

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I-2 : NEW DELHI

BEFORE SHRI R.S. SYAL, AM & SHRI KULDIP SINGH, JM

ITA No.6794/Del/2015
Assessment Year : 2011-12

Gruner India Pvt. Ltd.,
C/o SS Kothari Mehta & Co., CAs,
146, Tribhuvan Complex, Ishwar
Nagar, Mathura Road,
New Delhi.
PAN: AADCG2938H

Vs. DCIT,
Circle-10(2),
New Delhi.

(Appellant)

(Respondent)

Assessee By : Shri Alok Gupta, FCA,
Shri Pancham Sethi, FCA &
Shri Arprit Mittal, CA
Department By : Shri A.M. Govil, CIT, DR

Date of Hearing : 26.04.2016
Date of Pronouncement : 29.04.2016

ORDER

PER R.S. SYAL, AM:

This appeal filed by the assessee is directed against the final assessment order passed by the Assessing Officer (AO) u/s 143(3) read

with section 144C of the Income-tax Act, 1961 (hereinafter also called 'the Act') on 30.11.2015 in relation to the assessment year 2011-12.

2. The first issue raised in this appeal is against the addition on account of transfer pricing adjustment amounting to Rs.7,78,95,037/-.

3. Briefly stated, the facts of the case are that the assessee, an Indian subsidiary of Gruner AG, Germany, is engaged in manufacture of Latching Relays, Solenoids and Actuators. It is meeting its business requirements of raw material, spares and other consumables by making purchases from its associated enterprise (AE). The assessee filed its return of income accompanied by Form No. 3CEB declaring eight international transactions. On a reference made by the AO for determining the arm's length price (ALP) of the reported international transactions, the Transfer Pricing Officer (TPO) observed that all the eight international transactions were shown at ALP in an aggregated manner by following the transactional net margin method (TNMM) as the most appropriate method on entity level. The TPO observed that the assessee also exports some of the finished goods to this AE in Germany

while majority of sales were made to unrelated parties. In the backdrop of such facts, it was opined that the international transactions of payment of - 'Royalty' amounting to Rs.3,24,20,870 and 'Fees for technical services' amounting to Rs.4,72,12,010 - could not be aggregated with other international transactions for determining their ALP. He, therefore, segregated these two international transactions from the remaining transactions, all of which were shown at ALP under the combined TNMM approach and accordingly proceeded to determine the ALP of such two transactions under the Comparable uncontrolled price (CUP) method. The ALP of these two transactions was determined by the TPO by choosing two companies as comparable, namely, Havels India Ltd. and Autometers Alliance Ltd., out of the assessee's list of comparables given under the TNMM. He found out the ratio of expenses of Royalty and Technical know-how fees to Total sales of these two companies at 1.08% and 0.03%, respectively, with the average rate of 0.56%. The TPO worked out similar ratio in case of the assessee at 16.26%. Thus, it was held that the transactions of payment of these two expenses were not at arm's length price. By applying the

benchmark of 0.56%, the TPO recommended transfer pricing adjustment amounting to Rs.7,78,95,037. The assessee remained unsuccessful before the Dispute Resolution Panel (DRP). That is how, an addition of Rs.7.78 crore came to be made in the final assessment order, against which the assessee has come up in appeal before us.

4. We have heard the rival submissions and perused the relevant material on record. It is manifest from the above discussion that the assessee demonstrated all the eight international transactions at ALP on a combined basis under the TNMM. The TPO has disputed only the transactions of payment of Royalty and Fees for technical services, whose ALP has been determined under the CUP method, thereby impliedly accepting the remaining six international transactions at ALP under the TNMM.

I. Whether segregation of the two transactions is justified?

5.1. The first issue raised by the ld. AR is against the separate determination of ALP of the international transactions of payment of royalty and fees for technical services. He urged that these two

international transactions ought to have been considered along with other international transactions in an aggregated manner under the TNMM as was done by the assessee. Relying on certain Tribunal orders, it was argued that the authorities below were not justified in segregating these two transactions for determining their ALP under CUP method. This contention was strongly opposed by the Id. DR who submitted that there was no relation between payment of royalty and fees for technical services and other international transactions of import of raw materials, export of finished goods, lease of machine/tools, purchase of plant and machinery, dividend paid and testing and celebration fees received. In his opinion, these two transactions were required to be separately benchmarked as has been done by the TPO.

