside to verify the calculation.

1.10 In view of the above, the revised operating margin of 16.77% is well within the arm's length range of 16.06% to 24.03% with a median of 20.05% (determined by the learned TPO in the order giving effect to DRP directions), the transfer pricing adjustment proposed in the case of the Appellant ought to be deleted.

1.11 Therefore, the Appellant prays that the Hon'ble Members consider the revised computations for determining the ALP and, accordingly, delete the transfer pricing adjustment for the provision of R&I, IT support, and other back office services.

1.12 If the above Ground No.6 is allowed, Ground Nos. 7 to 12 on comparables will become academic.

2. Notional Interest on outstanding receivables [Ground No. 15] Finding of the lower authorities

2.1 The learned TPO recharacterized the outstanding receivables as unsecured loans advanced by the Appellant to its AEs and imputed notional interest thereon at the rate of LIBOR plus 400 basis points on inter-company receivables exceeding a credit period of 60 days. Consequently, the learned TPO made an upward adjustment of imputed interest on outstanding inter-company receivables. In doing so, the learned TPO made a one sided adjustment on delayed receivables while at the same time

ignoring amounts from the AEs received in advance of 60 days.

2.2 The Hon'ble DRP rejected the Appellant's contentions and upheld the learned TPO's order on this transfer pricing adjustment, in which interest was charged on invoices (receivables) that were outstanding beyond the agreed credit period of 60 days. The weighted average of the interest receivables is actually only 29.72 days which is within the period of 60 days as taken the learned TPO. (page no. 1396 of the Factual Paperbook)

Submissions of the Appellant

2.3 Without prejudice to Appellant's arguments of (1) outstanding receivables not being an international transaction, (2) comparing of working capital adjusted margins of comparables subsuming the impact, if any, of outstanding receivables and there being no need for a separate adjustment and (3) weighted average period of realization of inter-company receivables should be considered in order to make a transfer pricing adjustment, if any, it is submitted that the Appellant is a debt free company.

2.4 It is not disputed that the Appellant is a debt-free company. This fact can be verified from its financials on page 267 of the paperbook. Furthermore, Schedule 5 deals with current liabilities (page 274 of the paperbook), confirming that the Appellant has no loans. Additionally, Schedule 16 deals with 'other expenses' (page 288 of the paperbook), showing that the Appellant did not incur any interest expenses. Hence, in the absence of interest outflow in the Appellant's books due to its debt-free status, any adjustment for notional interest on outstanding receivables is not warranted.

2.5 Reliance is also placed on decision of jurisdictional Hon'ble Tribunal ruling in the Appellant's own case for A Y 2014-15 (Case law no. 2 of the Legal paperbook) and A Y 2010-11 (Case law no. 3 of the Legal paperbook) wherein the jurisdictional Hon 'ble Tribunal held that in case of a debt free company, there is no requirement for making transfer pricing adjustment on account of the interest on outstanding receivables. The Hon'ble Tribunal after considering the learned DR's argument on the amendment in Section 92B held as under:-

"5.6. The learned DR, on the other hand, referred to Explanation (i)(c) of section 92B and submitted that transaction in dispute has been brought in ambit of International transaction by the Parliament of India w.ej01.04.2002 and, thus, there is no dispute as far as the impugned transaction is an International transaction. He further submitted that though advance has been received on many occasions but in case of few transaction delay in receipt of outstanding receivables is more than 60 days and thus the lower authorities has correctly made at adjustment on account of interest on outstanding receivables.

5.7 We have heard the rival submission of the parties and perused the relevant material on record. The Tribunal in the case of Pegasystems Worldwide India (P) Ltd. (supra) has held as in case of a debt free company, there is no requirement for making transfer pricing adjustment on account of the interest on outstanding receivables. The relevant finding of the Tribunal is reproduced as under:

