IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, BENGALURU

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

IT(TP)A No.451/Bang/2015
(Assessment year: 2010-11)

Income-tax Officer,
Ward 6(1)(1),
Bengaluru. … Appellant

Vs.

M/s.Safran Engineering Services India Pvt.Ltd.
CSRIE, #32, Grape Garden, 17th 'H' Main road,
VI Block, Koramangala,
Bengaluru-560095. … Respondent
PAN:AAAFC S9003D

Appellant by : Ms.Neera Malhaotra, CIT(DR).
Respondent by : Shri K.R.Vasudevan, Advocate.

Date of hearing : 21/08/2017
Date of pronouncement : 20/11/2017

O R D E R

Per INTURI RAMA RAO, AM :

This is an appeal filed by the revenue directed against the final assessment order dated 30/01/2015 passed u/s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] for the assessment year 2010-11.

2. Briefly, facts of the case are that the respondent-assessee is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of rendering software development services. It belongs to high technology group with three core businesses: aerospace, defence and security. It

develops, produces and markets engines and propulsion systems for civil and military airplanes and helicopters, ballistic missiles, launch vehicles and satellites. It also provides a wide range of systems and equipment for civil and military airplanes and helicopters. Return of income for the assessment year 2010-11 was filed disclosing 'nil' income. The assessee-company also reported the following international transactions in its 92CE report:

Description	Amount Paid (Rs.)	Amount Received (Rs.)
Software Services		59,53,29,869
Management fee, Technical Support & Professional Fees	4,82,42,634	
Reimbursement of expenses		71,71,079
Reimbursement of expenses Consultancy charges Freight forwarding charges Internet Charges	 2,12,942 1,24,110 26,81,330	

The assessee-company also submitted Transfer pricing (TP) study report applying TNMM as the most appropriate method and 12 comparables were selected by the tax-payer.

3. The Assessing Officer (AO) selected the case for scrutiny and referred the matter to the Transfer Pricing Officer (TPO) for the purpose of bench marking international transaction. The TPO, vide order passed order u/s 92CA, accepted that the international transaction relating to software development services and receipt of reimbursement of expenses are at arm's length. However, as regards payment of management technical support and professional fee (intra-group services), the TPO called upon the respondent-assessee to furnish the following documents in order to verify whether specified services are rendered at all, if services are rendered what is the basis for such payment and whether two independent parties will be willing to pay any consideration for services rendered:

1.1 Copies of invoices raised by the AE in your favour and also ledger account of "Management fees / intra group service" in your books of account for the FY 2009-10.

1.2 Exact details of services for which the Management fees / intra group service is shown to have been paid. Reasons why such services are not available locally. How did the Taxpayer manage its requirements before taking the services from the AE? If there is a duplication of services, for such services, furnish the details of expenditure incurred by you and your AE and also justification for such duplication. For example, if you have availed HR services from your AE, expenditure on HR department in your company needs to be given, immaterial of which head such expenses are debited in your books of account. Furnish the copies of relevant ledger accounts.

1.3 Your AE might be in a position to provide a number of services, but it has to be shown that such services were actually required by the Taxpayer for its business during the FY2009-10.

1.4 Please submit the documentation and evidence to show that the above services are actually rendered by the AEs to the Taxpayer. In this regard, please produce documentation maintained by the Taxpayer and the AEs from whom such services are received. The documentation should be such that it clearly enables the TPO to ascertain the following information/evidence :

- The manner in which the services are rendered. Even if services are rendered, whether such services require payment when dealing at arm's length. If yes, what is the cost that would be charged at arm's length;
- Names, qualifications and permanent addresses of the persons who are said to have rendered the Management fees / intra group service to the Taxpayer ;
- Their designations ,salaries and periods of employment with the AE before being deputed to serve the Taxpayer ;

- **Terms & conditions of their services to the Taxpayer and the Agreements, if any, in this regard;**

- Period of their stay in India with their residential addresses during the stay ;
- Exact nature of services rendered to the Taxpayer and the record of such services being rendered in India ;
- Record of expenses pertaining to their stay in India;
- Correspondence between the Taxpayer and the AE in regard to such services;

1.5 Please submit the documentation and also evidence to show that a tangible and direct benefit is derived by the Taxpayer in paying the above amounts to the AEs. If no benefit is derived by the Taxpayer or the benefit derived is remote or the benefit is for the entire group, the same is not charged. Unless it is shown that tangible and direct benefit is derived by such payment, the arm's length price of intra-group service payments would be treated as Rs. Nil.

1.6 The details of similar payments made by the Taxpayer during the earlier three years and the subsequent two years with corresponding turnovers and net operating profits.

1.7 During the FY 2009-10, you have paid an amount of **Rs. 4,82,42,634/-**. When any such huge amount is paid by way of Management fees / intra group service payments by unrelated parties, the parties there to would like to know what services one party is going to receive from other much before the start of the year and also how these services are going to be quantified.