5.2. The key question which, therefore, falls for our consideration is whether the segregation of these two transactions of payment of Royalty and Fees for technical services from the other international transactions, is justified?

5.3. The Hon'ble jurisdictional High Court in *Sony Ericson Mobile Communication India Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del)*, has dealt with the circumstances in which aggregation can be done in the context of AMP expenses. The principles laid down in this case are universally applicable and are not confined to the peculiar facts of that case alone. It has been held that 'transaction includes the number of closely linked transactions.' Dealing with AMP expenses, it held vide paras 80 and 81 that inter-connected international transactions can be aggregated and section 92(3) does not prohibit the set off. Further, in paras 91, 121 and others, it held that the ALP of AMP expenses should be determined preferably in a bundled manner with the distribution activity. Vide paras 194 (i), (ii), (viii) and others it held that for determining the ALP of these transactions in a bundled manner, suitable comparables having undertaken similar activities of distribution of the products and also incurring of AMP expenses should be chosen. It still further held in paras 100, 121, and 194 (iii), (vi) and (xi) that if adjustment is not possible or comparables are not available, then, TNMM on entity level should not be applied and the international

transaction of AMP should be viewed in a debundled or a segregated manner. In separately determining the ALP of the AMP expenses, the Hon'ble High Court held that the TPO is free to choose any other suitable method and in making TP adjustment on account of AMP expenses, appropriate set off/purchase price adjustment should be allowed from the other transaction of distribution of the products. The Hon'ble High Court also held in page 92 of its judgment that 'it would not be proper and appropriate to apply the TNMM method in case the Indian assessed is engaged in manufacturing activities and distribution and marketing of imported and manufactured products as interconnected transactions. *Import of raw material for manufacture would possibly be an independent transaction viz., marketing and distribution activities or functions.*' A careful perusal of the judgment of the Hon'ble jurisdictional High Court divulges that though a number of closely linked transactions can be aggregated, but, the transactions which are not closely related to each other would require determination in a segregated manner.

5.4. The Hon'ble Punjab & Haryana High Court in *Knorr Bremse India P. Ltd. vs. ACIT (2016) 380 ITR 307 (P&H)*, has held that in case of a package deal where each item is not separately valued, but, all are given a composite price, this should be considered as one international transaction and processed accordingly for the transfer pricing purpose. It further held that where a number of transactions are priced differently, but, on the understanding that the pricing was dependent upon the assessee accepting all of them together (i.e., either take all or leave all), then also, the separate transactions be considered as one international transaction. In such circumstance, burden has been placed on the assessee to prove that although each transaction is priced separately, but, they were provided under one common understanding. It further laid down emphatically that : *` the contention that as the services and goods are utilized by the assessee for the manufacture of the final product they must be aggregated and considered to be a single transaction and the value thereof ought to be computed by the TNMM is not acceptable.* Merely because the purchase of each item and the acceptance of each service is a component leading to the manufacture/production of the

final product sold or service provided by the assessee, it does not follow that they are not independent transactions for the sale of goods or provision of services. The end product requires several inputs. The inputs may be acquired as part of a single composite transaction or by way of several independent transactions. In the latter case, the sale of certain goods and/or the provision of certain services from out of the total goods purchased or services availed of by an assessee together can form part of a separate independent international transaction. In such an event, the AO/TPO must value this group of sale or purchase of goods and/or provision of services as separate transactions.'

