

for short] r.w.r. 10D of the Income tax Rules, 1962, which has already been decided by the ITAT and the Hon'ble Delhi High Court.

2. Briefly stated, the facts of the case are that Marubeni-Itochu Steel India Private Limited ("MIIP"/ "the Appellant") is a service and trading company and provides liaisoning support services to its parent and affiliates for purchase and sale of goods from/in India. It acts as a communication channel between its parent/affiliates companies and third parties in India. MIIP is engaged in undertaking two types of transactions with its Group Companies:

- a) **Provision of support services to its Group Companies - Service Segment** where sales and purchases in relation to the import and export is recorded in the books of Associated Enterprises ("AE"). The services include the following:-

Furnishing information regarding steel products and Indian steel market;

Providing information concerning transportation, customs clearance and any other information as required by the AEs;

Receiving and delivering of relative documents required in the contracts and shipping documents as required by the AEs;

- Acting as a channel of communication between the AEs and the end- customer;
- Any other activities as may be necessary for the smooth performance of the AE's transactions, as instructed by the

AE.

b) Purchase of steel products from its Group Companies for the purpose of resale in India - Trading Segment

Back to back trading transactions on the basis of confirmed orders for the purpose of resale to pre-identified customers in India.

3. During the financial year 2012-13, the Appellant Company had entered into the following international transactions with its AEs (Page 95-96 of PB):

S. No.	Nature of international transaction	Value (in INR)
1.	Import of traded goods (steel	540,611,790
2.	Provision of support services	202,781,949
3.	Re-imbursments payable	65,201,137
4.	Re-imbursments receivable	10,256,175
5.	Trade payable	254,443,632
6.	Trade receivable	15,236,594
7.	Advances	1,906,100
8.	Credit guarantee	-

4. For the purpose of establishing arm's length price (ALP) of its international transactions entered with its Associated Enterprises (AEs), the Appellant company had undertaken a Transfer Pricing study (refer pages93-150 of the Paper book) as provided under Rule 10D of the Income-tax Rules, 1962 ("Rules") read with section 92D of the Income-tax Act, 1961 ("Act").

5. The Assessing Officer, during the course of assessment proceedings observed that vide an order dated 26.08.2016 (pages 197-236 of appeal documents), the Ld. TPO re-characterized the commission segment of the appellant's business as trading business and rejected the approach adopted by the appellant in its TP report. The Ld. TPO observed that the Appellant has performed all the critical functions and assumed significant risks. The Ld. TPO further held that the Appellant is the owner of supply chain management and human intangibles and was generating substantial benefits to its AEs on account of location savings arising from its activities in India. After having held that the commission segment of the appellant to be trading business, he chose trading companies from the databases as comparable under TNMM with operating profit margin on costs (OP/TC) as the profit level indicator. Further, while computing the operating profit and total costs, the Ld. TPO added the value of goods transacted by the AEs on which the Appellant has earned commission amounting to Rs. 1605 crores, to the cost base of service fee and commission segment disregarding the fact that the value of Rs. 1,605 crores was recorded as sales/purchases in the books of AEs. Based on such approach, TPO made adjustment of Rs. 379,330,512 to the total income of the Appellant.

6. Aggrieved against the aforesaid order, the Appellant filed its objections before the Ld. Dispute Resolution Panel ("DRP"). The DRP, however, upheld the order of the TPO. The Ld. DRP disregarded the

submissions made by the assessee pointing out that the re-characterization of commission income as trading was without any basis. Similarly, the conclusions regarding intangibles, risk and functions was without any evidence or cogent reason. The conclusions were based on conjectures and contrary to the rulings of the Hon'ble Tribunal and High Courts in large number of cases.

7. In the present case, the assessee has reported international taxation entered into by the assessee and the Associated Enterprises [EC] for the financial year 2012-13. Based on the international taxation, the case was referred to the TPO for determining the ALP by the assessee.

8. Aggrieved by the order passed by the DRP/Assessing Officer, the assessee is in appeal before us.

9. At the very outset, the ld. counsel for the assessee submitted that the issue involved in the present case in hand is covered in favour of the assessee by the decision of the ITAT in assessee's own case for assessment year 2010-11, which was subsequently confirmed by the Hon'ble Delhi High Court. In this regard, the ld. counsel for the assessee drew our attention towards operative part of the relent order which reads as under:

"52. Next issue is with report to service fee segment which the TPO treated as trading segment. As per the assessee, the assessee is involved in two segments i.e. trading segment and service fee/commission fee segment. In respect to the computation of ALP by the assessee reflected for trading segment is not disputed by the TPO. However, in respect to the other segment which was claimed by the assessee as income from service fee/commission fee segment, the TPO, however, disagrees with the assessee's contention and treats it as income from trading activity. The same issue cropped in Mitsubishi Corporation India Pvt. Ltd. (supra) wherein the Coordinate Bench following the order of the Hon'ble jurisdictional High Court decision in the case of M/s Li & Fung India Pvt. Ltd vs. CIT (361 ITR 85) has upheld the contention of the assessee that it is no longer open to the revenue authorities to reconstruct the financial statements of the assessee by including the cost of products incurred by its AEs, in respect of which services are rendered, in its reconstructed financial statements and then putting the hypothetical trading profits, so arrived in their reconstructed financial statements, to the tests for determining arms' length price. The Coordinate Bench held as follows:-

