आयकर अपीलीय अधिकरण," के" खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNAL,MUMBAI-"K",BENCH

सर्वश्री राजेन्द्र, लेखा सदस्य एवं अमित शुक्ल, न्यायिक सदस्य

Before S/Sh. Rajendra,Accountant Member & Amit Shukla,Judicial Member

आयकर अपील सं/.ITA No.1778 /Mum/2012,निर्धारण वर्ष/Assessment Year-2007-08

ATOS India Private Ltd. Godrej & Boyce Complex Plant 5, Pirojshanagar , LBS Marg Vikhroli (West),Mumbai-400 079. **PAN No.AAACO 2461 J**	Vs.	Addl. CIT, Range-8(1), Mumbai.

(अपीलार्थी /Assessee) (प्रत्यर्थी / Respondent)

आयकर अपील सं/.ITA No.2134 /Mum/2012,निर्धारण वर्ष/Assessment Year-2007-08

Addl. CIT, Range-8(1), Mumbai	Vs.	ATOS India Private Ltd. Mumbai-400 079.

निर्धारिती ओर से/Assessee by : Sh. Kanchan Kaushal

राजस्व की ओर से/ Revenue by : Sh. Aliasger Rampurwala

सुनवाई की तारीख /Date of Hearing : 07.12.-2015

घोषणा की तारीख / Date of Pronouncement: 13.01.2016

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

<u>लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-</u>

Challenging the order dated 02.01.2012 of CIT(A)-15, Mumbai, the Assessee and the Assessing Officer(AO), have filed cross appeals for the above mentioned appeals raising various grounds.

During the course of hearing before us, the Authorised Representative (AR) stated that the assessee was not interested in pursuing Ground.No. 2 and 3. Hence, same stand dismissed as not pressed.

Assessee-company,engaged in the business of development and maintenance of computer software,development,sale/export of software services and provision of technical consultancy , filed its return of income on 31.10.2007,declaring total income at Rs.18.84 crores, after claiming deduction u/s.10A of the Act of Rs.7.26 crores in respect of AK Unit deduction u/s. 10A of Rs.16.55 crores in respect of PT Unit and deduction of Rs.26.25 crores u/s. 10B in respect of AHA unit. The AO completed the assessment u/s. 144C(3) r.w.s. 143(3) of the Act on 9.2.2011, determining the income of the assessee at Rs.36,65,36,000/-.

<u>ITA 1778/Mum/2012-(Assessee's Appeal):</u>

2.First Ground of appeal pertains to disallowance made under the head project risk expenses (PRE),amounting to Rs.31.83 lacs.During the assessment proceedings,the AO found that assessee had debited an amount of Rs.2.38 crores as PRE.He directed the assessee to furnish further breakup and to justify the claim. Vide its letter,dt.1.11.2010,it was stated that the assessee was incurring liquidated damages due to delayed delivery/additional cost, that PRE were effected under Schedule -11 in the P&L account, that it represented the provisions made during the year in accordance with the contract, that the provision was part of total project cost and had been recognised regularly on the basis of reasonable revenue milestone achieved as defined in the purchase order, that in the subsequent years the company would actually

incur the expenses, that the said provision of PRE would get adjusted without affecting the P&L account in respective assessment years.After considering the submission of the assessee, the AO held that the claim of expenditure was in the nature of provision made.After considering the contract entered into by the assessee with Hindustan Petroleum Ltd. (HPCL), he further held that during the year under consideration the contract had not been completed, that it was not possible to come to the conclusion of delay if any,that the provision made by the assessee for the possible liquidated damages was erroneous and could not be allowed as an expenditure incurred for the purpose of business u/s.37(1). Finally,he disallowed the claim made on account of liquidated damages of Rs.2.83 crores.