1.8 The quantification of such services and also the basis for such apportionment, if it is the case, as the Management fees / intra group services would have been rendered to various other group entities also. In this regard, please also justify how two independent parties would have quantified the services as no independent company would pay Management fees / intra group service payments without actually knowing the apportionment.

1.9 In respect of each type of expense under the Management fees / intra group services rendered, the basis of such quantification / break-up of service or cost involved and also the price to be paid at arm's length. This is required as no independent party would like to pay for a service without knowing the cost of such service or without knowing the cost at which such service is rendered in the market and as it is such a huge amount.

1.10 Whether intra service payment is paid by any of the other concern or subsidiaries of the Group anywhere in the world. If yes, copies of those agreements for intra service payment and also the basis on which such payments are made.

1.11 Whether Management fees / intra group services is paid by any independent concern or entity in any other country through which AE Group carries on similar business as that of you. If yes, copies of those agreements for intra-group services and also the basis on which such payments are made.

1.12 Please establish that a service (i.e., a benefit) has actually been supplied for which intra-group service payments are made by you. In this respect please produce

a. documents supporting the calculation of cost-based charges, for example, direct costs plus a reasonable proportion of indirect costs, and **adequate records to permit verification of such costs**;

b. documents supporting the mechanism used to determine the amounts to be apportioned among associated enterprises, for example, use of formulas, time surveys, etc including the details of the application of this mechanism to the costs incurred during the FY 2009-10 and documentation supporting any review of the applicability of the chosen mechanism;

c. documents supporting the selection of keys for apportionment among several associated enterprises, including reasons why particular keys were considered the most appropriate in the circumstances of the case;

d. documents supporting the selection of a pricing methodology or methodologies and any documentation supporting the consideration and rejection of other methodologies; and

e. documentation created in the undertaking of a functional analysis of the various group members providing and receiving services to establish the relationship between the relevant services and the members' activities and performance.

1.13 Even if a service is rendered, the amount of the charge for such services must be determined based on arm's length principle. This requires a detailed cost benefit analysis by the Taxpayer like any other independent entity. An independent entity in an identical situation would examine whether it can get such services from third party or can do it on its own. It also examines alternatives for service providers and selects one service provider to which it would pay in accordance with the economic benefit derived by it from such services. Not only the mark-up but also quantification of service itself is the subject matter of transfer pricing. In this regard, please provide the quantification of such services in terms of actual expenditure incurred and commensurate benefits derived there from.

1.14 Whether any part of the Management fees / intra group services rendered to the Taxpayer are in the nature of stewardship activities or shareholder activities, please submit the details of such expenses incurred by the AE(s) and charged to the Taxpayer, as the same need not be charged by the AEs to the Taxpayer.

1.15 Whether the charges paid by the Taxpayer for Management fees / intra group services reflect the same charges for the services that would have been, or would reasonably be expected to be, levied between independent parties dealing at arm's length for comparable services under comparable circumstances.

1.16 If any services purported to have been received through electronic media like e-mails, network, CDs etc, then please furnish the details thereof along with valuation of such services. If the same is valued by two independent parties dealing in similar circumstances, the value of such services and also justification that such payment is at arm's length.

1.17 If the payment is made for utilization IT services as well as software, please furnish the following details.

a. Particulars of the hardware and software used and cost of their purchase and maintenance for the FY 2009-10 as shown in the books of the AE with independent third party evidence in the form of purchase vouchers / invoices along with copies of ledger account.

b. Proof that such software / hardware were used by the Taxpayer for the FY 2009-10.

c. The cost incurred by the Taxpayer in India on such IT services including hardware, software and professionals for the 2009-10. The details of Taxpayer's employees who dealt with such IT services during the year.

d. The availability of such hardware, software and professional services locally. If such services are availed locally, what would be the cost that would have been incurred by the Taxpayer?

1.18 Please give the details of head or heads under which such payment is shown in the books of account of AE and also produce a copy of ledger account of the Taxpayer in the books of AE in respect of Management fees / intra group services. Also give the details of head under which these payments are shown for the income tax authorities in the respective countries of AEs.

4. In response to said show cause notice, the respondent-assessee filed submissions dated 31/12/2012. In support of its claim it has submitted the following documents:

- Purchase order raised to Teuchos SA towards payment for the provision of services of the dedicated manager, the deputed managing director from Teuchos SA and towards information technology services,
- Statement of work,
- Technical proposal
- Ledger a/c; invoice copies

It was further submitted that the Program manager and the managing Director are employees of Teuchos SA who have been dedicated to work for SAIPL and their cost (salary, etc) are initially borne by Teuchos SA and later cross charged to the Indian entity.