"Service fee commission segment of assessee's activities

80. Coming to the service fee commission segment, we have noted that as regards the service fee commission segment, the TPO has re-characterized the same as trading activities as he was of the view that the right course of action will be to treat the same as equivalent to trading segment, because what the assessee has disclosed as service/ commission income is infact trading income. Accordingly, the cost of goods sold by the AEs,

which was Rs.2927,92,05,406, was also to be included in cost base of the service/commission segment and then ALP was recomputed. So far as this aspect of the matter is concerned, the issue is now covered in favour of the assessee by Hon'ble jurisdictional High Court's decision in the case of Li & Fung wherein Their Lordships have, inter alia, observed as follows:

This Court is of opinion that to apply the TNMM, the assessee's net profit margin realized from international transactions had to be calculated only with reference to cost incurred by it, and not by any other entity, either third party vendors or the AE. Textually, and within the bounds of the text must the AO/TPO operate, Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's net profit margin for application of the TNMM. Rule 10B(1)(e) recognizes that "the net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise ... " (emphasis supplied).

It thus contemplates a determination of ALP with reference to the relevant factors (cost, assets, sales etc.) of the enterprise in question, i.e. the assessee, as opposed to the AE or any third party. The textual mandate, thus, is unambiguously clear. 40. The TPO's reasoning to enhance the assessee's cost base by considering the cost of manufacture and export of finished goods, i.e., ready-made garments by the third party vendors (which cost is certainly not the cost incurred by the assessee), is nowhere supported by the TNMM under Rule 10B(1)(e) of the

Rules. Having determined that (TNMM) to be the most appropriate method, the only rules and norms prescribed in that regard could have been applied to determine whether the exercise indicated by the assessee yielded an ALP. "

81. Clearly, therefore, it is impermissible to make notional additions in the cost base and thus take into account the costs which are not borne by the assessee. It is so opined by Hon'ble jurisdictional High Court on a careful analysis of rule 108(1)(e)(i). It is, therefore, no longer open to the revenue authorities to reconstruct the financial statements of the assessee by including the cost of products incurred by the AEs, in respect of which services are rendered, in its reconstructed financial statements, and then putting the hypothetical trading profits, so arrived at in these reconstructed financial statements, to the tests for determining arms' length price. Respectfully following the esteemed views of Their Lordships, we hold that the adjustments carried out in the cost base of ALP computation, in respect of service fee/commission segment, are indeed devoid of legally sustainable merits. We direct the Assessing Officer to delete these adjustments. Once this notional adjustment is deleted, the ALP determination is to be done on the basis of the commission/service fees. As we have stated earlier in this order as well, in the course of proceedings before us, the assessee has filed fresh computation of the ALP which attempts to demonstrate that, if notional adjustments made by the TPO are deleted, no ALP adjustment will be warranted. However, we are not inclined to go into verifications which must take place at the assessment stage. "

53. Respectfully following the ratio laid by the Hon'ble predicted High Court in Li & Fung out that of the co-ordinate bench in Mitsubishi (supra) we deem it appropriate to uphold the grievances of the assessee in principle, as the terms above, delete the notional adjustments by TPO's adopting cost base of the AEs.

In view of the above, it was submitted that there is no change on facts or law during the intervening period, therefore, the present appeal may be allowed.

6. Per contra, the ld. DR relied on the orders of the DRP and vehemently argued that the case of the assessee though is covered by the order passed by the Tribunal and confirmed by the Hon'ble Delhi High Court, however, the Revenue is in appeal before the Hon'ble Supreme Court, therefore, the matter may not be adjudicated and decided by the Tribunal.

7. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book as well as written synopsis filed on behalf of the assessee. In our considered view, once the issue is squarely covered by the earlier order of the Tribunal for assessment year 2011-12 [supra], which was confirmed by the Hon'ble Delhi High Court, we do not deem it appropriate to keep the matter pending before us. In that view of the matter, we allow the grounds raised by the assessee in the present appeal. However, it is made clear that in case the

Hon'ble Supreme Court in the appellate proceedings modifies/set asides/cancels the order by the Tribunal/ High Court, then necessary consequential effect will be given by the Assessing Officer in the present case as well.

8. In the result, the appeal of the assessee is allowed.

Pronounced in the open court on 27.09.2017.

Sd/-
[L.P. SAHU]
ACCOUNTANT MEMBER

Sd/-
[LALIT KUMAR]
JUDICIAL MEMBER

Dated: 27th September, 2017

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi