आयकर अपीलीय अधीकरण, न्यायपीठ – "C" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**C**" KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.863 & 539/Kol/2016
Assessment Year :2011-12

DCIT, Circle-12(2), P-7, Chowringhee Square Aayakar Bhawan, 6th Floor, Kolkata-69 M/s Philips India Ltd (formerly Philips Electronics India Ltd) 7, Justice Chandra Madhab Road,Kolkata-20 [**PAN No.AABCP 9487 A**]	**V/s**. **V/s**.	M/s Philips India Ltd. 7, Justice Chandramadhab Road, Bhawanipur, Kolkta-20 DCIT, Circle-12(2), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Arvind Solde, Advocate
राजस्व की ओर से/By Respondent	Shri G. Mllikarjuna, CIT-DR
सुनवाई की तारीख/Date of Hearing	13-11-2017
घोषणा की तारीख/Date of Pronouncement	15-12-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This Revenue as well as assessee are in cross-appeal against the order of Dispute Resolution Panel-2 (DRP for short) passed u/s 144C(5) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for assessment year 2011-12.

Shri G. Mallikarjuna, Ld. Departmental Representative appeared on behalf of Revenue and Shri Arvind Solde, Ld. Advocate appeared on behalf of assessee.

2. Both these appeals are disposed off by way of this common order for the sake of convenience.

First we take up Assessee's appeal ITA No.539/Kol/2016 for A.Y 2011-12.

3. The assessee has raised the following grounds as under:-

"*1. Orders bad in law and on facts*
1.1. That the assessment order passed by the Learned AO under section 143(3) read with section 144C and read with the order passed by the Learned Transfer Pricing Officer (hereinafter referred as 'TPO'), under section 92CA(3) of the Act is bad in law and void ab-initio,

1.2. That the Learned DRP erred in not holding that the order of TPO and the draft order of the AO (in so far it relates to transfer pricing proceedings) are void ab initio as the conditions of section ne (3) of the Act have not been satisfied.

2, Determination of arm's length price by the AO, TPO and DRP for Management Support Services received by the Appellant

On the facts and circumstances of the case, the Learned AO, DRP and TPO erred in rejecting the transfer pricing analysis undertaken by the Appellant with respect to the Management Support Services without appreciating the contentions, arguments, voluminous documentary evidences and data put forward by the Appellant during the course of the proceedings before them, and in doing so, have grossly erred in -

2.1 Making an adjustment of Rs. 2,027,159,953 to the Arm's Length Price (hereinafter referred as ALP') of the international transaction relating to Management Support Services received by the Appellant and in not accepting the ALP of the international transaction as recorded in the books of account of the Appellant:

2.2 Concluding the ALP for services provided by the Associated Enterprise AE') to the Appellant under the Management Support Services agreement to be Nil;

2.3 Concluding that the services received by PIL from the AE are in the nature of stewardship and shareholder services leading to direct benefit to the AE and no proximate benefit to the Appellant;

2.4 Completely disregarding the benefits received by the Appellant on receipt of such management services and not appreciating that such services have significantly assisted the Appellant in achieving its daily operational efficacy;

2.5 Completely ignoring the fact that the voluminous tangible evidences furnished during the assessment proceedings unambiguously demonstrate regular flow of services received by the Appellant and how such services significantly helped PIL's daily operations;

2.6 Not appreciating that the Appellant is a part multinational enterprise wherein many processes are centralized to facilitate the group entities to attain operational efficiency and a competitive edge in their respective countries. Such arrangement does not lead into any proximate benefit to the AE rendering the service but to the entities who are beneficiary of such pooled services; and

2.7 Not taking cognizance of the fact that rational and scientific allocation keys for the payment of Management support service fees were provided by the Appellant and that the Appellant has maintained proper documentation and global auditor's certificate to demonstrate the basis of the charge.

3. Determination of arm's length price by the AO, TPO and the DRP for IT Services received by the Appellant

On the facts and circumstances of the case, the Learned AO, DRP and TPO erred in rejecting the transfer pricing analysis undertaken by the Appellant with respect to the IT services received by the Appellant from AE without appreciating the arguments, documentary evidences and data put forward by the Appellant during the course of the proceedings before them, and in doing so have grossly erred in -

3.1 Making an adjustment of Rs. 35,526,652 to the ALP of the international transaction relating to IT services received by the Appellant and in not accepting the ALP of the international transaction as recorded in the books of account of the Appellant;

3.2 Concluding that the IT services received by PIL from the AE are in the nature of stewardship services leading to direct benefit to the AE and no proximate benefit to the Appellant;

3.3 Concluding the arm's length price for IT services paid by the Appellant to be Nil;

3.4 Completely disregarding the benefits received by the Appellant on receipt of such IT services and not appreciating that such IT services are prerequisite for Appellant's business which have significantly assisted appellant in achieving its daily operating efficacy; and

3.5 Completely ignoring the fact that the tangible evidences furnished during the assessment proceedings which unambiguously demonstrate that the Appellant has significantly utilized those IT infrastructures and systems in its daily operations.

4. Rule of consistency

4.1 The Learned AO, DRP and TPO erred in disallowing the payments made for management support services and IT services by the Appellant in the year under appeal without appreciating that the same have been accepted to be at arm's length in the Appellant's own case in preceding years (i.e. for all the assessment years preceding to AY 2009-10) by the AO and the TPO.

4.2 The Learned TPO erred in not applying the rule of consistency to transfer pricing proceedings when the facts of the case including the underlying arguments have not altered.

5. Determination of arm's length price for Software Segment
5.1. The Learned AO, TPO and DRP erred in making an adjustment to the ALP of international transactions relating to software development services rendered by the Appellant and in not accepting the ALP of the international transaction as recorded in the books of account by the Appellant.

5.2. Without prejudice to the generality of the above, the Learned AO and the DRP erred in making a transfer pricing adjustment of Rs 16,27,69,727 on the basis that the Appellant should have made operating profit/ total cost margin of 15.36 % with respect to its software development services.

5.3. The Learned AO and DRP erred in selecting some functionally non-comparable companies for determination of arm's length price.
5.4. Even for some of the accepted comparables, the Learned AO, DRP and the TPO erred in computing the operating profit! total cost margin.
5.5. The Learned AO, DRP and the TPO erred on facts and in law in rejecting some of the comparables selected by the Appellant.
5.6 The Learned AO, DRP and the TPO erred in not granting the working capital adjustment in spite of the Direction of the Hon'ble RP in this regard. The earned AO & TDPO has erred in not allowing working capital adjustment on the basis of non-availability of segmental balance sheet regarding software services.
5.7. The Learned Assessing Officer, DRP and the TPO erred in not accepting the difference in risk profile of the Appellant vis-a-vis the comparable companies and thereby erred in not allowing the benefit of risk adjustments to the Appellant.

Use of contemporaneous data and disregard of Rule 10B(4) of the Rules.
5.8. The Learned AO, DRP and TPO erred in facts in not considering the application of multiple year data while computing the margins of the comparable companies, having regard to the provisions of Rule 10B(4) of the Rules
5.9. The Learned AO, DRP and the TPO erred in law and on facts in not considering the application of multiple-year data while computing the margins of the comparable companies, having regard to the provisions of Rule 10B(4) of the Rules.
6. Variation of 5% from the arithmetic mean.
6.1 The Appellant reserves the right for the benefits arising out of the proviso to Section 92C(2) of the Act.
7. Depreciation on moulds

7.1. The Learned AO and DRP erred in law and on facts in disallowing Rs. 2,67,54,530 being excess depreciation to the tune of 15% claimed by the Company on moulds.
7.2. The Learned AO and DRP erred in law and on facts in disallowing the excess depreciation on moulds without taking cognizance of the provisions of the Act read with Income-tax Rules, 1962.

7.3. The Learned AO and DRP erred on facts in holding that the moulds are not used for the purpose of the business of the Company and are not used in rubber/plastic factory.
8. Short credit of tax deducted at source
8.1. The Learned AO erred in granting credit of tax deducted at source of Rs. 3,71,65,130 instead of Rs. 4,84,89,927, thereby resulting in short grant of credit of Rs. 1,13,24,797.

9. Interest under section 234A
9.1. The Learned AO erred in levying interest of Rs. 1,35,46,528 under section 234A of the Act.

10. Interest under section 234B
10.1 The Learned AO erred in levying interest of Rs. 39,96,22,576 under section 234B of the Act.
11. Interest under section 234D
11.1. The Learned AO erred in levying interest of Rs. 1,61,67,498 under section 234D of the Act.
12. Interest under section 244A
12.1. The Learned AO erred in recovering interest of Rs. 42,39,613 under section 244A of the Act.

13. Penalty u/s 271(1)(c)
13.1. The Learned AO erred in initiating penalty proceedings under section 271 (1)(c) of the Act.

14. Dividend Distribution Tax
14.1 The learned AO erred in wrongly computing additional tax and interest payable on distributed profit of Rs. 4,44,320 without assigning any reason thereto.

The appellant submits that the above grounds are independent and without prejudice to one another.
The appellant desires leave to add or to alter, by deletion, substitution or otherwise, any or all of the above grounds of objections, at any time before or during the hearing of the appeal."

4. The facts in brief as have been brought on record are that the assessee in the present case is a Limited Company and engaged in the business of manufacturing & sale of electronics & electrical products, electronic medical equipment, development of embedded software & services.

The assessee is a part of M/s Royal Philips Organization, having head quarter in Netherlands. The parent company of the group is Koninklijke Philips Electronics NV (KPENV) based in Netherlands. The assessee falls in the definition of associated enterprises as per the provision of section 92A(2) of the Act.

The assessee is engaged in 4 business segments as detailed below:

1. Consumer lifestyle
2. Healthcare
3. Lighting
4. Software Development

Consumer Lifestyle consists of Domestic Appliances & Personal Care and Consumer Electronics divisions. It consists of Television, Shaving & Beauty, Audio & Video Multimedia, Domestic Appliances, Health & Wellness, and Peripherals & Accessories etc.

A benchmarking study was conducted using TNMM as the most appropriate method and it was concluded by the assessee that it international transactions of the Consumer Lifestyle division relating to the distribution function are in compliance with the arm's length principle.

Healthcare

Philips Healthcare's activities are organized across five business i.e. Imaging System, Clinical Care Systems, Home Healthcare Solutions, Healthcare Informatics and patient Monitoring, Customer Services.

A benchmarking study was conducted using TNMM as the most appropriate method and it was concluded by the assessee that its international transactions of the Healthcare division relating to the distribution function are in compliance with the arm's length principle.

Lighting

Lighting business spans the entire lighting value chain – from lighting sources, electronics and controls to full applications and solutions. It consists of Lamps, Consumer Luminaries, Professional luminaries, Lighting Electronics and controls, Automotive Lighting, Special Lighting Applications etc.

A benchmarking study was conducted using TNMM as the most appropriate method and it was concluded by the assessee that its international transactions of the Lighting division relating to the distribution function are in compliance with the arm's length principle

Software

Philips Software Centre (PSC) is an offshore software development centre established to meet the need for in-house software development and software services to KPNV Group based on specifications provided.

In the benchmarking study of the software division the assessee characterized the division as in-house service provided with limited functions and limited risk and receiving remuneration for services rendered based on cost plus mark-u. Assessee selected TNMM as the most appropriate method. A search was conducted by using Prowess and Capitalines Plus databases for software services.

5. The assessee during the year under consideration entered into various transactions with it AE which were accepted by the TPO except the following:-

1. Payment on account of Management support services
2. Payment on account of IT Charges
3. AMP expenses
4. Rendering software development charges

The Ground No. 1 raised by the assessee is general in nature and does not require any adjudication.

6. The second issue raised by the assessee is that the ld. DRP erred in making an adjustment of Rs. 202,71,59,953.00 to the ALP of the international transaction relating to Management Support Services.

7. The assessee in pursuance to the agreement with its parent company dated 22nd October 2004 has been availing certain services as detailed under:

Article-2

Services in commercial, accounting, auditing, financial fiscal, social and legal matters and in all other fields in which Philips has resources

Philips shall furnish to the company concern services as far as they are reasonably required for the business of the company.

In this context, Philips shall make available to the company such resources in commercial, accounting, auditing, financial, fiscal, social and legal matters and in other fields as Philips now and in the future may possess and may freely and unconditionally furnish to the company, and render assistance in this connection, all to the extent reasonably required to facilitate the company's business operation.

This assistance may relate to:

a. The distribution and trading of products, particularly with respect to advertising, sales promotion, public relations, market research (in particular, information and trends on the world market), labeling, packaging, shipping and forwarding, long term export business and international public tendering and purchasing from third parties;
b. Advice and support with respect to the supply of requirements of the company from other sources, if Philips is prevented from fulfilling such requirements of the company.
c. Financial, accounting and auditing matters relating to such subjects as:
    i) Accounting and auditing principles and methods;
    ii) Budgeting methods;
    iii) Capital structure, loans, exchange risks, financial research, warranties and guarantees, credit management, the establishment and management of finance and lease companies and all further banking activities, including long-term finance plans;
    iv) Developments of data processing;

d. Fiscal and legal matters, including patents, trademarks and customs duties, particularly in international transactions;
e. Personnel matters, particularly with respect to:
   i) The selection and training of personnel;
   ii) An adequate personnel policy;
f. Insurances;
g. Admittance at the company's specific request and at mutually agreed times of a reasonable number of employees of the company to its premises to the extent to which Philips has the free right to do so, so that they can acquaint themselves with commercial and other knowledge as specified above, familiarize themselves with the organisation of the Philips concern and with working methods used by it or receive advice on specific matters in the fields described above; and
h. Any other similar matters which the company may reasonably refer to Philips or which Philips itself may deem appropriate.

It has been agreed that the services mentioned above would be rendered by Philips to the company outside the country.

Any services that would be required to be rendered by Philips in or within the country, whether by way of deputation of employees / representatives or otherwise, would be mutually agreed amongst the parties hereto and the same would not form part of this agreement.

