

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'I-2', NEW DELHI**

**BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER  
AND  
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 1675/Del/2010  
Assessment Year: 2005-06

Asstt. Commissioner of Income Tax, Circle I, Block . I-B, CGO Complex, NH-4, Faridabad	<b>Vs.</b>	M/s. Va Tech Esher Wyas Flovel Ltd., 49/5, Mathura Road, Village Prithla, Faridabad
<b>PAN : AAACF0010A</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Sh. Ashwani Taneja, Adv.
Department by	Sh. H.K. Choudhary, CIT(DR)

Date of hearing	23.10.2017
Date of pronouncement	13.11.2017

**ORDER**

**PER O.P. KANT, A.M.:**

This appeal by the Revenue is directed against order dated 05/02/2010 passed by the Commissioner of Income-tax (Appeals), Faridabad [in short ~~the~~ CIT-(A)] for assessment year 2005-06, raising following grounds:

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law in deleting the addition of Rs. 12,62,73,121/- made by the Assessing Officer on account of Project Procurement expenses disregarding the fact that the same were not incurred for the purpose of - business."*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law in deleting the addition of Rs. 95,47,197/- made by the Assessing Officer on account of Arm's Length Price of International Transaction u/s 92CA(3) of*

*the Income Tax Act, 1961 disregarding the Arm's Length Price of International transaction determined by the Transfer Pricing Officer u/s 92CA(3)*

3. *On the facts and circumstances of the case, the Ld. v CIT(A) has erred on facts and in law in deleting the addition of Rs. 2,52,406/- and Rs. 2,45,572/- made by the Assessing Officer on account of disallowance out of telephone and Car expenses ignoring the real life factual proposition that possibility of user of telephone and Car for non business purposes could not be absolutely ruled out and is in contrary to the decision of the Hon'ble Madras High Court in the case of CIT vs. Chitram and Co. (P) Ltd. 191 ITR 96 and CIT vs. Madura Coats Ltd. 263 ITR 241."*
  4. *That the appellant craves for the permission to add, delete or amend the grounds of appeal before or at the time of hearing of appeal.*
2. Briefly stated facts of the case are that:
- (1) During relevant year the assessee was engaged in the business of:
    - (a) manufacturing hydro turbines governing equipments, spare parts of all types of turbines and
    - (b) executing hydropower plants on Engineering, Procurement and Construction(EPC) basis.
  - (2) During the relevant year, 99.99% of the shares were held by %a Tech Escher Wyss GMBH+, Germany and rest of 0.01% of the shares were held by other foreign companies.
  - (3) Return of income for the relevant year was filed on 28/10/2005 declaring nil income. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short ~~the Act~~) was issued and complied with.

- (4) During scrutiny proceedings, the Assessing Officer noticed following international transactions entered into by the assessee with associated enterprises:

S.No.	International Transaction	Method used to justify arm's length price	Value (in Rs.)
1.	Import of Raw materials & components	TNMM	12,356,250
2.	Receipt of technical counseltancy services	TNMM	27,016,194
3.	Receipt of storage income	TNMM	84,237
4.	Payment for SAP license fee	TNMM	79,562
5.	Payment of royalty	TNMM	10,274,950
6.	Repayment of principal amount of leased asset (SAP License)	TNMM	1,846,876
7.	Payment of interest on ECB Loans.	CUP	23,123,374
8.	Payment of corporate Guarantee charges	CUP	10,500,000
9.	Supply of machinery & Equipment	CPM	10,070,000
10.	Chargeback of Expenses by V A Tech Group companies	-----	2,329,550

- (5) The Ld. Assessing Officer referred the case to the Ld. Transfer Pricing Officer (TPO) for determination of arm's length price of the international transactions.
- (6) The Id. TPO accepted the most appropriate method applied by the assessee in its transfer pricing study, however, he disagreed with average of multiple year data of the comparable chosen by the assessee for computing average profit level indicator (PLI). The assessee had shown working capital adjusted margin (operating profit/operating revenue) of the five comparable companies with three years data (i.e. FY 2002-03, 2003-04 and 2004-05) at 5.95% as against the margin of the assessee of 6.17% for FY 2004-05. The Id. TPO accepted the contention of

the assessee to drop one of the comparable i.e. M/s ABB limited because of lack of availability of segmental data. The average OP/OR of the four comparable companies after the working capital adjustment to the comparables with data for financial year 2004-05 was worked out at 8.77%. In view of the findings, the Id. TPO in his order dated 05/09/2008 under section 92CA(3) of the Act, computed the adjustment to the international transaction as under:

<i>Operating revenue</i>	<i>Rs. 121,62,17,344</i>
<i>Operating expenditure</i>	<i>Rs. 114,11,76,625</i>
<i>Operating profit</i>	<i>Rs. 750,40,719</i>
<i>OP/OR(%)</i>	<i>6.17</i>
<i>OP/OR of the comparables</i>	<i>8.77</i>
<i>Adjusted operating profit</i>	<i>Rs. 10,66,62,261</i>
<i>5% of adjusted OP</i>	<i>Rs. 53,33,113</i>
<i>Difference between adjusted OP &amp; OP shown by assessee = Rs. 3,16,21,542</i>	

- (7) Further, in view of the mistake in computation of margin of the comparables, the Id. TPO rectified the adjustment to the international transaction in his order under section 154 dated 15/09/2008 as follows:

<i>Operation revenue</i>	<i>Rs. 1,21,62,344/-</i>
<i>Operating expenditure</i>	<i>Rs. 1,14,11,76,625/-</i>
<i>Operating profit</i>	<i>Rs. 7,50,40,719/-</i>
<i>OP/OR (%)</i>	<i>6.17%</i>
<i>OP/OR of the comparable</i>	<i>6.955%</i>
<i>Adjusted operating profit</i>	<i>Rs. 8,45,87,916/-</i>
<i>5% of adjusted OP</i>	<i>Rs. 42,29,396/-</i>

*Adjustment:- Difference between adjusted OP and OP shown by the assessee Rs. 95,47,197/- (8,45,87,916 - 7,50,40,719).*

- (8) The Ld. Assessing Officer in the assessment order passed on 20/11/2008 under section 143(3) of the Act made transfer pricing addition of Rs.95,47,197/- as proposed by the Ld. TPO. In addition to the transfer pricing addition, the Ld. Assessing Officer also made another disallowances/additions to the returned income, including procurement (commission) expenses, vehicle expenses, telephone expenses etc.
- (9) On further appeal, the Ld. CIT-(A), allowed part relief to the assessee.