2.1. Aggrieved by the order of AO,the assessee preferred an appeal before the First Appellate Authority(FAA).Before him,it was argued that the assessee had entered into contract with HPCL and certain other parties, that as per the agreements entered into with those parties it was decided that they had a right to deduct a sum equivalent to certain percentage on the project value from the sum payable to the assessee under the head liquidated damages, that the right was exercisable only on the assessee's default to complete the project within the specified time frame, that the assessee had furnished relevant documents before the AO, that the agreement with HPCL was towards the supply and installation of various items for automating and integrating their petrol pumps and regional offices, that the time period of the project was 14 months from the date of signing the project, that the project had to be completed on or before 15.9.2006, that it could be completed only in May 2007, that it had debited its P&L account for the year under consideration, that the same was claimed as deduction, that the PRE had been calculated on the value specified in the project order, that the liability for the PRE had crystallised in the year in question,that it had rightly claimed the same as a deduction in the year under consideration.It relied upon the case of KCP Ltd.(34 ITD 50).Further, it was argued that PRE amounting to Rs.81.00 lacs toward Phase-II of HPCL,that terms and conditions were similar to Phase-I.Alternatively,it was argued that the expenses should be allowed in the year in which the same had been actually incurred.After considering the submission of the assessee and considering the case of N. Sundereshwaram (Income Tax Ref 336 and 337 of 1985, dt.4.6.1996) of Hon'ble Kerala High Court,the FAA held that the claim of damages by customer had not been adjudicated by arbitration, that the assessee had only made provision,that the project was not completed in the year under appeal, that the same could not be called liquidated damages as such, that the assessee had claimed that actual expenses had been incurred in the subsequent years but it did not explain as to how much expenses were incurred in excess of the provision,that it was not explained as to how the assessee had arrived at the likely delay that would be caused, that the expenses could not be termed liquidated damages, that the provision made were actually not for any kind of output.Before the FAA the assessee had made application under Rule 46A(c) of the Income tax Rules 1962 (Rules) and requested the FAA to admit additional evidences.But, he rejected application and held that documents even after being considered would not tilt the decision in favour of the assessee as far as allowability of provisions was concerned. Finally,he upheld the order of the AO.

2.2. Before us,the AR argued that delay in completing the project occurred in the year under consideration,that the liability had to be allowed in the same year, that in the subsequent years necessary entries were passed without affecting the P&L account.He relied upon the cases of Bharat Earth Movers(245 ITR 425) and K.C.P. Ltd.(34 ITD 50) and F.F.E. Minerals India

Ltd.(84 TTJ 907).The Departmental Representative (DR) argued that liquidated damages were not crystallized during the year,that liability had not accrued, that there was only possibility of incurring of expenditure, that debit/credit notes from the assessee - HPCL was not made available, that it was a case of preponement of liability.With regard to expenditure of Rs.31.83 lacs(GOA-1.3),the AR stated that it pertained to 10A Unit and it was covered by the judgment of Gem Plus Jewellery (194 taxmann 192).In the rejoinder the AR stated that it was a contractual agreement and there was no need for debit/credit notes. He referred to pg No.451 of paper book and stated that quantification issue could be sent back to the AO.

2.3. We have heard the rival submissions and perused the material before us.We find that the assessee had claimed liquidated damages of Rs.2,38,83,772/- as PRE, that it had entered into certain agreements with parties including HPCL, that the claim was made for Rs.1.26 crores for the First Phase to be carried out for HPCL, that further a claim of Rs.81.00 lacs was made for phase-II of the work assigned by HPCL,that Rs.31.83 lacs was relatable to 10A units, that as per the agreement entered into with HPCL for both the phases the assessee was to pay liquidated damages @ 0.5% - 5% for the period of delay, that the first phase was completed belatedly i.e.in May 2007,that the second phase was also delayed,that as per the agreement the HPCL was entitled to deduct the damage – amount from the amount due to the assessee, that the assessee while finalizing the account had considered the liquidated damages, that the AO and the FAA had rejected the claim made by the assessee. In our opinion as per the conditions of the agreement entered by the assessee with the HPCL, assessee had to compensate HPCL for delay in executing the project, that the factum of delay is not in dispute.Thereofre, in our opinion the issue is directly covered by the decision of KCP Ltd. (supra). In that case the facts were as under :