The nature of work performed by them is stated to be as per the description of services narrated at Pg 7 – Pg 18 of the submissions.

2.2 A perusal of the functions listed in the submissions is akin to those activities which the OECD has classified to be in the nature of 'shareholder' or 'stewardship activities'. The Taxpayer has submitted that there was a choice before it in respect of choosing to utilize the services of the program manager and the **Managing Director** deputed from the parent company. The submission is reproduced below:

As has been mentioned earlier, there are group entities within the Safran Group with which Safran India competes for the same work; thereby necessitating Safran India to pitch for work within the Group. Therefore, it is imperative for Safran India to have real time knowledge about the opportunities within the group and also have someone to advocate Safran India's capabilities to the customers(AEs) for effective promotion of Safran India's business.

To accomplish the above objective, Safran India could have either deputed someone from India or availed the services from a local person.

Safran India chose to utilize the services of a local person (ie., Program manager) because acquiring business from the French jurisdiction requires local expertise and knowledge about the French language, culture and business practices.

From the above it appears that among the group entities, only Safran India has a disadvantage being non French. The knowledge and the expertise that the Taxpayer has stated above are things that any professional has to be trained in and acquired, not only to work in France but anywhere in the world. The aim is to get contracts for Safran India and for that, Safran India's previous track record should help and not the local expertise and knowledge of French culture.

Further, in the same submission, it is stated as under:

The program Manager had spent time with Safran India to understand the capabilities of the company and his services have been utilized for piloting work from Group companies and in overall management of projects. The dedicated program manager was selected from Teuchos Exploitation and the cost of the said manager was paid to Teuchos Exploitation.

However, the TPO rejected the above explanation by holding that there was no justification for above payment.

5. After receipt of the TPO order, the AO passed draft assessment order dated 10/3/2014 incorporating the above TP adjustment and making addition on account of interest income and restricting deduction u/s 10A in respect of communication charges, internet expenses, and insurance by reducing the same from export turnover.

6. After receipt of draft assessment order, the respondent-assessee filed objections before the Dispute Resolution

Panel(DRP) contending that the TPO ignored details provided by the assessee for receipt of management technical support and profession charges and also contending that TNMM is the most appropriate method for bench marking international transaction pertaining to payments made to intra-group services. The DRP, after considering objections of the respondent-assessee held that the TPO was not justified in holding that software development services provided to AE are at arm's length and management services fee paid to be at 'nil' The DRP further held that differential between shareholders or stewardship activities is established. The relevant directions of the DRP are extracted below:

> 2.8 However, the treatment of the ALP for the said fee at 'nil' is found to be erroneous and it shows that the TPO has not taken into account the specific business model of the taxpayer wherein it functions as a profit centre. Since the management fee paid is factored in while deciding the hourly rates to be charged to the AE, and the cost recovered therefrom, the TPO cannot simultaneously hold that the margins in the software development services provided to the AE are at arms' length but the management service fee was to be taken at 'nil'. The differentiation from shareholder or stewardship activities is also established. From the break-up of the details of the services it is also evident that the technical fee paid to the Managing Director was not a component of the impugned charges in the earlier year's for which the TPO has made adjustment. A blind reliance on the earlier years order, even though the facts have changed, vitiates the TPO's conclusions. The TPO at places also appears to be somewhat short sighted and substitutes his business wisdom for that of the taxpayer. For instance, his conclusion about knowledge of French language not being critical in obtaining contract for Safran India exemplifies this. It is contrary to the stand approved in all the judicial decisions cited above.

7. After receipt of directions from the DRP, the AO passed final assessment order 30/01/2015 without making any adjustment of ALP on account of payment of management services fee.

8. Being aggrieved, the revenue is in appeal before us raising the following grounds of appeal:

1. The directions of the Dispute Resolution Panel are opposed to law and facts of the case.

2. On the facts and in the circumstances of the case the Dispute Resolution Panel erred in law in allowing the management fee for payment towards cost support services without appreciating the fact that the assessee has not been able to justify the payment.

3. On the facts and in the circumstances of the case, the Disputes Resolution Panel erred in directing the AO to consider the interest income in eligible profits of the undertaking for computation of deduction u/s 10A without appreciating that the interest income earned does not have direct nexus with profits derived from the export activity of the assessee.

4. On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the AO to reduce expenses on telecommunication, internet expenses, freight expenses, insurance expenses and foreign exchange loss and other expenses incurred in foreign currency both from export turnover and as well as from total turnover for the purpose of computation of deduction u/s 10A of the Income tax Act without appreciating the fact that the statute allows exclusion of such expenditure only from the Export turnover by way of specific definition of export turnover defined in the Act and there is no specific provision in section 10A warranting exclusion of above expenses from the total turnover also.

