आयकर अपीलीय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
श्री डी.टी.गरासिया ,न्यायिक सदस्य
तथा
श्री ओ.पी.मीना ,लेखा सदस्य के समक्ष

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER
AND
SHRI O.P. MEENA, ACCOUNTANT MEMBER

आ.अ.सं /.T.P.A. No. 157/Ind/2015 &T.P.A. No. 316/Ind/2016		
निर्धारण वर्ष/ Assessment Year:2010-11 & A.Y. 2011-12		
M/s. Andritz Hydro Pvt. Ltd. **(Earlier known as Va Technical Hydro India Pvt. Ltd.)** D-17, Industrial Area KVNMP A, Mandideep462046Near Bhopal	Vs.	**DCIT 1(1) Bhopal**
अपीलार्थी /Appellant		**प्रत्यर्थी /Respondent**
स्था.ले.सं./**PAN: AABCV 2466R**		

आ.अ.संा /..P.A. No. 265 /Ind/2015 & I.T.A. No. 349/Ind/2016		
निर्धारण वर्ष/ Assessment Year:2010-11 & A.Y. 2011-12		
DCIT 1(1) Bhopal	Vs.	**M/s. Andritz Hydro Pvt. Ltd.** **(Earlier known as Va Technical Hydro India Pvt. Ltd.)** D-17, Industrial Area KVNMP A, Mandideep462046Near Bhopal ,
अपीलार्थी /Appellant		**प्रत्यर्थी /Respondent**
स्था.ले.सं./**PAN: AABCV 2466R**		

अपीलार्थी की ओर से/Appellant by	**Shri Kapil Hirani CA,** **Shri Derpan Kirpalani CA**
प्रत्यर्थी की ओर से/Respondent by	**Shri Lal Chand CIT (DR)**

सुनवाई की तारीख/Date of hearing	**06.01.2017**
उद्घोषणा की तारीख/Date of pronouncement	**28.02.2017**

आदेश /O R D E R

PER O.P. MEENA, ACCOUTANT MEMEBR.

These Cross appeals filed by the Assessee and Revenue respectively, are directed against the final assessment order under section 143(3) read with section 144C and 92CA of Income Tax Act,1961(hereinafter referred as of "the Act") of the Deputy Commissioner of Income tax-1(1),Bhopal (hereinafter referred as "the AO"), for the assessment year 2010-11 order dated 13.02.2015 and for the A.Y. 2011-12 order dated 22.02.2016 passed in pursuance of the directions issued by Dispute Resolution Panel-IV, Mumbai (hereinafter referred as "DRP").

Since the issue in these appeals are common in nature, these appeals are clubbed together and being disposed-of by this common order for the sake of convenience and brevity. The Assessee and the Revenue has taken following grounds of appeal in –

T.P.A. No. 157/Ind/2015:A.Y. 2010-11

Transfer Pricing Grounds

1. *The Learned Transfer Pricing Officer (Ld. TPO)/ Dispute Resolution Panel (DRP) erred on the facts and circumstances of the case and in law, by not accepting the economic analysis undertaken by the Appellant which was in accordance with provisions of the Act read with Rules for establishing arm`s length price of the international transactions.*
2. *Based on the facts and circumstances of the case, the Ld. TPO/ DRP has erred in law and in facts in making adjustment of Rs. 43,11,705/- to the transaction related to ''Contract revenue from projects'' In doing so, the Ld. TPO/DRP erred in*
   a) *In not considering the internal Cost Plus Method (CPM) analysis undertaken by the Appellant using combined transaction approach which was in accordance with the provisions of the Act read with Rules and internationally*

accepted principles. Applying on a project-by-project basis, despite agreeing to various functional risk differences between individual projects, which would lead to unreliable results when compared on project-by-project basis.

b) Not accepting the margin on individual projects to be at arm`s length which was consist margin earned by the AE on project from third party customers.

c) Not taking cognizance of the facts that same international transaction of Appellant has been accepted by the Revenue authorities to be at arm`s length in previous years.

d) Not accepting use of Transaction Net Margin Method (TNNM) as a most appropriate method on without prejudice basis, due to non-applicability of CPM, to benchmark the aforesaid transaction, In doing so, the Ld. TPO/DRP further erred in not accepting the order of Hon`ble ITAT for earlier years

3. The Ld. TPO/DRP has erred in making an adjustment of Rs. 11,723,967 to the transaction related to ''payment for technical service" by determining the arm`s length price of such payments as NIL. In doing so, the Ld. TPO/ DRP erred in ;

a) rejecting the economic analysis in relation to such payment, which was done using a transaction-by-transaction analysis wherein closely linked transactions were benchmark together, which was in accordance with the provisions of the Act read with Rules for establishing the arm`s length price of such payments.

b) ignoring the correct nature of international transaction and the evidences/facts submitted by the Appellant, thereby not appreciating the difference between the payment for royalty vis-à-vis payment for technical service by the Appellant.

c) using Comparable Uncontrolled Price (CUP) method as the most appropriate method as per Rule 10C of the Income-Tax Rules, 1962 .

d) applying CUP method for determining the arm`s length price in respect of appellant`s international transactions without identifying any comparable uncontrolled transaction(s) for the computation of arm`s length price which is not in accordance with Rule 10B(1)(a)

e) questioning the commercial rationale of the legitimate business expense incurred by the taxpayer and not restricting the scope of assessment under section 92CA to determining the arm`s length price of international transactions by adopting one of the prescribed method only.

4. The DRP also erred in issuing directions with certain typographical errors, which denied the relief the Appellant a relief on INR

11,13,016 in relation to international transaction of payment of technical services.

Corporate Tax Grounds

5. *Based on the facts and circumstances of the case, the Ld. Assessing Officer (the Ld.AO) DRP had erred in law and fact by disallowing the payments of INR 10,699,464 made by the Appellant to its overseas parent company for the purchase of technical drawings and designs and alleging the same to be in the nature of royalty on which tax had to be withheld at the time of payment. In doing so, the Ld.AO further erred in not following the ruling of the Hon`ble ITAT in Appellant`s own case on this issue.*

Common Grounds

6. *Based on the facts and circumstances of the case, the Ld.AO has erred in proposing to initiate penalty proceedings under section 271(1)(c) of the Act against The Appellant.*
7. *Erred in giving short credit of tax deducted at source of INR 26,920. The above grounds are independent and without prejudice, to each other unless mentioned specifically.*

T.P.A. No. 316/Ind/2016:A.Y. 2011-12

Transfer Pricing Grounds

On the facts and circumstances of the case and in law, the learned AO based on directions of DRP

1. *erred on the facts and circumstances of the case and in law, by not accepting the economic analysis undertaken by the Appellant which was in accordance with provisions of the Act read with Rules for establishing arm`s length price of the international transactions.*
2. *erred in law and in facts in making adjustment of INR 17,71,095 to the transactions related to ''Contract revenue from projects'' In doing so, the Ld. TPO/Hon`ble DRP erred in*
   a) *Inappropriately rejecting the Transaction Net Margin Method (TNNM) as most appropriate method using Cost plus Method (CPM) without providing any cogent reasons.*
   b) *Not considering the internal Cost plus Method (CPM) analysis submitted by the Appellant, which was in*

accordance with the provisions of the Act read with Rules and internationally accepted principles.

c) *Applying CPM on a project-by-project basis, despite agreeing to various functional risk differences between individual projects, which would lead to unreliable results when compared on project-by-project basis.*

d) *Not taking cognizance of the facts that same international transaction of Appellant has been accepted by the Revenue authorities to be at arm`s length in previous years.*

3. *Erred in making an adjustment of INR 34,18,088 to the transaction related to ''payment for technical services" by determining the arm`s length price of such payments as NIL. In doing so, the Ld. TPO/Hon`ble DRP erred in ;*

a) *Rejecting the economic analysis in relation to such payment, which was done using combined transactions analysis wherein closely linked transactions were benchmark together, which was in accordance with the provisions of the Act read with Rules for establishing the arm`s length price of such payments.*

b) *Using Comparable Uncontrolled Price (CUP) method as the most appropriate method as per Rule 10C of the Income-Tax Rules, 1962 .*

c) *Applying CUP method for determining the arm`s length price in respect of appellant`s international transactions without identifying any comparable uncontrolled transaction(s) for the computation of arm`s length price which is not in accordance with Rule 10B(1)(a)*

d) *Questioning the commercial rationale of the legitimate business expense incurred by the taxpayer and not restricting the scope of assessment under section 92CA to determining the arm`s length price of international transactions by adopting one of the prescribed method only.*

e) *Not appreciating that even if payment for technical services is held to be covered by Technical Collaboration Agreement (TCA) entered in to by the Appellant` with its AE's , the overall payments under TCA is within the limits of the rates agreed in TCAs.*

4. *Ld TPO/ DRP have erred in not allowing set-off of surplus revenue / profit exceeding the arm`s length price (ALP) earned from other transactions with Associated Enterprises (AE's)while computing the ALP under transaction-by-transactions analysis approach.*

Corporate Tax Grounds

5. *Erred is disallowing the payments of INR 3,21,61,710 made by the Appellant to its overseas parent company for the purchase of technical drawings and designs and alleging the same to be in the nature of royalty on which tax had to be withheld at the time of payment. In doing so, the Ld.AO/ Hon`ble DRP further erred in not following the ruling of the Hon`ble ITAT in Appellant`s own case on this issue.*
6. *Erred in giving short credit of tax deducted at source of INR 1,81,109 while passing the final assessment order.*

Common Grounds

7. *Erred in proposing to initiate penalty proceedings under section 271(1)(c) of the Act against The Appellant.*

The above grounds are independent and without prejudice, to each other unless mentioned specifically.

TPA. No. 265/Ind/2015: REVENUE`s APPEAL FOR A.Y. 2010-11

Ground:No.1: Whether on the facts and circumstances of the case, the Hon`ble Dispute Resolution Panel, Mumbai was justified in deletion the addition of Rs. 3,47,53,202/- on account of provision of warranty expenses when there was failure on the part of the assessee to fulfill three conditions needed in respect of goods sold to create warranty liability and also ignoring the finding of the AO that the liability arising on account of such claim, is highly contingent and depending on the happening of all the three conditions needed in this aspect.

TPA. No. 349/Ind/2016: REVENUE`s APPEAL:FOR A.Y. 2011-12.

Ground No: 1. Whether on the facts and circumstances of the case, the Hon`ble Dispute Resolution Panel, Mumbai was justified in in law in deleting the addition of Rs. 3,52,88,923/- on account of provision of warranty expenses when there was failure on the part of the assessee to fulfill three conditions needed in respect of goods sold to create warranty liability and also ignoring the finding of the AO that the liability arising on account of such claim, is highly contingent and depending on the happening of all the three conditions needed in this aspect.

First we take up assessee`s appeal in I. T. A. No. 157/Ind/2015 of assessment year 2010-11 and I.T.A. No. 316/Ind/2016 for A.Y. 2011-12 for adjudication.

1. Ground No. 1 is common for A.Y. 10-11 and A.Y. 11-12 which is of general in nature and is covered by other grounds of appeals hence, not specifically and separately adjudicated.

2. Ground No. 2 for both assessment year relates to adjustment of Rs. 43,11,705/- (A.Y.:10-11) & Rs. 17,71,095/- (A.Y.:11-12) made by the TPO in respect of transactions relating to "Contract revenue from Projects"

2.1. Succinctly, the facts as culled out from the order of the lower authorities are that as per Transfer Pricing Study Report (in short TPSR), the assessee adopted Cost Plus Method (CPM) as the most appropriate method with GP margin as the appropriate Profit Level Indicator (PLI). It carried out analysis for identification of comparable transactions for the export of finished goods under similar conditions with unrelated entities and such segments were separately identifiable; the assessee considered the two segments viz Projects with AEs and Projects with Non-AEs for CPM analysis. The GP mark-up earned by the assessee from sales to unrelated parties was computed and was added to the direct and indirect cost of production to arrive at the ALP of the products sold to AEs during the year. The assessee computed overall GP Margin from sale to AEs at 14.32% and GP Margin on sales to Non-AEs at 14.72%. Taking recourse to Proviso to section 92C(2), it was claimed by the assessee that the transaction is within tolerance band of +/-5% Margin.

2.2. The TPO made the comparison with the assessee margin reflected in respect of controlled transactions with its AEs for each projects separately. The TPO held that all the projects of the assessee with the AE were independent projects and, therefore, transfer pricing provision were to be applied on individual transaction basis. The assessee contended that there was functional and risk difference between the individual controlled transactions and aggregate uncontrolled transactions. The assessee, is therefore, objected to the action of the TPO in looking at different individual related party transactions instead of aggregating the same. It was argued that the assessee had undertaken the transaction with its parent company, which is a single large customer and therefore, the project instituted by the assessee for its AEs is broadly similar in respect of the product output and, therefore, such transaction should be aggregated. It was argued that the assessee is a risk bearing entity and, therefore, it is quite likely that the return on some projects would be lower than the others. It was pointed out that even in the unrelated transactions, margin earned on some projects was lower than mean gross margin. There was no intention to shift profits to AE in any project. The TPO ignored the functional difference between individual projects. In respect of related party, the contract involved merely sale of generators and generator parts while in case of unrelated party, the contract involved was of servicing erection and installation of such generators in addition to design and manufacturing. Thereafter, the assessee explained that the project Ashlucreek earned lower gross profit margin on account of extraordinary cost of Rs. 87,28,333/- which was incurred by the assessee during F.Y. 2008-09 on which Rs. 56,78,653/- was allowed in A.Y. 2009-10 in proportion to total cost to be incurred over the life cycle of the project. The secondary analysis done based on TNNM, is not appreciated by the TPO.

2.3. The DRP observed that there is no dispute between TPO and the assessee as regards the method, which is CPM and benchmarking which is based on internal, comparable. The only dispute is that the assessee has aggregated all the projects with AE (the AEs are different) and compared the mean CPM of the projects of related party transactions. In contrast, the TPO has rejected the aggregation of related party transactions and applied the benchmarking analysis on project-by-project transaction with AE. The DRP has observed that the assessee itself submitted that there is huge variation in the gross profit margins on projects undertaken with related parties. This indicates difference in FAR of the projects, resulting into different profit margins. Consequently, the aggregation of such projects having different FAR incorrect and therefore, the aggregation carried out by the assessee is also held to be incorrect. Based on Rule 10A (d), and even the OECD guidelines, the only transaction, which are similar in nature or closely interlinked can be aggregated as one transaction and benchmarked, and only where considering it as separate transaction is impractical. Such is not the case here. Since all the AE projects of the assessee are independent and different projects, the benchmarking needs to be carried out separately on individual transaction basis. The application of gross profit margin on global basis will lead to lower than non-arm`s length price of one transaction being marked by high price of another in the same or another AEs case, which is not in accordance with provisions of law. The contention of aggregating as helping to reduce the impact of differences in terms and conditions as the accounting treatment given by the assessee is incorrect. If there are differences and such differences are material, then they must be explicitly recognized and provided for in the comparability analysis, but this does not mean that transaction with AEs must be aggregated. The assessee has contended that it has charged lower margin for some

projects with AE as it was able to command a higher margin for other projects from same AE so that as a portfolio, the assessee has realized arm`s length margin from AE on aggregate basis. However, in absence of any evidence in this regard, this contention of the assessee was not found acceptable by DRP. The DRP has observed that a higher margin in one project cannot be the reason for a margin not as per ALP in another project. Further, the assessee has not provided functional differences, if any in the scope of projects for AEs as well as Non-AEs nor mentioned the same in TP documentation. Hence, this argument of the assessee was rejected. The DRP held that it is settled law that each AE transaction has to be at ALP. Aggregation is permitted in respect of same or closely linked transaction with same AE but aggregation of different and independent transaction with different AEs cannot be benchmarked on aggregate basis. Therefore, the DRP had held that admittedly, the AE transaction are not at ALP on stand-alone basis. Hence, the adjustment made by the TPO were upheld. The DRP also observed that the Tribunal has accepted TNNM in earlier year, but it could not be accepted in this year on the plea that res-judicata does not apply to income tax proceedings as Transfer Pricing is fact subjective exercise which can be different from year to year. Both the TPO and the assessee have agreed that the CPM is most appropriate method. Merely, because the analysis leads to different conclusions, the MAM cannot be thrown out. TNNM is not demonstrated to be the MAM.