"17.2 Ld. Counsel submitted that the issue of charging of interest beyond the period was not adjudicated and DRP reduced the rate of interest from 12% LIBOR plus 2.5 points. It was submitted that Assessee was a debt free company, AE takes care of funding, no interest was charged and there is no liability of interest and therefore, notional interest income cannot be brought to tax. Assessee relied on the principles laid down by Co-ordinate Bench at Mumbai in the case of Lintas India Pvt. Ltd., in ITA No. 2024/Mum/2007 dt. 09-11-2012 and also Mastek Ltd ; v. ACIT in ITA No. 3120/Ahd/2010 then referring to the provisions of the Act the explanation brought by amendment in 2012 Finance Act. It was submitted that even though retrospective, it does not cover Assessee's transaction as the word 'capital financing' used there particularly refers to loans or advances given for capital financing, whereas in Assessee's case, these are outstanding services rendered but not capital financing. The words are to be interpreted invoking the principles ejusdem generis and so the outstanding receivables cannot be equated to capital financing as amended by the provisions of the Act. It was further submitted that working capital adjustments are being made while analyzing the operational performance of the companies, therefore, outstanding amount gets adjusted in working capital adjustments and another separate addition is not required under the TP provisions. Thus, it was contended that the outstanding amounts are not to be considered for adjustment.

17.3 We have considered the issue and examined the rival contentions. In the case of Evonik Degussa India P. Ltd., in ITA No. 76531Mum12011, it was already held the TP adjustment cannot be made on hypothetical and notional basis, until and unless there is some material on record that there has been under charging of real income. Thus on the facts and circumstances of the case, we are of the opinion that addition on account of notional interest relating to alleged delayed payment in collection of receivables from the AEs is uncalled for on the facts of the present case. Even though DRP tried to distinguish the above decision on facts, as seen from the facts in both the cases, we are of the opinion that the above decision will equally apply to Assessee's case. Assessee has outstanding service charges receivables and as seen from the order of TPO, the outstanding is only from 31-07-2009. There seems to be no such delay in earlier months. Assessee has no interest liability at all so notional interest cannot be brought to tax under the provisions of TP. As rightly pointed out by the Ld. Counsel, the outstanding receivables on account of services cannot be equated with capital financing as provided for in the Explanation by the amendment by Finance Act, 2012 retrospectively. Even otherwise, as rightly held by the Logix Micro Systems Ltd v. ACIT [42 SOT 525] (supra), TPO should have allowed some

interest free period for receiving the outstanding service charges. While acknowledging the order of the ITAT, TPO did not even bother to exclude the reasonable period and levied interest not only from the date of invoice to the date of realization during the year but also for the period beyond 31-03-2010 in later year. We were informed that no such addition was made in the later year on Assessee's receivables. We are of the opinion that both on the facts of the case and principles of law, there is no need for bringing to tax the notional interest on the outstanding receivables. Accordingly, we allow the grounds 7 & 8 of Assessee and direct AOITPO to delete the said addition made. "

5.8 We have verified the balance sheet of the assessee available on page 134 of the paper book along with notes on page 143 of the paper book and we find that the assessee has not borrowed any fund for its business activity and, thus, it being a debt free company, the ratio of the decision of the Tribunal in the case of Pegasystems Worldwide India (P) Ltd. (supra) is squarely applicable on the facts of the case. Accordingly, we delete the transfer pricing adjustment made on account of interest on receivables. The grounds No. 13 to 15 of the appeal are accordingly allowed. "

2.6 Further, the Appellant relied on the Hon'ble Supreme Court in the case of Bechtel India Pvt. Ltd (SLA (C) No. 4956/2017) (Case law no. 14 of the Legal paperbook) wherein the Apex court dismissed the SLP filed by the Revenue Authorities against the order passed by the Delhi High Court (Case law no. 15 of the Legal paperbook), The Hon'ble Delhi High Court held that the Assessee (Bechtel) is a debt-free company; thus, the question of receiving any interest receivables does not arise. As stated above, the Appellant is also a debt-free company.

2.7 Additionally, without prejudice to Appellant's contention of debt-free entity, the Appellant also relied on the following jurisdictional Tribunal rulings, wherein it is held that the transfer pricing adjustment raised on account of notional interest on outstanding receivables has to be deleted where the Appellant has already factored the impact of receivables by undertaking working capital adjusted margins of comparables for comparability purposes and no further adjustment on basis of outstanding receivables should be made.