5.5. When we consider the *ratio decidendi* of the above referred two judgments, the picture which emerges is that although closely related transactions can be aggregated, but, unrelated transactions cannot be clubbed for determining ALP on a combined basis. The relevant criteria to determine whether certain transactions be considered as one international transaction or not is to see if such transactions were entered into a package deal or were intended to be simultaneously accepted or

these are so closely linked that one cannot at all stand without the other. If the above criteria is satisfied, then, two or more related transactions can be considered as one international transaction for the purpose of determining their ALP. On the contrary, if the above criteria is not satisfied, then, these transactions are to be viewed separate from each other and, accordingly, their ALP should also be determined in a distinct manner as if these are two separate independent transactions. The mere fact that both the intra-group services and goods are utilized by the assessee for the manufacture of the final product, cannot be treated decisive to consider such separate transactions as a single transaction.

5.7. Adverting to the facts of the instant case, we find that that the assessee entered into an Agreement with its AE, namely, Gruner AG, a German company, on 6th of March, 2009, a copy of which has been placed on pages 167 onwards of the paper book. Under this Agreement, the assessee was granted a licence permitting use of technology and technical know-how in the field of electro mechanical components and also the brand name of its foreign AE. In lieu of such use of technical

know-how and brand name, the assessee became liable to pay a licence fees and royalty as stated in Schedule II to this Agreement. This Schedule provides for payment of royalty and fees for technical services each @ 8% calculated on the basis of the net ex-factory sale price of the product, exclusive of excise duty minus the cost of the standard bought out components and the landed cost of imported components, irrespective of the source of procurement, including ocean freight, insurance, custom duties, etc. Apart from this Agreement, the assessee also entered into another Agreement dated 25.6.2009 with Gruner AG, Germany, for availing certain Management services. A copy of such Agreement is available on page 107 onwards of the paper book. Under this Agreement, the assessee agreed to pay at the hourly rates. It is the payment pursuant to the Agreement dated 25.6.2009 and 8% fees for technical services under the Agreement dated 6.3.2009, that the assessee paid total fees for technical services at Rs.4.72 crore. Royalty payment @ 8% made to Gruner AG, under the Agreement dated 6.3.2009, stands at Rs.3.24 crore. Thus it is palpable that the assessee paid royalty and fees for technical services to its AE pursuant to the Agreements which

are solely for this purpose. There is no reference or mention whatsoever of any other international transactions undertaken by the assessee during the year in these Agreements. It is further found that the international transactions of import of raw material and export of finished goods along with lease of machine/tools and purchase of plant and machinery, etc., have no link with payment of royalty and payment of fees for technical services. The two international transactions of payment of royalty and fees for technical services are altogether independent from the international transactions of import of raw materials, etc. The Id. AR vehemently harped on the fact that royalty and fees for technical services was paid by the assessee on the basis of import of raw material and, hence, these transactions should be considered along with the other international transactions including import of raw materials, spares and consumables. We are afraid that this contention is not correct. We have discussed hereinabove that the Agreement dated 6.3.2009 provides for payment of royalty and fees for technical services: 'calculated on the basis of the net ex-factory sale price of the product, exclusive of excise duty minus the cost of the standard bought out components and the

landed cost of imported components, irrespective of the source of procurement, including ocean freight, insurance, custom duties, etc.’ Thus, it is manifest that royalty and fees for technical services is payable by the assessee on sale price net of excise duty and import of raw material, etc. To put it simply, such payment of royalty and fees for technical services @ 8% is only on ‘value addition’. There may be total import of goods worth Rs.100/-. However, royalty and fees for technical services will be paid only on the sale price of goods as reduced, *inter alia*, by import of the corresponding raw materials, etc. If, during a particular year, raw material, etc., are consumed worth Rs.60/-, the remaining Rs.40/- will be in stock. In such a situation, royalty and fees for technical services will be paid with reference to the amount of sale price as reduced, *inter alia*, by Rs.60/-. The essence of the matter is that royalty and fees for technical services is required to be calculated on the basis of ex factory sale price of the goods as reduced by the expenses and not on import of raw materials. It is further pertinent to note that the assessee is not obliged to make 100% purchases and sale to its AEs alone. The assessee is free to purchase raw materials and other

components from and also sell its goods to its non-related parties as well. This explicitly proves that the payment of royalty and fees for technical services has relation with the total sales made by the assessee and it cannot be construed as interlinked with import of raw materials from its AE alone.