2.4. The learned Counsel for the assessee submitted that the assessee is applying CPM computed gross profit margin of sale to AE's at 14.32% vs. Sale to Non AE's at 14.72%. The difference being with the acceptable range of +-5percentage prescribed under proviso to section 92C (2), no adjustment on account of ALP is warranted. The TPO/DRP accepting the use of CPM, grossly erred in applying the

same to individual transaction with AE's instead of aggregating approach adopted by the assessee which is illegal.

2.4.1. The learned Counsel submitted that the gross margin earned by the assessee from transaction with unrelated parties range from (-) 486.10% to 3867.84%, average being 14.72% which has been compared with the average gross margin of transactions with AE's. The assessee recognizes revenue on Percentage of Completion Method (POCM) in accordance with Accounting Standard 7. While recognizing revenue of POCM basis, yearly gross margins from each transaction may vary as the project span for the periods over one year. Accordingly, unrelated party transactions cannot be reliably compared with related party transactions on individual transaction basis. Thus, to eliminate the impact of such differences, the arithmetic mean of gross margins earned by the assessee from all related party transactions should be compared with arithmetic mean of gross margins of all unrelated transactions which has been done by the assessee.

2.4.2. It was submitted that it is not possible to find a project with reference to its AE which is completely with similar functionalities to a project, and which has been undertaken by the assessee for Non AE enterprises as each project operates in a different life cycle. With projects operating in different life cycles with different level of completions, the margin needs to be compared on an aggregate basis as project wise one-on-one comparison is not possible. Moreover, in view of the nature of business of the assessee, the overall profitability of the projects depends upon various factors such as nature of work, bidding process, location etc. The assessee accordingly compared the gross margins earned from the aggregate transaction entered with Non AE's. The Ld. TPO/DRP however, grossly erred in comparing individual projects margins of transaction with AE with

aggregate margins earned from transaction with Non AE's which is improper as individual margins are being compared with aggregate margin which is impermissible under law.

2.4.3. The Ld. TPO assumed that each project transaction with AE is separate transaction and needs to be analyzed separately ignoring the fact that the assessee had undertaken the impugned transaction with its parent company as a single large customer. Since all the gross margins of the assessee from sales made to AE's are, comparable with Non AE's, the impugned transactions should be considered ALP and no adjustment is warranted.

2.4.4. The learned Counsel submitted that the Ld. TPO erred in misinterpreting the OECD Guidelines, which prescribed that the transaction should be evaluated together where transactions are in the nature of long-term contracts. The contracts of the assessee with AE run over a period of 2 to 4 year and as such are long-term contracts justifying combined transaction approach as taken by the assessee.

2.4.5. The learned Counsel submitted that the Ld. TPO/DRP erred in not appreciating the fact that the assessee had earned lower than mean gross margin in some individual unrelated party transactions also. Therefore, comparing margin of individual contracts with AE's with margin calculated the average margins entered with Non AE's is illegal and against the principal of transfer pricing.

2.4.6. The learned Counsel also submitted that the case laws cited by the TPO in fact supports the view of the assessee that in case of transaction which are similar in nature, can be analyzed under a combined transaction approach. It was contended that the approach adopted for determination of ALP of the international transactions of the assessee has been accepted by Revenue Authorities to be at arm`s length in A.Y. 2008-09.

2.4.7. The learned Counsel submitted the Ld. TPO/DRP erred in not appreciating the fact that in the case of unrelated party transactions, the assessee performed additional functions since it is also responsible for the installation and commissioning of equipment supplied, the areas in case of related parties, the drawn of the assessee is restricted to only supply of equipment. Thus, given that additional functions performed, the assessee is anyways likely to earn higher gross margins in unrelated party transactions than related party transactions.

2.4.8. The learner TPO/DRP further grossly erred in not appreciating the fact that the assessee is a risk bearing entity. The assessee is full of risk bearing manufactures and supply of all power generation equipment's and as such the assessee is likely to earn low gross margins inserting transactions based on the quotient of risk involved. The same is also evident from the fact that the assessee has earned lower then mean gross margins in unrelated party transactions also.

2.4.9. The Ld. A.R. Further submitted that the TPO/DRP has grossly erred in ignoring the individual projects specific functional differences. As reiterated above, the overall profitability of the projects depends upon various factors such as nature of work, bidding process, location etc. Thus, in some projects during the overall profitability margins earned lower, it would be inappropriate to hold that the assessee should earn more than the rest of the projects. Without prejudice to above, it was submitted that the margin of XE Kaman- Andritz India Projects is marginally lower when compared individually with two other projects as its risk is covered through the third party consortium. The risk being mitigated, the margins are less as per the common business practices. The addition made because of

the difference in margins of XE, Kaman Projects; thus, deserves to be deleted on this fact as well in the interest of natural Justice.

2.4.10. The learned Counsel further submitted without prejudice to the above, that with reference to additions made in project Ashlucreek, the Ld. TPO/DRP erred in not appreciating the fact that the reason for lower gross margin on this project was extraordinary cost of INR 87,28,333 which was incurred by the assessee during financial year 2008-09 of her breach INR 56,78,653, which has been allowed in A.Y. 2009-10 in proportion to the total cost to be incurred over the life cycle of the project. Thus, proportionate adjustment for the extraordinary cost incurred in F.Y. 2008-09 should be allowed during F.Y. 2009-10. If the effect of the extra-ordinary event is ignored, the revised Adjusted Gross Margin comes to 18.8% as compared to 14.70% average gross margin earned from non-AE projects and thus warranting no addition.

2.4.11. Without prejudice to the above , the Ld. A.R. further submitted the assessee in the alternate also performed TP analysis using transitional net margin, which serve as corroborative analysis for the International transactions relating to contract revenue and from the projects with AE's. In an undertaking that TNMM analysis, the assessee chose itself as tested party and operating profit as a ratio of operating revenue as a profit level indicator. The margin using TNMM method for the assessee for transaction with AE was determined at 10.01% compared to 6.66% for transactions with Non AE's. This contention of the assessee was also accepted by the ITAT Indore bench in earlier years (i.e. A.Y. 2006-07, 2007-08, and 2009-10) vide order dtd. 03.07.2004. Relying on the analysis undertaken by the assessee, the entire adjustment on account of contract revenue from AE projects was deleted as the transactions having been analyzed under TNMM were held to be at arm`s length. Therefore, relying on the

decision in preceding years, the Ld. A.R. submitted that the addition made in current year deserve to be deleted.

2.5. The Ld. D.R. submitted that as per TP documents international transaction representing sales to AE has been benchmarked using TNNM method. It was noticed that the assessee was aggregating all transactions undertaken by both Units Mandieep and Prithla comparing the average gross margin of comparable transactions. As per Indian TP regulations, TNNM is to be applied on transaction basis. Since in this case, gross margin earned on the transaction is separately, there was no requirement of aggregating all of them and then calculating the average gross margin. The Ld. D.R. referred to para 1.42 of OECD Guidelines which suggest that ideally ALP should be applied on transaction-by-transaction basis, however, where separate transactions are closely linked or continuous that they cannot be evaluated adequately on a separate basis. Such transaction should be evaluated together using the most appropriate arm`s length method or methods. It can be seen from the aforesaid para of the OECD guidelines that it recommends evaluation / benchmarking on transaction by transaction basis and only in certain situations when they cannot be evaluated on separate basis that combined approach has been suggested. Further, some examples have been given the International transactions, which may warrant an aggregated approach for benchmarking. It can be further seen that in the case of the assessee, separately in respect of its International transaction sale relating to receipt of revenues from each project has been found to be feasible, which in fact has been provided by the assessee itself in TP documentation. The case of the assessee does not fall in any of the categories/ examples given in Para 1.42 of OECD Guidelines. Accordingly, the contention of the assessee of benchmarking all

international transaction on aggregated basis, being incorrect not found acceptable.

2.5.1. The Ld. D.R. further submitted that the contention of the assessee that aggregating the accounting differences between different projects neutralized is also fallacious. The adjustment of such accounting difference is not required to be carried out by neutralizing such differences in one transaction with the other. Further, no such accounting difference was pointed out in transfer pricing documentation.

2.5.2. The Ld. D.R. further submitted that the contention of the assessee that the transaction should be considered at arm`s length on the basis of secondary analysis carried out using TNNM was considered and not found to be acceptable as the provisions of law say that most appropriate method is required to be applied in accordance with Rule 10C. It is not in dispute that on same basis, the assessee has selected CPM as the most appropriate method, which was also accepted by the TPO. Consequently, the analysis carried out by the assessee using TNNM as the most appropriate method for benchmarking the other transactions and becomes the most appropriate method for benchmarking that transaction only cannot be the most appropriate method for benchmarking these transactions.

2.6. We have heard the rival submissions of both the parties and have perused the material available on record. We find that as per Transfer Pricing Study Report (in short TPSR), the assessee adopted Cost Plus Method (CPM) as the most appropriate method with GP margin as the appropriate Profit Level Indicator (PLI). It carried out analysis for identification of comparable transactions for the export of finished goods under similar conditions with unrelated entities and such segments were separately identifiable; the assessee considered the two segments viz Projects with AEs and Projects with Non-AEs for

CPM analysis. The assessee computed overall GP Margin from sale to AEs at 14.32% and GP Margin on sales to Non-AEs at 14.72%. Taking recourse to Proviso to section 92C (2), it was claimed that the transaction is within tolerance band of +/-5% Margin.

2.6.1. We find that there is no dispute between TPO and the assessee as regards the method, which is CPM and benchmarking based on internal comparable. The only dispute whether the assessee has justified for considering the aggregation of all the projects with AE (the AEs are different) and compared the mean CPM of the projects of related party transactions. In contrast, the TPO has rejected the aggregation of related party transactions and applied the benchmarking analysis on project-by-project transaction with AE. It is seen that that the gross margin earned by the assessee from transaction with unrelated parties range from (-) 486.10% to 3867.84% of which average being 14.72%, which has been compared with the average, gross margin of transactions with AE's. The assessee recognizes revenue on Percentage of Completion Method (POCM) in accordance with Accounting Standard 7. While recognizing revenue of POCM basis, yearly gross margins from each transaction may vary as the project span is for the periods over one year. Therefore, we are of the view that unrelated party transactions cannot be reliably compared with related party transactions on individual transaction basis. In view of this matter, we are of the opinion the arithmetic mean of gross margins earned by the assessee from all related party transactions should be compared with arithmetic mean of gross margins of all unrelated transactions, which has been done by the assessee. It was contended by the learned Counsel that it is not possible to find out project with reference to its AE, which is completely with similar functionalities to a project, which has been undertaken by the assessee for Non AEs enterprises as each project

operates in a different life cycle. Since the projects are operating in different life cycles with different level of completions, it would be more appropriate to compare the margin on an aggregate basis as project-wise one-on-one comparison is not possible and would give distorted results. We are also aware of the nature of business of the assessee. The overall profitability of the projects depends upon various factors such as nature of work, bidding process, location etc. Therefore, we are of the view the Ld. TPO/DRP was in error in comparing individual projects margins of transaction with AE with aggregate margins earned from transaction with Non AE's which is improper as individual margins are being compared with aggregate margin which is impermissible under law.

2.6.2. It appears to us that the TPO might have assumed that each project transaction with AEs is separate transaction and needs to be analyzed separately whereas it is the contention of the assessee that the impugned transactions are undertaken by the assessee with its parent company as a single large customer.

2.6.3. We also note that according to the TPO the OECD Guidelines prescribed the transaction should be evaluated together where transactions are in the nature of long-term contracts. The Ld. D.R. referred to para 1.42 of OECD Guidelines which suggests that ideally ALP should be applied on transaction-by-transaction basis, however, where separate transactions are closely linked or continuous that they cannot be evaluated adequately on a separate basis. The para 1.42 of OECD Guidelines is reproduced as under:

> *"ideally, in order to arrive at the most precise approximation of fair market value, the arm`s length principle should be applied on a transaction-by-transaction basis. However, there are often situations where separate transaction are so closely linked or continuous that they cannot be evaluated adequately on separate*

basis. Examples may include 1. Some long-term contracts for the supply of commodities or services, 2. Right to use intangible property, and 3. Pricing a range of closely-linked products (e.g. in a product line) when it is impractical to determine pricing for each individual product or transaction. Another example would be the licensing of manufacturing know-how and the supply of vital components to an associated manufacture; it may be more reasonable to assess the arm`s length terms for the two items together rather than individually. Such transactions should be evaluated together using the most appropriate arm`s length method or methods. A further example would be the routing of a transaction through another associated enterprise; it may be more appropriate to consider the transaction of which the routing is a part in its entirety, rather than consider the transaction on separate basis."

2.6.4. We find that in the case of the assessee, there are long-term contracts for supply of commodities, and separate transactions are closely linked or continuous that they cannot be evaluated adequately on a separate basis as per examples given in the light of OECD Guidelines para 1.42 as quoted above, we are, therefore, of the view that the combined approach of transaction and aggregation of transaction is the most appropriate method.

2.6.5. We also find that the contracts of the assessee with AEs run over a period of 2 to 4 year and as such are long-term contracts justifying as a combined transaction approach as taken by the assessee. We also observe that the assessee had earned lower than mean gross margin in some individual unrelated party transactions also. Therefore, comparing margin of individual contracts with AE's with margin calculated the average margins entered with Non AE's does not appear to be as per the principal of transfer pricing.

2.6.6. We also find that that the case laws cited by the TPO in fact supports the view of the assessee that the transactions, which are similar in nature, can be analyzed under a combined transaction approach. It was also pointed out to us that the approach adopted for determination of ALP of the international transactions of the assessee has been accepted by Revenue Authorities to be at arm`s length in A.Y. 2008-09. Therefore, we do not find any plausible reason for the TPO to deviate from that stand.

2.6.7. We also notice that in case of unrelated party transactions, the assessee performed additional functions since it is also responsible for the installation and commissioning of equipment supplied the areas in case of related parties, the drawing of the assessee is restricted to only supply of equipment. Thus, given that additional functions performed, the assessee is anyways likely to earn higher gross margins in unrelated party transactions than related party transactions. The assessee is a risk bearing entity and is full of risk bearing manufactures and supply of all power generation equipment's and as such the assessee is likely to earn low gross margins on international transactions based on the quotient of risk involved. The same is also evident from the fact that the assessee has earned lower than mean gross margins in unrelated party transactions also.

2.6.8. The individual projects have specific functional differences as each has various factors such as nature of work, bidding process, location etc. as different. Therefore, overall profitability in some projects may be lower margin earned; therefore, it would not be appropriate to hold that the assessee should earn more than the rest of the projects. For example, the margin of XE Kaman- Andritz India Projects is marginally found to be lower when compared individually with 2 other projects as risk is covered through the 3rd party consortium. The risk being mitigated, the margins are less as per the

common business practices. Therefore, adjustment made on account of the difference in margins of XE, Kaman Projects is not justified. We also find that in the case of Ashlucreek projects, the reason for earning lower gross margin was on account of extraordinary cost of Rs. 87,28,333 incurred by the assessee during financial year 2008-09 of Rs.56,78,653 which has been allowed in A.Y. 2009-10 in proportion to the total cost to be incurred over the life cycle of the project. If the effect of the extra ordinary event is ignored, then revised Adjusted Gross Margin comes to 18.8% as compared to 14.70% average gross margin earned from non-AEs projects and thus we find that there is no reason to make adjustment on this account also.