5. On the facts and in the circumstances of the case the Dispute Resolution Panel erred in placing reliance on the decision of the Hon'ble High Court of Karnataka in the case of M/s. Tata Elxsi Ltd. which has not become final since the same has been not accepted by the Department and SLPs are pending before the Hon'ble Supreme Court.

6. For these and other grounds that may be urged at the time of hearing, it is prayed that the directions of the Dispute Resolution Panel in so far as it relates to the above grounds may be reversed.

7. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.

8. Ground Nos.1, 6 and 7 are general in nature and do not require any adjudication.

9. Ground No.2 challenges the direction of the DRP suggesting nil adjustment on account of payment of management fee to its AE.

9.1 The ld.CIT(DR) contended that the DRP was not justified in deleting ALP adjustment on account of payment of management service fee. The respondent-assessee had failed to justify the payment of management services and failed to prove receipt of services from AE. The ld.CIT(DR) submitted that the DRP had deleted ALP adjustment without examining any evidence and without meeting objections raised by the TPO. She further submitted that in the immediately preceding years i.e. assessment year 2006-07 in ITA No.1261/Bang/2010 the Tribunal confirmed the ALP adjustment for want of evidence in support of receipt of services from AE for management support services.

9.2 On the other hand, learned counsel for the assessee submitted that pursuant to remand order passed by this Tribunal, the TPO had accepted the evidence filed in support of receipt of management services fee and made nil adjustment for assessment year 2008-09. For assessment year 2007-08 also, this Tribunal has set aside the issue to the file of the AO to examine evidence in support of receipt of services. Therefore, he submitted that the issue may be remitted back to the file of the AO for *de novo* examination of the evidence.

10. We heard rival submissions and perused the material on record. The issue in present appeal is whether the DRP was justified in directing deletion of ALP adjustment in respect of payment made towards management support services by the respondent-assessee-company to its AE. The TPO has suggested ALP adjustment treating service charges fees at nil on the ground that the respondent-assessee-company failed to prove receipt of actual services as well as justification for payment of such fees. However, the DRP has deleted ALP adjustment taking into

consideration the services of managing director to the company, which are part of management support services which was not forming part of management support services in the earlier years. The DRP had not referred to any evidence nor dealt with the aspect of receipt of services by the assessee-company from AE towards management support services. It is now trite law that onus always lies on the assessee to prove receipt of services from AE. The co-ordinate bench of Tribunal in the case *M/s.Volvo India (P) Ltd.* (2017) 77 taxman.com 207 held as follows:

> ***"10.*** *We heard the rival submissions and perused the material on record. The issue in the present appeal is whether the AO/TPO was justified in adopting the ALP at Rs. Nil in respect of management and support services fee paid by the appellant to its AE. Primarily, the TPO determined the ALP as Nil for the following reasons:—*
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> *"(i) The assessee paid management fee through a single invoice, raised much after the closure of the financial year.*
>
> *(ii) The Assessee failed to produce any evidence regarding the expenditure incurred by the AE on behalf of the assessee.*
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> *(iii) The AE, Volvo Truck Corporation also did not furnish any details of expenditure incurred by it in connection with the management fee received by it.*
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> *(iv) The assessee changed its stand many times during the course of the hearings that the payment is made towards marketing services and / or brands, trademarks etc."*
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> ***11.*** *No doubt, now it is settled proposition of law that it is beyond scope and powers of AO/TPO to question the necessity of incurring any expenditure. The Hon'ble Delhi High Court in the case of EKL Appliance Ltd. (supra) held that TPO cannot determine the ALP at Nil by holding that there was no need to incur any expenditure. The above decision was followed by the several coordinate benches of the Tribunal, some by them are as follows:*
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> *i. Dresser-Rand India (P.) v. Addl. CIT [2011] 13 traxmann.com 82/[2012] 53 SOT 173 (Mum.)*

ii. *Ericsson India (P.) Ltd. v. Dy. CIT [2012] 25 taxmann.com 472 (Delhi)*

iii. *AWB India (P.) Ltd. v. ACIT [IT Appeal No. 4454 of 2011] (Delhi);*

iv. *SC Enviro Agro India Ltd. v. Dy. CIT [2013] 34 taxmann.com 127/143 ITD 195 (Mum. - Trib.)*

v. *Abhishek Auto Industries Ltd. v. Dy. CIT [2011] 9 taxmann.com 27 (Delhi)*

vi. *McCann Erickson India (P.) Ltd. v. Addl. CIT [2012] 24 taxmann.com 21 (Delhi)*

vii. *DSM Anti-Infectives India Ltd. v. Addl. CIT [2014] 50 taxmann.com 239 (Chd. - Trib.)*

viii. *TNS India (P.) Ltd. v. Asstt. CIT [2014] 48 taxmann.com 128/[2015] 152 ITD 123 (Hyd. - Trib.)*