2.1 Aggrieved, the Revenue is in appeal raising the grounds as reproduced above.

3. In ground No. 1, the Revenue has challenged deletion of the addition of Rs.12,62,73,121/- made by the Assessing Officer on account of project procurement expenses.

3.1 During assessment proceeding, the Assessing Officer noted expenses of Rs.12,62,73,121/- towards project procurement expenses debited to the profit and loss account. The assessee furnished detail of project-wise commission paid to commission agents towards project procurement. The Assessing Officer followed finding of his predecessor in assessment year 2004-05, keeping in view the identical facts and circumstances. In assessment year 2004-05, the Assessing Officer disallowed the entire expenses towards commission for project procurement in absence of documentary evidences of services rendered by the commission agents. Alternatively, he also concluded that assessee claimed entire commission expenses towards projects though no revenue from the contracts was recognized in the year under consideration therefore, keeping in view the percentage completion method followed by the assessee, commission expenses corresponding to revenue recognized was only allowable. Accordingly, he held that only

part of the commission expenses was only allowable. Following the same view, the Assessing Officer in the year under consideration disallowed entire expenses of Rs.12,62,73,121/- towards project procurement expenses (commission) and alternatively, without prejudice to entire disallowance, on the basis of percentage completion method, held the expenses of Rs.2,76,08,085/- as allowable only.

3.2 Before the Ld. CIT-(A), the assessee submitted that Assessing Officer has not provided sufficient opportunity of hearing and therefore, filed application for admitting additional evidences under Rule 46A(1)(d) of Income-tax Rules, 1962 (in short ~~the Rules~~). The Ld. CIT-(A) forwarded the additional evidences alongwith application of the assessee to the Assessing Officer for his comments. The Assessing Officer objected to the admission of the additional evidences, as according to him sufficient opportunity was already provided to the assessee in assessment proceedings. The learned CIT-(A) after considering the objection of the Assessing Officer and rejoinder of the assessee, admitted the additional evidences and again directed the Assessing Officer to examine the additional evidences on merit. The Assessing Officer examined the additional evidences and provided the opportunity to the assessee for verification of the claim of services rendered. The Assessing Officer submitted her verification report on 28/01/2010. The Ld. CIT-(A) in the impugned order has expressed annoyance on delay in furnishing the remand report to him. The Ld. CIT-(A) provided copy of the remand report to the assessee for rejoinder. The learned CIT-(A) has reproduced entire rejoinder of the assessee from page 13 to 31 of the impugned order, though contents of the remand report has not been produced. The Ld. CIT-(A) followed his finding on the issue in dispute in assessment year 2003-04 and held the commission expenses as

genuine and allowed the ground of the appeal of the assessee on the issue in dispute.

3.3 At the outset, before us counsel of the assessee submitted that in the assessment year 2004-05, the Tribunal in ITA No. 3495/Del/2009 has upheld the finding of the Ld. CIT-(A) in deleting the disallowance of commission expenses. Therefore, he submitted that the issue in dispute is covered in favour of the assessee. The learned counsel also filed paper book in three volumes containing pages 1 to 893. In a brief synopsis filed, the learned counsel referred different pages in support of his contention of rendering services by the commission agents.

3.4 The Ld. Sr. DR, on the other hand, submitted that in assessment year 2004-05 addition was made relying on the statement of Sri S. K. Kaul, Managing Director of the assessee company recorded under section 131 of the Act during assessment proceeding of assessment year 2003-04. He further submitted that the issue in dispute in assessment year 2003-04 has been restored back by the Tribunal to the Assessing Officer. He further submitted that assessee has not furnished any documentary evidence of the services rendered by the so-called commission agents. According to him, the assessee has merely filed copy of agreements and correspondence between the assessee and the commission agent. He submitted that no documentary evidence have been filed to establish the role played by the commission agent in procuring the contract order from the government authorities or other principle parties including any evidence of representation by the commission agent before government authorities etc. The Ld. CIT(DR) submitted that correspondence between the assessee and agent are only internal documents and no independent evidence from third parties whether the commission agent has rendered any services has been filed either before the Ld. CIT-(A) or before the Tribunal. He accordingly

requested that issue in dispute may be restored to the file of the Assessing Officer following the finding of the Tribunal in assessment year 2003-04.

3.5 We have heard the rival submission and perused the relevant material on record. In assessment year 2004-05, the Assessing Officer asked the assessee to submit proof of the services rendered particularly keeping in view the finding of the Assessing Officer in assessment year 2003-04 that Sh. S. K. Kaul, Managing Director of the company failed to provide documentary evidence in support of specific services rendered by the commission agent and he only repeated the particulars of the services provided in the scope of work in the agreement with the commission agents. The finding of the Assessing Officer on the issue in dispute is reproduced as under:

*“1.5 There are many important factors, which are to be taken into account to consider the allowability of commission expenses.*

*(i) What is the background of the commission agent, what technical/engineering expertise the commission agent has in the relevant field, the nature of business, professional activities carried on by the commission agents, what are the services required by the assessee for obtaining orders in respect of its projects, as to whether the commission agent has requisite expertise in rendering the services in the relevant field to help the assessee in obtaining the orders and the documentary evidences of actually rendering of services for which commission expenses were incurred*

*In the statement, Sh. S.K. Kaul, M.D. has also simply repeated the particulars of services rendered by the commission agents, as shown in the ‘Scope of Work’ in the agreement, But he also could not furnish any documentary evidences nor could give particulars of any specific service rendered by them to justify the commission expenses.*

*After examining the facts of the case, the commission expenses were not found genuine and therefore, were added to the income of the assessee for AY 2003-04.*