2.6.9. We also find force in the submissions of the Ld. A.R. for the assessee that the assessee has also in the alternate performed TP analysis using transitional net margin which serve as corroborative analysis for the International transactions related to contract revenue and from the projects with AE's. The margin using TNMM method for the assessee for transaction with AE was determined at 10.01% compared to 6.66% for transactions with Non AE's. We also find that this contention of the assessee was also accepted by the Hon`ble ITAT in earlier years (i.e. A.Y. 2006-07 ,2007-08, and 2009-10) vide order dtd. 03.07.2004. Relying on the analysis undertaken by the assessee, the enter adjustment on account of contract revenue from AE projects was deleted as the transactions having been analyzed under TNMM were held to be at arm`s length. Considering the above facts and circumstances, we direct the Ld.AO to delete the adjustment made by the AO/ TPO. The above grounds of the assessee are, therefore, allowed.

3. Ground No. 3 relates to adjustment of Rs. 1,17,23,967/-(A.Y. 2010-11) and Rs. 34,18,088/- (A.Y. 2011-12) to the

transaction related to ''payment for technical service" by determining the arm`s length price of such payments as NIL

3.1. Briefly, stated the facts of the case are that the TPO on the basis of last years in the case of M/s. VA technical Eshcher WYSS Flovel Limited merged with the assessee, noted that the transfer pricing adjustment was made in which the arm`s length price determined was Nil for technical services received from AE's of which payments made were already covered under technical royalty agreement. It was explained that in respect of Mandideep unit , the entity had entered in to an agreement with the AE's which was altogether different from the agreement entered in to by Prithla unit and further Article 5 and 6 of agreement showed that it does not include any arrangement towards provision of technical services rendered by the AE's. In respect of Prithla unit, agreement with German AE was for receipt of technical assistance for manufacturing of contract products while payment for technical services was in relation to other component of project. Therefore, the payments of technical royalty and technical services are different, hence, no disallowance should be made. However, the TPO reproduced some provisions of Technical Collaboration Agreement (TCA) dtd. 1st day of January 2006 and viewed that the licensor has provided know-how and available technical information and assistance for marketing, layout, basic design, manufacture, installation and servicing of contract products to the assessee. The term "technical information" means engineering and manufacturing information available with the licensor which inter-alia includes processes and products related to manufacture, testing, application, installation, of Rs. 1, 39, 79,990/- commissioning and servicing of contract products. It is clear that as per the royalty agreement, the associate's enterprise is required to provide all the information, which

relates to marketing as well as installation and servicing of the contract products to the assessee, which are already covered under TCA and thus, it is duplicate in nature. Accordingly, the TPO found that an amount of Rs. 1,39,79,990/- is covered under the royalty agreement in respect of Mandideep unit hence, its ALP was determined at NIL and disallowance of Rs. 1,39,79,990/- were proposed. Similarly an amount of Rs. 3,02,21,072/- in respect of Prithla unit is found to be covered under royalty agreement hence, same was disallowed by not considering to be ALP. Accordingly, the TPO proposed adjustment of Rs. 4, 42, 01,062/- in this regard.

3.2. Before DRP, it was argued that certain expenses were disallowed without considering that these were examined in previous year A.Y. 2009-10 for Prithla units pertaining to Baghlighar projects of which payments were not covered by royalty agreement. The assessee filed additional evidence, which were sent to the TPO, but the TPO objected to its admission. However, the DRP observed that these go to establish the factual position in respect of adjustment made, hence, the same were admitted. The DRP found that an amount of Rs. 15,94,092/ of identical items to be duplicative in nature hence, it was disallowed. This is as per item 12 & 13 on page No 33 of TPO order. From the explanation filed, it is clearly appearing twice. As per the payment terms 50% was paid upfront and 50% was later on completion of work. Since it is not covered under royalty agreement on the argument that it is duplicative in nature to be considered, hence, the DRP found the adjustment as incorrect and deleted the same. The DRP further held that there is no supply of products so far as Baglihar project is concerned and merely supervision contract, which is not covered by TCA dtd. 01.01.2006. Further, in TP order for A.Y. 2009-10 in the case of M/s. VA Technical Escher Wyss Floves Pvt. Ltd. (now merged with the assessee) dtd. 29.01.2013, the factual aspect of transaction has

been discussed in para 63 of TP order, made similar payments of Rs. 2,06,77,248/- which has been clearly held to be not covered by payment to technical services covered in impugned TCA, hence, adjustment of Rs. 2,70,,70,489/- was directed to be deleted. The DRP has also directed the TPO to verify the payments listed at Serial No. 1,4,8,9,21,and 54 as being commissioning of other projects and for service in Canada and Bhutan totaling to Rs.38,12,515/- and delete the adjustment if that same were not found linked to contract products. Thus, payments of Rs. 15,94,092/- Rs. 2,70,70,489/- and Rs. 38,12,515 were deleted and balance amount of net adjustments of Rs. 1,17,23,967/- i.e. [Rs. 4,42,01,062- (15,94,092- 2,70,70,489- 38,12,515)] were upheld.

3.3. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned Counsel for the assessee, submitted that the DRP has grossly erred in confirming addition of Rs. 1,17,23,967/- for A.Y. 2010-11 and Rs. 34,18,088/- for A.Y. 2011-12 on the following grounds

> "*That the expenditure on account of technical services amounting to Rs. 1,17,23,967/- as confirmed by the DRP are not covered under the royalty agreements and as such no adjustment is warranted on the same. The receipts of technical service by the assessee is not in dispute. The amount paid for technical services for Mandideep Unit, the royalty is paid only for manufacturing and selling rights (Article 5) and does not cover other services such as Training of License Personal (Article 2), Deputation of licensor`s personal to licensee (Article 3) and transmission of Technical Information (Article 4) . The payments made thus, are on account of service covered vide Article 2, Article 3 and Article 4 and cannot be deemed to be covered by Royalty payable as envisaged for service mentioned in Article 5 . The payments for technical*

services are thus, over and above the consideration towards Manufacturing and Selling rights and is thus, allowable deduction. Similarly, the amounts paid for technical services for Prithla unit, the amounts paid, are covered under a specific exclusion under Article 4.2 of the royalty agreement and as such is allowable. The consideration mentioned in the agreement for Prithla Unit does not, cover payments made towards the Deputation of the licensor personal in Article 4 and as such payments made in pursuance of the same are distinct from the royalty consideration is specified therein in Article 7 and as such is allowable as deduction. The learned that TPO/DRP grossly failed to appreciate the fact that the payment of royalty and technical services serve two different purposes. The approach proposed by the TPO in the year under appeal is absolute contradiction of the approach endorsed in TP order for A.Y. 2008-09 wherein he has accepted the use of TNNM as the most appropriate method and manner of application of TNNM for benchmarking the impugned International transaction of the Appellant.

The learned TPO grossly erred in questioning the commercial expediency of payments towards technical services which is impermissible and the TPO can't question the quantum of any payment made but the scope is restricted only to verify whether the services have actually been rendered. The rendering of services has not been disputed by the TPO. The learned Counsel has placed reliance on the following decisions: CIT vs. EKL Appliances (20 12) 345 ITR 241 (Del) and S A Builders (2007) 288 ITR 1 (SC) for his proposition of consistency.

3.3.1. The learned Counsel further submitted without prejudice to above that in view of TPO/DRP payment of technical services covered by Technical Collaboration Agreement (TCA) with AEs, after including payment of technical services, effective rate of royalty on total sales of assessee is re-computed around 3.48% which is less than the rates at agreed in TCA with AEs which makes it very clear that the payment of technical services is over and above the royalty payments specified in that TCA.

3.3.2. Without prejudice to above, it was submitted that the TPO has applied CUP to determine ALP of the amounts paid for technical services without bringing any comparables on record, which is illegal.

3.3.3. The ld. A.R. Further submits that in the succeeding years i.e. A.Ys. 2012-13 and 2013-14, the TPO has accepted this factual position by not making any adjustment for amounts paid for services covered under Article 2, Article 3, and Article 4 of the agreement in case of Manideep Unit and Article 4.2 in respect of agreement in the case of Prithla Unit. The additions made in A.Y. 2012-13 amounting to Rs. 34,12,846/- pertained to sums, details of which were furnished by the assessee himself, which were covered under Royalty Agreements and that whose ALP was taken at Nil. Therefore, in the line of course of action taken by the TPO for A.Y. 2012-13, the Ld. A.R. furnished the details of adjustments vide Anx-A for A.Y. 2010-11 and Anx-B for A.Y. 2011-12 which are wrongly sustained by the DRP in connection with payments for technical services wrongly held to be already covered in Royalty agreement specifying the exact nature of the sum so paid along with the exclusion clauses relating to Royalty agreements to substantiate the claim of the assessee that amounts so adjusted by the TPO /DRP for A.Y. 2010-11 and A.Y. 2011-12 were unjustified as

the same were on account of payments not covered vide Royalty Agreement.

3.3.4. The details of Technical services received from AEs-amounts in dispute before ITAT for the A.Y. 2010-11 are submitted as per ANX-A below :

No	**Name Of Associated Enterprise**	**Unit**	**Particulars/Scope Of Work**	**TP Adjustment Amount (INR)**	**Appellant's Comments**
1	ANDRITZ Hydro GmbH,Austria	Mandideep	Manufacturing Support In Shop Floor For the Purpose Of Up gradation	3,581,363	Amount Paid for need based onsite job-work support. Covered by Exclusion clause in 3.2 of the agreement relating to General technical assistance by active participation in establishing marking, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing.
2	ANDRITZ Hydro GmbH,Austria	Mandideep	Designs	14,760	Amount Paid for need based onsite job-work support. Covered by Exclusion clause in 3.2 of the agreement relating to General technical

					assistance by active participation in establishing marking, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing.
3	ANDRITZ Hydro GmbH,Austria	Mandideep	Designs	35,835	Amount Paid for need based onsite job-work support. Covered by Exclusion clause in 3.2 of the agreement relating to General technical assistance by active participation in establishing marking, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing.
4	ANDRITZ Hydro GmbH,Austria	Mandideep	Support for logistic network in India	761,755	Amount paid for need based onsite job-work support-not covered under royalty agreement. Separately chargeable as per TCA, as TCA dated 1 January 2006. The royalty

					consideration (as per Article 6)is paid only for the manufacturing and selling rights (Article 5) and does not cover other services covered by Article 2 (Training of Licensee Personnel), Article 4(Transmission of technical Information) **(Item 29 of the Paper book)**
5	ANDRITZ Hydro GmbH,Austria	Mandidep	Engineering support for scada portion of the project	1,477,770	Paid for engineering support for specific tasks. Covered by exclusion clause in 3.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing.
6	ANDRITZ Hydro GmbH,Austria	Mandidep	Reimbursement of expenses incurred for training	293,460	Reimbursement of training costs on actual basis. Other similar Payment has been accepted at ALP(Please refer

					from 3CEB)
7	ANDRITZ Hydro GmbH,Austria	Mandidep	Site support, site visit travel Insurance	75,991	Amount Paid for need based onsite job-work support. Covered by Exclusion clause in 3.2 of the agreement relating to General technical assistance by active participation in establishing marking, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing.
8	ANDRITZ Hydro GmbH, Austria	Mandidep	Quality Inspection-forging	192,433	Paid for engineering support for specific tasks. Covered by exclusion clause in 3.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing.

9	ANDRITZ Hydro GmbH, Austria	Mandidep	Rotor hub machining and support from Haw	479,672	Paid for engineering support for specific tasks. Covered by exclusion clause in 3.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing.
10	ANDRITZ Hydro GmbH, Austria	Mandidep	Business development support hours	1,113,016	Paid for engineering support for specific tasks. Covered by exclusion clause in 3.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing. Allowed by DRP in principle. However, due to a

					typographic error in the DRP direction application filed with DRP.
11	ANDRITZ Hydro GmbH, Austria	Mandideep	Support of Mr. Kraxner in weiz	149,760	Amount Paid for need based onsite job-work support. Covered by Exclusion clause in 3.2 of the agreement relating to General technical assistance by active participation in establishing marking, design, Production, assembly, quality control, testing, application, installation, commissioning and servicing.
12	ANDRITZ Hydro GmbH, Austria	Mandideep	Cooler, bearing , retaining rings procurement support	619,008	Paid for engineering support for specific tasks. Covered by exclusion clause in 3.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, Production, assembly, quality control, testing, application, installation, commissioning and

					servicing.
13	ANDRITZ Hydro GmbH, Germany	Prithla	Reimbursement of expenses incurred for general training for the Projects Heads-Large hydro	269,869	Reimbursement of training costs on actual basis. Other similar Payment has been accepted at ALP(Please refer from 3CEB)
14	ANDRITZ Hydro GmbH, Germany	Prithla	Hydraulic layout and data schedule for bid Documentation	408,904	Paid for support in respect of bid documentation (hydraulic layout and data schedule) for a specific project (Singoli Batwari) and not for design and drawings of "Contract Products". Covered by exclusion Clause in 4.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, production, assembly, quality control, testing, applications, installation and servicing.

15	ANDRITZ Hydro GmbH, Germany	Prithla	Commissioning of engineer for inspection of nozzle spring (Hours + Expenses)	145,246	Covered by exclusion Clause in 4.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, production, assembly, quality control, testing, applications, installation and servicing. Further, it also Includes reimbursement of local costs such as hotel expenses, daily allowance, car, petrol, etc. for the expatriates working on erection commissioning site for Teesta
16	ANDRITZ Hydro GmbH, Germany	Prithla	Hydraulic layout and data schedule for bid Documentation	269,249	Paid for support in respect of bid documentation (hydraulic layout and data schedule) for a specific project (Singoli Batwari). Covered by exclusion under Article 4.2 of TCA

					dated 26 April 2006. Therefore, Separately Chargeable.
17	ANDRITZ Hydro GmbH, Germany	Prithla	Engineering Services	1,835,876	Paid for detailed engineering services for a specific project (Rangit).
	Total			**11,723,967**	

3.3.3. Similarly detail of technical services rendered are as under for A.Y. 2011-12:

No	**Name Of Associated Enterprise**	**Unit**	**Particulars/Scope Of Work**	**TP Adjustment Amount (INR)**	**Appellant's Comments**
1	ANDRITZ Hydro GmbH, Austria	Prithla	Basic Design & Engineering for Butterfly Valve	1,077,972	Covered by exclusion Clause in 4.2 of the agreement relating to general technical assistance by active participation in establishing

					marketing, design, production, assembly, quality control, testing, applications, installation and servicing.
2	ANDRITZ Hydro GmbH, Austria	Mandideep	GH-DE Design support for Turbo Q 3&4	830,114	Covered by exclusion Clause in 3.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, production, assembly, quality control, testing, applications, installation and servicing.

3	ANDRITZ Hydro GmbH, Germany	Pirthla	Basic Design for Various	1,510,002	Covered by exclusion Clause in 4.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, production, assembly, quality control, testing, applications, installation and servicing.
			Total	**3,418,088**	

3.4. On the other hand, the Ld. D.R. submitted that the assessee has entered into a Technical Collaboration Agreement (TCA) with its AEs under which the assessee is paying royalty to the said AE. The assessee also procures project specific technical services from the said AE as and when required. The licensor has provided

know-how, available technical information and assistance for marketing, layout, basic design, manufacture, installation and servicing of contract products to the assessee. The term "technical information" means engineering and manufacturing information available with the licensor which inter-alia includes processes and products relating to manufacture, testing, application, installation, commissioning and servicing of contract products. It is clear that as per the royalty agreement, the associate's enterprise is required to provide all the information, which relates to marketing as well as installation and servicing of the contract products to the assessee, which are already covered under TCA and thus, it is duplicate in nature. The international transaction representing payment of technical services are class of transactions in itself and it cannot be clubbed with the other transaction of the assessee for benchmarking. The Ld. D.R. also submitted that it is not the claim of the assessee that the expenditure in relation to the payment of technical services is included in cost of goods sold calculated for the purpose of determining gross margins for using cost plus method in the determination of arm`s length price for the international transactions representing receipt of contract revenue. Therefore, the payment of technical services cannot be considered ALP based on TNNM analysis undertaken by the assessee.