- TCI -GO Vacation India (P) Ltd vs ACIT [2024] 159 taxmann.com 710 (Delhi-Trib.) (Case law no. 18 of the Legal paperbook)
- Kronos Solutions India (P) Ltd vs DCIT [2023] 149 taxmann.com 194 (Delhi-Trib.) (Case law no. 19 of the Legal paperbook)
- Alcatel Lucent India Ltd vs ACIT [2023] 149 taxmann.com 150 (Delhi-Trib.) (Case law no. 20 of the Legal paperbook)
- DCIT vs IQOR India Services (P) Ltd [2022] 140 taxmann.com 629 (Delhi-Trib.) (Case law no. 21 of the Legal paperbook)

2.8 The learned DR relied on the retrospective applicability of the amendment to explanation (i)(c) of Section 92B introduced by the Finance Act, 2012, citing the following judicial precedents to support his position:

- Apache Footwear India (p.) Ltd. vs ACIT [2023] 148 taxmann.com 371 [Hyd-Trib.]

In this ruling, the Hon'ble Tribunal confirmed the retrospective application of the amendment that introduced the Explanation to Section 92B of the Act by the Finance Act, 2012. It was determined that the amendment applies to delays in the realization of trade debts resulting from sales of goods or services in the ordinary course of business.

- IOMEDIA India Pvt. Ltd vs ACIT (ITA No.995IDeII2021)

The above ruling considers that the entity involved has opted for the Safe Harbour Regime for a period of 5 years. Further, it also considers the definition of "Eligible International Transaction" as per Rule 10TC, which pertains to the applicability of Safe Harbour Rules only. Further, the order also addressed the adoption of interest rates.

2.9 Additionally, the learned DR mentioned that the Hon'ble Delhi High Court, in the Appellant's own case for AY 2014-15 [2021] 131 taxmann.com 253 (Delhi), left the question of law open regarding whether transfer pricing adjustment on 'delayed receivables' could apply to a debt-free company. .

Rejoinder to DR's arguments:

2.10 As a counterargument, the Appellant Counsel submitted the following arguments:

- The above rulings cited by the learned DR do not deal with the issues in Appellant's case. The Appellant's case is squarely covered by Hon'ble SC ruling in the case of Bechtel India Pvt. Ltd (supra) as well as in Appellant's own cases for AY 2014-15 and AY 2010-11.
- Since Hon'ble Delhi High Court, in the Appellant's own case for AY 2014-15 [supra] left the question of law open regarding whether transfer pricing adjustment on 'delayed receivables' could apply to a debt-free company, the decision of the Delhi Tribunal in Appellant's own cases for A Y 2014-15 and A Y 2010-11 will still apply.
- Without prejudice to our above, the weighted average period of realization of inter-company receivables works out to 29.72 days (page no. 1396 of the Factual Paperbook). Given that the weighted average period is within the credit period allowed by the learned TPO i.e., 60 days, it is submitted that no transfer pricing adjustment is warranted.
- Lastly, if the outstanding receivables are benchmarked by undertaking working capital adjustment and then no separate adjustment are required to be undertaken

for outstanding receivables. Reliance in this regard was placed on the Hon'ble Delhi High Court ruling in the case of Kusum Health Care Private Limited [2018] 99 taxmann.com 431 (Delhi) (Case law no. 17 of the Legal paperbook) wherein the High Court has upheld this principle.

Conclusion

2.11 In view of the above contentions, it is respectfully submitted that, in light of the apex court's decision in the case of Bechtel India Pvt. Ltd. (supra), as well as precedents set in the Appellant's own cases at both the High Court and Tribunal levels, the transfer pricing adjustment related to notional interest ought to be deleted."

"SUBMISSIONS BY THE LD. DR FOR THE REVENUE :

Kindly refer to the above. The case was heard on 24.04.2024 and during the course of hearing, both the sides argued the matter. Further, both the sides were given the liberty to file written submissions, and in line with the directions, the written submissions are filed with the request to take it on record. It is also brought to the notice of the Hon'ble Bench that the submission filed by the assessee's counsel has been received in the office of the undersigned on 01.05.2024.

Issue no. 1: Adjudication of ground of appeal no. 6 before DRP

During the course of hearing, the Id. Counsel of the assessee has referred to the GoA no.6, taken before the DRP and stated that the AO has not followed the directions of the Ld. DRP. For ready reference, the GoA, No.6 and the DRP directions are reproduced below for ready reference.

6. Ground of objection 6: The learned TPO has passed an order under section 92CA (3) of the Act which suffers from computational errors in determination of ALP, and consequently erred in computing the amount of adjustment to be made in respect of the subject transaction. (Kindly refer Annexure7)

Directions by DRP:

The TPO is directed to verify the computation and to do necessary corrections where ever required after affording an opportunity of being heard to the assessee and examination the details filed by the assessee.