5.8. It is simple and plain that cross subsidization of the international transactions in a combined approach is impermissible. It is clear from section 92(1) that if an international transaction is recorded showing a lower income than its ALP income, then it is the higher ALP income, which should be considered for the purpose of computation of the total income. Section 92(3) of the Act manifests that the provisions of this section shall not apply in a case where the computation of income having regard to ALP has the effect of reducing income chargeable to tax. The net effect of section 92(3) is that if transacted value income from an international transaction is more than its arm's length price income, then, the ALP income should be discarded and the actual income should be considered. To sum up, it is the higher of actual

income or the ALP income from an international transaction, which should to be taken into consideration for computing the total income. It does not mean that the actual more income from one international transaction *vis-a-vis* its ALP income should be combined with another unrelated transaction which gives actual income less than the ALP income and then both be processed together under this Chapter so as to set off the income (Transacted income minus ALP income) from the first transaction with the potential income arising from the second transaction (ALP income minus transacted value income). When we consider more than one separate transaction under the combined umbrella of TNMM on an entity level, it is quite possible that a probable addition on account of transfer pricing adjustment arising from one international transaction may be usurped by the income from the other international transaction giving higher income on transacted value. That is the reason for which the legislature has provided for determining the ALP of each international transaction separately from the others. As the international transactions of payment of royalty and fees for technical services are separate transactions and not closely linked with the other transactions

with which the assessee has merged them, we cannot permit such merger or aggregation for the purpose of the determining their ALP on entity level under TNMM. We, therefore, reject this contention raised on behalf of the assessee.

5.9. Under these circumstances, we are of the considered opinion that the TPO was justified in segregating the international transactions of payment of royalty and fees for technical services from other international transactions as these are not linked with import of raw material etc. from its AE. The assessee's contention in this regard is, ergo, repelled.

II. Selection of the most appropriate method.

6.1. Having held that the international transactions of payment of royalty and fees for technical services should be separately benchmarked from the other international transactions, the next significant question which arises for our consideration is the determination of the most appropriate method.

6.2. Section 92C(1) provides that the ALP in relation to an international transaction shall be determined by any of the methods given in this provision, being, the most appropriate method having regard to the nature of transaction or class of transaction, etc. The methods so specifically given in this provision, *inter alia*, include CUP, TNMM and Cost Plus Method.

6.3. We have rejected the assessee's point of view of combining several transactions under the TNMM. Now let us examine if the application of CUP method is in order for determining the ALP of payment of Royalty and fees for technical services. By now, it is fairly settled through a catena of decisions that the CUP is the most appropriate method to determine the ALP of an international transaction because it seeks to compare the price charged or paid for property transferred or services rendered provided proper comparables are available. It is under this method alone that the price charged or paid is directly compared with the price charged or paid in an uncontrolled comparable transaction. Rest of the four specific methods seek to make comparison of the price

charged or paid indirectly through the medium of normal profit arising in a comparable uncontrolled transaction. Further, the CUP method is a transaction specific method which strives to determine the ALP of an international transaction on a micro level, thereby lending more credibility to the ALP of a transaction. As such, we hold that the CUP is the most appropriate method for determining the ALP of these transactions under the present circumstances and the TPO was justified in applying the CUP as the most appropriate method.

III. Determination of ALP under CUP method

7.1. The next issue for our consideration is the determination of ALP under the CUP method. It can be seen that the TPO has worked out percentage of 0.56% in the case of two comparables, namely, Havels India Ltd. and Autometers Alliance Ltd. with the numerator of total of royalties and fees for technical services and denominator of Sales. It is this 0.56% which has been considered for making transfer pricing adjustment of Rs.7.78 crore. In order to evaluate the stand point of the

TPO, it is relevant to consider the mandate of Rule 10B(1)(a) which deals with the determination of ALP under the CUP method, as under :-

“(a) comparable uncontrolled price method, by which,—

(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified ;

(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market ;