3.5. We have heard the rival submissions of both the parties and have perused the material available on record. We find that the assessee has considered aggregation of transaction into its TPSR. When that international transaction pertaining to import of raw material, contract revenue from for Associates were closely linked with main business and thus, applied TNMM method where OP/OR was computed at 10-10% for the assessee as against 6.66% of the

comparables. It was argued that the TPO has not provided cogent reasons for rejecting economic analysis undertaken by the assessee. We find that the TPO has applied CUP method, without bringing any comparable on record. We, further find that the TPO has questioned the business decision of entering into technical services agreement, which is beyond his jurisdiction and not permissible in law. It is not for the TPO to advise as to how the business has to be run by the assessee and what type of contract agreement has to be entered in to by the assessee. It is the decision of commercial expediency, which is not permissible to be disturbed by the TPO. We also find that rendering of service has not been disputed. The DRP has confirmed the expenditure of Rs. 1,17,23,967/- incurred on account of technical services as covered under the royalty agreement. However, the perusal of Technical Collaboration Agreement (in short TCA) dtd. 01.01.2006 in respect of Manideep Unit shows that the royalty is being paid only for manufacturing and selling of right as prescribed under Article 5 of TCA of which consideration is to be paid as provided under Article 6 of TCA: In order to appreciate it in proper perspective, the relevant Article 2,3,4 and 5 of TCA is reproduced as under:

"**Article two- Training of THE LICENSEE'S Personnel**

2.1. During the term of this Agreement THE LICENSOR Shall receive THE LICENSEE's Personal for training in it is the LICENSOR'S country or elsewhere. Such Personnel Will be trained by THE LICENSOR in the functions relating to the marketing, design, Manufacture, testing, installation, commissioning and servicing of CONTRACT PRODUCTS and materials used therein. The training shall be for such periods and for such numbers as may from time to time be agreed upon by the parties in respect of the CONTRACT PRODUCTS. The LICENSOR shall endeavor to ensure that the training of THE LICENSEE's personnel in the above fields will be adequate to impart complete competency in the respective fields. THELICENSEE shall obtain the prior approval of the concerned

Indian Government Authorities Wherever applicable, for the deputation of their personnel to THE LICENSOR.

2.2. THE LICENSEE shall be responsible for and shall pay all such salaries, living allowances, travelling expenses and other remuneration and expenses to which its personnel deputed to THE LICNSOR may be entitled. The LICENSOR will not charge training costs if LICENSOR's Personnel impart training.

2.3. THE LICNSEE shall be responsible for and shall have sufficient knowledge in their respective lines and actively participate in their respective functions. They shall also have sufficient working knowledge of the English language THE LICENSEE shall endeavor that the personnel trained by THE LICENSOR will thereafter work at THE LICENSEE, S works where CONTRACT PRODUCTS are engineered and/or manufactured for at least three years from the date of completion of the training.

2.4. A man-month as used in this Article 2 is based upon the regular working time of five days per week with seven hours each, with no working on holidays.

Article 3-Deputation of THE LICENSOR'S personnel

3.1 Subject to THE LICENSEE obtaining the approval of the concerned Indian Government authorities if any and upon mutual agreement of the parties, THE LICENSOR shall make available to THE LICENSEE for periods to be agreed upon by the parties suitable specialists who are required by THE LICENSEE in INDIA in order to train its personnel at the licensee's factory and to provide general technical assistance by active participation in establishing marketing, design, production, assembly, quality control, testing, applications, installation, commissioning and servicing at THELICENSEE factory of CONTRACT PRODUCTS or sites where such products assembled, instead and /or tested.

3.2 THE LICENSOR'S technical personnel shall be made available to THE LICENSEE on the VA TECH HYDRO rates according to the transfer price Regulation and the periods to be mutually agreed upon.

Article 4-Trasmission of Technical information

4.1 The documentation to be supplied to THE LICENSEE by THE LICENSOR hereunder shall be in the metric system and in English language.

4.2 The documentation shall be given in the form of suitable reproducible available with THE LICENSOR such as tracings, transparencies, microfilms, electronic files, etc. as may be desired by THE LICENSEE.

4.3 THE LICENSOR shall deliver the documentation to THE LICENSEE in THE LICENSOR's

Country by either delivering to the air carriers designated by THE LICENSEE for dispatch to THE LICENSEE, or at the request of THE LICENSEE it shall be made available by THE LICENSOR to personnel of THE LICENSEE delegated to THE LICENSOR or to a representative of THE LICENSEE in LINCESOR's country. The customs duties and other levies, taxes or charges payable in India shall be on the account of THE LICENSEE.

Article 5- Manufacturing and Selling Rights

5.1. The LICENSOR for the period to this Agreement grants to THE LICENSEE, under kits Technical information and improvements furnished by THE LICENSOR to THE LICENSEE present pursuant to this Agreement as well as under the relevant patents

5.2. THE LICENSEE is free to offer for export CONTRACT PRODUCTS manufactured by it to other countries as may be mutually agreed upon between THE LICENSOR and THE LICENSEE.

5.3. THE LICENSEE shall make adequate arrangements for the marketing of CONTRACT PRODUCTS.

5.4. THE LICENSEE shall have the right to sublicense the rights granted hereunder to another party in India only with the prior written approval of THE LICENSOR and the Government Authorities, on terms and conditions to be mutually agreed upon by the parties hereto.

Article 6-Consideration

6.1 In consideration of the rights granted to THE LICENSEE as set forth in Article 5 of this Agreement, THE LICENSEE shall, subject to the compliance of statutory regulations, Pay to THE LICENSOR following royalties.

a) CONTRACT PRODUCTS manufactured 5%
and/or sold by THE LICENSEE for
The domestic market.

b) CONTRACT PRODUCTS manufactured 8%
And/or sold by the LICENSEE for
The export market.

The above percentages of royalties are application on "net sales" of CONTRACT PRODUCTS manufactured and/or sold by THE LICENSEE during the validity of this Agreement, The term "net sales" shall mean the net ex-factory sale price of the CONTRACT PRODUCT exclusive of cost of imported components irrespective of the source of procurement (including ocean freight, insurance custom duty etc.). Royalties are not applicable on CONTRACT PRODUCTS sold to the LICENSOR.

6.2 All Payments due based on this Agreement will be considered as effected only when they are at free disposal of THE LICENSOR. THE LICENSEE will pay any duty, taxes and similar charges payable in India and related to these payments.

6.3 Within three months from March 31th and September 30th of each year THE LICENSEE shall render to THE LICENSOR A report showing the total ex-factory selling prices of each of the CONTRACT PRODUCTs invoiced by THE LICENSEE during the preceding half year, the amount invoiced for foreign supplied components in accordance with Article 6.1 as well as the corresponding royalties due.

6.4 The royalties which are due shall be payable in Euro at the market rate of exchange existing at the time of remittance. The amount shall be remitted to THE LICENSOR at their bank account in Austria within four months (subject to the current regulatory framework) after the end of the respective half year THE LICENSEE shall send a copy of the respective documents (application for transfer of royalties) to THE LICENSOR within one month along with the report of the royalties due.

6.5 THE LICENSEE shall keep proper books and records giving full information regarding the turnover subject to royalties payable to THE LICENSOR. THE LICENSOR shall be entitled at its cost to have these records and relevant documents examined. For the purpose of examination, THE LICENSEE is obliged to grant inspection of its books and records and access to its offices."

3.5.1. Thus, the royalty payments as mentioned in clause 6.1 as per the terms set out in clause 6.2 to 6.5 of Article 6 of TCA in respect of manufacturing and selling rights as mentioned under Article 5 of TCA dtd. 01.01.2006 would be payable by the assessee to its parent company Andritz Austria. However, in addition to this, the assessee has also availed services rendered on account of Training of the Licensee`s personnel as prescribed under Article 2 of TCA, Deputation of the Licensor`s personnel as prescribed under Article 3 of TCA and Transmission of technical Information as prescribed under art 4 of TCA. We have gone through the Articles 2 to 4 of TCA and find that the payments made on account of services mentioned in these Articles are not covered by the services in the nature of royalty as mentioned in the Article 5 and payments mentioned under Article 6 of TCA. In this view of the matter, the nature of services rendered under Article 2,3 and 4 of TCA cannot be deemed to be covered by royalty payable as envisaged under Article 5 read with Article 6 of TCA. We find that clause 2.1 of Article 2 provides that Licensor shall receive the Licensee `s personnel for training in its plants in the Licensor country or elsewhere and as per clause 2.2 of Article 2 the Licensee shall be responsible to pay all such salaries and living allowances, travelling allowances and other remuneration and expenses to personnel deputed for training. This type of services under the head of training as given in scope of work as listed in Article 2 are not covered by Article 5 of TCA . Similarly payments related to deputation of personnel at the assessee`s factory at Mandideep Unit to train the licensee`s personnel for the services of nature mentioned in clause 3.1 of Article 3 of TCA are also not covered by the services mentioned under Article 5 of TCA. Such nature of payment has been reflected in Anx-A of the Table mentioned in para 7.3.15 of DRP`s order in the case of the assessee. The perusal of Article 4 of TCA shows that

payments relating to delivery of documentation by Air carrier, custom duties and other levies under the head of Transmission of Technical Information are not covered by Royalty clause falling under Article 5 of TCA. We find that the consideration mentioned in Article 6 talks about services of royalty in nature and not the services rendered under Articles 2, 3 and 4 of TCA. The assessee has claimed that the payment disallowed by the AO/TPO pertained to service rendered under Article 2 ,3 and 4 of TCA , hence, the same are exclusive of services of royalty nature as mentioned under Article 5 of TCA . Therefore, the AO/TPO was not justified of having considered the same as falling under Article 5 of TCA.

3.5.2. We are of the considered opinion that that the payment for technical services of Articles 2, 3 and 4 of TCA are over and above the consideration paid towards manufacturing and selling and is therefore, allowable deduction. Similarly, the amounts paid for technical services for Prithla Unit are also covered under the specific exclusion clause 4.2 of the Royalty Agreement and as such is allowable deduction as not falling under the royalty category. We have perused the TCA dtd. 26.04.2006 entered in to in respect of Prithla Unit and find that consideration mentioned under Article 7 is read as under :-

> *"7.1. In consideration of the Technical know-how and documentation prepared and transmitted in the LICENSOR `S Country as per Article 5 and the technical assistance rendered in the LICENSOR `s country as per Article 2, and training of THE LICENSEE `s personnel as per Article 3, the LICENSEE shall pay the LICENSOR royalty as provided below."*

3.5.3. Thus, we find that the payments mentioned for the service rendered under Article 2, 3 and 5 are falling under the royalty as per Article 7, which clearly mentioned that these services are in the nature

of royalty. However, the service rendered under Article 4 of TCA dtd. 26.04.2006 are not covered by this royalty clause which is reproduced as under:

> ***"Article four – Deputation of THE LICENSOR `S personnel***
>
> *4.1 THE LICENSOR shall make available to THE LICENSEE for periods to be agreed upon by the parties suitable specialists who are required by THE LICENSEE in India in order to train its personnel at the LICENSEE`S factory and to provide general technical assistance by active participation in establishing marketing, design, production, assembly, quality control, testing, applications, installation and servicing at THE LICENSEE`S factory, of CONTRACT PRODUCTS.*
> *4.2. THE LICENSOR`S technical personnel shall be made available to THE LCNSE on the VA TECH HYDRO inter- company rates and for the periods to be mutually agreed upon."*

3.5.4. Thus, perusal of Article 4 of TCA with Prithla Unit as above shows that the nature of services rendered through the above Article 4 is not covered by royalty clause of Articles 2, 3, 5 and 6 and consideration prescribed under Article 7 of TCA. It is the claim of the assessee that the personnel treated by the AO/TPO were made for the service rendered under Article 4 for deputation of personnel, which is not covered by royalty clauses consideration as mentioned under Article 7 of the TCA. Therefore, the consideration mentioned in the agreement for Prithla Unit does not cover payments made towards the Deputation of the licensor personal in Article 4 and as such payments made in pursuance of the same are distinct from the royalty consideration as specified in the Article 7 and as such is allowable as deduction. We find that the learned that TPO/DRP has failed to appreciate the fact that the payment of royalty and technical services serve two different purposes. We also find that the TPO has accepted the use of TNNM method in A.Y. 2008-09 as most appropriate method

for the purpose of benchmarking the impugned International, whereas the approach proposed by the TPO for the year under appeal is absolute contradiction of the approach adopted earlier in TP order for A.Y. 2008-09.

3.5.5. We further find that in the succeeding years i.e. A.Y. 2012-13 and A.Y. 2013-14, the TPO has accepted this factual position by not making any adjustment for amounts paid for services covered under Article 2, Article 3, and Article 4 of the agreement in case of Manideep Unit and Article 4.2 in respect of agreement in the case of Prithla Unit. The additions made in A.Y. 2012-13 amounting to Rs. 34,12,846/- pertained to sums, details of which were furnished by the assessee himself, which were covered under Royalty Agreements and that whose ALP was taken at Nil. The learned Counsel for the assessee, has furnished the details of adjustments vide Anx-A for A.Y. 10-11 and Anx-B for A.Y. 11-12, which are wrongly sustained by the DRP in connection with payments for technical services wrongly held to be already covered in Royalty agreement specifying the exact nature of the sum so paid along with the exclusion clauses relating to Royalty agreements to substantiate the claim of the assessee that amounts so adjusted by the TPO /DRP for A.Y. 2010-11 and A.Y. 2011-12. Since the TPO has accepted the fact that above nature of services does not fall under the clause of royalty as per TCA, we are of that view that no adjustment is called for in the case of the assessee. Therefore, the TPO was not justified in making adjustment as the same were on account of payments not covered under the Royalty Agreement.

3.5.6. In the light of the above discussion, we are of the considered view that the payments made in respect of Mandideep and Prithla Units as sustained by the DRP by holding as covered by royalty agreement are not sustainable in law as the same are not covered

under the royalty clause of respective TCA dtd. 01.01.2006 in respect of Mandideep units and dtd. 26.04.2006 in respect of Prithla Unit for aforesaid units. Accordingly the TP adjustments of Rs. 1,17,23,967/- for A.Y. 2010-11 and Rs. 34,18,088/- for A.Y. 2011-12 are directed to be deleted. Thus, ground no. 3 of A.Y. 2010-11 and ground no. 4 of A.Y. 2011-12 are allowed.

4. Ground no. 4 states that the DRP also erred in issuing directions with certain typographical errors, which denied the relief to the Appellant of INR 11,13,016 in relation to international transaction of payment of technical services.

4.1. Brief facts are that the TPO has proposed the adjustment of Rs. 4,42,01,062/- towards payments for technical services to AE's. The assessee filed objection before the DRP , who allowed relief of Rs. 3,24,77,095/- and confirmed the balance amount of Rs. 1,17,23,967/- against which the assessee has preferred this appeal before us on Ground No. 3 above. However, without prejudice to above, the learned Counsel submitted that an amount of Rs. 11,13,016/- relating to Mandideep unit was held to be not covered by Royalty agreement and as such no addition was warranted on the same. The said relief due to some typographical error remained to be given to the appellant against which the appellant has preferred a rectification application and the same is pending. The learned Counsel therefore, prayed that the same may be granted in the interest of natural justice.