ix. *Atotech India Ltd. v. Asstt. CIT [2014] 148 ITD 670/42 taxmann.com 468 (Delhi - Trib.)*

x. *Nippon Leakless Talbros v. ACIT [IT Appeal No. 5931 (Delhi) of 2012]*

xi. *Nippon Leakless Talbros v. ACIT [IT(TP) Appeal No. 475 (Delhi) of 2015]*

xii. *Hughes Systique India (P.) Ltd. v. Asstt. CIT [2013] 36 taxmann.com 41 (Delhi - Trib.)*

xiii. *Knorr-Bremse India (P.) Ltd. v. Asstt. CIT [2013] 56 SOT 349/[2012] 27 taxmann.com 16 (Delhi - Trib.)*

xiv. *Thyssen Krupp Industries India (P.) Ltd. v. Asstt. CIT [2013] 55 SOT 497/[2012] 27 taxmann.com 334 (Mum. - Trib.)*

xv. *LG Polymers India (P.) Ltd. v. Addl. CIT [2011] 48 SOT 269/15 taxmann.com 79 (Visakha).*

12. *Thus in the light of the above legal position, the ALP of services of AE cannot be determined at Nil by questioning the necessity of benefits of expenditure incurred. But the matter does not end there. The onus lies on the assessee to prove that the services are actually rendered by the AE. But the assessee had failed to discharge this onus lying upon it despite being*

asked to do so by the TPO. The TPO had especially invited the assessee company to produce the proof in support of the services rendered by AE. The appellant only had tried to prove this by producing some correspondence which does not prove that the services are actually rendered. The failure by the assessee to discharge the onus can be presumed that the assessee had no evidence to establish that services of management support are rendered by its AE in consideration to payment of Rs.26,22,19,000/-. This presumption can be drawn even as per the provisions under section 86 of Indian Evidence Act. The submission that the TPO had impliedly accepted the rendition of services cannot be accepted as there was no finding given by the TPO that services are actually rendered. In fact, the TPO while summarizing this observation vide page No. 30 of his order vide column No.6 had specifically mentioned that the assessee had failed to prove that the services are actually rendered by AE. Furthermore the finding of the TPO that the invoice was raised much after the closure of the accounting year and the payment of management fee in nothing but siphoning of the profits from India with the intention of avoiding tax are serious enough to doubt the genuineness of transactions. The appellant had made no effort to controvert the findings of the TPO. Therefore, in our considered opinion the TPO/AO is justified in adopting ALP at Nil.

13.** Now we shall deal with the alternative submission of the learned counsel for the appellant that the transaction of management and support fee should be bundled with other transactions and bench marked by adopting TNMM cannot be accepted for the reason that bundling of transactions is permissible only when the transactions are closely related to each other and reliance in this regard can be placed on the decision of Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. v. CIT [2015] 374 ITR 118/231 Taxman 113/55 taxmann.com 240 and Punjab Haryana High Court in the case Knorr Bremse India (P) Ltd. v. Asstt. CIT [2016] 380 ITR 307/236 Taxman 318/[2015] 63 taxmann.com 186. It is not the case of the appellant that these transactions are closely linked with the other transactions and therefore the submission that these transactions should be bundled with other transactions cannot be accepted."**

11. In the present case, the assessee-company had not filed any evidence before lower authorities or before this Tribunal to substantiate receipt of services from AE. Therefore,, the ratio of

the decision in the case of the assessee for the assessment year 2009-10 is squarely applicable wherein this Tribunal had refused to remand the matter to the file of the AO for fresh consideration. The relevant part of the order is extracted below:

> *"10. We heard rival submissions and perused the material on record. The issue of determining ALP adjustment in respect of management fee to intra-group services, had come up before the co-ordinate bench. to which the Hon'ble Accountant Member is the author, in the case of M/s. 3M India Ltd.,in IT(TP)A No.725/Bang/2011 dated 13/05/2016. No ALP adjustment can be made in respect of intra-group services for the reason that no benefit was derived by the assessee-company by incurring such expenditure and also the TPO cannot question necessity of incurring such expenditure. This Tribunal held that it is incumbent upon the assessee-company to prove that services are actually received by the assessee-company and failing to do so may result in ALP adjustment. The mandatory condition or making no ALP adjustment is that the assessee-company should prove by leading necessary evidence on record that services are actually received. Failure to do so may also render the very transaction as a sham transaction and the real purpose of making such payment requires to be proved. The relevant observation made by the Tribunal in the case of M/s. 3M India Ltd.,(supra) is as under:*
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> > *s "8. We heard rival submissions and perused material on record. A perusal of the TPO's order reveals that the ALP in respect of intra-group services was determined at 'nil' as, in his perspective, no benefits were derived by the assessee-company out of such services and there was no need of such services and there was no proof in support of rendition of such services to the assessee- company. The TPO has neither challenged the keys applied for allocation of cost by AE nor the TPO has disputed the actual cost incurred by the AE.*
> >
> > *9. Now, we shall analyze each of the above reasons assigned by the TPO for determining ALP at 'nil'. The law is now quite well settled that it is beyond the scope and powers of the AO/TPO to question the necessity of incurring expenditure. The Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Ltd. (345 ITR 241), after considering the judgment of the Apex Court in the case of CIT vs. Walchand & Co. P.Ltd. (65 ITR 381)(SC), Sassoon J.David & Co. Pvt. Ltd. vs. CIT (118 ITR 261)(SC) held that the TPO cannot determine ALP at nil by holding that there was no need to incur such expenditure. While coming to this conclusion, the Hon'ble High Court has referred to the judgment of the Apex Court in the case of Eastern*

Investments Ltd. vs. CIT (20 ITR 1)(SC) and CIT vs. Rajendra Prasad Moody (115 ITR 519)(SC). It has been held by the Hon'ble High Court that :

"It has been held by our courts that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In Eastern Investment Ltd. v. CIT, (1951) 20 ITR 1, it was held by the Supreme Court that "there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under Section 12(2) of the Income Tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned". In CIT v. Walchand & Co. etc., (1967) 65 ITR 381, it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in Hughes v. Bank of New Zealand, (1938) 6 ITR 636 that "expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense". The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in CIT v. Rajendra Prasad Moody, (1978) 115 ITR 519, and it was observed as under: -

> *"We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of Section 57(iii) cannot be different. The deduction of the expenditurecannot, in the circumstances, be held to be conditional upon the making or earning of the income."*

It is noteworthy that the above observations were made in the context of Section 57(iii) of the Act where the language is somewhat narrower than the language employed in Section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in Section 37(1) of the Act is broader than Section 57(iii) of the Act makes the position stronger.

20. In the case of Sassoon J. David & Co. Pvt. Ltd. v. CIT, (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/ brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have

been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised. ......

The ratio of the above decision was followed by the co-ordinate benches of the Tribunal in several cases. Some of them are:

i. *Dresser-Rand India Pvt. Ltd. v. ACIT [2012] 13 ITR (Trib.) 422 (Mum)*

ii. *Ericsson India (P) Ltd. v. DCIT [2012] 146 TTJ 708 (Del)*

iii. *AWB India Pvt. Ltd. v. ACIT: ITA No.4454/Del/2011 (Del-ITAT); AY 2007-08*

iv. *SC Enviro Agro India Ltd. v. DCIT [ITA No.2057-2058/Mum/2009]*

v. *Abhishek Auto Industries Ltd. v. DCIT: ITA No.1433/Del/2009 – AY 2004-05*

vi. *McCann Erickson India Pvt. Ltd. v. ACIT: ITA No.5871/Del/2011 – AY 2007-08*

vii. *DSM Anti- Infectives India Ltd. v. ACIT: ITA Nos. 1139/Chd/2011 and 1290/Chd/2012 –AY 2007-08; 2008-09*

viii. *TNS India Pvt. Ltd. V. ACIT: (2014) 32 ITR (Trib.) 44 (Hyd.) –AY 2003-04; 2004-05; 2005-06*

ix. *Atotech India Ltd. v. ACIT: ITA No.104/Del/2012 –AY 2007-08*

x. *Nippon Leakless Talbros v. ACIT: I.T.A. No. 5931/Del/2012 – AY 2008-09*

xi. *Nippon Leakless Talbros v. ACIT: IT(TP)A No. 475/Del/2015 – AY 2010-11*

xii. *Hughes Systique India P. Ltd. v. ACIT: [2013] 25 ITR (Trib) 556 (Delhi) - AY 2007-08, 2008-09*

xiii. *Knorr-Bremse India (P.) Ltd. v. ACIT: [2013] 56 SOT 349 (Delhi) - AY 2007-08*

xiv. *Thyssen Krupp Industries India (P.) Ltd. v. ACIT: [2013] 55 SOT 497 (Mumbai) - AY 2007-08*

xv. *LG Polymers India P. Ltd. v. ACIT: [2012] 16 ITR (Trib) 240 – AY 2006-07*

Thus, in the light of above legal position, though ALP of services by AE cannot be determined at 'nil' by questioning the necessity, the benefits of expenditure incurred, such expenditure can be allowed only after proving conclusively that there was actual rendition of services by AE. The onus lies on the assessee to prove that the services are actually rendered by the AE. In this context, we may point out to the decision in the case of Hon'ble Supreme Court in the case of Laxmi Narayan Madanlal vs. CIT (86 ITR 439) wherein it was held as follows:.........

Thus, for allowability of this kind of expenditure, condition sine qua non is proof of actual services rendered. The co-ordinate bench of the Tribunal, to which one of us i.e. the Accountant Member is the author of the order, in the case of M/s.B Fouress Pvt. Ltd. vs. DCIT in ITA Nos.847 & 847/Bang/2014 dated 30/12/2015 held as follows:

............Thus, the assessee failed to discharge the burden of proving that the expenditure laid out were incurred wholly and exclusively for the purpose of business. We may further add that the Hon'ble Supreme Court in the case of CIT Vs Imperial Chemical Industries (Ind.) Pvt. Ltd (1969) 74 ITR 17 has unequivocally held that the burden of proving that a particular expenditure had been aid out or incurred wholly and exclusively for the purpose of business entirely lies on the assessee. The discharge of the burden had to be effective and meaningful and not to cover up by merely book entries and paper work. The mere fact of payment of commission by account payee cheques and compliances with the TDS provisions shall not alone enable the assessee to claim deduction unless and amount has been expended wholly and exclusively for the purpose of business.

11. A Co-ordinate Bench Tribunal of Delhi in the case of Kanu Kitchen Kulture (P)Ltd Vs DCIT (2013) 28 ITR (T) 49 (Del.-Trib.) held that whether the assessee failed to demonstrate the services rendered by the commission agent, the

commission was disallowed. The relevant paras of the judgment are reproduced below;

"22. Thus the assessee as utterly failed to demonstrate the nature and extent of service rendered by the agent and availed of by the assessee for its business of modular kitchen. In this scenario what appears on record is merely book entries coupled with TDS the amount which will be claimed as a refund by the recipient being a loss making concern. In our considered view the assessee has produced only skeletal paper work of the arrangement without any iota of evidence about actual business services rendered.

23. The assessee's claim for allowing similar commission payment in subsequent year caries no merit inasmuch as the learned DR has rightly pleaded that each and every year of assessment is separate and independent unit and principles of resjudicata do not apply. The assessment for the assessment year 2009-10 is under section 143(1) and for the assessment year 2010-11 there is no mention of the commission at all. Therefore, we are unable to give evidenced to the facts whose record is not before us and not referred to before the lower authorities".

12. Similarly, the Hon'ble Delhi High Court in the case of Schneider Electric (Ind.) Ltd Vs CIT (21008) 304 ITR 360 (Del.) held that in the absence of material on record suggesting that the commission agents had procured the sale orders, no commission should be allowed. The relevant para of the judgment is reproduced below;

"13. We agree with the Tribunal that there is absolutely no material on record to suggest that M/s Ram Agencies had procured any sale orders for the assessee. The production of a few bills or payment having been made by account payee cheques cannot by itself show that M/s Ram Agencies had procured sale orders for the assessee. Apart from an internal note, there is no evidence of any correspondence or any personal; meetings etc. between the assessee and M/s Ram Agencies to suggest that the was any relationship on the basis of which M/s Ram Agencies procured some orders for the assessee for which it was entitled to receive commission. Moreover, we find that the understanding between the parties was an oral understanding and it appears to be doubtful that such an oral understanding can be arrived at without any long standing relationship having been established between the assessee and M/s Ram Agencies. It seems a bit out of place that the parties

entered into an oral business relationship involving such huge amounts of money over a period of time".

13, The Co-ordinate Bench of Delhi in the case of Printer House Pvt.Ltd. Vs DCIT (Del.) authored by Accountant Member, after referring to the above precedence on this issue held as follows:

"Thus, having regard to the ratio laid down in the above cases that in the absence of proof in support of the services rendered by the commission agent, no commission can be allowed as a deduction. Therefore, we dismiss the appeal filed by the assessee and allow the appeals filed by the revenue".

14. In the present case, the learned CIT(A) had not examined any evidence to show that the agents have actually rendered their services. The learned CIT(A) had totally misdirected himself by examining the issue from the angle of tax deducted at source and he had failed to examine whether the services are actually rendered by the commission agents or not. Therefore, we are unable to sustain the order of the learned CIT(A) and hold that the commission payments in question are not allowable keeping in view the ratio laid down in the cases cited supra. The assessee company had miserably failed to demonstrate the actual services rendered by the agents to whom the commission payments were made, despite ample opportunity granted by this Tribunal to furnish evidence in support of service rendered by commission agent.

10. In light of the ratio laid down in the cases cited supra we hold that the condition of rendition of services should be satisfied by the assessee so as to allow the same as expenditure. In the present case, assessee-company had not produced any evidence in support of rendering of services before the TPO. It is only before us, by way of additional evidence, assessee-company has filed some material, in support of the actual services rendered by the AE. The CIT(A) had no occasion to examine this evidence as it was claimed that this evidence was filed for the first time before us . Therefore, the CIT(A), without examining the aspect of actual rendition of services by the AE in respect of IT services, had directed the allowance of expenditure. Therefore, in interests of justice, we restore this issue to the file of the AO for purposes of verification of this evidence and come to conclusion whether the services are actually rendered by the AE or not and direct the TPO/AO to bench mark the transaction of rendering of services of market management support services, after being satisfied himself that the services are actually rendered by the AE.