The assessee was a Public Limited Company engaged in the manufacture of sugar, cement, machinery, etc.The dispute related to the claim of the assessee for deduction of Rs. 21,47, 801/-which was a provision made in the accounts for payment of liquidated damages in respect of contracts of the assessee to supply machinery manufactured by the assessee. The assessee's claim was that time was the essence of the contract for the supply of the machinery and a specific clause has been incorporated in the agreements that in case of delay, liquidated damages at a percentage of the total value of the contract had to be paid and, therefore, since admittedly there was a breach of contract by reason of the delay, the assessee had computed the damages payable for the period of the delay falling within the previous year and had made a provision in the account. The AO, was of the view that in respect of one of the contracts, the delivery date was beyond the previous year and in the case of the other contracts such damages occur only when the delivery was actually completed which was also beyond the previous year and therefore, the deduction claimed could not be allowed. He also noted that for the earlier AY., the deduction had been allowed only after the delivery of the machinery. He was of the further opinion that the calculation of the damages also depended upon negotiation and hence the amount claimed could not be regarded as accrued liability.On appeal,the FAA confirmed the order of the AO.In the appellate proceedings before the Tribunal,it was argued that in terms of the agreements liability to pay damages arose no sooner than there was a breach and the assessee had only provided for the liquidated damages pertaining to the period of delay falling within the previous year in order to arrive at the true income of the assessee particularly when the assessee was accounting for receipts attributable to the previous year.It was submitted that this was the consistent method of accounting

followed by the assessee and there was no reason to depart from it. On the other hand, it was contended by the DR that there could not be a unilateral liability for damages and that such a liability was contingent on the purchaser making a claim therefore which could arise only after the completion of the contract.

The Special Bench of the Tribunal,while deciding the issue,held as under :

> *"It is not in dispute that in terms of the agreements of the assessee for the supply of goods, time was the essence of the contract and any delay in the delivery of the goods would result in the liability to pay damages. That the parties meant it seriously is proved by the fact of provision for bank guarantee up to the maximum value of liquidated damages.*
>
> *The stipulation in the contract clearly shows that the liability for liquidated damages is certain, accrued and is not to depend upon the happening of any event other than delay in deliveries. The only point in dispute in the present case is whether the liability for payment of damages should be taken at the point of time when the breach occurred or at the point of time when the assessee delivered the goods and raised the bill.*
>
> *The clause in the agreement extracted above does clearly provide for the payment of liquidated damages no sooner than the delay takes place and as a guarantee for payment of liquidated damages bank guarantee was to be given for the full amount of liquidated damages. There may be a possibility for the deduction of liquidated damages on negotiation. But that is not to say that the liability to pay liquidated damages did not accrue. Nor does it stand to reason because the delay in the delivery of the goods under the terms of the agreements in question constituted breach, it does not discharge the contract as such, because admittedly the contracts have not been avoided by the other side at all. The reason is that they were continuing contracts for manufacturing of articles to the specification of the purchaser and time was stipulated as the essence of the contract; nonetheless it would have served no purpose if the purchaser had cancelled the contracts when the work on the manufacture of the machinery had progressed perhaps a very large extent any payments were made in the mean time as per the terms of contract. That was the reason why penalties have been provided in the agreement itself depending in the period of delay which is intended to act as a deterrent against delays in deliveries and this is to avoid future litigation as to the quantum of damages. Sec. 74 of the Contract Act, 1872 shows that the claim for damages arises at the point of breach but the quantification of damages is subject to negotiation, though the ceiling of the amount is stipulated in the contract. As far as the assessee is concerned, the liability to pay damages arose at the point of time when the breach occurred i.e., when it failed to deliver on the due date, and at that point of time the liability accrued which as a prudent trader it could quantify and take into account by means of a provision. Since the agreements have already stipulated the amount, there was nothing wrong in adopting the same formula for computing the amount. All that has happened is since the delay stretched beyond the previous year, the assessee has apportioned the damages and has taken into account only that amount which is relatable to the delay that has occurred in the previous year in question. This is perhaps proper and rational and there is nothing wrong in this method of accounting either in law or as a matter of method of accounting which has been consistently followed by the assessee, to which no objection was take by the regular audit as well as by the tax audit. The Department does not either dispute the accrual of liability to pay liquidated damages, but in fact it actually allowed the whole amount in the year in which deliveries were given. The contract does not provide for such a situation, nor does the liability to pay the liquidated damages arise on delivery. Claiming the liquidated damages as and when delays take place is an easier method, and should there be any difficulty in calculations or quantification, that may render the amount provided as damages incorrect but that does not postpone the accrual of liability.*