4.2. We have heard the rival submissions of both the parties and have perused the material available on record. We find that this amount is covered by ground no. 3 above. We also find that this

amount is appearing at Serial No. 11 of the details of payment which relates to payment made for support in respect of business development and not for design and drawing of contract products hence, same is covered by exclusion clause in 3.2 of the agreement relating to general technical assistance by active participation in establishing marketing, design, production, assembly, quality control testing application, installation, commissioning and servicing. Therefore, this amount is not covered by Ro agreement; hence, it is required to be deleted. Hence, this grounds of appeal is allowed.

5. Ground NO. 4 for A.Y. 2011-12 relates to not allowing set-off of surplus revenue / profit exceeding the arm`s length price earned from other transaction while computing the transaction-by-transaction analysis approach.

5.1. We have heard the parties. We are of the view that the decisions rendered in above ground would take care of this ground. However, even if there is any surplus of revenue /profits remains after giving appeal effect to this order, the AO may consider for allowing set-off if admissible under the law. These grounds are disposed-of accordingly.

6. Ground No. 5 for both assessment year relates to disallowance of payments of Rs. 1,06,99,464/- for AY10-11 and Rs. 3,21,61,710/- for A.Y. 11-12 made by the assessee to its overseas parent company for the purchase of technical drawings and designs that same in the nature of royalty on which tax was required to be deducted at source.

6.1. Brief facts are that the assessee company has debited Rs.1,06,99,464 in the Profit & Loss Account in the A.Y. 2010-11 on account of technical drawing expenses under the head “cost of raw materials and components”. The AO treated the same as expenditure in the nature of royalty within the meaning of Article 12 of DTAA with

Austria. As no TDS was deducted thereon by invoking provisions of Section 40(a)(ia), the AO disallowed the payment so made. Since TDS was not made in respect of this expenditure under section 195 of the Act, he disallowed the expenses claim under section 40(a) (ia) of the Act.

6.1.1. The Ld.AO followed the observation made in the order under section 195 read with section 9(1)(vi) dtd. 22.03.2005 passed by the ACIT, TDS Bhopal. The arguments advanced were that the Royalty has been given a wide meaning in both IT Act and the DTAA. The design and drawing is not kept as goods by non-resident Austrian Parent Company nor is the assessee keeping it as such. The drawings are more in the nature of secret formula. No outright sale of design has taken place and it is for limited use in manufacturing by the assessee and finally given to customers to whom generators designed based on drawing are sold. The designs purchased are not available off the shelf. The income arising to Parent Austrian Company on sale of generators by its 100% subsidiary being received in India, orders of which received in India and being manufactured in India as per design provided by the Parent Austrian Company. The Ld.AO also placed reliance in the case of CIT vs. Davy Ashmore India Ltd. and CIT vs. Neyveli Lignite Corporation Ltd. and AAR ruling in the case of Ishikawajima Harima Heavy Industries Company Ltd. 271 ITR 193 (SC) in support of his view.

6.1.2. The AO held that the assessee company has not obtained the design from anywhere else and it manufactures every generator on the design provided by the Parent Austrian Company with its 100% subsidiary company only. Thus the income accruing/in India is directly through the connection of Austrian Company in India, as envisaged in section 9(1)(vi) of Income Tax Act,1961 and Article 12 of DTAA. He therefore, held that payments are in the nature of royalty on

which no TDS was done; therefore, these were disallowed under section 40(a) (ia) of the Act.

6.2. The DRP observed that careful study of technical services proves and agreement within parent company show that the technical drawings and designs for use of the assessee are rights granted to use scientific work, patent, design, plan, secret formula, process, or industrial commercial or scientific experience. Hence, technical drawings and designs can be held to be falling under one or more of the various items listed in the Treaty. The service provided under the agreement are also technical in nature. Therefore, the payments made as per agreement is taxable in India as per Article 12 of tax Treaty as well as section 9(1) (vi) and section 9(1) (vii) of the Act. The DRP also placed reliance in the case of HMS Real Estate (P) Ltd. 325 ITR 71(AAR) and DCIT vs. All Russia Scientific Research Institute and Cable Industry 92 TTJ 74(Mum). The DRP observed that Australian Company provided complete design, drawing and the assessee has not purchased designs & drawings but only agreed to right to use it under license. Therefore, the assessee was liable to deduct TDS u/s. 195 of the Act. Since, the assessee has not deducted TDS, provisions of section 40(a) (ia) are attracted and the AO has rightly disallowed the sum paid to Australian Parent Company. The DRP noted that the technical services agreement entered in to January 2006 substantially alters the position. The DRP, observed that the ITATs has not considered in the order given in favour of the appellant prior to the year 2006 as the orders of the ITAT for A.Y. 1999-2000 to A.Y. 2002-03 was passed on 09.04. 2010,and the order for A.Y. 2001-01 to 2003-04 was passed on 28. 12.2011on the basis of order of A.Y. 1999-2000 to 2002-03, whereas the Income Tax Act,1961 has been amended retrospectively by Finance Act 2010, w. e. f. 01. 06. 1976,

whereby, under the Act, the scope of royalty on fees for technical services has been expanded which was not considered by the ITAT.

6.3. Being, aggrieved the assessee filed this appeal before the Tribunal. The Ld. A.R. submitted that the payments of Rs. 1, 06, 99,464/- for A.Y. 2010-11 and Rs. 3, 21, 61,710/- for A.Y. 2011-12 have been made for purchase of technical drawings and designs to manufacture the generators customized to the needs of its customers. Andritz Austria in turn prepares and sells the technical drawings and designs to the assessee on principal-to-principal basis without retaining any rights in the drawings. The copyright in the drawings is however, retained by Andritz Austria. The ownership of the design per se thus, is transferred to the assessee whereas ownership of copyright in drawings is retained by Andritz Austria. The assessee thus, has the right to use the product i.e. design so purchased "on as is basis" and is not authorized to modify, edit, reproduce the same. Even the technical know-how in relation to the drawings so made is retained by the Andritz Austria and is not transferred to the assessee. The transaction is thus if it transaction of purchase of drawings and not in the nature of royalty warranting deduction of tax at source. The designs so purchased are given to the customers of the assessee as part of the terms of contract between the assessee and its customers, which is specifically provided for consolidated consideration to be charged for the supply of generators as well as the technical drawings and designs used in their manufacture. The supply of the design is imperative for the customers of the assessee to ensure maintenance and smooth running of the generators. That the transaction of purchase of drawings is the outright purchases is further substantiated by the fact that the said drawings are considered as "goods" under the Customs Act and are chargeable to custom duty at the appropriate rates. The hard copies of technical drawings and

design are retained by Andritz Austria are accordingly accompanied by a bill of entry and subject of payment of customs duty while being imported in India.

6.3.1. The Ld. Counsel further submitted that the transaction is thus a purchase of the copyrighted article and not the purchase of copyrights therein. The assessee does not possess any rights of whatsoever nature in the copyrights contained in the design, which continues to be owned by Andritz Austria. Purchase of the design only allows use of information contained therein but does not transfer the copyright therein.

6.3.2. The Ld. A.R. also brought to our notice that the ITAT in the case of the assessee for earlier years including for A.Y. 2006-07 to A.Y. 2009-10 vide order dated 03.07.2014, has decided the issue in favour of the assessee by holding that the transactions are in the nature of purchase of design and drawings and not in the nature of royalty. The Hon`ble ITAT vide para 8.1 of the said order further observed that the Department has not filed any appeal against the order of CIT(A) for A.Y. 2004-05, wherein similar additions were deleted. Since the present case of the assessee is on identical facts, the addition made in current year is not justified and must be deleted in the interest of justice. In support of his contentions, the Counsel placed reliance in the case of Radhasaomi Satsang Saomi Bagh vs. CIT (1992) 193 ITR 321(SC). The learned Counsel for the assessee, has also submitted a chart giving comparison of DRP finding and submissions of the assessee as under ;

DRP Observation	Assessee`s comments to DRP observation
i. The DRP held that the technical services agreement entered in to	i. The Hon`ble ITAT has post 2006, vide order dated 3.7.2014 for A.Y.

	2006 substantially alters the position. The DRP, at the time of hearing, the to order of Hon`ble ITAT for years which were given in favour of the appellant prior to the year 2006		2006-07 to 2009-10 has taken the same view and held that the transaction is in the nature of purchase not warranting deduction of tax at source. The finding of the DRP' is thus, not sustainable
ii.	The orders of the Hon`ble ITAT for A.Y. 1999-2000 to A.Y. 2002-03 has been passed on 9.4. 2010 whereas the order for A.Y. 2001-01 to 2003-04 has been passed on 28. 12.2011. The Income Tax Act,1961 has been amended retrospectively by Finance Act 2010, w.e.f. 1. 6. 1976, whereby, under the Act, the scope of royalty on fees for technical services is been expanded which were not considered by the Hon`ble ITAT.	iii.	There were only 2 retrospective amendments made by Finance Act, 2010 which are referred by the DRP. First pertains to right to use a computer software and second is with reference to income deeming to accrue on arising India whether or not, the Non-resident has a residence or place of business or business connection in India or the Non-resident has rendered services in India. Both amendments are not applicable to the facts of the case. The observations of the DRP are thus misplaced and not sustainable.

6.3.3. The learned Counsel stated with reference to the contention of the DRP, relying on that the agreement entered by the assessee with Andritz Austria wherein consideration payable is

designated as royalty @ 5% on sales in India and adjacent countries and @8% of exports to other countries, the assessee submits that the terms and conditions mentioned in the agreement relating to transactions of sales of generators which have been developed based on the expertise of Andritz Austria. However, in certain cases, looking at the complexities of the project involved it becomes imperative that the specific designing of the Generators is made looking at the specific needs of the clients and their projects. The assessee does not possess the requisite expertise to create such designs. Accordingly, in such cases, the designs are sold by Andritz Austria to the assessee for further delivery to the clients along with Generators as part of the terms of contract. The assessee merely execute the contract and supply the generators based on the design so received. The assessee does not get any other right in the said designs apart from creating the Generators and that too for specific entity for whom design was made. The technical know-how in respect of the said design is retained by Andritz Austria. Accordingly, it was prayed that the addition of Rs. 1,06,99,464/- for A.Y. 10-11 and Rs. 3,21,61,710/- from A.Y. 11-12 may be deleted.

6.3.4. The learned Counsel for the assessee, also placed reliance in the case of Sonata Infra Technology Ltd. (2006) 75 SOT 465(Mum), Tata Consultancy Ltd. 271 ITR 401 , Lucent Technologies Institute 2009-TIOL_161-ITAT-DEL, Samsung Electronics Co Ltd. 94 ITD 91, Property Quip corporation Ltd. 255 ITR 354, Associated Cement Corporation (2001) 124 STC 59, Citizen Watch Company Ltd. 148 ITR 774 etc. as per submission made before the TPO in support of his contention.

6.4. The Ld. D.R. relaying on the orders of the TPO/ DRP submitted that ITAT order for A.Y. 1999-2000 to 2002-03 dtd. 09.04.2010 is passed before the amendment in Finance Act, 2010. Further the order

for A.Y. 2001-01 to 2003-04 dtd. 28.12.2011 was passed relying orders of earlier years, hence, the Tribunal has not considered the scope of retrospective effect of amendment by Finance Act, 2010. It was argued that technical drawing and designs are intangible properties and not tangible goods though not appear on paper, therefore, therefore, same cannot be regarded as transfer for limited right to use and they are composite payment of royalty which is also covered by section 9(1)(vi) and section 9(1)(vii)of the Act as well as under India- Austria Tax Treaty on which TDS was not made hence, the AO has rightly disallowed the same under section 40(a)(ia) of the Act.

6.5. We have heard the rival submissions of both the parties and have perused the material available on record. We find that the supply of generators to its customers as per terms of contract which is specifically provided for consolidated consideration is to be charged consisting of generators as well as technical drawings and designs used in their manufacture. The supply of the design is imperative for the customers of the assessee to ensure maintenance and smooth running of generators. The assessee makes purchases of technical drawings and designs to manufacture generators as per needs of customers. Accordingly Australian Parent Company prepares and sales design to the assessee on the principal-to-principal basis with retaining the rights therein with him. Thus, the copyright in design is retained by Andritz Austria, thus, the assessee has right to use the product of design so purchased ""as is basis"" and not authorized to modify, edit, reproduced. We find that the technical know-how relating to design and drawings is not transferred to the assessee and same is retained by the parent company. Thus, the purchase of technical drawings and designs is outright purchase in the nature. We

also note that that these drawings supplied to the assessee by Parent company are also treated as goods as per Customs Act, on which custom duty is payable. In view of these facts, we are of the view that the transaction of purchase of drawings and design is not in the nature of royalty.

6.5.1. So far, observation of the DRP that technical services agreement entered in 2006 altered the position and decisions as given by Tribunal prior to year 2006, and there is amendment in Income Tax Act, 1961 which has increased the scope of royalty to cover such supply of technical drawings and designs. We find that the learned Counsel for the assessee, submitted that there were only two retrospective amendments made by Finance Act, 2010 that are referred to by the DRP. First pertains to right to use a computer software and second is with reference to income deeming to accrue or arising in India whether or not, the Non-resident has a residence or place of business or business connection in India or the Non-resident has rendered services in India. Both amendments are not applicable to the facts of the case, as they do not change the definition of royalty in respect of supply because of outright purchase without transferring copyright therein. Further, we find that the ITAT vide order dated 3.7.2014 for A.Y. 2006-07 to 2009-10 has taken the same view and held that the transactions are in the nature of purchase not warranting deduction of tax at source. The finding of the DRP' is thus, not sustainable on facts and in law. We find the ITAT in the case of the assessee for A.Y. 2006-07 to 2009-10 vide order dated 03.07.2014 in I.T.A. No. (TP) No. 5& 311/Ind/2011 has observed as under

"*8. The assessee company has debited Rs.66,90,516/- in the A.Y. 2006-07 on account of technical drawing expenses under the head "cost of raw materials and components". The AO treated the same as expenditure in the nature of royalty within the meaning of Article 12 of DTAA with Austria. As no TDS was deducted thereon by invoking*

provisions of Section 40(a)(ia), the AO disallowed the payment was so made.

8.1 The fact as submitted by the assessee with regard to payment for designs & drawings as under:

• The assessee company is a wholly owned subsidiary of nonresident company M/s Andritz Hydro GmbH, Austria ("Andritz Austria") and is engaged in the business of manufacturing generators and other heavy electrical equipment's for supply to Hydro Power Plants.

• The assessee enters into contracts with its customers for supply of generators and equipment's as per their specifications of frequency, current, capacity, speed, efficiency etc. Such contracts include supply of 'technical drawing and design' to the customers along with the equipment's

• The assessee does not possess the requisite skills and technical expertise for the designing of the generators and in this regard seeks assistance from its overseas parent entity.

• For the above purpose, purchase orders are placed on Andritz Austria for the supply of technical drawings and designs to manufacture the generators customized to the needs of the customers. Copies of some of the sample Purchase Orders are attached as Exhibit 35 of the Paper book) to substantiate the fact that orders are place by the Assessee for purchase of the Designs and not obtaining a limited right to use them.

• It has been submitted to the AO that Andritz Austria sells the technical drawings and designs to the assessee on a principal-to-principal basis and does not retain any right in such drawings and designs. The drawings procured from Andritz Austria are used in the manufacture of generators and supplied along with the generators to the customers.

• The terms of the contract between the assessee and its customers specifically provide for a consolidated consideration to be charged for the supply of generators as well as the technical drawings and designs used in their manufacture. (Copy of relevant extracts of contract agreements as enclosed as Exhibit 36 of the Paperbook).

• The hard copies of technical drawings and design obtained from Andritz Austria are accompanied by a bill of entry and subject to payment of custom duty while being imported in India. Further, payment is made to Andritz Austria towards outright purchase of technical drawings and in this regard has been claimed as expenditure by the assessee in its books as, 'cost of raw materials and components'.