(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm’s length price in respect of the property transferred or services provided in the international transaction ;”

7.2. A careful perusal of the mechanism provided under Rule 10B(1)(a) for determining the ALP of an international transaction divulges that under sub-clause (i), the *price* charged or paid for services provided in a comparable uncontrolled transaction is identified. Under sub-clause (ii), the *price* so determined under sub-clause (i) is adjusted to account for differences, if any, between international transaction and the comparable uncontrolled transactions. Under sub-clause (iii), the *adjusted price* arrived under sub-clause (ii) is taken as ALP in respect of property transferred or services provided in the international transaction. Thus, it

is explicit from the mandate of sub-clause (i) of Rule 10B(1)(a) that it is the '*price* charged or paid' for the services provided in a comparable uncontrolled transaction, which is taken into consideration. It is this *adjusted price paid* for availing services which constitutes the benchmark for comparison with the *price* paid for availing of any services in an international transaction. Corollary of the above is that the *price* paid for availing of services in a comparable uncontrolled transaction is compared with the *price* paid in an international transaction. The emphasis under the CUP method is on the comparison of *price* paid for availing services.

7.3. When we advert to the facts of the instant case, we find that the TPO has simply computed ratio of the expenses of royalty and fees for technical services with sales of the comparables at 0.56% and, then, proceeded to apply such benchmark for determining the ALP of these two international transactions. In the entire episode, there is no reference to the price paid by the comparables as a yardstick for comparing with the price paid by the assessee. The approach adopted by

the authorities is obviously erroneous as they have sought to compare percentage of expenses to sales rather than the *price* paid under a comparable uncontrolled situation.

7.4. There is a further fallacy in the calculation made by the TPO inasmuch as he computed the ratio of expenses of royalty and technical know-how to sales at 0.56% of comparables and applied such percentage on the figure of the assessee's sales for recommending the transfer pricing adjustment. We have noticed above that the assessee paid royalty/fees for technical services only on the 'value addition' made by it in respect of sales effected inasmuch the same has been paid on the net ex-factory sale price of the product, exclusive of excise duty minus the cost of the standard bought out components and the landed cost of imported components, including ocean freight, insurance, custom duties, etc. In such circumstances, even the comparison of the ratio of these expenses to sales of comparables with the ratio of these expenses to the sales of the assessee is totally unwarranted, because these expenses have been paid by the assessee as a percentage of 'value addition' made

by it and not on the sale price. Thus it is patent that the TPO not only applied CUP method in a wrong manner but also went wrong in determining ALP in such wrong application.

7.5. It is still further observed that the TPO has selected two companies as comparables, namely, Havels India Ltd. and Autometers Alliance Ltd., out of the assessee's list of nine comparables given under the TNMM. The assessee's contention made before the TPO as well as the DRP that Havels India Ltd. paid royalty to a related entity and Autometers Alliance Ltd. owns R&D department and incurred high R&D cost which might not require it to obtain technology from any other AE, have not been dealt with. The Id. AR contended that these two companies were chosen as comparable out of a whole lot of nine companies which was, again, not proper. We are in agreement with such a contention. Not only the assessee's objections should have been dealt with but also an opportunity should have been given for the consideration or exclusion of other companies. Under such circumstances, albeit, we approve the application of the CUP as the most

appropriate method in the given circumstances for determining the ALP of the international transaction of royalty and fees for technical services, but, the manner of selection of comparables also cannot be upheld.

IV. Whether rate of Royalty/FTS approved by RBI is always at ALP ?

8.1. The Id. AR contended that the royalty and fees for technical services were paid by the assessee to its AE as per the rates approved by the RBI under the automatic route and the same *per se* be considered at ALP. Sounding a contra note, the Id. DR put forth that such rates approved by the Government of India/Reserve Bank of India are meant for the purpose of regulating the flow of foreign exchange under the FEMA and are, hence, not binding on the TPO for the computation of the ALP.