The Ld. Counsel stated that the TP I AO has not given effect to the directions of the DRP. Further the Ld counsel also submitted before the Hon'ble Bench calculations/computations with regard to the above noted ground which are enclosed as annexure (A).

From the prima facie perusal of the order giving effect (OGE) of the TP / AO, it is seen that, on GoA no. 6, the TPO, OGE is silent about the directions by DRP.

Thus on the Hon'ble Bench. Directions, it is submitted that the GoA 6. may please be remitted back to the TPO/ AO for giving effect. Also, the calculations/computations submitted by the Ld counsel also may be remitted to AO for fresh examination with regard to DRP directions with no fetters attached to the TPO. Thus in other words, only for limited purpose of the deciding GoA 6, the matter may be referred back to TPO with no conditions attached.

Issue No.2: Notional interest on receivables.

A. On this issue, the Ld. Counsel of the assessee has taken the following grounds.

(1) Assessee debt free company, accordingly there is no question of receiving any interest on receivables,

(2) The Ld. Counsel also relied on the following judgement/orders.

(i) Hon'ble Bench ruling as the case of Bechtal India Pvt. Ltd.

(ii) Hon'ble ITAT decision as assessee own case for A.Y. 2014-15.

(iii) Hon'ble Delhi High Court judgment in the case of Kusum Healthcare Pvt. Ltd. on the point that when working capital adjustment has been made then no separate adjustment are required to be undertaken for outstanding receivables.

B. Submission of the department:-

(1) After the amendment brought about in explanation to section 92B by Finance Act 2012 inserted with retrospective effect from 01.04.2002, it is a settled law that interest on receivables is a separate international transactions and it has been held in number of judgements/orders by various courts including Hon'ble Delhi ITAT also and for the sake of brevity, the same are not reproduced.

(2) The Ld. Counsel has relied on the order of the Hon'ble Delhi High Court in the case of Bechtel India Pvt. Ltd. in ITA No. 379/2016 which was passed in appeal by the Pro CIT-2, New Delhi against the order passed by Hon'ble ITAT in ITA No. 1478/Del/2015. First of all it is humbly submitted that the Hon'ble Tribunal in that case did not consider the amendment in section 92B by Finance Act 2012 inserted with retrospective effect from 01.04.2002.

(3) In fact, in the subsequent case of Bechtel India Pvt. Ltd. vs. ACIT 4(2), 85 taxmann.com 121 (Delhi Tribunal 2017) for A.Y.2009-10, the Hon'ble Delhi Tribunal has after considering the amendment to section 92B with regard to notional interest on receivables has a clearly considered this issue i.e. whether interest could be attributable to debt free company or not and clearly held that interest is required to be computed separately for late realization of receivables and it has nothing to do with the debt free funds of the company. Being very pertinent, the relevant extract of the Hon'ble Tribunal order is reproduced below:-

19. In the case of Ameriprise India (P.) Ltd. (supra), it has been observed that the working capital adjustment is in respect of international transaction of rendering services to the AE. Interest for credit period allowed as per the agreement is given in the price charged for rendering of services. Whereas the non-realisation of invoice value beyond the stipulated period is a separate international transaction whose ALP is required to be determined. Granting of working capital adjustment is confined to the international transaction of rendering of services, whose ALP is separately determinable. On the other hand, the international transaction of interest receivable from its AEs for late realization of invoices beyond such stipulated period is a separate international transaction. Allowing working capital adjustment in the international transaction of rendering of services can have no impact on the determination of ALP of the international transaction of interest on receivables from AEs beyond the stipulated period allowed as per agreement. In the case of Mckinsey Knowledge Centre (P.) Ltd. (supra), again, the Tribunal reiterated this reasoning and, inter alia, observed that:

" In our considered opinion, whereas, the international transaction of purchase/sale of goods from/to AE contemplates comparison of the price charged/paid for such goods by impliedly including the interest for the period allowed for realization of invoices as per the terms of the agreement, the international transaction of charging interest on late recovery of trade receivable covers the period which starts with the termination of the period of credit allowed under the agreement, which is subject matter of the international transaction of purchase/sale of goods. "

20. The Tribunal also explained that if an invoice is raised during the year and the proceeds are realized within the year, but, beyond the stipulated period of agreement, then, the same will not come within the working capital adjustment because working capital adjustment is made with reference to the opening and closing balances as on 1st April and 31st March. Therefore, respectfully following the decision of the Tribunal noted above, we reject the assessee's contention that the interest on delayed payment of receivables get subsumed in the working capital adjustment allowed to the assessee. The Id. counsel has also advanced an argument that since it was debt free fund company, which finding is not disputed, therefore, no interest could be attributable on the late realization of receivables. In our opinion, this plea is to be rejected at the threshold because, as noted earlier, interest on delayed realization of receivables is a separate international transaction and, therefore, requires separate benchmarking. It has nothing to do with the operations of the assessee company being with the debt free funds only.