The assessee has also submitted copies of orders passed by higher appellate authority i.e. Commissioner of Income Tax (Appeals)

("CIT(A)") in favour of assessee in similar matters in past assessment years holding that Andritz Austria had sold technical drawing and design to the assessee. In this regard, the said expenditure would be regarded as a business expenditure and not royalty as contended by the Ld. AO.

8.2 The contention of the assessee with regard to the disallowance of payment u/s.40 (a) (i) was as under:-

"The designs and drawings are purchased on a principle-to-principle basis and is in the nature of purchase of goods the transaction is in the nature of purchase of "Copyrighted article" and not of a purchase of "copyright" itself in the drawings. Hence, the same is in the nature of the "business income" and not in the nature of "royalty".

To substantiate the nature of transaction as a purchase of goods, the Appellant has provided various supporting documents such as copies of bill of entry, copy of physical drawings received, copies of invoices and details regarding the terms and conditions of the transaction, which have not been challenged by the Ld. AO For AY 2003-04 and AY 2004-05, the Ld. CIT(A) has also held that the transaction is in the nature of purchase of designs and drawings not in the nature of royalty (vide orders dated 19 January 2007 and 23 November 2007).

• Further, the CIT(A) order for A Y 2003-04 has also been upheld by the same bench of the Hon'ble ITAT vide order dated 28 December 2011 (ITA No 29/IND-2005 for AY 2000-01, ITA No 253 and 254/1ND- 2007 for AY 2001-02 and AY 2002-03, ITA No 255/IND-2007 for AY 2003-04).

• Further, no appeal has been filed by the tax authorities against the order of the Ld. CIT(A) for AY 2004-05.

• The facts of the current appeals are same as those covered in the aforesaid orders. In this regard Appellant has relied on following key judicial precedents:

• DCIT-3(1), Bhopal vs VA TECH Hydro India Private Limited (ITA No 255/IND-2007)

• ACIT, 3(1), Bhopal vs VA TECH Hydro India Private Limited (ITA No 112 to 115/IND-2007)

• Davy Ashmore India Ltd. vs CIT - 190 ITR 626

• Pro-Quip Corporation Vs CIT - 255 ITR 354

9. With regard to the payment made for design and drawing imported by it from its group companies in Austria, the AO held that such import of design is not in nature of 'purchase of raw materials', however, the AO treated the same as payment of royalty as per Section 91(vii). While reaching to this conclusion the AO has relied upon the order passed u/s.201(1). As no tax was deducted on these payments, the AO disallowed the same by invoking provisions of Section 40(a)(i) and which was confirmed by CIT(A). We do not find

any merit in the conclusion of the lower authorities insofar as the design and drawings was purchased on a principle to principle basis and same was in the nature of purchase of goods. Precisely the drawing is in the nature of purchase of 'copyright articles' and not of purchase of 'copyright" itself in the drawings. Hence, the same is in the nature of business expenditure and not in the nature of royalty. The payments of technical drawings and design have been incurred to procure such drawings and designs along with all the rights attached to them as the entire set was required to be provided to the customers as per the terms of the contract. Without acquiring all the rights attached to such drawings and designs, the assessee would not have been in the position to meet its contractual obligation. We had verified the copies of bills of entry, copy of physical drawings receipt, copies of invoices and details regarding terms and condition of the transaction IT(TP)A No.5/Ind/2011, IT(TP)A No.313/Ind/2011, IT(TP)A No.616/Ind/2012,& IT(TP)A No.120/Ind/2014 17 and found that the drawing was in the nature of purchase of goods. Exactly similar issue has been considered by the Tribunal in assessee's own case for the A.Y. 2003-04 vide order dated 28-12- 2011 in ITA No.29/Ind/2005. The precise observation of the Tribunal were as under :-

"First, we shall take up the appeal of the Revenue for assessment year 2000-01 (ITA No.29/Ind/2005) wherein first ground pertains to granting relief of Rs.4,14,18,313/- representing disallowance of expenditure under the head 'technical design & drawings'. The crux of arguments on behalf of the Revenue is in support to the assessment order whereas the learned counsel for the assessee contended that the impugned issue has already been decided in favour of the assessee by the Tribunal. In reply, the ld. CIT/DR Shri Anadi Varma invited our attention to pages 2 to 5 and para 37 of page 13 of the assessment order.

2. We have considered the rival submissions and perused the material available on file. Since common grounds are involved, therefore, these can be disposed of by this common & consolidated order for the sake of brevity. Without going into much deliberation, we are reproducing hereunder the relevant portion of the order for assessment year 1999-00 to 2002-03 (ITA Nos.112 to 115/Ind/2007), order dated 30.4.2010:

2. The facts, in brief, are that the assessee company is a manufacturer of dydroelectric and turbo-generators for hydel and turbo projects and selling the same in India and abroad. The assessee is a 100% subsidiary of VA TECH HYDRO GmbH Austria from 1.4.2001. VA TECH Hydro is an established name in the world in the field of manufacturing and erection of Hydro and Turbo

projects since last about 100 years. The Assessing Officer, on scrutiny of books of accounts of the assessee company and Form No. 27 for the assessment years, in question, found that though the assessee company has spent huge amounts as expenditure on technical drawings and designs on account of payments to parent company, neither the tax was deducted at source, nor the assessee company obtained no deduction certificate from the Assessing Officer. The Assessing Officer, called for the explanations of the assessee and after considering the same, made the following observations :-

"6.1 Arguments of the assessee are hovering around incorrect reasoning that a) it has purchased the design on out right basis as commodity and b) on the dictionary meaning of Royalty.

6.2. Royalty has been given wider meaning both in the Income Tax Act and DTAA, which includes payment for design/drawing. Assessee has relied on judgment in the case of CIT V/s DAVY ASHMORE INDIA LTD. 190 ITR, CIT Vs. Neyveli Lignite Corporation Ltd. 243 ITR 459,etc. However, these cases are distinguishable on facts which are different and not of any support to the assessee. The design purchased by the assessee are not in respect of commissioning of plant but these are in respect of a IT(TP)A No.5/Ind/2011, IT(TP)A No.313/Ind/2011, IT(TP)A No.616/Ind/2012,& IT(TP)A No.120/Ind/2014 18 particular generator which is being manufactured and sold to the customers. Such designs are purchased separately for every generator the assessee has manufactured so far. In these case laws, there was an outright purchase of plant along with design through a bid process. Where an Assessee is getting the design prepared for every generator from the parent Austrian Company. Assessee's arguments are baseless and denying the basic definition of royalty as mentioned in article 12 of DTAA and explanation 2 to section 9(vi) of the I.T. Act, according to which payments in the head of design in reference to assessee's case is within the ambit of the definition of royalty as provided therein. In fact the case Ishikawajima Harima Heavy Industries Company Ltd. In re (AAR) 271 ITR 193 makes the position of taxability clear.

6.3. The non-Resident Austrian Parent company is not marketing 'design' as goods for sale to all. In addition, the assessee company 'V A Tech India' is not keeping, nor has any intention to keep, the design as goods. It is in fact more like a secret formula. The web site of the assessee company gives the details about the algorithms and the design process (Enclosed as annexure A). That Design is being used by it to manufacture the end product (generator) which is meant for sale after that it is of no use to the assessee. Therefore, design of

a generator cannot be equated with software package or any other copy righted articles whose unlimited number can be sold in market.
6.4. No outright sale of designs has taken place. It is only the limited use for manufacturing that the assessee company is holding authority to use design. Assessee company cannot purchase these design from any other third company as the trade name under which assessee company and non-resident Austrian Company are manufacturing and selling the generator is same and both the companies are known for their specific designs of generators. It has specifically been mentioned on the designs that it is the property of the parent Austrian Company. The assessee had right to use a particular design for single time. The assessee has been barred to sale the design as such to another manufacturer by the specific condition and warning printed on the design. When the design cannot be sold as above how it can be termed as outright purchase as claimed by the assessee. Thus, the assessee has only been given the right to use the design.
6.5. The designs are not purchased through open tender or bid because assessee is manufacturing generators with a unique technology which is possessed by the parent Austrian company only hence the designs are specific to the parent company. Because of this special relationship assessee is bound to purchase the design from its parent Austrian company only. The design is first received through Internet and its hard copy along with bill is received through Customs to justify the payments made to the parent company from the angle of allowability of expenditure.
6.6. There is no agreement/terms and conditions in purchase of the designs from the parent Austrian company. Assessee is just placing the orders for supply of the designs to its parent company IT(TP)A No.5/Ind/2011, IT(TP)A No.313/Ind/2011, IT(TP)A No.616/Ind/2012,& IT(TP)A No.120/Ind/2014 19 and in each case the cost of the design is also determined by the Austrian company on its own parameters.
6.7. The design purchased by the company are not available off the shelf. These designs are prepared and supplied exclusively as per the specification and requirements of the customers which is provided to Austrian company by the assessee. As informed by the assessee these designs are different for each generator assessee has manufactured.
6.8. Income is arising to the parent Austrian company on sale of generators by its 100% subsidiary company in India, orders for which are received in India and being manufactured in India as per designs provided by the parent Austrian company. Assessee company has not obtained the design from anywhere else and it

manufactures every generator on the design provided by the parent Austrian company only. Thus the income is accruing/ arising in India directly through business connection of Austrian company with its 100% subsidiary company in India as envisaged in section 9(1)(vi) of the Income Tax Act, 1961 and article 12(2) of the DTAA.

6.9. The Legal provisions have been examined in para 2 supra and the DTAA in para 3. The payment made by assessee company is covered in definition of Royalty as per DTAA, which defines Royalty as 'consideration for the use of or the right to use… design or model, plan, secret formula or process… information concerning industrial, commercial or scientific experience.'

6.10. The payment made by assessee company is also covered in definition of Royalty as per IT Act, 1961 explanation 2 section 9(1)(vi); Explanation 2.- For the purpose of this clause "royalty" means …..(ii) the imparting of any information concerning the working of…..design, secret formula or process…"

6.11. The facts along with the case laws have been examined in para 4 and 5. After the detailed examination of facts and circumstances of the case it is held that VA TECH HYDRO India Pvt. Ltd. has failed to deduct tax on sums paid to the Parent Austrian company which was chargeable to tax within India by virtue of the IT Act, 1961 and as per the provisions of DTAA between India and Austria.

6.12. Assessee company is manufacturing Generator and its accessories i.e. only the electrical part of the complete Turn key Project for generation of electricity. Turbine is manufactured by the VATECH ESCHER VYAS Floval Ltd., Faridabad, which is again Austria 100% subsidiary company of Austria in India. International orders for supply of generators are received through its parent company in Austria for which the assessee company supplies generator and its accessories to its parent Austrian company. Turbine and erection infrastructure is supplied by the Austrian company in such projects. Projects in India are completed by the assessee company with the Turbine supplied by the another 100% subsidiary company i.e. VATECH ESCHER VYAS FLOVAL Ltd., Faridabad. In all the cases design of generator is supplied by the parent Austria company only.

6.13. The 'V Austria Tech India' has stated that its Parent Austrian Company does not have Austria permanent establishment. In fact, there is no need for the Austrian company to have another permanent establishment in India, as they have their 100% subsidiary company in India (VA Tech India') which is acting on their behalf for procuring orders etc. Further the 'VA Tech India' is manufacturing every generator on the basis of design provided by the Austrian company. Thus the assessee company 'VA Tech India'

is means for accrual of income to the Austrian company on account of its business activities in India. moreover, for taxability of Royalty, Permanent Establishment is not an essential criterion. (Also held in Leonhardt Andra Und Partner, Gmbh v. Commissioner of Income Tax; 249 ITR 418 (CAL). In view of the above it is held in the case of 'VA Tech India' that the payment made by the assessee is in the nature of Royalty. However, even if the claim of the assessee is taken up for arguments sake as payment for technical services still the payment shall be taxable @ 10% in India in view of the earlier discussion in this order.

6.14. Generator is designed as per the requirement of the customer therefore its design is an integral part of it, on the basis of which it is manufactured and for that generator the customer making payments. Therefore, providing of the design to the customer cannot be termed as Austria separate sale as claimed by the assessee. Without design generator cannot be manufactured. Hence the price of generator or any plant will always be inclusive of design without which it is of no use. The design of particular generator is specific to that only and is of no use in case of any other generator. Hence the arguments of the assessee that they are selling the design along with generator is simply misleading and not relevant to the issue of taxability.

6.15. As discussed earlier in para 1.9 the drawings and designs are made with the help of sophisticated computer programs and algorithms. (Please see Annexure Austria). The computer program along with the brain of the design engineer is the input in the process and output is certain design and other parameters. These parameters are for the help of detailed design which is prepared in India by the assessee 'VA Tech India. The parent Austrian company has neither given the sophisticated computer programs nor the algorithms to VA Tech India. Only the output of the sophisticated computer programs and algorithms is provided to the assessee 'VA Tech India' which it calls as 'design'. Rights over these designs is with parent Austrian company. The assessee company further prepares detailed designs on the basis of the parameters and designs provided by its parent company. The rights over these detailed designs prepared by the assessee 'VA Tech India' with 'VA Tech India' itself. Thus it is clear that there are two sets of designs, one prepared by the Parent Austrian company for which assessee makes payment and another in house detailed design prepared by 'VA Tech India' based on the original design.

6.16. From the discussion, it is clear that with the design and other parameters supplied by the parent Austrian company, the assessee cannot create another output in Austria different case or even Austria similar case. From all the discussion and case laws cited above, it is

beyond doubt that the payments made by the assessee 'VA Tech India' are in the nature of Royalty and are squarely covered by the decision of Royalty both in the DTAA and IT Act, 1961. I hold that the payments made by the assessee 'VA Tech India' are in the nature of Royalty and that the assessee 'VA Tech India' having failed to deduct tax has committed default within the meaning of sec.195(1) read with DTAA between Austria and India and read with sec.9(1)(vi) of the Income Tax Act, 1961." The Assessing Officer, for the reasons mentioned above, finalised the proceedings initiated earlier culminating in the order under section 195(1) read with section 9(1)(vi) and 201(1)/ 201(1A), by holding that the payments made by the assessee company to its parent Austrian company VA TECH Hydro GmbH Austria, for the purchase of design, during the F.Y.2002-03, 2001-02, 2000-01 and 1999-2000, are treated as 'Royalty' within the meaning of Explanation 2 to section 9(1)(vi) and article 12 of the DTA Agreement, on which the assessee has failed to deduct tax at the rate of 10% under section 195 of the Income Tax Act, 1961. The calculation made by the Assessing Officer in this behalf is as under :- Default under section 201(1) Rs. 1,16,28,072 Interest under section 201(1A) Rs. 71,28,172 Total Demand payable Rs.1,87,56,244 .

4. Felt aggrieved, the assessee preferred an appeal before the learned Commissioner of Income tax (Appeals) wherein detailed submissions were made. The learned CIT(Austria), after considering the submissions and the legal position explained by the assessee, made the following observations :- "The entire transaction between the appellant and the nonresident company is of sale and purchase of goods on principal to principal basis. The meaning of 'royalty' has been defined in the DTAA. The Apex Court in the case of Union of India Vs Azadi Bacho Andolan and Another reported in 263 ITR 706 (SC) held that in case of difference between the provisions of the Act and the Agreement, the provisions of the Agreement would prevail over the provisions of the Act, therefore, the definition of 'royalty' is under the domestic law is not applicable for the purpose of understanding the concept of royalty under the Double Taxation Avoidance Agreement between India and Austria and, therefore, the A.O. is not justified in applying the provisions of section 9(1)(vi) of the IT Act. As regards the ownership is concerned, as rightly explained by the learned counsels that the transfer of ownership in the case of movable goods is governed by the Sales of Goods Act. The sale bill issued by the selling party contains the terms and condition on the basis of which the goods are being sold against the price. In the sale bills issued by the non-resident Austrian company, there is no mention that despite the sale of drawings and designs against the

price, they have retained the ownership in the drawings and designs. The A.O. has failed to establish as to how the income arising to the non-resident company from the sale of the drawings and designs from outside country to the appellant company is chargeable to tax in India, when the non resident company is not having any permanent establishment in India, is taxable in India and, therefore, in the absence of any concrete finding that such payments are chargeable to tax in India, section 195 has no application. Having regard to the detailed and exhaustive submission and the case laws relied upon by the appellant, I hold that the payments made for the purchase of drawings and designs do not give rise to any income in India and no tax needs to be deducted u/s 295 of the IT Act. The said payments are also not in the nature of royalty as defined in the DTAA entered into between India and Austria. In any case, it is not a case of the A.O. that there is a transfer of copyright by the Austrian company in favour of the appellant company but its is a case of sale of copyrighted articles and therefore also the payments made by the Indian company to non resident company are not in the nature of royalty. Hence the demands raised u/s 201(1A) for interest payable from the date of default in not deducting the tax at source till passing of the order by the A.O. in Financial Years 1999-2000, 2000-01, 2001-02 & 2002-03 are cancelled."