8.2. Having regard to the rival submissions made before us, we find that the Hon'ble jurisdictional High Court in *CIT vs. Nestle India (2011) 337 ITR 103 (Del)* has answered this question by considering the provisions of section 40A(2) along with section 92, etc., of the Act. In

that case, the Tribunal deleted the disallowance u/s 40A(2), being the excessive and unreasonable payment of royalty to the associated concern, by holding that since the permission was given by the RBI, its reasonableness could not have been gone into by the AO. Setting aside the Tribunal order on this score, the Hon'ble Delhi High Court held that : 'the Tribunal is not correct in observing that since the permission is given by the RBI, the reasonableness and genuineness of the expenditure could not have been gone into by the AO. The purpose for which such permission is given by the RBI is totally different. The RBI is only concerned with the foreign exchange and, therefore, would look into the matter from that point of view. The RBI, at the time of giving such permission would not keep in mind the provisions of the IT Act and that is the function of the IT authorities and, therefore, they can validly go into such an issue'. It is explicitly clear from the enunciation of law by the Hon'ble Delhi High Court that the grant of permission by the RBI to payment of royalty is not sacrosanct for the purposes of the Act and, can be examined by the AO to ascertain its excessiveness. We want to make it clear that this judgment in the case of *Nestle India (supra)* was

rendered for the assessment years 1997-98 and 1998-99. Chapter-X of the Act containing the transfer pricing provisions came into force only w.e.f. assessment year 2002-03. However, the fact remains that the question before the Hon'ble High Court was to consider the reasonableness of the royalty amount paid by that assessee to its associated concern under the provisions of section 40A(2). The nitty-gritty of section 40A(2) is to disallow any excessive and unreasonable payment made to the closely related persons as referred to in clause (b) of section 40A(2). Similarly, the purpose of Chapter-X of the Act is also to ensure that income from international transactions is computed having regard to the arm's length price. In this way, any excess payment made to associated enterprises in an international transaction is recomputed to bring it in line with what an independent party would charge from another unrelated party. The essence of both the provisions is same in so far as the payment of expenses to related parties is concerned.

8.3. It is significant to note that the RBI provides for maximum permissible rate of royalty etc. which can be paid. Such rate of royalty

etc. as permitted is applicable to all the manufacturing activities across the board with a few exceptions. The technical know-how required for manufacturing electronic goods is quite different from the technical know-how required for manufacturing automobiles or heavy industrial equipments. That is the reason for which the RBI provides for a universal upper rate of royalty etc. so that the parties may negotiate the actual rate depending upon complexity of the technical know-how required for the concerned product. With the given maximum common rate of 5%, the actual rate may be anything 5% or 4% or 3% or 2% or 1% etc., depending upon the intricacy of the know-how required for the concerned product along with other relevant factors. Such a rate fluctuating from 0% to 5% can never constitute a benchmark for all the businesses for which technical know-how may be required. What we need to do in a transfer pricing analysis is to find out a comparable case engaged in the same line of business. The rate of royalty for use of technical know-how of industrial equipments cannot be considered as comparable with that of electronic goods. Even within the overall electronic goods segment, there can be different products or components

and the technical know-how required for components cannot be compared with the electronic goods on the whole. In our considered opinion, at best, the rate of royalty approved by the RBI has a persuasive value in the process of determination of ALP of Royalty for a particular case and cannot be considered as conclusive. Similar view has been taken by the Delhi Bench of the Tribunal in *LG Electronics India Pvt. Ltd. vs. ACIT (2015) 167 TTJ 417 (Del)*. We, therefore, refuse to accept the payment of royalty and fees for technical services at ALP simply on the ground that it was paid at the maximum rate stipulated by the Reserve Bank of India.

V. Whether the TP provisions apply when deduction is available under the Act ?

9.1. The ld. AR argued that its profit is deductible u/s 80IC of the Act. He vehemently submitted that once the profit from rendering of software development services is deductible, then, no motive can be attributed for artificially reducing the profit by manipulating the price with its AE. It was elaborated that the profit of an assessee, eligible for deduction under

section 80IC, becomes tax neutral irrespective of its quantum. He, therefore, urged that either the international transaction should not be processed in terms of Chapter-X of the Act or higher amount of deduction should be allowed corresponding to the amount of addition on account of transfer pricing adjustment. This was forcefully contested by the ld. DR.

9.2. Having heard the rival submissions and perused the relevant material, we find ourselves unable to accept both the submissions advanced by the ld. AR on this aspect of the matter. In so far as the first submission for not carrying out any transfer pricing adjustment in view of the benefit enjoyed by it u/s 80IC of the Act is concerned, we find that no exception has been carved out by the statute for non-determination of the ALP of an international transaction of an assessee who is eligible for the benefit of deduction section 10A/10B or any other section of Chapter-VIA of the Act. Section 92(1) clearly provides that any income arising from an international transaction is required to be computed having regard to its arm's length price. There is no provision

exempting the computation of total income arising from an international transaction having regard to its ALP, in the case of an assessee entitled to deduction u/s 80IC or any other such relevant provision. Section 92C dealing with computation of ALP clearly provides that the ALP in relation to an international transaction shall be determined by one of the methods given in this provision. This section also does not immune an international transaction from the computation of its ALP when income is otherwise eligible for deduction. On the contrary, we find that subsection (4) of section 92C plainly stipulates that where an ALP is determined, the AO may compute the total income of the assessee having regard to the ALP so determined. This shows that the total income of an assessee entering into an international transaction, is required to be necessarily computed having regard to its ALP without any exception. Thus, the Id. AR's argument that since its income is subject to deduction u/s 80IC, the provisions of the Chapter-X of the Act should not be applied, in our considered opinion, has no force in view of the clear statutory mandate contained in proviso to section 92C(4), which reads as under:-

‘Provided that no deduction under section 10A or section 10AA or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section:’.

9.3. A circumspect perusal of this proviso read along with sub-section (4) of section 92C divulges that when the total income of an assessee from an international transaction is computed having regard to its ALP, then, no deduction u/s 10A or any other section including those covered under Chapter VIA of the Act shall be allowed in respect of the amount of income by which the total income of the assessee has been enhanced after computation of income determined on the basis of the ALP of an international transaction. The legislature has unconditionally provided for not allowing the benefit of deduction under any section in respect of the addition made on account of transfer pricing adjustment. Not allowing of any benefit u/s 80IC in respect of an addition on account of transfer pricing adjustment pre-supposes the existence of transfer pricing addition in the first instance to an assessee who is otherwise eligible to the benefit of deduction under this section. If one was to presume that no addition towards transfer pricing adjustment is comprehensible in the

case of an assessee enjoying the benefit of deduction u/s 80IC, then there was no need to enshrine an express provision forbidding the grant of deduction under this section in respect of enhancement of income due to transfer pricing adjustment. Once the legislature has engrafted an unambiguous provision explicitly spelling out the non-granting of deduction u/s 80IC on the enhanced income due to transfer pricing addition, we are afraid to accept the assessee's contention, which runs diagonally opposite to the unequivocal language of proviso to section 92C(4). This contention, if taken to a logical conclusion, would amount to obliterating the proviso itself, which is patently incorrect.

9.4. Our view is fortified by the Special Bench order in the case of *Aztech Software and Technology Services Ltd. vs. ACIT (2007) 107 ITD 141 (SB) (Bangalore)* in which similar issue has been decided by the Special Bench by holding that availability of exemption u/s 10A to the assessee is no bar to applicability of sections 92C and 92CA. Similar view has been taken by Pune Bench of the Tribunal in the case of *ACIT vs. MSS India (P) Ltd. (2009) 123 TTJ 657 (Pune)* and several other