It is also submitted that in the above noted case of Bechtel India Pvt. Ltd, the Hon'ble Tribunal has arrived at the decision after analyzing the decision of the Hon'ble ITAT in the case of Kusurn Healthcare Pvt. Ltd. Vs (ITA 6814IDeV2014), ITAT, Delhi and also the decisions of the Hon'ble ITAT in the case of Ameriprise India Pvt. Ltd.(2015) 62 Taxmann.com 237 (Delhi Tribunal) and Mckinsey Knowledge Centre Pvt.

Ltd. vs DCIT (2017) 77 taxmann.com 164 (Delhi Tribunal).

(4) Thus it is respectfully submitted that the decision cited by the Ld. Counsel of Bechtel India is not applicable in the case as in that case the amendment to section 92B has not been considered. Further the decision of Tribunal in Bechtel India is of 21 st December 2015 and the decision of Hon'ble High Court is also of 21st July 2016. However, the subsequent decision cited supra by department is of 16th may 2017 published in 85taxmann.com 121 (2017) and the issue of notional interest on receivables has been decided by Tribunal after considering everal decisions of Tribunals/ High Courts.

(5) Further the issue of interest on receivables on debt free company and the application of decision of Bechtel India (cited by assessee) has also been discussed by various Tribunals and in that context, the Reliance is also placed on the recent decision of the Hon'ble IT AT Hyderabad in the case of Apache Footwear India Pvt. Ltd. v. ACIT (2023) 148 taxmann.com 371 (Hyderabad-Trib.), (copy of the order submitted during hearing) wherein the Hon'ble Tribunal after considering the various decisions including the Hon'ble Delhi High Court decision in the case of Kusum Healthcare Pvt. Ltd. and also Bechtel India Pvt. Ltd. have come to conclusion that outstanding receivables by the assessee from AEs are required to be separately benchmarked and interest should be charged on the delayed period @ 6% on the receivables. Being very pertinent the relevant extract of the Hon'ble Tribunal order is reproduced below for ready reference:-

11. The above-said issue of delay in receivables is no more res integra. The co-ordinate Bench in the cases relied upon by the Revenue examined the issue and thereafter directed the TPO/Assessing Officer 10 apply rate of interest of 6% on outstanding receivable at the year end. The assessee had relied upon various judgements. All these judgments have been considered by the coordinate Bench and thereafter, the above said direction was issued by the Bench.

12. The reliance of the assessee on the decision of Hon'ble Delhi High Court in the case of Boeing India (P.) Ltd. (supra), is of no use to the assessee as in the said judgement, the Hon'ble Delhi High Court in Para 15 had mentioned that the issue receivable is essentially a question of fact. As mentioned hereinabove, in the present case, there is a delay in receiving the outstanding of Rs. 62,38,68,941/- in respect of 519 invoices as mentioned hereinabove and there is no explanation given by the assessee for such a delay in receiving the amount. The very purpose of benchmarking the transaction is to ascertain whether assessee, who is similarly situated, would render the same kind of services at the same or similar price to a third party or not. If we examine the issue in the above-said context, it would be clear that the assessee would charge bank interest or any other interest with a view to compensate itself on account of delay in making the payment. Hence. we do not find any error in the same.

13. The reliance of the assessee in the case of Betchel India (P.) Ltd. (supra) is also not correct as A.Y. in that case was 2010-11. By the Finance Act, 2012, the Explanation was inserted in Sec.92B of the Act and by virtue of which "payment or deferred payment or receivable or any other debt arising during the course of business" has been considered to be an international transaction which is required to be benchmarked. Following the above said Explanation, the co-ordinate Bench for the subsequent assessment years vide order dt.16-5-2017 in the case of Bechtel India (P.) Ltd. v. Asstt. CIT [2017] 85 taxmann.com 121 (Delhi - Trib.) had decided the issue against the assessee. In view of the above, the decision relied upon by the assessee is of no help to assessee.