5. Now, the revenue is in appeal before us.

6. The learned CIT DR submitted that on the hard copy of drawings and designs supplied by the foreign company, it was specifically mentioned that such drawing was the property of that company and it could neither be kept, nor could be used in any other manner, without the written consent of the foreign concern. The learned CIT DR further submitted that it could neither be handed over, nor in any other way could be communicated to a third party, hence, the Assessing Officer logically inferred that the assessee company could not be considered as owner of such designs. The Assessing Officer, according to the learned CIT DR, in the absence of any material brought on record by the assessee company, rightly held that the parent non-resident company had proprietary rights in such drawings. The learned CIT DR thereafter referred to the provisions of section 9(1)(vi) and Explanation 2 thereto and also to the provisions of Article 12 of DTAA with Austria which are reproduced as under for the sake of convenience :- "Provided that nothing containing contained in this clause shall apply In relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of any data, documentation, drawing or specification

relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the Ist day of April, 1976, and the agreement is approved by the Central Government. Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a nonresident manufacturer along with a computer or compute-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Trading, 1986 of the Government of India. Explanation 2.- For the purpose of this clause. "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for – (i) the transfer of all or any rights (including the granting of a license) in respect of a paten, invention, model, design, secret formula or process or trade mark or similar property. (ii) the imparting of any information concerning the working of, or the use of a patent, invention, model, design, secret formula or process or trade mark or similar property. (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property; (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill; (iva) the use or right to use any industrial, commercial or scientific equipments but not including the amount referred to in section 44AB (v) the transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)" The term Royalties and fees for Technical Services has been defined in Article 12 of DTAA with Austria which reads as under :- "Article 12 : royalties and fees for technical services – (1) Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. (2) However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties and fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed 10% of the gross amount of the royalties

and fees for technical services. (3) The term "royalties" as used in this Article, means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematography films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience." The learned CIT DR contended that as per the meaning of the term 'royalty', as per both these provisions, the transaction between the assessee company and its parent non-resident company, fell within the realm thereof, hence, the assessee should have deducted the tax at source. The learned CIT DR thereafter also drew our attention to the observations of the Assessing Officer as regard to procurement of the same designs for the same contract, which also indicated that it was a case of royalty and not a case of out-right purchase thereof. The learned CIT DR placed heavy reliance on the conclusions drawn by the Assessing Officer which have already been reproduced hereinbefore. The learned CIT DR, thereafter, contended that the parent company was not selling the designs in the open market i.e. to any other party other than its subsidiaries. Hence, it was not a case of sale of copy righted articles. The learned CIT DR further emphasized on the fact that it was used by the assessee in manufacturing of the turbine/generator and was not sold as such in the open market like purchase and sale of a copy righted book or software, etc. The learned CIR DR further emphasized on the fact that if the view of the assessee was accepted then every transaction would become a case of sale and in that case, provisions relating to royalty would become redundant. At this stage, a question was posed to him that if the view of the revenue is accepted, then every transaction would become a case of royalty, to which the learned CIT DR could not give any effective reply. The learned CIR DR thereafter placed reliance on the order of the Assessing Officer.

7. The learned counsel for the assessee submitted additional evidence as regards the treatment of such transactions in the books of non-resident parent company which was admitted as the learned CIT DR did not object for admission of the same. The learned counsel for the assessee submitted that as per this information, it was abundantly clear that such transactions were treated as transactions of sale and purchase in the books of parent company and had been taxed as business profits and not as a royalty. It was further pointed out that the tax rate on business profit was higher than the tax rate applicable to royalties. The learned counsel for the assessee

thereafter contended that the ownership in such drawings was transferred to the assessee company on delivery of drawings by such company to the assessee. However, as per the condition of such sale transaction, the assessee could not reproduce it on its own or could use it in a manner not being permitted by the seller. Thus, the sale transaction was subject to certain condition and which was a normal condition in the case of purchase of all copy-righted articles/goods. Hence, such transaction was a case of out-right purchase for a specified purpose. The learned counsel for the assessee further submitted that the assessee delivered these drawings to the buyers of plant and machinery and such condition also restricted such buyers from using such drawings for commercial manner benefits. The learned counsel for the assessed, thereafter, contended that these were subject to the custom duty and refund of custom duty had also not been claimed which was generally a case in respect of an item received for a limited use or for a limited period. It was also specifically pointed out that such designs were procured for specific projects on a single user basis as the same had to be given to the buyer of plant and machinery manufactured by the assessee company. The learned counsel for the assessee thereafter controverted the factual findings of the Assessing Officer, particularly in regard to the Assessing Officer's contention that the assessee had paid money for the same drawing three times and referred to the various pages of the paper book in this regard. The learned counsel for the assessee also submitted that the action of the Assessing Officer was a case of change of opinion in respect of the same transaction which had been found to be of the nature of purchases, both in the course of proceedings under section 144A as well as under section 92CA of the Act. Hence, for this reason also, the action of the Assessing Officer was not justified. The learned counsel for the assessee thereafter contended that it was a settled law that the sale transaction did not result in royalty and in this regard again submitted that the transfer of such designs by the assessee to the buyers of generators in an unbridled manner established this fact. The learned counsel for the assessee further reiterated the submissions made before the learned Commissioner of Incometax (Appeals), particularly in respect of drawings being goods and the acquisition of drawings on out-right purchase basis could not be considered as a transaction of the nature of royalty. The learned counsel for the assessee further submitted that the provisions of DTAA were to supercede the provisions of the Income Tax Act and for this proposition the learned CIT DR also did not disagree. The learned counsel for the assessee thereafter placed reliance on the decision of the Hon'ble Calcutta High Court in the case of Davy

Ashmore India Limited v. CIT; 190 ITR 626, wherein the Hon'ble High Court had pointed out that the transferor retained the proprietary right in the designs and allowed the use of such rights, the consideration received for such user was in the nature of royalty. However, in the present case, the assessee company was not allowed to use such right i.e. to make similar designs at its level and to sell the same to third parties and to pay consideration out of such sales to the parent company as it was an undisputed fact that such design was used for a specified project and had been handed over to the buyer of the plant and machinery for their reference, if the situation so required. He further contended that the decision of the Hon'ble Calcutta High Court in the case of Leonhardt Andhra UND Partner,GMBH v. CIT; 249 ITR 418 was not applicable as in that case the royalty was not defined in DTAA between India and Germany and in the absence of such definition, the statutory definition as contained in section 9(1)(vi) was applied, whereas in the present case, article 12(3) existed between two countries and as per that definition, consideration paid was not towards right to use but it was for the use of designs as such and, therefore, the aforesaid decision of the Hon'ble High Court was not applicable. The learned counsel for the assessee thereafter referred to the ruling of the learned Commissioner of Incometax (Appeals) for advance ruling in the case of Pre-quip Corporation v. CIT, as reported in 255 ITR 354 (pages 140 to 150 of the paper book) wherein it has been opined that transaction of sale of engineering drawings and designs by US Company to Indian Company did not amount to a transaction resulting into payment of royalty. The learned counsel for the assessee submitted that the facts of this case are identical with the facts of the present case before the Tribunal and the royalty as per article 12(3) of Indo US DTAA was also similar. Hence, the ratio laid down in this case is squarely applicable to the present case. The learned counsel for the assessed, thereafter, referred to the decision of the Tribunal in the case of Lucent Technologies Hindustan Limited v. ITO as reported in 270 ITR 62 (AT) wherein the assessee had acquired hardware and software and the department bifurcated the transaction as one of supply of hardware and the other of the software, treating the software part as royalty, the Tribunal held that the assessee's transaction with the non-resident company was for the purchase of integrated equipment which consisted hardware as well as software and it was inseparable and having regard to the nature of agreement, what the assessee had purchased was a copy righted article and not copy right of the rights and similar was the position here, hence, this decision of the Tribunal also supported the claim of the assessee. The learned counsel for the assessee thereafter

referred to the decision of the Tribunal in the case of Indian Hotels Co. Ltd. v. ITO in ITA No.553/Mum/00 (refer pages 163 to 167 of the paper book),wherein Indian Oil had obtained the services of a foreign company to prepare the interior design which had to be used by the Indian company for the purpose of re-designing or renovating the interiors of Taj Mahal Hotel at Mumbai and the design supplied by the foreign company became the property of Indian Hotel Company Limited (assessee) and in that background, the Tribunal held that the assessee company had purchased and acquired interior design on a principal to principal basis i.e. as a buyer and in that view of the matter, the payment by that company did not amount to royalty. The learned counsel for the assessee relied upon the decision of the Tribunal in the case of Wipro Limited v. ITO as reported in 94 ITD 9 for the proposition that where the payment was for obtaining the data and use it the way the assessee wanted to use it, it was the use of a copy-righted article and not a case of transfer of right in the copy-right of that article and similar was the case here wherein the assessee company got the right to use of a copy-righted article and no right in the copy-right of the drawings/designs and the note on the hard copy of such designs confirmed this position i.e. the assessee had no right in the copy right of these drawings/designs i.e. the assessee had no right in the copy right of these drawings/designs and it could use only as per the terms and conditions of the agreement with its parent company for its own purposes in the capacity of the owner thereof. Thereafter, the learned counsel for the assessee referred to the decision of the Tribunal in the case of DCIT v. Finolex Pipes Limited as reported in 106 TTJ (Pune) 741 wherein the Tribunal had held that fee payment for design documentation to German company by the assessee Indian company for out-right sale of such documentation was not royalty as per DTAA. The learned counsel for the assessee also relied upon the decision of the Hon'ble Karnataka High Court in the case of Jindal Thermal Power Company Limited v. DCIT (2009) 225 CTR (Kar) 220.
8. The learned CIT DR, in the rejoinder, contended that in the case of Pro-quip Corporation v. CIT (supra), the language of article 12(3) of DTAA was materially different and the said decision was based on such language, hence, not applicable to the facts of the case. The learned CIT DR further submitted that the other decisions relied upon by the assessee were factually different as in those cases, the assessee was the ultimate user of those designs/drawings along with the plant and machinery, whereas in the present case, the assessee manufactured turbine/generator and sold such turbine/generators. The CIT DR further submitted that the decision of the Tribunal in the case of Lucent Technoligies Hindustan Limited

(supra) rather supported the case of the revenue. The CIT Departmental Representative further submitted that the basic design obtained by the assessee company was further modified and such modified design was given to the buyer of the turbine/generator and not basic design, as contended by the learned counsel for the assessed.

9. We have considered the submissions made by both the sides, material on record and the orders of the authorities below. It is noted that the assessee is engaged in manufacturing of turbine/generator as per the specifications/requirements of its customers. For this purpose, the assessee procures basic design from its parent company and accordingly manufactures such plant and machinery. It is also noted that such basic design is also given to the buyer of plant and machinery by the assessee company. The dispute before us is regarding the nature of payment made by the assessee company to its parent nonresident company for obtaining such designs. The conclusions of the Assessing Officer as well as the findings of the learned Commissioner of Incometax (Appeals) have already been reproduced which contain details of judicial decisions relied upon by both the sides. In our opinion, if the view of the Assessing Officer is accepted, then there will not be any transaction of sale and purchase in such situations and every transaction would come within the meaning of term 'royalty'. Further, in our opinion, the basic distinction between a transaction of 'royalty' and of outright sale and purchase is transfer of ownership to the buyer and this distinction has been maintained even in the provisions of section 9(1)(vi) as well as of DTAA. We have also perused the note on the hard copy of such designs. In our opinion, substance of such note is nothing but an indication that such product is sold only for specific use and no right in copy-right thereof has been given to the buyer by the transferor/seller, meaning thereby that such article/goods in the form of designs could be used for specific purposes and cannot be used for other commercial gains by the buyer. This can be put in different words i.e. it is a case of purchase of copy righted article and not of copy rights therein. Thus, on this very fact, we do not consider any necessity to go into the issue further and deal with the judicial decisions cited by both the sides. However, before parting, we consider it appropriate to observe that if the view of the revenue that copy righted article could only be a trading item or of the nature of finished goods only, then a transaction of sale and purchase of such drawings/designs would necessarily be considered as a transaction of payment of 'royalty', which cannot be correct as even the software has been judicially classified as goods. We also do not agree with the contention of the revenue that when the goods are acquired for self-

consumption, that would amount only to use of such items, resulting into 'royalty' because items for selfconsumption for use in intermediate process are also acquired on principal to principal basis by way of purchase. It is also to be noted that in the hands of non-parent company, such transactions have been accepted by the revenue authorities of that country as of the nature of business profits resulting from the sale of such drawings. Hence, when the same provisions of DTAA are applicable then this action of such revenue authorities also supports the claims of the assessee. To sum up, even at the cost of repetition, we state that it is a case of purchase of a copyrighted article on principal to principal basis and not a case of payment for transfer of right in the copy right of such designs. In this view of the matter, we confirm the findings of the learned Commissioner of Income tax (Appeals).

10. In the result, all the appeals of the revenue fail and are dismissed. Order pronounced in open Court on 30th April, 2010."

3. In the aforesaid order, an elaborate discussion has been made by the Tribunal. If the aforesaid facts are kept in juxtaposition with the facts of the appeal in hand, we find that the assessee purchases technical drawings and design for Rs.4,14,18,313/- from its Austrian Joint Venture Company i.e. VA Space Tech Elin, Austria and the said expenditure was directly claimed to be manufacturing expenses and was claimed in its P & L account under the head 'manufacturing expenses' which were disallowed by the ld. Assessing Officer doubting the genuineness of the expenses. Admittedly, the audited accounts, Trading and P & L Account and details of technical drawings expenses were duly furnished by the assessee before the Assessing Officer as well as before the ld. CIT(A). The stand of the assessee before the Revenue authorities as well as before us is that the expenses were incurred for purchase of technical drawings and design from its joint venture company for business expediency. Uncontrovertedly, the impugned expenditure was fully supported by bill of entries, custom clearance, shipping agents documents, payments through banking channel with compliance of rules and regulation of Foreign Regulation Act (at the relevant time). All these documents were not disputed by the Assessing Officer and were duly examined by the ld. CIT(A), meaning thereby, the expenses were claimed to be genuine business expenditure. There is categorical finding in the impugned order that the genuineness of the expenses for incurring the technical drawings and design was duly established as the copies of the invoices, purchase orders were duly produced right from assessment stage. Even otherwise, the ld. Assessing Officer has nowhere mentioned in the assessment order that the payments for the impugned expenses were not made. The suspicion

of the ld. Assessing Officer is that the transactions relating to drawings & design expenses are nothing but an afterthought. However, noting concrete has been brought on record by the Assessing Officer in support of his suspicion as to how the purchase orders are not genuine. The assessee has furnished various documents to establish the genuineness of such expenses and the technical design was purchased as a matter of business expediency to implement the project, therefore, we find no infirmity in the stand of the ld. CIT(A) on this issue. Consequently, affirmed. Our conclusion will cover ground no.1 of ITA No.253/Ind/2007 (Assessment Year 2001-02) and ground no.2 of ITA No.255/Ind/2007 (Assessment Year 2003-04) also.