*In the year under consideration also, the assessee has not furnished any evidence of services rendered by any of the commission agent. The assessee has simply furnished copies of some correspondence or agreements addressed to the so called commission agents by the assessee company regarding their appointment for representation and liaison work for the different projects.*

*Despite various opportunities granted from time to time, the assessee could not furnish evidences of any service in respect of various scope of works shown in the commission agreements. The assessee has undertaken execution of various Hydel Power Projects and a number of projects / contracts, are the Government contracts which are awarded by the competent authorities after following the prescribed procedures of calling up the tenders, opening of bids, study of relevant data's, financial capacity of the bidder's, technical expertise of the bidder's and other relevant details and informations. It is not understood as to how and what type of arrangements are made by the commission agents for attending of tender opening. One of the important area of work mentioned in the scope of work is preparation of comparative statements. it is not understood as to how the comparative statements can be prepared before opening of tenders and once the tenders are opened in presence of all the bidders and the tender is awarded to any one of the bidder on the basis of rates quoted by him and his technical expertise in the relevant field then what is the role of the commission agent in preparation of comparative statements. Similarly there does not appear any role of the commission agent on submission of reports in regard to development on the tender process and collection of letter of intent etc. The assessee has also not filed any evidence in regard to the role of commission agent in arranging technical meetings and negotiations between the assessee company and the competent tender awarding authorities. From the detail facts of the case, it is apparently clear that the said commission agents had not rendered any type of services to the assessee company which could justify the commission expenses, claimed by it in the return of income.*

*One of the ground taken by the assessee to justify its commission expenses is that the payments of commission was*

*made through cheque and that TDS was also deducted from the commission expenses. It was also stated that payment of commission expenses were made to the commission agents as per the terms and conditions of the commission contract and upon receiving the corresponding payments from the customer. This plea of the assessee also cannot be said as genuine ground to justify its claim. The execution of any agreement between the two parties and payments through cheques in terms of said agreements will not make the non-genuine transactions into genuine transactions when the basic concept of purpose of agreement is not beyond doubt.*

*“(ii) The second factor on the issue will be as to what is the nature of expenses incurred by the assessee under the Garb of commission expenses and as to whether the same are allowable expenses u/s 37(1) of the I.T. Act. From the facts of the case it is abundantly clear that the assessee has not made payment of any commission expenses in consideration of any services required from the commission agents for procurement of contract orders. At the most, the payments made by the assessee company can be said to have been made to influence the process of award of tender in its favour. Any payment made by the assessee which is not made for getting any genuine services required in carrying on the business-but is made to influence the decision making process will be the payment made against the public policy. Such expenditure is not allowable u/s 37(1) of the I.T. Act or any other provisions of the Act. In this connection reliance is placed on the decision Hon’ble Andhra Pradesh High Court in the case of CIT Vs Kodandarama And Company and other, 144 ITR 395.*

*After considering the facts of the case and the details filed by the assessee, it is held that the commission expenses claimed by the assessee are not genuine and disallowed”*

3.6 The Tribunal in ITA No.3945/Del/2009 for assessment year 2004-05 deleted the disallowance. The relevant part of the decision of the Tribunal is extracted as under:

*“11. It is a matter of record that Assessing Officer has not placed any evidence on record that the assessee has not incurred the expenditure for business purposes. Whereas the assessee has filed*

*all the copies of the agreement with the commission agents where the type of services to be rendered by the agents are stated. The assessee has also submitted the copies of the invoices raised by the agents along with correspondences with the agents as mentioned hereinabove. The details of commission expenses, mode of payment and TDS deducted. These all documentary evidences go to prove that nature of work executed by the commission agent and the necessary evidences as asked by the Assessing Officer in paragraph 1.2 of his order. The agents has executed the work for procuring the contracts for the assessee and necessary correspondences are on record in which no defect has been pointed out by the Assessing Officer in the remand report. Payment of commission and tax deducted at source also prove the commission paid to the agents on completion of their work. In our view all possible evidences which could be possible to be placed on record during the execution of work by the agents were placed on record by the assessee. In this way, the assessee has discharged its primary burden cast upon it. The Revenue cannot brush aside these positive evidences. The Assessing Officer has nowhere pointed out or recorded any finding against the assessee with regard to expenditure so incurred is not genuine.*

*12. As regards the allegation made by the Assessing Officer and learned DR that the payments were made to influence the procurement of contracts and is against the public policy is in fact covered u/s.37(l) of the Act. According to the said Explanation the assessee has not done any offence or has not done any activity or incurred any expenditure which is prohibited by law and accordingly explanation-I to Section 37 of the Act is not applicable.*

*13. The assessee has claimed the expenses on the basis of accrual on the provisions of the accounting standard and the accounts of the company are duly audited and no defect in the same has been pointed out.*

*14. Assessee produced sufficient evidence and material before the authorities below to establish the nature and genuineness of the transaction. There is no challenge to the finding of learned CIT(A) in admitting additional evidence at appellate stage. The agreement and material produced on record with the commissions agents clearly established that the commission agents were legally bound to execute the work of procuring contacts for the business for which they were paid commission. The assessee filed various*

*correspondences on record between the commission agents and the assessee which clearly revealed that various types of works done by the commission agent for the assessee. All the payments of commission were paid by cheques and subject to TDS. Thus, the assessee produced sufficient evidence and material before the authorities below to prove that commission agents did render services for the assessee's business. The Assessing Officer did not bring any evidence on record that commission payments were made to influence the other parties for procurement of the contact. The Assessing Officer himself in his alternate contention allowed the deduction of part of the commission paid in a sum of Rs.54,41,905/- which itself proved that the commission agents did render services for the business and profession of the assessee. The Assessing Officer while making the addition of disallowing the commission relied upon statement of Shri S.K. Kaul, M.D. recorded in preceding Assessment Year 2003-04. Every year is separate year and no material produced on record as to how the statement recorded in preceding assessment year was relevant to the assessment year under appeal. The material facts for assessment year under appeal. Assessment Year 2004-05 have not been referred and could not be referred in statement of Shri S.K. Kaul in preceding Assessment Year 2003-04. It is also not clarified whether before relying upon the same statement the assessee was confronted of this fact or not. It is admitted fact that the matter in Assessment Year 2003-04 has not yet reached finality, therefore, how the statement recorded in Assessment Year 2003-04 was relevant in assessment year under appeal has not been explained.*

15. *Learned counsel for the assessee also produced on record the assessment orders passed by the Assessing Officer in subsequent Assessment Year 2007-08 u/s. 144/147 of the IT Act, Assessment Year 2008-09 u/s.143(3) r.w.s. 144C of the IT Act and assessment order for Assessment Year 2009-10 again u/s.143(3) r.w.s. 144C of the IT Act. Learned counsel for the assessee pointed out that despite in one year it is a reopening of the assessment and in other two years a transfer pricing matter, the authorities below have not disallowed the similar commission paid to the commission agents. This fact itself supports the claim of assessee that the commission agents rendered services for the business and profession of the assessee right from the beginning which continued even in subsequent years, therefore, the Income Tax Authorities should also follow the rule of consistency and the Id, CIT(A) on proper application of material facts rightly deleted the addition.*

*Learned counsel for the assessee relied upon the order of ITAT Delhi Bench in the case of ACIT vs. Sanjay Enterprises, 23 SOT 0498 in which it was held:*

*"Commission paid to agents for making representation and mobilizing public opinion for continuation of sale of lottery tickets of other states in the State of Madhya Pradesh was neither an offence nor prohibited by law as envisaged by Explanation to s. 37(1) nor even against public policy, hence allowable under 37(1)."*

*15.1 Learned counsel for the assessee also relied upon the order of ITAT Delhi Bench in the case of Anupam Synthetics Pvt. Ltd. vs. JOT; J 04 TTJ 113 in which it was held:*

*"Commission to agent for procuring Government contract - Assessee-company having procured a Government supply contract only through guidance and assistance of an agent who rendered effective services to the assessee in securing the tenders, making negotiations with the concerned officers, ensuring timely supplies and also obtaining the release of payment, the payment of commission made to said agent was fully justified and same is allowable as business expenditure."*

*15.2 The assessee filed all the relevant and cogent evidence to prove that commission agents rendered services for the assessee's business. The findings of fact recorded by the learned CIT(A) have not been rebutted through any evidence or material on record. The decisions relied upon by learned DR which are mostly not on the point in issue or for payment of illegal gratification which are not applicable to the facts and circumstances of the case because Assessing Officer did not bring any evidence on record for payment of any illegal gratification etc.*

*16. Considering the totality of the facts and circumstances of the case, we do not find any justification to interfere with, the order of the learned CIT(A)."*

3.7 In the above decision, the Tribunal has noted that each assessment year is separate and no material was produced on record as how the statement recorded in preceding year was relevant to the assessment year under appeal. Further, the Tribunal held that matter in assessment year 2003-04 has not yet reached finality and therefore,

relevancy of the statement recorded in assessment year 2003-04 in the assessment year under appeal was not explained by the assessee.

3.8 We concur with the above finding of the Tribunal, and we are of the opinion that the assessee is required to discharge onus of the services rendered in each year separately and no reliance can be placed on any documentary evidence supporting services rendered either in preceding or succeeding assessment years. In the brief synopsis, the Ld. counsel has referred following documents as evidence in support of the claim of rendering services:

1. *PB 675 is detail of project procurement expenses for the period 01.04.2004 to 31.03.2005.*
2. *PB 671-673 is assessee's letter dated 06.01.2010 filed before Ld. CIT(A) regarding furnishing of additional evidences..*
3. *PB 667-670 is assessee's letter dated 03.02.2010 filed before Ld. CIT(A) to counter comments of Ld. AO.*
4. *PB 658-661 is assessee's letter dated 30.11.2009 filed before Ld. CIT(A) to counter comments of Ld. AO.*
5. *PB 655-656 is assessee's letter dated 26.10.2009 filed before Ld. CIT(A) submitting additional evidences under rule 46A(l)(d).*
6. *PB 628-636 is the submission before Ld. CIT(A) submitting above factual background and enclosing various evidences to prove that the impugned expenses was incurred for the purpose of the business.*
7. *PB 66-67 is the submissions before Ld. A.O. submitting an exhaustive note on the nature of services rendered by the commission agents in regard to the project procurement.*
8. *PB-70 is the details of commission expenses showing the amount of commission / project procurement expenses, name of the project and name of the commission agents.*
9. *PB-2 is P&L A/c showing contract revenue to the tune of Rs. 1,1,68 Crores.*
10. *PB 102A- 102B is letter dated 02-06-2008 filed to Ld. A.O. through which copy of agreement was also furnished.*
11. *PB 102G-102H is appointment of M/s C.T. Cotton Yam Ltd. appointing them as representative in relation to Brindavan Mini Hydel Project.*

12. *PB 148-150, 152 are the correspondences between M/s C.T. Cotton Yam Ltd. with the assessee in relation to Brindavan Mini Hydel Project.*
13. *PB-153 is the copy of invoice from M/s C.T. Cotton Yam Ltd. to the assessee in respect of Brindavan Mini Hydel Project.*
14. *PB 154-155 are the evidence of payment released by Brindavan Mini Hydel Project.*
15. *PB 210-211 is the copy of award of project to assessee regarding Brindavan Mini Hydel Project.*
16. *PB 213-214 is the copy of agreement between assessee and M/s Artria regarding Brindavan Mini Hydel Project.*
17. *PB 215-230 is the copy of detailed order issued to the assessee regarding Brindavan Mini Hydel Project.*
18. *PB 1021-102J is appointment of M/s C.T. Cotton Yam Ltd. appointing them as representative in relation to Rani Awanti by Sagar Project.*
19. *PB-112 is letter from the assessee to M/s C.T. Cotton Yam Ltd. requesting the agent to send various informations in respect of Rani Awanti by Sagar Project.*
20. *PB-113 is letter from M/s C.T. Cotton Yam Ltd. informing the assessee that agent can provide valuable information in respect of Rani Awanti by Sagar Project.*
21. *PB-114 is letter dated 31.08.2002 from M/s C.T. Cotton Yam Ltd. intimating that M/s SEW Construction Ltd. is prepared to sign MOU in relation to the execution Rani Awanti by Sagar Project.*
22. *PB 115 is assessee's letter dated 03.09.2002 to M/s C.T. Cotton Yarn Ltd. in relation to Rani Awanti by sagar project offering the modified the term.*
23. *PB-116 is letter dated 08.10.2002 from M/s C.T. Cotton Yam Ltd. to the assessee in respect of Rani Awanti by Sagar Project informing the extension to date for submissions of tender.*
24. *PB-117 is letter dated 14.10.2002 from M/s C.T. Cotton Yam Ltd. to the assessee giving valuable information in respect of Rani Awanti by Sagar Project.*
25. *PB 118 is assessee's letter dated 11.12.2002 to M/s C.T. Cotton Yam Ltd. requesting to pursue the consultants in respect of Rani Awanti by Sagar Project.*

26. *PB 119 appointing them as representative in relation to is letter dated 16.12.2002 from M/s C.T. Cotton Yam Ltd. to the assessee informing about the progress in respect of Rani Awanti by Sagar Project.*
27. *PB-120 is letter dated 05.02.2003 from M/s C.T. Cotton Yam Ltd. to the assessee informing about the meeting in respect of Rani Awanti by Sagar Project*
28. *PB 121 is letter dated 24.02.2003 from M/s C.T. Cotton Yam Ltd. to the assessee giving information in respect of Rani Awanti by Sagar Project.*
29. *PB 122 is letter dated 03.03.2003 from M/s C.T. Cotton Yam Ltd. to the assessee giving valuable information regarding Rani Awanti by Sagar project.*
30. *PB 123 appointing them as representative in relation to is letter dated 03.03.2003 from M/s C.T. Cotton Yam Ltd. to the assessee giving valuable information regarding Rani Awanti by Sagar Project.*
31. *PB 125 is invoice raised by M/s C.T. Cotton Yam Ltd. in respect of Rani Awanti by Sagar Project.*
32. *PB 125A-126 is the copy of certificate issued by ITO authorizing the assessee to pay without TDS to M/s C.T. Cotton Yam Ltd.*
33. *PB 126A-126C is MOU between M/s SEW Construction Ltd. and assessee in relation to Rani Awanti by Sagar Project.*
34. *PB 126D-126E, 126F-126G are the copies of GPA issued by M/s SEW Construction Ltd.*
35. *PB 126H-126K are the papers relating to Rani Awanti by Sagar Projects.*
36. *PB 102K -102L is appointment of M/s C.T. Cotton Yam Ltd. appointing them as representative in relation to Samal Project.*
37. *PB 165 is copy of bill raised by M/s C.T. Cotton Yam Ltd. regarding Samal project*
38. *PB 166-168 is the copy of no TDS certificate in respect of M/s C.T. Cotton Yam Ltd.*
39. *PB 169-173, 194,195, 196, 197, 198, 199, 200 & 201 are the copies of correspondence between M/s C.T. Cotton Yam Ltd. and the assessee in respect of Samal Project.*
40. *PB 174-193 are the copies of correspondence between the assessee and M/s Orrisa Power consortium Ltd. regarding Samal Project.*
41. *PB 231-246 is the agreement between assessee and M/s Orrisa Power Consortium Ltd. regarding Samal Project.*

42. *PB 247- 263 is the copy of agreement between assessee and M/s Orrisa Power Consortium Ltd. regarding Samal Project.*
43. *PB 264-277 is the copy of agreement between assessee and M/s Orrisa Power Consortium Ltd. regarding Samal Project.*
44. *PB 102M-102N is appointment of M/s C.T. Cotton Yam Ltd. appointing them as representative in relation to Malana Power Project.*
45. *PB 129-134 are the correspondence between M/s C.T. Cotton Yam Ltd. with the assessee regarding Malana Power Project.*
46. *PB 135 is the copy of bill of M/s C.T. Cotton Yam Ltd. regarding Malana Power Project.*
47. *PB 136-137 are the release of advance payment in respect of Malana Power Project.*
48. *PB 138-145 is the copy of agreement between assessee and Malana Power Project.*
49. *PB 102O-102P is appointment of M/s C.T. Cotton Yam Ltd. appointing them as representative in relation to Ganguwal and Cottla Projects.*
50. *PB 158-161 are the correspondence between assessee is M/s C. T. Cotton Yarn Ltd. regarding Ganguwal and Cottla Projects.*
51. *PB 162 is copy of invoice from M/s C. T. Cotton Yam Ltd. regarding Ganguwal and Cottla Projects.*
52. *PB 102Q-102R is appointment of M/s Sachdeva Financial Services P. Ltd. appointing them as representative in relation to Varahi Under Ground Power Projects.*
53. *PB 204-205 is the copy of bill from M/s Sachdeva Financial Services P. Ltd. regarding Varahi Under ground Power Project.*
54. *PB 102S-102T is appointment of M/s Vishal Pipes Ltd. appointing them as representative in relation to Shiva Samudram Project.*
55. *PB 208-209 is the copy of bill from M/s Vishal Pipes Ltd. regarding Shiva Samudram Project.*
56. *PB 105-106 is appointment of M/s Aravali Aluminum P. Ltd. appointing them as representative in relation to Sabarigari Project.*
57. *PB 107 is copy of debit note raised by M/s Aravali Aluminum P. Ltd towards commission charges.*

58. *PB 108 is copy of letter from Mr. Jorge regarding collection of payment in respect of Sabarigari Project.*
59. *PB 109 is letter from K.S.P.B. intimating the assessee about the handing over payment to Mr. Jorge in respect of Sabarigari Project.*
60. *PB 278-293 is the copy of contract between the assessee and M/s Va-Tech Hydro regarding Teesta Power Project.*
61. *PB 294-302F are purchase order etc. between the assessee and M/s VA-Tech Hydro.*
62. *PB 302G are further evidences in this regard.*
63. *PB 676 is debit note raised by M/s V A Tech Hydro India P. Ltd towards commission charges.*
64. *PB 208-209 is the copy of bill from M/s Vishal Pipes Ltd. regarding Shiva Samudram Project.*
65. *PB 278 - 284 is the copy of contract agreement (second contract) between M/s National Hydro Electric Power Corporation Ltd. and M/s Va Tech Hydro India Pvt. Ltd.*
66. *PB 285 - PB 293 is the copy of contract agreement (first contract) between M/s National Hydro Electric Power Corporation Ltd. and M/s Va Tech Hydro India Pvt. Ltd.*
67. *PB 294 is assessee's letter dated 20-04-2006 addressed to M/s Va Tech Hydro India Pvt. Ltd. acknowledging receipt of their purchase orders along with copies of the purchase orders at PB 295 - 296, 298.*
68. *PB 297 - 302 is the consortium agreement entered between the assessee company and M/s VA Tech Hydro India Pvt. Ltd regarding the Teesta Project.*
69. *PB 302C - 302F is the copy of ledger account.*
70. *PB 655-656 is assessee's letter dated 26.10.2009 filed before Ld. CIT(A) praying for admission of additional evidences under Rule 46A(l)(d).*
71. *PB 658 - 661 is assessee's letter dated 30-11-2009 replying to counter comments filed to Ld. CIT(A).*
72. *PB 667 - 670 is assessee's letter dated 03-02-2010 replying to counter comments dated 28-01-2010.*
73. *PB 671 - 673 is assessee's letter dated 06-01-2010 filed to Ld. CIT(A) furnishing additional documents.*

74. *PB 674 - 675, 727 is the detailed chart showing project procurement expenses from the period 01-04-2004 to 31-03-2005.*
75. *PB 676 is the debit note dated 31-12-2004 raised by M/s VA Tech Hydro India Pvt. Ltd.*
76. *PB 677 is the bill dated 16-09-2004 raised by M/s D. D. Agrovet Pvt. Ltd. amounting to Rs.5,89,20,882/-addressed to M/s VA Tech Hydro India Pvt. Ltd. for consultation and solicitation fees NHPC contract for supply and erection of Teesta Low Dam Project.*
77. *PB 678 - 684 is the copy of purchase order dated 31-12-2005 placed by Andritz Hydro Pvt. Ltd. (M/s VA Tech Hydro India Pvt. Ltd.) before M/s D. D. Agrovet Pvt. Ltd.*
78. *PB - 685 is the invoice dated 08-12-2004 raised by M/s Sharika Enterprises Pvt. Ltd. amounting to Rs.20,00,000/- addressed to M/s VA Tech Hydro India Pvt. Ltd. for consultancy charges for the services offered.*
79. *PB 686 - 690 is the copy of purchase order dated 21-12-2004 placed by Andritz Hydro Pvt. Ltd. (M/s VA Tech Hydro India Pvt. Ltd.) before M/s Sharika Enterprises Pvt. Ltd.*
80. *PB 691 - 693, 719 is the copy of ledger account of M/s Va Tech Hydro India Pvt. Ltd.*
81. *PB - 728 is Share split of Teesta Project between assessee company and M/s Va Tech Hydro India Pvt. Ltd.*

3.9 On perusal of the above documents, we find that these are mainly agreements between the assessee and commission agent, correspondence between the assessee and the commission agent, copy of invoices issued by the commission agent, evidence of payment released by the principal, copy of contract awarded to the assessee, letter by the assessee appointing the commission agent etc.

3.10 In our opinion, these documents are not sufficient to demonstrate the actual services rendered by the commission agents. The assessee was required to explain the role of the commission agent in procuring contracts from the government agencies and other principle parties. The assessee was required to furnish documentary evidence, whether the commission agent represented before the parties, who awarded contract

to the assessee and whether those commission agent participated in any contract awarding activity or any activity provided in the scope of work in the agreement. The documents submitted by the assessee are mostly computer-generated printouts of correspondence between the assessee and the commission agent. No evidence is available in paper book, as how these correspondences exchanged between the assessee and the commission agent, whether it was through post or whether it was through emails. The assessee has not produced any evidences supporting the technical expertise and experience of the commission agents in the field of services rendered. The assessee has not produced any certificate from the parties who awarded contract that said commission agents played the role as per the scope of work in the agreement between the assessee and the commission agent, alongwith documentary evidence of interacting with those parties.

3.11 On being asked by the bench to both parties the status of the assessment before the Assessing Officer in assessment year 2003-04 subsequent to the restoration of the matter by the Tribunal, both the parties expressed inability in providing the present status of the assessment in assessment year 2003-04.

3.12 In view of the above facts and circumstances, we are of the opinion that the fact of services rendered has to be examined in each year on the basis of the documentary evidences submitted by the assessee and therefore, issue in dispute cannot be treated as covered by the decision of the Tribunal in assessment year 2004-05. The documentary evidences in the year under consideration for establishing the services rendered need to be produced by the assessee and examined by the Assessing Officer afresh. Accordingly, we feel it appropriate to restore the issue to the file of the Assessing Officer to examine copy all the documents produced by the assessee or any other evidences to

discharge the onus of services rendered by those commission agents, and after carrying out the necessary enquiries as required in the facts and circumstances of the case, he shall decide the issue in accordance with law. If required so, the Assessing Officer may examine original copies of the correspondence between the assessee and the commission agents. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. Accordingly, the ground of the appeal is allowed for statistical purposes.

4. In ground No. 2, the Revenue has challenged deletion of the Transfer Pricing Adjustment of Rs.95,47,197/- made by the Assessing Officer.