> *11. On the principle of consistency, we hold that each assessment year is separate and distinct. The principles of res judicata have no application to income-tax assessment proceedings. Simply because in the preceding year, this expenditure came to be allowed without any probe or enquiry it does not preclude the AO from making the enquiries on these issues.*

11. Now, in the present case, assessee-company had not discharged the onus of proving the receipt of services before lower authorities. Despite opportunities given to the assessee-company, no attempt was made by the assessee-company to lead necessary evidence in support of receipt of actual services from the AE. The submission of the assessee-company that an opportunity may be granted to the assessee-company to discharge onus, cannot be accepted because it is settled principle of law that the assessee-company cannot be given a second innings to patch up the weak parts of its case. Reliance can be placed on the following decision of the ITAT:

1. *Asst. CIT vs. Anima Investment Ltd. (2000) 73 ITD 125(Delhi);*
2. *Asst. CIT vs. Arunodoi Apartments (P) Ltd. (2002) 123 Taxman 48(Gau.)*

The Courts have held that appeals are not to be decided for giving 'one more innings' to the lower authorities in the appellate jurisdiction.

1. *Rajesh Babubhai Damania vs. CIT (2001) (251 ITR 541)(Guj.*
2. *CIT vs. Harikishan Jethalal Patel (1987) 168 ITR 472 (Guj) Remand not for the benefit of the party seeking it to fill up gaps.*

Even the Hon'ble jurisdiction High Court in the case of Karnataka Wakf Board vs. State of Karnataka, reported in AIR 1996 Kar.55 at pages 63 & 64 held as under:

> *"Where the party had an opportunity of adducing evidence in the case but with open eyes failed to adduce that evidence, the case should not be remanded to give a second chance to the party to adduce that evidence. The policy of the law is that once that matter has been fairly tried between the parties, it should not, except in special circumstances, be reopened and retrieved. In a recent decision their Lordships of the Supreme Court laid down that power to order retrial after remand, where there had already been a trial on evidence before the court of first instance, cannot be exercised merely because the Appellate Court is of the view that the parties who could lead better evidence in the Courts of first instance have failed to do so."*

The Hon'ble Tribunal, Delhi bench in the case of Zuari Leasing & Finance Corporation Ltd. vs. ITO (2008) 112 ITD 205(Delhi)(TM), following the

case-laws referred to above held that the Tribunal should not remand back to the file of the AO in order to give a second innings to the litigant. Therefore, following the principles enunciated in the above decision, we are unable to remand the present assessment order to the file of the AO for de novo examination as no case was made out by the assessee-firm that it was prevented by sufficient reasonable cause from filing necessary evidence in support of receipt of actual services from the AE. Simply because in earlier years the issue was remanded back to lower authorities, remand cannot be ordered in the present year without valid reason in the light of the decisions cited supra. Needless to mention that each year is an independent and separate assessment year and the principle of res-judicata is not applicable.

Therefore, we do not find any merit in the submissions made by the learned counsel for the assessee for remand of the matter to the file of the TPO for *de novo* examination. Hence, grounds of appeal filed by the revenue in this regard are allowed.

12. Ground No.3 challenges directions of the DRP to consider interest income as part of eligible profits of the undertaking for purposes of computation of deduction u/s 10A. The direction of the DRP is in consonance with the decision of the Hon'ble jurisdictional High Court in the case of *CIT vs. Motorola India Electronics (P) Ltd*.(265 CTR 94). Therefore, we do not find any reason to differ with the direction of the DRP. Ground of appeal in this regard is dismissed.

13. Grounds No.4 & 5 challenge direction of the DRP to reduce expenditure incurred in foreign currency on travel and telecommunication to be reduced from both export turnover as well as total turnover. This direction is line with the decision of the Hon'ble jurisdictional High Court in the case of *CIT vs. Tata Elxsi* (349 ITR 98). We do not find any merit in the ground of appeal filed by the revenue and are accordingly dismissed.

14. In the result, the appeal filed by the revenue is partly allowed.

Order pronounced in the open court on 20th November, 2017

Sd/-	sd/-
(SUNIL KUMAR YADAV)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Place : Bengaluru
D a t e d : 20/11/2017
srinivasulu, sps

Copy to :

1 Appellant
2 Respondent
3 CIT(A)-
4 CIT
5 DR, ITAT, Bangalore.
6 Guard file

By order

Senior Private Secretary
Income-tax Appellate Tribunal
Bangalore