It was also agreed in the agreement that the assessee for the aforesaid services shall pay the remuneration to its parent company as detailed under:-

Article-4

Remuneration

In consideration of the concern services rendered by Philips under this Agreement the Company agrees to pay to Philips remuneration by aggregating amounts calculated as follows:

a. That part of the concern services costs which corresponds to the ratio between the relevant local turnover and the relevant world turnover; and
b. A surcharge of 10% on the amounts as calculated according to a above.

The amount calculated at a above, would excluded any costs in respect of concern services rendered inside the country.

7.1 The assessee during the year during the year has accordingly claimed the expenses of Rs. 202,71,59,953.00 towards the aforementioned services. The assessee paid cost plus 10% to its AE for the services received. The assessee claimed to have received the services provided by the AE using variety of communication tools such as live meetings, webinar, webcasts, conference calls, voice calls, emails etc. and also inviting for participation in workshops and conferences held in Netherlands, Singapore & other countries. The assessee in support of his claimed has also filed voluminous documentary evidence in the form of emails, presentations, directives, instructions, screen shots etc. for each of its division/ business segments. As such it was claimed by the assessee before the AO that :

1) The services were actually received.
2) Services received were directly beneficial to assessee and not to any other AE.
3) There was operational efficiency in the working of the assessee on account of services rendered by AE.
4) The services rendered by the AE were not in the nature of shareholders/ stewardship activity.

The assessee in support of its claim also filed detailed submission demonstrating the allocation of cost of Management support services to it. The assessee also filed auditors certificate certifying that these cost were calculated on the basis of Management support service agreement dated 22nd October 2004 with AE. The auditor has confirmed that they conducted their

examination in accordance with international standards on Assurance Engagements. In the above certificate, inter alia, the auditor has certified:

- Cost of concern activities as per division as a percentage of relevant world turnover;
- Calculation factor regarding sub-division organization cost on the basis of production;
- Cost of concern activities per sub-division/lower level as a percentage of sales to third parties or relevant turnover;
- Calculation factor regarding development activities;

In respect of the cost allocations the assessee highlighted the following facts:

- The AE used the same pricing method for earlier years also and the same pricing mechanism is followed for other group entities as well;
- The AE has not charged for shareholder services;
- The centralization of costs result in significant group cost savings which the assessee has also benefitted from;
- It was difficult for the assessee to engage a third party for providing similar high level services;
- The services rendered by the AE are of high quality;
- The assessee did not have sufficient in house resources to provide services similar to those received from the AE;
- Services received by the assessee enabled it to carry out its business operations more efficiently in an increasingly globalized and competitive scenario;
- Access to such services enabled the assessee to keep up with customers' expectation.

Also the assessee filed GSA TP documentation, wherein the mark-up of 10% was benchmarked and the same was also proved to be at arm's length. Further, it was also demonstrated that due to the continued support being received by the assessee, the turnover of the assessee (excluding software segment revenue) increased from 3% to 346% (considering year 2000-01 as the base year).

The assessee also submitted that the AO in KPNV's order has classified and acknowledged that the services provided by KPNV to the assessee are complex and technical in nature. Such services were required for the survival and success of the assessee, therefore not for the benefit of KPNV.

However the TPO disregarded the contention of the assessee by observing that the services received by the assessee from the AE are in the nature of stewardship and shareholder services leading to direct and proximate benefit to the AE. The AO also noted that the AE has applied an indirect method of allocating the costs to the assessee under MSSA and then added a margin of 10% on the costs while making a charge. The margin of 10% is determined based on benchmarking study of pan Asia comparables. The selection of comparable was inappropriate based on the functional profile and specific economic and market conditions prevailing in the Indian market. The AO also observed that there should not be any mark up on cost. The TPO accordingly held the ALP for services provided by the AE to the assessee under the Management Support Services agreement ("MSSA") to be Nil and made the addition to the total income.

8. Aggrieved assessee preferred an appeal to Ld. Dispute Resolution Panel (DRP for short) wherein it was submitted that the TPO did not appreciate the fact that the AE provided services to the whole group and the cost was allocated to all the group entities using defined allocation keys in a scientific way which was also certified by KPMG. Further, the assessee also submitted a GSA Transfer Pricing documentation wherein the mark up of 10% was benchmarked and the same was also proved to be at arm's length. Since the AE provided services to group companies which inter-alia were located in Asia Pacific region including the assessee, the comparables were chosen from Pan Asia region. The TPO failed to appreciate this aspect. The rationale for using comparables from Pan Asia region was to substantiate that the Pan Asian companies, providing services similar to what the AEs are providing, are

charging a markup in line with what the AE is charging. Hence there is no loss to the Indian revenue when the assessee is availing services from the AE rather than availing services from a Pan Asia independent company. Further, OECD guidelines on transfer pricing mention in Para 1.57 & 1.58 that geographical location is important for comparability as follows:-

> *"1.57 The geographic market is another economic circumstances that can affect comparability. The identification of the relevant market is a factual question 1.58. In cases where similar controlled transactions are carried out by an MNE group in several countries and where the economic circumstances in these countries are in effect reasonably homogeneous, it may be appropriate for this MNE group to rely on a multiple country comparability analysis to support its transfer pricing policy towards this group of countries…."*

Further, it is important to note that worldwide the Tax au9thorities accept the same geography in which the company which is receiving the services is operating. Otherwise, they tend to question the rationale of availing services from outside the geography of the services recipient. Hence, the assessee used Pan Asian comparables to justify the cost plus markup being charged by the AE is within the range as being charged by a Pan Asian independent company and there is no loss of revenue for gong outside the local geography. Further, as regards the TPO's contention that no mark up should have been charged the assessee would like to highlight that TP refers to dealings between related parties in the same way how independent parties would have dealt with. In a scenario where the assessee would have obtained such services from any third party and the third party would have charged a price in which profit element would have been embedded. The AE here has included a minimal markup which was also proved to be at arm's length as similar markup was charged by similar service oriented companies in the Asia Pacific region.

The above contention of the assessee is also recognized by the OECD Guidelines as under:

> *"7.19 Once it is determined that an intra-group service has been rendered, it is necessary as for other types of intra-group transfers, to*

determine whether the amount of the charge, if any, is in accordance with the arm's length principle. This means that the charge for intra-group services should be that which would have been made and accepted between independent enterprises in comparable circumstances. Consequently, such transactions should not be treated differently for tax purposes from comparable transactions between independent enterprises, simply because the transactions are between enterprises that happen to be associated."

Hence, the contention of the TPO that no markup should have been charged is totally erroneous.

However the ld. DRP rejected the contentions of the assessee & confirmed the order of the TPO by observing as under:-

"DRP's Findings: The ground no's 2 & 3 and their sub grounds 2.1 to 2.9 and 3.1 to 3.6 respect of. Management Support Services (MSS for short) and Information Technology Services (ITS for short) are taken up together for disposal as a common theme runs through them. The elementary objection of the A' was that the AO miserably failed to appreciate the fact that the MSS &. ITS were continuously flowing services received by the A' from its AEs to add muscles to and improve the daily operational efficiencies of the A' in India. The business challenges, dynamics and stiff competition the market faced by the A' predicated hiring of the above services, which were not taken cognizance of by the TPO. It was further alleged by the A' that the TPO completely failed perceive the benefits accruing to it from such services provided by the AEs to the Indian entity i.e. the A'.

The Panel considered the rival submissions in the above regard. The paper books filed the A' were meticulously gone through by us. The evidence on record in respect of appearing at pages 1 to 56 of the volume 1 of part 3 (Exhibit 2 of DRP submission) were carefully considered and analysed by us to properly appreciate the merits of the claim. The discussion made by the TPO on pages 132 to 232 of his order under challenge was also carefully perused and analysed vis-a-vis the submissions made by the A' on pages 893 to 907 of the paper book volume 2. The relevant agreements enclosed in respect of the various services filed with the paper book were also studied in depth (pages 982 to 991 of the paper book). The bills raised in lieu of the services enclosed on sample basis on pages 992 to 1005 of the same paper book were also perused.

*Before delving into the merits or otherwise of the objections of the A' as above the Panel feels tempted to refer to the essential ingredients which result in "**Stewardship activity**":* -

1) "The parent company seconds its employee on deputation to the country where subsidiary is incorporated.

2) The subsidiary does not undertake any revenue generating functions.
3) The subsidiary does not take any risks.
4) The client interaction is done by the staff of the parent company.
5) The subsidiary is not involved in any back office services in India.
6) The services rendered are of preparatory and auxiliary nature as per the treaty.
7) The subsidiary conclude contracts on behalf of its parent company.
8) The rights and objections arising out of the transactions are tilted heavily in favour of the parent company.
9) The functional analysis shows that economically significant activities and responsibilities were undertaken by the parent company as compared to transactions undertaken between independent enterprises.
10) Any independent enterprise in place of the subsidiary availing of parent company's services would have been w1lling to pay on account of such services being indispensable.
11) The services relate to day to day management of the business operations including planning services for particular operations and provision of technical advice.
12) By such activities the parent company establishes personnel or other policies of the group and review and monitor the performance of the subsidiary.
13) These are duplicative services which do not provide any benefit to the recipient enterprises but only lead to incidental and not intended benefits.
14) Such services do not enhance the economic and commercial value of the recipient enterprise. "

Against the above backdrops, the intra-group services availed of by the A' were examined by us from the following angles:-

1. Sum & substance of the agreement entered into by the A' relating to Intra-Group Services (IGs in short)
2. Identification of each & every service.
3. Amount paid for each service
4. Contemporaneous documentary evidence to demonstrate that such services were actually received.
5. Justifying the need for such services
6. When and how the services were requisitioned from the AEs
7. How the rate of payment for IGs determined and whether agreements contain any whisper of the same.
8. Whether cost benefit analysis was done while requisitioning the services payment of the IGs
9. Expected benefit from the Intra-Group services vis-a-vis the payment made for the same.
10. Evidence of benchmarking analysis undertaken at the time of entering into agreement so as to compare the payment of IGs to the AEs vis-a-vis independent party under similar circumstances.
11. What tangible and direct benefit was derived by the A'.

12. Whether services availed of from AEs have also been performed by the A' itself or from independent parties.
13. Details of such expenditure for each of the services.
14. Why a separate payment was made for the services to the AE.
15. Documentary evidence of cost incurred by the AE for rendering each type services purportedly received by the A' and the mark up applied, if any by the AE?
16. Whether the cost incurred by the AE was audited?
17. Whether AE was rendering services to any other AEs / independent parties also. If, so, the details thereof including the rates / amount Costs charged from such A Es along with mark up if any?
18. Whether the AE rendered services to any other AE / independent parties also.
19. Whether the AE rendered services to more than one entity including the company, then the basis of allocation amongst various entities and the basis choosing particular allocation key?

As a concomitant of the above the A' was duty bound to adduce the following evidence:-

1) Emails containing propriety information
2) Process Manuals
3) Marketing Brochures
4) Timesheets
5) Minutes of meetings
6) Examples of increase in sales
7) Examples of decrease in costs
8) Lower level of attrition
9) Increase in efficiency
10) Market penetration etc
11) A certificate enduring the allocation

In order to ensure that intra-group services were not a camouflage or contrivance devised by the A to shift profits out of India, the following facts were also considered by the Panel in the light of the evidence filed before us and the TPO's discussion to ascertain whether the mark up was influenced by any of the following factors:-

a) Whether the provider of such services also provides the same services to another entity at the ALP and the nature of such a charge.
b) The financial impact of provision of such service to the provider and recipient of the same on the profitability of the entities involved.
c) The efficiency and capability of the provider of the service in comparison to another entity that could be providing the same service?
d) Any non-routine activity that could be indentified during the course of provisions of such services.
e) If these sources have been centralised in order to achieve cost efficiency which could benefit the provider and recipient of the service.
f) Whether the provision of such a service is peculiar or the main function of the provider of the service.

With the above facts in mind the evidence and submissions filed by the A' were examined by us. Contrary to the above stipulations &-requirements collated the A' filed agreement & sample bills only which upon a perusal demonstrated that the nexus between the services rendered by the AEs and their direct benefit to the A' was conspicuously absent. The methodology for pricing such a service was also not done on any scientific basis. The bills also were silent on how the AEs put-the cost on such services. The specific nature of services was also not discernible from the bills. All the bills merely stated services charges etc. without describing the exact nature of services. Thus, from the evidence made available by the A' in the form of additional evidence i.e. agreements, bills and emails, it was clear that the services did not answer the requirements as per (a) to (f) supra. Accordingly it is held by the Panel that the services were of duplicative nature which no independent party would be willing to avail of at a price. The basis of evaluation of each service and the proof of actual receipt of such services along with the benefit were also not there. When and how the services referred to in the bills and the agreements were requisitioned by the A' from its AE's were also not clear. Similarly the cost benefit analysis undertaken by the A' and the expected benefits were also not available on record. Thus in a nutshell the 19 angles from which the case of the A' was examined did not go to establish that the services received by the A' from its AE were not in relation to day to day management of the business operations of the A', that the services were not aimed at monitoring the performance of the A' and that they enhanced the economic and commercial value of the A'. Accordingly the grounds 2 & 3 with its sub grounds are dismissed."

Aggrieved, by this, the assessee has come up in appeal before us.

9. The ld. AR before us filed paper books in two volumes which are running from pages 1 to 940 and 1 to 55 and made the submissions which can be compiled as under :

1. The ld. DRP has treated the expenses booked by the assessee under management support service as income in the hands of AE i.e. KEPNV. Thus the amount of management services will result to double taxation. The ld. AR in support of his claim drew our attention on the DRP order in relation to KEPNV for the same assessment year 2011-12 which is place on pages 632 to 639 of the PB.
2. The ld. AR also filed a chart showing the benefit derived by the assessee from the management support services on sample basis which is running from pages 1 to 55 and placed on record.