14. So far as the argument of the assessee that the assessee is a debt free company and therefore, no borrowed fund was used for making supplies to its A.E. and therefore, is not liable to be compensated for the delay in receiving the receivable is concerned, the same in our view, suffers from inherent flaw as in the T.P. analysis, the TPO is required to examine whether the assessee had supplied the product/services to its A.E. at Arm's Length Price or not? If by providing the services/goods at a discounted rate or permitting the assessee to receive the payment after a long period of 60 days or 90 days, then it will amount to permitting the A.E. to use the working capital of the assessee for the purposes of earning the profit. No prudent business man would venture into this kind of activity and permit a third party to use the working capital of the assessee and earn profit thereon. In the present case, though the assessee was required to maintain the T.P. Study and file the same before the TPO to show that the assessee's transactions with its A.E. were at Arms Length however, nothing has been brought to our notice that the assessee has brought any comparable instance. In these circumstances, the TPO had applied the banking rate as applicable to short term loans. In our view, the same is required to be corrected and instead thereof, ALP is to be computed by adding notional interest @ 6% on the receivable. Considering the totality of facts and circumstances, in view of the decisions cited supra and in view of foregoing discussion, we dismiss the appeal of the assessee. Accordingly, the appeal of the assessee is dismissed.

Similar issue of interest on delayed receivables in the case of debt free companies has also been decided by several other tribunals and some of the decisions are quoted below:

(6) Albany Molecular Research Hyderabad Research Center (P.) Ltd.v. Deputy Commissioner of Income-tax [2021] 126 taxmann.com 289 (Hyderabad - Trib.)

The relevant extract of the Hon'ble Tribunal decision is reproduced below:-

5.5 For the A.Yrs 2013-14 and 2014-15, there is no dispute that assessee had realised its receivable from its AEs after abnormal delay beyond the agreed credit period. This, in our considered opinion, tantamount to indirect funding made by the

assessee to its AEs by allowing the AE to utilize funds of the assessee as per its whims and fancies. Merely because the assessee is a debt free company except ECB loan, it cannot allow its funds to be utilized by its AE for an indefinite period of time beyond the agreed credit period. We find that clause C of Explanation to section 92B of the Act has been introduced in the statute by the Finance Act 2012.

(7) Reliance was also placed on the recent decision of Hon'ble Tribunal in the case of Iomedia India Pvt. Ltd. vs. ACIT, Circel-12(3), ITA no. 99S/DelJ2021 for A.Y. 2016-17 (copy of the order submitted during hearing), to emphasis on the remarks in the decision by Hon'ble Tribunal that interest is now charged on outstanding receivables by various tribunals across the country. For ready reference, operative part of the decision is reproduced below:-

6. This definition of "Eligible International Transaction" in Rule 1 OTC is for the purpose of applicability of Safe Harbour Rules only. Hence the international transaction of interest on outstanding receivables does not figure in any of the clauses (i) to (x) in the aforesaid list. Hence the assessee would not be able to get the benefit of ALP adjustment getting subsumed in the mark up of 25% offered under Safe Harbour Rules. However, in consistent with various Tribunal decisions across the country, we hold that adoption of interest calculated on outstanding receivables at the rate 0/ LIBOR + 200 basis points should be adopted as against LIBOR + 400 basis points. This in our considered opinion, would meet the ends of justice for both the sides. Accordingly, the grounds raised by the assessee are partly allowed.

C. The assessee has also relied on the decision of Hon 'ble Delhi High Court in the case of Kusum Healthcare. From the perusal of the records, it is seen that though the TPO has mentioned the invoices raised during the year but ha evident from the DRP directions, it is clearly evident that this issue of interest on delayed receivables is recurring issue and additions have been made on notional interest in earlier years also in the case of assessee and accordingly, it clearly reflects a pattern which is spread over several years and it fulfils the condition laid down in Kusum Healthcare decision. Also, it is respectfully submitted that the decision of Kusum Healthcare has been distinguished by several Tribunals across the country and it has been held consistently that working capital adjustment does not subsume the invoices raised and realised during the year as adjustment are made only at the end of the year based on the opening and closing figure. This has been discussed in several cases including

(a) Bechtel India Pvt. Ltd. vs. ACIT 4(2), 85 taxmann.com 121 (Delhi Tribunal 2017,

(b) Albany Molecular Research Hyderabad Research Center (P.) Ltd.v. Deputy Commissioner of Income-tax [2021] 126 taxmann.com 289 (Hyderabad - Trib.),

(c) Apache Footwear India Pvt. Ltd. v. ACIT (2023) 148 taxmann.com 371 (Hyderabad-Trib etc.

(d) Swiss Re Global Business Solutions India (P.) Ltd. v. Addl./Jt./Dy./Assistant Commissioner of Income-tax/Income-tax Officer, FAC) Delhi [2022] 137 taxmann.com 417 (Bangalore - Trib.)

(e) Maxim Integrated Products India Sales Pvt. Ltd. v. DCIT (2022) 140 taxmann.com 578 (Bangalore- Tribe.)

(f) Teradata India Pvt Ltd. vs. DCIT, Circle-3(1), Gurugram in ITA No. 1248 & 2337/Dell2022 for A.y. 2017-18 & 2018-19.

D. The assessee has also relied on the decision of Hon 'ble Delhi IT A T in the case of Aicatel Lucent India Ltd. vs. ACIT (2023) 149 taxmann.com 150 (Delhi Tribunal). In this connection, it is respectfully submitted that in the subsequent assessment year i.e. for A.Y. 2018-19, the Hon'ble Delhi ITAT vide its order in ITA 0 1447/Del/2022 dated 20.03.2024 has after discussing its own order for A.Y. 2017-18 has taken a contrary view and has restored the matter to the AO. Being pertinent, the operative part of the decision is reproduced below:-

39. Though we are conscious of the fact that in assessment year 2017-18, the co-ordinate Bench has decided the issue in favour of the assessee, however, we are of the view that in the impugned assessment year, the issue has not been examined in the context of principles laid down by the Hon 'ble jurisdictional High Court in case of Kusum Healthcare Pvt. Ltd. (supra). However, in all fairness, it must be said that there is delay in trade payable to AEs. Therefore, some benefit on account of delayed payables must have percolated to the assessee. Thus, it needs to be examined whether and to what extent the benefit received by the assessee on account of trade payables can be set off against the purported benefit given to the AEs on account of trade receivables.

40. In view of the aforesaid, we are inclined to restore the issue to the Assessing Officer for de novo adjudication keeping in view the observations made by us (supra) and applying the ratio laid down by the Hon 'ble jurisdictional High Court in case of Kusum Healthcare Pvt. Ltd. The assessee must be provided reasonable opportunity of being heard before deciding the issue. Ground is allowed for statistical purposes.

Thus it is respectfully submitted that in view of the above discussion, the adjustment made by the TPO/ AO on account of notional interest on receivables and duly confirmed by the DRP may please be upheld and assessee's application on this issue may be dismissed."

4. Upon careful consideration, we find that assessee in this case is only pressing for adjudication of Grounds No.6 & 15 on which both parties have given their submissions.

5. As regards Ground No.6 i.e. proportionate adjustment for third-party transactions is concerned, we find that it is undisputed that AO/TPO has not given effect to the

directions of the DRP. In such situation, the request of the Id. DR for the Revenue that the matter may be remitted to the AO/TPO cannot be accepted and he cannot be given a second inning. In our considered opinion, the submission of the Id. Counsel for the assessee has cogency and we do not find any infirmity in the same. However, the computational aspect can be checked by the AO only. Hence, for computational purposes, we remit the issue to the file of AO who should check the computational aspect.

6. As regards Ground No.15 i.e. notional interest on outstanding receivables is concerned, we find that there are decisions on both sides of the Tribunal. However, the assessee deserves to succeed on account of the fact that in assessee's own case for AY 2014-15 & 2010-11, the issue is decided in favour of the assessee and Hon'ble Delhi High Court in AY 2014-15 left the question open regarding whether transfer pricing adjustment on delayed receivables could apply to a debt free company. Hence, the submission of the Id. Counsel for the assessee that the decision of Hon'ble Delhi High Court in assessee's own case for AY 2014-15 and Tribunal decision in assessee's own case for AY 2010-11 still applies. We find ourselves in agreement with the submissions of the assessee, since in assessee's own case, the issue is decided in favour of the assessee. Following the principles of stare decisis we set aside the orders of the authorities below on this issue and addition is deleted.

7. In the result, assessee's appeal is partly allowed for statistical purposes.