We find that in the case of Bharat Earth movers (supra)the Hon'ble Supreme Court has also laid down certain principles about quantification of liabilities.Respectfully following the above, we hold that liquidated damages for breach of contract for delay in supply of goods are allowable deduction in the assessment year relevant to the point of time when the breach occurred and not the point of delivery of goods and raising of bills.Ground no.1 is decided in favour of the assessee for the two amounts i.e. Rs.1.26 crores and Rs.81.00 lacs.As far as Rs.31.83 lacs is concerned we are of the opinion that AO should add back the PRE while computing deduction

u/s. 10A/B in view of the decision of Hon'ble Jurisdictional High Court delivered in the case of Gem Plus Jewellery (supra). Ground No.1.3 is decided in favour of the assessee in part.

3.Next effective ground(Gr. No.4 and 5)is about adjustment on account of notional interest on overdue receivable of Rs.3.45 crores.During the assessment proceedings,the AO found that the assessee had entered in to international transactions.He made a reference to the Transfer Pricing Officer(TPO).He further received a reference from the AO to determine Arms Length Price(ALP)relating to interest not charged on overdue amounts from the Associate Enterprises(AE),consequent to sales made to them. The TPO noted that as per the terms of agreement with the AEs ,the assessee was required to get paid within 30 days after dispatch end of the month,that the assessee was to get interest @ 2% on delayed payment.The TPO directed the assessee to furnish certain detail with regard to interest receivable/ received. (Article 7 of the agreement).As per the TPO the assessee did not file complete details.He directed it to explain as to why interest @ 2% should not be charged for all the payment beyond 30 days from its age.Vide its working dt.13.10.10 the assessee informed that as per without prejudice working the interest chargeable @ 2% on over due AE payments amounted to Rs.3, 45, 98, 277/-.However, the assessee objected to the charging of interest on notional basis . The TPO finally held that as per the agreement assessee had to charge interest at a specified rate beyond the stipulated period, that by not charging interest it had given benefit to AE, that the cost of such interest had to be determined .Finally, he suggested an upward adjustment of Rs.3.45 crores to the AO for not charging interest from the AE.s for the year under consideration.

3.1. Aggrieved by the order of the AO,the assessee preferred an appeal before the FAA Before him, it was contended that an outstanding debit balance was not an international transaction in itself, that it was a result of an international transaction,that a continuing debit balance reflected that the payment was to be received from the debtor, that its pricing policy to its AE.s had factored in additional credit period availed by the AE.s, that the margins were higher than the arithmetic means of comparable companies selected in the TP study, that the assessee had not borrowed any fund from external sources to finance its working capital requirements, that in certain cases there may be delay in receiving payment beyond normal credit period, that the assessee was not bearing interest cost, that as a result of not realizing the debts from AE.s within a specified period there had been no impact on assessee's profit/income, that the TPO had relied on a single transaction,that vide letter dt.15.12.09 the assessee submitted another inter-company agreement which did not contain a clause on charging interest on delayed receivables,that in all inter-company agreements clause of charging interest for delayed payments was not present,that there was no intention to charge interest except in very exceptional circumstances,that as per the normal industrial practice interest element on overdue payment was factored into inter-company agreement only to act as a deterrent and were triggered only in exceptional circumstances,that the assessee was not charging interest from the third parties on delayed payments, that there were delays in recievables not only from AE.s but also from third parties, that the assessee generally recovered its dues from third party customers in 97 days, that it had recovered dues from its AE.s in only 58 days, that nil rate of interest was charged in an uncontrolled transaction, that the nil rate should be considered as an ALP Bench mark, that 2% interest per month chargeable for delayed payment as mentioned in agreement with AE.s could not form basis of