3. The ld. AR also submitted that the in the earlier assessment year the Hon'ble ITAT in the own case of the assessee in ITA No. 1141/Kol/2016 for the AY 2009-10 vide order dated 5.4.2017 was pleased to delete the addition made by the TPO and confirmed by the Ld. DRP. The expenses were claimed on the basis of same management support services agreement i.e. 22nd October 2004. The copy of the order is placed on pages 642 to 683 of the PB.
4. The ld. AR also submitted that the ld. DRP did not make any adjustment in the management support service expenses in the AY 2010-11, 2012-13 and 2013-14. The copies of the orders are placed on pages 741 to 940 of the PB.
5. The ld. AR also submitted that there was no change in the management support services Agreement made 22nd October 2004 between the assessee & AE.

On the other hand the ld. DR submitted the written submission. The written submission is reproduced hereunder:-

"The Indian Transfer Pricing regulations explicitly cover the transactions in the nature of provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service, within the ambit of Transfer Pricing provisions. However, they fail to pro-vide any further guidance on the approach to be followed while benchmarking intra-group services. Reliance is thus, placed on the international tax practices followed in the UN TP Manual, OECD Guidelines, the United States Transfer Pricing regulations etc. both by the taxpayer and the Revenue while undertaking the compliance and the audit exercise respectively The test for an intra-group service generally involves examination of the following factors:

- The nature of activities;
- The associated need and benefits;
- Documentary evidence in support of the transaction;
- The charge-out mechanism; and
- The ALP of the transaction.

Nature of activities

In Transfer Pricing's context, it is essential to draw a line of distinction between a business activity and a service. Essentially the guiding principle that goes in determining the existence of an intra-group service is whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would

have performed the activity in-house for itself. An in-depth analysis, following the aforementioned conceptual difference between business activities and services, clears the air on many common business activities erroneously perceived to be in the nature of intra-group services. This includes:

• Activities without any benefit: any activity which does not lead to an incremental commercial or economic value addition for the recipient cannot be regarded as a service. In the case of Gemplus India (P.) Ltd vs ACIT, [2010] 8 taxmann.com 170 the Bangalore Tribunal upheld the adjustment made by the TPO where the payments to be made to AE were not dependent on the nature and volume of service and even the appellant failed to prove any commensurate benefit against such payments. The Tribunal ruled that the TPO was justified in holding that assessee had not proved any commensurate benefits against payments of management service charge, therefore, upheld the impugned addition. It is important to highlight here that an independent entity would never have entered into an agreement for receipt of services the terms of payments of which would be independent of the nature and volume of service. This ruling reiterate the aforementioned principle that distinguishes a services from other business activities. Shareholder / custodial activities: The activities of a parent company primarily as an investor of capital or a shareholder of the subsidiary which are mainly undertaken for the benefit of the group's shareholders are considered as shareholder activities. It also covers activities involving compliance of regulatory, legal, and reporting requirement of the parent companies. A third party would never require such services and so would never make payments for them. For example: Activities in relation to consolidation of accounts by the parent company would constitute shareholders services, requiring no remuneration for the costs incurred.

• Activities providing incidental or remote benefits: In a situation where an entity receives incidental benefits attributed solely to it being part of the MNE group, and not because of any specific activity being performed, the same requires no remuneration. Similarly, an entity may be receiving incidental benefits because of activities relating to other group members. An independent enterprise in an uncontrolled environment is not expected to make payments for an incidental benefit associated with another set of uncontrolled transaction. Basis this, it can be surmised that incidental benefit do not require an independent remuneration arrangement. The Delhi Tribunal in the case of M/s Knorr-Bremse India Pvt. Ltd vs ACIT TS-700-ITAT-2012 (Del)held that professional consultancy and management fee paid by the appellant were only towards incidental and passive association benefits, therefore the Transfer Pricing Officer had rightly adopted nil value as the ALP.

• Activities leading to duplication of benefits: A third party would never make payment for receiving the same service twice since the incremental benefit is lost. Keeping this in mind, an activity leading to duplication of benefits cannot be construed as a service and therefore does not require any remuneration.

Surmising the above, for an activity to qualify as a service, the fundamental factor that need to be considered is:

- Whether an independent enterprise would have been willing to pay for the activity; or
- Whether an independent enterprise would have performed the activity in-house itself.

Evaluating the needs and benefits of Intra-group services

It involves identifying the incremental economic or commercial value that has arisen to the services recipient. A direct nexus between the services received and the corresponding value created should be established. An intra-group service should be analysed to see how it helps the service recipient make gains through increased profitability be it by increasing sales or by reducing costs. In order to understand the value creation aspect of intra-group services, it is necessary to break the same into bits and pieces and analyse it further. The value of an Intra-group services can segregated into its reference value and its differential value. The reference value of an Intra-group service would necessarily constitute the price of the next best alternative. Whereas, the differential value of the service is essentially the net benefit it delivers to the recipient over and above those rendered by competitive reference service providers i.e. the value over and above the reference value. In short, it is that part of the economic value which is attributed to its difference over alternatives. It is very common to find an Indian subsidiary of an MNE group receiving some centrally provided services, for instance to gain economies of scale through the concentration of activities. These services may vary from being very simple administrative functions to more complex industry specific functions. The decision to provide certain services centrally may also be determined by the need to have the best practices implemented across geographies. Thus it can be said that the needs and benefits of Intra-group service arrangements is driven by the necessity to achieve operational efficiency, improve business operations, standardize policies, procedures and controls that are conducive to the MNE group's business operations.

Documentary evidence in support of Intra-group services

where a payment has been made for an inbound service, a taxpayer is expected to provide documentary proof of tangible benefit accrued on account intra-group services received. The following documents are essential for any taxpayer to support the charges for intra-group services:

- Service agreements between parties: The service agreement provides a basic legal framework for receipt of services and is expected to cover every possible detail. The agreement should list the services to be provided along with how and when these services are be requisitioned. The agreement should provide what costs are to be included in the charge for the services and the basis of determining the payment for various categories of services. In case the all or a part of the service is outsourced to a third party, the same may be mentioned in the agreement along with the mark-up, if any charged on the third party costs. It is advisable that the service agreement contains a clause providing the parameters of the measuring the expected benefits and linking the charges to such benefits.

Such an arrangement help in establishing the cost benefit nexus before the Indian Revenue.

- Cost benefit analysis: Details of cost benefit analysis, if any undertaken at the time of entering into the agreement. Third party quotes for similar services if arranged for at the time of entering into the agreement, should also be made available
- Functional analysis: The functional analysis should cover all basic questions like:
- Who is doing what and for whom;
- Where are they doing it;
- Why are they doing it;
- Who are they doing it;
- What property is being used or transferred in connection therewith;
- Benefit test documentation: Services may be received by way of conference calls, occasional visits and mails / presentations / tool kits exchanged from time to time. The actual evidence of receipt of services can be established with the help of the policies / e mails / guidelines / presentations used during the rendition of services. In addition to these, copies of time sheets of the service provider's personnel, cost centre reports and global Transfer Pricing documentation can also be helpful in substantiating and justifying Intra-group services. The table below gives an illustrative list of few generic services and the corresponding benefit test documents that may be submitted:

Nature of services	Examples of benefit test documents
Finance and treasury Legal	- Email correspondence and documents showing financial reporting and accounting guidelines received; - Manuals governing investment and transfer of assets decisions; - Presentations on usage of financial reporting and group record management software and databases; - Treasury management strategy and guidance; and - Email correspondence between the AE and third party banks in lieu of negotiations of interest rates, loans, credit lines etc. - Correspondences highlighting the legal assistance in the form of emails and draft contracts; - Guidance received on hiring a foreign counsel; - Guidance on legal system, prevailing in a foreign jurisdiction where the service recipient has a business interest; - Assistance regarding setting up an overall legal policy.

Business development	- Presentation and correspondences depicting formulation of business development strategy, identification of business opportunities in new markets, acquisition and strategy alliance, identification of customer base, assistance in negotiation etc.; - business proposals for new customer prepared by the service provider; - market research report received from service provider.
Tax	- Memos and presentations received containing recommendation and advise on various tax implications in respect of foreign operations; - Insights into potential tax exposures for specific projects such as investments, acquisition or reorganisations.
Information technology	- Call logs detailing the description of products / services used by employees of service recipient along with the amount paid for the product / services and the quantity; - Role of recipient company's personnel engaged in information technology operations vis.a vis. The role of the service provider so as to establish non-duplicity of services. - Presentation / reports containing benefits obtained from having a centralised information technology function in terms of cost saving and economics of scale; - Screenshots / emails showing IT services actually being received (troubleshooting problems, creation of logins for employees); - Third party invoices raised on the service provider and agreements for the services and software licenses procured;
Human resource and training	- Email invitation and attendance sheet of the employees attending the training programme; - Documents depicting any review of employment contracts by the service provider on behalf of recipient; - Reports demonstrating benefits of a centralized human resource system like lowering of attrition rate, lesser personnel employed in the human function than required, people survey results.

Before proceeding with determining the ALP, it is essential to establish the charge-out mechanism for the intra-group services rendered. For this, it is essential to distinguish between services that benefit a particular affiliate directly and services that benefit several affiliates or the group as a whole. There are two charge-out mechanisms:

- The direct charge mechanism

• The indirect charge mechanism
The direct charge mechanism involves charging AEs directly for specific services. The DECD advocates the use of direct charge mechanism in cases where similar services are provided to AEs. Essentially, the cost pool for services rendered to associate concerns needs to be distinguishable and there should be a comparable open market transaction to facilitate pricing.

Under the indirect charge method, the chargeable cost pool is identified, aggregated and allocated or apportioned amongst the members of MNE group on the basis of some degree of estimation or approximation. DECD advocates use of an indirect charge method which is sensitive to the features of the individual case, contains safeguards against manipulation and follow sound accounting principles and be capable of producing charges or allocations of costs that commensurate with the actual or reasonably expected benefits to the recipient of service, 'OECD further stresses that to satisfy' arm's length principle, one needs to have an allocation method that leads to a result that is consistent with what comparable independent enterprise would have been prepared to pay.

Arm's length pricing of Intra-group services
Before coming to the question of determining the ALP, it is essential to establish the following:

• The business activity qualifies as an intra-group service;
• The cost of such intra-group service commensurate with its benefits;
• There exists sufficient documentary evidence to justify such benefits; and
• A prudent and reasonable charge out mechanism has been established;

Once all of the above conditions are satisfied, one should proceed with choosing the most appropriate method for benchmarking the transaction depending upon the facts and circumstances of each case.

Benefit test
The Delhi High Court in the case of CIT vs. Cushman and Wakefield (India) P. Ltd TS-150-HC-2014 (DEL-TP) clarified that it was absolutely necessary for the taxpayer to relate costs to benefits and demonstrate the value received on account of the payment. Here it is worth mentioning that the High Court in this judgment has sought to create a distinction between the In the case of Deloitte Consulting India (P.) Ltd. Vs DCIT [2012] benefit test i.e. examining services exists or benefits have accrued and the arm's length test. High Court held that the powers of the TPO is limited to determination of ALP, however the TPO may determine the arm's length price as nil in situations where an independent entity in a comparable transaction would not pay any amount. In the case of Deloitte Consulting India (P) Ltd. vs. DCIT [2012] 150 TTJ 824 (Mumbai) the tribunal on the issue as to whether the TPO was empowered to determine the ALP at nil, held that the taxpayer had to establish before the TPO that the payments made were commensurate to the volume and quality of the service and that such costs were comparable. The Tribunal further held

that when commensurate benefit against the payment of service is not derived, the TPO is justified in making an adjustment under ALP. The Tribunal had determined the ALP at nil keeping the factual position as to whether in a comparable case, similar payment would have been made or not in terms of the agreements

Similarly, in the cases of M/s Knorr-Bremse India Pvt. Ltd vs ACIT and Gemplus India (P.) Ltd vs ACIT, discussed above, the payments made in congruence of intra-group service arrangement were disallowed by determining their as nil on the grounds that they failed the benefit test.

Therefore, in this case the TPO in his order has exhaustively discussed with reasons 'as to why the services rendered amount to shareholder activities and in the absence of proper documentary evidence ,he arrived ALP at NIL and adjustment accordingly. Even the DRP has at length dealt the issue and further on the failure of assessee to prove conclusively with necessary evidences has upheld the order of TPO. In view of the factual position of the assessee and also the case laws discussed the order of TPO may kindly be upheld."

Lastly, ld. DR vehemently supported the order of authorities below.

10. We have heard the rival contentions & perused the materials available on record. In the instant case the TPO has treated the MSSA received by the assessee as stewardship services and for the benefit of AE. Accordingly the TPO valued the ALP of these services at NIL value. The order of the TPO was subsequently confirmed by the Ld. DRP.

However we note that the assessee has provided the details of the benefit derived by it from the MSSA received from AE at the time of assessment proceedings. However the order of the TPO is silent on this aspect.

Similarly we also note that the Revenue in the own cases of the assessee pertaining to other assessment years as discussed above has accepted claim of MSSA of the assessee. Besides we also note that the Hon'ble ITAT in the own case of the assessee has decided impugned issue in favour of assessee in **ITA No.1141/Kol/2016** for the AY 2009-10 vide order dated 5.4.2017. The relevant extract of the order is reproduced below :

"4. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee. We find

that the ld AR referred to the Agreement entered into by the assessee which is enclosed in page 194 of the Volume I of Paper Book as under:-

5.2 Concern Services furnished by Philips

In general, when a qualified Philips subsidiary entered into GSA agreement with Philips, it will be provided Concern Services. The major concern activities performed by Philips is related to services in commercial, accounting, auditing, financial, fiscal, social and legal matters and in all other fields in which Philips has know-how and experience. Philips shall make available to the Company such know-how, expertise and experience in the aforesaid areas as Philips now and in the future may possess and may freely and unconditionally furnish to the Company, and render assistance in this connection, all to the extent reasonably required to improve the Company's business operation.

The assistance may relate to :

a. *the distribution and trading of products, particularly with respect to advertising, sales promotion, public relations, market research (in particular, information and trends on the world market), labeling, packaging, shipping and forwarding, long-term export business and international public tendering and purchasing from Third parties;*

b. *advice and support with respect to the supply of requirements of the Company from other resources ;*

c. *financial, accounting and auditing matters relating to such subjects as:*

    i. *accounting and auditing principles and methods;*
    ii. *budgeting methods;*
    iii. *capital structure, loans, exchange risks, financial research, warranties and guarantees, credit management, the establishment and management of finance and lease companies and all further banking activities, including long-term finance plans;*
    iv. *development of data processing*

d. *fiscal and legal matters , including patents, trademarks and customs duties, particularly in international transactions ;*

e. *personal matters particularly with respect to :*

    i. *the selection and training of personnel ;*

ii. an adequate personnel policy;

f. insurances;

g. admittance at the Company's specific request and at mutually agreed terms of a reasonable number of employees of the Company to its premise to the extent to which Philips has the free right to do so, so that they can acquaint themselves with commercial and other knowledge as specified above, familiarize themselves with the organization of the Philips Concern and with working methods used by it or receive advice on specific matters in the fields described above;

h. sending at the Company's specific request such experts from Philips to the Company's offices as may be agreed between the parties for such period or periods as may be agreed between them to advise the Company on matters as mentioned above;

i. any other similar matters which the Company may reasonably refer to Philips or which Philips itself may deem appropriate.

4.1. The ld AR also brought to our notice page 196 of the Paper Book containing the functions performed as below:-
Functions are defined as the activities that each of the entities participating in a particular transaction performs as a normal part of their operations. Functions can be divided into broad categories:

- *strategic management functions are those activities that determine the overall strategy and organization of the firm ;*
- *corporate service functions assist in the day-to-day management of the organization (e.g. finance, human resources, information systems, etc.,);*
- *product and process development functions relate to design, research and development activities ;*
- *procure functions are those activities related to the sourcing and purchase of raw materials and other inputs to the production process;*
- *make functions are activities that impact the manufacture of a company's products including production planning and control and process improvement;*
- *move functions focus on the organization of outbound logistics to deliver products to the customer ; and*
- *sell functions include marketing, advertising , sales and distribution activities.*

4.2. We find that no adjustment on account of Management Support Service Charges were made in the past by the revenue from Asst Years

2005-06 to 2008-09 though the agreement is effective from 22.10.2004 onwards. We also find that Article 6 of MSSA enclosed in page 294 of the Paper Book on 'Taxes' is as under:-

The costs, taxes, stamp duties and similar charges arising out of this agreement shall be borne by the Company (assessee) if such amounts are due in the Country, and by Philips if such amounts are due outside the Country with the exception of :

a. taxes which can be claimed back or credited against tax by the Company in accordance with the legal provisions which shall be chargeable to the Company; and

b. taxes which can be claimed back or credited against tax by Philips in accordance with the legal provisions, which shall be chargeable to Philips.

The ld AR argued that the assessee had complied with the TDS obligations on the subject mentioned payments and the same has been accepted by the department. He also referred to the summary of emails from Pages 333 to 378 and further emails which are enclosed in Exhibit II from pages 800 to 854 of Paper Book. He also referred to the exclusion of 12000000 Euros towards the Shareholder function costs in the overall cost allocation to the assessee company which is enclosed in page 795 of the Paper Book. We find that the assessee had also furnished before the lower authorities , the details of specific benefits derived by it on each of the emails corresponded between the assessee and KPENV comprising of various services rendered by KPENV pursuant to the MSSA. In fact the benefits derived from each of the services is furnished in the separate column in the said reply dated 11.1.2013 before the ld TPO which is also enclosed as Exhibit II in the Paper Book filed by us. The ld TPO simply replied in his remand report filed before the ld DRP to these emails and the reply of the assessee by stating that the services rendered are only in the nature of control, supervisory and monitoring functions. The assessee in turn filed rejoinder to this remand report by specifically pointing out the benefits derived from each of the services and also by objecting to the remand report of the ld TPO by stating that the ld TPO had not assigned any reason for concluding that the services are in the nature of control, supervisory and monitoring functions. We find that the assessee had specifically replied that it was benefitted by substantial cost reduction on an overall basis by utilizing the services rendered by KPENV pursuant to MSSA. The details of these benefits derived are enclosed in pages 965 to 981 of the Paper Book. The ld AR also drew our attention to the order of the ld DRP dated 23.12.2013 passed in the hands of KPENV for the Asst. Year 2009-10 (enclosed in page 1018 to 1043 of Paper Book), wherein the ld DRP agreed that KPENV had rendered services

*which are in the nature of '**Fee for Technical Services**' on going through each and every clause of the MSSA and Management Support Charges were paid by Philips India Ltd (assessee herein) to KPENV for receiving such services. We find that in Para 38 of the said order of ld DRP in the hands of KPENV, it was held as below:-*

38. In view of the above, it is evident that in order to ensure the survival and success of PIL (i.e. Philips India Ltd), the assessee has been involved in the selection and training of PIL's personnel and in the process, 'made available' 'technical knowledge, experience, skill' to the personnel, which will enable the personnel to fulfill such specialized tasks on their own. Therefore the assessee's claim of not fulfilling the 'make available' condition is rejected.

The ld DRP in para 39 of the said order (enclosed in page 1040 of paper book) had further held that the consideration of all these facts leads to the conclusion that the deliverables under the MSSA are predominantly in the form of 'commercial knowhow' and not commercial services and therefore covered by the definition of the term 'Royalty' under Article 12 of the DTAA.
4.3.3.4. From the above it would be clear that the receipts in respect of MSSA would be taxable either as FTS (to the extent they are services rendered) or Royalty (to the extent it is providing commercial know-how or commercial experience). As both FTS and Royalty are taxable at the same rate under the DTAA, it does not matter that there is no clear cut separation or quantification in the MSSA of the service and the know-how portions. The entire receipts would be chargeable to tax in India under the DTAA as well as the I.T.Act.

4.2.1. Hence based on the aforesaid order of ld DRP in the hands of KPENV for the Asst Year 2009-10, we find that the ld DRP had treated the receipts of Management Support Services Charges from assessee herein (i.e. Philips India Ltd) in the hands of KPENV as FTS or Royalty and made it taxable in India. So once the same is accepted as FTS or Royalty in the hands of KPENV, the nature of payment cannot be different in the hands of the assessee herein by simply placing reliance on the benefit test, even though the benefits derived by the assessee pursuant to MSSA has been elaborated in detail by the assessee by way of substantial cost reduction. We also find that the assessee had paid service tax of Rs 14,87,24,134/- on payment of Management Support Service Charges of Rs. 125,27,30,863/-.

4.3. We find that the ld DR argued that assessee had not proved that services were received by the assessee and had derived commercial and economic benefits out of the MSSA. He argued that only general

reply was given by the assessee with regard to the benefits derived. He argued that these services were rendered by KPENV to other group companies also and quantum of benefit vis a vis the service is not proved by the assessee.

4.4. We find that the assessee had also proved the benefits derived by way of increase in turnover from the years ended 31.3.2005 onwards pursuant to the MSSA. It is reiterated that MSSA was entered into on 22.10.2004 and the following table would prove the benefit derived by way of increase in turnover in figures as well as in percentage prior to rendering of management support services and thereafter :-

Sr. No.	*Year Ended*	*Sales (Rs. Crores)*	*% increase (taking year 200-01) as the base year*	*Remarks*
1	*March 2001*	*15313*	*-*	*No Management support services received during this period*
2	*March 2002*	*15709*	*3%*	
3	*March 2003*	*16379*	*7%*	
4	*March 2004*	*16293*	*6%*	
5	*March 2005*	*21484*	*40%*	*Management support services were received from FY 2004-05 onwards (i.e., first year of receipt of management support services)*
6	*March 2006*	*23829*	*56%*	*Subsequent years in which Management support services continued to be received by the Assessee*
7	*March 2007*	*22790*	*49%*	
8	*March 2008*	*27621*	*80%*	
9	*March 2009*	*28645*	*87%*	
10	*March 2010*	*31162*	*104%*	
11	*March 2011*	*34267*	*124%*	

4.5. In the instant case, we are convinced that the assessee had indeed received the services from KPENV which fact is also acknowledged by the ld DRP in the hands of KPENV as stated supra. The benefits derived by the assessee out of these services by way of substantial cost reduction and increase in turnover substantially cannot be swept under the carpet. We find that no adjustments to ALP was made in the Asst Years 2005-06 to 2008-09 in respect of the very same MSSA by the ld TPO for the assessee. We find that the principles of consistency need to be followed and cannot be given a go by when there is no change in the facts and circumstances of the case from the earlier years. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Radhasaomi Satsang vs CIT reported in (1992) 193 ITR 321 (SC) .

4.6. We find that the decision relied upon by the ld AR on the Hon'ble Delhi High Court in the case of CIT vs Cushman and Wakefield (India) (P) Ltd reported in (2014) 367 ITR 730 (Del) is well founded wherein it was held that :-

*"35. The Transfer Pricing Officer's report is, subsequent to the Finance Act, 2007, binding on the Assessing Officer. Thus, it becomes all the more important to clarify the extent of the Transfer Pricing Officer's authority in this case, which is to determining the arm's length price for international transactions referred to him or her by the Assessing Officer, rather than determining whether [such services exist or benefits have accrued. That exercise - of factual verification is retained by the Assessing Officer under Section 37 in this case.] Indeed, this is not to say that the Transfer Pricing Officer cannot - after a consideration of the facts - state that the arm's length price is '**nil**' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the Transfer Pricing Officer stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the Transfer Pricing Officer. …… ……. …. .*

36. In this case, the issue is whether an independent entity would have paid for such services. Importantly, in reaching this conclusion, neither the Revenue, nor this Court, must question the commercial wisdom of the assessee, or replace its own assessment of the commercial viability of the transaction. The services rendered by CWS and CWHK in this case concern liaising and client interaction with IBM on behalf of the assessee-activities for which, according to the assessee's claim-interaction with IBM's regional offices in Singapore and the United States was necessary. These services cannot - as the Income-tax Appellate Tribunal correctly surmised-be duplicated in India insofar as they require interaction abroad. Whether it is commercially prudent or not to employ outsiders to conduct this activity is a matter that lies within the assessee's exclusive domain, and cannot be second- guessed by the Revenue." [brackets provided by us]

4.7. We also find that the decision relied upon by the ld AR on the co-ordinate bench of this tribunal in the case of DCIT vs Bata India Ltd reported in (2016) 69 taxmann.com 120 (Kolkata Trib) dated 6.4.2016 had considered the decisions of Hon'ble Delhi High Court in the case of CIT vs EKL Appliances Ltd (2012) 345 ITR 241 (Del) ; CIT vs Cushman & Wakefield (India) (P) Ltd (2014) 367 ITR 730 (Del) and co-ordinate bench of Mumbai Tribunal in the case of Dresser Rand India (P) Ltd vs Addl CIT (2011) 47 SOT 423 (Mum) and applied the principles emanating out of those judgements and applied the same to the facts of the case in Bata India Ltd. In the said case (i.e Bata India Ltd supra) it was observed as under:-

27. *The Hon'ble High Court of Delhi in the case of CIT v. EKL Appliances Ltd.[2012] 345 ITR 241/24 taxmann.com 199/209 Taxman 200 as well as CIT v. Cushman & Wakefield (India) (P.) Ltd.[2014] 367 ITR 730/46 taxmann.com 317 (Delhi), rendered similar ruling as was rendered in the case of Dresser-Rand India (P.) Ltd. (supra). In the case of Cushman & Wakefield India (P.) Ltd. (supra), the Hon'ble Delhi High Court observed that whether a third party - in an uncontrolled transaction with the Taxpayer would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. In the context of cost sharing arrangement, the Hon'ble High Court opined that concept of base erosion is not a logical inference from the fact that the AEs have only asked for reimbursement of cost. This being a transaction between related parties, whether that cost itself is inflated or not only is a matter to be tested under a comprehensive transfer pricing analysis. The basis for the costs incurred, the activities for which they were incurred, and the benefit accruing to the Taxpayer from those activities must all be proved to determine first, whether, and how much, of such expenditure was for the purpose of benefit of the Taxpayer, and secondly, whether that amount meets ALP criterion. In the present case however, the arrangement between the AE and the Assessee is not a cost sharing arrangement but a payment for specific services rendered. To this extent the above observations of the Hon'ble High Court may not be relevant to the present case.*

28. *The following aspects would require consideration in order to identify intragroup services requiring arm's length remuneration:*

- Whether services were received from related party.

- Nature of services including quantum of services received by the related party.

- Services were provided in order to meet specific need of recipient of the services.

- The economic and commercial benefits derived by the recipient of intragroup services.

- In comparable circumstances an independent enterprise would be willing to pay the price for such services?

- An independent third party would be willing and able to provide such services?

Whether payment made to AE meets ALP criterion will be determined, keeping in mind all the above factors, as well.

29. *Keeping in mind the principles emanating from the aforesaid decisions, we shall now proceed to examine the material on record to see the nature of services received by the Assessee and as to whether the same were at Arm's Length.*

47. *In the light of the discussion in paragraphs 30 to 46, We hold that the Assessee has established the nature of services including quantum of services received by the related party, that services were provided in order to meet specific need of the Assessee for such services, the economic and commercial benefits derived by the Assessee of intragroup services.*
4.8. We also find that in the recent decision of the Hon'ble Delhi High Court in the case of Knorr-Bremse India (P) Ltd vs ACIT reported in (2016) 380 ITR 307 (Del) wherein the relevant head notes is reproduced herein below :-

Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Adjustments - General) - Assessment year 2007-08 - Whether answer to issue whether a transaction is at an arm's length price or not is not dependent on whether transaction results in an increase in assessee's profit; mere failure to establish that transactions resulted in a profit does not indicate that they were not at an arm's length price and even if profit is established, it does not necessarily follow that transaction was at an arm's length price - Held, yes [Para 21]

We find that this judgment had approved the earlier decision of Hon'ble Delhi High Court in the case of Cushman and Wakefield (India) (P) Ltd supra and also the decision of EKL Appliances supra.

4.9. In view of the aforesaid findings and respectfully following the judicial precedent relied upon hereinabove, we hold that the determination of ALP for Management Support Services at Rs NIL is unwarranted and accordingly the upward adjustment made by the ld TPO in the sum of Rs. 125,27,30,863/- is deleted. Accordingly, the Grounds Nos. 2 & 3 raised by the assessee are allowed.

In view of above we find that the assessee has actually received MSSA services from the AE and it cannot be categorized as stewardship services. Therefore respectfully following the order of this Hon'ble Tribunal in the own case of the assessee, we reverse the order of authorities below. Hence ground of appeal of the assessee is allowed.

11. The next issue raised by the assessee is that the Ld. DRP erred in making an adjustment of Rs. 3,55,26,652.00 to the ALP of the international transaction relating to IT Services.

12. During the year under consideration for AY 2011-12 the assessee received IT services from its AEs. The services were received by the assessee in pursuance to Service Level Agreements (SLA for short) entered into by the assessee with its AE. The assessee paid cost plus 5% to its AE for receipt of such services. The IT services provided by AE were integral to the business of the assessee. The services were received based on SLA entered into by the assessee with it AE. The services were effective from January 1, 2006, the SLAs were bifurcated in 5 separate agreements:

- Code Desktop Client Service – it supports Philips desktop infrastructure and covers all the activities to create and maintain upto date Code Desktop Client. This service is divided into four categories – Hardware, Software, Scripting and Support (Refer page 55-57 of Volume 1 part-1-DRP submission).
- System Management Infrastructure – System Management Infrastructure is Philips application for systems management of Wintel Clients and servers residing in EMI forests. It provides number of system management functions such s inventory, software distribution, reporting & remote assistance for Wintel clients & services. (refer page 57-58 of Volume 1 Part-1-DRP submission)
- DIAMOND Basic – DIAMOND is a companywide electronic messaging and application hosting environment that supports a number of collaboration and application services lie email. It includes email, directory, calendaring & scheduling, virus scanning, mail file restore, spam filtering etc. (refer page 58-59 of Volume 1 part 1-DRP submission)
- IP Service IP Services provide the Philips community with private wide area IP network dedicated to supporting Philips business. It is an internally open network providing IP communication

between all Philips locations connected to the Philips Global network. The IP services covers 3 parts IP transport services, IP address space management services and DNS backbone service. The IP service enables transparent, end-to-end communications for services such as file transfer, transaction processes and electronic mail. (Refer page 60 Volume 1 Prt-1 – DRP submission.)

- Philips Email to Applications Connectivity Enablement (PEACE): PEACE enables non-DIAMOD email enabled applications to communicate with other email enabled applications and Philips users using a secure and efficient corporate infrastructure. (Refer page 60-61 of Volume 1 part-1-DRP submissions).

For allocation of IT costs, the total cost of the Group's IT services was divided by the total quantity (units) to arrive at the price per unit of service charge. The price per unit is thereafter applied to number of users, applications or network connections used by the assessee.

The assessee during assessment proceedings claimed that

- The services were actually received;
- Services received were directly beneficial to PIL and not its AEs;
- The services resulted in operational efficiency of PIL and
- Services were not in the nature of shareholder/stewardship activity.

The assessee in support of his claim produced voluminous evidences before the TPO such as sample invoices, agreements to justify the IT services.

The assessee during the assessment proceedings also submitted that the 5% mark up is at arm's length based on the benchmarking carried out by the AE for the management support services. Since the comparables selected for management support services also consisted the comparables which provide IT services. The arithmetic mean of the mark up on total cost for the independent comparables selected for management support services was 8.27% with updated margin of 8.53% only.

The assessee further submitted that the IT services received from the AE have resulted in significant benefit to it, without which the assessee would not have been able to function efficiently. Moreover, had the assessee not

received these services from its AE, it would have procured the same from third parties, which would have resulted in incurring more expenditure for IT services. The assessee benefitted from economics of scale as the services like licenses; applications etc. which were procured by the AE from third parties were taken for the whole Group which have resulted in lower price to the AE.

Further, in 21st century technology plays a key role in the functioning of any enterprise more so a global enterprise like Philips. The assessee being part of the Philips group has to use the same licenses and applications which are used by all the group companies worldwide to be in sync with the group and also to get the benefit of economics of scale. Further, the assessee did not have resources and expertise to develop he applications on its own which are required for its efficient functioning. Moreover, it is business decision to have such services globally sourced rather than locally procured.

However the TPO disregarded the contentions of the assessee and held that the services received by the assessee from the AE are in the nature of stewardship services leading to direct and proximate benefit to the AE. Accordingly the TPO determined the arms length price for Information Technology (IT) services provided by the AE to the assessee to be Nil. Thus, the TPO proposed an adjustment to the tune of Rs.35,526,652/- and added to the total income of the assessee.

13. Aggrieved assessee preferred an appeal to ld. DRP wherein it was submitted that during the course of transfer pricing assessment proceedings, all the Service Level Agreements (SLA) entered with its AE were filed to the TPO. Besides sample copies of the invoices received from the AE were also filed. It was also reiterated that the IT services provided by the AE were integral to the business of the assessee and were allocated based on the number of users, applications or network connections in India.

It was further submitted that the charges were received from the AE based on cost with a limited mark-up of 5% thereon which is much lower than the

arithmetic mean of the independent comparables selected for management support services which is with updated margin of 8.53%. Hence, the mark up of 5% on cost charged by the AE to the assessee for IT services may be considered to be at arm's length. Thus the IT services received from the AE have resulted in benefit to the assessee without which the assessee would not have been able to function efficiently.

However, the ld. DRP rejected the contentions of the assessee & confirmed the order of the TPO. The findings of the DRP observations has already been recorded in **Para 8** of this order.

Being aggrieved by the order of Ld. Dispute Resolution Panel (DRP), assessee has come up in appeal before us.

14. The ld. AR before us made the submissions which can be compiled as under:-

1. The ld. DRP has deleted the addition in respect of IT charges claimed by the assessee in respect of AYs 2009-10, 2010-11, 2012-13 and 2104. Therefore the IT expenses claimed by the assessee should be allowed as deduction in the year under consideration.
2. The ld. AR in support of his claim also relied on the judgment of Hon'ble Supreme Court in the case of Radhasaomi Satsang vs CIT reported in (1992) 193 ITR 321 (SC) .
3. The ld. AR drew our attention on pages 413 to 419 where details of IT services received by the assessee and its corresponding benefit to the assessee are placed.
4. The ld. AR reiterated the submissions as made before the lower authorities.

On the other hand, Ld. DR submitted that no benefit test has been conducted during the assessment proceedings. There has to be a co-relation between the IT service agreement and benefit derived by the assessee from IT services. The ld. DR vehemently supported the order of lower authorities.

15. We have heard the rival contentions & perused the materials available on record. In this regard we find that the ld. DRP has deleted the addition made by the TPO in own cases of the assessee pertaining to other assessment years as discussed above. Thus, the assessee has been claiming the IT expenses for the last several years and the same was not denied and therefore in our view principle of consistency should be applied in the instant case. In this connection we are relying on the decision of Hon'ble Supreme Court in the case of Radhasoami Satsang vs. Commissioner of Income Tax (1992) 193 ITR 0321 (SC)

> *"We are aware of the fact that, strictly speaking, res judicata does not apply to IT proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*
>
> *One these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter-and, if there was no change, it was in support of the assessee-we do not think the question should have been reopened and contrary to what had been decided by the CIT in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under ss. 11 and 12 of the IT Act of 1961."*

15.1 We observe that there is no change in the facts & circumstances of the case, therefore in our considered view the order of the ld. DRP needs to be reversed.

Besides the above we also note that for the AY 2009-10 & 2010-11 the Hon'ble ITAT in the own case of the assessee in ITA No. 1141/Kol/2016 & 2408/Kol/2016 set aside the matter to the ld. DRP for fresh adjudication and subsequently the ld. DRP was pleased to delete the addition as made by the TPO. The subsequent order of the ld. DRP are placed on pages 727 & 766 of the paper book. Similarly we also note that there was no addition made by the

ld. DRP for the AY 2012-13 & 2013-14 on account of IT services expenses incurred by the assessee. The copies of the orders are placed on pages 795 & 879 of the paper book. In view of above, we are inclined to reverse the order of authorities below. Thus the ground raised by assessee are allowed.

16. The next issue raised by the assessee is that the Ld. DRP erred in making an adjustment of Rs. 16,27,69,727.00 to the ALP of the international transaction relating to software development services rendered by it.

17. The assessee during year from its PSC division had provided software development services to its AE. The assessee provided services based on a SLA with KEPENV and charged a markup of 10% on costs for the services provided. The assessee based on the FAR analysis of PSC division selected the Transaction Net Margin Method (TNMM) as the most appropriate method for determining the ALP of software development services. The assessee selected operating margin on operating costs as an appropriate Profit Level Indictor (PLI). The assessee conducted comparable search in two publicly available databases i.e PROWESS and Capitaline Plus and selected nine companies as comparables. The assessee earned an operating margin on operating cost of 9.02% compared to comparables of three year weighted average margin on operating cost i.e. OP/OC of 0.52% and accordingly, it was justified that the transaction of the assessee pertaining to rendering of software development services to its AE was at arm's length.

The assessee has maintained and filed a bona fide TP documentation as prescribed in Rule 10D of the Income Tax Rules, 1962 in support of his claim.

The assessee selected certain companies for the purpose of comparisons to determine the ALP as detailed under :

Philips Software Center Annexure 4
Search for Software Services
Transfer Pricing Study-(2010-2011)
Margin Summary of comparable companies Amount in Cr.

Sr.	Name of the company	Type of Accounts	Operating profit			Operating cost			Operating margin (%)			Weight average operating margin on
			2009	2010	2011	2009	2010	2011	2009	2010	2011	

												operating cost (%)
1	Bells Softech Ltd	Standalone	0.39	(0.17)	(0.16)	3.00	1.05	0.96	12.97%	-16.95%	-16.95%	1.11%
2	CG-VAK software and Export Ltd*	Standalone	0.36	(0.58)	9.29	6.52	5.85	5.91	5.47%	-9.96%	4.98%	0.37%
3	Evoke Technologies Pvt Ltd	Standalone	2.10	1.68	1.09	10.54	9.18	13.40	19.93%	18.29%	8.11%	14.69%
4	I Power Solution India Ltd	Standalone	0.01	0.03	0.01	0.89	0.59	0.41	1.21%	4.73%	2.86%	2.67%
5	Kashyap Technologies Ltd	Standalone	(1.86)	2.59	0.97	46.96	40.16	18.06	-3.95%	6.45%	5.36%	1.62%
6	Melstar Information Technologies Ltd	Standalone	(1.51)	NC	0.84	19.88	NC	24.38	-7.60%	NC	3.44%	-1.52%
7	Persistent Systems Ltd	Consolidated	62.56	120.33	135.05	532.11	487.42	659.92	11.76%	24.69%	20.46%	18.93%
8	Spry Resources India Pvt. Ltd	Standalone	0.68	0.68	0.67	3.95	2.06	3.63	17.19%	33.32%	18.40%	21.09%
9	VMF Soft Tech Ltd	Standalone	(1.06)	0.18	(3.56)	1.97	0.77	-53.72%	23.41%	-84.06%	-63.68%	
	Arithmetical mean										-4.15%	-0.52%
	Maximum											21.09%
	Minimum											-63.68%
	Lower IQ											0.37%
	Upper IQ											14.69%

NC-Not comparable
Note: * Segment Data considered

The assessee also provided working for working capital and risk adjustments. The assessee also submitted that the Hon'ble DRP Kolkata in its own case for AY 2010-11 has allowed working capital and risk adjustments of 2% each, thus following rule of consistency the same should be allowed as the facts remain same and there has been no change in the business.

However the TPO during assessment proceedings observed that assessee is engaged in cutting edge product without appreciating that the products are not conceptualized in India and hence the role of PSC is limited to only that of a routine captive service provider. Thus the TPO rejected the comparables selected by the assessee in its Transfer Pricing Study on the basis of functionality and selected new comparable companies. The TPO selected 10 companies, out of which one company (Persistent Systems Limited) was common with TP study and proposed an arithmetic mean margin OP/OC of

28.100%. The details of comparable companies selected by the Transfer Pricing Officer (TPO) are detailed as order.

Sr.no	Company name	PLI
1	Acropetal Technologies Ltd ()Seg)	31.98%
2	E-infochips Ltd	56.44%
3	FCS Software Solutions Ltd	16.51%
4	ICR techno	24.83%
5	Infosys Ltd	43.39%
6	Larsen & Tourboo Infotech Ltd	17.89%
7	Persistent Systems & Solutions Ltd	22.12%
8	Persistent Systems Ltd.	22.72%
9	Tata Elxsi Ltd (Seg)	20.91%
10	Sasken Communication Technologies Ltd	24.13%
	Arithmetic Mean	28.10%

Based on the above the TPO proposed an adjustment to the tune of Rs.49,57,73,339/- towards software development services rendered by the assessee to its AEs.

18. Aggrieved assessee preferred an appeal to ld. DRP wherein it was submitted that the TPO disregarded the comparable set of the assessee without providing any cogent reasons. The TPO insisted on use of current year data. Further, goodself he applied an ad hoc and arbitrary approach. The assessee submits that this approach exemplifies cherry picking and thus bad in law and against the principle of natural justice. The comparable selected by the TPO inter alia suffers from the following lacuna:

- Functionally not comparable to the assessee (-the assessee is engaged in the business of software development. The comparable selected by your goodself are in the business ranging from professional services, system integration, provider of solutions to network equipment

manufacturers, IIT/ITES service provider etc. these comparables should not be considered for comparability analysis.

- Comparables having significant intangibles and research & development activity (such as Sasken, Tata Elxsi and Infosys) – the assessee is a captive service provider. It does not have any intellectual property or intangibles. Hence comparables with significant R&D expenditure and intangibles should not be considered as comparable to the assessee.

Detailed submission on each of these companies is provided in Exhibit 6, to this submission.