4.1 The Ld. TPO accepted the most appropriate method and comparables selected by the assessee, however, he has taken PLI data of comparables for current year only as against multiple year data taken by the assessee. The Ld. CIT-(A) after taking into consideration the submission of the assessee justifying multiple year data, deleted the transfer pricing adjustment with following findings:

*“15. The AO in her remand report has not commented anything on this issue, showing her inability to do so since the issue pertains to Transfer Pricing Officer and it would not be appropriate to comment on the valuation made by the TPO.*

*16. I have carefully considered the contentions of the learned AR and perused the order of assessment. I have also gone through the order of the TPO on the issue. Without acceding to the request of the AO that the TPO may be called for his comments on the workings of the valuation made by him in his order u/s 92CA- dated 05.09.2008, in accordance with the provisions of section 92D(3) of the I.T. Act, 1961, this office is quite a competent authority to adjudicate the issue on the computation of the ALP shown by the appellant. After going through all the documentary evidences produced by the appellant company in support of the ALP shown as desired u/s 920(3) which are found to be quite specific and rational material, and considering also the well-reasoned rebuttal offered by the Ld. A.R. to the A.O's method of establishing the ALP of this taxpayer, I find that the TPO's action does not conform to the basic intent and purpose of the provisions of Indian Transfer Pricing principles read with the OECD guidelines, the most reliable source of comparable statistics and economic and social data. The appellant company has fully discharged its*

*onerous burden of maintaining and furnishing detailed documents as required u/s 920 and 92E of the I.T. Act, 1961 I find that the TPO has indulged in merely finding faults with the transfer price determined through such adjustments that don't stand the tests of comparables chosen, data employed, and the methodology adopted by the appellant company which are found to be adequate u/s 920 and 92E. In this connection, it is not out of place to mention that the ALP methods and modalities u/s 92C of the appellant company have been accepted by the Department (the same TPO, New Delhi) for the next assessment year 2006-07 or the identical facts and issue under reference, as is apparent from assessments records of that assessment year. Keeping in view such a scission, therefore, I am satisfied that the adjustments made on account of ALP by the TPO are unsustainable and that the ALP u/s 92(2) submitted by the assessee company is quite fair and reasonable. Hence the addition of Rs. 95,47,197/- worked by the TPO stands cancelled.”*

4.2 Before us, the learned counsel of the assessee supporting the finding of the Ld. CIT-(A) submitted that total international transaction in the case is of Rs.9,75,96,756/- and therefore, the PLI (OP/OR) of 6.95% should be applied only on the amount of international transaction and not on the gross revenue of the enterprise.

4.3 On the other hand, Ld. CIT(DR) on the issue of applying  $\pm$ PLI over the amount of international transaction only, submitted that the assessee is not in appeal and therefore cannot be allowed to raise any new grounds while arguing the appeal filed by the Revenue.

4.4 On the issue of single year data versus multiple year data the Ld. CIT(DR) submitted that learned CIT-(A) in his findings, has not given any proper reasoning for rejecting the basis of single year data except general finding that the TP rejection does not conform to the basic intent and purpose of the provision of the Indian Transfer Pricing principles read with the OECD guidelines.

4.5 We have heard the rival submission and perused the relevant material on record. We find that the issue of applying the  $\pm$ PLI only on the amount of international transaction carried out by the assessee is concerned, the assessee is neither in appeal nor filed any cross objection before the Tribunal. The assessee has not filed any application

under Rule 27 of the ITAT Rules and not taken additional grounds on the issue also. No such plea was taken before the Ld. CIT-(A), which shows that the assessee was not aggrieved with finding of the Ld. CIT(A) or the Ld. Transfer Pricing Officer, therefore, this plea of the assessee cannot be considered by us at this stage. Accordingly, we reject the contention of the Ld. counsel on this issue. On the issue of single year data versus multiple year data of comparables is concerned, we are of the opinion that for justifying multiple year data of comparables before the Ld. CIT-(A), the assessee contested variation in net profit of the comparables companies. In our opinion, merely variation in the profit cannot justify use of multiple year data until and unless, the reason for variation in the profit are linked to the cyclic nature of business transactions, having financial impact on more than one year. No factual information was brought on record in respect of the comparables other than presenting theoretical or general arguments supporting adoption of multiple year data.

4.6 In the year under consideration before us, the Rule 10B(4) of the Income-tax Rules, 1962 (in short ~~the Rules~~) has specifically provided for using the data of the relevant financial year and data of the two years prior to the relevant financial year could only be considered, if such data reveals facts which could have influence on the determination of the transfer price in relation to the transaction being compared. Before us, the assessee has not brought on record any evidences showing the influence of the cyclic nature of the transactions of the comparables or having financial impact of operational activity over the subsequent years.

4.7 In our opinion, the learned CIT-(A) was not justified in deleting the transfer pricing addition without giving reasons for taking average of multiple year data for computing PLI of comparables. In view of above discussion, we set aside the finding of the Ld. CIT-(A) on the issue in

dispute and restore that of Ld. TPO/AO. The ground of appeal is accordingly allowed.

5. In ground No. 3, Revenue has challenged deletion of the addition of Rs.2,52,406/- and Rs.2,45,572/- made by the Assessing Officer on account of disallowance out of telephone and car expenses.

5.1 As far as the facts in respect of the addition of Rs.2,52,406/- on account of disallowance out of telephone expenses is concerned, the Assessing Officer has noted that the assessee failed to prove the genuineness of the expenses and no call register or any other record was maintained by the assessee so as to explain that all telephone and fax expenses were related wholly and exclusively for the purpose of business. The Assessing Officer accordingly disallowed a sum equal to 5% of the total expenses, which amounted to Rs.2,52,406/-. Before the Ld. CIT-(A), the assessee filed submission that disallowance was made without any opportunity to the assessee and claimed that detail of telephone expenses was filed before the CIT-(A) to show that same were incurred for the purpose of business of the assessee. The assessee further submitted that no ad-hoc disallowance can be made in the hands of the assessee for personal nature of the expenses.

5.2 As far as disallowance of Rs.2,45,572/- in respect of car expenses is concerned, the Assessing Officer has noted that the assessee failed to put forward any cogent reply and documentary evidence in respect of its claim and accordingly disallowance at the rate of 5% of the expenses amounting to Rs.2,45,572/-, treating the same as non-business purpose, was made. Before the Ld. CIT-(A), the assessee contended that no show-cause was given before making any disallowance. The assessee also claimed to file copy of Ledger of car hiring expenses and other hiring expenses before the Ld. CIT-(A).