considering ALP Bench mark, that third party contracts were with domestic companies as well as overseas companies, that it did not charge any interest to its third party customers where amount remained outstanding for more than the stipulated payment terms, that it had applied a consistent policy of not charging interest on delayed receivables for both domestic and overseas clients, that the average data collection period of comparable companies worked out to 140 days, that the assessee recovered its dues from the AE.s within 58 days,that its average data collection period from its AE.s was much less in comparison to the average data collector period of comparable selected in the TP study, that in comparison to third parties,pricing /margin was sufficient to compensate for higher credit period, that the OP TC margin of comparable was 14.23 %,that OPTC margin earned by the assessee was 29.41 %, that a working capital adjustment had already been taken into consideration, the element of notional interest income attributable to extension of credit to accounts receivables, alternatively it was argued that debit balance could at best be treated as short term credit facility by assessee to its AE.s, that the interest rate was required to be based on currency of loan i.e. LIBOR.It relied upon the case of Siva Industries & Holding Ltd.(ITA/2148/ Mds/ 2010),Four Soft Ltd.(ITA/1495/Hyd./2010) and Tech Mahindra Ltd.(ITA/1176/Mum/2010). It was also alternatively argued that domestic prime lending rate PLR could be applied instead of interest rate of 24%.Finally, it was argued that transaction entered into by the assessee with its AE.s were in accordance with the arms-length standard and no further adjustment on account of notional interest was warranted.

After considering the submission of the assessee, order of the AO and TPO the FAA held that assessee had provided software development services to its AE.s pursuant to the agreement signed by it with them, that as a result of the transaction the receivable remained outstanding beyond the period stipulated in the agreement, that there was specific clause in the agreement about charging interest @2% per month, that the assessee had specific clause for charging interest with the AEs that it had not included the clause for charging interest while dealing with the third parties, that it led to the conclusion that when assessee conducted its business with third parties it had factored the delayed realization into its pricing of services, that assessee itself had stated that the agreement with the third parties had varying credit period, that there was no clause relating to interest charging for delayed payments, that considering the terms of the agreement the rate would become independent CUP rate for the Bench marking,that there would no justification to adopt any other Bench mark, that there would be specific clause for charging of interest in the agreement, that the rate of interest mentioned in the agreement would be arms length rate,that in absence of specific rate mentioned in the agreement the assessee could adopt different rate, that honouring the terms of agreement was essential in third party situation.Rejecting the various arguments taken by the assessee,the FAA dismissed the appeal filed by the assessee.

3.2. During the course of hearing before us,the AR argued that controlled transaction could not be considered for determining arms length rate of interest,that it should be bench marked with third parties,that the TPO had applied the rate of 2.5% that arose in controlled transaction, that no interest was charged form third parties and some of the AE.s, that it was not an international transaction .He relied upon the cases of Dania Oro Jewellery Pvt. Ltd(ITA 6827/ Mum/2012 AY.08-09, dt.20.12.2013), Tecnimont ICB (P) Ltd. (ITA4608&5085/ Mum/ 2010 dt.13.7.2012)and Akzo Noble Chemicles(India) Ltd.)(ITA/1477/PN/2010 AY.06-07 dt. 11. 2. 14).Alternatively,he stated that LIBOR rate should be adopted for charging interest on

delayed receipts from the AE.s.The DR argued that the transaction n question was international transaction and not a result of such transaction, that no documents were furnished for not charging interest from the AE.s for delayed payments by them, that the TPO had rightly applied the rate of 2% as mentioned in the agreement, that the facts of Dania Oro Jewellery Pvt. Ltd case were different from case under appeal.He referred to the case of iGATE Computer System Ltd.(ITA/2504/PN/2012 dt.27.5.2015) .