In the light of the same, the assessee submits before the Hon'ble DRP that the comparables proposed in the final order is not appropriate and hence cannot be considered for comparability analysis. Further the assessee pleads before Hon'ble DRP to accept the comparables provided in the TP documentation. The assessee in the TP documentation had selected the following companies as comparables:-

Company name	2009	2010	2011	Three years weighted average operating margin on operating costs
Bells Softech Ltd	12.97%	-16.32%	-16.95%	1.11%
CGVAK Software & Export Ltd (Seg)	5.47%	-9.96%	4.98%	0.37%
Evoke Technologies Ltd	19.93%	18.29%	8.11%	14.69%
I Power Solution India Ltd	1.21%	4.73%	2.86%	2.67%
Kaashyap Technologies Ltd	-3.95%	6.45%	5.36%	1.62%
Melstar Information Technologies Ltd	-7.60%	NC	3.44%	-1.52%
Persistent Systems Ltd.#	11.76%	24.69%	20.46%	18.93%
Spry Resources India Pvt. Ltd	17.19%	33.22%	18.40%	21.09%
VMF Softech Lt	-53.72%	23.41%	-8406%	-63.68%
Arithmetical Mean (average)				(-) 0.52%

- Common comparable

18.1. Notwithstanding the arguments provided above, the assessee submits that the computation of the margins provided by the TPO is erroneous.

Notwithstanding the arguments provide above, the assessee submits that the computation of margins for 3 companies provided by the TPO in the final order

is erroneous. The correct margins as submitted before the TPO are given hereinbelow:

Name of the Company	Operating Margin on cost computed by your goodself	Operating Margin on cost computed by the assessee.
Accropetal Technologies Ltd (Segmental)	31.98%	22.06%
Tata Elxsi Ltd(segmental)	20.91%	9.04%
Persistent systems & Solutions Ltd	22.12%	16.00%

The details working of the margin calculation are provided in Exhibit 6 to this submission. It was submitted that the Ld. TPO disregarded the comparable set of the assessee without providing any cogent reasons.

Out of the above 9 companies, the Ld. TPO selected only one company as comparable in the final order. Further the Ld. TPO has rejected the comparable which were functionally comparable to the business of the assessee and arbitrarily selected companies with higher margin by searching through internet. Also, the Ld. TPO has not provided any reasons to demonstrate how the other 9 companies selected by the assessee are functionally different. The assessee submits that it selected the comparables based on a proper methodical search conducted applying various search criteria. Hence, the act of the Ld. TPO of rejecting the comparable selected by it without providing any cogent reason is totally unjustified. Based on the above, the assessee submits that the comparable set selected by the assessee should be accepted.

However the ld. DRP rejected certain Nos. of companies for the purpose of comparison as proposed by the TPO. At the same time the ld. DRP retained certain companies as submitted by the assessee for the purpose of comparison to determine the ALP. The contentions of the assessee & observation of the ld. DRP in respect of the companies retained & rejected are recorded in its order on the pages 22 to 42.

Besides the above the above the ld. DRP also directed to make the adjustments for the working capital adjustments in respect of certain companies.

Being aggrieved by the order of ld. DRP, both assessee & Revenue came in 2nd appeal before us.

The grievances of the assessee are two folds. (1) The learned DRP erred in accepting certain companies as recommended by the TPO for the purpose of comparables. (2) The TPO failed to provide working capital adjustments as directed by the learned DRP.

On the other hand the grievances of the Revenue are also two folds. (1) The ld. DRP erred in directing to include certain companies for the purpose of comparables. (2) The ld. DRP erred in admitting the fresh companies for the purpose of comparables.

First we take up assessee appeal ITA No. 539/Kol/2016

The ld. AR before us submitted that the following companies cannot be selected for the purpose of comparable.

1. E- Infochips Ltd.

   (a) Functionally not comparable – E-Infochips is engaged in diversified activities as it has income from software development, hardware maintenance, and IT consultancy. Further the Annual Report (AR) mentions that the company is engaged in software development and It enabled services * products. Also the company is engaged in manufacturing & trading of PCB.

   (b) Segmental information not available – as per the AR, it is proclaimed that it is engaged in Software development and it enabled services and products. However, segmental information in relation to such activities is not provided in the AR

   (c) Engaged in R&D activities – Further the company is also involved in R&D activities.

   (d) Exceptional year of operation – the company had an abnormal increase in turnover year on year far exceeding the industry average and thus had an exceptional year of operation as e-Infochip has grown by 96 percent this year which is five times the industry average.

2. Infosys limited.

   (a) Rejected by DRP in AY 12-13 – Infosys has been rejected by the DRP in the assessee's own case for AY 2012-13 on account of different FAR.
   (b) Functionally different – The company provides a wide range of services encompassing technical design, engineering design etc and in addition offers software products for the banking industry. The company earns income from both software services and software products including licensing of software products.
   (c) Segmental information not available – there is no segmental information available in their AR in relation to revenues earned from Software services and software products.
   (d) Brand profits/ intangibles –it also enjoys significant benefits on account of ownership of marketing intangibles and intellectual property rights.
   (e) R&D activities –further the company is also involved in R&D activities.
   (f) Not appearing in the final list of comparables of the TPO order in the assessee own case-
   Infosys Ltd. is not appearing in the final list of comparables in respect to the TPO order for:-
      - AY 2009-10 (refer Pg. no 212 of the order)
      - AY 2010-11 (refer Pg. 28 of the order)
      - AY 2012-13 (refer Pg no. 6 of the order giving effect to DRP directions)
      - AY 2013-14 (refer Pg no. 26 of the order) and
      - AY 2014-15 (refer Pg no. 32 of the order)

3. Persistent System Limited

   (a) Functionally not comparable – Persistent systems is engaged in provision of outsourced product development services for independent software vendors and enterprises, which is different in nature from IT services. The company derives income from both software services & products.
   (b) Segmental information not available – P&L shows income from "sale of software services & Products. However, no break-u available in respect of the same. There is no segmental information available in their annual report.
   (c) Owns intangibles- The company also owns intangibles.
   (d) Engaged in R&D activity – The company also undertakes R&D activity.

(e) Acquisitions during the year: Persistent has also undertaken acquisitions during the year
Separate charts to be seen for detailed arguments & case laws.

Similarly the ld. AR submitted that correct margin was not computed in case of Persistent Systems & Solutions Limited.

The ld. AR also submitted that the working capital adjustments should be given by the TPO as directed by the learned DRP. The learned AR in support of his claim also submitted that the Hon'ble ITAT in the own case of the assessee in ITA 1068/Kol/2015 for the assessment year 2006-07 has allowed working capital adjustments by 2%.
The ld. AR also submitted that the variation of 5% from the arithmetic mean should be allowed to the assessee.

On the other hand the ld. DR submitted that the 3 companies selected by the ld. DRP were showing similar functions and profitability therefore the same should be retained. The ld. DR vehemently supported the order of ld. DRP.

Now we take up Revenue appeal ITA No. 863/Kol/2016

19. The ld. DR submitted that the companies selected by the TPO during the assessment proceedings were showing similar functions and profitability to the assessee. Therefore the same should be retained for the purpose of the comparables to determine the ALP.
The Ld. DR also submitted that fresh list of companies has been admitted by the ld. DRP without providing opportunity to the TPO. The ld. DR vehemently supported the order of TPO.

On the other hand the learned AR reiterated the submission as made before the learned DRP. The ld. AR also submitted that the following companies were correctly rejected by the ld. DRP for the purpose of comparable.

1. Acropetal Technologies Ltd. (Seg) (Acropetal):-

The Hon'ble DRP in their Directions had rightly rejected Acropetal by stating that it is functionally not comparable to the assessee. Accordingly, the contentions of the assessee against Acropetal is reproduced as under:

(i) Functionally not comparable – Acropetal Technologies is not functionally comparable as its IT services segment also consists of ITeS services. Further the company is also engaged in product development.

(j) Segmental not available – the company engaged in both IT and IT enabled services under 'Information Technology Service' segment, however there is no bifurcation available & the company does not have segmental information in their AR.

(k) Engaged in R&D activities – the company also engages in R&D activities.

(l) Incorrect margin – without prejudice, the corrected margins to be considered is at 22.06% vis-a-vis 321.98% erroneously computed by the TPO.

2. ICRA Techno Analytics Ltd. (ICRA):- The Hon'ble DRP in their directions had rightly rejected IC by stating that it is engaged in software development along with ITeS, also segmental details are not available.

Accordingly, the contentions of the assessee against ICRA is reproduced as under:-

(a) Functionally not comparable – ICRA Techno Aanlytics is not functionally comparable as it is engaged in diversified activities consisting of business analytics & Intelligence (BPO activities),web development, trading of computer software etc.

(b) Segmental not available – The company does not have segmental information in their annual report in relation to its diversified activities.

(c) Related party transactions - The company has RPT of 22.06% during the year.

(d) Acquisition during the year – During the year, the company has undertaken merger of its subsidiary "Axiom" with itself.

Separate charges to be seen for detailed arguments & case laws.

3. Larsen & Toubro Infotech Ltd. (L&T):- The Hon'ble DRP in their directions had rightly rejected L&T by stating that it has intangibles for its propriety products & services etc. Accordingly, the contentions of the assessee against L&T is reproduced as under:-

(a) Functionally not comparable – Larsen & Toubro Infotech is not functionally comparable as it is engage in both software services and software products.
(b) Segmental information not available – The company does not have segmental information in their AR
(c) Owns Intangibles – the company owns intangibles for its proprietary products and services developed. It also owns Brand,
(d) Acquisitions during the year – The company has also undertaken acquisitions during the year.

Separate charts to be seen for detailed arguments & case laws.

4. Sasken Communication Technologies Ltd. (Sasken) _ The Hon'ble DRP in their directions had rightly rejected Sasken by stating that the company is also engaged in ITeS which had outsourced its services unlike the assessee.

Accordingly, the contentions of the assessee against Sasken is reproduced as under:-

(a) Rejected by DRP in AY 2012-13 – The company was also rejected by DRP in Assessment Year 2010-11 and AY 2012-13.
(b) Functionally not comparable – Sasken Communication Technologies is not functionally comparable as the company provides telecommunication software services and solutions to provides telecommunication software services and solutions to network equipment manufacturers, mobile terminal vendors ad semiconductor companies. It also derives revnue from products business.
(c) Segmental information not available – The company does not have segmental information in their AR.
(d) Engaged in R&D activity – The company incurs expenditure on R&D and is also setting up a R&D centre in Chennai.
Separate charts to be seen for detailed arguments & case laws.

5. Tata Elxsi Ltd. (Seg) (Tata) – The Hon'ble DRP in their directions had rightly rejected Tata Elxsi by stating that the company has intangible. Accordingly, the contentions of the assessee against Elxsi is reproduced as under:-

(a) Rejected by DRP in AY 2012-13 –The company was also rejected by DRP in AY 2012-13.

(b) Functionally not comparable – Tata Elxsi engages in diversified activities such as the embedded product design, industrial design services, animation and visual effects, which are related to engineering services and not software development services.

(c) Segmental not available – The “Software development & services segment” involves variety f activities like embedded product design, industrial design services, animation and visual effects etc., for which the segmental is not available.

(d) Engaged in R&D activity – The company is also engaged in significant Research and development.

(e) Owns intangibles – Tat Elxsi earns revenues from in-house developed intellectual properties.

The ld. AR also submitted the details of the companies which have been accepted by the ld. DRP for the purpose of comparables. The details stands as under:-

6. Bells Softech Ltd. (Bells Softech):- The Hon'ble DRP in their directions had rightly accepted Bells Softech by stating that the company is functionally comparable. Accordingly, the submissions of the assessee with respect to Bells Softech is reproduced as under:-

(a) Functionally comparable:- Bells Softech is functionally comparable as it is engaged in the provision of software solution service and it derives its revenue from software development services.

7. CG Vak Softwre & Export Ltd (Seg) (“CG Vak”):- The Hon'ble DRP in their directions had rightly accepted CG-Vak by stating that the

comparable is engaged mainly into software development. TNMM is a more tolerant method. Enterprises may have a wide range of GP margins but still earn broadly similar level of profits, hence accepted.

Accordingly, the submissions of the assessee with respect to CG- Vak is reproduced as under:-

> (a) Functionally comparable –CG Vak is functionally comparable as it is engaged in providing customized software development services, software testing services, software consulting services, etc. The company is operating its business through two segment Software services and BPO services. Further the software service business segment has been considered comparable for the purpose of this analysis.

8. Evoke Technologies Pvt. Ltd. (Evoke")- The Hon'ble DRP in their directions had rightly accepted Evoke by stating that the comparable is engaged mainly into software development. TNMM is a more tolerant method. Enterprises may have a wide range of GP margins but still earn broadly similar level of profits, hence accepted.
(a) Functionally comparable:- Evoke is functionally comparable as it is derives its revenue from software development services.
(b) Accepted by TPO in subsequent Assessment Years:- The TPO has accepted it as a comparable in AY 2012-13, AY 2013-14 and AY 2014-15.
9. I Power Solutions India Ltd. ("I Power") :- The Hon'ble DRP in their directions had rightly accepted I-Power by stating that the comparable is engaged mainly into software development. TNMM is a more tolerant method. Enterprises may have a wide range of GP margins but still earn broadly similar level of profits, hence accepted.
(a) Functionally comparable:- I Power Solutions is functionally comparable as it is provides web/e-commerce solutions, software application development, information processing. Further the company derives income only from software development.
10. Kaashyap Technologies Ltd.("Kaashyap"):- The Hon'ble DRP in their directions had rightly accepted Kaashya by stating that the comparable is engaged mainly into software development. TNMM is a more tolerant method. Enterprises may have a wide range of GP margins but still earn broadly similar level of profits, hence accepted.
(a) Functionally comparable:- Kaashyap Technologies is functionally comparable as it is engaged in provision of software development services and consulting services.
11. Melstar Information Technologies Ltd. ("Melstar"):- The Hon'ble DRP in their directions had rightly accepted Melstar by stating that the comparable is engaged mainly into software development. TNMM is a

more tolerant method. Enterprises may have a wide range of GP margins but still earn broadly similar level of profits, hence accepted.
(a) Functionally comparable:- Melstar is functionally comparable as it is engaged in providing software services.
(b) Accepted by DRP in AY 2009-10:- The company was also accepted by the DRP in AY 22009-10.