orders. The reliance of the Id. AR on the order of the Mumbai Bench of the Tribunal in the case of *DCIT vs. Tata Consultants Services Ltd.* (ITA No. 7513/M/2010) dated 4.11.2015, in our considered opinion is misconceived, because, in that case, the Tribunal primarily found that the AO erred in not himself examining the issue of TP and failed to apply his mind to the TP report filed by the assessee. The last sentence in para 54 of the order upholding the assessee's contention that no TP adjustment can be made where the assessee enjoys benefit of deduction u/s 10A or 80HHE, etc., is only *obiter dicta* inasmuch as the addition was found to be not sustainable on the other main grounds as discussed in the body of the order. On the contrary, we find that the decision of the Special bench in *Aztech Software (supra)* permitting the applicability of sections 92C and 92CA to an assessee availing the benefit of section 80IC etc. of the Act is its *ratio decidendi*. The Id. AR has not pointed out any judgment of some Hon'ble High Court deciding this point either way. In view of the fact that there is already a Special Bench decision in the case of *Aztech Software (supra)* which supports the making of transfer pricing adjustment notwithstanding the availability of deduction

under such sections to the assessee, apart from clear statutory mandate contained in proviso to section 92C(4), we are more inclined to go with the view of the Special Bench.

9.5. It is, therefore, held that the eligibility of the assessee to deduction u/s 80IC of the Act does not operate as a bar on determining the ALP of international transaction undertaken by it and further the enhancement of income due to such transfer pricing addition cannot be considered for allowing the benefit of deduction under this section. Similar view has been taken by the Delhi bench of the tribunal in *Headstrong Services India Pvt. Ltd. VS. DCIT* (in ITA No. 6200/Del/2012) vide its order dated 11.2.2016. This contention is, therefore, jettisoned.

VI. Rule of Consistency

10.1. The ld. AR lastly submitted that the TPO was not justified in differing with the determination of ALP as done by the assessee for the reason that similar adjustment made by him for the immediately preceding assessment year, namely, 2010-11, came to be deleted by the

DRP and no further appeal was filed by the Revenue. Relying on the principle of consistency, it was contended that similar view ought to have been taken for the year under consideration as well.

10.2. We do not find any substance in the contention made on behalf of the assessee. Despite the fact that there is no *res judicata* in income tax proceedings, it can be seen that the TPO for the assessment year 2010-11 did not segregate payment of royalty and fees for technical services from the overall international transactions under the TNMM. Transfer pricing adjustment was made by taking all the international transactions on a combined basis under the TNMM, which issue stood decided in favour of the assessee by the DRP. *Au contraire*, we find that for the year under consideration, the TPO has separated the international transactions of payment of royalty and fees for technical services from other international transactions by treating the remaining at ALP under the TNMM. There is a sea change in the approach adopted by the authorities in the preceding year *vis-à-vis* the current year. The fact that the TPO proceeded on a wrong premise in the preceding year without

considering the international transactions of royalty and fees for technical services as separate from the others, cannot give a licence to the assessee to claim that the same wrong approach be repeated in the subsequent years as well. In an earlier part of this order, we have approved the action of the TPO in segregating these two international transactions from the remaining transactions and determining their ALP separately. Under such circumstances, the assessee cannot seek deletion of addition on the principle of consistency because of a completely changed scenario in the instant year. Such a rule of consistency, if at all, could have been pleaded if the TPO in the preceding year had also segregated such two transactions and benchmarked them same separately under the CUP method, which the DRP would have overturned. Since no such exercise was done by the TPO in the preceding year when the proceedings went on an altogether different line, we cannot approve the argument of the ld. AR for accepting these two international transactions at ALP.

11. In view of the foregoing discussion, we set aside the impugned order and remit the matter to the file of AO/TPO for a fresh determination of the ALP of the international transaction of payment of royalty and fees for technical services in consonance with our decision on various aspects given above. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such fresh proceedings.

12. The last effective ground is against not granting credit for tax amounting to Rs.38,93,400/-. We direct the AO to verify this contention and allow the credit for the above amount or its part, if the same was paid by the assessee, but, not adjusted.

13. In the result, the appeal is allowed for statistical purposes.

The order pronounced in the open court on 29.04.2015.

Sd/-

[KULDIP SINGH]
JUDICIAL MEMBER

Sd/-

[R.S. SYAL]
ACCOUNTANT MEMBER

Dated, 29th April, 2015.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.