3.3. We have heard the rival submissions and perused the material before us.We find that while recommending upward adjustment for charging interest for the delayed receipts the TPO had considered the terms and conditions of the agreement entered in to by the assessee with its AE.s.,that the agreement stipulates that for delayed payment(beyond a period of one month)the AE.s.had to pay interest @2%,that the AO had called for details in that regard about the period of delay and as per the AO the assessee did not provide the necessary information,that as per the direction of the AO the assessee had calculated the interest amount for the delayed receipts from its AE.s.In our opinion,the transaction in question is an international transaction and not a result of a transaction as argued by the AR.The assessee had provided specific services to its AE.s.therefore the series of events cannot be termed a result of international transaction.Once it has been decided that issue before us is a Transfer Pricing issue then the value of the transaction has to be determined.It is a case where the TPO has relied upon on the agreement entered into by the assessee with its AE and has treated it as a Benchmark.We find that no independent source was searched or relied upon by the him.It is a fact that the agreements with the third parties did not contain any clause for charging interest for delayed payment.Thus,the matter has its own peculiarities.The assessee has entered in to agreement with the AE.s.and value of the transaction will have to be decided.The arguments of factoring of delayed payment in the value of service cannot be brushed aside especially when it is found that the OPTC margin earned by the assessee was 29.41 % and it was quite higher than the parties compared with i.e.app.15%.The TPO had not considered these vital issues and had applied the flat rate of 2%,as mentioned in the agreement.In our,opinion the alternate argument advanced by the assessee of adopting LIBOR rate is worth considering,if the facts of the case under appeal are deliberated upon.We are of the opinion that in the interest of justice interest rate should be fixed at LIBOR+200 points for the delayed payments received by the assessee from its AE.s.for the period as mentioned in the agreements.AO is directed to recalculate the interest amount accordingly.Ground no.4-5 are decided in favour of the assessee,in part.

4.Last effective ground(Gr. No.6)deals with disallowance of expenditure of Rs.55.19 lacs and Rs.33.13 lacs under the heads ‘communication and network services’ and ‘IT Infrastructure Services’ respectively. During the assessment proceedings,the AO had made reference to the TPO with regard to certain payments made to AE.s.As per the TPO (letters dt.9.9.10 and 1. 10.2010),the assessee had not provided details so as to enable him to ascertain cost contribu - tion arrangement. He directed the assessee to give the basis of payment for communication and network related services (Rs.2,20,78,272/-),IT Infrastructure Service charges (Rs.1,25,32, 468/-)and Software licence(Rs.2.04,60,897/-).The TPO observed that the assessee did not provide actual computation of figures based on actual data except that of software licence amount, that it merely provided some invoices, that the invoices did not provide basis of such charge.He held that he was not going into genuineness or otherwise of payments,that merely

receiving of invoices was not sufficient compliance with arms length principle, that assessee had not provided hard figures and facts.He determined the arms length price at Rs.1.65 crores for communication and net work related services.Similarly for IT Infrastructure Services arms length price was determined at Rs.93.99 lacs.As a result, an adjustment of Rs.55.9 lacs and Rs.31.33 lacs was recommended by the TPO under the respective heads.

4.1. Before the FAA,it was argued that the assessee had received communication and network related services from ATOS,Netherland,that it included running and maintaining charges of the server located in Netherland, that the server offered access to various overseas customers served by the assessee,that the employees were required to be authenticated, that the process of authenticating the employee was also undertaken by ATOS, Netherlands,that the assessee paid communication and network charges to ATOS, Netherlands,that the charge were determined on the number of bytes used by the assessee, that the AE would raise specified invoices in that regard, that one of the AE.s provided Information Technology Services , that it would allocate cost on the basis appropriate allocation keys,that during the course of hearing before TPO it had filed TP Report wherein TNMM was selected as the most appropr -iate method to benchmark the assessee's international transaction,that payment of communic ation and network related services and IT Infrastructure service charges were closely inter-linked with the main international transaction of software development services, that both of them were aggregated along with the main international transaction, that operating profit/total cost was selected as the profit level indicator, that assessee's Operating Profit/Total Cost (OP/TC) margin of 29.01% was higher than the average OP/TC margin of the comparable companies, that the payments made by the assessee to its AE.s was in accordance with the APL,as required by the Act.