8.1 The department has also not filed any appeal against the order of CIT(A) for A.Y.2004-05 holding that transaction is in the nature of purchase and design and drawings are not in the nature of royalty. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case, we delete the disallowance made by the AO by invoking section 40(a)(i) for all the years under consideration.

6.5.2. In the light of findings of the Tribunal in the case of the assessee for A.Ys. 2006-07 to 2009-10 as reproduced above, and the facts of the case, we are of the considered opinion that the assessee has purchased copyrighted items in form of technical drawings and designs only and the amount paid on account of supply of technical drawings and designs is not in the nature of royalty, hence, no TDS was required to be deducted under section 195 of the Act. Therefore, disallowance made under section 40(a)(ia) of the Act by The AO/TPO and sustained by the DRP is not justified hence, directed to be deleted. Thus, ground No. 5 of A.Ys. 2010-11 and 2011-12 of assessee`s appeal is allowed.

7. Ground No.6:for A.Y. 2010-11 and Ground No. 7 for A.Y. 2011-12 relates to initiation of penalty proceedings under section 271(1) (c) of the Income-tax Act 1961.

7.1. We find that the assessee is aggrieved with the initiation of penalty proceedings under section 271 (1) (c) of the Act. No appeal lies against mere initiation of penalty proceedings. These grounds of appeals, are therefore, premature and accordingly dismissed.

8. Ground No. 7 for A.Y. 10-11 and ground no. 6 for A.Y. 11-12 : relates to not giving credit of TDS of Rs. 26,920/-(A.Y. 10-11) and Rs. 1,81,109/- for A.Y. 11-12 .

8.1. We have considered the facts and are of the view that due credit of TDS paid is allowable to the assessee. Therefore, the AO is directed to allow due credit of TDS, as claimed by the assessee after due verification. Accordingly, these grounds of appeal are, treated, as allowed for statistical purposes.

I.T.A. No. 265/Ind/2015: REVENUE`s APPEAL FOR ASSESSMENT YEAR 2010-11 I.T.A. No. 349/Ind/2016: REVENUE`s APPEAL FOR ASSESSMENT YEAR 2011-12.

9. Ground No. 1: For A.Y. 2010-11 and A.Y. 2011-12 pertained to disallowance of warranty provisions of Rs. 3,47,53,202/- for A.Y. 10-11 and Rs. 3,52,88,923/- for A.Y. 11-12 of which facts are identical except figures hence, same are being considered together and being disposed-of accordingly.

9.1. The assessee has debited an amount of Rs. 3,47,53,202/- for the assessment year 2010-11 and Rs. 3,52,88,923/- for the assessment year 2011-12 as warranty under the head selling expenses. The AO called upon the assessee to furnish the project-wise details, in respect of warranty provision and substantiate the provision for warranty claimed in the books of accounts. The AO noted that the statement

filed by the assessee gives the value, which is said to be the basis for making provision, rather than value of contract executed. The said claim is merely a contingent liability made on estimate basis and nor the sale price included the warranty expenses. In the absence of satisfactorily explanation, the AO concluded, that the provisions were arbitrary and there was no rationale behind the warranty provisions made in the books of accounts. The assessee company has nowhere proved that sale price included warranty expenses. The AO observed that the assessee company has relied on the case of Rotork Control (P) India Ltd. 314 ITR 62(SC)/(2009-TIOL-64-SC) but as held in the said case this provision can be allowed if made after scientific method for its quantification. The AO has relied in the case of Metal Box vs. Workman 73 ITR 53 (SC) to contend that contingent liability cannot be allowed as deduction. Further, in CIT vs. Kalinga Tubes 218 ITR 164(SC) it was held that only such expenditure, which accrues in a year under mercantile system of accounting, is allowable only from the profits of that year. Hence, the AO has proposed to disallow the same in draft assessment order. Aggrieved with the draft order, the assessee approached to DRP.

9.2. Before the DRP, it was submitted that the assessee has entered in to entered the contract with its customers for the sale of generators which required by Hydro Power Plant. The liability of warranty flows

from the contract sale. Making a provision for all known liabilities is fundamental principle of mercantile system of accounting. The assessee has submitted project-wise details of the warranty expenses booked during the year and also explanation regarding the basis of claiming the same as business expenditure. It was submitted that once the warranty period specified under the contract lapses, the surplus balance lying in the warranty provision is transferred back to Profit & Loss Account. The assessee has also produced before the Ld. AO, orders of CIT(A) on similar issues of the assessee arising in AY 2003-04 and AY 2004- 05, wherein the CIT(A) has allowed the provision for warranty as deductible expense. Further, the CIT(A) order for A Y 2003-04 has also been upheld by the Indore Bench of the Income Tax Appellate Tribunal vide order dated 28 December 2011 in I.T.A. No. 255/Ind/2007 and vide order dated 03.07.2014 for A.Y. 2006-07,2007-08, 2008-09 and 2009-10 in lTA No. IT(TP)A.No.5/Ind/2011, IT(TPA)No.313/Ind/2011, IT(TP)A No.616/Ind/2012, & IT(TP)A No.120/Ind/2014 & 255/IND-2007. The DRP further observed that no appeal has been filed by the tax authorities against the order of the Ld. CIT(A) for AY 2004-05. The facts of the current appeals are same as those covered in the previously mentioned orders. The assesse has also relied on Hon`ble Apex Court decision in the case of Bharat Earth Movers vs. CIT[200]

245 ITR 428 (SC) for the proposition that if a business liability has arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. Based on the facts and circumstances of the case, the DRP has directed the AO to allow the assessee as deduction, while computing the income of the assessee as it has created the provision for warranty.

9.3. Being, aggrieved the Revenue has filed this appeal before the Tribunal. The Ld. CIT (DR) submitted that the AO also disallowed provision of warranty expenses on the plea that warranty provision is a 'contingent liability'. The Ld. DRP vide order dated 23. 12. 2014 for the assessment year 2010-11 has held that the assessee has made such estimate and at approximately 1% of COGS from the details furnished for A.Y. 2006-07 to A.Y. 2010-11. It is seen that the overall reversal of provisions for this period is 17% of the provisions made and has fallen to 7% in A.Y. 2010-10, considering only this year. This shows that the provision made is not excessive. The assessee company has debited an amount of Rs. 3,47,53,202/-as warranty expenses under the head selling expenses. The details as provided of warranty provision showed that arbitrary provision has been made for warranty. Further, the assessee has failed to fulfill the conditions in respect of goods sold to create warranty liability. Therefore, the liability arising

on account of this claim, is highly contingent and dependent on the happening of certain events. Unless the contingent event becomes certain, the assessee does not have any obligation for damages. Further, the DRP upheld the disallowance made on account of warranty provisions during the assessment year 2006-07 to 2009-10. Further, it has been observed that the assessee has failed to demonstrate that it meets the conditions laid down by the Hon`ble Supreme Court in the case of Rotork Control (P) India Ltd. 314 ITR 62(SC)/ (2009-TIOL-64-SC), and M/s. Metal Box 73 ITR 53 for allow-ability of warranty expenses and submitted that the deduction for the same cannot be allowed.

9.4. On the other hand, the learned Counsel for the assessee, submitted that the DRP has rightly deleted the addition as the similar additions were deleted by the Tribunal in earlier years in assessee`s own case. The activity of the assessee is being turnkey contracts, EPC contract, and supply of turbines/generators stipulate warranty obligations. The assessee has made warranty provisions approximately 1% of cost of goods sold (COGS) which has been held to be non-excessive considering data for A.Ys. 2006-07 to 2010-11. The learned Counsel placed reliance in the case of Rotork Control (P) India Ltd. 314 ITR 62(SC)/(2009-TIOL-64-SC).

9.5. We have heard the rival submissions of both the parties and have perused the material available on record. We find that the assessee has entered into contracts with its customers for the sale of generators and other equipments required by Hydro power plants. Such contracts contain the essential warranty clause, which serves as an assurance, or guarantee by a seller of goods about the character, quality or fitness of the product under sale for the agreed period. The obligation of warranty flows from the contract of sale. During the warranty period, the assessee is committed to take remedial action at his cost should there be failure in quality or performance of its products (i.e. generators and equipment's) sold. We also note that making a provision for all known liabilities is a fundamental principle of the mercantile system of accounting and the assessee by provisioning for the liability arising from warranty clauses of the long-term contracts has to abide by such accounting principles. It is seen that the assessee had debited the relevant expenses to the warranty provision account. For this purpose, the assessee has furnished project-wise details of the warranty expenses booked during the year and also explanation regarding the basis of claiming the same as business expenditure. It was also submitted to the Ld. AO that once the warranty period specified under the contract lapses, the surplus

balance lying in the warranty provision account is transferred back to the profit and loss account.

9.5.1. We find that for A Y 2003-04 and A Y 2004-05, the provision for warranty has been held to be in the nature of ascertained liability and not contingent liability by the Ld. CIT (A) vide orders dated 19 January 2007 and 23 November 2007.

9.5.2. We also find that order of ld. CIT (A) for A Y 2003-04 has also been upheld by the same bench of the Hon'ble Indore Bench of the Income Tax Appellate Tribunal vide order dated 28.11.2011 in I.T.A. No. 255/IND-2007. We also find that the tax authorities against the order of the Ld. CIT (A) have filed the no appeal for AY 2004-05. The facts of current appeals are same as those covered in the aforesaid orders. The following key judicial precedents support the contentions of the assessee:

- DCIT-3(1), Bhopal vs VA TECH Hydro India Private Limited (ITA No 255/IND- 2007).
- Rotork Controls India (P) Ltd - 2009-TIOL-64-SCIT
- Bharat Earth Movers v CIT - 245 ITR 428 (2000) (SC)
- CIT v Vinitec Corporation Pvt Ltd - 278 ITR 337 (2005) (Del)
- CIT vs. Majestic Auto Ltd. (204 ITR (AT) 14) (Chd)

9.5.3. Hence, based on the above, it can be concluded that the provision for warranty is in the nature of an ascertained liability (with a reasonable estimate of the quantum) and not a “contingent liability”, hence, a deduction for the same should be allowed while computing the total income of the assessee for the relevant assessment years.

9.5.4. Further we find that the Indore Bench of the Income Tax Appellate Tribunal vide order dated 03.07.2014 in I T A No. IT(TP)A No.5/Ind/ 2011, IT(TP)A No.313/Ind/2011, IT(TP)A No.616/Ind/2012,& IT(TP)A No.120/Ind/2014 12 255/IND-2007 in para 6 to 8 of the order observed as under :

> *"6. We have considered the rival contentions, carefully gone through the orders of the authorities below and found that assessee has made provision for warranty for each project separately taking into consideration all the factors with regard to the scope of work, terms of warranty agreed with the customers, estimated cost of warranty based on earlier years' experience. This method of warranty provisions was consistently followed over the years, which is also in accordance with the Accounting Standard u/s.145(2). Thus, we found that the basis of provision was not an ad-hoc or contingent as alleged by the AO. With regard to the reasonableness of the warranty provision, we had verified from the warranty provision reversed on yearly basis and the same was found to be reasonable. Exactly similar issue was dealt by the Tribunal in assessee's own case for the assessment year 2003-04 vide order dated 28-12-2011 in ITA No.255/Ind/2007, wherein it was held that the provision of warranty was not a 'contingent liability'. The precise observation of Tribunal were as under:-*
>
> *"15. We have considered the rival submissions and perused the material available on file. We find that the following provision was made of the warranty claim in the accounts of the assessee: Project Name Total Cost incurred (in Rs.) Provision @1% (in Rs.) Warranty Period. The details of warranty provision and its reversals are reproduced hereunder:*

Project Name	*Total Cost incurred (in*	*Provision @1% (in Rs.)*	*Warranty Period*

	Rs.)		
Bhandardhara	*53230000*	*532300*	*18 months from Test Run*
Triveni Sugars	*12000000*	*120000*	*2 crushing seasons*
Vajra	*6550000*	*65500*	*18 months from supply*
Chaskaman	*7550000*	*75500*	*18 months from supply*
Rana Sugars	*5190000*	*51900*	*2 crushing seasons*
Triveni Turbo	*4915000*	*49150*	*24 months from supply*
HPCL	*6600000*	*66000*	*24 months from supply*
Renuka Sugars	*9150000*	*91500*	*2 crushing seasons*
Na Loi	*25450000*	*254500*	*24 months/8 hrs. of operation*
Pan Africa	*9028000*	*90280*	*18 months from commissioning*
Shri Ram	*5315000*	*53150*	*18 months from commissioning*
Koradi	*1630000*	*16300*	*12 months from commissioning*
West Coast	*12200000*	*122000*	*24 months from operation*
Total		*15,88,080*	

The details of warranty provision and its reversals are reproduced hereunder:

S.No.	*Assessment*	*Warranty*	*Warranty provision of*

	Year	*provision created during the period (in Rs.)*	*earlier years reversed during the period (in Rs.)*
1	*2003-04*	*1588080*	
2	*2004-05*	*3024128*	*680100*
3	*2005-06*	*6954871*	*529718*
4	*200607*	*6810422*	*487755*
5	*2007-08*	*6572822*	*2872949*
	TOTAL:	*24950323*	*45701522*

If the totality of the facts are analysed, warranty claimed is inbuilt in the sale mechanism and the warrant provision was made due to contractual liability which can be based upon estimated liability which is otherwise eligible for deduction u/s 37 of the Act. Incurring of liability is certainty whereas the quantification depends upon certain business exigency and at the same time, exact quantification may not be possible when such provision is estimated, which is to be discharged at a future date, therefore, it is lawfully deductible. Our view is supported by the ratio laid down in decisions from Hon'ble Apex Court in Bharat Earth Movers Ltd. vs. CIT (245 ITR 428) (SC), CIT vs. Vinitec Corporation Pvt. Ltd. (278 ITR 337) (Del) and CIT vs. Majestic Auto Ltd. (204 ITR (AT) 14) (Chd). Therefore, the stand of the ld. CIT(A) is affirmed."

6.3 As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case, we delete the disallowance made by the AO in respect of provision of warranty.

7. It is pertinent to mention here that against the order of CIT(A) for the assessment year 2004-05, no appeal has been filed by the Revenue before the Tribunal, which further substantiates the fact that the department has accepted the assessee's claim of warranty as 'ascertained liability'. In the result, grounds taken by the assessee in all the years with respect to provision of warranty are allowed.

9.5.5. In the light of above facts and circumstances, we find that the assessee has made provision for warranty for each project

separately taking into consideration all the factors with regard to the scope of work, terms of warranty agreed with the customers and estimated cost of warranty based on earlier years' experience. This method of warranty provisions was consistently followed over the years, which is also in accordance with the Accounting Standard under section 145(2). Thus, we are of the view that the basis of provision was not an ad-hoc or contingent as alleged by the AO. With regard to the reasonableness of the warranty provision, we had verified from the warranty provision reversed on yearly basis and the same was found to be reasonable. In view of these facts and circumstances, we are of the considered opinion that DRP is justified in allowing the deduction on account of warranty provisions. In the result, grounds taken by the Revenue for the A.Ys. 2010-11 and 2011-12 with respect to provision of warranty are dismissed.

10. In the result, the appeal of the assessee is allowed and appeal of Revenue is dismissed for the assessment years 2010-11 and 2011-12.

11. The order pronounced in the open Court on 28.02.2017.

Sd/-	**Sd/-**
(डी.टी.गरासिया)	(ओ.पी.मीना)
न्यायिक सदस्य	लेखा सदस्य
(D.T.GARASIA)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

दिनांक /**Dated : 28 February, 2016.opm**