5.3 The learned CIT-(A) relying on the decision of the Tribunal in the case of DCIT Vs. Haryana Oxygen Ltd. (1999) 76 ITD 32 (Del.), held that assessee company is a juristic entity and the disallowance, if any could be made only in the hands of the directors as perquisite. The finding of the learned CIT-(A) on the issue in dispute is reproduced as under:

*“221 have carefully considered the contentions of the learned AR perused the order of assessment. Evidently, these two disallowances have been made in a very mechanical and stereotyped manner without bringing any specific instances of non-business use and especially in the case of a company like present one which has been subject to audit both under the Indian Companies Act, 1956 and Income Tax Act, 1961. Moreover, the company is a juristic entity and the disallowance, if any, for such non-business use of these assets can be made only in the hands of the Directors as a 'perquisite", as held by the Ld. Jurisdictional Tribunal in the case of DCIT Vs. Haryana Oxygen Ltd. (1999) 76 ITD 32 (Del). Therefore, both the disallowances stand deleted.*

5.4 Before us, the Ld. counsel of the assessee relied on the order of the learned CIT-(A) .

5.5 On the other hand, Ld. CIT(DR) submitted that the Ld. CIT-(A) has not provided any opportunity to the Assessing Officer to examine the call register maintained for telephone and logbook of vehicles maintained by the assessee, in support of its claim that all expenses incurred were for the purpose of business. He submitted that the learned CIT-(A) allowed the ground in favour of the assessee only relying on the decision of the Tribunal in the case of Haryana oxygen Ltd. (supra). The Ld. CIT(DR) submitted that finding of the Ld. CIT-(A) was contrary to the decisions of the Hon<sup>ble</sup> Madras High Court in the case of CIT Vs. Chitram and Company Private Limited 191 ITR 96 and CIT versus Madura Coats Ltd 263 ITR 241.

5.6 We have heard the rival submission and perused the relevant material on record. In the case of CIT Vs. Chitram & Co. Company Private Limited (supra), it was not disputed before the Assessing Officer that the cars had been used for business and non-business purposes as well. Even in the course of the appeals preferred by the assessee before the AAC (First Appellate Authority), the only plea taken was that the disallowance was on the higher side. The issue before the Hon<sup>ble</sup> High Court was that in view of the use of car for non-business purpose, whether the assessee was entitled for full depreciation on the Car. In view of the facts of the case, the Hon<sup>ble</sup> High Court held that:

*" .....We are of the view that the decision in Punjab National Bank vs. CIT (supra) would not, in any manner, help the assessee to contend that the depreciation on cars should be allowed in toto. Applying, therefore, the principles laid down in CIT vs. Sobharam Jokhiram (1960) 39 ITR 299 (Pat), Waterfall Estates Ltd. vs. CIT (supra) and CIT vs. K. L. Bhasin and Co. (supra), we hold that the Tribunal was in error in holding that the assessee would be entitled to full depreciation in respect of the cars used by it. We, therefore, answer the third question referred to us in the negative and in favour of the Revenue. In view of the partial success of the Revenue and the assessee in these references, we do not make any order as to costs."*

5.7 The Tribunal in the case of Haryana Oxygen Ltd. (supra) considered the decision of the Hon<sup>ble</sup> Madras High Court in the case of Chitram & Co. P Ltd (supra), however, observed that in the case in hand issue of expenses on running of car was involved rather than issue of depreciation on the car. The finding of the Tribunal is reproduced as under:

*"19. A bare perusal of the relevant statutory provision indicates that where the plant and machinery are not used exclusively for the purpose of business only, the deductions towards current repairs, insurance premium against risk of damage or destruction and depreciation will be restricted to a fair proportionate part thereof as the AO may determine. It is obvious that expenses on running of cars, such as petrol, etc., do not fall within the ambit*

*of this sub-s. (2). It is only the amount of current repairs, which are the subject-matter of disallowance in the instant case and repairs are certainly distinct from running expenses, inasmuch as the repair presupposes damage to the asset which is sought to be remedied by incurring expenditure”*

5.8 In the case of CIT Vs. Madura Coats limited (supra), the Hon<sup>ble</sup> High Court held as under:

*“4. In so far as the second question is concerned, it relates to the disallowance of the expenditure under s. 40A(5) of the Act. It was found by the assessing authority that the expenditure was incurred in respect of use of the company’s cars by the employees and directors for their personal purposes. Hence, the disallowance of the expenditure under s. 40A(5) by the assessing authority is warranted as the cars were used for the personal purposes of the employees and directors of the assessee and the Tribunal was not correct in deleting this amount. We, therefore, answer this question in favour of the Revenue and against the assessee.*

5.9 Hon<sup>ble</sup> High Court in above case has clearly held that expenses on cars used for personal purpose by the employees and directors of the company cannot be allowed as expenditure under the head profit and gains of business.

5.10 In the instant case, the Ld. CIT-(A) has not given any finding on the basis of documents produced by the assessee before him whether the expenditure was incurred wholly and exclusively for the purpose of business or not. Since the Assessing Officer did not get opportunity to examine documents like call registers for telephones and logbook etc. of vehicles as same were neither produced before him in the assessment proceedings nor forwarded to him by the Ld. CIT-(A), the claim of the assessee has remained non-verified by the lower authorities. In the interest of justice, we feel it appropriate to restore the issue to the file of the Assessing Officer to verify the documentary evidence supporting the claim of the assessee that the expenditures on telephone and car were incurred towards the business purpose only and decide the issue in dispute in accordance with law. The assessee shall be afforded

adequate opportunity of being heard. The ground of the appeal is accordingly allowed for statistical purposes.

6. In the result, appeal of the Revenue is allowed partly for statistical purposes.

The decision is pronounced in the open court on 13<sup>th</sup> Nov., 2017.

Sd/-  
**(H.S. SIDHU)**  
**JUDICIAL MEMBER**

Dated: 13<sup>th</sup> November, 2017.

RK/(D.T.D)

Copy forwarded to:

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

Sd/-  
**(O.P. KANT)**  
**ACCOUNTANT MEMBER**

Asst. Registrar, ITAT, New Delhi