After considering the submission of the assessee,the FAA held that the assessee had not submitted backup documents and working of the allocation of the cost during the course of hearing before the TPO, that during the appellate proceedings the assessee was directed to file certain details, that the assessee had not been able to give any details in respect of quantum of services that it might have received, that it was not able to give details in respect of the basis on which the cost had been quantified,that aggregation or grouping of the various international transactions undertaken by the assessee and benchmarking them under the umbrella of TNMM was rightly rejected by the TPO. Finally, he upheld the order of the FAA.

4.2. During the course of hearing before us the AR stated that the assessee had aggregated both the transaction, that the PIL level was roughly double of the comparables, that the services availed by the assessee were essential for the main job i.e. software development, that the assessee had used infrastructure facility and applications made available by the AE.s, that the TPO had made no separate benchmarking.He referred to page No.418, 419, 556, 558, 565 and 566 of the paper book.The DR argued that the assessee had not supplied necessary details to the TPO/FAA, that entity level of TNMM was not acceptable, that there were two types of transaction and therefore, benchmarking had to be done separately.

4.3. We have heard the rival submissions and perused the material before us.We find that the assessee had filed invoices and the basis of payments made under the heads communication and network related services and IT Infrastructure service charge (page- 418-425 of the PB). It is found that assessee had made submission in that regard before FAA and had produced group IT Service agreement.We find that same were not properly analysed by the TPO/ FAA.We are of the opinion that issue needs further verification and investigations. Therefore,

in the interest of justice we are remitting back the matter to the TPO for fresh adjudication who will decide the issue after affording a reasonable opportunity of hearing to the assessee. The assessee is directed to produce all the necessary documents related to Communication and network related services and IT Infrastructure service charge to the TPO.Ground No.6 is decided in favour of the assessee ,in part.

ITA/1467/M/2014(Revenue's Appeal):

5.The effective Ground of appeal,filed by the AO,is about direction given by the FAA for reducing expenditure incurred in foreign currency for providing technical services from total turnover,while computing deduction u/s.10A of the Act.

During the assessment proceedings,the AO asked the assessee as to why the expenses incurred in foreign exchange in providing technical services in respect of Akriti Soft Tech unit should not be excluded for export turnover.The assessee relied upon certain cases and submitted that if expenses were to be reduced from export turn over then the same should be reduced from total turnover as well.However, the AO did not agree with the assessee and recomputed the exemption u/s.10A of the Act.

5.1. In the appellate proceedings the assessee brought to the attention of the FAA,the judgment delivered by the Tribunal for the AY.2002-03 and other cases.Referring to the judgment of the Tribunal for the AY 04-05 in assessee's own case,the FAA held that expenses incurred in foreign exchange towards technical services provided outside India amounting to Rs.6.65cr from export turnover alone was not as per law,that same had also to be reduced from total turnover.

5.2. During the course of hearing before us,the DR left the issue to the discretion of the bench.The AR stated that the Hon'ble Bombay High Court in assessee's own case has decided the issue in íts favour for the AY.s. 2002-03-2005-06.

We have heard the rival submission and perused the material before us we find that the Tribunal as well as the Hon'ble Bombay High Court has decided the issue against the AO and in favour of the assessee(IT Appeal No.3733 of 2010, 1446 of 2011 and 1409 of 2011 and 1410 of 2011dt.29.7.11,8.2.13.11.1.2013 and 11.1.2013).Respectfully,following the same effective ground of appeal,raised by the AO,is decided against him.

As a result,appeal filed by the assessee stands partly allowed and the appeal of the AO is dismissed.
फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है एवं निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 13th January, 2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 13 जनवरी, 2016 को की गई।

Sd/-	**Sd/-**
(अमित शुक्ल / **Amit Shukla**)	(राजेन्द्र / **RAJENDRA**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 13.01.2016
Jv, Sr.PS
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR " " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**, ए** खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**