The ld. AR also submitted that no fresh list of companies has been submitted before the learned DRP for the purpose of comparables. The ld. AR vehemently supported the order of ld. DRP.

20. We have heard the rival submissions and perused the materials available on record. There is no dispute on the application of TNMM as the MAM with PLI OP / OC except in one company i.e. Persistent system & solutions limited. As per the assessee it should be 16% and the same should be at 13.63% after working capital adjustment. The necessary working as made by the assessee is placed on page 481 of the PB which reads as under:

Persistent Systems & Solutions Ltd – Computation of Net Cost Profit margin		
Particulars	Amount (in Rs)	Page
Revenues	189,490,457.00	Pg 53 AR 2011
Operating income	189,490,457.00	
Personnel expenses		
Operating & Other expenses	150,781,722.00	Pg 53 AR 2011
Depreciation & Amortization	12,570,870.00	Pg 53 AR 2011
Operating expenditure	163,352,592.00	
Operating profit	26,137,865.00	
OP/OC	16.00%	
Reconciliation		
Add: Other income	418,608.00	Pg 53 AR 2011
Less; Interest	1,851,986.00	Pg 53 AR 2011
PBT	242,704,487.00	
PBT as penalty Financials	24,704,487.00	Pg 53 AR 2011
Difference	--	

The TPO is directed to consider the above working while working out the margin. Thus in this regard we direct the TPO to work out the PLI correctly as per the provisions of law.

Now the controversy that revolves around us is only on the selection of comparables. We find that the ld. AR had duly made out a case for exclusion of comparables after bringing out the functional differences, non availability of segmental reporting, R & D Activities in respect of E-Infochips Limited, Infosys Limited Page and Persistent Systems Limited.

For the above discussion of three companies we also observe that the segmental report is not available, therefore we are of the view that these companies should be excluded from the list of comparable companies. We also note that the ld. AR in support of his claim has cited various cases of Hon'ble Tribunals which are placed on record and the operative portions are not produced here for the sake of brevity.

21. We also find that the Infosys Ltd was excluded by the ld. DRP in the AY 2012-13 from the list of comparables on the basis of different FAR. The Revenue did not prefer any appeal against the order of ld. DRP.

Similarly we find that the AR has relied on various case laws in the case of comparables rejected by the ld. DRP which are placed on record.

21.1 We also note that the ld. DR has not brought anything on record suggesting that the fresh evidences were admitted by the ld. DRP. Therefore we hold that no fresh comparables has been selected by the ld. DRP without providing opportunity to the TPO.

21.2 We also note that there was clear direction of the ld. DRP to the TPO to provide the adjustment of the working capital but we find that the TPO failed to comply the direction of the ld. DRP. It is also pertinent to note that there was no ground of appeal of the Revenue against the direction of ld. DRP. Hence the TPO is directed to follow the direction of the ld. DRP for providing adjustment for working capital.

21.3 We also observe that the assessee is getting the relief on the selection of comparable companies. Therefore we are not inclined to adjudicate the issue of the assessee for claiming the benefit of variation of 5% from the arithmetic mean and the same becomes infructuous. Thus the grounds of

appeal of the Revenue are dismissed and the grounds of appeal of the assessee are allowed.

22. Next inter-related issue raised by assessee in ground No.7 to 7.3 is that Ld. DRP erred in allowing depreciation on moulds @ 15% though it is eligible for depreciation @ 30%.

23. The AO during the course of assessment proceedings observed that assessee has claimed depreciation @ 30% on moulds instead of 15%. The AO further observed that the assessee is engaged in business of manufacturing, selling and trading of electronics and electrical products, electronic medical equipments and development of software services. Therefore, the assessee is entitled to claim depreciation @ 15% on moulds.

24. The depreciation on moulds 30% is available to the assessee if these are used exclusively in rubber and plastic industries. As such, assessee had no plastic factory. Therefore, the assessee is not entitled for depreciation @ 30% on moulds. Accordingly, AO disallowed the excess depreciation claimed by assessee for ₹2,67,54,530/- and added to the total income of assessee.

25. Aggrieved, assessee preferred an appeal before Ld. DRP. The assessee before DRP submitted that the moulds were used exclusively to the plastic factory and therefore it is entitled to claim depreciation @ 30% as per Rule 5 of the Income Tax Rule, 1962. However, Ld. DRP rejected the claim of assessee by observing as under:-

> *"…. … Accordingly to the New appendix 11 to Rule 5 of the IT Rules effective from AY 2006-07 onwards, (vii) of Part A of the Table of rtes at which depreciation is admissible moulds are eligible for depreciation at the rate of 30% in the cases of factories involved in rubber & plastic goods production. In the case at hand, the businesses were Consumer Lifestyle products distribution, Healthcare, Lightings and Software developments and not production of plastic or rubber goods…."*

26. Aggrieved by this, the assessee has come up in appeal before us on the following:-

(a) As per section 32 of the Act read with Rule 5 of the Rules, depreciation @ 30% would be available if the following conditions are satisfied:

i) Moulds are owned by the assessee;

ii) Moulds re used for the purpose of assessee's business; and

iii) Moulds are exclusively used in the rubber / plastic factory

(b) In the instant case, moulds were owned by the assessee and used for the purpose of its business. Further, the moulds were exclusively used in the plastic factory by the job workers / co-makes to whom moulds were given by the assessee to be used in the plastic factory, under its control and supervision. As all the above mentioned conditions are satisfied with, the assessee would be eligible for depreciation @ 30%.

(c) Also depreciation has been granted to the assessee for all earlier years at the higher rate of 30%.

On the other hand, Ld. DR vehemently relied on the order of Authorities Below.

27. We have heard the rival contentions and perused the material available on record. In the instant case, issue relates to depreciation claimed by the assessee @ 30% on moulds on the ground that these are used in plastic factories. However, the amount of depreciation claimed by the assessee on moulds was disallowed by the assessee on the ground that higher rate of depreciation on moulds is available only if these are used in the plastic factory. The view taken by the AO was subsequently confirmed by the Ld. DRP. Now the issue before us arose whether assessee is eligible for depreciation on moulds at higher rate in the given facts and circumstances. It is undisputed fact that assessee has been claiming depreciation on moulds @ 30% in all the earlier years which was granted by the Revenue and no dispute with regard to rate of depreciation arose in the earlier years despite the fact that the assessments for earlier years were framed u/s 143(3) of the Act. In this regard we observe that the assessee was allowed depreciation at higher

rate in all the earlier years and no disallowance was made on account of this. However we note that similar disallowance was also made by the ld. DRP for the AY 2012-13 & 2013-14. The ld. AR before us has also not brought anything on record evidencing that the assessee had plastic factory. The ld. AR has just verbally submitted that in most of the products which are manufactured by the assessee are made up of plastic product which appears to be true. But as such no documentary evidence was filed in support of the assessee claim. However in the interest of justice & fair play, we are inclined to restore this matter to the file of AO for fresh adjudication in accordance with the law. The ld. AR is directed to produce necessary documents in support of his claim. Hence the ground of appeal filed by the assessee is allowed for statistical purposes.

28. Next issue raised by assessee in ground No. 8 & 8.1 is that AO erred in granting short credit of TDS for ₹1,13,24,797/- only.

29. At the outset, we find that AO has granted credit of TDS for ₹3,71,65,130/- whereas as per the assessee, it is entitled for the credit of TDS of ₹4,84,89,927/-. In view of above facts, we direct the AO to grant the amount of TDS as per the provision of law. Hence, this ground of assessee's appeal is allowed.

30. Next issue is with regard to interest u/s 234A/234B/234D r.w.s. 244A of the Act which is consequential. The AO is directed to grant consequential relief to assessee.

31. Next issue raised by assessee in ground No.13 and 13.1 is that AO erred in initiating penalty proceedings u/s 271(1)(c) of the Act.

32. At the outset, it was observed that impugned appeal before us filed by assessee is against the quantum addition made by the AO. Therefore, the issue of penalty proceedings is not arising from the order of Authorities Below. Thus, the ground raised by assessee becomes infructuous. Hence, same is dismissed as infructuous.

33. Next issue raised by assessee in ground No.14 is that AO is erred in charging sub-charge on the Dividend Distribution Tax (DDT for short) at 7.5% against 5%.

34. At the outset, Ld. AR for the assessee brought to our notice that AO has charged the DDT along with surcharge @ 7.5% whereas surcharge applicable is @ 5% only. Ld. AR further submitted that the dividend was declared, distributed and paid in the Assessment Year 2012-13 and applicable surcharge is @ 5% as per the provision of Section 115O of the Act. Accordingly, Ld. AR prayed before us to direct the AO to levy the surcharge @ 5% on the DDT. On the other hand, Ld. DR vehemently relied on the order of Authorities Below.

35. We have heard rival contentions of both the parties and perused the material available on record. The grievance of the assessee is that the surcharge on DDT should have been levied @ 5% only. On perusal of records, we find that the surcharge applicable for the AY 2011-12 is 7.5%. But it is undisputed fact that dividend was declared and distributed and paid in AY 2012-13 and therefore the surcharge as applicable to the AY 2012-13 i.e. @ 5% should be applied on the DDT. In view of above, we direct the AO to delete the extra surcharge levied on the DDT. Consequently, ground raised by assessee is allowed.

36. In the result, assessee's appeal is allowed for statistical purpose.

Coming to Revenue Appeal 863/Kol/2016

37. Revenue's raised the following grounds:-

"1. Whether on the fact and in the circumstances of the instant case, the Ld. DRP has erred in directing exclusion to revise AMP adjustment following Delhi High Court order in the case of Sony Ericsson case, when the Delhi High Court is not a jurisdictional High Court in this instant case.

2. Whether on the facts and in the circumstances of the instant case, the Ld. DRP's direction on the issue of AMP adjustment, is within its jurisdiction since it tantamount to fresh Transfer pricing proceedings, akin to set aside of assessment, and also in violation of Sec. 144C(13) of the Income Tax Act 1961.

3. Whether on the facts and in the circumstances of the instant case, the Ld. DRP has erred in incorporate certain companies as comparable

in a unilateral manner without proper examination of their functional and product similarities with that assessee company on the issue of AMP adjustment.

4. Whether on the facts and in the circumstances of the instant case, the Ld. DRP has erred in rejecting certain comparable selected by the TPO without adequate examination of assessee's functions, which was in the nature of IT services and ITeS services on the issue of Software services segment.

5. Whether on the facts and in the circumstances of the instant case, on the issue of software services, the Ld. DRP has erred in directing inclusion of certain companies, which are not only functionally dissimilar to Philips Software Center and also reported extremely low revenue.

6. Whether on the facts and in the circumstances of the instant case, on the issue of software services, the Ld. DRP has erred in accepting a fresh list of low profit making and loss making companies selected by the assessee and presented as additional evidence without allowing the TPO to examine those comparables or submit his rebuttal.

7. On the facts and circumstances of the case and in law, the Hon'ble DRP has erred by allowing relief to the assessee on the issue of disallowance of lease rental paid for motor cars by treating the same as revenue expenditure instead of capital expenditure and hence, not allowable.

8. On the facts and circumstances of the case and in law, the Hon'ble DRP has erred by not considering that the waiver of loan constitutes the benefit arising from the business carried out by the assessee and as such, it would squarely attracts the provisions of Clause (iv) of Sec.28 of the IT Act, 1961."

38. The first issue raised by the Revenue in ground No. 1 ,2 & 3 is that ld. DRP erred in deleting the addition made by the TPO on account of AMP adjustment.

39. The assessee during the year incurred expenses towards advertisement and marketing in each of its business segments. As per the assessee such expenses were critical for its business in India and it has also benefited from such expenses. The assessee also claimed that it had incurred similar expenditure in earlier years and the TPO accepted the same. The assessee before TPO during the course of Transfer Pricing Proceedings also made detailed submissions in respect of AMP expenses as detailed under :-

- AMP expenses incurred by the assessee were in respect of its own business requirements /considerations / purposes and was not rendered on behalf of the AE;

- AMP expense does not constitute an international transaction
- The AMP expenses are already factored in TNMM in the distribution segments and hence the same are not required to be evaluated separately;
- The business and pricing model of the assessee in relation to its distribution activities should be evaluated before concluding applicability of the Special Bench Ruling of LG Electronics;
- Where the Indian entity has been adequately and properly compensated for incurring such expenditure; no separate TP adjustment is warranted;
- Application of Bright Line Test (BLT) is not in consonance with Indian Transfer Pricing Regulations;
- Without prejudice to the above, even if BLT is applied a proper comparable set is important to establish the BLT.

However, the TPO rejected the assessee's claim and held that excess of AMP expense incurred by the assessee is service rendered by the assessee for promoting the brand on behalf of its AE and hence categorized the same as deemed international transaction u/s 92B of the Act. The TPO held as under:

- The assessee has incurred significant AMP expenses which resulted in promoting brand of its AE;
- Considered the alleged transaction of promoting of brand for its AE as a deemed international transaction u/s/.92F of the Act;
- Rejected the assessee's contention that the TNMM analysis was sufficient to show that the transactions of the assessee are at arm's length;
- Determined the price of the alleged AMP expenses applying BLT.

Based on the above the TPO proposed an adjustment to the tune of Rs.35,19,21,583/- towards excess AMP expenses holding that the assessee should have received reimbursement of such alleged excess AMP expenses from the AE.

40. Aggrieved, assessee preferred an appeal to ld. DRP wherein it was submitted that AMP expense does not constituted an international transaction. These AMP expenses represent purely payments made to third party vendors and are not covered under the purview of Section 92 of the Act. The relevant

extract of Section 92F(V) which governs the definition of transaction is produced below:

> *"transaction include an arrangement, understanding or action in concert,-*
> *(A) Whether or not such arrangement, understanding or action is formal or in writing; or*
> *(B) Whether or not such arrangement, understating or action is intended to be enforceable by legal proceedings."*

Hence, as can be read from the above, it is evident that the incurring of the excessive AMP expenses is not covered under the definition of transaction as there is no arrangement between the assessee and its AEs to incur a particular amount of AMP expense. Mere, presumption just because of the assessee being a subsidiary which is owned by AE, an arrangement between AE and the assessee exists. The assessee is a separate legal entity with its own management and functions independently. The TPO has not provided any substantial evidence to justify there exists an arrangement. Therefore, the expenses incurred by the assessee on AMP cannot be said to be an international transaction as at first place it does not even meet the criteria laid down under section 92F(v), which defines the term '***transaction***".

Apart from the above, it is submitted that the AMP expenses cannot be considered as "international transactions". In this regard, Section 92(1) of the Act provides the following:

> *"An income arising from an international transaction shall be computed having regard to the arm's length price." [emphasis supplied]*

As per the above, the primary section i.e. Section 92(1) of the Act limits arm's length analysis to "international transactions. Further, Section 92(B)(1) of the Act defines the term "international transaction" in the following manner:

> *"For the purpose of this section and section 92,92D and 92E, "international transactions" means a transaction between two or more associated enterprises either or both of whom are non-residents, in the nature of …… "*

Section 92B(1) defines the term "**international transaction**" to mean transaction(s) between "**associated enterprises**". In this regard it is noted

that section 92B(2) of the Act, extends the scope of Section 92B(1) by introducing a deeming fiction with regard to international transactions to include transaction(s) between an unrelated entity and the assessee resulting from the existence of a prior arrangement between the AE of the assessee and such unrelated entity.

40.1 From the above, it is evident that the purview of Section 92 is limited to only such transactions that are either between two AEs or governed by a prior arrangement between the AEs and Assessment Year unrelated party. Here, it may be noted that the AMP expenses do not form part of the international transactions' of the assessee since the expenditure has been entirely incurred in India and with unrelated domestic parties by the assessee. And assessee domestic transactions entered into by the company with independent third parties is beyond the scope of powers vested with the TPO under the said section. Accordingly, the assessee submits no adjustments should be made in respect of excess AMP expenditure as these costs represent transactions that are purely for domestic purpose, entered into by the assessee with unrelated domestic vendors, for which no transfer pricing reference was made. The TPO has held that the AMP expenditure incurred by the assessee has benefited its AEs. However in this regard it is submitted that the ITAT and High Courts in India have consistently held that the AMP expenditure incurred in India is wholly and exclusively for the purpose of Indian taxpayer's business and any benefit derived thereof to the foreign AE owning the brand is merely incidental. Here, reliance is placed on the order dated 30 April 2007 of Hon'ble ITAT Delhi Bench in the case of Nestle India Ltd [111 TTJ 498 A.Y 1999-00]. In the said case, Nestle (India) Ltd (Nestle India) had entered into an agreement with Nestle Switzerland Co. which were owners of Nestle Trademark, Nestle India Ltd had right to use the said "Trademark" in its operations and incurred Advertisement / Marketing expense of Rs.104.86 crores in India to promote sale of its products in India. The AO disallowed fifty percent of the said marketing expenses holding that the same was not for the Nestle India's

business but for the benefit of Nestle Switzerland who owned Nestle brand. In the judgment, it was held by Hon'ble ITAT :-

> *"… .. there is no justification on the part of Assessing Officer to invoke the provisions of Section2 of the Act in the matte. Therefore, we find ourselves in agreement with the view of CIT(A) that provisions of section 92 are not applicable for the allowability of this expenditure. The expenditure incurred by the assessee company on advertisement / sales promotion of some Nestle products in India may give rise to certain benefit to Nestle SA, but this cannot be a ground to disallow the claim of the assessee, once it is established that the expenditure in question has been incurred by the assessee for the purpose of business of the assessee inasmuch as the expenditure by the assessee on advertisement / sales promotion has direct nexus with the earning of income by the assessee."*

In Nestle's case the Hon'ble ITAT has held that AMP expense incurred by the assessee for promotion of its own products in its own territory, albeit carrying the brand name of an AE, is not amenable to the provisions of section 92 and has also not in violation of the requirements of section 37(1) of the Act.

In light of the above compelling arguments, facts and available judicial precedence, it is hereby submitted that holding the excessive AMP expenses as international transactions is not in consonance with the Indian transfer pricing regulation and is bad in law.

The AMP expenses are already factored in TNMM and hence the same are not required to be evaluated separately.

41. The assessee reiterated that it has benchmarked the segments based on TNMM. In doing so the assessee has incorporated all the costs in connection with its distribution segments including AMP expenses. The assessee submits that the it made imports from its foreign AE which were subjected to the TP provisions under TNMM and hence there was no warrant for making any further addition on the transaction of excessive AMP expenses incurred by the assessee for its AEs. The Hon'ble High Court of Delhi recently in the case of Sony Ericsson and others pronounced its ruling on transfer pricing (TP) adjustment on account of advertisement, marketing and sales promotion (MP) expenditure incurred by them as part of their distribution

business in India. The High Court observed that taxpayers could aggregate the controlled transactions if the transactions are closely linked and meet specified common portfolio or packaged parameters and as such cannot be evaluated adequately on separate basis. The Hon'ble High Court further held that once the TPO accepts TNMM as the most appropriate method for determining arm's length price of bundled transactions, then it is impermissible to separately determine the arm's length price of a particular expenditure like AMP, since, such expense is already factored in the net profit of the interlinked transactions. In the light of decision of Hon'ble High Court in this regard, the assessee wishes to reiterate that the AMP expenses are already factored in TNMM analysis carried out by the assessee and also accepted by the TPO and hence the same are not required to be evaluated separately.

Accordingly the ld. DRP after considering the submission of the assessee deleted the addition made by the TPO.

42. Aggrieved by the order of ld. DRP, assessee is in second appeal before us. The ld. DR before us submitted that

> The Delhi bench of the Income Tax Appellate Tribunal in a recent ruling in the case of Luxottica India Eyewear Pvt Ltd (ITA No. 3441De1/2017) has given a new dimension to the issue of excessive spend on Advertisement, Marketing, and Promotion expenses (AMP) in India. The Tribunal has scanned the relatively new approach adopted by the tax authorities of making an "AMP intensity adjustment" to factor in the "marketing function" and brand value creation done by the Indian distributors on behalf of its Associated Enterprise (AE), who is the brand owner, as an alternative to applying the bright line test. The facts and observations of the case are discussed below:
>
> Facts Of The Case.
> • The taxpayer is a part of Luxottica group which is in the business of design, manufacture and distribution of sunglasses and prescription frames in mid and premium price, categories.
> • The taxpayer is engaged in trading and distribution of the group products in India.
> • For the Assessment Year (AY) 2012-13, with respect to the international transaction pertaining to its trading activity, that is, import of finished goods, the taxpayer has applied Resale Price Method (RPM) for benchmarking purposes. Notably, the taxpayer has incurred a significant AMP expenditure in proportion to its sales revenue.

• The Transfer Pricing Officer (TPO) evaluated the significant AMP expenditure incurred by the taxpayer and opined that the excessive promotional efforts or expenditure incurred by the taxpayer was in essence a 'marketing function' carried out by the taxpayer on behalf of its AE and it enhanced the value of the 'Luxottica' brand owned by its AE.
• The TPO analysed the need to make an adjustment to the operating margins of comparable companies vis-a-vis the taxpayer to factor in the difference in the intensities of AMP expenditure of the comparable companies. Based on the same, the TPO carried out an 'AMP intensity adjustment' to operating margin of comparable companies by considering the difference in the percentage of AMP to sales (intensity of AMP) of the taxpayer and the comparable companies. While doing so the TPO considered the Transactional Net Margin Method (TNMM) as the most appropriate method for benchmarking the international transaction of import of finished goods.
• In effect, a transfer pricing adjustment was proposed after comparing the profit margin of the taxpayer and the AMP intensity adjusted margins of comparable companies.

The Tribunal's Ruling

In response to the appeal filed by the taxpayer against the computation of transfer pricing adjustment, the Delhi Tribunal has decided the appeal principally in favour of Revenue. The key observations of the Tribunal's ruling are as below:

> While the taxpayer did not challenge the 'AMP intensity adjustment' made by the TPO before the Tribunal, the Tribunal in its order reaffirmed the approach adopted by the TPO of treating AMP as a function in view of similar observations by the Delhi High Court in the cases of Bausch & Lomb Eyecare India Pvt Ltd. and Ors vs Addl CIT and Ors and Sony Ericson Mobile Communications (India) Pvt Ltd. vs CIT.

In response to the taxpayer's contention that the TPO had rejected RPM and applied TNMM as the most appropriate method, the Tribunal, in the light of the facts presented, observed that the TPO had not considered the excessive AMP expenditure as a 'separate international transaction and adopted an alternative approach of considering the AMP expenses to be embedded in the primary international transaction i.e. import of finished goods.

The Tribunal acknowledged the fact that "If, however, it turns out that such an adjustment cannot be done due to one reason or the other, then the RPM should be discarded and another suitable method be adopted, which encompasses the effect of AMP intensity adjustment. "

On the other hand the ld. AR reiterated the submissions as made before the ld. DRP. Both the parties relied in the order of authorities below as favourable to them.

43. We have heard the rival submissions and perused the materials available on record. The primary issue here arises whether the AMP expenses constitute the international transactions so as to attract the provisions of transfer pricing of the Income Tax Act. The claim of the ld. AR is that the AMP transaction does not represent the international transaction between the AE's therefore no question of determining the ALP of AMP transactions. We find force in the argument of the ld. AR in the given facts & circumstances. Therefore, in our considered view the AMP cannot be regarded as international transaction. In holding so we find the support & guidance from the judgment of Hon'ble Delhi High Court in the case of Maruti Suzuki India Limited Vs. CIT reported in 381 ITR 117 wherein it was held as under :

> ***"51.*** *The result of the above discussion is that in the considered view of the Court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the Court is of the view that the decision in Sony Ericsson Mobile Communications India (P.) Ltd. case (supra) holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in Sony Ericsson to the above effect is in the context of those Assessees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses."*

In view of we note that the facts of the above case are identical to the present issue, thus the principle laid down by the Hon'ble Delhi High Court in the case of *Maruti Suzuki India Limited (supra)* are applicable to the instant case. Respectfully following the same we dismiss the ground of appeal filed by the Revenue.

44. The second issue raised by the Revenue is that the ld. DRP erred in excluding certain comparables as suggested by the TPO and including companies which are non functional to the business of the assessee. The Revenue also claimed that the additional evidences have been admitted by the ld. DRP.

45. We have already dealt this issue elaborately while adjudicating the grounds of appeal of assessee No. 5 & in **ITA No.539/Kol/2016** and allowed the issue in favour of assessee. Consequently, the ground of appeal filed by the Revenue is dismissed.

46. Next issue raised by Revenue in ground No.7 is that Ld. DRP erred in deleting the addition made by the AO on account of lease rental paid for the cars.

47. The assessee has claimed an expense of ₹5,75,02,965/- on account of least rental paid for the motor cars taken on finance lease. The AO was of the view that the expenditure incurred on lease rental are in the nature of capital expenditure. Accordingly, the same was disallowed and added to the total income of assessee.

48. Aggrieved, assessee preferred an appeal before Ld. DRP who deleted the addition made by AO.

The Revenue, being aggrieved is in appeal before us.

49. Before us both parties relied on the order of Authorities Below as favourable to them.

50. At the outset, we find that the Co-ordinate Bench of this Tribunal has decided the issue in favour of assessee and against the Revenue in assessee's own case in ITA No. 1141/Kol/2016 for AY 2009-10 dated 05.04.2017.The relevant extract is reproduced hereunder:-

> *"6.2. We have heard the rival submissions. We find that the issu9e under dispute is covered by the decision of the Hon'ble Supreme Court in the case of ICDS Ltd supra in favour of the assessee. Hence respectfully following the same, we allow the ground No.6 raised by the assessee."*

Respectfully following the same, we confirm the order of Ld. DRP and Revenue's ground is dismissed.

51. Last issue raised by Revenue in ground No.8 is that Ld. DRP erred in deleting the addition made by the AO for ₹2,23,60,000/- on account of waiver of loan.

52. The assessee, during the year has credited its profit and loss account on account of waiver of loan for ₹2,23,68,000/-. The assessee in computation of income has reduced the amount of loan waived from its total income on the ground that it is not taxable. However, AO was of the view that the impugned amount falls within the provision of clause (iv) of Section 28 of the Act and therefore it is liable to be taxed and accordingly, AO added the same to the total income of assessee.

53. Aggrieved, assessee preferred an appeal before Ld. DRP who deleted the addition made by AO.
The Revenue, being aggrieved, is in appeal before us.

54. Before us both parties relied on the order of Authorities Below as favourable to them.

55. We have heard the rival submissions and perused the materials available on record. It is undisputed fact that the loan was taken by the assessee through cheque/cash. Thus the impugned loan was not availed in kind. Thus the provision of section 28(iv) cannot be applied to the impugned waiver of loan. The Hon'ble Gujarat High Court in the case of CIT Vs. Alchemic (P) Ltd. reported in 130 ITR 168 has held as under :

> *"Under section 28(iv), the question of including the value of the benefit or perquisite would arise only if the benefit or the perquisite is not in cash or money but is non-monetary benefit or non-monetary perquisite. Hence, the impugned amount was not taxable under section 28(iv)."*

In view of above we note the loan amount was taken by the assessee through cheque / cash. The ld. DR has also not brought anything on record contrary to

the argument of ld. AR. Thus in our considered opinion the amount of loan waived off by the assessee is capital transaction and outside the purview of tax net. Hence the ground raised by the Revenue is dismissed.

56. **In combine result, appeal of assessee is partly allowed for statistical purpose and that of Revenue is dismissed.**

Order pronounced in the open court 15/12/2017

Sd/-	Sd/-
(न्यायिक सदस्य)	(लेखा सदस्य)
(N.V.Vasudevan)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,

*Dkp, Sr.P.S
दिनांकः- 15/12/2017 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Philips India Ltd., 7,Justice Chandramadhab Road,Bhawanipur, Kolkata-20
2. राजस्व/Revenue-DCIT, Circle-12(2), P-7, Chowringhee Sq, 6th Floor, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।